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Payment Services:
Making Safeguarding Work
A discussion paper
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Executive Summary

For good reasons safeguarding of customer's funds is mandated for authorised payment institutions and electronic money institutions (together 'institutions'). In practice, almost all safeguarding is undertaken using the segregation methodology which requires so-called 'relevant funds' to be identified and kept separately in a segregation account.

The FCA has published detailed guidance as to how safeguarding is to work but many institutions find difficulties in complying with this guidance and particularly requirements that

- Relevant funds received into a safeguarding account must not be mixed with other funds so that at all times one needs to be capable of identifying and quantifying relevant funds[1]; and that
- 'Payment and e-money institutions are expected to match the value of payments they make on behalf of their clients from their own funds because they will have to both keep the value in a safeguarding account and remit it to the payee'[2].

This paper sets out arguments that these interpretations are not entirely well-grounded in theory, that they go beyond the policy intentions of the Second Payment Services Directive and that, in certain circumstances, they lead to some perverse outcomes in practice, causing in many cases, an effective need for duplication of safeguarding that adds disproportionately to costs for the additional customer benefit. We identify some areas where we consider that the FCA has scope to change or to add to its existing guidance in ways that would be of benefit to the industry without compromising customer protection and other areas where legislative change would be of value.

Introduction

This paper has been developed in dialogue with a number of our respective clients by Fieldfisher, an international law firm head-quartered in London with a significant practice in payment services, and by fscom, a boutique compliance consultancy specialising in European payments regulation. More detail about the authors appears at the end of this document.

The basic idea of safeguarding in the payment services industry is uncontroversial – it is needed to protect customers from insolvency (or misapplication of funds) by their authorised payment institution (API) or electronic money institution (EMI)[3]. (For convenience, we will refer to authorised payment institutions and e-money institutions collectively as '**institutions**'.) However, problems arise both practically and as a matter of principle in applying the concept. This paper considers some of those issues and what might be done to deal with them.

Two methods are allowed for safeguarding:

- **segregation method;** and
- **the insurance or guarantee method.**

The insurance method is not widely followed and there may be doubts over the capacity of the insurance industry to cover the high volume of transactions, although the possibility of coverage by means of a guarantee, rather than insurance, may extend the possibilities.

In practice, almost all safeguarding is undertaken using the segregation methodology. This requires the institution to segregate 'relevant funds' from other funds that it is holding and, where the institution 'continues to hold the relevant funds at the end of the business day following the day on which they were received', to place them in a separate account that it holds with an EEA-authorised credit institution or the Bank of England (or hold them in the form of 'relevant assets' (secure liquid assets of an approved type) in a separate account with an authorised custodian.

However, while the most commonly used, this methodology is beset with practical difficulties of interpretation including for the institutions in determining:

- **what** is meant by relevant funds;
- **when** they are 'received' by the institution; and
- **when** the safeguarding obligation ceases?

The FCA guidance, in its 'Our Approach'[4] document and in direct engagement, creates additional obligations, and therefore, complexity, for institutions. For example, the FCA's strict insistence that:

- relevant funds received into a safeguarding account must not be mixed with other funds so that at all times one needs to be capable of identifying and quantifying relevant funds[5]; and that
- '*payment and e-money institutions are expected to match the value of payments they make on behalf of their clients from their own funds because they will have to both keep the value in a safeguarding account and remit it to the payee*'[6].

Further complications arise because:

- some banks require that funds must pass through a firm's own account, rather than a client account, before onward payment where the funds have been used to settle foreign exchange transactions;
- the card schemes have interpreted the FCA's guidance as meaning that, once a transaction has been made, the funds must be both safeguarded and available in an account over which they have a right; and
- institutions cannot rely on the safeguarding of their funds by wholesale institutions, with the effect that both institutions have to safeguard the same funds, which increases the cost for consumers.

It is the contention of this paper that these interpretations are not entirely well-grounded in theory and that, in certain circumstances, they lead to some perverse outcomes in practice. In many cases, they cause an effective need for duplication of safeguarding, which, if rigidly followed, could make it uneconomic for the vast majority of, if not all, institutions, causing them to go out of business given the prohibitive cost to them of duplicating clients' funds.

