

PSD2 AND NON-GEOGRAPHIC NUMBERS**A NOTE FOR THE INTERNET TELEPHONY SERVICES PROVIDERS' ASSOCIATION (ITSPA)****MAY 2018****SUMMARY**

- PSD2 clarifies and narrows the scope of the electronic communications exclusion, which was previously drafted broadly to exclude certain payment transactions made by means of telecom or information devices from the scope of the Regulations. Some communications providers have taken the view that calls to 08 / 09 / 188 non-geographic numbers and mobile short codes now involve the provision of payment services within the scope of the Regulations.
- In the case of calls to 08 / 09 / 118 non-geographic numbers we consider, for the reasons set out in this advice note, that the better view is that none of those involved in the value chain is actually providing a 'payment service' that is within the scope of the Regulations. Further, we do not believe that the existence of a revenue share arrangement is determinative in assessing whether a payment service is being provided.
- Some communications providers do, however, provide services in relation to calls to non-geographic numbers that are likely to amount to payment services. For example, some aggregators or resellers may offer clearance and settlement services to assist originating (or terminating) communications providers with their billing and payment requirements.
- In relation to calls to mobile short codes we consider, for the reasons set out in this advice note, that it is more likely those involved in the value chain are providing a payment service¹, as the mobile network operator (and those involved in the value chain) is providing a means through which a caller can execute a payment transaction to a third party provider in order to pay the third party service provider for its service.
- If the FCA or a court were to take the view that a payment service is being provided in respect of calls to 08 / 09 / 118 non-geographic number ranges and/or mobile short codes, we expect that those involved in the value chain would be eligible to take advantage of the electronic communications exclusion.
- Where an entity relies on the electronic communications exclusion it must notify the regulator and provide it with an annual audit opinion that the transactions to which it relates comply with the spend caps set out in the Regulations.

1. The Regulation of Payment Services has changed

- 1.1 The second Payment Services Directive (2015/2366) ("**PSD2**") was implemented in the United Kingdom by the Payment Services Regulations 2017 (the "**Regulations**"). Many of Regulations came into force on 13 January 2018.
- 1.2 Among other things, PSD2 clarifies and narrows the scope of the electronic communications exclusion, which was previously drafted broadly to exclude certain payment transactions made by means of telecom or information devices from the scope of the Regulations.

¹ Under either paragraph (c) or (d) of Schedule 1 to the Payment Services Regulations 2017, depending on the circumstances.

- 1.3 Some communications providers have taken the view that calls to 08 / 09 / 188 non-geographic numbers and mobile short codes involve the provision of payment services within the scope of the Regulations and that they must therefore seek to obtain the benefit of the electronic communications exclusion, which requires notification to the FCA, the imposition of spending caps and the submission of annual audit reports.
- 1.4 This note considers whether calls to 08 / 09 / 118 non-geographic numbers and mobile short codes involve the provision of payment services within the scope of the Regulations. It has been prepared for ITSPA and its members on a confidential basis, subject to the limitations set out in Annex B to this note.

2. Are you providing a 'payment service'?

- 2.1 A 'payment service' may refer to a number of different activities that are carried out as a regular occupation or business activity, including:
- (a) the execution of payment transactions including transfers of funds on a payment account;² and
 - (b) the execution of payment transactions where the funds are covered by a credit line for a payment service user.³

Payment transactions include credit transfers or payment transactions made through a payment card or similar device.

- 2.2 Electronic communications network or service providers may be providing the payment service in paragraph (c) (if the payment is made from the caller's prepaid account) or paragraph (d) (where the payment is charged to the caller's monthly bill).
- 2.3 This, in our view, is the threshold question for determining how the Regulation applies to calls and related services and whether or not the relevant services constitute a 'payment service'. Only if the services fall within the scope of that definition is it relevant to consider any exclusions, such as the revised electronic communications exclusion.

3. 08 / 09 / 118 non-geographic call services

- 3.1 The 08 / 09 / 118 non-geographic number ranges cover a wide variety of services (including voice based services) provided by both private organisations and public bodies which can be accessed from a caller's telephone. There are a large number of variations in how non-geographic calls are conveyed between retail callers and service providers and the flow of funds is not always the same. The flow of funds used for the purposes of this note is described in Annex A, Part 1.
- 3.2 We consider that the better view is that none of those involved in the value chain for 08 / 09 / 118 non-geographic numbers is actually providing a '*payment service*' that is within the scope of the Regulations. This is because:
- (a) Each relationship within the value chain is subject to pricing and payment terms agreed under separate commercial agreements (many of which will not be known to others in the value chain).

