



Financial Conduct Authority consultation on the Implementation of the revised Payment Services Directive (PSD2)

Response from Mobile UK

1. Mobile UK, whose members are the UK's four mobile network operators EE, Telefonica (O2), Three and Vodafone, welcomes the opportunity to respond to the Financial Conduct Authority's consultation on the implementation of the the revised Payment Services Directive (PSD2).
2. Mobile UK's response focuses on Question 3 of the consultation – i.e:

Q3: Do you have any comments on our proposed electronic communication network exclusion guidance in the draft PERG text (Appendix 1)? Do you have any comments on the proposed electronic communication network exclusion notification (draft direction and draft template in Appendix 2)?

3. The reason for this focus is that the ability for electronic communications networks (ECNs) and its related value chain to be able to continue to benefit from the ECN exclusion will be fundamental to the sector being able to go on operating under a general authorisation as an Electronic Communications Network supervised by Ofcom, without having to apply to the FCA for a simultaneous authorisation as a Payment Institution.
4. The foreseeable and unforeseeable consequences, such as the impact on competition, would work strongly against the interests of the users of telecommunications services, if an FCA authorisation were to be required..
5. There are a number of specific points in the draft approach document that need addressing.

Exclusion flowing through the value chain

6. Her Majesty's Treasury's consultation asked stakeholders for views on how/if the exclusion should flow through the value chain. While some intermediaries may seek authorisation to offer some specific payment services, it is fundamental that entities lying in the telecommunications value chain should also benefit from the exclusion as they do today under the digital exemption, providing they are able to comply with the requirements. Moreover,

intermediaries should not be treated as payment acquirers, if the only ‘payment transactions’ being acquired are those that are covered by the exclusion.

7. Mobile UK urges the FCA to work closely with HMT and Ofcom to publish payment service regulations that would allow the exclusion to pass through the value chain.

Scope

8. A further, very important aspect of the FCA’s approach is to be clear as to what **precisely** is a ‘payment transaction’ – i.e. an act initiated by the payer or payee, or on behalf of the payer, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and payee;
9. Thus, the FCA must consider carefully whether customers using a DQ, PRS voice or a PRS text services are executing a ‘payment transaction’ and thus within the scope of a ‘payment service’?
10. HMRC’s view of the transactions in question are as follows:
 11. *A customer may make purchases online or on their Wireless Application Protocol (WAP) phone from a variety of retailers with whom the TelCo has entered into agreements. The TelCo never takes title to the product and is not responsible for its advertising or delivery.*
 12. *The monies collected by the TelCo on behalf of the retailers are passed to them on a monthly basis less the commission retained by the TelCo.*
 13. *The TelCo is providing various services to the retailers, namely: providing access to the retailers’ websites through a link, billing customers, calculating the charges to be paid by the retailers and passing on to the retailers the amounts billed on their behalf. It would be artificial to split these supplies as together they combine to form the TelCo service. Thus there is a single composite supply. As the services are predominantly administrative and IT-related in nature they are therefore taxable at the standard rate of VAT, and any commission received by the TelCo would also be taxable at the standard rate.¹*
14. The passing of the ‘out-payment’ down the value chain is treated as a standard value added supply for VAT purposes, which is slightly at odds with a pure payment service which is treated as ‘exempt’ for VAT purposes.
15. **It is clearly extremely important to be precise about which transactions within the ECN environment are within the scope of a ‘payment transaction’ and which are simply value added communications services. Moreover, the issue of monitoring and complying with the €300 and €50 limits would be an order of magnitude more simple if only Payforit and carrier billing were to be in scope.**
16. Mobile UK and others will discuss this scope aspect in more detail at a meeting with the FCA on 16th June 2017.
17. **For information:** If communications providers were forced to cease access to DQ services (amongst other services) once a customer reached the €300 monthly limit, this may breach

¹ <https://www.gov.uk/hmrc-internal-manuals/vat-finance-manual/vatfin2430>

our obligations under the Universal Services Directive and Ofcom General Conditions (whereby operators are obliged to provide access to Directory Enquiry Services, and generally connect numbers if technically feasible).

Enforcement

18. The industry has made it clear on a number occasions that it would cost many £millions (up to £10m for a provider) for the industry to build billing systems (and PSA estimates that there are about 80 CSPs providing PRS) that would monitor expenditure on live calls and thus **guarantee** that the €300 limit was never breached – completely disproportionate to any extra consumer protection delivered, bearing in mind that, in the mobile environment at least, less than 0.5% of customers get to the €300 limit.
19. It would be extremely helpful if the FCA could signal to the industry as early as possible what reasonable steps need to be taken to protect consumers and that minor breaches appearing in the audit report would be proportionately dealt with. The penalties for breaches are potentially severe, the costs and consequences (both foreseeable and unforeseeable) of seeking authorisation make that route impractical, and the chances of significant breach is low but the chances of minor breaches are high. *(Note this would be a considerably smaller issue if the Scope question above can be resolved).*
20. Mobile UK believes it is custom and practice for regulators, without necessarily fettering their discretion, to give guidance on their approach to enforcement.

Definition of subscriber

21. At present, FCA defines ‘individual subscriber’ as the account holder. However, such an approach does not take account of account holders who have more than one ‘phone line’ (or SIM card) on their account, such as family accounts, corporate accounts etc. More practical approaches seem to have been taken in other member states, such as France, where provisions are made for multi-number/person accounts.
22. Mobile UK urges the FCA to deliver a different formulation that takes account of bill payers who have more than one phone. E.g. Can the €300 limit be multiplied by the number of phones on the account?

Timescales

23. HMT’s PSD transposition processes are about 6 month behind the original plan, with knock on effects for the FCA. This will make it impossible to put in place any system changes that may be necessary (e.g. around definition of subscriber) and meet the Jan 2018 timeframe.
24. What comfort can FCA give to ensure that enforcement process cut in from a reasonable starting point?

Euro / GBP translation

- 25.** The FCA has proposed that euro translation takes place monthly. In this context, it will not be possible to implement; indeed one operator has told Mobile UK that implementing such a change can take six weeks to put through – a situation which would never catch up with itself. Mobile UK suggests that the FCA selects an annual date (such as the 1st May) that applies across the whole industry, when operators update their spend limits based on the Central European Bank exchange rates. This is consistent with the process already in place by mobile operators for setting the financial cap and surcharges under the EU Roaming Regulations. More frequent foreign exchange calculations will create complexity, uncertainty and unnecessary costs for operators, intermediaries, merchants and most importantly customers **as new spend limits must be communicated throughout the value chain.**