

Proposed PSD3 and Payment Services Regulation (PSR):

Bird & Bird's initial thoughts

Introduction

After much anticipation, the European Commission (EC) has published one week ago, on 28 June, its proposed revisions to EU payment services legislation, as well as a proposal on Open Finance/data access in the financial services sector beyond open banking/payment accounts in the form of a new Open Finance framework called "FIDA". The proposals are available [here](#) along with other various documents, including Impact Assessments, etc.

This is now the beginning of the EU legislative process in relation to those texts. It isn't clear how long this legislative process will take, but it is possible that they would not be adopted in final form before at least Q2 2025.

Following their adoption in final form (which may differ quite substantially from the drafts published by the EC) and their publication in the Official Journal of the EU, the texts will "enter into force" 20 days later. Then it is proposed that:

- Member States would have 18 months to implement PSD3 into their national legal order;
- Market participants would have 18 months to comply with the PSR (no need for the PSR to be implemented into national laws since it is a Regulation and therefore is directly applicable), with the exception of the rules on confirmation of payee/"matching service" in relation to which payment service providers (PSPs) would be given 24 months to comply.

Over the last week, we were able to review the proposals and provide our initial thoughts below on the proposed PSD3 and PSR. By definition, those are not exhaustive, are subject to change, and as always do not constitute legal advice.

We will publish a separate client alert on FIDA.

On that same day, the EC also released a proposal regarding the Digital Euro, that we will cover in a separate client alert.

PSD3 and PSR

Essentially, the EC is proposing that PSD2 would be split into two different instruments:

A third Payment Services Directive (PSD3) that would deal in particular with the authorisation process for payment institutions (PIs) (which now also includes electronic money institutions (EMIs)) and the prudential regime. Of course, a directive remains the most appropriate instrument since licensing and supervision of PIs remains a national competence of EU Member States.

A separate Payment Services Regulation (PSR) that would deal essentially with rules (and related penalties) for PSPs and users. The EBA, in its Opinion on PSD2 (published in June 2022 - [here](#)), identified differences in Member States' approaches to applying PSD2, and an EBA Peer Review (published in January 2023 - see [here](#)) concluded that deficiencies in approaches led to different supervisory expectations for PIs and EMIs. A regulation (rather than a directive) is meant to enhance harmonisation of the rules and enforcement across the various EU Member States.

In addition, the EC proposed to merge the EU E-Money Directive (EMD2) with the proposed PSD3 and PSR texts, so as to have one coherent regime for both payment services and e-money services, and thereby ensure a level-playing field between PIs and EMIs. Currently, EMD2 contains requirements in terms of authorisation and supervision for EMIs, whereas PSD2 does the same for PIs, but also sets out the rule of

conduct that apply to various categories of PSPs (which also apply to EMIs). This means that there is already a lot of similarities between the two legal frameworks (at least when payment transactions involve e-money) and there are only a few specificities when it comes to e-money, and therefore it appears sensible for PSD3/PSR to regulate both PIs and EMIs.

PSD3 also amends the Settlement Finality Directive (SFD) in order to allow non-bank PSPs (e.g. PIs and EMIs) to participate directly in SFD-designated payment systems. That way, those non-bank PSPs would no longer need to rely on banks in order to execute payment transactions (especially in a context where some banks may have adopted a de-risking strategy).

The EBA is given once again a number of mandates under PSD3 and the PSR to prepare draft regulatory technical standards (RTS) and draft implementing technical standards (ITS), ultimately to be adopted by the EC, as well as guidelines, and to continue maintaining the register. For example:

- **PSD3:** the EBA is given a number of mandates to prepare draft RTS and draft ITS, e.g. on cooperation and information exchange between national competent authorities (NCAs) of the Home Member State and of the Host Member State, on a common assessment methodology to be provided to NCAs in the application for the authorisation of PIs and on the circumstances in which the appointment of a central contact point is appropriate, etc.
- **PSR:** the EBA is given a number of mandates to prepare draft RTS and draft ITS, e.g. on the criteria on the basis of which an Account Servicing PSP (ASPSP) may be exempted from the obligation to have in place a dedicated interface exposed to TPPs, on the exclusions from the scope of the PSR, fraud reporting requirements, authentication, communication and transaction monitoring mechanisms, etc.

The PSR would be followed by a review, five years after the date of application, focusing in particular on open banking rules, fees and charges for payment services and combating fraudulent transactions.

The PSD3 will also be reviewed for its effectiveness and efficiency in achieving its objectives. The whole directive will be considered, however there will be some topics of focus; these will include the scope and safeguarding of PIs' funds which may be affected by new rules on deposit guarantee schemes which were adopted on 18 April 2023 (which can be found [here](#)), as well as the possibility to include other technical service providers (TSPs) such as payment system operators, payment processors or gateways under the under the scope of PSD3. Five years is usually the period after which a review would take place, however the review specific to the extension of scope to TSPs will likely take place three years after the application date in consideration of Regulation 2022/2554 on digital operational resilience for the financial sector (DORA) which only applies to financial entities regulated/supervised under EU legislations.

