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PART 1 - BACKGROUND

Single Market in Payment Services

Council Directive 2015/2366/EC, the Payment Services Directive 2 ("PSD2") provides the legal framework for the operation of the single market in payment services. It aims to facilitate safer and more innovative payment services across the EEA. PSD2 sets out common rules in relation to electronic payments such as credit transfers, direct debits, card payments, and mobile and online payments. It also regulates payment service providers in EEA Member States.

PSD2 replaces and supersedes Council Directive 2007/64/EC, the first EU Payment Services Directive ("PSD1"), which entered into force in Ireland in 2009. PSD2 builds upon PSD1 by making it possible for the EU market in payment services to be opened up to new categories of payment services provider offering a range of new payment services to businesses and consumers.

This briefing paper summarises the key elements of PSD2 as implemented in Ireland.

Scope of the PSD2

Generally the following types of firm, among others, will require authorisation or registration for their payment services activities:

- Credit card companies and card issuers;
- Non-bank credit card issuers;
- Merchant acquirers;
- Payroll operators;
- Certain telecommunications network operators;
- Money remitters;
- Payment initiation service providers ("PISPs");
Account information service providers (“AISPs”); and

The agents thereof.

PSD2 focuses on the provision of payment services in electronic form and does not apply to cash only transactions or paper transactions (i.e. cheques, bills of exchange, promissory notes or other instruments or vouchers).

PART II - APPLICATION OF PSD2 IN IRELAND

Irish PSD Regulations 2018

PSD2 became law in Ireland on 13 January 2018 with the signing by the Minister for Finance of the European Union (Payment Services) Regulations 2018 (Statutory Instrument No.6 of 2018) (the “Regulations”).

Competent Authority

The Regulations designate the Central Bank of Ireland (the “Central Bank”) as the competent authority for the purposes of the PSD2. The Central Bank is therefore responsible for authorisation and supervision of entities providing payments services under the Regulations. Such authorisation may be unconditional or subject to such conditions or requirements as determined by the Central Bank. The Central Bank also has the power to withdraw an authorisation in certain circumstances.

Provision of “Payment Services”

Subject to certain exclusions, an entity which provides a “payment service” by way of business in Ireland will fall within scope of the Regulations. The person providing the “payment service” is referred to as the “payment services provider” for the purposes of the Regulations.

A “payment service” is defined in the Schedule to the Regulations as:

- Services enabling cash to be placed on a payment account as well as all operations required for operating a payment account;
Services enabling cash withdrawals from a payment account and all of the operations required for operating a payment account;

The execution of the following types of payment transactions - (i) direct debits, including one-off direct debits; (ii) payment transactions through a payment card or similar device; (iii) credit transfers, including standing orders;

The execution of the following types of payment transactions where the funds are covered by a credit line for the payment user - (i) direct debits, including one-off direct debits; (ii) payment transactions executed through a payment card or similar device; (iii) credit transfers, including standing orders;

Issuing payment instruments or acquiring payment transactions;

Money remittance;

Payment initiation services (“PIS”); and

Account information services (“AIS”).

Services excluded from the definition of “Payment Services”

Regulation 4 of the Regulations provides a list of a broad range of activities which are not captured under the Regulations, as summarised below:

Payment transactions made exclusively in cash directly by a payer to a payee, without any intermediary intervention;

Payment transactions from a payer to a payee through a commercial agent in certain circumstances;

The business of physical transport (including collection, processing and delivery) of banknotes and coins;

Non-professional cash collection and delivery within the framework of a non-profit or charitable activity;

The provision of cash back at the point of sale;
Cash-to-cash currency exchange operations where the funds are not held on a payment account;

Payment transactions based on certain types of paper documents drawn on a payment service provider ("PSP") with a view to placing funds at the disposal of a payee (i.e. paper based vouchers);

Payment transactions carried out within a payment or securities settlement system between on the one hand, settlement agents, central counterparties, clearing house or central banks and other participants of the system and on the other hand a PSP;

