

NEW UK REQUIREMENTS ON CROSS-BORDER PAYMENTS – "ONSHORING" AND PRACTICAL ISSUES

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UK Payments Regulation Alert

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The Cross-Border Payments Regulation (EC) No 924/2009 (CBPR) is the EU legislation that sets out the principle of equality of charges for intra-EU cross-border euro payments and corresponding national payments within an EU member state. CBPR has been amended by Regulation (EU) 2019/518 (Amending Regulation), which extends the equality of charges principle to any non-euro currency of an EU member state and inserts new transparency requirements on currency conversion charges. CBPR applied directly in the UK until 31 December 2020.

CBPR (as amended by the Amending Regulation) has, since 1 January 2021, been "onshored" into UK law following the end of the Brexit transition period, with amendments, and we refer to the UK's implementation of CBPR in this alert as UK CBPR.¹ Essentially, only the new transparency requirements on currency conversion charges under Article 3a and Article 3b (as inserted by the Amending Regulation) are retained. This means that the equality of charges requirements are not part of the UK CBPR regime.

In this alert, we discuss in more detail the requirements now applicable to payments within the scope of UK CBPR.

UK CBPR REGIME

Scope

The UK regime applies to any "national payment" or "cross-border payment" that is denominated in sterling or any EU currency and involves currency conversion. A "national payment" is a payment entirely within the UK, i.e. the payer's payment service provider and the payee's payment service provider are both located in the UK. A "cross-border payment" is a UK-EEA payment where the payer's payment service provider is located in the UK and the payee's payment service provider is located in the EEA or where the payer's payment service provider is in the EEA and the payee's payment service provider is in the UK.

Firms within scope are "payment service providers" as defined in the Payment Services Regulations 2017 (PSR2017) and providers of dynamic currency conversion services (DCC).² Note that DCC providers may or may not be regulated payment service providers, depending on their business model. This alert focuses on regulated payment service providers PSPs, which are, in summary, banks and non-bank payment institutions, as well as electronic money institutions.

Requirements Under Article 3a

Under Article 3a, PSPs must disclose, before initiation of a payment, currency conversion charges in the form of a percentage markup over the euro foreign exchange reference rates issued by the European Central Bank. PSPs must also publish the percentage markup on an electronic platform (e.g., their websites).

The heading of Article 3a indicates that its requirements relate to “card-based transactions” only. However, the wording of Article 3a, other than Article 3a(5) and (6) (see below), does not expressly refer to payment cards. Further, there is no definition of “card-based transaction” in the UK CBPR nor in PSR2017.³

The Financial Conduct Authority (FCA) has provided some guidance on the meaning of a card-based transaction, although the guidance is given in another context. In the FCA’s view, a card-based payment transaction extends further than transactions using a physical card and would include any payment transaction made by means of a card, telecommunication, digital or IT device, or software if this “results in” a debit card or a credit card or an e-money card transaction.⁴

On the assumption that this guidance applies for the purposes of Article 3a, this would cover a payment using an app or wrapper that is linked to a card (it is the card that is actually being used but via the app/wrapper). For example, if a UK cardholder uses such an app (which is linked to their sterling-denominated UK card) to pay in euro, the UK card issuer (if it performs the currency conversion) must disclose the percentage markup to the cardholder before initiation of the transaction.

However, if the same UK cardholder uses their card to top up a sterling-denominated e-money wallet and then uses the wallet itself (as opposed to the card) to pay in euro, the subsequent payment may not be “card-based” (notwithstanding that the value in the wallet ultimately comes from the card at the “topping-up” stage). This is on the basis that the subsequent payment is sufficiently separate from the “topping-up” transaction. In this case, Article 3b would instead become relevant (see below).

The above disclosure and publication requirements applied under CBPR from 19 April 2020, and they continued to apply under UK CBPR from 1 January 2021.

In addition, under Articles 3a(5) and (6), if the payer uses a card to make a payment or an ATM withdrawal in any “Union currency” that is different from the currency of the account to which the card is linked, the card-issuing PSP must send an “electronic message” to the payer with the percentage markup before processing the payment. Such an electronic message only needs to be sent once in every month in which relevant transactions occur (i.e., before processing of the first such payment in a given month).

There is some uncertainty in regard to whether the electronic message requirements above apply in the UK at all. The requirements are expressed, in the Amending Regulation, to apply from 19 April 2021. The Explanatory Memorandum issued by HM Treasury that accompanied the UK onshoring legislation⁵ stated that because Articles 3a(5) and (6) would apply in April 2021, i.e. after the end of the Brexit transition period, they could not be onshored and therefore “will not come into UK law.”⁶ This suggests that the requirements under Article 3a(5) and (6) are not part of the UK CBPR regime. However, the UK onshoring legislation itself has not specifically removed Article 3a(5) and (6) from the text of the retained CBPR and the Explanatory Memorandum does not have legal force. There appears to be a sound basis, given the onshoring framework set out in the European Union (Withdrawal) Act 2018, to conclude that Articles 3a(5) and (6) should not apply at all in the UK. The FCA or HM Treasury may yet provide further clarification on this point.

Requirements Under Article 3b

Article 3b sets out similar disclosure requirements for “credit transfers” initiated online via the PSP's website or mobile banking app.

The term “credit transfer” is as specifically defined under PSR2017 and means “a payment service for crediting a payee's payment account with a payment transaction or a series of payment transactions from a payer's payment account by the payment service provider which holds the payer's payment account, based on an instruction given by the payer.”

The definition appears to be wide enough to catch not only typical bank transfers but also e-money wallet transactions (as mentioned above). Therefore, non-bank payment firms, particularly electronic money institutions, should also carefully consider these requirements.

These requirements applied under CBPR from 19 April 2020, and they continued to apply under UK CBPR from 1 January 2021.

GENERAL ISSUES

Article 3a and Article 3b are drafted in a manner that suggests that the requirements may only apply to transactions initiated by the payer themselves. For example, the relevant information is expressed to be provided and/or disclosed “to the payer” or the PSP must “inform the payer”; Article 3b also refers to credit transfers “initiated directly.” There is therefore some uncertainty in regard to whether these requirements should apply to transactions initiated by using a third-party payment initiation service (PIS), although the policy rationale would seem to point toward PIS-initiated payments also being included.

If PIS-initiated payments are included, operational adjustments may be necessary in relation to some PIS-initiated transactions that are processed without direct contact between the payer's PSP and the payer.

CONCLUSION

These requirements under Articles 3a and 3b are relatively new. Nonetheless, we await with interest the development of market practices in relation to CBPR compliance, as well as any specific guidance or clarifications from the FCA that may address some of the practical interpretational issues.

FOOTNOTES

¹ See the Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 (SI 2019/710) (Reg.33) and the Securities Financing Transactions, Securitisation and Miscellaneous Amendments (EU Exit) Regulations 2020 (SI 2020/1385) (Reg.64 and 72).

² In essence, these are conversion services to enable, e.g., a UK cardholder in France to pay in sterling (i.e., the currency of the card) at the point of sale, rather than euro (the currency used by the French merchant); the conversion is performed by the merchant or service providers engaged by the merchant.

³ There is no such definition, either, in the EU CBPR nor in the EU Payment Services Directive 2015/2366 (i.e., PSD2).

⁴ See para.8.225, the Payment Services and Electronic Money Approach Document.

⁵ That is, the Securities Financing Transactions, Securitisation and Miscellaneous Amendments (EU Exit) Regulations 2020 (SI 2020/1385).

⁶ See paragraph 2.69 of the Explanatory Memorandum.

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