

Bird & Bird

EDPB's new guidelines on the interplay
between PSD2 and GDPR

10 September 2020

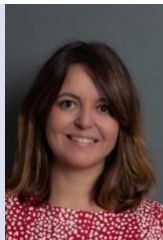
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PSD2 objectives

Protect consumers



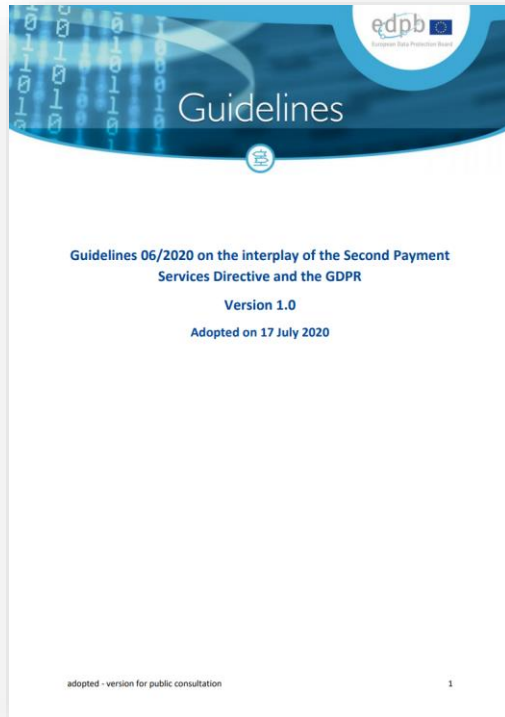
Enhance competition



Increase security



EDPB Guidelines 06/2020



- Public consultation open until **16 September 2020**
- Today's workshop:
 - Overview of the Guidelines
 - Deep-dive into select areas
 - Discussion to fuel response to consultation by Bird & Bird