Main changes that we have identified to date

There are a lot of wording changes between PSD2/EMD2 on the one hand, and PSD3 and PSR on the other hand. Some of those wording changes are not significant, or at least not very significant (e.g. in PSR a lot of "Member States shall require that ..." in PSD2 have been removed to do the switch from a Directive to a Regulation). We merely highlight below **some** (i.e. not all) of the **main** changes that we have identified to date between, on the one hand, PSD2/EMD2 and PSD3, and on the other PSD2/EMD2 and PSR. But **there are a lot of other changes** that we don't flag below (plus, as mentioned above, the proposals will evolve over the coming months and years).

PSD3 - some of the main changes

New definitions or changes to existing definitions in PSD3

Art. 1(3) PSD3 states that “Unless specified otherwise, any reference to payment services shall be understood in this Directive as meaning payment and electronic money services”. However, in Article 2(3), it is stated that “‘payment service’ means any business activity set out in Annex I”, which only lists payment services; e-money services are listed in Annex II. Presumably Article 2(3) should also make reference to Annex II? Note that there is no reference to Annex II to be found anywhere in PSD3...

Art. 2(13) PSD3: the definition of “payment account” is amended as follows: “*‘payment account’ means an account held by a payment service provider in the name of one or more payment service users which is used for the execution of **one or more** payment transactions **and allows for sending and receiving funds to and from third parties***”. The change is meant to reflect the judgement from the EU Court of Justice in the ING-DIBA case, and the two follow-on EBA Q&As (Q&A 2018_4272 and Q&A 2019_4856). Note that the judgement used an “or”, whereas the two EBA Q&As and the PSD3/PSR definition use “and”.

Art. 2(17) PSD3: the definition of PIS is amended as follows: “... a service to ~~initiate~~ **place** a payment order at the request of the ~~payment service user~~ **payer or of the payee with respect to a payment account held at another payment service provider**”. Under PSD2, a PIS was a payment service that could only be provided to a payer ((the service provided by a PISP to a payee is merely a technical service, which is not regulated under PSD2). We do not think that the change in the definition is meant to alter the position, but instead is probably only meant to reflect the that the provision of the PIS to the payer can be triggered by the payer or the payee, much like a card-based payment can be initiated by the payer (through the payee) or by the payee (so-called merchant initiated transactions or MIT).

Art. 2(18) PSD3: the definition of AIS is amended as follows: “*account information service’ means an online service ~~to provide consolidated~~ **of collecting, either directly or through a technical service provider, and consolidating** information held on one or more payment accounts held by the ~~of a payment service user with either another payment service provider or with more than one or~~ **several account servicing** payment service providers;”. The same definition appears in Art. 3(21) PSR. It is worth noting in relation to the possibility for an AIS to share payment account data with a third party (which was a question that the EBA answered in Q&A [2018_4098](#)), the EC stated in the recital 26 PSR that “... *That new open banking-based business model requires a modification of the definition of [AIS], to clarify that the information aggregated by the authorised [AISP] may be transmitted to a third party to enable that third party to provide another service to the end-user, with the end-user’s permission*”. However that modification doesn’t appear in the definition in AIS in Art. 2(18) PSD3 nor in the definition of AIS in Art. 3(21) PSR (as mentioned above, both definitions are identical).*

Article 2(24) PSD3: while PSD2 didn’t contain a definition of TSP as such (but did contain an exclusion from the scope of PSD2 for TSPs which provides some colour as what was a TSP is)

- PSD3 introduces a new definition of TSP: “*‘technical service provider’ means a provider of services which, although not being payment services, are necessary to support the provision of payment services, without the provider of technical services entering at any time into possession of the funds to be transferred*”.
- *But Art. 3(36) PSR also introduces a new definition of TSP, which unfortunately is not identical to the PSD3 definition. The PSR definition reads “... a provider of services which support the provision of payment services, without entering at any time into possession of the funds to be transferred”. The PSR definition therefore seems to be wider than that PSD3 since it doesn’t refer to “necessary”.*

It is not obvious to us why PSD3 would need a definition of TSP; definition TSP in the PSR should be sufficient?

As a general comment, in order to avoid such potential misaligned definitions in PSD3 and the PSR, perhaps all definitions should be contained in the PSR, and PSD3 should merely state that all terms used in PSD3 have the meaning as defined in the PSR?

Annexes I and II - list of payment services and e-money services

While Annex I to PSD2 listed **eight** types of payment services, the Annex to PSD3 lists only **seven** payment services. This does not mean that certain services currently considered as “payment services” under PSD2 will not be caught under the proposed PSD3. Instead, the EC has proposed to rationalise the list of existing payment services. They are the following:

- 1 Service #1 in the Annex to PSD3 reads “*Services enabling cash to be placed on and/or withdrawn from a payment account*”. Under PSD2, those were two separate services (namely services #1 and #2). The EC is therefore proposing to merge these two services given their similar nature. Does that mean that a PI that is authorised for cash withdrawals under PSD3 would also automatically be authorised for the placement of cash on a payment account (which is not necessarily the case under PSD2)? Another key change is the deletion of the reference to “*operations required for operating a payment account*” that appeared in PSD2 services #1 and #2 (which makes sense since those operations do not constitute a separate payment service from the above cash related services).
- 2 Service #2 PSD3 reads “*Execution of payment transactions, including transfers of funds from and to a payment account, including where the funds are covered by a credit line, with the user’s payment service provider or with another payment service provider*”. Again, this is a merger of two separate payment services under PSD2, namely services #3 and #4 (which makes sense given their similarity). Again, does that mean under PSD3 a PI authorised to provide service #2 will automatically be authorised to provide credit relating to the payment service?
- 3 “Issuing of payment instruments” and “acquiring of payment transactions”, which were previously one service under PSD2 (i.e. payment service #5) are split into two separate services under PSD3 (namely services #3 and #4). Therefore, a PI authorised to acquire payment transactions will not necessarily be authorised to issue payment instruments, and vice versa (which makes sense given the fundamentally different nature of those two services).