² Payment Services Regulations, Schedule 1, Part 1, paragraph (c) (summarised).

³ Payment Services Regulations, Schedule 1, Part 1, paragraph (d) (summarised).

- (b) If the originating communications provider is not paid by the caller the bad debt risk sits with the originating communications provider (except in certain cases of fraud), who is still obliged to pay the aggregator the access charge and service charge or aggregated flat fee which is due.
- (c) The sum received by the called party from the reseller or terminating communications provider is therefore not a direct '*pass through*' of the amount paid by the caller to the originating communications provider (or reseller, as appropriate) and in many cases the deductions made from the notional 'service charge' at each stage of the value chain on account of charges for routing are substantial.
- (d) Each payment in the value chain therefore appears to be separate from the last.
- (e) Other payment service providers (such as banks) are used to facilitate payments between each party in the value chain.
- (f) There is no 'contract' between the caller and the called party. The caller generally only has recourse against its service provider (i.e. the reseller or originating communications provider), except for those arising pursuant to specific regulation by Ofcom and the Phone-paid Services Authority.

3.3 We would therefore argue that the unbundled access charge and the service charge paid by the caller to the originating service provider (or reseller, as appropriate) is paid in consideration of the service provided by the originating communications provider to the caller. The FCA has stated, Chapter 15 of The Perimeter Guidance Manual:

"In our view, the simple act of accepting payment by way of debit card or credit card for supply of your own goods or services does not generally amount to the provision of the service of execution of payment transactions through a payment card... The firm providing the merchant acquiring service enabling the restaurant to process the card transaction and receive payment is providing a payment service in this instance." (emphasis added)

3.4 Certain stakeholders in the telecommunications industry have taken the view that an electronic communications network and/or service provider will be considered to be providing a payment service where it provides a voice based service that includes a revenue share arrangement with a third party (unless an exclusion is available under the Regulations). We do not, however, believe that the existence of a revenue share arrangement is determinative in assessing whether or not a payment service is being provided.

3.5 Despite these views, some communications providers do provide services in relation to calls to non-geographic numbers that are likely to amount to payment services. For example, some aggregators or resellers may offer clearance and settlement services to assist originating (or terminating) communications providers with their billing and payment requirements. Such services are likely to involve the provision of payment services, for which the provider must either be authorised or entitled to rely on an exclusion. However, such services are distinct from the provision of calls to non-geographic numbers themselves.

4. Mobile short codes

4.1 Mobile short codes can be used to pay for certain types of voice based services and are sometimes used as an alternative to non-geographic numbers. Mobile short codes can be used by a caller to access a range of services provided by service providers which are not covered by the caller's monthly allowance agreed with their mobile network provider (e.g. video chat services, entering TV competitions, charity donations).

- 4.2 Charges for voice calls to mobile short codes are more clearly and transparently priced for callers, with a wide range of pricing choices for service providers from zero rated to £2.00 per minute for voice calls. We understand that where a caller makes a call to a mobile short code:
- 4.2.1 the caller is charged their standard network rate plus a fixed amount (whether per minute or per call) by its mobile network provider. We refer to the fixed amount in this advice note as the "**Fixed Charge**"; and
 - 4.2.2 the Fixed Charge is then passed through the value chain to eventually reach the service provider, less commission taken by the other entities involved in the value chain (e.g. aggregators), usually on a percentage basis.
- 4.3 This may not be the payment flow structure adopted for every type of mobile short code (for example there may be different arrangements for the making of low cost calls to international numbers). However, to the extent that Fixed Charge payment flow is adopted as described above, there is a clear distinction between the manner in which the funds flow compared to calls to non-geographic numbers.
- 4.4 This flow of funds outlined above in paragraph 4.2 appears, on the face of it, to be more likely to be considered a payment service,⁴ as the mobile network operator (and those involved in the value chain) is providing a means through which a caller can execute a payment transaction to a third party provider in order to pay the third party service provider for its service. Communications providers should therefore consider whether or not they can rely on an exclusion in order to carry traffic to mobile short codes.

