Study on the application and impact of Directive (EU) 2015/2366 on Payment Services (PSD2)

Questionnaire

For payment service providers

(EU associations)

22/02/2022

1 Introduction

With the value of non-cash transactions undertaken in 2020 amounting to EUR 203.4 trillion, the European Union constitutes one of the largest retail payment markets in the world. Technological development has led to a fast-paced evolution of payment services, resulting in a need to introduce new legislation and to periodically update the rules governing the sector. The revised Payment Services Directive (hereafter referred to as PSD2) that came into force in 2016 (with a transposition deadline of 2018) constitutes the EU's most comprehensive regulatory framework for retail payments. The sections below will outline the context and needs that have led to the adoption of the Payment Services Directive and its revision, as well as the market and policy developments since PSD2 was passed.

Back in 2007, the Payment Services Directive (PSD1) entered into force with the aim of creating a uniform legal framework to support the development of an integrated payment market. The Directive also facilitated the establishment of the Single Euro Payments Area (SEPA).

The European payment service industry benefitted considerably from PSD1. However, the rapid change of development on the payments market made it necessary to revise the Directive. The revised Payment Services Directive ((EU) 2015/2366) (PSD2) is the main piece of legislation governing payment services in the EU and the most comprehensive and relevant set of EU rules in the field of retail payments. It provides the legal foundation for an EU single market for payments and the supervision of payment institutions with the objective to establish safer and more innovative payment services across the EU. It defines information requirements, rights and obligations between payment service providers (including banks, payment institutions and e-money institutions) and payment services users (including consumers and merchants). The revised Payment Services Directive aimed to:

I. Improve competition and cross-border payments
II. contribute to a more integrated and efficient European payments market;
III. further level the playing field for payment service providers by including new players;
IV. make payments safer and more secure; and
V. enhance protection for European consumers and businesses.

I. Basic information on the respondent (used for analysis of types of respondents)

1. Which kind of organisation do you represent?

A European trade body for non bank payment service providers, the Electronic Money Association

2. In which countries are you active?

Across the EU, headquartered in Belgium, with branches in Ireland, Netherlands, Luxembourg, Malta, Lithuania, and an office in the UK

3. Are you aware of the Revised Payment Services Directive (PSD2, Directive (EU) 2015/2366?

Yes

II. Questions on the impacts of the PSD2

4. What are the main economic and non-economic benefits and drawbacks of PSD2? What problems did your Members encounter?

Benefits:

PSD2 has continued to offer a framework for non-bank payment service providers to offer payment products, through payment institutions, and has enabled new entrants (AISPs and PISPs) to offer innovative services within this framework. This has, in turn, encouraged innovation and competition in the PSP market to the benefit of payment service users.

Issues to be addressed in a future revision of PSD2:

(i) SCA: The PSD2 SCA rules limit the number of options/technologies available to payment market participants, meaning that most forms of SCA combine passwords (knowledge) with some sort of form of device-based authentication factor as possession (e.g., OTP, app-based notifications). The narrow interpretation of inherence-based SCA elements to include only a limited range of behavioural biometrics set out in the EBA Opinion (EBA-Op-2019-06) does not take into account the extensive experience of the payment sector in data-driven authentication, thus limiting the options available to firms. This has added further friction to PSU everyday interactions with payment accounts. The introduction of SCA has also impeded the ability of PSPs to deliver their services to PSUs with lower levels of digital literacy (or access to digital devices) or to vulnerable customers. We hope that a revision of PSD2 would largely focus on payment account security objectives rather than specify acceptable authentication elements.

EMA members have commented that the detailed SCA requirements and SCA exemption requirements prescribed in the regulatory technical standards have imposed costs on PSPs significantly beyond those originally envisaged. PSPs have expended time, effort and costs in understanding, preparing for and implementing solutions compliant with regulatory technical standards that became outdated as soon as they were published, hindering innovation and competitiveness in the market. Further changes to SCA should be focused on the outcomes, with industry determining the most appropriate measures to address fraud risk.

There is some industry evidence[1] pointing to increased numbers of dropped/abandoned remote electronic payment transactions after the requirement for full SCA compliance started to apply to credit transfers (14th September 2019) and to payment cards (30th

[1] Card Scheme (MCI) data from Q1/Q2' 2021 indicates c.22% of all browser-initiated card transactions and to 53% of in-app card transactions failed to complete Issuer Step Up (Soft Declines).

December 2020). Data on failed/abandoned transactions will be available at EU Retailers and Acquirers.

It is generally accepted that the initiation of payment transactions where SCA is applied involves more friction on the PSU side. Current SCA rules emphasise active authentication techniques, with explicit customer intervention; this approach limits choice and distorts the customer experience, when frictionless solutions might also be available.

Payment ecosystem participants (Acquirers, Issuers) have been trying to limit such friction through the balanced use of SCA Exemptions (Low Value, Trusted Beneficiary, Acquirer TRA, Issuer TRA). There has also been growing use of Merchant-Initiated Transactions (MITs) that are excluded from SCA requirements.

The requirement to apply SCA (and Dynamic Linking) has severely impacted the use of remote payments in certain Use Cases (Travel, Entertainment) that involve the use of service delivery intermediaries and aggregators. Many of these Use Cases continue to operate on the back of sector-specific SCA exemptions/waivers granted by local NCAs.

There are also good arguments to distinguish the application of SCA for payments involving corporate entities from those for purely retail payments; the former face more limited fraud risks. A risk-based application of dynamic linking for remote payments may reduce friction in use cases where the payer (or payee) is a corporate entity.

Small/medium size retailers are facing integration difficulties (and increased costs) to deploying SCA compliant solutions that allow the use of payment cards for remote/e-commerce payment transactions. These retailers are dependent on the support of Acquirers and Payment Gateways to deploy SCA-compliant payment solutions; acquirers and gateways have prioritised onboarding the larger e-commerce merchants and that has created a backlog of SME e-retailers that have limited access to such solutions. Total Merchant Service Charges (MSCs) incurred by e-retailers for SCA-compliant payment card solutions (e.g. 3DS v2.x) are higher than for previous, non-SCA compliant solutions. Increased Acquirer, Gateway, technology vendor (ACS) and Card Scheme fees contribute to the increased MSCs incurred by retailers.

Finally, whilst device manufacturers can provide compliant and seamless payment experiences, competing PSPs are blocked from accessing the more diverse OS/device-level controls because of Data Protection limitations. This has led to a distortion in competition in the market, as the level of friction has a direct impact on customer experience, and therefore on customer choice.

5. To what extent do you think PSD2 has contributed to the development of cross-border payments within the EU?

PSD2 has contributed to a more harmonised approach across the EU, as evidenced by the growth in the sector. NCAs do however have varying degrees of experience in the implementation of PSD2 and further legislative guidance would assist, addressing authorisation, passporting, application of SCA obligations and scope of AIS/PIS data access.

Furthermore, financial crime related requirements such as that for a local central Contact Point, and application of local AML regulation more generally, continue to present barriers to firms offering cross-border services.

Greater harmonisation of PSD2 implementation as well as of related financial crime legislation
is likely to increase the efficiency of the single market and competition by encouraging new entrants to join the market.

The EU regulatory framework for payments has facilitated the growth of a large, innovative, and competitive PSP market delivering cross border remittance services. The Commission could play a role in further development of the international remittance market by sharing best practices in the regulatory framework for payment institutions more broadly on a global basis.