As regards e-money services (which are listed in Annex II), an interesting question seems to arise from the merger of some PSD2 and EMD2 provisions. Art. 6(1)(a) EMD2 states that “*In addition to issuing electronic money, [EMIs] shall be entitled to engage in any of the following activities: (a) the provision of payment services listed in the Annex to Directive 2007/64/EC; ...*”. Under one interpretation, which we believe is currently followed by **some** NCAs but certainly not all, this means that an EMI is automatically authorised to provide **all** the payment services listed in Annex I to PSD2. Art. 6(1)(a) EMD2 does **not** seem to have been taken over in the PSD3 proposal. This therefore begs the question whether an PI authorised only to provide e-money services under Annex II PSD3 will automatically be authorised to provide all the payment services listed in Annex I PSD3, or not? Presumably that is not the intention.

Winding-up plan - Article 3(3)(s) PSD3

There is no substantial change to the existing conditions for granting and maintaining an authorisation as PI (including EMI). The novelty is certainly the requirement for a winding-up plan (in case of failure) that must be submitted with the PI application.

This plan should be adapted to the future PI's size and business model, and appropriate to support an orderly wind-up of activities, including continuity or recovery of any critical activities performed by outsourced service providers, agents or distributors.

Initial capital requirements for PIs, including account information service providers (AISPs) and payment initiation service providers (PISPs) - Article 36(5) and Article 3(4) PSD3

Requirements for initial capital are updated for inflation since PSD2 (which was adopted in 2015), except for PISPs since they are relatively new to the market.

Recital 25 provides that "Taking into account the difficulties experienced by the providers of [AIS] and [PIS] to contract a professional indemnity insurance covering the risks related to their activity, it is appropriate to provide for the possibility for these institutions to choose to hold initial capital of EUR 50 000 **as an alternative** to the professional indemnity insurance, at the licensing or registration stage only. That **flexibility for [AISPs] and [PISPs]** at the licensing or registration stage should be without prejudice to the **requirement** for those providers to subscribe to a professional indemnity insurance **without undue delay after their license or registration has been obtained**". This recital is quite puzzling:

- While AISPs are required to contract a PII but are not subject to initial capital requirements, PISPs are subject to both requirements pursuant to Art.3(4) and 5 PSD3. Therefore, we don't understand what flexibility is actually being granted to PISPs? The above question is confirmed by the fact that, while Art. 36 PSD3 provides the flexibility/alternative mentioned in recital 25 PSD3, we haven't an article in PSD3 providing such flexibility/alternative for PISPs.
- Also, Article 36 PSD3 states that "*As an alternative to holding a professional indemnity insurance ... the undertakings [providing only AIS] shall hold an initial capital of EUR 50 000, which **can** be replaced by a professional indemnity insurance after those undertakings have commenced their activity as a payment institution, **without undue delay***". The wording doesn't clearly express a requirement for an AISP to contract the PII, whereas the intention is clearly expressed in recital 25 PSD3. We therefore expect the wording of Art. 36 PSD3 to evolve during the legislative process.

Calculation of own funds- Articles 6, 7 and 8 PSD3

Currently, PIs' own funds must be calculated in accordance with one of the three methods (A, B, or C) referred to under Article 9 PSD2 – EMD2 uses the same methods for EMIs providing payment services, but also contains a method D that is specific to the activity of issuing e-money (see Art. 5 EMD2).

There is no change in these calculation methods, either for PIs that do not offer e-money services (Art. 7 PSD3) or for PIs that offer e-money services (Art. 8 PSD3). However, it is now proposed to require PIs that do not offer e-money services to apply by default Method B so as to enhance a level playing field (i.e. there is no longer a choice to be operated between the various methods). Although, it is still possible for national competent authorities (NCAs) to accept one of the two other methods (A or C) for PIs whose business models result in low volume but high value transactions. The EBA has a mandate to develop draft RTS in relation to the criteria to determine when a PI is considered as having such a business model and for which the above exception may apply.

Safeguarding of user funds- Article 9 PSD3

The safeguarding rules for PIs remain largely unchanged from PSD2. However:

- PIs would now have the option to also safeguard customers' funds directly in an account held with a central bank (at the discretion of that central bank). Again, this will allow PIs not to rely too extensively on commercial banks.
- PIs must avoid concentration risk to safeguarded customer funds by ensuring that the same safeguarding method is not used for the totality of their safeguarded customer funds. In particular, they shall endeavour not to safeguard all consumer funds with one credit institution (which is also the reason why they have the option to safeguard directly with central banks).
- PIs must inform their NCA in advance of any material change in measures taken for safeguarding of funds.
- Again, the EBA has a mandate to develop draft RTS on risk management of safeguarded funds.

Under EMD2, EMIs had **five** business days to safeguard customers' funds received in exchange for the e-money that has been issued (Article 7 EMD2). With PSD3, it seems that EMIs will have to safeguard the funds "... *by no later than the **end of the business day following the day when the funds have been received, after the issuance of electronic money***" (Article 9(4) PSD3).