Contents



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Special categories

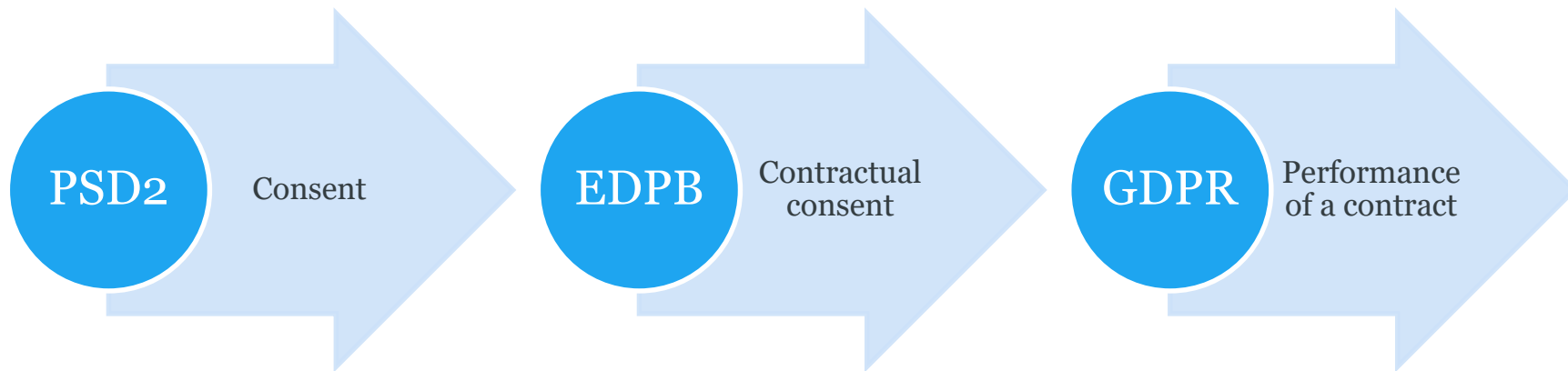


Other

Lawful basis

PSD2 consent does not mean GDPR consent

PSD2 consent ≠ GDPR consent



Necessary for the performance of a contract

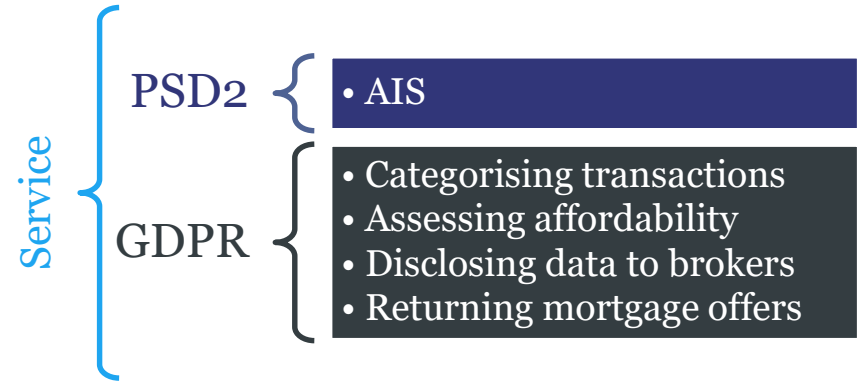
Starting point

- "contracts may incorporate terms that also impose conditions about additional services that are not regulated by the PSD2"

EDPB Guidelines 2/2019

- 'Necessary for performance' requires something more than a contractual clause
- Contracts cannot artificially expanded
- No bundling: necessity to be assessed for each service

Example: Open Mortgages S.A. (AISP)



Explicit consent

Explicit consent under PSD2 is "contractual consent +"

Explicit consent

GDPR

- Explicit consent requires the data subject to give an **express statement of consent**



PSD2

- Explicit consent means a contract with the following elements:
 - Specific categories of personal data
 - Specific payment services
 - Distinguishable clauses
 - Freely given

Hybrid of contract + consent +
transparency

PSD2 framework contract requirements

Need for a framework contract

- When payment services are rendered on a recurrent basis.
- Governance of the provision of payment services - rights and obligations of the parties.
- Transparency and information obligations of the PSP.

Framework contract information and transparency requirements

- Regulated under Title III, Chapter III of PSD2.
- Framework contracts shall contain:
 - general information on the payment services and their applicable conditions;
 - relevant information on (i) the PSP; (ii) the use of the payment services; (iii) charges and interest and exchange rates; (iv) communication between parties; (v) safeguarding and corrective measures; (vi) notification and execution of changes and termination; (vii) dispute resolution;
 - right of the PSU to terminate the contract at any time and when it does not accept a modification, without any costs.

Poll 1

Does the EDPB's explicit consent analysis create any practical difficulties for your organisation?

1. *Yes*

2. *No*

Purpose limitation

Consent saves the day

Purpose limitation

GDPR & PSD2

GDPR

Article 5(1)(b)

Personal data shall be... collected for specified, explicit and legitimate and shall not be further processed in a manner that is incompatible with those purposes...
(**'purpose limitation'**)

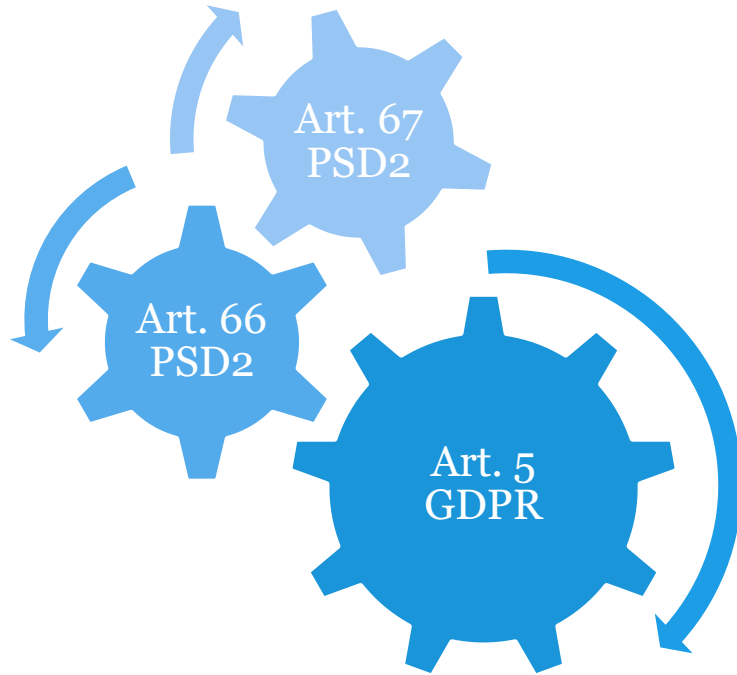
PSD2

Articles 66(3)(g) and 67(2)(f)

