Updating the Payment Services Directive – PSD2

In July this year, the European Commission (the "**Commission**") published its 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 ("**PSD2**"). PSD2 is the Commission's attempt to update the Payment Services Directive (2007/64/EC) ("**PSD**") to reflect new developments in the payments market.

The need for PSD2

In November 2007 the regulatory framework for payment services in Europe was harmonised for the first time through the adoption of the PSD, which introduced a licensing regime for payment institutions and aimed to create a well-functioning, integrated and competitive single market for payment services across the EU.

Since 2007 there has been significant growth in the number of card, online and mobile payments and the Commission's Green Paper on Card, Internet and Mobile Payments, published in January 2012, highlighted the growing need to update the regulatory framework for payment services to reflect new types of payment services and other developments in the payments market. PSD2 is the Commission's flagship initiative to address this need. In particular, in the FAQs accompanying PSD2, the Commission explained that PSD2 aims to boost transparency, innovation and security, create a level playing field and bring new types of payment services within scope, such as payment initiation services offered by so-called third party payment service providers.

The following sections summarise some of the key changes introduced by PSD2.

'One leg out' payments

Currently, most of the provisions of Titles III and IV of PSD only apply where all PSPs involved in the transaction are located in the EU. One of the key changes introduced by PSD2 is an expanded scope extending to 'one leg out' payments, whereby the Title III transparency and information requirements and the Article 78 value date and availability of funds requirements will extend to transactions with third countries where only one PSP is in an EU Member State.

PSD2 also extends the Title III transparency and information requirements to payments made in any currency.

'Negative scope' exemptions

The Commission found that certain negative scope exemptions had been implemented inconsistently across Member States and so it has sought to clarify and narrow the scope of these exemptions in PSD2. In particular, the ATM exemption of Article 3(o) of PSD has been removed and the limited network and mobile device content exemptions have been restricted. Under PSD2, the limited network exemption applies only to genuinely small networks which have been recognised by the competent authorities and a cap per transaction in respect of ancillary services has been introduced to the mobile device content exemption.

Expanding consumer rights and protections

Refunds

PSD currently provides that the payer is entitled to a refund from his PSP in respect of unauthorised payment transactions by requiring the PSP to restore the debited payment account to the state it would have been in if the unauthorised payment transaction had not occurred. PSD2 clarifies that in order to prevent any financial disadvantage to the payer, the credit value date for the refunded amount must be no later than the date on which the unauthorised amount was debited. PSD2 also introduces an unconditional refund right in respect of disputed direct debits, except where the payee has already fulfilled its contractual obligations and the goods or services have already been received or consumed by the payer.

Security

The duty of a payment service user ("**PSU**") to keep the personalised security features of a payment instrument safe has now been made conditional on such obligation not inhibiting the PSU's ability to use the payment instrument in question

and payers can no longer be required to bear losses relating to unauthorised payment transactions resulting from a failure to keep personalised security features safe. Moreover, in the event of theft or loss of a payment instrument, the maximum amount of loss that the payer may be obliged to bear has been reduced from EUR 150 to EUR 50.

PSD2 introduces the requirement for PSPs to apply "strong customer authentication" to secure electronic payments, unless EBA guidelines allow a specific exemption. Strong customer authentication requires two or more independent elements, such as a password and a fingerprint or a PIN and a card. If strong customer authentication is not used for payments via a distance communication, the payer would only bear financial consequences for unauthorised payments where it has acted fraudulently.

Complaints

PSD2 introduces requirements for PSPs to put in place adequate and effective consumer complaint resolution procedures. In particular, PSPs will be required to make every possible effort to respond in writing to a complaint from a PSU within 15 business days. The existing out-of-court redress procedures have also been expanded to cover the activities of authorised representatives.

Third Party Payment Service Providers ("TPPs")

Since the introduction of the PSD, there has been an expansion in the area of internet payments and third party payment service providers ("**TPPs**") have evolved, offering services based on access to payment accounts provided by a PSP in the form of payment initiation and/or account information services. However, as TPPs do not actually provide or maintain accounts for PSUs, they are not currently subject to PSD. PSD2 makes changes to bring TPPs within scope of regulation.

Some of the main provisions in PSD2 which relate specifically to TPPs include:

- the requirement for Member States to ensure that a payer has the right to use a TPP to obtain payment services enabling access to payment accounts;
- an obligation on account servicing PSPs ("**ASPSPs**") to notify the TPP immediately upon receipt of a payment order and to provide information on the availability of funds on the payer's account;
- the requirement for the TPP to provide certain information to a payer or payee (such as information on charges);
- the requirement that TPPs are given access to payment account information and are empowered to use that information; and
- provisions about liability for unauthorised or incorrectly executed payment transactions, including an attempt to place the burden of proof on TPPs in certain cases.

Arguably, this is the most significant change introduced by PSD2. Further consideration of the impact of these changes on the payments market is covered in a separate briefing.

"Payment initiation services" are payment services that enable access to a payment account provided by a TPP. For example, payment initiation services may facilitate online payments by establishing a software 'bridge' between the website of the merchant and the online banking platform of the consumer.

"Account information services" are services whereby consolidated and user-friendly information is provided to a PSU on one or more payments accounts held by it in one or more PSPs.

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J201311050044142