

REVISED LEGISLATIVE PACKAGE ON PAYMENTS ON ITS WAY: PSD 3 AND PSR. KEY UPDATES IMPACTING THE PI AUTHORISATION PHASE



CONTEXT

On 28 June 2023, the European Commission published the proposals for the legislative package on payment services (“**Revised Payments Legislative Package**”) that will replace the Directive (EU) 2015/2366 on payment services in the internal market (“**PSD 2**”) and Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions (“**EMD**”) and merge the legal frameworks applicable to payments and electronic money services.

Awaited with great interest by all stakeholders, the European Commission’s initiative considers the outcome of the consultation carried out in 2022, including the European Banking Authority’s advice on the review of PSD2¹ (“**Opinion of EBA on the review of PSD2**”), and the study on the application and impact of PSD2², and aims to tackle the shortcomings / challenges identified in the existing payments legal framework, while improving consumer protection, competition, security, and innovation in the EU payments landscape.

The Revised Payments Legislative Package consists of:

- a draft directive on payment services and electronic money services (“**Draft PSD 3**”) to regulate the licensing and supervisory requirements for payment institutions (electronic money service providers incorporated as a sub-category of payment institutions), repealing the PSD 2 and EMD;
- a draft regulation on payment services in the internal market (“**Draft PSR**”) to cover conduct rules and operational requirements for payment and electronic money service providers offering payment and electronic money services in the EU.

OUR NOTES

In this note we aim to outline the main changes proposed by the Revised Payments Legislative Package that have an impact on the authorization phase, including requirements on / content of the authorization application, qualification of payment services and scope of licensing requirements.

While the main novelties related to the authorization phase mainly stem from the Draft PSD 3, which is largely based on title II of PSD2 regarding “Payment Service Providers”, certain changes contemplated by the Draft PSR

refer to operational requirements that need to be proven from the outset of the business activity and therefore have an impact of the authorization process. We have addressed these altogether below.

1. Updated definitions. Clearer delineation of different categories of payment services and related concepts

Credit transfers and money remittance

The similarity of the nature of business models for the provision of credit transfers and money remittance has triggered difficulties in delineating such services under the current PSD 2 regime. This translated also in different approaches taken by various competent authorities, additional efforts and information exchanges with competent authorities in qualifying the relevant services and prolonged authorization process in numerous jurisdictions.

In consideration of the EBA's views under the Opinion of EBA on the review of PSD2, the Draft PSR expressly clarifies that a payment account opened by the payment service provider in the name of the user is always needed to qualify a payment transaction as a credit transfer. Further, to allow a better distinction between such payment services, the preambles of both Draft PSD 3 and Draft PSR set out that money remittance is a payment service that is provided without any payment accounts being created in the name of the payer or the payee.

The principles that result from the above clarification should allow easier qualification of credit transfers and money remittance services in various business cases / models.

Placing / withdrawing cash from a payment account and operating a payment account

To address contradictory approaches across EU in relation to the authorization of payment services linked to payment account, the Draft PSD 3 now excludes the operations required for operating a payment account from the list of regulated payment services and clarifies that opening and maintaining a payment account does not depend on providing services enabling placing / withdrawing cash from a payment account and execution of credit transfers.

As such, under the Draft PSD 3, operation of payment accounts will not be treated as a standalone payment service requiring authorization and providers operating payment accounts will be able to obtain the payment services license only for the individual payment services linked to a payment account they intend to provide.

Issuing of payment instruments and acquiring of payment transactions

While not necessarily controversial in practice given the very different nature of such services, issuing of payment instruments and acquiring of payment transactions are set out under the Draft PSD 3 as two separate payment services. It is self-explanatory that these services may be authorized individually under the Draft PSD 3.

Despite the EBA's views in the Opinion of EBA on the review of PSD2, the European Commission did not see merits in updating the definition of issuing of payment instruments to expressly clarify whether it automatically entails the execution of payment transactions with the said instrument or requires the authorization for the distinct payment service of executing payment transactions.

As such, based on the current version of the Revised Payments Legislative Package, this will still be a matter of interpretation and corroboration of the provisions in place, however based on the novel / updated defined terms of "execution of payment transaction" and "payment instrument".

Other

Given the interplay between the various concepts under the Revised Payments Legislative Package, several other novel / updated definitions (e.g., “payment account”, “execution of payment transactions”, “initiation of a payment transaction”) as well references in the preamble of the PSR / Draft PSD 3 (e.g., those referring to “pass-through wallets”) may further facilitate the qualification of business models under the regulated payment services.

2. Excluded services & licensing exemptions

Limited network exclusion

While the EBA Guidelines on the limited network exclusion under PSD2 (EBA/GL/2022/02) provide very useful guidance on the use of specific instruments under such exclusion, in practice there still have been several issues in interpreting the scope of this exclusion.

Aiming to address these, the Draft PSR expressly provides that the use of specific instruments would fall under the limited network exclusion only to the extent these allow purchases in a single limited network of service providers. Further, the clarification that such excluded instruments may be used only in physical premises (and not online stores) is included in the preamble of PSR (in line with the same principle provided set out the EBA Guidelines on the limited network exclusion under PSD2).