The [service provider] shall...not use, access or store any data for purposes other than for the provision of the...service as explicitly requested by the [user].



Specified purposes



- Art. 66(2)(f) PSD2 limits the PISP's processing to payment initiation services
 - Instruction from PSU + 'consent'
 - Initiate the payment order
 - Receive authorisation from ASPSP
- Art. 66(3)(g) PSD2 limits the AISP's processing to account information services
 - Instruction from PSU + 'consent'
 - Access payment accounts held by PSU
 - Receive authorisation from ASPSP
 - Receive account information from ASPSP
 - Display account information back to PSU

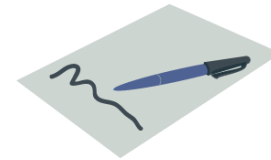
Further processing

Article 6(4) GDPR + recital 50

- PSD2 data use restrictions preclude a compatibility test
- Any other purpose is automatically incompatible

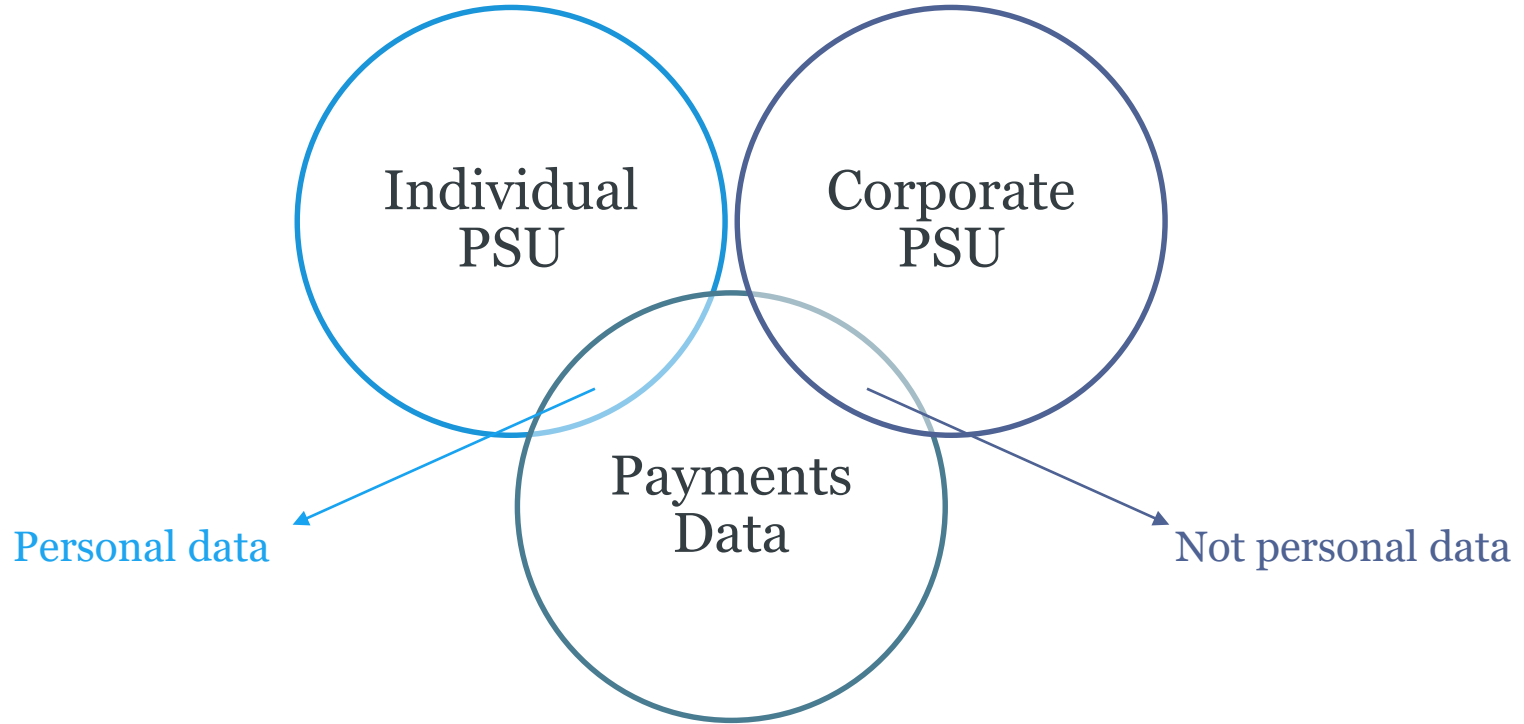
Further processing

- EU or Member State law
 - Anti-money laundering
- Consent...

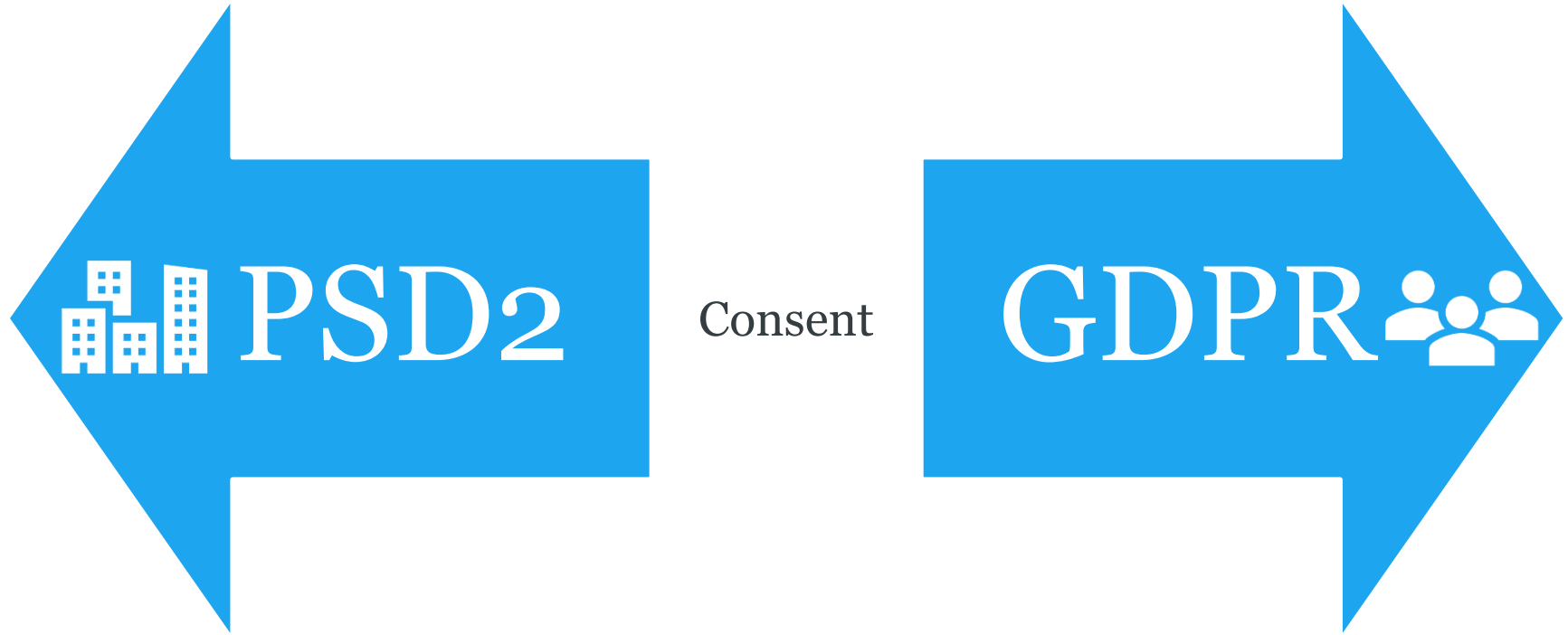


Dual regime under PSD2

(Re)use can depend on the type of PSU



Data (re)use only for data subjects



Poll 2

Will the EDPB's position on purpose limitation prove problematic for your organisation?

