



Department for
Business, Energy
& Industrial Strategy

THE CONSUMER RIGHTS (PAYMENT SURCHARGES) REGULATIONS 2012

Guidance



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Contents

About this guidance	3
Summary of the Regulations	4
Background	5
Prohibition of surcharges: retail customer to merchant payments under Regulation 6A(1)	6
Key requirement	6
Means of payment	6
Limitation of surcharges: business to business payments under Regulation 6A(2) and consumer to business payments under Regulations 4 and 6A(2)	7
Key requirement	7
Regulation 6A(2)	7
Regulation 4	7
What can be charged	8
Calculating a surcharge	8
Transparency of a surcharge	8
Managing costs and discounts	9
Managing the increased costs	9
Discounts for a particular means of payment	9
Booking and handling fees	9
Redress and enforcement	10
Consumer rights in the case of breach	10
Enforcement by customers	10
Enforcement by Trading Standards and Northern Ireland (DETI)	10
Enforcement Orders under Part 8 of the Enterprise Act 2002	10
Other consumer legislation	12
Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013	12
Consumer Protection from Unfair Trading Regulations 2008	12

About this guidance

- 1.1 This paper provides updated guidance on the Consumer Rights (Payment Surcharges) Regulations 2012¹ (“the Regulations”). It supersedes previously published guidance issued by BIS in March 2013, with an update issued in August 2015. This guidance should not be treated as a substitute for the Regulations themselves, which are available from www.legislation.gov.uk/uksi/2012/3110/made (please note that the site displays the Regulations as originally made and does not include amendments made since then).
- 1.2 The Regulations are amended by paragraph 12 of Schedule 8 to the Payment Services Regulations 2017² with effect from 13 January 2018. This brings into force the requirements of the Second EU Payment Services Directive (“the Directive”)³ on that date. This guidance explains the requirements of those Regulations as amended.
- 1.3 For all other information and guidance on the implementation of the Directive please refer to the guidance issued by the Financial Conduct Authority, published on 19 September 2017⁴.
- 1.4 This document is intended as guidance only. Please bear in mind that whether there has been a breach of the Regulations in any particular case is a matter for a court to decide and the guidance will not bind a court. If in doubt you should seek your own legal advice.

¹ Statutory Instrument 2012/3110 www.legislation.gov.uk/uksi/2012/3110/contents/made

² www.legislation.gov.uk/uksi/2017/752/contents/made

³ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L2366>

⁴ www.fca.org.uk/publication/finalised-guidance/fca-approach-payment-services-electronic-money-2017.pdf

Summary of the Regulations

- 2.1 For most retail payments, the Regulations ban merchants from charging a fee in addition to the advertised price of a transaction on the basis of a consumer's choice of payment instrument (for example, credit card, debit card or e-money); the cases in which surcharges are banned are set out in regulation 6A(1).
- 2.2 For other retail payments and most payments between businesses made with commercial payment instruments, the Regulations ban merchants from charging customers more than the direct cost borne by them for use of the relevant means of payment. This restriction is governed by regulation 4 and by regulation 6A(2).
- 2.3 The Regulations apply to contracts however they are concluded - for instance, contracts concluded on business premises (for example, a shop) or away from business premises (for example, at the customer's home) or at a distance (for example, mail order, internet, telephone or fax) are all covered by the Regulations.
- 2.4 The Regulations entitle customers to receive a refund of any unlawful surcharge they have paid and enable customers, if necessary, to take legal action to recover any such surcharge.
- 2.5 The Regulations give consumer enforcement authorities (including local authority trading standards and the Northern Ireland Department for Enterprise, Trade and Investment) the power to take civil enforcement action against traders who breach the Regulations.
- 2.6 The amendments to the Regulations (regulation 6A, and related amendments) apply to charges made on or after 13 January 2018, except for charges under contracts entered into before 18 July 2017; regulation 4 has been in force since 6 April 2013.
- 2.7 Please note that these Regulations apply to all businesses (including micro-businesses and new businesses).
- 2.8 The Regulations sit alongside, and do not displace, other statutory protections for consumers. For more details, please see the "Other consumer legislation protections" section of this guidance.

