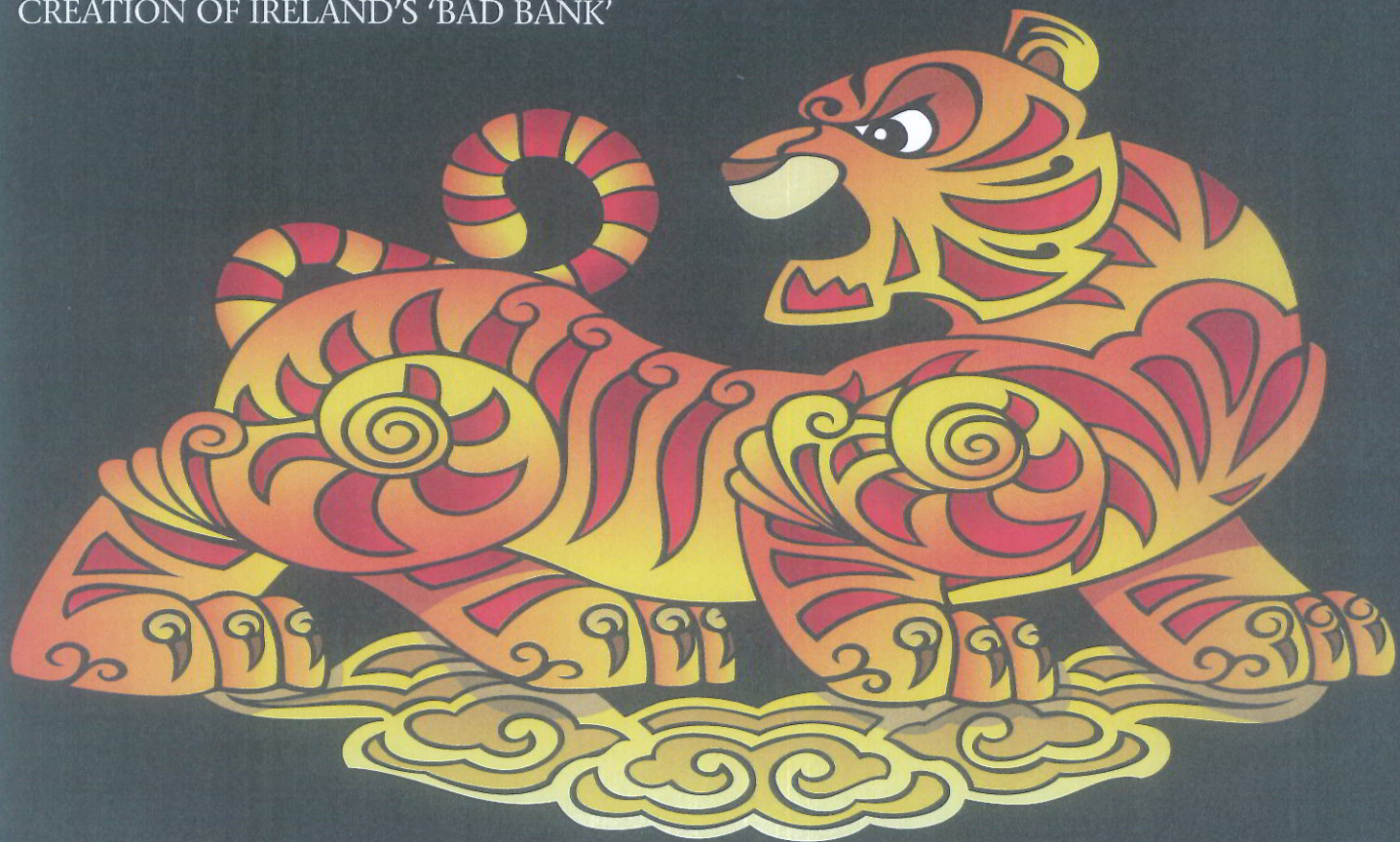


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Paying the piper

Raquel Azevedo and Marisa Larguinho analyse the impact on businesses and consumers of the new EU Directive on payment services and provide a case study of implementation in Portugal

The European Directive covering payment services in the internal market – which at the time of writing has been fully adopted by 25 member states and partially adopted in one other – governs the taking up, pursuit and provision of payment services. The Directive is in force in 21 states and partially in force in five others.

Directive 2007/64/EC lays down rules concerning transparency of conditions and information requirements for payment services, and the respective rights and obligations of users and payment service providers in relation to the provision of payment services as a regular occupation or business activity.