Location – main place of business- Article 13(3) PSD3

PSD2 already required PIs to carry out part of their payment services business activity in their home Member State (the country where they have their registered office and where they are authorised as PI).

However, it appeared that such a requirement had been interpreted very differently among the various EU Member States, with some NCAs requiring that the "majority" of the payment services business activity had to be carried out in the home Member State. This is no longer an option for NCAs under the proposed PSD3, and PIs would be allowed to carry out only a "part" (which obviously is less than a "majority") of their payment services business in their home Member State.

Cash withdrawals at retailers and services enabling cash withdrawals offered by ATM deployers not servicing payment accounts - Articles 37 and 38 PSD3

Two new proposals are aimed at improving access to cash.

- Retailer cash withdrawals: PSD3 introduces an exemption for services where cash is provided in retail stores without a purchase (see below PSR table and what we call "cashback without a purchase").
- Cash withdrawal with ATM deployers: PSD3 contains a new definition for "ATM deployer", which means "*operators of automated teller machines who do not service payment accounts*". These ATM deployers will remain exempt from PSD3 licensing requirements, but they will be subject to a new registration requirement that must be accompanied with specific documentation. As mentioned below, the PSR requires further transparency on all charges to be provided or made available to the user before a withdrawal and upon receipt of the cash once the transaction is complete.

Re-authorisation requirement for PIs and former EMIs - Article 44 PSD3

As with the transition between PSD1 and PSD2, existing licensees, PIs and EMIs will be required to apply for re-registration or re-authorisation under PSD3 in order to continue providing payment services or issuing e-money. The validity of existing licences will be “grandfathered” until 30 months after entry into force on the condition that the application for a licence under this Directive is made at least 24 months after the Directives entry into force.

Settlement of disagreements between NCAs and EBA assistance - Article 29 PSD3

PSD3 clarifies provisions for cooperation between NCAs and also introduces the possibility for NCAs to request the assistance of the EBA in solving possible disagreements with other NCAs.

PSR - some of the main changes

We highlight in the table below some of the main changes made in the proposed PSR versus PSD2 and EMD2. Once again, it is not exhaustive, and is only based on the changes that we were able to identify to date.

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|---|
| Commercial agent exclusion (CAE) - Article 2(2)(b) |
| <p>The scope of this exclusion is interpreted differently by national regulators, giving rise to some legal uncertainty. Some changes in the wording are introduced in the PSR in order to narrow down the scope of the CAE, in particular by:</p> <ul style="list-style-type: none">• making a reference Directive 86/653 on self-employed commercial agents;• adding a requirement that the agreement between the principal and the commercial agent should give the third party <i>“a real margin to negotiate with the commercial agent or conclude the sale or purchase of goods and services”</i>. This additional wording is subject to interpretation, in particular:<ul style="list-style-type: none">– The text continues to say negotiate “or” conclude (not “and” as some regulators seem to read the current PSD2 wording)– what is “a real margin ... to conclude ...”? Either the commercial agent concludes or he doesn’t conclude? Would it be sufficient for the principal and the commercial agent to state in the agreement that the commercial agent is authorised to conclude with the third party and has a reasonable margin to do so?– as regards “negotiate”, what is a “real margin” to negotiate? E.g. is a mandate given by the principal to its commercial agent to negotiate the price by a maximum 5% enough for the commercial agent to have “a real margin to negotiate”? <p>We expect that the wording will evolve during the legislative process. Also the EBA is given one year from the date of entry into force of the PSR to issue Guidelines on this exclusion.</p> |
| “Cash back without purchase” exclusion - Article 2(2)(e) |
| <p>PSD2 already contains an exclusion for the provision of cash as part of “purchase with cashback”.</p> <p>PSR now introduces another exemption for “cashback” (but more precisely, cash withdrawal at retailers) without a prior purchase. It reads as follows: <i>“services where cash is provided in retail stores following an explicit request by the payment service user but independently of the execution of any payment transaction and without any obligation to make a purchase of goods and services. The payment service user shall be provided with information on any possible charges for this service before the requested cash is provided;”</i></p> |
| Technical service provider exclusion - Article 2(2)(i) |
| <p>The wording of the (long under PSD2) TSP exclusion has been shortened to read: <i>“without prejudice to Article 23(2), and Articles 58 and 87’, services provided by technical service providers”</i> are excluded from the PSR.</p> <p>The PSR now provides a separate definition of what a TSP is, largely inspired from the PSD2 TSP exclusion (but shorter). But interestingly, the wording <i>“with the exclusion of [PIS] and [AIS]”</i> in the PSD2 TSP exclusion (which was meant to prevent someone arguing that providing an AIS or PIS is merely a technical service, therefore excluded from the scope of PSD2) seems have to disappeared from the definition of a TSP in the PSR (but kept in recital 16)?</p> |
| ATM withdrawals - charges - Art. 7 PSR |

A new requirement is introduced in relation to cash withdrawals: *“Natural or legal persons providing cash withdrawal services as referred to in Article 38 of [PSD3] shall provide or make available to their customers information on **any charges before the customer carries out the withdrawal** as well as upon receipt of the cash when the transaction is completed.”*

Derogation from information requirements for low-value payment instruments and electronic money - Art. 10 PSR.

The amounts of 30 EUR and 150 EUR in Article 63 PSD2 are replaced by 50 EUR and 200 EUR in Article 10 PSR.