6. Do you think there is a need to extend the scope of PSD2 obligations applicable to two leg and one-leg transactions or transactions in other currencies to currency conversion charges?

We consider that the scope of article 82 should not be increased to include one-leg-out transactions. PSD2 legislates for payment services within the European Union. There may however be initiatives that seek to standardise practices on a global basis, and the Commission should seek to adopt these where they are consistent with the objectives of the PSD. These include FSB developments in this regard.

III. Objectives, scope and definition of PSD2

7. In your opinion, is the scope of the PSD2 sufficiently clear? If not, which actors/instruments/exclusions should be added, deleted or specified?

We consider the scope of PSD2 in terms of legislation to be sufficiently clear.

However we have a number of comments on the Article 3 negative scope/exemptions:

Commercial agent exemption Article 3(b): There is benefit in maintaining the commercial agent exemption, as it allows for bill payments and similar arrangements to be offered, where the merchant can manage the risk in a similar way to other commercial risks.

Technical service provider exemption Article 3(j) ("TSP"): is of paramount importance. The exclusion as currently drafted is required and should form a key part of a redrafted PSD3, otherwise competent authorities will find their resources stretched to breaking point when attempting to supervise businesses that only have a tangential relationship to payment services. Additionally, overregulation would be detrimental to innovation and, ultimately, harm consumers as well as the economy. TSPs should be allowed to operate under an exclusion considering that they work with already regulated entities that are subject to payments regulation, which ensures protection of the customer and the payment system.

Limited network exemption Article 3(k): there are divergences between the competent authority approaches towards notification; some NCAs have introduced notification processes that are comparable to an authorisation application; this of course undermines the benefit and intended objective of the exemption. The EBA Guidelines on the Limited Network Exemption have provided some clarity and harmonisation. However we consider that a more effective approach, and one that would encourage the single market in the EU, would be to provide the ability to passport an exemption to other EU member states, or simply to recognise the home member state's assessment as having authority across the EU.

This is in line with approach in the E-commerce Directive (2000/31/EC), where the only competent authority ("CA") that can object to the use of the exclusion is the CA in the MS in which a service provider relying upon an exclusion is in incorporated (or otherwise established); host CAs would then accept this determination, although they would be free to report their concerns about the service provider's conduct so as to assist the host CA.

At the moment service providers must notify each MS if they wish to operate under the limited network exclusion. In practice this has proven far too burdensome and unnecessary, particularly in light of the fact that MSs have adopted the same payments directive. Having to notify in this way and not being able to "passport" an exclusion will prevent innovative products - that could be beneficial for the economy and users - to get off the ground for the fear of regulation in some of the MSs due to the absence of a uniform approach by MS CAs.

We also consider that PSD2 should be revised to address the dilemma faced by firms not knowing whether a product will be regarded as exempt once it reaches the notification threshold, and therefore refraining from offering services at all at the outset. It would be better for a simplified notification procedure to be made available at the outset, enabling clarity and regulatory certainty for business.

Article 37(2) relates to notification under Article 3(k): following from our comments above, and in relation to the home member state competent authority, the CA should be required to respond with any objections it may have within 2 months of notification, and if a CA does not respond within this period, it should be deemed to have agreed with the service provider's application of the LNE.

The threshold trigger for the notification to the home CA should also be increased (from EUR 1 million) to when the total value of payment transactions executed over the preceding 12 months exceeds the amount of EUR 3 million in any MS to reflect the increased use of non-cash means of payment in the EU and the impact of inflation. Once a notification has been made, no further notifications should be required unless there are changes to the service that could impact the application of the LNE.

Electronic communication network exemption 3(l): we do not object to this exemption, and are supportive of the values being increased in line with inflation to enable users to continue to benefit from the convenience that it offers.

8. To what extent are the categories of payment service providers still adequate given developments in the payment market?

The EU's regulatory approach to payments and e-money has fostered innovation, competition and diversity in the payment services sector, and delivered an effective and comprehensive regulatory framework for payment service providers. The current system enables firms with different business models to adopt the most appropriate regulatory licence, whether bank, e-money or payment institution. It is calibrated and applied in a way that allows for the supervision of entities according to the products, and volume of activity they are undertaking. We support the continued approach to payment services regulation, but suggest a more streamlined approach that enables transition from one type of institution to another. This should not however entail the consolidation of the e-money and PSD, but rather creating links between the regulations that enable better variation of permissions.

9. In your view, what potential risks are stemming from unregulated services? And what risks are created by the introduction by PSD2?

The exemptions set out at Article 3 provide for a risk-based approach to regulation, capturing regulated payment activities in the Directive, whilst allowing for those activities that do not merit regulation to fall outside of the scope of the Directive. This is supported.

There are also increasing opportunities for users to make use of payment services that are offered from outside of the EU, and these may not always give rise to systemic or significant risks. The approach to capturing such services should be pragmatic whilst ensuring a level playing field as well as user protections.

The offering of payment services without regulation risks consumer harm, an erosion of trust in the payment system and an impact on competition for those regulated firms.

10. Are you aware of the exclusion for telecom services providers? How are they applied regarding the thresholds for the exemption? Are the thresholds appropriate (Article 3 lit. l of PSD2)?

We consider that the Electronic Communications Exemption (ECE) limits should be increased in line with inflation, and in line with contactless limits applicable to payment cards, in order to maintain a level playing field with card payments.

11. Is the concept of e-money still fit for the future (i.e. regarding new providers, new business models, and new needs from the customer side)?

Yes. The concept of e-money (as maintained in the Second Electronic Money Directive) attracts its own legal treatment and issuance and redemption requirements. E-money is defined as a prepaid instrument/value, it can be purchased and sold, it is pegged against national currencies at par, with a right for redemption also at par. E-money is distinguishable from, for example, deposits, in that it is modelled on cash, being a claim against the issuer, and is intended to function in many instances where an electronic equivalent of cash is required.

The electronic money Directive seeks to regulate e-money as a product, it sets out issuance and redemption requirements, and defines e-money as a prepaid instrument. E-money is not a deposit or debt instrument, and consequently attracts its own legal treatment. It can be purchased and sold, and it is pegged against national currencies at par, with a right for redemption also at par.

It is modelled on cash, in that it is a claim against the issuer, and is intended to function in many instances where an electronic equivalent of cash is required.

As a prepaid instrument, the prudential risks associated with e-money go beyond those of settlement, which is that of immediate payment services, as funds are held by the issuer on an ongoing basis; pending a payment instruction. This is an important distinction that separates immediate payments from those that are prepaid and contemplated to be held on an ongoing basis.

Use of the e-money product to undertake payment services on the other hand is shared with all other payment instruments, and these are captured in PSD2. Risks associated with payment service provision are shared and EMIs comply with these, as do PIs and banks.

It is the prudential risks and controls associated with the issuance and redemption of e-money that are distinct, the legal nature of the instrument, and consequently the prudential obligations that mitigate these risks that merit a distinct framework.

The e-money industry has put in place a detailed contractual structure that utilises the legal attributes of e-money, enables its distribution and creates business models that rely on these attributes. These have been effective for some 20 years. The utility of the instrument and its distinction from bank funds should therefore not be underestimated or degraded.

As described above, electronic money is an instrument, in the way that cash is an instrument or in the way that a deposit is a loan instrument. Payment is the process of

transferring and accepting different instruments in fulfilment of payment obligations, or as a gift.

It is appropriate therefore to regulate banks under a consolidated banking directive, to regulate credit under a consumer credit directive and to regulate e-money under an e-money directive. Making payments with any of these three different types of products: debit, credit or a prepaid e-money instrument would however all be subject to common payments regulation under PSD2.