Background

- 3.1 Surcharging is the practice of merchants/retailers charging a fee for using a particular payment instrument, e.g., a debit card, credit card, or e-money account such as PayPal. Merchants and retailers themselves will usually incur a payment processing fee for the use of certain payment methods, such as the merchant service charge for processing debit and credit card transactions.
- 3.2 Historically, some merchants have opted to charge customers for the use of some payment methods. In 2012, the EU prohibited traders from charging consumers fees that exceed the cost to the trader of using any particular payment instrument (see regulation 4, summarised below). Unfortunately, this restriction has had limited effect. As a result, the EU adopted the Directive in 2015, requiring Member States to ban surcharges on consumer credit and debit cards from 13 January 2018. The UK government has decided to go further in protecting consumers by including other payment instruments, such as PayPal, within the prohibition (see regulation 6A(1), summarised below). Commercial transactions are not covered by the ban, but are now subject to the prohibition on charging fees that exceed the cost of accepting the payment method.
- 3.3 People are often unaware of surcharges until they come to pay. For some transactions, and online transactions in particular, charges may only become apparent many steps after a purchase decision has been made, leaving the customer inconvenienced or unwilling to cancel the transaction.
- 3.4 In 2015, the government's impact assessment for the second Payment Services Directive estimated the costs at approximately £166m per annum⁵.

⁵ www.gov.uk/government/uploads/system/uploads/attachment_data/file/645586/PSDII_Impact_Assessment.pdf

Prohibition of surcharges: retail customer to merchant payments under Regulation 6A(1)

4.1 Key requirement

4.2 The prohibition under regulation 6A(1) prevents a “**payee**” (a merchant) from imposing a surcharge on the “**payer**” (a customer, usually a retail customer in this case) for using a particular method of payment. The prohibition applies where both of the following are the case:

- the **payment service provider** of **both** the **payee** *and* the **payer** are located within the European Economic Area (EEA); and
- the surcharge relates to one of the **means of payment** in regulation 6A(1)(a)-(c).

5.1 Means of payment

5.2 The ban on surcharging in regulation 6A(1) applies to most retail payment instruments as defined in regulation 6A(1)(a) and (b). These are:

- non-commercial cards for which interchange fees are regulated under the Interchange Fee Regulation (IFR); These **include** the vast majority of cards, including Visa and MasterCard; however, they **do not include** corporate cards issued to employees for business expenditures such as office equipment and supplies or services;
- other non-commercial payment instruments, e.g., a retail e-money payment; and
- payment services to which EU Regulation 260/2012 applies (Single Euro Payments Area (SEPA) direct debits and credit transfer).

Limitation of surcharges: business to business payments under Regulation 6A(2) and consumer to business payments under Regulations 4 and 6A(2)

6.1 Key requirement

6.2 Where regulation 4 and/or regulation 6A(2) applies (and provided that regulation 6A(1) does not apply), surcharges are permitted, but must not exceed the costs incurred by the merchant / trader in processing the relevant means of payment. Where none of these regulations (6A(1), 6A(2) or 4) apply there is no limit on the level at which a surcharge can be set, subject to the consumer rights referred to in the “Other consumer legislation” section below.

7.1 Regulation 6A(2)

7.2 Regulation 6A(2) applies where:

- the payment service provider of the payee or of the payer, but not of both, is located in an EEA state, or
- where the payment service providers of both the payer and the payee are located in an EEA state and a payment instrument which falls outside of the scope of regulation 6A(1) (such as a commercial credit card) is used.

7.3 Regulation 6A(2) limits surcharges between payers and payees in respect of payment instruments. A payment instrument is a personalised device or personalised set of procedures agreed between the payment service user and the payment service provider which are used by the payment service user in order to initiate a payment order.

8.1 Regulation 4

8.2 Regulation 4 limits surcharging under certain contracts concluded between consumers and traders. Those contracts include sales or service contracts and contracts for the supply of water, gas, electricity, district heating or digital content (regulation 5(1)).

8.3 Certain contracts are excluded from regulation 4. The exclusions are set out in regulation 5(2) and include certain contracts relating to social services, health services, gambling, banking, immovable property and rental of residential property, timeshare, foodstuffs and certain other goods for household consumption in specified circumstances.

8.4 These exclusions (set out in regulation 5(2)) do not apply where either regulation 6A(1) or regulation 6A(2) applies.