Information and conditions - Art. 13 and 20 PSR

Art. 13 PSR (for single payment transactions) and Art. 20 PSR (for framework agreements) contains a new requirement (albeit with some differences in wording between the two provisions) to provide the PSU with information on the estimated charges for currency conversion *“as a percentage mark-up over the latest available applicable foreign exchange reference rate issued by the relevant central bank;”*. The wording is clearly inspired from Regulation (EU) 2021/1230 of the European Parliament and of the Council of 14 July 2021 on cross-border payments in the Union - CBPR2), in particular Article 5 of CBPR2.

Art. 20 PSR also contains a requirement in terms of information that needs to appear in a framework contract: *“The payment service provider shall provide the following information and conditions to the payment service user: ... ii) all charges, if any, for domestic, automated teller machines (ATMs) withdrawals payable by payment service users to their payment service provider at an ATM of:*

- 1) *their payment service provider;*
- 2) *a payment service provider belonging to the same network of ATMs as the user’s payment service provider;*
- 3) *a payment service provider belonging to a network of ATMs with whom the user’s payment service provider has a contractual relationship;*
- 4) *an ATM provider not servicing payment accounts when offering cash withdrawal services;”*

Termination fees - Article 23 PSR

A new requirement is added in relation to fees for the termination of a framework contract: *“Where, under the framework contract, payment services are offered jointly with technical services aimed at supporting the provision of payment services and provided by the [PSP] or by a third party the [PSP] has partnered with, such technical services shall be subject to the same framework contract requirements on termination fees.”*

Surcharging - Art. 28 PSR

The prohibition on surcharging credit transfers and direct debits that are subject to the SEPA Regulation, set out in Art. 62(4) PSD2, is extended to cover all *“credit transfers, including instant credit transfers, and direct debit transactions within the Union”*.

Access to payment systems - Article 31 PSR

The requirement for payment systems to have access rules and procedures which are objective, non-discriminatory, transparent and proportionate is extended to payment systems designated under the EU Settlement Finality Directive (SFD).

The rules and procedures for admission, and the criteria and methodology for risk assessment, should be made public.

Payment systems are required to notify PSPs in writing whether their request for access is accepted or refused, and if refused to provide the full reasons.

For payment systems that are not covered by the SIPS Regulation (Regulation (EU) No 795/2014), Member States shall designate a NCA responsible to ensure enforcement of the above.

Access to payment accounts - Art. 32 PSR

Article 36 PSD2 on access to payment accounts is being reinforced as a result of allegedly excessive “derisking” measures taken by banks and various publications from the EBA on this topic (see e.g. the EBA’s Opinion of 5 January 2022 on de-risking [here](#)). Art. 32 PSR requires in particular that:

- “A credit institution shall only refuse to open or shall only close a payment account for a payment institution for its agents or distributors or for an applicant for a licence as a payment institution in [specifically listed] cases: ...”
- “A credit institution shall ... duly motivate any ... decision [to refuse to open or to close a payment account]. **Such motivation must be specific to the risks posed by the activity or planned activity of that payment institution or of its agents or distributors, as assessed by the credit institution, and not be generic in nature.**”
- “... the [addressee] of a negative decision may appeal to a competent authority.”
- “The EBA shall develop draft [RTS] specifying the harmonised format and information to be contained in the notification and motivation referred to [above]”

Open banking - Art. 35-49 PSR

PSD2 provided for three categories of TPPs, namely AISPs, PISPs and so-called card-based payment instrument issuers (CBPIIs) under Article 65 PSD2 on “Confirmation of availability of funds”. This third category disappears in the PSR, which therefore only provides for two categories of TPPs: AISPs and PISPs.

Account Servicing Payment Service Providers (ASPSPs) offering payment accounts that are accessible online are now required to provide **at least one dedicated interface** for TPPs to access payment accounts (there is no longer a choice between exposing a dedicated interface or a modified customer interface - MCI). Although, as an exception, a NCA may either (1) allow an ASPSP to offer as interface one of the interfaces that it uses for authentication and communication with its payment services users (i.e. a MCI) or (2) “where justified”/“where appropriate” not to offer any interface at all to TPPs (Art. 39 PSR).

Art. 35 to 37 (on the provision of dedicated interfaces, the requirement of dedicated interfaces, and data parity between dedicated interface and customer interface) are largely imported from the RTS on SCA and CSC ([here](#)), but also from a few other sources (e.g. EBA Opinions and EBA Q&As). Although there are a few changes, including:

- While PSD2 didn’t contain a requirement for an ASPSP to provide a “yes” or “no” answer to a PISP on the availability of funds, but this requirement was “created” in Art. 36(1)(c) of the RTS on SCA and CSC, Art. 36(5) PSR now contains this specific requirement: “[ASPSPs] shall ensure that the dedicated interface provides to [PISPs]: (a) the immediate confirmation, upon request, in a simple ‘yes’ or ‘no’ format, of whether the amount necessary for the execution of a payment transaction is available on the payment account of the payer; ...”.
- Under Art. 36(5) RTS on SCA and CSC: “[AISPs] shall be able to access information ... (a) whenever the payment service user is actively requesting such information; (b) where the payment service user does not actively request such information, **no more than four times in a 24-hour period ...**”. But under Art.

41(2) PSR: “[ASPSP] **shall allow** [AISPs] *to access information ... whether or not the [PSU] is actively requesting such information*”. i.e. it would appear that the limitation of “four times in a 24-hour period” in the scenario where the PSU is not actively requesting the information is being removed?