Payment transactions related to securities asset servicing in certain circumstances;

Services provided by technical service providers that support the provision of payment services without them at any time entering into possession of the funds to be transferred (with the exclusion of PIS and AIS) in certain circumstances;

Services based on specific payment instruments that can be used only in a limited way, that meet certain conditions (e.g. staff catering cards, store cards etc.);

Certain low value payment transactions resulting from services provided by a provider of electronic communications networks or services in certain circumstances;

Payment transactions carried out between PSPs, their agents or branches for their own account;

Payment transactions between group undertakings (without any intermediary intervention by a PSP other than an undertaking belonging to the same group); or

The provision of a cash withdrawal facility by means of an automated teller machine ("ATM") in certain circumstances, however, the ATM operator must still provide the customer with certain information on withdrawal charge.

Payment Institutions

Regulation 6 provides that a person shall not provide a payment service in Ireland unless the person is:
A credit institution within the meaning of EU Banking Directives authorised in Ireland or in an EEA Member State;

An e-money institution authorised in Ireland or in an EEA Member State;

An Post or the postal authority of another Member State (in its/their capacity as the provider of a giro service);

The Central Bank, the European Central Bank, or the central bank of another Member State when not acting in its capacity as a monetary authority;

A Member State or a regional or local authority of a Member State;

A payment institution authorised by the Central Bank;

A credit union;

A small payment institution as outlined in Regulation 41;

A registered AIS as outlined in Regulation 42;

A payment institution subject to certain transitional arrangements outlined in Regulation 140; or

A payment institution authorised as such in another Member State pursuant to the law of that Member State giving effect to PSD2.

Each of the above are referred to as a "payment institution" under the Regulations.

Ancillary Activities

Apart from the provision of payment services, Regulation 29 provides that a payment institution may engage in the following activities:

- The provision of operational and closely related ancillary services such as ensuring the execution of payment transactions, foreign exchange services, safekeeping activities, and the storage and processing of data;
- The operation of payment systems; and
Business activities other than the provision of payment services, subject to any Irish law or law of the EU applicable to such activities.

Regulation 29 provides that where a payment institution engages in the provision of a payment service, it may hold only payment accounts which are exclusively for payment transactions. The Regulations permit a payment institution to grant credit for a maximum period of 12 months in certain circumstances.
PART III – AUTHORISATION OF PAYMENT INSTITUTIONS IN IRELAND

Routes of Authorisation

The following entities are permitted to provide payment services in Ireland without the need for further authorisation or registration under the Regulations:

- Irish credit institutions and credit unions (because they are already authorised by the Central Bank);
- EEA authorised payment institutions (because they are already authorised in their home state);
- EEA registered AISPs (because they are already registered in their home state);
- Irish authorised and registered e-money institutions (because they are already authorised by, or registered with, the Central Bank);
- EEA authorised electronic money institutions (because they are already authorised in their home state);
- An Post Ltd; and/or
- Certain public bodies, such as the Central Bank and the ECB and regional or local authorities.

However, the above entities must comply with the applicable conduct of business requirements, and the reporting and notification requirements in the Regulations.

Save as set out above (and save for certain transitional arrangements outside of the scope of this paper), a payment institution will need to be:

- Authorised by the Central Bank as an authorised payment institution; or as a “small payment institution” (see below); or
- Registered as an agent (see below) of an authorised Irish payment institution/ EEA authorised payment institution; or
Registered (not authorised) with the Central Bank if it is an AIS.

**Authorisation**

The conditions for authorisation as a payment institution are set out in Regulation 7.

**Application Procedure**

*Preliminary Meeting with the Central Bank:* The Central Bank requires each proposed payment institution meets with it at a preliminary stage to discuss its business and the proposal to seek authorisation. Only on satisfying the Central Bank’s preliminary enquiries can the application proceed.