8.5 Regulation 4 does not refer to any particular method of payment, such as credit or debit cards. Therefore, the provision applies to any means of payment that a trader decides to accept in any particular case. This would include cash, cheques, credit cards, debit cards, prepaid cards, charge cards, mobile payments, credit transfers and

direct debits. As the technology relating to payments develops, any new methods of paying will also be subject to the prohibition.

9.1 What can be charged

9.2 It is important that surcharges can only consist of costs borne by the payee/trader for use of the payment method in question. For card payments, the government considers that legitimate surcharges could include fees directly charged to the payee such as:

- The Merchant Service Charge, which companies pay to their payment service provider. This includes the interchange fee paid by the company's payment service provider to the card issuer, the fees paid by the company's payment service provider to the scheme (for example, Visa or Mastercard); and the margin retained by the company's payment service provider to cover costs and profit; or
- The transaction/overhead fees paid by the company to intermediaries for some or all of the merchant services usually provided by the payment service provider. This is where an intermediary acts as a point of contact for companies and typically deals with the payment service provider, charging a mark-up on the payment service provider's fees for the relevant services.

9.3 Importantly, the government's intention is that the general costs of running a business not directly incurred in consequence of use of the payment method in question cannot be included in a surcharge. Consequently, indirect costs, such as general administrative overheads or staff training, equipment installations and set-up fees must not be included in any surcharge.

10.1 Calculating a surcharge

10.2 The amount of any surcharge must be limited to a fee not exceeding (under regulation 6A(2)) the costs borne by the payee for use of the specific payment instrument or (under regulation 4) the cost of the given means of payment. It follows that a payee / trader must be able to identify those costs derived directly from the payment service in question. Accordingly, the government's intention is that costs must not be calculated on an average basis across two or more individual methods of payment (e.g., credit and debit cards together) and applied as a flat fee across those means of payment.

10.3 However, recognising the difficulty of calculating costs for specific transactions, the government considers it reasonable, within a single method of payment, for the payee / trader to impose its charge on an averaged basis (rather than a per-transaction basis). For example, the government would consider it acceptable for a payee / trader to impose a standard charge for a credit card transaction, based on average credit card transaction costs.

10.4 Depending on the circumstances, it might be appropriate for the payee/trader to make that surcharge on a flat fee basis or as a percentage of the headline price.

11.1 Transparency of a surcharge

11.2 For regulations 6A(2) and 4, the government considers that the payee/trader will, if it decides to make a surcharge, need to identify clearly the amount of the surcharge that the payee/trader proposes to impose. Transparency is also important in light of the consumer rights referred to in the "Other consumer legislation" section below.

Managing costs and discounts

12.1 Managing the increased costs

12.2 The government recognises that if retailers currently surcharge customers for using a card, they could incur some additional costs as a result of this ban. How they choose to manage any increase in their costs as a result of the ban is a commercial decision for retailers themselves to make.

12.3 Retailers may choose to:

- stop accepting a certain payment method;
- absorb the costs;
- pass on the costs through an increase in headline price of the relevant goods or services which is payable by all customers; or,
- negotiate lower fees with their payment service provider.

13.1 Discounts for a particular means of payment

13.2 Whilst encouraging customers to pay with a certain payment method is not prohibited, it is important that any discounts for use of a particular means of payment do not create a situation in which those making payments by other means are effectively faced with a surcharge that does not comply with the Regulations.

13.3 The government considers that, if a discounted price is offered for the use of any means of payment (whether that is a means of payment to which the Regulations apply or not):

- that same level of discount must be offered in all situations where regulation 6A(1) applies, so that there is no surcharge; and
- the difference between that discounted price and a higher price charged in any situation where regulation 4 or 6A(2) applies must be no more than the cost the payee faces in processing the means of payment in that situation.

13.4 Some sectors may offer discounts on the basis of payment in instalments or one-off payments. Such discounts would not fall within the scope of the prohibition to the extent that they do not create an effective surcharge on a particular means of payment. For example, it would be acceptable for a monthly magazine subscription to cost more over a year if paid for by monthly payments rather than a single annual payment, but any difference in such monthly payments on the basis of the payment method used would need to comply with the criteria described above.

14.1 Booking and handling fees

14.2 The government's intention is that other fees, such as booking or handling fees, are not covered by the Regulations to the extent that they do not differentiate between customers on the basis of their choice of means of payment.