- Art. 38 PSR introduces a new regime compared to the RTS on SCA and CSC in case of unavailability of the dedicated interface:
- *“In case of unavailability of the dedicated interface, [ASPSP] shall ... offer to [TPPs] without delay **an effective alternative solution**, such as the use of the interface that the account servicing payment service provider uses for authentication and communication with its users, to access payment account data. Where the dedicated interface is unavailable and the [ASPSP] has not offered a rapid and effective alternative solution referred to in paragraph 2, [TPPs] may request their **competent authority ... to allow them to use the interface that the [ASPSP] uses for authentication and communication with its users** for payment account data access.*
- *... the competent authority may for a time-limited period ... authorise **all [TPPs]** to access payment accounts data via an interface that the [ASPSP] uses for authentication and communication with its users. ...*
- *As long as the competent authority has not taken a decision on the request, **the requesting [TPP]** may exceptionally access payment accounts data via an interface that the [ASPSP] uses for authentication and communication with its users. ...”*
- Article 43 PSR requires ASPSPs to provide the PSU with a *“dashboard ... to monitor and manage the permissions the [PSU] has given [to TPPs]”*. In particular, the ASPSP and the TPP are required to *“cooperate to make information available to the [PSU] via the dashboard in real-time”*.

Article 44 on obstacles is largely imported from the EBA Opinion on obstacles of 4 June 2020 [here](#).

Article 48 PSR requires NCAs to, in particular, act “without delay” whenever an ASPSP or TPP wouldn’t comply with the above requirements, and to hold regular joint meetings with ASPSPs and TPPs.

The words “consent”, “explicit consent” and “explicitly requested” in PSD2 have been replaced in favour of “permission” and “permitted”; not only in the provisions on open banking (e.g. Articles 46-47, 49, 66 PSR) but also in other non-open banking related provisions (e.g. Art. 51 and 61 PSR). The use of the terms “consent” and “explicit consent” in PSD2, in particular in relation to open banking, had triggered lengthy discussions around whether or not those were the same concepts as “consent” and “explicit consent” under the GDPR. While the EDPB in its December 2020 guidelines on the interplay of PSD2 and GDPR [here](#) confirmed that the PSD2’s “explicit consent” was more akin to a contractual permission, the discussion was emblematic for several notable points of interplay (or friction, according to some in the industry) with the GDPR. The change from “consent” or “explicit consent” to “permission” means that the reference to “permission” is without prejudice to the obligation of PSPs to identify an appropriate legal basis for data processing under Article 6 GDPR, without saying what the appropriate lawful basis is. Such wording seems to suggest that it could be something other than contractual necessity?

Confirmation of payee/“matching service” - Articles 50 and 57 PSR

Similar to its proposal for an Instant Payment Regulation (IPR) amending the SEPA Regulation and CBPR2, a requirement for a “confirmation of payee” system, referred to as “matching services”, is introduced in Art. 50 PSD2 in relation to regular (i.e. “non-instant”) credit transfers where the payer inputs himself the unique identifier and the name of the payee.

New rules on liability in case of fraud are introduced in Art. 57 PSR in relation to the above confirmation of payee system: “1. The payer shall not bear any financial losses for any authorised credit transfer where the [PSP] of the payer failed ... to notify the payer of a detected discrepancy between the unique identifier and the name of the payee provided by the payer. ... 3. Where the [PSP] of the payee is responsible for the breach of Article 50(1) committed by the [PSP] of the payer, the [PSP] of the payee shall refund the financial damage incurred by the [PSP] of the payer. ...”

Unauthorised transactions - Art. 56 PSR

A new Article 56(2) PSR is introduced with new deadlines: “Where the payer’s [PSP] had reasonable grounds for suspecting fraud committed by the payer, the payer’s [PSP] shall, within 10 business days after noting or being notified of the transaction, do either of the following:

- a) refund the payer the amount of the unauthorised payment transaction if the payer’s [PSP] has concluded, after further investigation, that no fraud has been committed by the payer;
- b) provide a justification for refusing the refund and indicate the bodies to which the payer may refer the matter ...”

“Spoofing” of the consumer’s PSP - Art. 59 PSR

A new liability regime for PSP is introduced in Art. 59 PSR: “1. Where a [PSU] who is a consumer was manipulated by a third party **pretending to be an employee of the consumer’s [PSP] using the name or e-mail address or telephone number of that [PSP]** unlawfully and that manipulation gave rise to subsequent fraudulent authorised payment transactions, the [PSP] shall refund the consumer the full amount of the fraudulent authorised payment transaction under the condition that the consumer has, without any delay, reported the fraud to the police and notified its payment service provider [..]

5. Where informed by a [PSP] of the occurrence of the type of fraud as referred to in paragraph 1, electronic communications services providers shall cooperate closely with [PSPs] and act swiftly to ensure that appropriate organizational and technical measures are in place to safeguard the security and confidentiality of communications ... including with regard to calling line identification and electronic mail address.”

Pre-authorisation - Art. 61 PSR

In relation to card-based payments where the amount is not known in advance (e.g. a supermarket takes a pre-authorisation on the payment account associated with the payer’s card because the price of e.g. a roasted chicken is unknown as it may depend on its weight), a new requirement is introduced that “**The amount of the funds blocked by the payer’s PSP shall be in proportion with the amount of the payment transaction which can reasonably be expected by the payer**”. For example, the payer’s PSP shouldn’t block €100 on the payer’s payment account in relation to a roasted chicken.

