Topics of this issue:

1. Presidency reaches compromise on PSD 2

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Having reached a compromise on the proposed interchange fee regulation, the Presidency of the EU Council has also reached a broad agreement with respect to the revised Payment Services Directive (PSD2).[1] If adopted by the Permanent Representatives Committee, this compromise will define the Council's position in Trilogue negotiations with the Commission and the EU Parliament.

In an accompanying document,[2] it is pointed out that the proposed Directive aims at

- "further developing the EU-wide market for electronic payments in a technologically neutral manner",
- "adapting the existing payment framework to emerging and innovative payment services, in particular internet and mobile payments",
- facilitating and making "more secure the use of internet payment services by including within its scope new so-called "payment initiation services" and "account information services",
- reinforcing "consumer protection through revised information and liability rules".

It has been a long process. In July 2013, the EU Commission published a draft version of the PSD 2. Subsequently, the ECB and the European Parliament delivered their opinions. Now, finally, the European Council also has come up with an opinion. As a consequence, the adoption of a PSD 2 in spring 2015 does not seem unrealistic. After the adoption, there is a 2-year period for the transposition into national laws of member states.

[1] Council of the European Union: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on payment services in the internal market and amending Directives 2002/65/EC, 2013/36/EU and 2009/110/EC and repealing Directive 2007/64/EC - Presidency compromise (16154/14), Brussels, 1 December 2014.
[2] Council of the European Union: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on payment services in the internal market and amending Directives 2002/65/EC, 2013/36/EU and 2009/110/EC and repealing Directive 2007/64/EC - Approval of a negotiating mandate (16155/14), Brussels, 1 December 2014

A systematic discussion of the PSD 2 proposal of the Presidency is beyond the scope of this newsletter. We will, however, highlight a few important issues.

- **Options for Member States**

One of the features of the current PSD is the large number of options for national law makers. Such options contradict the aim of full harmonization. However, in the 2013 proposal of the EU Commission a number of options for member states were included and subsequently, more options have been added, most notable the right of Member States to prohibit surcharging (Article 55(3)).

Table 1 Options for Member States

Article 2(1d) and (2), (Scope of Title I),	Article 51(3), (information),
Article 7(3) (own funds),	Article 54(2) and (3), (scope of Title IV),
Article 27, (waiver),	Article 55(3), (surcharging),
Article 31(2), (scope of Title III),	Article 56(2) and (3), (low-value payments, e-money),
Article 35(2), (low-value payments, e-money),	Article 66(1b), (liability)
Article 48(6), (termination),	Article 77, (execution time)
Article 50(3), (information),	

(All of these options are listed in Article 95)

- **Payment initiation services**

One of the most contested issues is the treatment of payment initiation services (and, to a lesser extent, account information services). The EU Commission proposed to bring such services under the wings of the PSD 2 and to introduce a right to access payments accounts. The Presidency compromise endorses this view, stating: “These services offer a low-cost solution for both merchants and consumers and provide consumers with a possibility to shop online even if they do not possess payment cards.” To achieve this end, the list of payment services in in the Annex to the Directive contains the new service “payment initiation” (as well as account information).

Information requirements with respect to payer and payee are defined in Articles 38 and 39. Article 40 rules that the payer’s account servicing payment service provider shall be provided with a reference of the transaction.

More than once it is stressed in this document that payment initiation is a legitimate service and that account servicing payment service provider (mainly banks) may not block such transactions or discriminate against such transactions. See Article 57 (2), Article 58 (2), Article 69 (1d), Article 102 (6).

Article 58 defines mutual obligations of the payment initiation service provider and the account servicing provider. Inter alia, it obliges the payment initiation service provider shall “authenticate itself towards the account servicing payment service provider of the account owner” (Article 58 (1a) b).

The difficult question of how to deal with disputed, non-executed or defective payment transactions that have been carried out with the help of a payment initiation service are dealt with in Articles 63, 64, 65, and 80. In most cases, the account servicing payment service provider is the first port of call for customers.

- **Competences of the European Banking Authority (EBA)**

The EBA shall take over task of co-ordination and information exchange between national supervisors:

- EBA register of authorised payment institutions and waived institutions (Article 14),
- Settlement of disagreements between competent authorities of different Member States (Article 25a).