In our analysis of the legal background, we illustrate that it is not appropriate to take a strict interpretation of the terminology used in the directives and we suggest a practical alternative implementation of these arrangements that is consistent with, and advances, the underlying policy of the safeguarding principle.

What is meant by ‘relevant funds’?

The definition of ‘relevant funds’ in the Electronic Money Regulations 2011 (the ‘**EMRs**’) is ‘*funds that have been received in exchange for electronic money that has been issued*’.

The basic definition of ‘relevant funds’ in the Payment Services Regulations 2017 (the ‘PSRs’), which applies where safeguarding is being undertaken by APIs, and also by EMI’s in relation to payment services that are unrelated to electronic money, is as follows:

a. *Sums received from, or for the benefit of, a payment service user for the execution of a payment transaction; and*

b. *Sums received from a payment service provider for the execution of a payment transaction on behalf of a payment service user.*

Two key elements used in this definition: ‘*sums*’ and ‘*received*’ are not further defined.

In relation to ‘*sums*’ it is notable that the PSRs do not use the term ‘*cash*’ or ‘*funds*’ here (even though Article 10 of the second Payment Services Directive (‘**PSD2**’) uses the terminology ‘**funds**’ and the term ‘*funds*’ is used in the definition of the same term within the EMRs).[7]

The term ‘sums’ would normally primarily denote the concept of an amount of something (as in for example ‘I have a sum of money’) rather than that something itself. We will call this ‘**sums meaning an amount**’. However the word can also be used as what linguistic experts describe as a metonym a word used as a substitute for something else with which it is closely associated providing a shorthand way of describing the thing itself (as in the example ‘*I will pay back the sum I owe on Friday*’). We will call this ‘**sums meaning cash**’.

Part of the problem in applying the term ‘relevant funds’ as it is used within the PSRs is that it seems to be used in both senses. When the PSRs allow for safeguarding by means of the insurance method ‘*relevant funds*’ must be taken as ‘sums meaning an amount’ - the requirement is to safeguard an amount equal to the money transferred to the API. However, when the PSRs is allowing for safeguarding by means of the segregation method there is the temptation to see the requirement as being focused primarily on identifying and following the journey of a specific holding of cash – i.e. ‘sums meaning cash’.

For example, under regulation 23(5) of the PSRs the obligation to keep ‘*relevant funds segregated from any other funds that it holds’ seems to refer to an actual identifiable cash asset. Equally the obligation under regulation 23(6) (which requires an API holding relevant funds at the end of the business day, to place them in a separate account) also seems to apply to an identified cash asset.*

Importantly, when the FCA insists that *‘relevant funds*’ must not be mixed with other funds they must be using the ‘sums meaning cash’ definition since it is impossible to mix real cash with a notional amount.

It is our contention that, tempting as it is to apply the ‘sums meaning cash’ definition to ‘relevant funds’, where the term is used in such places as regulation 23(6), this approach is flawed. It is flawed, both in theory because this means that the term ‘relevant funds’ is being used in different senses in different places within the same regulation and it is flawed in practice because it leads to an overly prescriptive approach to trying to match the amount of money within a safeguarding account (where the segregation method is being used) that produces, as far as we can see, no consumer benefit. This point is analysed further in section 7 below.

Unhelpfully, the definition of ‘*relevant funds*’ does not give any indication of how and at what point funds cease to be relevant funds. It is not explicit within the definition that the sums only remain ‘*relevant funds*’ whilst funds (or something that is traceable as being the representation of those funds) are held by the institution. We consider that this must be implicit within the definition, although the argument that it is implicit is easier to see where relevant funds refers to actual identifiable cash funds (‘sums meaning cash’) than if it refers to a notional balance (‘sums meaning an amount’).