The main differences between payment institutions and e-money institutions concern the e-money instrument itself, and that it involves the holding of users' funds on an ongoing basis; whereas other payment products offered by PIs do not involve holding of balances on an ongoing basis.

12. In your opinion, should account information services still be covered by PSD?

In the long term we can see the rationale for separating AIS services from PSD2 and potentially providing the regulated activity of account information services within a new Open Finance framework. We understand that this is likely to be published later in 2022, and could be adopted at the same time as the next iteration of PSD2. However the impact on TPPs who wish to offer both AIS and PIS services may be significant, as this may require authorisation under two separate regimes. There should be a means for payment firms to be able to offer AIS services that are related to their payments business under a single regulatory framework, even if AIS services are also made available under a separate framework. This could for example be analogous to credit institutions being able to offer e-money services under their banking licence, while EMIs are able to do so separately under the e-money Directive.

It would then be helpful to clarify that AIS services do not fall within the scope of AML legislation, where the relevant money laundering risks do not arise. Their inclusion was simply a consequence of the legislative framework within which they were established.

13. Are there any overlaps or gaps with regard to the service categories outlined in Annex I, in particular with regard to "payment initiation service", "account information service" and the "acquiring of payment transactions"?

There appears to be some inconsistency in how member state NCAs interpret the different payment categories; the following are some examples:

- Some require permissions 1 or 2 or 3 if payment accounts are used in relation to permissions 4 or 5, as these permissions make mention of payment accounts; we believe this is an overly restrictive interpretation and that permissions 4 and 5 both allow for payment accounts to be operated implicitly.
- Acquiring of payment transactions is sometimes associated with card payment transaction acquiring only, although acquiring of transactions may utilise other payment instruments including bank transfers or mobile wallet payments; clarity on the generality of this provision would be helpful.
- Account information service is defined as relating to the provision of consolidated information on accounts held in a number of places. This reflects the nature of AIS

services at the time of drafting of PSD2, but today only reflects a small part of such services. It would be better to define this term more generally, for example as services that involve access to payment account information held by an ASPSP. The current definition is currently resulting in restrictions on innovation and AIS service offerings in member states.

- The definition of 'account information services' also refers to the provision of information on account(s) held with another PSP or more than one PSP. Some PSPs offer accounts that can only be accessed (for example, to view balance and/or transactions) by PSUs via an interface (such as an app) developed and maintained by a third party. It would be helpful to clarify that such third parties are not engaging in account information services when providing account information on behalf of a PSP, on an account held with that PSP.

14. What impact can be expected from recent CJEU (Court of Justice of the European Union) case law?

The case has produced an unusual outcome, in that the PSD2 definition of a payment account is being interpreted under the Payment Account Directive Directive 2014/92/EU ("PAD"), rather than within PSD2 itself. It would be helpful for the definition of payment accounts to be clarified within PSD itself.

The CJEU case suggests that accounts that are intended to be captured in PSD2 under access obligations set out at Articles 65-67 are informed by the definition at Article 1(6) of the PAD which require payment accounts to have a certain number of functionalities, which are:

(a) placing funds in a payment account;
(b) withdrawing cash from a payment account;
(c) executing and receiving payment transactions, including credit transfers, to and from a third party.

This relevant functionality that was utilised in the case related to the third limb (c) which provided for transfers to be possible to third parties. It is however possible to suggest that other functionalities must also be present.

The scope of accounts that are captured is interpreted differently in different member states, with resulting uncertainty over which accounts are available to PIS and AIS providers. It would be helpful to clarify scope, and for this to be set out in a pragmatic manner. Please also see our further response to Question 31.

Whilst this response relates to PSD2, we would also bring the Commission's attention to the varying interpretation of accounts falling within the PAD, where countries such as Germany, Poland and Lithuania have taken an inclusive approach that has brought e-money accounts within scope of PAD obligations, requiring for example the provision of Fee Information Documents and Statements of Fees, even though there is no basis for comparison with current account products.

IV. Impact of PSD2 on licensing of payment institutions

15. Please describe the impact of the payment institutions authorisation regime on the market? Do you think there is a need to set out additional provisions regarding the licensing/authorisation and the supervision, given the evolution of the payment market since the adoption of PSD2?

Authorisation in general: authorisation requirements introduced by PSD2 amounted to an increase in the obligations that firms were expected to comply with. Since that time, additional obligations have been introduced or elaborated, such as those in level 2 text issued by the EBA and by NCAs, as well as general expectations relating to issues such as outsourcing, operational resilience, wind down planning, consumer protection including vulnerable customer policies etc. We strongly urge the Commission to refrain from further regulatory intervention in the prudential, conduct of business and supervisory framework.

If there is a perceived need for greater scrutiny, we suggest this is addressed by way of supervisory oversight rather than further regulatory obligations. Similarly, greater harmonisation of supervisory practices would be helpful, together with NCA cooperation to reduce the need for host member state intervention.

Any additional authorisation proposals should be supported by a robust cost/benefit analysis.

There is currently a discrepancy between the manner in which a credit institution can seek to take on the permissions of AIS and PIS and that PIs and EMIs. We suggest a more uniform approach where all three types of institutions are treated in a similar manner; either requiring simple notification to add such a permission, or requiring a variation of permission. There should not be a discrepancy as this could translate into a competitive or time advantage for one type of institution over another.

Safeguarding requirements:
The PSD2 requires outstanding funds for both PIs and indirectly for EMIs to be safeguarded when the safeguarding conditions are met. The main means of safeguarding is to place the funds in a separate account with a credit institution. PSD2 then delegates the criteria for determining the permissible credit institutions to home member states. This is often interpreted as being restricted to EEA authorised credit institutions.

This restriction is inflexible and does not take into account the needs of diverse business models that PSPs have, particularly those with a global presence, and that operate on a 24-hour basis. EMI and PI transactions take place in real time, but often the CIs holding safeguarding accounts only operate during banking hours. It would assist business enormously if eligible credit institutions for the purpose of safeguarding are set out more broadly in the legislation, including credit institutions authorised outside of the EEA, and that this is harmonised in level 1 text.

Additional issues:

1. Firms need greater clarity regarding the type of secure, liquid and low risk asset that safeguarded funds can be invested in. There is a need for diversification and limited flexibility to enable a limited revenue to be generated in order to contribute to the cost of safeguarding.

2. EMIs and PIs should additionally be permitted to safeguard customer funds at central banks, removing investment risk altogether, and assisting in the resolution of part of the de-risking challenges that are faced by the industry.

16. What are the main types of licensing services provided and what is their relative importance? Are there substantial differences between Member States?

Competent Authorities have differing levels of experience in authorising and supervising payment services providers. This is mostly driven by the number of PSPs that choose to be located in different jurisdictions, which in turn is driven by broader choices including availability of qualified staff, the cost of doing business, and access to resources and to given markets. Having said this, different NCAs have differing authorisation and supervisory approaches, as well as differing levels of familiarity with PSPs business models and product propositions.

It would be helpful to cultivate greater communication between industry and NCAs at an EU level to improve understanding and to better inform decision making.

V. Impact of PSD2 on supervision of Payment Service Providers

17. Is the supervision of payment service providers (including payment institutions) adequate, both at EU level and in the Member States? Are there elements in the supervisory framework applicable to credit institutions which should be extended to PIs?

