

Direction under regulation 39 of the Payment Services Regulations 2017 (Notification of use of electronic communications exclusion)

Purpose and statutory context

Under regulation 39 of the Payment Services Regulations 2017 ("PSRs 2017"), if a person (a "service provider") provides, or intends to provide, a service for payment transactions falling within paragraph 2(l) of Schedule 1 to the PSRs 2017 (activities involving electronic communications networks which do not constitute payment services), the service provider must:

- (a) notify the Financial Conduct Authority ("FCA"), including with such notification a description of the service;
- (b) provide an annual audit opinion testifying that the transactions for which the service is provided comply with the limits mentioned in paragraph 2(l) of Schedule 1 to the PSRs 2017.

The purpose of this document is to direct the form in which the information required by regulation 39 of the PSRs 2017 must be submitted to the FCA and the manner in which it must be verified.

The provisions of paragraph 2(l) of Schedule 1 to the PSRs 2017, read alongside the definition of "payment service" in regulation 2(1) of the PSRs 2017, are referred to as the "electronic communications exclusion" in this Direction. References to activities falling within the electronic communications exclusion in this Direction include activities carried on before 13 January 2018 if such activities would fall within the exclusion if they were carried out after the 13 January 2018.

The Direction

The FCA directs that an electronic communications network or service provider to which regulation 39 of the PSRs 2017 applies (a "service provider") must provide the information required by that regulation in the form, at the time and verified in the manner described below.

This Direction may be amended by further Direction to all service providers, to a class of service providers or to an individual service provider. For the avoidance of doubt, such amendments are likely to be made only where necessary in exceptional circumstances.

Powers exercised

The FCA makes this Direction in exercise of the following powers under the PSRs 2017:

- Regulations 39(3) and (4); and
- Regulation 109(1).

Background to this Direction

The revised Payment Services Directive (“PSD2”) entered into force in January 2016. PSD2 updates the regulation of payment services in Europe and departs from the original Payment Services Directive 2007 in a number of ways, including changing the scope of the exclusions and introducing notification and registration requirements for certain excluded providers. PSD2 was transposed into UK law through the PSRs 2017.

The FCA is the authority with responsibility for monitoring and enforcing compliance with a majority of the provisions of the PSRs 2017.

Who does this Direction apply to?

This Direction concerns an electronic communications network or service provider who provides, or intends to provide, a service, additional to the electronic communications network or service, that falls within the following exclusion:

“Payment transactions resulting from services provided by a provider of electronic communications networks or services, including transactions between persons other than that provider and a subscriber, where those services are provided in addition to electronic communications services for a subscriber to the network or service, and where the additional service is—

- i. for purchase of digital content and voice-based services, regardless of the device used for the purchase or consumption of the digital content, and charged to the related bill; or*
- ii. performed from or via an electronic device and charged to the related bill for the purchase of tickets or for donations to organisations which are registered or recognised as charities by public authorities, whether in the United Kingdom or elsewhere,*

provided that the value of any single payment transaction does not exceed £40, and the cumulative value of payment transactions for an individual subscriber in a month does not exceed £240.”

A payment transaction that falls within this category does not constitute a payment service to which the prohibition in regulation 138 of the PSRs 2017 (Prohibition on provision of payment services by persons other than payment service providers) applies. A person carrying out payment transactions within the electronic communications exclusion may or may not be authorised or registered by the FCA in respect of other services or activities.

Regulation 39 of the PSRs 2017 only applies to the electronic communications network or service provider. Nonetheless, the electronic communications exclusion applies to all payment transactions resulting from the services falling within paragraph 2(l) of Schedule 1 to the PSRs 2017, including transactions between persons other than the electronic communications network or service provider and a subscriber. For the

avoidance of doubt, this means that a business carrying out payment transactions that benefit from the electronic communications exclusion but which is not the electronic communications network or service provider does not have to notify the FCA or provide an annual audit opinion. Please refer to the FCA's Perimeter Guidance Manual (PERG 15.5 Q41A) for further information about the scope of the electronic communications exclusion.

What information is required?

An electronic communications network or service provider who provides or intends to provide a service falling within the electronic communications exclusion must submit the following information to the FCA:

- a notification including a description of that service ("services notification");
- an annual audit opinion testifying that the transactions for which the service is provided comply with the applicable financial limits ("audit opinion").

The timing of the services notification

Persons providing a service before 13 January 2018 that would fall within the electronic communications exclusion and who continue to do so afterwards:

A service provider who provides a service falling within the electronic communications exclusion prior to 13 January 2018 must submit the services notification on or before 13 January 2018 in accordance with regulation 39(2)(a) of the PSRs 2017. If a service provider wishes to submit a services notification before the deadline then the service provider may do so at any time after 13 October 2017.

Persons providing a service falling within the electronic communications exclusion only on or after 13 January 2018:

If a service provider intends to begin providing a service falling within the electronic communications exclusion on or after 13 January 2018 then the service provider must submit the services notification before the commencement of the service in accordance with regulation 39(2)(b) of the PSRs 2017.

How to submit the services notification

A service provider must use Connect to submit the services notification.

The audit opinion

A service provider must also submit to the FCA an annual audit opinion testifying that the transactions for which the service is provided comply with the limits mentioned in paragraph 2(1) of Schedule 1 to the PSRs 2017.

