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IMPACT OF PSD2 ON ONLINE MARKETPLACES OPERATING IN EUROPE

The online retail market is growing exponentially in Europe. For 2017, the B2C e-commerce turnover is forecasted to reach around EUR 602 billion, representing a year-on-year growth rate of 14%. Online marketplaces help sellers scale up their operations at an unprecedented pace.

Many online marketplaces manage the flow of payments themselves by acting as intermediaries between buyers and sellers. Where an online marketplace accepts funds before transferring such funds to intended recipients, this may constitute a regulated payment service (money remittance and/or execution of payment transactions) which would require the online marketplace to be licensed under the current Payment Services Directive (PSD1), unless it can rely on an exclusion. Under the PSD1, the 'commercial agent exclusion' may apply where an online marketplace negotiates or concludes the sale and purchase of goods and services on behalf of the payer or the payee.

Many online marketplaces have taken the view that they are acting as a commercial agent where the buyer pays the seller via their online platform. However, different interpretations of the 'commercial agent exclusion' by regulators of the Member States have made it difficult for online marketplaces to apply the commercial agent exclusion consistently throughout Europe. Under the PSD1, some (but not all) Member States allowed the use of the exclusion by online marketplaces that act as intermediaries on behalf of *both* buyers and sellers but without applying a margin, to negotiate or conclude the sale or purchase of goods or services.

The revised Payment Service Directive (PSD2) – which comes into effect on 1 January 2018 – explicitly clarifies that the commercial agent exclusion only applies when the commercial agent acts only on behalf of *either* the payer or the payee (and not both), regardless of whether or not they are in possession or control of funds. Such test would not be easily met for online marketplaces which contribute in an automated manner to the conclusion of an agreement between customer and merchant.

Therefore, online marketplaces which currently rely on the commercial agent exclusion when managing the flow of payments should carefully consider whether they act on behalf of either the payer or the payee or on behalf of both, in order to assess whether they can continue to rely on the commercial agent exclusion, or whether they may need to apply for a license under PSD2. The online marketplace's contractual rights and obligations towards the payer and/or payee are likely to inform this analysis. Any other platforms which accept payments or donations before transmitting them to the intended recipient (eg online fundraising platforms) should also review their regulatory position.

As a potential alternative to licensing, online marketplaces may wish to consider whether they are able to make changes to their contractual terms and/or business model, such that they can rely on an exclusion so that they no longer provide a payment service under PSD2. For example, an online marketplace which receives payment on behalf of the payee, where such receipt constitutes settlement of the payer's debt to the payee, or which completely outsources the flow of payments from buyers to sellers through a licensed payment service provider, may not be providing a payment service under PSD2. However, this would need to be analysed carefully, on a case by case basis.

We are happy to discuss the changes to the commercial agent exclusion in relation to your business or any other matter related to PSD2 in more detail. We refer to our briefing 'PSD2 Implementation: What you need to know' which can be found at: https://www.cliffordchance.com/briefings/2017/09/psd2_implementationwhatyouneedtoknow.html.

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