Drawing attention to these basic difficulties of interpretation does not, of itself, provide a particularly useful means of understanding or applying the provisions. In the case of legislation that is derived from an EU Directive it is generally not appropriate to try to understand the provision by means of close textual analysis[8]. However it is helpful to understand that the language of PSD2 and indeed of the PSRs when dealing with such concepts as 'relevant funds', 'holding funds' and 'segregating funds' must often be regarded as figurative rather than literal. As a result, there is a large scope for interpretation. That interpretation should be based on the policy intention behind these provisions. Indeed even in the absence of figurative language it is always necessary when dealing with European legislation to look beyond the words to the context and the objectives of the legislation. For example the European Court of Justice has pronounced that:

'It should be noted at the outset that, when interpreting a provision of EU law, it is necessary to consider not only its wording but also its context and the objectives pursued by the rules of which it is part.'[9]

In view the of the uncertainties of the language used in the directive, we ask the FCA to acknowledge that there is a large scope for interpretation and that interpretation should be based on the policy intention behind these provisions.

What is the policy intention?

The intention behind the safeguarding provisions in PSD2 is clear. It is to protect payment service users against the insolvency of an institution. This can be seen within recital 37 to PSD2:

Provision should be made for payment service user funds to be kept separate from the payment institution's funds. Safeguarding requirements are necessary when a payment institution is in possession of payment service user funds. Where the same payment institution executes a payment transaction for both the payer and the payee and a credit line is provided to the payer, it might be appropriate to safeguard the funds in favour of the payee once they represent the payee's claim towards the payment institution.

This aim is reflected in article 10(a) of PSD2 which, when it sets out the possibility of safeguarding by means of segregation, requires the funds to be '*insulated in accordance with the national law in the interest of payment service users against the claims of other creditors of the payment institution*'.

It is not the intent of the legislation that the (relatively poorly capitalised) institution is obliged, in effect, to underwrite the payments system itself.

It is accepted that as well as looking at the insolvency of the institution, if the institution chooses to operate through an agent, the policy aim would extend to protecting against the insolvency of the agent. However, it is necessary to distinguish between:

i. the use of an agent; and

ii. transfers between bank accounts.

Because it is not appropriate for the safeguarding policy to extend to protecting against the insolvency of another payment service provider acting as such to the institution.

Where an institution instructs the transfer of monies to the bank account of a correspondent payment services firm in an overseas jurisdiction the correspondent firm is an agent. By contrast, where an institution instructs the transfer of monies from one bank account it holds in the UK to another bank account that it holds in an overseas jurisdiction neither bank involved is an agent of the institution. In this latter case the institution has not transferred money to an agent: it has instructed its payment service provider to move money for it, or to put it another way converted the relevant funds from being an asset held at one bank into an asset it is holding at another bank.

In relation to electronic money, the original 2000 directive[10] did not impose terms regarding safeguarding as such but instead included requirements for EMIs to have investments in assets that are zero-risk credit weighted and regarded as sufficiently liquid in an amount 'no less than their financial liabilities related to outstanding electronic money. There was at that stage no need to match precisely any concept of 'relevant funds'.

The second Electronic Money Directive in 2009[11] ('**EMD2**') introduced a requirement for safeguarding but was less helpful in its recitals in explaining the purpose of the requirement other than noting in recital 14 that safeguarding balances the less stringent prudential requirements on EMI's compared with credit institutions. However it is difficult to see any wider policy aim than that applicable under PSD2.

We ask the FCA to confirm that it agrees that the policy intention of safeguarding is to protect customers from the insolvency of the institution (and its agent) and not the insolvency of its payment service provider.

Interpretation in the light of the policy intention

Given this policy intention we suggest that in answering the questions, 'when are relevant funds received by an institution?', and 'when does the safeguarding obligation end?', the key is to consider the points at which the payment service user's funds first become, and when they cease to remain, **liable to be affected by the insolvency of the institution (or its agent).**

In this section, we consider the application of the policy intention in four scenarios:

I. When the obligation begins in respect of funds received for electronic money;

II. When the obligation ends in respect of pull payments;

III. When the obligation ends in respect of funds moved via certain payment systems; and

IV. When the obligation ends in respect of push payments outside of the EEA.

When the obligation begins in respect of funds received for electronic money

The definition of relevant funds in respect of electronic money raises an interesting question about what happens where the EMI receives money prior to when it issues the electronic money. It would seem that in this case there are no 'relevant funds' and therefore no obligation to safeguard until the electronic money has been issued.

