

INFORMATIVE NOTE

PLMJ

Advising with Value

November 2009

BANKING AND FINANCE

PAYMENT SERVICES DIRECTIVE

IMPLEMENTATION IN PORTUGAL

The Directive 2007/64/EC of the European Parliament and of the Council on payment services in the internal market (the "Directive") was implemented in the Portuguese jurisdiction on time through the Decree-Law no. 317/2009, of 30 October 2009 (the "Decree-Law"), which entered into force on last 1 November.

Such Decree-Law governs the taking up and pursuit of payment services and the provision of payment services. Its scope is confined to payment service providers whose main activity consists in the provision of payment services to payment service users.

Payment Services

According to the Decree-Law, payment services are, *inter alia*: (i) services enabling cash to be placed on a payment account; (ii) services enabling cash withdrawals from a payment account; (iii) execution of payment transactions, including transfers of funds on a payment account; (iv) execution of payment transactions where the funds are covered by a credit line; (v) issuing or acquiring of payment instruments; (vi) money remittance; and (vii) execution of payment transactions.

By its turn, (i) paper cheques, (ii) payment transactions made exclusively in cash directly from the payer to the payee, without any intermediary intervention and (iii) payment transaction on services linked to securities are, amongst others, included in the negative scope of the Decree-Law.

Main innovations

Notwithstanding the copy out approach of the Decree-Law in certain matters, key options have been made with a material impact on the market practice and on the relationship between payment services providers and users.

One of the most important options in the Decree-Law is the application of rules on transparency of conditions and information requirements for payment services to the micro enterprises, giving them the same level of protection in what concerns to information as that given to consumers.

In fact, one of the pivotal issues of the Decree-Law deals with the information requirements: in Portugal, the *ratio* behind such rules is the more information provided to users the better. In other words, the Portuguese legislator

Such Decree-Law governs the taking up and pursuit of payment services and the provision of payment services. Its scope is confined to payment service providers whose main activity consists in the provision of payment services to payment service users.

"Portuguese Law Firm of the Year"
Chambers Europe Excellence 2009, IFLR Awards 2006 & Who's Who legal Awards 2006, 2008, 2009

"Corporate Law Firm of the Year - Southern Europe"
ACQ Finance Magazine, 2009

"Best Portuguese Law Firm for Client Service"
Clients Choice Award - International Law Office, 2008

"Best Portuguese Tax Firm of the Year"
International Tax Review - Tax Awards 2006, 2008

Mind Leaders Awards TM
Human Resources Suppliers 2007

PLMJ

PAYMENT SERVICES DIRECTIVE

In fact, one of the pivotal issues of the Decree-Law deals with the information requirements: in Portugal, the *ratio* behind such rules is the more information provided to users the better. In other words, the Portuguese legislator decided to give users the highest level of protection in this respect.

decided to give users the highest level of protection in this respect.

However, a dual regime has been implemented: payment services providers' information duties arising from the providing of a single payment transaction are lower than those arising from framework contracts. This distinction is grounded on two main reasons: single payment transactions are simpler than entering into a framework contract and usually the payer is present when giving a payment order (being provided with all needed and adequate information *in loco*).

In the execution of individual payment transactions, payers have the right (upon request) to be provided with specific information on the maximum execution time and the charges payable by the payer and, where applicable, a breakdown of the amounts of any charges. On its turn, in framework contracts, users have the right to be provided with all the material information prior to the entering into of the contract.

Additionally, as a general rule, the Decree-Law sets forth that the payment services providers are not allowed to charge users for providing information on transparency of conditions and on requirements for payment services. The burden of proof on whether the requirements on information have been complied with or not depends on the payment services provider.

Another innovation entered by the Decree-Law refers to the rules on termination and amendment of framework contracts. Until now, the

prior notice for such purposes was not expressly provided and such matter was only governed by the rules on abusive standard terms which only set out that a "reasonable term" shall be set up. Conversely, the Decree-Law now foresees a two months prior notice for the payment institutions to terminate or amend framework contracts with consumers and micro enterprises.

One of the hot issues in Portugal further to the implementation of the Decree-Law relates to charges: Portuguese consumers associations are raising questions on the possibility of payees imposing charges due to the use of payment instruments. Such associations have been arguing that payees are trying to transfer their charges to the payers. However, article 61 of the Decree-Law, which allows payees to charge or propose reductions by the use of certain payment instrument, does not correspond to an option made by the Portuguese State (and then reversible), but otherwise to a transposition *tout court* of article 50 of the Directive.