We are not aware of any shortcomings in relation to the current supervisory framework. We are not aware of any systemic failings or risks that have led to failings at an industry-wide level. The EMA has branches in 6 EU member states, and has observed national supervisory oversight of the e-money and payments sectors increasing significantly over recent years. NCAs are increasing their supervisory engagement with the industry, their understanding of the market is greater than before, and the degree of scrutiny of firms is higher.

In this context, we do not see which aspects of the supervisory framework applicable to credit institutions would be suitable or appropriate for the PI/EMI sector. EMIs and PIs do not take deposits and do not use user funds to make loans. The nature of the risks associated with the banking sector is significantly different. Both EMD2 and PSD2 have been calibrated to the risks associated with the respective activities. In addition, the new PISA framework introduced by the ECB will add a layer of oversight that will capture the more significant institutions.

Although PSD2 is a maximum harmonisation directive, member states can adopt different policies when applying the supervisory regime. One particularly important choice relates to that of calculating own funds. The three methods of calculation can give rise to significantly differing outcomes. The choice between using turnover (method B) and income (method C) as own fund indicators is particularly important and is subject to variations in business model and business practices. Some NCAs adopt a non-flexible approach and result in discrepancies in the capital charged from one member state to another.

We also note the variation in supervisory practices and reliance by host member states on engagement with passporting firms rather than on cooperation with home member state supervisors. This places undue burdens on firms, results in member states creating local reporting and engagement obligations, and ultimately leads to the fragmentation of the common market. We encourage the European Commission and other European policymakers to address harmonisation in a more inclusive manner, addressing soft factors such as cooperation and data sharing in a more robust manner, removing the need for host member states to seek to impose obligations at a host member state level.

18. How well does the coordination between the supervision of payment services/ e-money-issuing and the oversight of payment systems, schemes and instruments work? Could any additional set of rules be established?

Significant institutions that will fall within the scope of the PISA framework could potentially be subject to supervision by NCAs as well as oversight by central banks. The oversight principles set out in PISA closely reflect the supervisory practices in PSD2 and there should therefore be close cooperation between NCAs and central banks in this respect to avoid dual regulatory obligations. Where PISA adopts broader provisions than the prudential framework, addressing for example the ecosystem, then direct engagement with the firm is required.

The evolution of PSD2 could be informed by oversight obligations that are introduced by the PISA framework, and could therefore limit the extent of any overlapping provisions.

19. Is the collaboration between the respective supervisory bodies in the Member States in which your Members operate, and between supervisory authorities in different Member States effective?

Cooperation and collaboration is in our experience limited, and member states rely instead on direct engagement with firms through the introduction of local supervisory or reporting requirements. This acts to fragment the market, and we encourage the Commission to create practical means of data and information sharing to address this issue.

20. Are the accounting and statutory audit provisions appropriate? Do you think there is a need for special provisions to address the specific business models in the field of payments?

The audit obligations are related to the size of the business and this is appropriate. There are further obligations relating to compliance with the prudential, conduct of business and financial crime obligations which are part of a firm's internal controls, governance and compliance framework. These would require an independent internal audit function where the size and complexity of the firms justifies this.

Smaller firms will be required to undertake compliance reviews and for some of these to be independent in nature. Obligations are already set out at Article 5(1)(c), (k), and Article 19(1)(b) in relation to agents and outsourced services.

21. Is the possibility of granting credit and conducting other business activities used by payment institutions?

The first EMD was adopted in 2000, and the first PSD in 2007. Since that time, the businesses of PIs and EMIs have steadily evolved. The payments businesses of these firms are now more diverse and offer a range of payment and related services. These do include credit both as a revolving line such that of credit cards, as a one-off credit service such as buy-now-pay-later products, and intermediate products such as charge cards.

Both EMIs and PIs however have to fund such credit from their own funds, while payment services customer funds are safeguarded separately. There is therefore minimal impact on the payments business through the addition of such services. Where consumer credit is offered, firms do of course also have to apply and be authorised under the relevant consumer credit regime.

The EU consumer credit regime is focused on consumer credit agreements and does not create a harmonised regime for licensing that can be subject to mutual recognition. A harmonised and passportable consumer credit license could greatly increase competition for consumer credit in the EU.

With the exception of a harmonised regime, we do not believe any additional regulation in relation to the offering of credit by EMIs and/or PIs is required.

22. Have there been any obstacles (e.g. regarding the interaction with the competent authorities) to the implementation of the EU-passport regime? Is the current EU-passport regime fit for purpose or does it need to be adjusted (e.g. with regard to notification requirements)?

As highlighted in the EBA's Report on potential impediments to the cross-border provision of banking and payment services of 29 October 2019, there is a lack of direction in Level 1 rules for determining the location of provision of financial services (including payment services), when offered from one member state to another. The need for a frictionless ability to offer services on 'freedom to provide services' basis is continuously undermined by member states' desire to exercise jurisdiction over services that are offered to residents in their state. There is a tendency to suggest a service amounts to a 'right of establishment', even when the activities are clearly undertaken on a cross border basis.

In the absence of such clarification, the benefits of the single market will be, and are being, eroded by overlapping obligations.

A related issue concerns member states' interpretation of when a payment services agent appointment is required, and what activity requires such appointment. We understand for example that the Bank of Italy considers an Agency relationship to arise where the services of a non-local PSP are merely promoted by a third party in Italy, while other NCAs take the view that a PSD2 Agency relationship only arises when a third party provides regulated payment services on behalf of the PSP.

23. With regard to small payment institutions, how has the PSD2 waiver and the accompanying notification requirement been applied (Article 32 PSD2)? What is the impact on affected small payment institutions?

The PSD2 waiver and notification requirement has operated effectively, and allowed smaller institutions to operate, scale up, and then apply for a full licence. It is a useful tool to allow market entry for new players.

VI. Impact of PSD2 on transparency of conditions and information requirements

24. How effective are the PSD2 transparency and information requirements? Did the transparency and information requirements improve user convenience and contributed to an informed user choice among different payment products? Are additional rules (e.g. regarding the advertising of payment services or standardisation of contractual information) necessary?

- The MS derogation regarding the **treatment of microenterprises as set out in Art. 38(2) PSD2** is better removed. Microenterprises are not consumers and should not be treated as such. Furthermore, this derogation and the matching one in Title IV create inconsistent COB treatments across the EU as not all MSs apply the derogation (and some apply it in one PSD2 title but not the other). This will also ensure consistency with the approach to businesses in EMD2 with respect to holding e-money and consistency with the general commercial approach of the freedom to contract.
- **Article 42(1) regarding a reduced information requirement for low-value payment instruments** and e-money: the values in this article should be increased to reflect at least inflation if not increased to an individual transaction limit of EUR100, and spending/storage limits of EUR500.
- **Article 42(2**): For national payment transactions, MSs should not be permitted to reduce the limits but only double the amounts in Article 42(1). The e-money storage limit should be increased to EUR1,000 to reflect the passage of time and inflation at least.
- **Regarding Article 51(1) and any other reference to providing information or providing information on a durable medium**: providing information through an app or a dedicated online interface (e. g. online account) should be treated as providing information on a durable medium. The times have changed and it is not beneficial to consumers to retain rules that do not reflect consumer behaviour. For example, consumers today will use their app notifications the way letters, or even emails, used to be used a few years ago. Consumers have access to their online interface with all the information about payment transactions in one place, and use the interface to keep informed. This could for example include an online dashboard that serves to inform users of various pieces of information relating to their service. Notifications sent to these online interfaces/accounts should be treated as a durable medium.
- **Regarding Article 54(1) and unilateral changes to a framework contract** as permitted under the relevant contract: PSD2 is a maximum harmonisation directive and it is expected that PSD3 will be also - accordingly, no MS consumer protection law should be permitted to override this important tool used to manage contractual relationships with PSUs.