Again there is no explicit guidance as to when funds are considered to be 'received' for the purposes of this definition, but there is a provision in regulation 20(4) of the EMRs as to when the safeguarding obligation commences. This would have been better if it had been clearly cast as a definition of when funds are deemed to be 'received' since there are situations where regulation 20(4) could lead to a conclusion that one should be protecting funds that are not relevant funds.

Regulation 20(4) is drafted as follows:

(4) Funds received in the form of payment by payment instrument need not be safeguarded until they —

a. Are credited to the electronic money institution's payment account; or

b. Are otherwise made available to the electronic money institution,

Provided that such funds must be safeguarded by the end of five business days after the date on which the electronic money has been issued.

Paragraph 4(a) seems otiose in that it must be clear even without that paragraph that money received directly into an EMIs payment account is 'received' and therefore is 'relevant funds'.

Paragraph 4(b) deals with the position where a customer makes an indirect payment, for example via a card scheme, where the EMI is acting as a merchant accepting the furnishing of card payment details as payment.

The proviso to regulation 20(4) is difficult to apply. It requires one to imagine a payment that has been received (so that it is capable of being 'relevant funds') but has not been credited to the EMI's payment account and has not otherwise been made available to the EMI.

We suggest that the best way to read regulation 20(4) is that where the EMI accepts payment by means of a payment instrument the EMI must be considered to have 'received' funds (so that relevant funds come into being) as soon as the EMI, or an agent such as the EMI's merchant, accepts the payment. This does not follow the drafting of the regulation (which on its face suggests that in such case the EMI might have 'received' funds so that they are 'relevant funds' at an earlier point than the point at which the funds are available to the EMI, but then is relaxing the requirement to start safeguarding these particular relevant funds) but we suggest that it captures the intent of the provision.

The combined effect of the definition of relevant funds and of paragraph 20(4) is that the safeguarding obligation does not arise until the latest of:

a. The date on which the electronic money is issued;
b. In a case where the EMI itself receives money otherwise than through a payment instrument, that date; and
c. In a case where the EMI has accepted payment through a payment instrument, the earliest of:
   i. Funds being credited to the electronic money institution's payment account;
   ii. Funds being available to the EMI; and
   iii. Five business days after the date on which the electronic money has been issued.

We ask the FCA to confirm the above understanding.

When the obligation ends in respect of pull payments

Where another payment service provider initiates a pull payment, for example, in the case where an e-money holder presents their prepaid card to a merchant and the acquirer acquires the payment on behalf of the merchant, the institution's obligation to safeguard the funds on behalf of the e-money holder ceases since it is at this point that the e-money is redeemed. As has been judicially noted 'Once a card issuer has authorised a transaction submitted to it via the card scheme, the merchant acquirer will be obliged to pay the merchant for a valid transaction'[12]. At this point the merchant accepts the claim against the relevant merchant acquirer (who in turn has a claim through the relevant card scheme against the card issuer) and this discharges the customer from his obligation to pay for the goods and services. The customer is no longer at risk at this point and it is correct that from this point (or at least at the first point that the EMI becomes aware that the redemption has occurred) that the matching 'relevant funds' should be released from the safeguarding account. Not only does this seem to follow from the purpose of holding 'relevant funds', but as a practical matter it allows the EMI to transfer funds at this point from the safeguarding account to an account which can be used as collateral for the EMI's obligations to make payment via the card scheme.

We ask the FCA to confirm that the safeguarding obligation for EMI's ceases once electronic money has been redeemed through a pull payment and that this occurs at the point that the customer has used his electronic money to make a purchase.