EBA shall develop draft regulatory technical standards specifying the framework for the co-operation and exchange of information of competent authorities of the home Member (Article 26 (6))

„EBA shall, in close cooperation with the ECB, develop guidelines with regard to the establishment, implementation and monitoring of the security measures, including certification processes when relevant.“ (Article 85 (3))

EBA shall issue guidelines on the classification of major operational incidents and on the criteria on how to assess the relevance of these incidents. (Article 86 (3))

The EBA is also entrusted with the task to set regulatory technical standards on authentication and communication. Most importantly, this includes the requirements of strong customer authentication and the exemptions. Furthermore, it has to specify the requirements for technical security measures and the protection of the confidentiality and the integrity of the payment service users’ personalised security credentials. (Article 87a)

- **Limited networks (Article. 3 (k))**

The EU Commission had been concerned that the exemption of Art. 3 (k) for limited networks might have been too broad and announced a stricter definition. However, the wording of 3 (k) in its 2013 proposal was little different from the PSD 1. Fortunately, the proposal of the Presidency is more precise. If adopted it will allow a number of limited networks, such as for instance semi-open-loop payments cards, accepted by third-parties under the same acceptance brand as the issuer, to remain outside of the scope of the PSD.

- **Refund rights (Article 67 (1))**

The EU Commission proposal contained an "unconditional right for refund within the time limits set in Article 68, except where the payee has already fulfilled the contractual obligations and the services have already been received or the goods have already been consumed by the payer." The Presidency compromise deleted this exception stating that "the payer's payment service provider may agree in the framework contract that the payer is entitled to a refund from his payment service provider even though the conditions for refund in the first subparagraph are not met."

- **1-leg or 2-leg approach**

Originally, the PSD followed a 2-leg approach, i.e. it applied to a particular transaction if both payment service providers (the PSP of the payer and the PSP of the payee) were located in the EU. The Presidency proposal contains a tiered approach. If both PSPs are located in the EU and if the transaction is carried out in a currency of one of the Member States, Titles III and IV are fully applicable. If the transaction is carried out in a currency that is not the currency of a Member State, certain exemptions apply. Equally, if only one PSP is located in the EU, Titles III and IV apply - but there are exemptions with respect to some of the provisions.

- **Definition of "acquiring"**

"Acquiring of payment transactions" is defined as follows: "a payment service provided by a payment service provider contracting with a payee to accept and process payment transactions, which results in a transfer of funds to the payee." (Article 4 (39))

- **Cross-border supervision of payment institutions**

The old wording of Article 10 (3) "A payment institution which under the national law of its home Member State is required to have a registered office, shall have its head office in the same Member State as its registered office" has been supplemented by the following condition "and shall carry out at least part of its payment service business there." This supplement seems to have been entered in order to prevent undertakings from seeking a license in a country where they are not active. Apparently, one EU country does not agree with the proposed change.[3]

Our Comment

Access to payment accounts is a controversial topic.[4] Banks have been lobbying hard against a right to access payment accounts. But it seems as if they are losing the battle. The EU Commission, the EU Parliament and now also the EU Council are supporting the idea that "payment initiation" is a legitimate business and a welcome driver for more competition in online payments. Thus, it seems unlikely that the Trilogue negotiations will lead to drastic changes regarding this topic.

It remains to be seen, however, how banks and payment initiation service providers will get along. The rules in the Presidency compromise suggest that it may not be easy for both sides. In particular, in cases of contested or defective transactions there may be difficult negotiations between the two sides. Customers will usually call on their bank which has the obligation to refund it things went wrong. The question of liability (payment initiation service provider or bank) has to be settled afterwards. This would be easier if both sides were pursuing a joint business case rather than finding themselves in a marriage that at least one side did not want.

The PSD 2 will establish an important role for EBA as regulator of payments in the EU. One of its tasks will be co-ordination and information flow. That makes sense. The EBA will also have to specify technical standards. Whether this is a good idea or not remains to be seen. It seems to be a good idea that such standards are not included in the Directive itself. But the question remains whether regulators should go this far at all. In the long run, there is the danger that regulators will prescribe ever more technical details. After all, if they do not have to come up with their own ideas but can conveniently entrust the matter to the EBA, they may be even more enthusiastic to prescribe technical standards.

[3] Council of the European Union: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on payment services in the internal market and amending Directives 2002/65/EC, 2013/36/EU and 2009/110/EC and repealing Directive 2007/64/EC - Approval of a negotiating mandate (16155/14), Brussels, 1 December 2014.

[4] See also „PSD 2 and the battle over access to payment accounts" in the July/August edition of this newsletter.

Limited networks: We are clearly at a loss here. What are the limited networks with large payment volumes that have so-far been exempted and that will now be covered by the PSD 2? We still do not see any. [5]

We have already discussed the new definition of "acquiring". [6] *The current wording may lead to considerable differences in national regulations and should therefore be made more precise.*

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[5] See our comments in the Newsletter of January and March 2014.
[6] See: „PSD II: A new definition of ‚acquiring'", in the October edition of this newsletter.