  The PSD2 already provides the necessary safeguards, and the intervention of MS laws would create inconsistent (and differing) treatment across the EU. Some MSs attempt to implement (or are already implementing) separate rules to take away the unilateral change right (when agreed in the contract) and replace it with a requirement to always obtain an agreement from the PSU when introducing changes to the framework contract. This requirement is disruptive and is not beneficial to consumers, who may

forget to accept the changes and then find themselves in a position where their cards/accounts are cancelled, or DDs do not work and similar, when this is not something they wanted.

The payments regulation already protects the consumer by making sure they are notified fully of any changes in advance. Putting any additional obligation on the consumer to accept the changes in order to continue using the service is unnecessary and burdensome, considering how consumers use their payment services today (i.e. they usually have several cards and accounts, and can easily change banks/PSPs) - expecting them to accept changes from all the providers does not protect them. Making sure they are notified correctly protects them and offers them the choice to exit the contract or continue without taking any action (i.e. unilateral change).

- Similarly, if the change is beneficial to the consumer, the notice period should be shorter (e.g. two weeks (general consumer protection law notice period)). This ensures any beneficial changes being introduced swiftly for the benefit of the consumer.
- Information requirements that are required to be made by PISPs should be clarified and simplified. Depending on the business model, there may be no regulated service offered to payers/consumers, (where for example, the merchant is the PISP's customer), minimum disclosures to the consumer should be set out and it should be clarified that these do not create a contract with the payer - (e.g. authentication process, contact details, etc.).

VII. Rights and obligations

25. How effective are the rights and obligation provisions (e.g. regarding charges, liability and recovery of damages) of the PSD2? Please explain the impact of PSD2 on the day-to-day experience of payment services users (e.g. users' awareness of their rights and obligations regarding PSD2)

- **Article 61(1):** this derogation is better removed, and non-consumer PSUs and PSP should be free to contractually agree to disapply the provisions of the domestic implementation of Article 102 (ADR procedures). This would give the businesses the same freedom to agree their own bespoke ADR mechanisms as in other commercial arrangements without the PSP being caught in a government-mandated system that is consumer focused and not business focused, and that operates without the benefit of the court systems' legal expertise and the intermediation of lawyers.
- **Article 61(2):** the MS derogation regarding the treatment of microenterprises is better removed. Microenterprises are not consumers and should not be treated as such. Furthermore, this derogation and the equivalent provision in Title III create inconsistent COB treatments across the EU as not all MSs apply the derogation. This will also ensure consistency with the approach to businesses in EMD2 with respect to holding e-money.
- **Article 63(1):** regarding reduced obligation requirements for low-value payment instruments and e-money - the values in this article should be increased to reflect at least inflation if not increased to an individual transaction limit of EUR100, and spending/storage limits of EUR500.
- **Article 63(2)**: we make similar comments to those made above under Title III. For national payment transactions, MSs should not be permitted to reduce the limits, but

only to double the amounts in Article 63(1). Same comments as above for Title III. The e-money storage limit should be increased to EUR1,000 to reflect the passage of time and at least the inflation.

- **Article 74(1):** the maximum liability for a payer resulting from the use of a lost or stolen payment instrument or from the misappropriation of a payment instrument should be increased to reflect inflation and also to discourage careless or reckless behaviour on the part of the consumer - we suggest a new limit of EUR150. Furthermore, MS should not have a derogation permitting them to reduce the maximum liability as this creates differing treatment across the EU for different consumers.

26. Are the rules regarding framework contracts and single payment contracts still fit for purpose, especially in cases involving several service providers?

There is a good deal of variation between members states' expectation for the detailed provisions of framework contracts; we support a less prescriptive approach, enabling a fit for purpose approach to be developed by industry.

27. Are the rules regarding changes in conditions of framework contracts adequate for purpose, especially in cases where the payment services user does not agree with the changes?

We have addressed this issue in our response to question 24; and have set this out again below for convenience.

- **Regarding Article 51(1) and any other reference to providing information or providing information on a durable medium**: providing information through an app or a dedicated online interface (e. g. online account) should be treated as providing information on a durable medium. The times have changed and it is not beneficial to consumers to keep the rules that do not reflect how the consumers behave. For example, consumers today will use their app notifications the way letters, or even emails, used to be used a few years ago. Consumers have access to their online interface with all the information about the transactions in one place and use the interface to keep informed. This could for example include an online dashboard that serves to inform users of various pieces of information relating to their service. Notifications sent to these online interfaces/accounts should be treated as a durable medium.
- **Regarding Article 54(1) and unilateral changes to a framework contract as permitted under the relevant contract**. PSD2 is a maximum harmonisation directive and it is expected that PSD3 will be also - accordingly, no MS consumer protection law should be permitted to override this important tool used to manage contractual relationships with PSUs.

  The PSD2 already provides the necessary safeguards and the intervention of MS laws would create inconsistent (and differing) treatment across the EU. Some MSs attempt to implement (or are already implementing) separate rules to take away the unilateral change right (when agreed in the contract) and replace it with a requirement to always obtain an agreement from the PSU when introducing changes to the framework contract. This requirement is disruptive and is not beneficial to consumers, who may forget to accept the changes and then find themselves in a

position where their cards/accounts are cancelled, or DDs do not work and similar, when this is not something they wanted.

The payments regulation already protects the consumer by making sure they are notified fully of any changes in advance. Putting this additional obligation on the consumer to accept the changes in order to continue using the service is unnecessary and burdensome, considering how consumers use their payment services today (i.e. they usually have several cards and accounts, and can easily change banks/PSPs) - expecting them to accept changes from all the providers does not protect them. Making sure they are notified correctly protects them and then they should have a choice to exit the contract or continue without doing anything (i.e. unilateral change).

- Similarly, if the change is beneficial to the consumer, the notice period should be shorter (e.g. two weeks (general consumer protection law notice period)). This ensures any beneficial changes being introduced swiftly for the benefit of the consumer.
- In any event, the notice period of two months must not under any circumstances be increased. It is also crucial to retain the language relating to the customer's deemed acceptance of the changes. It would not be feasible for a PSP to obtain an answer from every PSU in the event of a change to the framework contract - this could cause a disruption to the service in question not intended by the consumer; accordingly, this language must be retained in PSD3.

28. To what extent promote the rules regarding charges competition and encourage efficient payment instruments? Please outline the rules' impact on: the competition in the payments market; prices of payment services; simplicity/complexity of payment products; and choice among payment products.

Rules that enable users understand service offerings, to better compare services, and to have control over their services will ultimately serve both competition and consumer good. This is reflected in our comments throughout.

29. What are the practical and financial consequences of the application of the surcharging ban from the perspective of payment service providers and payment services users (both merchants and consumers)?

This issue will require some time to explore, but industry is generally supportive of the ban on surcharging, enabling users to use whatever payment product they prefer at the point of interaction.

30. How have the rules on refunds and the associated rules on the burden of proof worked, especially regarding payment initiation services? Have they been correctly applied?

These have varied from product to product, with some difficulties being encountered for some services. We are in the process of collating information and can provide additional data at a later stage.