When the obligation ends in respect of funds moved via certain payment systems

Where payments are made within the EEA by means of a designated payment system (which in the UK would include Faster Payments Scheme, CHAPS; Bacs, C&C (Cheque & Credit), LINK, Northern Ireland Cheque Clearing, MasterCard and Visa Europe, the question of finality of payments is addressed by the Settlement Finality Directive[13]. This has been incorporated into the law of the United Kingdom by means of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999.

These regulations back up the various rules adopted by these various designated payment systems to modify the law of insolvency so that those rules take precedence over the rules that apply in general corporate insolvency proceedings. Thus, once a transaction is deemed irreversible under the rules of any of these systems, payment service users can be confident that the transaction would not be overturned as a result of the insolvency of the institution.

As a result, it may be considered that the safeguarding obligation should end at this point and that in the case where monies are (under the rules of a designated payment system) deemed to have been irreversibly committed to that system, the monies are no longer held by an institution and no longer count as 'relevant funds'.

We ask the FCA to confirm that for push payments made through designated payment systems, the monies are no longer relevant funds when the transaction is irreversibly committed to the system.

When the obligation ends in respect of push payments outside the EEA

The FCA provides the following guidance at paragraphs below:

> *The general principle is that the safeguarding obligation remains in place until the funds are no longer held by the institution. In practice, this means that the institution should generally continue to safeguard until funds are paid out to the payee or the payee's PSP. If a chain of PSPs is involved, an institution's safeguarding obligation continues while it holds the funds and ends when it has transferred them to another PSP which holds the funds on behalf of the payment service user. The funds must be safeguarded by the institution for the benefit of the payer or payee; it is not sufficient for the funds to be safeguarded for the benefit of another institution in the payment chain.*
>
> *An institution may receive and hold funds through an agent or (in the case of EMI's and small EMIs) a distributor. The institution must safeguard the funds as soon as funds are received by the agent or distributor and continue to safeguard until those funds are paid out to the payee, the payee's PSP or another PSP in the payment chain that is not acting on behalf of the institution. The obligation to safeguard in such circumstances remains with the institution (not with the agent or distributor). Institutions are responsible, to the same extent as if they had expressly permitted it, for anything done or not done by their agents or distributors (as per regulation 36 in the EMRs and regulation 36 in the PSRs 2017).*

It is unclear within the paragraphs quoted above precisely what is meant by 'receipt by the payee or its PSP'. 'PSP' is defined in the PSRs and generally used within the '*Our Approach*' document to mean a payment services provider in the EEA (including those licensed under PSD2 and EEA authorised banks). If this meaning is taken here, in cases where the money is transferred to a provider of payment services outside the EEA, a transfer to a third country money services provider or even to a third country bank would not constitute a receipt by the payee or its PSP. Logically, then, safeguarding would apply right up to the point that the payee withdraws the relevant cash from its bank (or deposits it in an EEA bank).

However, even if 'PSP' is read more expansively to include any person that is providing payment services, it in effect requires the institution to act as guarantor of the payment system up to the point the payment reaches the payee or the payee's agent rather than up to the point when it has left the control of the institution and it agents. There is also no practical way for an institution to determine when funds have credited a client's bank/payment account. This puts a potentially large burden on institutions not intended by the legislation and cannot be regarded as a proportionate response to the policy objectives of PSD2.

Further, the FCA's guidance has little to say on the question of *where* 'relevant funds' should be considered to be held in various scenarios. With the segregation method, relevant funds need to be held in a safeguarding account but, given the chameleon nature of the term 'relevant funds', it can be difficult to trace where 'funds' are situated at a particular point in time. While money is in transit settlement chains will involve a number of participants holding different rights against other participants, often at the same time and often quantifiable only on an aggregated basis and/or in arrears, so that both as a matter of language and as a matter of practicality it is difficult or impossible to judge which of these rights should be regarded as representing at any particular time the sum that has given rise to '*relevant sums*' being in existence.

In our view, because safeguarding is there to protect the monies that are '*held*' by the institution (or its agent), for these purposes one needs to identify what is the nature of the rights that the institution is holding. Rarely will institutions be holding physical cash. For the most part, the institution is holding, in the first place, a right to receive into its bank account the transfer of a balance that is in the course of being made through a payments system, and subsequently, rights against the institution's bank once the institution has been credited with the amount of the relevant funds.