Redress and enforcement

15.1 Consumer rights in the case of breach

15.2 Regulation 10 provides that where fees are charged in contravention of the Regulations:

- any requirement that the fee (or in the case of regulation 6A(2) or 4, the excess fee) be paid is unenforceable and therefore the customer is not under any obligation to pay it; and
- where that fee (or excess) has already been paid, it is refundable.

16.1 Enforcement by customers

16.2 In addition to bringing complaints to the relevant enforcement bodies under regulations 7 and 8 as explained below, customers may directly enforce their rights under regulation 10, if necessary, in civil proceedings before the courts.

16.3 Where a business complaints procedure has not resolved a customer's complaint, the customer may try Alternative Dispute Resolution (ADR). In ADR, an independent person looks at the problem and tries to help the customer and the payee reach an agreement. ADR services may be provided through a relevant trade association, sectoral ombudsman or complaints handling scheme.

16.4 Consumers can seek further information through the Citizen's Advice Bureau Website at: www.citizensadvice.org.uk/consumer/alternative-dispute-resolution/settling-out-of-court/who-offers-alternative-dispute-resolution-adr/

17.1 Enforcement by Trading Standards and Northern Ireland (DETI)

17.2 Under regulations 7 and 8, local authority Trading Standards (or the Department for Enterprise, Trade and Investment in Northern Ireland) have a duty to consider complaints made to them about unlawful surcharges. They may apply to court for an injunction (or in Scotland an interdict) to secure compliance with the Regulations. This avenue of redress is only open where an infringement has actually taken place.

18.1 Enforcement Orders under Part 8 of the Enterprise Act 2002

18.2 Part 8 of the Enterprise Act gives specified enforcers the power to apply to the courts for enforcement orders. These enforcement bodies include the Competition and Markets Authority (CMA), local trading standards (or DETI in Northern Ireland) and certain sectoral regulators. An enforcement authority may apply to the courts if it becomes aware that the trader has engaged, is engaging or is likely to engage in conduct which constitutes an infringement of consumer legislation in cases where the infringement harms the **collective interests** of consumers. Part 8 of the Enterprise Act 2002 applies to the Directive and Regulations by virtue of the inclusion of the relevant provision of the Directive and the Consumer Rights Directive in Schedule 13 to the Enterprise Act 2002 and the designation of the Regulations in the Enterprise Act 2002 (Part 8 EU Infringements) Order 2014.

- 18.3 If the enforcer successfully establishes collective harm and a breach or imminent breach of the Regulations, the court can grant an enforcement order. This will require that the trader does not continue or repeat the conduct. These orders are injunctive in nature and prohibit future breaches of the provision rather than penalising previous breaches. The Consumer Rights Act 2015 extended these powers (from 1st October 2015) to allow enforcement orders to include positive measures aimed at increasing consumer redress, business compliance and/or the information available to consumers.

Other consumer legislation

19.1 Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

- 19.2 Regulation 40 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (which applies to contracts concluded on or after 13 June 2014) prohibits additional payments which the consumer has not expressly agreed to pay before entering into the contract. The Department for Business, Innovation and Skills (BIS) issued guidance on those Regulations in December 2013 which confirmed that:

“Traders will need the active consent of the consumer for all payments – pre-ticked boxes for additional payments, for instance, will no longer be permitted.

Consumers will not be liable for costs which they have not been told, pre-contract, that they must bear.”

20.1 Consumer Protection from Unfair Trading Regulations 2008

- 20.2 The Consumer Protection from Unfair Trading Regulations 2008⁶ (which implemented the Unfair Commercial Practices Directive (2005/29/EC)) – the ‘CPRs’ – are also relevant to the transparency and presentation of payment surcharges.

- 20.3 Broadly, the CPRs prohibit unfair commercial practices by traders which affect the transactional decision making of consumers. A transactional decision can include decisions other than purchase decisions (for example making a premium rated phone call to enquire about a product). Where a trader misleads consumers about a payment surcharge, for example because the overall presentation of the price of a product does not make clear that there is a surcharge to be added, this might breach regulation 5 or 6 of the CPRs (misleading actions and omissions). Where a trader omits or hides information about a payment surcharge, this might breach regulation 6 of the CPRs (misleading omissions). The CPRs have no effect on the amount of a payment surcharge.

⁶ www.legislation.gov.uk/ukSI/2008/1277/contents/made



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