Although it isn’t clear to us how the card issuer would know that the transaction at merchant “Supermarket X” relates to a roasted chicken, as opposed to, say, a new TV or a washing machine, and therefore whether the amount blocked is reasonable or not? So while the obligation of proportionality seems to be imposed on the card issuer, it should really be down to the merchant to only pre-authorise a reasonable amount?

This article remains limited to card-based payments, therefore the possibility of blocking funds e.g. on an e-money account remains, to some extent, unclear. It would be good to clarify this issue during the legislative process.

Data Protection - Article 80 PSR

Article 94(2) PSD2 on the processing of personal data by payment systems and PSPs has been entirely re-written. It now focused on the processing of “special categories of personal data” by payment systems and PSPs.

This seems to be a reference to the EDBP guidelines on the interplay of PSD2 and GDPR where the EDPB stated that payment account information received by an AISP may sometimes contain special category data under the GDPR, such as data related to health, religious beliefs or sexual preferences, which can be problematic due to the significant restrictions around the processing of such data under the GDPR. Article 80 PSR seems to address this issue, and provides that payment systems and PSPs are allowed to process such data *“to the extent necessary for the provision of payment services and for compliance with obligations under this Regulation, in the public interest of the well-functioning of the internal market for payment services...”*.

This might however be a double-edged sword as many in the industry have argued that the EDPB's considerations on this point were too strict (we tend to agree), and that processing of payment account data, such as historical transaction data, does not automatically result in the processing of special category data. While Article 80 PSR now provides a legal basis for some use cases, it can also be read as an acknowledgement of the discussion on this point, or (as the EDPB no doubt will argue) an acknowledgement of the position expressed by the EDPB.

Management of operational and security risks - Art. 81 PSR

The previous Articles 95(1) PSD2, which is now Art. 81(1) PSR, now cross-refers to DORA (Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector).

The previous Article 96 PSD2 on “incident reporting” is deleted completely since now largely covered by DORA, with the exception of Art. 96(6) PSD2 on fraud reporting which is now Art. 82 PSD2.

Transaction Monitoring Mechanism (TMM) - Art. 83 PSR

A new article on transaction monitoring mechanism (TMM) is introduced in the PSR, which is inspired in part by Art. 2 of the RTS on SCA and CSC. In particular the minimum risk-based factors listed in Art. 83(2) seem to be a straight copy-paste from Art. 2(2) RTS on SCA and CSC.

Payment fraud risks and trends - Art. 84 PSR

A new requirement is introduced for PSPs to alert their customers when new forms of fraud emerge (a similar requirement already existed under the now repealed 2014 EBA guidelines on the security of internet payments - see [here](#), para. 12.2).

Another requirement is introduced for PSPs to organise training programmes for their employees (similar to the requirement that was imposed to e-merchants in the now repealed 2014 EBA guidelines on the security of internet payments, see requirement BP 9).

Strong customer authentication (SCA) - Articles 85-89, and 58 PSR

It has always been our view that the definition of SCA in Article 4(30) PSD2 didn't require the two or more elements to belong to different categories (as long of course as “the breach of one does not compromise the reliability of the others”). However, the EBA had taken the opposite view, e.g. in para. 33 of its 2018 Opinion on the implementation of the RTS on SCA ([here](#)) and in Q&A 2020_5619 ([here](#)). While the definition of SCA in the PSR remains unchanged compared to PSD2, Article 85(12) PSR now provides that *“The two or more elements referred to in Article 3, point (35), on which [SCA] shall be based **do not necessarily need to belong to different categories, as long as their independence is fully preserved**”*.

In various Q&As, the EBA had accepted that not all card-based payments are initiated by the payer through the payee (and therefore in principle subject to SCA), but that some card-based payments are initiated by the payee (only) and therefore fall entirely outside the scope of the SCA requirements - so called merchant initiated transactions or MIT (see e.g. [Q&A 2018 4031](#), [Q&A 2019 4791](#), [Q&A 2019 4794](#)). However, the EBA added that (1) when the payer gives an MIT mandate to the payee remotely an SCA is required and (2) all PSD2 provisions applicable to transactions initiated by the payee should apply to MIT including the 8 week unconditional refund right of Art. 76(1) *in fine* PSD2. In Art. 85(2) to (5) PSR, the EC is elevating those Q&As into the PSR text, seemingly without any changes.

Art. 85(6) PSR confirms what the EBA had already stated e.g. in [Q&A 2019 4664](#)- i.e. that “*where the mandate given by the payer to the payee to initiate one or several direct debit transactions is provided through a remote channel **with the direct involvement of a payment service provider** in the setting up of such a mandate, strong customer authentication shall be applied.*”

Recital 95 of PSD2 states that “*There does not seem to be a need to [apply SCA] to payment transactions initiated **and executed** with modalities other than the use of electronic platforms or devices, such as paper-based payment transactions, mail orders or telephone orders*” (i.e. so-called MOTO transactions). While there seemed to be a general understanding that card-based payments should be able to benefit from this exclusion, the EBA essentially negated the possibility in its [Q&A 2019 4788](#). With Article 85(7), the PSR will allow (again) MOTO card-based transactions to be excluded from the scope of SCA by focusing on the fact that the **initiation** of the payment, rather than its **execution**, is not performed electronically. However the EC added that “*security requirements and checks are carried out by the [PSP] of the payer allowing a form of authentication of the payment transaction*” - that is authentication, but not necessarily SCA: query what this will look like in practice?