If the institution instructs a transfer from that bank to another bank (other than another bank acting for the institution or the bank of its agent), until the point that the transfer is effected, as a matter of logic either (a) the institution is no longer holding relevant funds at all (so that logically the safeguarding obligation no longer applies) or (b) the institution's holding is still represented by a right against the institution's bank in respect of the account from which the money is being transferred. If that account is a safeguarding account, then the institution is continuing to safeguard money because the relevant funds should still be considered to be within the safeguarding account.

We ask the FCA to agree that the safeguarding requirement ceases at the point that the institution no longer holds relevant funds directly or through its agent.

The need to exactly match the safeguarding account to the amount of relevant funds

As we have seen above, the insistence that '*relevant funds*' must not be mixed with other funds only makes sense if one adopts the metonymic 'sums meaning cash' definition for the word 'sums' used within the definition of '*relevant* funds' and this is not a consistent use of the definition.

Furthermore, it is not practical to think that one can trace 'relevant funds' through all the complex settlement systems that apply so as to be able to state at any particular one time how and where a particular original sum is represented within the system. As well as being a practical impossibility, the more closely one looks at the language around the idea of a 'sum' being 'transferred' this is not the way that a transfer of 'money' works. Rather than any particular asset (like a bag of gold) being passed between different parties, for the most part the so-called 'transfer' of money involves the extinction of one chose in action[14] (a bank balance with one particular bank or settlement system counter-party) and its replacement by a new chose in action (a bank balance with a different bank or settlement system counter-party).

Given this background, it is more helpful to approach the legislative provisions with the realisation that, in places, concepts are being used figuratively rather than literally so that there is scope for interpreting what is meant by 'segregating funds'. We would further suggest that an interpretation that requires institutions to go out of their way to ensure the purity of the segregated funds by not allowing (the entirely notional concept of) 'relevant funds' to be mixed with non-relevant funds takes the use of the figurative language too far.

We assume that the reason why it is thought to be important not to mix safeguarded funds with other funds is to avoid in some way tainting what are funds that are exclusively held for the benefit of customers with the institution's own funds (which, on an insolvency of the institution would form part of the institution's insolvency estate). However, we can see no basis on which it would act to the detriment of the customer if a safeguarding account was over-funded. Provided that the bank in question is aware of the nature of the safeguarded account, and that the proceeds of the account are primarily there for the benefit of clients, we do not see how it would create any difficulty on the insolvency of the institution if there was slightly too much within the account so that there would be an excess for the general creditors of the institution once the secured clients had been paid out in full.

As a result, it is our contention that guidance that it is in some way wrongful for an institution to over-fund a safeguarding account is disproportionate in meeting the aims of the legislation. Furthermore, the ensuing obligation to make multiple 'artificial' movements of funds intraday to ensure removal of profit etc. increases operational risk for minimal benefit.

We ask the FCA to amend the guidance to acknowledge that over-safeguarding is not problematical where there is a robust and accurate ledger system and clear recognition in the terms of the account where relevant funds are held that they are held on trust for the customers who have provided relevant funds and any right that the API may have in its own right to any excess within the account is secondary to the rights of the relevant customers in relation to relevant funds.

The inability for one institution to rely on the safeguarding of another institution

It is often more efficient and cost effective for an institution to make payments through another non-bank payment service provider, or wholesale institution, because such businesses have developed user-friendly technology and secured better foreign exchange (FX) and payments rates than the institution could secure on its own account. While there is no prohibition in the PSRs or EMRs that disallows such arrangements, the safeguarding obligations are such that it is very costly for institutions with safeguarding obligations to do so because both entities must safeguard the same funds.

As noted above, the FCA's approach document states the following:

> *If a chain of PSPs is involved, an institution's safeguarding obligation continues while it holds the funds and ends when it has transferred them to another PSP which holds the funds on behalf of the payment service user. The funds must be safeguarded by the institution for the benefit of the payer or payee; it is not sufficient for the funds to be safeguarded for the benefit of another institution in the payment chain.*

Given the objective of opening the payments market to competition, it is disappointing that the effect of the safeguarding obligation is to create a situation where all payments by non-bank players must be made directly via banks in the EEA.