1. *Yes*

2. *No*

Silent party data

No consent unless its explicit

Silent party data

PSD2 does not apply to silent party data

Lawful basis

- Legitimate interests
- Consent (special category data)!

Further processing

- Only for compliance with EU or Member State law
- Consent is unavailable

Consent is not legally feasible...

"consent of the silent party is legally not feasible, because in order to obtain consent, personal data of the silent party would have to be collected..."

...except for special category data:

"In cases where [substantial public interest] does not apply, obtaining explicit consent... seems to remain the only possible lawful derogation...This also applies to silent party data."

What about Article 11 GDPR?

Article 11(1) GDPR

If the purposes for which the controller processes personal data do not...require the identification of a data subject...

the controller shall not be obliged to maintain, acquire or process additional information in order to identify the data subject **for the sole purpose of complying with this Regulation**

- EDPB Guidelines do not mention Art. 11
- Art. 11 has implications for:
 - Personal data (Art. 4(1) GDPR)
 - Purpose compatibility (Art. 6(4) GDPR)
 - Controller obligations (Art. 24 GDPR)
 - Privacy by Design (Art. 25 GDPR)
 - Security (Art. 32 GDPR)
- How does this impact the personal data of silent parties?

Poll 3

Would your organisation need to process silent party personal data for additional purposes?

1. *Yes*

2. *No*

Special category data

Substantial public interest & explicit consent

Payment transactions can contain special category data

"financial transactions can reveal sensitive information about individual data subject [sic]"

Examples

- Donations to political parties or churches → political opinions and religious beliefs
- Deduction of an annual membership fee → trade union membership
- Analysing medical bills → health data
- Certain purchases → sex life or sexual orientation

Problems with this approach

- Whether transactions reveal special category data needs to be assessed on a case-by-case basis.
 - Donating to the red cross for humanitarian work does not necessarily reveal religious beliefs

Sensitive payment data ≠ special category data

Substantial public interest

- EU or Member State law must set out the derogation
 - Proportionate
 - Suitable and specific safeguards
 - Respect the essence of data protection law
 - Protect the fundamental rights and interests of data subjects

"including interests of systemic importance"

Explicit consent

- Considered a 'safety net' rather than an alternative:
 - "In cases where [substantial public interest] does not apply..."
- In reality, explicit consent is likely to be what is most pragmatic for a TPP:
 - I agree that Open Mortgages S.A. can consolidate payments transactions revealing my racial or ethnic origin, political opinions, religious or philosophical beliefs...*

Poll 4

What is your organisation's approach to financial transactions and special category data?

- 1. We do not consider financial transactions to reveal special category data*
- 2. We accept that financial transactions can reveal special category data but we take no specific action*
- 3. We accept that financial transactions can reveal special category data and we have deployed solutions to address this*

What if there are no suitable derogations?

“ payment service providers may explore the technical possibilities to exclude special categories of personal data and allow a selected access, which would prevent the processing of special categories of personal data related to silent parties by TPPs. ”

Poll 5

Can your organisation filter transactions that can reveal special category data?

- 1. No*
- 2. Not today, but our teams are currently working on a solution*
- 3. Yes, we do this already*