Refunds have been difficult to implement in the PISP context as frequently, a refund is regarded as a new transaction, and is therefore subject to SCA.

This issue supports our general preposition that the application of SCA should be risk-based; so given that refunds are mostly low risk transactions; the PSP should be able to choose not to apply SCA.

X. Data access and data sharing

31. With regards to implementation, what needs to be improved on PSD2 rules on access to and use of payment accounts data in the Member States?

Definition of 'payment account':

Member State transposition of the definition of a 'payment account' into national legislation has led to differences in interpretation which presents complications for TPPs that are active in multiple countries. For instance, the assessment of whether a 'credit card account' falls within the scope of the PSD2 definition of 'payment account' varies by Member State. Consequently, TPPs providing services in multiple EEA countries may access credit card account data in one country, whereas banks in another country do not make this data accessible.

Providing access to 'payment accounts':

As PSD2 implementation has demonstrated, ASPSPs have faced significant cost in developing compliant access interfaces to payment accounts. This has had particular impact on smaller ASPSPs who, as yet, have not seen significant demand for access by TPPs. Indeed, some of our Members have implemented, and now maintain, PSD2 compliant interfaces to payment accounts, and report no demand at all for access from TPPs. The requirement to provide an interface for data access by TPPs where there is no market demand, is a barrier to entry for small and niche innovative financial solutions.

If PSD2 rules on access to payment accounts are to be further developed, consideration must be given to the potential impact on smaller financial institutions, and whether the cost borne will result in the anticipated benefits to consumers and businesses.

There is an opportunity to introduce thresholds (volume of payment accounts, volume of transactions, etc.) below which ASPSPs could launch and operate payment services without having to provide TPP access to payment accounts data. This could also be coupled with an exemption process for those ASPSPs whose payment services and accounts see no demand from TPPs for access.

TPPs' access to data:

TPPs' product propositions, and ultimate value, will only be fully realized by combining multiple financial data sets. The key barriers to developing and scaling TPP propositions is the data provider's willingness to share data, and a standardised mechanism for accessing data (such as APIs). Some of the challenges experienced by TPPs accessing data are:

- The mixture of different types of interfaces (APIs and MCIs) to access data and the operational complexity and cost this introduces for TPPs in maintaining multiple connections across all data providers,
- Poor stability and performance of PSD2 APIs, in some cases,
- Data parity between customer interfaces and dedicated interfaces: for example, some APIs don't contain FX pricing information, though they contain all other prices (to allow customers to compare products),
- 90-day re-authentication requirement: AISPs should be able to operate their services on a continuous unattended basis without the need for the PSU to re-authenticate with the ASPSP every 90 days (or every 180 days, as per changes currently proposed by the EBA in its CP 2021/32),
- Regulatory perimeter – PISPs should be able to access AIS data in order to manage their payment risk even if they don't intend to offer AIS products.
- Definition of 'payment account' - see also our response above regarding the differing interpretations of what constitutes a payment account and the subsequent fragmented approach to data access this can result in.

32. Is it always clear to the customer with whom the contract is concluded when a customer makes use of a payment initiation? If not, for which reasons? Should additional requirements be introduced? Or what should be simplified?

PSD2 requires payment service providers to make specific disclosures to their customers regarding the service that is being offered.

There may be some uncertainty whether a service is offered to a payer when a PISP is acting on behalf of a payee, and this merits some clarification. We do not believe any additional disclosure obligations are required in the legislation.

There are also instances where a number of service providers may be involved in delivering a payment service to the customer; and it may be that only one or several of them contract with the customer. The customer should be able to discern this clearly from their framework or single transaction contract.

33. What are the trends with regard to Application Programming Interfaces (APIs)? Are there common standards (e.g. Berlin Group, STET, etc.)? Should there be further standardisation of APIs?

Further alignment of industry standards will help drive migration to PSD2 APIs because implementation complexity and cost will reduce, and ultimately encourage pan-European solutions to emerge. In particular, when considering payment initiation APIs, there are a number of areas where further standardisation would assist PSPs to develop the market for innovative PIS solutions.

However, further layers of *legislation* at the API standards level could risk the technical neutrality of the regulatory framework and limit the opportunity for market innovation based on PSD2 APIs. There is also the risk that maximum harmonisation principles applied at the API standards level may result in a narrowing in scope of PSD2 API functionality, diminishing their usefulness and driving more functionality to the commercial API space. We therefore do not consider it necessary for a legislative solution in this respect.

34. Please provide your view on the openAPI infrastructure and its functioning, in particular the changes required in terms of business models, costs and effort related to implementing PSD2 vs the scale of openAPI use and revenues?

The costs associated with access to payment accounts have been addressed in our response to question 31. TPPs on the other hand are focused on such product propositions, and this will be party of their cost of doing business. Moving towards common standards will be preferable, will decrease costs for all parties, and maximise the number of accessible users.

35. With regards to consent management, are there any specific issues related to ensuring that customer consent is meaningful (e.g. free, informed and specific)? If so how can this be improved?

We would like to raise a separate issue related to consent within the context of PSD2: Article 94(2) of PSD2 provides: *Payment service providers shall only access, process and retain personal data necessary for the provision of their payment services, with the explicit consent of the payment service user.*

This article must be amended to either:

1. remove the term "explicit"; or
2. clarify that "explicit consent" in this context <u>does not necessarily</u> mean contractual consent.

The EDPB Guidelines on the interplay between PSD2 and the GDPR interpret "explicit consent" in article 94(2) to mean contractual consent. Paragraph 36 provides: *"Explicit consent" referred to in Article 94 (2) PSD2 is a contractual consent. This implies that Article 94 (2) PSD2 should be interpreted in the sense that when entering a contract with a payment service provider under the PSD2, data subjects must be made fully aware of the specific categories of personal data that will be processed. Further, they have to be made aware of the specific (payment service) purpose for which their personal data will be processed and have to explicitly agree to these clauses. Such clauses should be clearly distinguishable from the other matters dealt with in the contract and would need to be explicitly accepted by the data subject.*

In the context of a PISP providing a payment initiation service ("PIS") to a merchant, which is the payee and not the payer in a payment transaction for the purchase of goods or services, the interpretation that "explicit consent" means "contractual consent" means that the relevant payment service user for the purposes of PSD2 94(2) is the merchant (i.e. the payee) and not the consumer or another type of purchaser (i.e. the payer).

Such a PISP (that is one providing a PIS to a merchant) does not routinely enter into a contract with the payer because it provides its payment service to the merchant not the payer. A PISP enters into a contract with the payee and is, therefore, able to obtain the payee's "explicit consent" i.e. on the basis of the payee agreeing to certain clauses legislating for such consent in the framework contract.

PSD2 article 94(2) must be clarified to ensure the Guidelines are not misconstrued as requiring a PISP that provides PIS to merchants to enter into contracts with a payer in order to obtain the payer's explicit consent. <u>This is not required under PSD2 94(2) nor</u>

practically feasible. The payer does not enter into a contract with such a PISP. The payer has limited interaction with this type of PISP.

Such an interpretation would be incorrect and restrict the PISP's ability to comply with PSD2 94(2).

36. With regards to scope of data access and sharing, what are the benefits and challenges of a possible extension of PSD2 approach to the access to and use of payment accounts data to other accounts within the banking sector (e.g. savings account information, consumer credit data)?

As the capabilities enabled by PSD2 mature and customer adoption grows, the potential for service and experience innovation based on open data and finance expands. We consider two key factors could determine the size and depth of open financial data's impact—the types of products included in scope, and whether the legislative framework allows customers to take action with their data as opposed to just viewing it.