It is our view that this could be rectified by amendments to the insolvency legislation so that a wholesale institution can safeguard on behalf of another institution for the benefit of the other institution's clients.

We ask the FCA to join with us to press the government to make this change to legislation with the twin objectives of facilitating competition in the market and protecting consumers.


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Conclusion and next steps

As demonstrated in this paper, both the directives and the implementing legislation for the payment services and e-money regimes have to be read purposively in light of the policy intention. The policy intention of the safeguarding obligation is to protect customers from insolvency of the API or EMI but the FCA's current interpretation may be disproportionate to the aims of the legislation both in that it requires institutions to do more than to protect customers against their own insolvency and also in requiring a labour-intensive precise matching of the amounts in a safeguarding account to the notional balance at any time of relevant funds when there would be no customer detriment if safeguarding accounts would be over-funded from time to time.

We have set out various areas where the FCA could amend and add to its guidance that would create a more proportionate and effective regime. Further, we have identified an area, the insolvency legislation, where we would warmly welcome the FCA's assistance to persuade the government to make a simple change to benefit consumer choice and protection.

We would be pleased to engage in a dialogue with the FCA concerning the issues raised in this memorandum.

If this would be considered helpful, we would be more than happy to host a workshop (or a small series of workshops) where the FCA could engage with clients of the two firms that have produced this memorandum who could explain some of the practical difficulties involved with the FCA's current guidance.

Appendix 1: Scenarios

Scenario	Effect of the 'Our Approach' guideline	Effect of applying the principles set out above
Client sends funds by electronic transfer to the institution's bank account for the purposes of a transfer	Funds become 'relevant funds' at the point that they are credited to the institution's account with the payment system	Same effect.
Client sends funds by electronic transfer to the institution's bank account for the purposes of a currency transaction to be followed by a transfer	Funds become 'relevant funds' at the point that they are credited to the institution's account with the 'payment system'.	Funds become 'relevant funds' at the point at which the money is appropriated to the money transfer service in accordance with the terms and conditions of the service offered) (which may be at a point after it has been converted into the other currency).
Institution instructs funds held by it to be transferred to the bank account of the payee's EEA payment services provider	Funds cease to be 'relevant funds' at the point that they are received at the payee's EEA payment services provider's bank account.	Funds cease to be 'relevant funds' at the point that they are irrevocably committed into the payment system so that they are no longer subject to bankruptcy risk on the institution.
Institution instructs funds held by It to be transferred to the payee's EEA bank account	Funds cease to be 'relevant funds' at the point that they are deemed received at the payee's EEA bank account.	Funds cease to be 'relevant funds' at the point that they are irrevocably committed into the payment system so that they are no longer subject to bankruptcy risk on the institution.
Institution instructs funds held by it to be transferred to the bank account of the payee's third-country payment services provider	Not clear – could be that funds cease to be relevant funds only at the point that they are received or deemed to be received by the payee.	Funds cease to be 'relevant funds' at the point that they are irrevocably committed into the payment system so that they are no longer subject to bankruptcy risk on the institution.
Institution instructs funds held by it be transferred to the payee's third-country bank account	Not clear. Could be that Funds cease to be 'relevant funds' at the point that they are deemed received at the payee's bank account or perhaps even only when drawn out by the payee.	Funds cease to be 'relevant funds' at the point that they are irrevocably committed into the payment system so that they are no longer subject to bankruptcy risk on the institution.
Third party sends funds by electronic transfer to the institution's bank account for the purposes of a money transfer to the institution's client to be followed by a currency exchange and the transfer of the second currency to the institution	Not clear – probably funds become 'relevant funds' at the point that they are credited to the institution's account and cease to be relevant funds when the currency is received by the client	Funds become 'relevant funds' at the point when received but cease to be 'relevant funds' at which the money is appropriated to the currency conversion.
Customer sends funds to an EMI to purchase electronic money	Funds become 'relevant funds' at the point that they are credited to the EMI's account with the payment system	Funds become 'relevant funds' at later of the point that they are credited to the EMI's account with the payment system and the point when the electronic money is issued
Customer uses electronic money held on a Visa card to make a purchase	Not clear	Funds cease to be 'relevant funds' as soon as EMI is aware that the electronic money has been redeemed.