*Next Step - Documents Submission:* The application process requires the following documentation to be submitted to the Central Bank:

- Completed application form;
- Programme of operations setting out the type of payment services to be offered;
- Detailed business plan (including financial projections covering a period of three years);
- Evidence the applicant has the requisite initial capital requirements according to Regulation 8;
- Description of the measures taken to safeguard payment service users’ funds (only required for certain payment institutions) as detailed in Regulation 17;
- Description of governance and internal control mechanisms to demonstrate they are proportionate, appropriate, sound and adequate;
- Description of the procedure to monitor, handle and follow up security incidents;
- Description of the process in place to file, monitor, track and restrict access to sensitive payment data;
Description of business continuity arrangements;

Description of principles and definitions applied for the collection of statistical data on performance, transactions and fraud;

Security policy document including a detailed risk assessment;

Description of internal control mechanisms established to comply with anti-money laundering and terrorist financing obligations, where appropriate;

Description of applicant’s structural organisation;

The identity of the persons holding in the applicant, the size of their holding and evidence of their suitability;

The identity of directors and persons responsible for management of the applicant and evidence that they are of good repute and possess appropriate knowledge and experience to perform payment services;

Where applicable, the identity of statutory auditors;

Applicant’s legal status and articles of association; and

Address of the applicant’s head office.

Applicant firms must send the completed application form to the Central Bank together with the supporting documents referred to above.

Timing

The process for authorisation will usually take approximately 6 months from the date of original submission of the complete application.

Better prepared, more detailed submission documents tend to result in a shorter authorisation process.
Small Payment Institutions

PSD2 provides individual EU Member States with a discretion to grant a waiver of the application of certain authorisation procedures to “small payment institutions” as defined in PSD2 and in the Regulations. The Central Bank has not availed of this discretion. Therefore, there is no small payment institution regime in Ireland and firms seeking to provide payment services are required to apply for authorisation as a payment institution.

Register of Payment Service Providers

Pursuant to Regulation 25, the Central Bank is required to maintain a publicly accessible register (the “Register”) of the following:

- Payment institutions and their agents;
- Certain entities benefitting from the exemption for authorisation (such as a small payment institution, an AIS provider and their agents);
- Credit unions; and
- Descriptions of activities notified to the Central Bank when a service provider is availing of either the limited network exclusion or use of electronic communications exclusion and the names of the service providers concerned.

The relevant registers are located on the Central Bank’s website.

EBA Register

The European Banking Authority (the “EBA”) maintains an electronic, central register of authorised payment institutions containing the information notified by the competent authorities in EEA Member States, including that notified by the Central Bank under Regulation 25.
PART IV - KEY PRUDENTIAL REQUIREMENTS FOR PAYMENT INSTITUTIONS

General

The prudential requirements applicable to payment institutions are contained in Part II of the Regulations (Regulations 8 to 61) and relate to, among other things, initial and ongoing capital requirements, the segregation and safeguarding of customers’ funds and certain accounting, audit, outsourcing and record-keeping requirements.

These prudential requirements apply to all payment service providers, however, an AIS provider is exempted from most of these requirements, save for certain requirements set out in Regulation 42 such as the requirement to be registered at both the Central Bank and the EBA.

Capital Requirements

A payment institution authorised under the Regulations is subject to the following:

- **Initial Capital requirement:** At the time of authorisation a payment institution is required to hold a minimum level of initial capital which is dependent on the level of authorisation. This ranges from €20,000 to €125,000.

- **Own Funds requirement:** On an ongoing basis a payment institution must ensure it has sufficient capital (“Own Funds”) in its own right to meet the applicable capital requirement. A payment institution is required to hold a minimum level of capital equal to the higher of its initial capital or the capital requirement calculated in accordance with one of the following methods:

  (a) Method A – 10% of the previous year’s fixed overheads (or in the first year the projected overheads);

  (b) Method B – Formula based calculation based on the level of payment transactions in the previous year (or projected in the first year); or

  (c) Method C – Formula based on the level of income of the payment institution.
The Central Bank will specify in its letter of authorisation which of the above methods is to be used.