However, there have been significant challenges in applying PSD2 legal framework to an area defined by rapid digital innovation. Firms have had to navigate their way through numerous pieces of legislation, regulatory guidance, opinions, and industry thinking before turning to technical standards and solution implementation. The substantial investment by all participants in the open banking ecosystem over a prolonged period of time cannot be underestimated, and has far exceeded original costs envisaged by regulators. This has to be a key consideration when planning a way forward for the scope of data access and sharing under PSD2.

In addition, regulation as the motivating force has inevitably resulted in a compliance-driven approach to developing technical standards and their implementation. This has slowed the pace of innovation as ASPSP and TPP legislative interpretation, expectations, and requirements have often not been aligned. Data providers must be sufficiently commercially incentivised to provide fully open and functioning access to data. This will only be achieved where the services developed are driven from clear customer and market demand.

Whilst some regulatory incentive will undoubtedly be required to achieve some of the objectives behind data sharing under PSD2, the boundaries of the mandated scope of data access and sharing should be carefully considered so as not to stifle market driven innovation.
See also our response to Question 31.

37. How are PSD2 rules on the availability of funds applied (Article 65 PSD2)? What business models regarding the availability of funds have been developed?

We are not aware of any businesses currently implementing this provision, and it may be that access to account balance without the means to reserve funds does not meet business requirements for offering an effective product.

X. Efficiency

38. What were the main factors that influenced the costs and benefits of PSD2? Is there a difference across Member States?

The benefits of PSD2 have proven to be numerous, from creating the concept of a payment institution, to establishing a level playing field for payment service providers, to increasing competition and latterly to the introduction of AIS and PIS services.

The costs and the difficulties that have been encountered relate largely to inconsistent application of some provisions across the EU, absence of clarity in relation to some provisions, and significantly, adopting detailed technical solutions to security and IT problems that are best addressed by industry without the obligation to adopt a single legislated solution. We suggest that provisions relating to SCA for example be set out as security objectives and that the solutions are left to industry to develop and to innovate.

39. Are there opportunities to revise or simplify the legislation to reduce unnecessary costs or maximise benefits? If so, indicate the legislative requirement, how a revision/simplification could contribute to lower costs or higher benefits. Would this have an impact on the intended objectives of PSD2? *(Reminder: the original objectives of the PSD are: Improving competition and cross-border payments, supporting innovation, increasing transparency, efficiency and choice for users as well as ensuring high-level protection for users)*

As stated earlier, SCA requirements have added friction to the everyday interactions of PSUs with payment accounts. The introduction of SCA has also impeded the ability of PSPs to deliver their services to PSUs with lower levels of digital literacy (or access to digital devices) or to vulnerable customers. PSPs are increasingly relying on less secure fallback channels (e.g. SMS, email) to complete PSU authentication for these customers. One possible solution would be to expand the scope of acceptable SCA elements to consider offline Use Cases or to service PSUs with lower levels of digital literacy.

Any future iterations of PSD2 should adopt a risk-based SCA application approach whereby Strong Customer Authentication is only applied where necessary (i.e. for high-risk payment account interactions). Such an approach would reduce the likelihood of legitimate transactions being declined and lower transaction abandonment rates. Allowing PSPs to deploy holistic user authentication frameworks that leverage "adaptive authentication" approaches to reflect the varying risks of attempted payment account interactions can preserve current SCA PSU security benefits while minimising friction in the customer experience.

The current treatment of all payment account interactions listed in Art.97(1) of PSD2 as a trigger for SCA appears to ignore the different risk profiles of such interactions (balance/history look up, payment transaction initiation/execution, account profile lookup/revision). This monolithic treatment of account interaction types has resulted in multiple SCAs being performed by payment ecosystem participants to complete a single payment transaction. Common examples include (i) The use of digital wallets to initiate a payment when both the wallet funding and the outward payment transaction require the execution of SCA or (ii) Combined AIS/PIS payment account accesses where a user first reviews account information before subsequently initiating a payment transaction. Payment industry participants have attempted to reduce the impact of this blanket regulatory treatment of different payment account interactions for SCA purposes by re-engineering payment flows and making use of SCA exemption or exclusions (e.g. increasing use of MITs). However, there is growing industry concern that this may not be a viable, long-term approach. The revision of Art. 97 (1) of PSD2 to afford greater PSP flexibility to apply SCA only in higher-risk transactions would offer a more viable alternative. Under the proposed revised treatment of account interactions, PSPs could still be required to apply appropriate customer authentication techniques (e.g. leveraging a single authentication element type) for lower-risk interactions.

Therefore, it would be useful to define more tightly the payer activities that must trigger SCA in Art.97 (1) of PSD2. Specifically, condition (c) should be revised to identify the actions - carried out over a remote channel - that must trigger SCA. The specification of SCA exemptions should continue to be included in Level 2/3 legal text that can be revised more frequently to address evolving fraud threats.

Additionally, the adoption of a prescriptive approach to implementing SCA in Level 1 text - rather than setting out a set of security objectives to be attained through the use of SCA implementation approaches- is likely to give rise to greater systemic payment ecosystem security risks. Attacks that target the specific SCA implementation can impact the entire payment ecosystem in the Union. The adoption of a prescriptive SCA implementation approach in Legal text that changes slowly can also limit innovation and the use of novel technologies that are showing potential to address payment security risks (AI, machine learning, behavioural biometrics). In this context, future revisions of PSD2 could consider allowing the use of alternative authentication mechanisms that can demonstrate equivalent strength to the current definition of SCA (e.g. one or multiple authentication elements of the same type coupled with additional PSP layered data) to attain the stated security objectives.

It is worth highlighting that Retailers and Acquirers are making increasing use of Merchant Initiated Transactions (MITs) including Direct Debits, Standing Orders to receive payment using transaction types that are excluded from the SCA requirements in PSD2. If MITs were moved within the perimeter of SCA requirements, the payment industry would suffer significant additional disruption. MOTO transactions are also currently out of scope of the SCA requirements in PSD2 unless a remote electronic channel is used to initiate such transactions. Our view is that MOTO transactions should remain out of scope SCA requirements since they experience low levels of fraud.

PSPs have commented that changes to SCA for e-commerce card payments have only recently been fully implemented (end of December 2020) and they will need some time to operate before meaningful conclusions can be reached as to their efficacy.

XI. Relevance

40. To which extent does PSD2 address current developments regarding providers of payment services (Banks, Third-Party Providers, young innovative entities/start-ups, large non-financial companies)?

The overall objectives of PSD2 are supported; industry and PSPs have however evolved in their roles and in the payment services that they offer. There have also been challenges that have caused serious difficulty to many firms. De-risking and availability of bank accounts continues to be a serious problem that requires legislative intervention.

As PIs begin to challenge banks in offering services in the retail and B2B sectors, direct access to payment schemes and systems becomes more urgent, and removing barriers to such access must be prioritised. This includes amending the Settlement Finality Directive to enable access to designated payment systems.

The advent of a digital Euro and CBDCs in general also raises a number of challenges and possibly opportunities too. More formal engagement with this process is critical as well as sight of proposed plans at the earliest possible stage in order to enable the sector to react appropriately, including by supporting such launches.

In relation to specific provisions of PSD2, please refer to our responses to questions 31 and 39 above.

41. To which extent does PSD2 address trends regarding payment initiation and account aggregation services (e.g. needs and behaviours of service users and splitting of value chains)?