5. The Electronic Communications Exclusion

- 5.1 The Regulations provide that certain activities are excluded from scope and will not constitute payment services. The exclusion of most relevance to electronic communications network and/or service providers is commonly referred to as the electronic communications exclusion.
- 5.2 The Regulations provide a specific exclusion in respect of the activities of electronic communications network and/or service providers, which is set out in paragraph (k) of Part 2 of Schedule 1 to the PSRs 2017. It is important to note, however, that simply because an electronic communications network or service provider falls within the electronic communications exclusion does not automatically mean that the electronic communications network or service provider is providing a payment service that is within the scope of the Regulations.
- 5.3 If the FCA or a court were to take the view that a payment service is being provided in respect of calls to 08 / 09 / 118 non-geographic number ranges and/or mobile short codes, we expect that those involved in the value chain would be eligible to take advantage of the electronic communications exclusion.
- 5.4 The language of the exclusion is clear that it applies in respect of the "*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***" (i.e. not just the originating communications provider (or reseller) which has the direct relationship with the caller). Further, the FCA, in Chapter 15 of The Perimeter Guidance Manual, has stated:

"The PSRs 2017 make clear that where a network operator benefits from the exclusion with respect to a particular transaction, the provider of any other payment service resulting from that transaction will also benefit from the exclusion."

⁴ Under either paragraph (c) or (d) of Schedule 1 to the Payment Services Regulations 2017, depending on the circumstances.

- 5.5 We interpret this to mean that if the network operator can take advantage of the exclusion, all of the other entities involved in the chain can (e.g. aggregators).
- 5.6 Where an entity relies on the electronic communications exclusion it must notify the regulator and provide it with an annual audit opinion that the transactions to which it relates comply with the spend caps set out in the Regulations. The FCA has issued a direction under Regulation 39 of the Regulations to provide further information for those that need to notify the FCA and provide an annual audit opinion. The direction can be found [here](#).

Fieldfisher LLP

ANNEX A: NON-GEOGRAPHIC NUMBER FUND FLOWS**Part 1: 08 / 09 / 118 Flow of Funds**

1. This note is based on the following number ranges: 0843/4/5, 0871/2/3, 090/1/8 and 118.
2. It is based on the flow of funds summarised below:
 - (a) the caller pays the originating communications provider a fee which is, for certain callers, disaggregated into an 'access charge' and a 'service charge', pursuant to the contract between the caller and their originating communications provider;
 - (b) the originating communications provider (OCP) pays the aggregator a charge, which may be disaggregated into a separate access charge and service charge or paid as an aggregated flat fee, subject to separate commercial terms agreed between the parties;
 - (c) the terminating communications provider typically pays the transit network provider (which may differ, depending on a range of factors) a transit charge which is subject to separate commercial terms agreed between the parties which will cover both the transit charge and the terms of transit;
 - (d) the reseller pays the terminating communications provider a charge for the provision of the non-geographic number(s) (and the reseller may also charge the terminating communications provider a fee, which may be calculated based on a share of revenues received by the reseller in respect of the call traffic) which are subject to separate commercial terms agreed between the parties;
 - (e) the service provider pays the reseller a charge for the provision of the non-geographic number(s) (and there may also be a charge payable by the reseller to the service provider, which may be calculated based on a share of revenues received by the reseller in respect of the call traffic).

ANNEX B: LIMITATIONS

1. This is a very new and developing area of law. We have provided a view in this note which can be used to support an argument that the Regulations do not apply to the arrangements we have outlined. However, it is certainly not inconceivable that a regulator could reach a different conclusion.
2. This advice is provided to ITSPA however we agree that it may be relied on by its members subject to the following limitations:
 - 2.1 We shall not be liable, in any event, for any indirect or consequential economic loss or damage (including loss of profits) suffered by ITSPA or any third party (including its members) arising from the provision of our services or advice;
 - 2.2 Our liability to ITSPA (and its members) shall also be limited to that proportion of the loss or damage suffered by ITSPA (or its members, as appropriate) which is ordered against us by a Court, or otherwise arises, after taking into account ITSPA's contribution (if any) to the relevant loss and damage or that of any other person responsible and/or liable to ITSPA for such loss or damage. We will not be responsible for any increased liability falling upon us by reason of any limit which ITSPA (or its members, as appropriate) may have agreed with any other advisor or which may otherwise have fallen upon us by reason of the contributory negligence of any other person against whom ITSPA (or its members, as appropriate) do not make recovery for any reason;
 - 2.3 If ITSPA (or its members) incur any expenses, damages, losses or liabilities whatsoever (including, without limitation, legal fees) in connection with or arising from the provision of services by us or as a result of any advice given or failed to be given to ITSPA and our liability to ITSPA (and its members, as appropriate) as a result is established, our total aggregate liability to ITSPA under this engagement letter or otherwise shall in no circumstances exceed the sum of £3 million. The foregoing cap on our liability is a total aggregate cap which shall apply to ITSPA and its members jointly; and
 - 2.4 Any limitation on our liability will apply only to the extent permitted by English law. Nothing in these terms shall exclude or restrict liability arising from fraud or reckless disregard of professional obligations. Any limitation does not apply to any liability for death or personal injury caused by negligence.