According to the Directive, payment services are, among others things: services enabling cash to be placed on a payment account; services enabling cash withdrawals from a payment account; execution of payment transactions, including transfers of funds on a payment account; execution of payment transactions through a payment card or a similar device; execution of payment transactions where the funds are covered by a credit line; issuing or acquiring of payment instruments; money remittance; and direct debits.

The Directive also expressly excludes from its scope among other types of transactions: paper cheques, payment transactions made exclusively in cash directly from the payer to the beneficiaries, without any intermediary intervention, and payment transactions on services linked to securities.

In Portugal the Directive was implemented at the end of October 2009 through Decree-

law 317/2009 and came into force on 1 November last year.

Notwithstanding the general copy-out approach – by which member states implementing legislation adopt the same language as the Directive instead of adapting it to local style and inserting it into national legislation – in certain matters,

the Directive obliged states to take key options that may have a material impact on market practice and on the relationship between payment services providers and users. When taking these options, the Portuguese legislator decided to award users – and in particular consumers and micro-enterprises – a high level of protection.

Higher protection

One of the most important options was to grant micro-enterprises the same level of protection as that granted to consumers. This higher protection level granted to consumers and micro-enterprises is mainly achieved by deeming as mandatory the application of certain information duties, notice periods, liability rules and value date rules, which, in cases where users are not consumers or micro-enterprises, may be waived by agreement between the parties.

In fact, one of the pivotal issues dealt with information requirements. In Portugal, the rationale behind such rules is the more information provided

to users the better, as this is considered to enhance their protection. However, a dual regime has been implemented; payment services providers' information duties arising from the provision of a single payment transaction are lower than those arising from framework contracts.

This distinction is based on two significant reasons: on the one hand, single payment transactions are simpler than entering into a framework contract, and, on the other, the payer is usually present when giving a payment order (being provided with all needed and adequate information).

Execution time

In the execution of individual payment transactions, payers have the right (on request) to be provided with specific information on the maximum execution time, on the charges payable by the payer and, where applicable, a breakdown of the amounts of any charges.

However, in framework contracts, payment services providers have a duty to provide users with all the material information prior to entering into the contract. This includes information on: the payment services provider; the payment service; charges, interest rates and exchange rates; means of communication used; preventive and corrective measures to be adopted by the user with reference to the payment instrument; variation and termination requirements; and claims and conflict resolution procedures. These information duties may be discharged by delivering a copy of the contract draft to the user.

Additionally, as a general rule, the implementing legislation sets forth that the payment services providers are not allowed to charge users for providing



Feature: Payment services

information on transparency of conditions and on requirements for payment services. In cases such as the provision of additional or more frequent information or transmission of the same by means different from those agreed, at the user's request, charges may be applied, as long as they are restricted to an appropriate amount, in line with the payment service provider's actual costs.

Minimum information requirements for individual payment transactions under a framework contract may be provided periodically, as long as this is provided for in the contract. In any case, this information must be provided at least on a monthly basis. It is also noteworthy that the burden of proof on whether the information requirements have been complied with falls on the payment services provider.

Charge prohibition

Regarding charges, in addition to the general prohibition on charging users for providing information in the terms stated, there is also a prohibition on charging for the corrective and preventive measures foreseen in the legislation unless otherwise specified. Those charges must be agreed between the parties and, in any case, must be appropriate and in line with the payment service provider's actual costs. In payment transactions, each user may only pay for the charges levied by their payment service provider, unless the transaction involves a currency conversion and a different distribution of costs was previously agreed.

Another of the implementing legislation's innovations refers to the rules on termination and variation of framework contracts. Until now, the prior notice required for these purposes was not expressly provided by law and such matters were only governed by the rules on abusive standard terms, which only set out that a 'reasonable term' must be granted. Conversely, a minimum two-month prior notice for the payment services

providers to terminate or amend framework contracts with consumers and micro-enterprises is now mandatory. On the other hand, should the user not be a consumer or a micro-enterprise, this rule may be waived by agreement and a shorter notice period may be established.

In turn, if a user wishes to terminate the contract, the ability to apply charges will also depend on the qualification of the user. In fact, should the user be a consumer or a micro-enterprise, charges may never be applied. Otherwise, charges may be applied in certain cases, as long as they are limited to an appropriate amount, in line with the payment service provider's actual costs.

Another relevant change introduced by the new legal framework is related to the orders execution regime. As a general rule, payment transactions must be executed in one business day, with these exceptions: first, unless otherwise agreed, in national transactions, if both the payer and the payee accounts are opened in the same payment services provider, the transferred amounts shall be credited in the payee's account in the same day of the order given by the payer; second, if agreed by the parties, such terms may be extended within the limits set forth by the Directive, except for other intra-community payment transactions 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 (see table below).