The form of the audit opinion

The audit opinion must:

- be prepared by an independent auditor with the skills, resources and experience commensurate with the nature, scale and complexity of the service provider's business and that is eligible for appointment as an auditor under the applicable law;
- confirm whether, in the auditor's opinion, the transactions for which the service is provided comply with the limits mentioned in paragraph 2(1) of Schedule 1 to the PSRs 2017;
- specify the period to which the opinion relates, the information and records on which the opinion was based and (where relevant) the industry standards or methodology used;
- set out any assumptions, limitations, caveats, or explanations as necessary; and
- be signed on behalf of the audit firm by the individual with primary responsibility for the audit opinion and in that individual's own name.

Service providers and auditors are reminded that sections 341 (Access to books etc.) to 346 (Provision of false or misleading information to auditor or actuary) of the Financial Services and Markets Act 2000 apply to the preparation and submission of the annual audit opinion under regulation 39(3) of the PSRs 2017 (see paragraph 6 of Schedule 6 of the PSRs 2017).

The FCA expects the application of the financial limits to be based on treating individual telephone numbers or SIM cards, rather than account holders, as separate 'subscribers'.

The timing of the audit opinion

In this Direction, "accounting reference date" means: (a) in relation to a company incorporated in the United Kingdom under the Companies Acts, the accounting reference date of that company determined in accordance with section 391 of the Companies Act 2006; and (b) in relation to any other body, the last day of its financial year.

A person to whom regulation 39 of the PSRs 2017 applies must submit an annual audit opinion to the FCA from 13 January 2018.

Persons providing a service before 13 January 2018 that would fall within the electronic communications exclusion and who continue to do so afterwards

- (a) Unless (b) applies, the service provider must submit the first audit opinion to the FCA no later than 3 months after its accounting reference date that immediately follows 13 January 2018.
- (b) If the service provider has an accounting reference date that falls less than three months after the 13 January 2018, it must submit the first audit opinion to the FCA no later than 3 months after the next accounting reference date i.e. the accounting reference date that immediately follows the accounting reference date in early 2018.

In either case, the first audit opinion must cover the entire period from 13 January 2018 until the relevant accounting reference date.

- (c) Unless (d) applies, the service provider must submit further audit opinions to the FCA no later than three months after each subsequent accounting reference date. The audit opinions must cover consecutive periods beginning on the day after the end of the period to which the previous audit opinion related and ending on the next accounting reference date.
- (d) The service provider is not required to continue to submit annual audit opinions if it has ceased to provide services in respect of which it relies on the electronic communications exclusion and all such transactions have been the subject of an earlier audit opinion submitted to the FCA. A service provider that has ceased to provide services in respect of which it relies on the electronic communications exclusion should notify us in accordance with the provisions below.

Persons providing a service falling within the electronic communications exclusion only on or after 13 January 2018

- (a) Unless (b) applies, a service provider who first begins providing a service falling within the electronic communications exclusion on or after 13 January 2018 must submit the first audit opinion to the FCA no later than three months after its accounting reference date that immediately follows the commencement of the service.
- (b) If the service provider has an accounting reference date that falls less than three months after the date on which it began to provide the service, it must submit the first audit opinion to the FCA no later than three months after the next accounting reference date i.e. the accounting reference date that immediately follows the accounting reference date that fell within three months of the commencement of the service.

In either case, the first audit opinion must cover the entire period from the date on which the service commenced until the relevant accounting reference date.

- (c) Unless (d) applies, the service provider must submit further audit opinions to the FCA no later than three months after each subsequent accounting reference date. The audit opinions must cover consecutive periods beginning on the day after the end of the period to which the previous audit opinion related and ending on the next accounting reference date.
- (d) The service provider is not required to continue to submit annual audit opinions if it has ceased to provide services in respect of which it relies on the electronic communications exclusion and all such transactions have been the subject of an earlier audit opinion submitted to the FCA.

How to submit the audit opinion

The annual audit opinion must be submitted electronically (for example as a PDF) using [Connect](#) alongside a completed services notification form.

Notification when ceasing to provide services

If a service provider is registered with the FCA as a provider of services falling within the electronic communications exclusion and ceases to provide such services, it must notify the FCA:

- using the regulation 39 form and Connect; and
- no later than 10 business days after the date on which it ceased to provide the excluded services.

On receipt of such notification, the FCA will update the register of service providers accordingly (see below).

The FCA's powers and responsibilities

In accordance with regulation 4(1) of the PSRs 2017, the FCA will maintain a register of service providers that have submitted a notification pursuant to regulation 39 of the PSRs 2017 and this Direction. The register will be publicly available and will display the following information about each service provider: name; registered address; and a brief outline of the services provided/the applicable exclusion.

The European Banking Authority ("EBA") will also maintain a register which includes the information covered in our public register, together with information provided by the competent authorities in other EEA Member States. This will be available free of charge on the EBA's website.

If (on the basis of the notification or otherwise) the FCA determines that the service provider has exceeded the applicable limits or is not eligible for the electronic network exclusion for any other reason it may take such action as it considers appropriate in the circumstances.

If the FCA considers that a service provider is obliged to submit a notification under regulation 39 of the PSRs 2017, but has not done so, the FCA may rely on its powers of enforcement set out in Part 9 of the PSRs 2017 (which apply to excluded providers as well as authorised payment service providers). For example, the FCA may publish a statement that the service provider has contravened the relevant requirement imposed by the PSRs 2017, may impose a financial penalty or may apply to court for an injunction.