**Safeguarding User Funds**

A payment institution authorised in Ireland must satisfy the Central Bank that it has adequate arrangements in place to safeguard the funds of payment service users (Regulation 17). However, these requirements do not apply to either the PIS and/or AIS services.

Generally, payment users’ funds must be safeguarded by a payment institution in any of the following ways:

- By the segregation of the users’ funds in the manner prescribed in an account with a credit institution or invested in assets designated or approved by the Central Bank as secure, liquid and low-risk assets; or

- The users’ funds must be covered by an insurance policy or some other comparable guarantee issued by an insurance company or a credit institution that does not belong to the same group as the payment institution, payable in the event that the payment institution is unable to meet its financial obligations.

**Outsourcing**

Regulation 30 contains the outsourcing requirements which are imposed by the Central Bank on payment institutions. Where a payment institution intends to outsource an important operational function it is required to ensure that:

- The outsourcing will not result in the delegation by senior management of its responsibility;

- The relationship and obligations of the payment institution towards its payment service users under the Regulations will not be altered;

- The payment institution will continue to comply with the relevant conditions contained in the Regulations which allowed for its authorisation; and

- None of the other conditions subject to which the payment institution’s authorisation was granted will be removed or modified.
The payment institution must also ensure that its agents and branches inform payment service users of the outsourcing in place. Regulation 30 sets out further details on the various notification and other requirements which apply to outsourcing by an Irish authorised payment institution. Regulation 31 provides that a payment institution remains fully liable for any acts of its employees, or agent, branch or entity to which its activities are outsourced.
PART V - PASSPORTING PROVISIONS FOR PAYMENT INSTITUTIONS

General

Authorised payment institutions can provide services on a cross-border or branch basis in other Member States using passport rights acquired under the PSD2: in other words, once a payment institution is authorised under PSD2 in one Member State, it has the right to establish a branch in another EEA Member State (a "branch passport") or provide services in another EEA Member State (a "services passport"). Note however that small payment institutions cannot acquire passport rights under the Regulations.

The passport will apply to the provision of payment services only and not to other unrelated types of business activity in which a payment institution might choose to engage, and for which the payment institution would need to apply for any appropriate licences.

Furthermore an authorised payment institution in one Member State can also provide services in another Member State through an agent established in the same Member State as the payment institution (using a services passport) or in another Member State (using its branch passport).

Application for a Passport

The procedures for making an application for a services passport and a branch passport are very similar, but there are additional procedures that need to be followed when passporting through an agent.

Right to Passport

Regulation 37 sets out the home/host responsibilities of competent authorities for passporting firms. It provides for the notifications and information to be provided by the applicant to the Central Bank and the timing and nature of information to be exchanged between (i) home/host competent authorities, and the Central Bank and the applicant. Commission Delegated Regulation (EU) 2017/2055 contains the regulatory technical standards ("RTS") specifying the framework for co-operation, and for the exchange of information, between competent authorities of the home/host Member State.
Supervision of “Passporting” Payment Institutions

Regulations 38-40 set out the rules relating to the supervision of payment institutions and their agents and branches when they are exercising their freedom of establishment and freedom to provide services in different Member States and how the various competent authorities will interact with one another.

In July 2018, the EBA published a final report (EBA/RTS/2018/03) containing its draft regulatory technical standards specifying the framework for co-operation and the exchange of information between competent authorities.

Central Contact Point

Regulation 38(8) provides that the Central Bank may require payment institutions whose head office is situated in another member state, and that operate through agents in Ireland under the right of establishment, to set up a central contact point in Ireland. This is to ensure adequate communication and information reporting on compliance with PSD2 and to facilitate supervision by the Central Bank.

The EBA published its final report (EBA/RTS/2017/09), in December 2017, setting out draft regulatory technical standards on the criteria for determining the circumstances in which the appointment of a central contact point is appropriate, and the functions of those central contact points.
PART VI – BUSINESS CONDUCT RULES

Introduction

The Regulations implemented in Ireland the business conduct rules provided for under PSD2, comprising:

- The transparency of conditions and information requirements as set out in Part 3 of the Regulations; and
- The rights and obligations in relation to the provision and use of payment services, as set out in Part 4 of the Regulations.