Both of these sectors are rapidly evolving and there is a need to ensure that provisions of the PSD or of level 2 text do not act to inhibit innovation or to restrict product propositions. The definition of AIS services and the conceptual approach to PIS services could be revised to enable more innovative services to be offered.

For example, AIS services have significantly evolved from being aggregators of information on different accounts; and PIS services now include products intended to facilitate treasury management or that are intended as services for payers rather than payees.

Please also refer to our response to question 31.

XII. EU value added

42. Did PSD2 help in establishing and fostering an EU-wide level playing field (e.g. information symmetries; same interests; closing regulatory gaps) in payment services?

PSD2 has made important strides in creating a single level playing field for different types of PSPs. There remain however important asymmetries as set out in our response to question 40: namely access to payment systems, access to bank accounts, the ability to introduce innovative means of authentication and in deploying services across the EU without onerous host member state requirements.

43. To which extent did PSD2 improve the functioning of the internal market?

PSD1 introduced the concept of a PI as a regulated payment service provider with mutual recognition rights across the EU; PSD2 added AIS and PIS services and service providers and this has further extended this regime.

Mutual recognition has made the ability to offer a single payment product across the EU a realistic proposition, but friction still needs to be removed in the passporting process.

Other related legislative frameworks, such as that for anti-money laundering also play an important role in enabling efficient and competitive payment services to be offered across the internal market.

Legislation could focus more on the working of the internal market in practice, addressing issues such cooperation between NCAs, mutual recognition, interpretation of legislative text and encouraging competition.

44. Are (additional) actions at EU level needed or justifiable to ensure a (further) coherent and effective supervision of payment services (i.e. to ensure a harmonised supervisory approach in the field of retail payments activity and with other EU financial legislation)? Is there a need to introduce specific or additional supervisory powers at EU level? How could these supervisory powers be designed?

Article 36 on access to bank accounts

Whilst Article 36 has been implemented in all EU member states, it has not been implemented consistently, and EMIs, PIs and cryptoasset firms continue to have great difficulty obtaining or holding on to a bank account. A number of adjustments to the relevant PSD2 article could improve the situation:

- Member States should be obliged to make access to banking services a right for PSPs, or to intervene where no banking services have been forthcoming in a given MS
- It should be clarified that the obligation for a CI to notify the NCA is triggered not only when refusing an application to open an account, but also when closing an existing account ("de-risking"). Member State interpretations have differed on this point, so the quantity and quality of notifications is inconsistent.
- Guidance should be provided for Credit Institutions in relation to their obligations under this Article, for example at what stage a refusal to onboard must be notified to the NCA, what mechanism they should use to notify the NCA, or in what circumstances the closure of an account must be notified to the NCA.
- MS should be obliged to collect and publish data at national and EU level on the number of PSPs that are de-risked or refused at application stage.

Article 35 on access to payment systems

Open, non-discriminatory, access to payment system infrastructure and operations is important for driving competition in the payments market, the uptake of instant payments, and achieving economies of scale. In order to generate a level playing field, and leverage innovative payment service providers' models, the operators of payment system infrastructures, and supporting technical service providers, cannot act as gatekeepers to payment system technical infrastructures.

Differing national approaches leads to market fragmentation, and we support EU-level action to ensure maximum harmonisation and a level playing for all market participants across Member States.

Competition between payment service providers (PSPs) will ultimately be to the advantage of end users of the payments systems; resulting in ease of use, reduced costs, and a wide acceptance network of payment methods. While we acknowledge that

not all PSPs may want to participate directly in a payment system, the route for those that do should not be prevented.

We expect and hope that the Settlement Finality Directive (SFD) will be amended to allow EMIs and PIs to participate in designated payment systems. Direct access by non-bank PSPs will also lead to:

- Improved resilience of payments – reducing complexity and links in technical chain means PSPs are more resilient and protected from IT failures elsewhere in the payment chain.
- Increased coverage – the economies of scale of payments systems can be more rapidly achieved if there are more PSPs are able to offer cost- effective services to payment users.
- Improved speed of adoption of SCTInst – non-bank PSPs would no longer be reliant on their sponsor banks' capacity to implement new payment schemes or features, such as SCTInst.

Article 35(1) provides that *Member States shall ensure that the rules on access of authorised or registered payment service providers that are legal persons to payment systems are objective, non-discriminatory and proportionate and that they do not inhibit access more than is necessary to safeguard against specific risks such as settlement risk, operational risk and business risk and to protect the financial and operational stability of the payment system.*

In order to ensure access, and if the SFD is not amended before the PSD2 is revised, we suggest removing the exemption for Article 35(2)(a) enabling access to designated payment systems, perhaps unders specific conditions that are non-discriminatory to PIs.

IBAN Discrimination

There continues to be widespread IBAN discrimination in the EU with banks and businesses refusing to accept direct debits and other payment arrangements that utilise non local IBAN numbers.

There has recently been an increase in entities refusing to accept UK IBANs even though the UK continues to participate in SEPA.

We urge the Commission to address IBAN discrimination urgently, both within the EU and within the SEPA scheme, implementing the EPC SEPA governing regulations (EU/260/2012).

45. Is a level playing field (same business – same regulation – same risks) still ensured?

Please refer to our responses to questions above citing issues relating to access to bank accounts, payment systems, passporting and AIS/PIS account access.

46. What are the consequences for payment services users if PSD2 waiver is made use of? Are there any issues hindering access?

We do not have data on this issue.

XIII. Closing question

47. Is there anything else that has not been covered so far that you would like to share with the study team?

(i) **Operational and security risks** are only referenced at a high level in Art.95 of PSD2. The risks are detailed in Level 1 text (the EBA Guidelines on ICT and Security Risk Management). These Guidelines cover an appropriate range of operational and security risks; they are next scheduled for review in 2022. There is some uncertainty on the treatment of Operational Resilience risks due to the publication of the EC DORA Draft Regulation. An area where additional regulatory guidance is required is the exchange of risk information from NCAs and the ECB to regulated entities. It is not clear at present whether the operational risk monitoring and incident reporting requirements that the DORA regulation introduces are to be treated as part of the operational and security risk frameworks that regulated entities have already deployed to comply with the relevant requirements in PSD2.

(ii) **We are in favour of IT security related provisions being set out at a high level, as objectives rather than specific solutions.** In the event that this is not achieved we suggest that:

- Level 2 RTS/GLs etc are impacted by product and market developments on a continuous basis; the EBA should therefore be given a mandate to implement changes on a regular basis to keep pace with market changes, without the need for Level 1 PSD2 text changes.
- Similarly, the process of producing RTS and GLs, then clarifying via Q&As, often over several years, is out of step with business and market needs, and requires revision to enable speedy responses, that are informed by business and market needs, and which provide an explanation of how market issues have been addressed.

(iii) **Reporting obligations draw considerably on firms' resources**, with little visible impact on supervisory effectiveness or on policy.

- We request increased coordination and alignment between ECB and EBA regarding reporting requirements, and some means of providing feedback on the outcomes of data collection exercises.
- There have also been recent changes to the data elements that are reported and this has given rise to considerable additional resource requirements. Although the burden has been reduced somewhat by combining the two reports at national level, it would be helpful if EU policymakers could guarantee that the data collection would remain static for some years to come, in order to reduce the cost and resources needed for the recent substantive changes that were introduced twice in the course of 2 years.

48. Could you put us in touch with some your member companies who might be interested in an interview?

Please approach us for further engagement.