Appendix 2:
About the authors

Alison Donnelly

Alison is a payments policy expert with in-depth knowledge and understanding of the payments and regulatory landscape in Europe, particularly Ireland and the UK. As a director of fscom, the boutique compliance consultancy, she helps payments businesses understand their regulatory obligations and develop commercially-sound systems and controls that protects consumers and adds value to the business.

She has recently been appointed the EWPN's ambassador for Ireland to champion diversity in the payments sector having already taken up the baton to foster diversity in her own business as well as through her role as a director of the Association of Professional Compliance Consultants (APCC) and with the Emerging Payment Association's (EPA's) Women in Paytech project.

In addition to these roles, Alison chairs the APCC's Supervision Working Group, which enables the dialogue between the FCA's Supervision Department and compliance consultants, and leads the EPA's Project Regulator, which seeks to influence the payments regulatory agenda.

Prior to joining fscom, Alison was the e-money policy specialist at the FSA and then FCA and was the Consumer Council's financial needs expert, leading on the successful Competition Commission inquiry on current accounts in Northern Ireland.

Nicholas Thompsell

Nicholas has a broad experience of law and regulation developed over more than 25 years to allow him to advise on complex issues and structures, across the financial services and payments services sectors. He particularly enjoys dealing with innovative transactions where there is a complex regulatory and/or tax background or where a new solution is being applied either to a new or an old problem.

Nicholas advises companies and institutions across the financial sector. His clients include start-ups, major financial institutions, challenger banks, building societies, government departments and regulators.

The extent of his interests is reflected in the range of his publications and speaking engagements covering topics ranging from capitalisation of financial mutuals, the FCA's client money rules; payment services; remuneration codes and claims management regulation to name but a few.

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fscom is an award-winning boutique consultancy that provides compliance advice and assurance to the fintech, paytech and FX sectors. By working in partnership with our clients, we set out commercially sound, practical and comprehensive advice that helps our clients grow their business in a compliant way.

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In 2017, Fieldfisher was named Law Firm of the Year Law firm of the Year at the British Legal Awards and Law Firm of the Year in Western Germany at the Juve Awards. 2018 saw Fieldfisher named Law Firm of the year at the Legal Business Awards 2018.

References

1. See for example at paragraph 10.38 of the Payment Services and Electronic Money – Our Approach. The FCA's role under the Payment Services Regulations 2017 and the Electronic Money Regulations 2011 December 2018 (version 3)
2. Email from the FCA's Supervision Department.
3. Or credit union where the credit union issues e-money.
4. Payment Services and Electronic Money – Our Approach. The FCA's role under the Payment Services Regulations 2017 and the Electronic Money Regulations 2011 December 2018 (version 3)
5. See for example at paragraph 10.38 of the Payment Services and Electronic Money – Our Approach. The FCA's role under the Payment Services Regulations 2017 and the Electronic Money Regulations 2011 December 2018 (version 3)
6. Email from the FCA's Supervision Department.
7. See Reg 20, EMRs
8. Vodafone 2 v The Commissioners of Her Majesty's Revenue and Customs [2008] EWHC 1569 (Ch)
9. Paragraph 19 of the ECJ judgment in Bundeskammer für Arbeiter und Angestellte (Austria) v ING-DiBa Direktbank Austria Niederlassung der ING-DiBa AG
10. Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions
11. Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions
12. Per Rimer LJ at paras. 7-9Lancore Services Ltd v Barclays Bank plc [2009] 2 C.L.C. 306:-
13. Directive 98/26/EEC
14. This is the technical legal term denoting an asset which consists of a legal right against another person

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