In Art. 85(9), the EC tries to clarify what is a remote transaction (requiring dynamic linking) versus a non-remote transaction (that doesn't require dynamic linking) by essentially importing from EBA [Q&A 2019 4594](#), [Q&A 2020 5367](#) and [Q&A 2020 5247](#)- i.e. if “*the authentication ... requires the payer's device*” then it is a remote transaction.

In the context of AIS, the PSR introduces an important change compared to PSD2: whereas under PSD2 the ASPSP was in charge of performing SCA on the PSU when it accessed payment account information through an AISP (with a possibility for the ASPSP to use a 90-day exemption, and soon as obligation for the ASPSP to use a 180-day exemption), under Art. 86(4) PSR it is **the AISP (not the ASPSP) that will perform SCA of the PSU** every 180 days. Only during the **first access** to payment account data by a given AISP will the **ASPSP** perform SCA pursuant to Article 86(3) PSR.

There has been much discussion under PSD2 as to whether a payer's PSP, e.g. a card issuer, was outsourcing to a wallet provider (e.g. Apple Pay or Google Pay) when relying on their assistance in the performance of SCA. In various Q&As, the EBA made a distinction between (1) the card issuer making use of third party technology such as a smartphone fingerprint reader to support SCA versus (2) the issuer outsourcing to the wallet operator (see e.g. [Q&A 2018 4047](#) and [Q&A 2019 4937](#)). The EBA had also stated in [Q&A 2019 4560](#) that “*only a single [PSU] can be associated, at a time, with the personalised security credentials, the authentication devices and/or software. This does not preclude, however, the use of the same authentication device and/or software by multiple payment service users **having different SCA profiles** when supported by the device and/or software*”. Article 87 PSR clarifies that “**A payer [PSP] shall enter into an outsourcing agreement with its [TSP] in case that [TSP] is providing and verifying the elements of [SCA]**”. This is therefore likely to require card issuers, for example, to enter into outsourcing agreements with wallet providers such as Apple Pay and Google Pay (unless, of course, if relevant technical changes are made in order to change the fact pattern).

Art. 88 PSR requires PSPs to develop a diversity of means for application of [SCA] to cater for the specific situation of all their customers, including “*persons with disabilities, older persons, with low digital skills and those who do not have access to digital channels or payment instruments*” and/or who do not possess a smartphone.

Under PSD2, there was concern expressed that the delay in compliance with the SCA obligations for remote card transactions was perhaps due in part to entities that were not authorised as PSPs under PSD2 and therefore not subject to the PSD2 SCA obligations, perhaps not subject to any supervision by NCAs, etc. In order to address this concern, Art. 58 PSR reads “[**TSPs**] and **operators of payment schemes** that either provide services to the payee, or to the [PSP] of the payee or of the payer, shall be **liable for any financial damage caused** to the payee, to the [PSP] of the payee or of the payer for their failure, within the remit of their contractual relationship, to provide the services that are necessary to enable the application of [SCA]”.

In its [Q&A 2019_4855](#), the EBA had concluded that a refund was a payment initiated by the original payee (now payer on the refund) to the original payer (now payee on the refund) and that SCA was in principle required, unless an exemption was available to one of the PSPs (or both). In its Call for Input [here](#), the EBA indicated that “there is merit in introducing an exemption from SCA [for refunds]” (para. 337) given the low levels of fraud in relation to refunds, but the EC doesn’t seem to have proposed such an exclusion from the SCA requirements. Perhaps it will be proposed during the legislative process?

Enforcement procedures, competent authorities and penalties - Articles 90 et seq.

Compared to PSD2, various new provisions are introduced in relation to regulatory enforcement by NCAs, with a view to making enforcement effective and coherent throughout the EU. For example Article 91 PSR lists the various powers that a NCA should have (e.g. require all necessary information including from non-PSPs (e.g. TSP, payment system operators); conduct all necessary investigations including request documents, examine books, interview individuals, etc; inspections at business premises; etc).

Art. 93 also requires NCAs to cooperate with each other and with authorities from any sector concerned as applicable, including by exchanging information.

Art. 97 provides for minimum sanctions for specific infringements of the PSR, such as a minimum level of fines, a public statement, cease and desist order, a ban from exercising managing functions.

Art. 98 provides that NCAs should be entitled periodic penalty payments until compliance is restored.

Article 99 lists the elements to be considered by a NCA when determining sanctions.

Art. 101 deals with the publication of sanctions on the NCA’s website.

Art. 102 with the reporting of certain enforcement activities to the EBA.

Art. 104 provides that “... *the EBA may ... temporarily prohibit or restrict in the Union, a certain type or a specific feature of a payment service or instrument or an electronic money service or instrument.*”

Co-authors:



Scott McInnes

Partner

+3222826059
scott.mcinnnes@twobirds.com



Peter Paulikovics

Junior Legal Advisor

+3222826072
peter.paulikovics@twobirds.com



Julien Sad

Senior Associate

+3222826041
julien.sad@twobirds.com



Melissa Daley

Knowledge Manager

+442074156034
Melissa.daley@twobirds.com

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