These timing requirements have raised several doubts among the payment services providers regarding currency conversion. Clarifications by European or national regulators in this regard are expected.

Personalised devices

It should also be noted that the payee's services provider shall ensure that the amount received from the payer is made available and value dated immediately after the time of the receipt of the funds.

Payment instruments are defined broadly in the Directive and in the implementing legislation, including personalised physical devices (such as credit and debit cards) and specific sets of procedures (such as those used for transactions internet via net banking), agreed between the user's services provider and the user, used to initiate a payment order.

The implementing legislation created a common regime, applicable to all these so-called payment instruments, in particular concerning information duties, liability and unauthorised transactions, user and provider duties, among other essential issues. This common regulation did not exist previously in the Portuguese legal framework, as each

Payment services

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

¹ All terms correspond to business days

² 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).

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

⁴ 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.

payment instrument had its own specific rules on these matters.

Again, Portugal followed the Directive's regime in relation to the liability of the payment services providers. In fact, where a payment order is initiated by the payer, the payment service provider is liable for the due execution of the payment transaction; should the order be initiated by the payee, the service provider is the one liable before the payee for its due transmission to the payer's service provider.

Redress procedures

Additionally, the implementing legislation establishes that those payment services providers must create adequate out-of-court complaint and redress procedures for the settlement of disputes by choosing and adhering to two out-of-court redress bodies. The Directive left it to member states to decide whether these procedures should be available to all users or consumers and micro-enterprises only. Portugal opted for the former.

Whenever the payment service users are consumers or micro-enterprises, they must be informed of the actual out-of-court complaint and redress procedures adhered to by the payment services provider. These details must also be communicated to the Bank of Portugal.

The choice of these out-of-court complaint and redress procedures has raised some difficulties among payment services providers, as most of the consumer and/or small claims redress bodies have strict geographical and/or material limitations and no list of approved bodies was disclosed by the Bank of Portugal, creating uncertainties about whether the regulator will consider the choices made as being adequate. Indeed, the choice of inadequate out-of-court redress bodies for these purposes is subject to fines up to €1.5 million.

Moreover, and without prejudice of bringing actions before the court, payment services users and their

representative associations may complain to the Bank of Portugal on the grounds of a breach of the rules governing the provision and use of payment services. In addition, the burden of proof of the perfect execution of a payment transaction falls on the payment services provider.

Title II of the Directive has been almost copied by the implementing legislation, which has established a new category of payment services providers – the so-called payment institutions, defined as providers of one or more payment services. The activities that payment institutions are authorised to provide are more restricted than those of banks and other credit institutions in Portugal. Consequently, the inherent risks arising from such activities are lower than those incurred by banks and certain credit institutions. So, a lower level of prudential supervision is required from the Bank of Portugal.

Statutory auditing

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 new legal framework 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.

The payment services providers in Portugal are now focused on amending the agreements that were in existence before the entry into force of the implementing legislation. However, while the validity of the existing payment services contracts is not affected, any provisions included in the law that are considered to be more favourable to payment services users will apply instead of the contractual regime stipulated by the parties.

Payment services providers are

Portuguese consumer associations have raised questions about the possibility of payees imposing charges

required to amend the contracts in force to comply with the new regime within six months of its entry into force. In the absence of reaction from payments service users, their consent is presumed after two months from receipt of the new contract. Some banks are using their internet banking systems both to communicate the new contractual conditions and to collect their clients express consent to the same, avoiding a two-month waiting period.

One of the significant topics in Portugal further to the implementing legislation relates to charges. Portuguese consumer associations have raised questions about the possibility of payees imposing charges due to the use of payment instruments and lobbying against this 'open door' to additional charges being imposed on consumers.

Following these public discussions, Decree-law 3/2010 of 5 January was published in the *Official Gazette*. It prohibits credit institutions imposing charges on automated teller machine transactions, as well as prohibiting payees from demanding any charge from payers for using a specific payment instrument (when using automatic payment terminals and devices).

Thus, regarding the second prohibition, Decree-law 3/2010 corresponds to an option made under article 63(6)(b) at the end of the implementing legislation. Indeed, to promote both competition and the use of efficient payment instruments, the prohibition represents a limitation to the payees' rights on charging the payers for using a particular payment instrument.

In addition, it should be stressed that if a credit institution or payee breaches the prohibitions mentioned, they will commit an administrative offence and be subject to fines of up to €3,740 for individuals and up to €44,891 for legal persons.

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