Other compliance considerations

- Data minimisation
- Security
- Transparency and accountability
- Profiling

Key issues

Digital filters

Data minimisation

Retention

Data minimisation

Fraud

Security

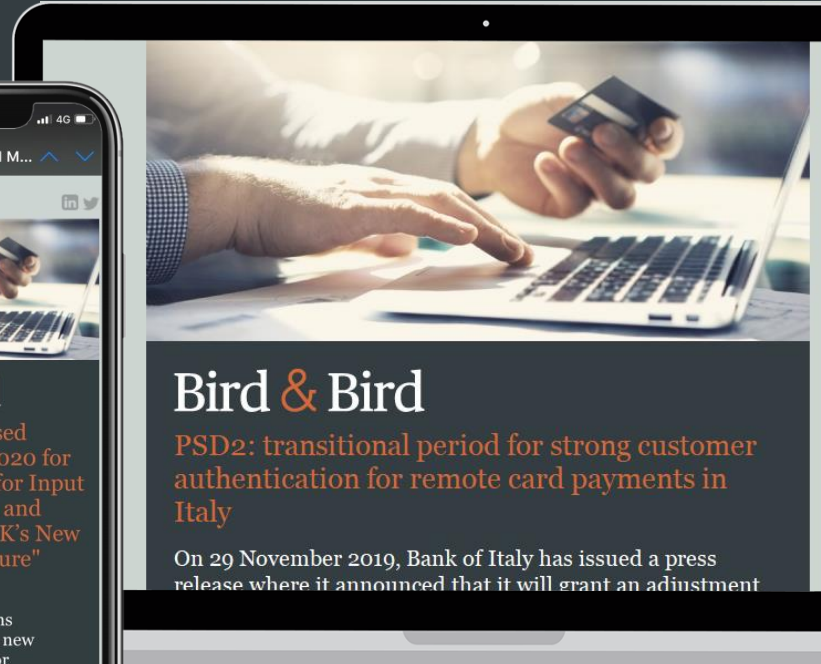
Privacy
dashboards

Accountability

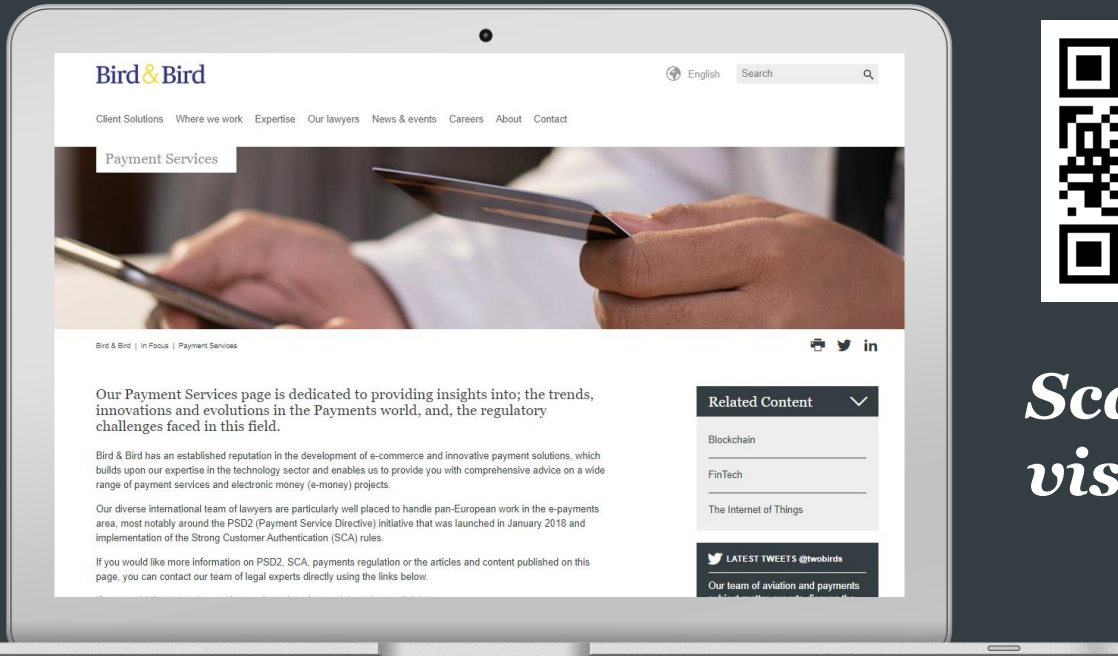
International Payments alerts



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Bird & Bird In Focus page: Payment Services



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visit [our website](#)*

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Thank you & Bird & Bird

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