

UK Defensive Over Post-Brexit Interchange Fee Strategy

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The UK government is pressing ahead with reforms to interchange fees and card surcharges in the event of a no-deal Brexit, despite policymakers expressing alarm over the potential for higher costs to both businesses and consumers.

A parliamentary committee granted its approval on Tuesday to a [draft statutory instrument](#) (SI) on the EU's [Interchange Fee Regulation](#), ensuring that if the UK crashes out without a deal in March certain controls will remain in place.

However, John Glen, Conservative MP and economic secretary to the Treasury, was defensive when challenged by opposition MPs over the [decision not to cap fees](#) on cross-border card payments.

"The most significant change in this space is that interchange fee caps will no longer apply in instances where either the merchant's acquirer or the card issuer are located outside the UK but inside the EEA," he said.

"Any adjustment to interchange fees as a result would be a commercial decision, and such impacts would be a consequence of the UK leaving the EU rather than due to the approach taken in this SI."

That conclusion is consistent with HM Treasury's broader approach to emergency Brexit legislation, which typically involves swapping references to EU texts and entities with their domestic equivalents.

In effect, that means in the event of a no-deal Brexit, card schemes such as Visa and Mastercard would be legally free to set interchange fees at a higher rate for cards issued in an EU member state when used in the UK.

Labour MP Jonathan Reynolds and Scottish National Party MP Alison Thewliss were unimpressed with that outcome.

"No provision has been made to prevent cardholders from having to pay high interchange fees from acquirers if we crash out without a deal," Reynolds said, adding that the caps still represent an important part of consumer protection legislation.

"That seems to carry a very high risk of consumer detriment given the prevalence of using cards to buy goods from across the EEA.

"It is not uncommon as all of us will be aware for large retailers operating in the UK and across Europe to channel their payments across locations in the EEA. That's certainly the case for many large online retailers."

"The EU and the European Commission have moved over many years to reduce fees and make transactions simpler," said Alison Thewliss, Scottish National Party MP. "What we are doing here ... is going backwards in reducing the benefits that our citizens have."

Thewliss said the proposal reverses much of the work carried out at the international level to ensure transparency and competition thrives in the payment card sector.

"The EU and the European Commission have moved over many years to reduce fees and make transactions simpler," she said.

"What we are doing here, particularly with this SI and with the prospect of a no-deal Brexit in the offing, is going backwards in reducing the benefits that our citizens have."

Thewliss also cited a [paper](#) by law firm Bird & Bird that raised several questions about the draft text, including why "universal" cards — where debit and credit cards "are not distinguishable" — are being kept in scope.

The paper said that measure "is not relevant to the UK" as it is "applied exclusively (or at least primarily) in France".

The MP also asked whether surcharging on all consumer card payments would remain banned if the statutory instrument took effect, or whether that too would only apply to UK-issued cards.

Glen was again defensive, fielding some of the questions raised, but said he would have to write to Thewliss clarifying many of the details.

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This has gone through scrutiny of the Lords committee and no points were raised," he said. "I'm not taking her concerns lightly but I don't want to also, when referring to legal drafting, give an ad-hoc response when clearly that would be problematic."

Thewliss described that course of action as "completely inadequate", not least due to the tight timeframes involved.

"Coming here this morning we have serious questions, we've been asked to pass this SI without any impact assessment, and while it's great that he will write to us this is after the effect of us having voted on it," she said.

Statutory Instruments, Interchange Fees and Surcharging

Generally, Glen was insistent that the Treasury does not wield sufficient power to use emergency legislation designed for a no-deal Brexit to make substantial alterations to existing texts.

"That is not something the government is permitted to do under this legislation," he said. "It is restricted to these fixes, to restrain the government from that sort of proactive innovation."

Legal experts acknowledged that British legislators are not in an easy position.

Gavin Punia, a senior associate at Bird & Bird in London, explained that statutory instruments should not be used to make policy changes, but rather "just to reflect the UK's new position outside the EU".

"Any actual change to the transitional provision is presumably seen as a policy change, so that would have to be followed up with a separate process of legislative work to change the statutory instrument or the legislation itself," he said.

"It's not a big policy change so to speak, because it would keep what is currently set out under the EU Interchange Fee Regulation, but as a legal-political provision that could be perceived to go beyond merely reflecting the UK's new position outside the EU, it would constitute a policy position and so their hands are tied."

That stance does appear to have consequences for the way UK payment card rules would work.

"It's not the final solution when it comes to this matter," said John Glen, Conservative MP and economic secretary to HM Treasury. "That's why, as I've set out, there will need to be further innovation and policy work subsequently."

One quirk raised during Tuesday's committee session is that the statutory instrument only brings in the EU interchange fee cap of 0.3 percent on credit cards. The 0.2 percent cap on debit cards is not mentioned.

That appears to be because Article 23(b) of the UK's [Payment Services Regulations 2017](#) already imposes that limit on debit cards. However, the restriction only runs until December 9, 2020, and is calculated based on a weighted average rather than an absolute cap.

In theory, that means further reforms would be needed if the UK wished to match the EU's rules exactly.

Another issue is that surcharging on some card payments, banned today under those regulations, could return for EEA-issued cards.

Currently, the ban "applies only if the payment service provider of the payer or the payment service provider of the payee is located in an EEA state".

But the [statutory instrument addressing surcharging](#) merely replaces the words "an EEA state" with "the United Kingdom", so as with interchange fees, appears no longer to apply unless the card is issued domestically.

Glen said further detail is due to be published next month on payment services and emphasised that the current emergency legislation should not be viewed as a long-term statement of intent.

"It's not the final solution when it comes to this matter," he said. "That's why, as I've set out, there will need to be further innovation and policy work subsequently."

"Our job is to deliver 63 statutory instruments to ensure we have got that functioning regime in place. Never has so much effort gone into achieving something that hopefully we won't need."

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