Geographical Scope

The business conduct rules which apply will vary depending on whether:

- The payment service provider of both the payer and the payee are located within the EEA and the service relates to a transaction in an EEA currency. In this case all of the provisions of Part 3 and 4 of the Regulations will apply;
- The payment service provider of both the payer and the payee are located within the EEA and the service relates to a transaction in a non-EEA currency. In this case, the transparency and information requirements apply only to those elements of the transaction that are carried out in the EEA. Certain further transparency and information requirements will not apply;
- The payment service provider of either the payer or the payee (but not both) is located within the EEA (i.e. “one leg” payment transactions). In this case, the transparency and information requirements apply only to those elements of the transaction that are carried out in the EEA. A greater number of the transparency and information requirements are excluded from application entirely in the case of “one leg” payment transactions.

Transparency of conditions and information requirements

Part 3 of the Regulations (Regulations 67 – 82) contains the transparency of conditions and information requirements which must be discharged by payment service providers. Such
requirements are designed to ensure that payment service providers provide users with clear information that is proportionate to their needs to enable them to make well informed choices within the payment services market.

Part 3 focuses on the key elements of content, conditions, accessibility and charges. It sets out differing requirements depending on whether or not the service is for a single (stand-alone) payment transaction or for one or more payment transactions under a framework contract.

Examples of the requirements include:

- **Information to be provided to the payee**: The Regulations oblige the payment service provider to provide to the payee certain specified information.

- **Information to be provided to the payer**: The Regulations oblige the payment service provider to provide to the payer certain specified information.

- **Charges for information**: The Regulations prohibit payment service providers from charging payment service users for providing information mandated by Part 3.

- **Additional information and conditions for framework contracts**: Requirements relating to the accessibility of prior information and conditions of the framework contract, relating, inter alia, to: (i) the use of the payment services, (ii) charges, interest and exchange rates, (iii) on means of communications; (iv) on safeguards and corrective measures.

- **Conditions imposed relating to a framework contract**: The Regulations govern the ability of the payment service provider to effect changes in the conditions of the framework contract, and its ability to terminate the contract.

- **Derogation**: Regulation 66 sets out the circumstances in which low-value payment instruments and electronic money can benefit from a derogation from certain of the information requirements.

- **Currency conversion**: Regulation 83 sets out certain requirements if a currency conversion service is offered, such as a requirement for the party offering the service to disclose all charges as well as the exchange rate to be used.
The rights and obligations in relation to the provision and use of payment services

Part 4 of the Regulations set out the rights and obligations of customers and payment service providers. It regulates the authorisation and execution of payment transactions, the ability to impose charges, requirements relating to refunds, requirements relating to non-execution or defective or late execution of payment transactions and other requirements in relation to the obligations of a payer’s and a payee’s payment service provider.

Some examples of the requirements include:

- **Charges**: The Regulations specify the limited circumstances in which a payment services provider can charge the customer. Further, Regulation 86 provides that any charge imposed must be appropriate and in line with the payment service provider’s actual costs.

- **Low-value payment instruments**: Regulation 87 permits a payment service provider to derogate from certain of the information/transparency rules if it agrees this with the payment service user.

- **Consent and withdrawal**: Regulation 88 deals with the consent to be given by the payer and the ability of the payer to withdraw consent.

- **Availability of funds**: Regulation 89 addresses requirements for the availability of funds where there is an account servicing payment service provider.

- **Access to payment accounts**: Regulations 90 & 91 set out the rights for payers to use AISPs or PISPs to access services.

- **Customer’s use of payment instrument**: There is a legal obligation on the customer to use any payment instrument (i.e. a credit card) in accordance with its terms and conditions of issue, to take all reasonable steps to keep it secure, and to notify the issuer without undue delay of its loss, theft, misappropriation or unauthorised use under Regulation 93.