Another relevant change introduced by the Decree-Law is related to the orders execution regime. As a general rule, payment transactions shall be executed in one business day, with the following exceptions: (i) unless otherwise agreed, in national transactions, if both the payer's and the payee's accounts are opened in the same payment services provider, the transferred amounts shall be credited in the payee account in the same day of the order given by the payer; (ii) if agreed by the parties, such terms may be extended within the limits set forth by the Directive, as follows¹:

Date of the Order (D)	Execution Term ²
National payment transactions between accounts opened in the same services provider	D ou D+1 ³
Other national payment transactions	D+1
Payment transactions within EU and EEA ⁴	D+1 ou D+3 ⁵
Other intra-Community payment transactions	D+1 ou D+4 ⁶

Finally, the payee services provider shall ensure that the amount received from the payer is made available and value dated immediately after the point of time of the receipt of the funds.

These requirements have been raising several doubts amongst the payment services providers in what concerns to currency conversion. Clarifications by European or national regulators in this regard are expected.

¹ Except for the "other intra-Community payment transactions" referred below where the parties have agreed in a D+4 term, one business day may be accrued to these terms whenever the payment order is given by written.

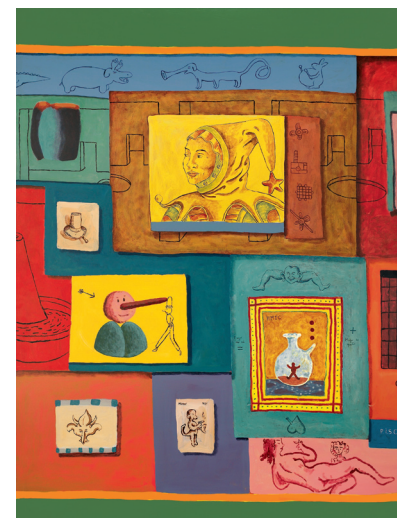
² All terms correspond to business days.

³ If agreed, the transaction may be executed in D+1.

⁴ Applicable to payment transactions in Euros in which both the payer's and the payees' payment services providers are placed in EU or EEA Member States (i.e., including Liechtenstein, Iceland and Norway).

⁵ Until 1 January 2012, a D+3 term may be agreed upon by the parties.

⁶ Applicable to payment transactions, in which both the payer's and the payees' payment services providers are placed in EU or EEA Member States, executed in a currency of those States outside the Euro area. The agreed term of D+1 shall not overcome a D+4 term.



Debate on the implementation of the Directive is over. The payment services providers in Portugal are now focused on the amendment of the agreements in force in the moment of the entry in force of the Decree-Law.

Liability and Complaints

The Decree-Law follows PSD regime in what concerns to the liability of the payment services providers: in fact, where a payment order is initiated by the payer, his payment service provider is liable for the due execution of the payment transaction; should the order be initiated by the payee, his service provider is the one liable before the payee for its due transmission to the payer's service provided.

Additionally, the Decree-Law sets forth that payment services providers shall set up adequate out-of-court complaint and redress procedures for the settlement of disputes. Moreover, without prejudice of bringing actions before the court, payment services users and their representative associations may complaint before the Bank of Portugal on the grounds of a breach of the rules governing the provision and use of payment services.

Moreover, the Decree-Law sets out that the burden of proof of the perfect execution of a payment transaction impends on the payment services provider.

Payment Services Providers

Title II of the Directive has been almost copied out by the Decree-Law which has implemented a new category of payment services providers: the so-called payment institutions, defined as providers of one or more payment services.

The activities which payment institutions are authorised to provide are more restricted than those banks and other credit institutions may perform in Portugal. Consequently, the inherent risks arising from such activities are lower than those incurred by banks and certain credit institutions. Thus being, a lower level of prudential supervision from the Bank of Portugal is required.

On the other hand, payment institutions authorised by another EU Member State may provide authorised payment services in Portugal through a branch, an agent or even under the freedom to provide services.

Moreover, the Decree-Law has established *grosso modo* that the rules on the accounting and statutory auditing of credit institutions and financial companies are also applicable to payment institutions.

Final Remarks

Debate on the implementation of the Directive is over. The payment services providers in Portugal are now focused on the amendment of the agreements in force in the moment of the entry in force of the Decree-Law.

In fact, rules more favourable to users of payment services entered into force last 1 November. The validity of the existing payment services contracts is not affected. Nonetheless, payment services providers shall amend the contracts in force in order to comply with the new regime within a six-month-term.

This Informative Note is intended for general distribution to clients and colleagues and the information contained herein is provided as a general and abstract overview. It should not be used as a basis on which to make decisions and professional legal advice should be sought for specific cases. The contents of this Informative Note may not be reproduced, in whole or in part, without the express consent of the author. If you should require further information on this topic, please contact [Magda Viçoso-mav@plmj.pt](mailto:Magda.Vicoso-mav@plmj.pt), [Raquel Azevedo-raaz@plmj.pt](mailto:Raquel.Azevedo-raaz@plmj.pt) e [Marisa Larguinhomala@plmj.pt](mailto:Marisa.Larguinhomala@plmj.pt).