- **Obligations of issuers of payment instruments**: Under Regulation 94, providers issuing payment instruments are subject to various obligations such as ensuring that the personalised security features are not accessible to other persons and not sending unsolicited payment instruments (except as a replacement).
Payer’s liability for certain unauthorised payment transactions: Regulation 98 provides that a payer is liable for any financial consequences resulting from the use of a lost, stolen or misappropriated payment instrument in certain circumstances (such as where he or she has acted fraudulently or with gross negligence as further specified in that Regulation). Aside from those circumstances, the payer is only liable to bear the loss relating to unauthorised payment transactions on the payer’s account up to a maximum value of €50.

Execution time and value dating: Regulations 107 & 108 provides for the maximum execution times for a payment transaction and governs the timings for the value dating of transactions and the availability of funds.

Derogation: Regulation 87 sets out the circumstances in which low-value payment instruments and electronic money can benefit from a derogation from certain of the requirements.

Data protection, operational and security risks and strong customer authentication

Part 4 of the Regulations also imposes obligations on payment service providers regarding data protection, operational and security risks and strong customer authentication.

Data protection: Chapter 4 of Part 4 of the Regulations is dedicated to the protection of personal data and specifically provides that a PSP will only access, process and retain personal data necessary for the provision of its payment services with the explicit consent of the payment service user concerned;

Risk management: Payment service providers must establish a framework with mitigation and control mechanisms to manage operational and security risks relating to the payment services they provide (Regulation 118). The framework must also cover effective incident management procedures that include detection and classification of major operational and security incidents. Payment service providers must also provide the Central Bank with a comprehensive assessment of these risks and of the adequacy of their mitigation and control mechanisms. They must provide the assessment annually or more frequently if the Central Bank requires.

Strong customer authentication: Payment service providers are required to apply strong customer authentication (“SCA”) procedures when a customer initiates a payment transaction online, accesses a payment account online or carries out any
action through a remote channel which may imply a risk of payment fraud or other abuses (Regulation 120).

 Incident Reporting: If a major operational or security incident occurs the payment service provider is required without undue delay to notify the competent authority of its home Member State (Regulation 119). In addition the payment service users will be entitled to receive a notification of the incident and all the measures they can take to mitigate the adverse effects of the incident where the incident has or may have an impact on the users’ financial interests.

The European Banking Authority has published certain guidelines relating to the above. The guidelines of most relevance to payment service providers are; (i) the final guidelines on security measures for operational and security risks of payments (December 2017); (ii) the final guidelines on major incident reporting (July 2017); and (iii) the updated final guidelines on fraud reporting (December 2018). The Commission Delegated Regulation (EU) 2018/389 containing regulatory technical standards for strong customer authentication and common and secured open standards of communication, as supplemented by an opinion and a final report from the EBA, will enter into force on 14 September 2019.
PART VII - HOW CAN DILLON EUSTACE ASSIST?

Our Experience

Dillon Eustace’s Financial Services Department acts for asset managers and advisers, broker-dealers and MiFID firms, investment banks, fund administrators, pension consultancies, placing agents, intermediaries and other regulated and unregulated firms looking to use Ireland as a strategic base from which to serve a wider European client base or seeking to export their European based business to Ireland.

Services

The Financial Services Department can advise on all aspects of the Regulations, such as:

- Establishment and authorisation of new payment institutions in Ireland – including advising on high level strategic matters, scope and application of the Regulations, co-ordination of application for authorisation including assistance/guidance in completion of the Application Form and Business Plan, advice on implementation of policies and procedures for compliance with ongoing organisational and conduct of business requirements;

- Cross-border passporting;

- Capitalisation and capital adequacy requirements;

- Drafting/reviewing all contracts, terms of business, policies and procedures manuals etc.;

- Liaising with the Central Bank on client’s behalf on all aspect of PSD-related business and applications for authorisation; and

- Ongoing legal, regulatory and tax advice.

August, 2019
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