Further and more importantly, the conditions of the limited network exclusion are to be set out in RTS to be to be prepared by EBA one year after the entry into force of the PSR.

The commercial agent exclusion

Under PSD 2 regime, the commercial agent exclusion is still controversial and gave rise to various interpretations, including on matters related to online marketplaces.

The Draft PSR aims to provide further clarity on the conditions under which payment transactions from the payer to the payee through commercial agents may be excluded from the scope of the regulation. To this end, the Draft PSR clarifies the concept of commercial agent by reference to the correspondent definition laid down in the existing EU legislation and provides further details on the arrangement to be entered between the commercial agent and the payer / payee based on which commercial agents may rely on this exclusion.

The independent ATM providers & Cash-in-shop services

Distributors of cash via ATMs that do not service payment accounts currently exempted from the scope of the PSD 2 under article 3 (o) will no longer have such regime under the Revised Payments Legislative Package.

While still exempted from the licensing requirements of payment institutions, the above-mentioned distributors will however be subject to a registration requirement and subject to the supervision of the competent authority.

Cash-in-store services provided by operators of retail stores that allow users to withdraw cash without a purchase on their premises will also be exempted from the licensing requirements in certain conditions set out by the Draft PSD 3. Nevertheless, the Draft PSR appears to regulate an exception to payments on the same subject matter and it is not clear whether the relevant legal provisions are fully correlated.

3. Content of the authorization application

Licensing and supervision of payment institutions under the new proposed regime will be regulated under the Draft PSD 3 which is mainly based on the existing Title II of PSD 2. Therefore, the content of the authorization to be submitted to competent authorities for a payment institution license is largely unchanged.

Few additional changes are however contemplated by the Draft PSD 3 in this regard, that include a new requirement for a winding-up plan to be submitted with an application. Other changes refer to the business continuity arrangements which need to be compliant with the Regulation (EU) 2022/2554 on digital operational resilience and the security policy document which is now subject to more detailed requirements referring also to measures for sharing fraud-related data as introduced under the PSR.

To ensure a unitary approach and a level playing field across the EU, several additional details relevant for the licensing application, including the information to be provided to competent authorities as well as a common assessment methodology of the application, will be specified in the RTS to be prepared by EBA one year after the entry into force of the new regime.

4. Initial capital & own funds

The requirements for initial capital of payment institutions (except for e-money service providers) are increased under the Draft PSD 3 with approx. 25%. The initial capital of payment institutions that provide e-money services is increased at EUR 400,000.

As concerns own funds, the Draft PSD 3 keeps the existing calculation methods. However, it designates current method B (relying on transaction volumes) as default option – exceptions are allowed for particular business models.

5. Professional indemnity insurance and initial capital for account information service providers

In context of the practical difficulties to hold a professional indemnity insurance at the licensing stage, account information service providers are allowed under the Draft PSD 3 to hold initial capital of EUR 50,000 instead.

6. Access to payment system and access to accounts held with credit institutions

In consideration of the EBA findings as concerns (i) divergent practices in relation to access to payment systems by payment institutions where some Member States allow for direct participation of payment institutions in payment systems with settlement finality, while others do not and make the payment institutions dependent on credit institutions, as well as (ii) difficulties for payment institutions to open accounts with credit institution, the Draft PSD 3 includes a chapter dedicated aimed at facilitating access by payment institutions to payment system and access to accounts held with credit institutions.

7. Safeguarding measures

Safeguarding rules for payment institutions are in principle unchanged under the Draft PSD 3. However, to further address the difficulties experienced by payment institutions in certain jurisdictions in opening and maintaining payment accounts with credit institutions, the Draft PSD 3 sets out an additional option for the safeguarding of users' funds, by holding such funds at a central bank, subject to the possibility for a central bank to not offer that option, based on its organic law.

In terms of safeguarding measures, the draft PSD 3 also addresses concentration risk and requires payment

institutions to ensure that the same safeguarding is not used for the totality of their safeguarded customer funds, and in particular not to safeguard all funds with one credit institution.

8. Internal governance arrangements

The Draft PSD introduces the mandate for EBA to issue guidelines regarding internal governance of payment institutions to address the current difficulties in ensuring and assessing compliance with the not sufficiently clear and of a too high-level requirements on internal governance arrangements under the PSD 2.

IMPLICATIONS FOR PIs AND EMIs AUTHORIZED UNDER THE PSD 2 AND EMD REGIMES

Under the revised licensing regime to be introduced by PSD 3, authorizations already granted to payment institutions and e-money institutions remain valid for an additional 24 months, as of the entry into force of PSD3. Nevertheless, such institutions will be required to provide the competent authorities all necessary information to assess their compliance with the new regime at the latest 18 months after the entry into force of PSD 3.

NEXT STEPS

The Revised Payments Legislative Package will follow the legislative process before the European Parliament and Council. Final version of the pieces of legislation may not become available any sooner than end of 2024.

1. Opinion of the European Banking Authority on its technical advice on the review of Directive (EU) 2015/2366 on payment services in the internal market (PSD2) (EBA/Op/2022/06), available at:
https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Opinions/2022/Opinion%20od%20PSD2%20review%20%28EBA-Op-2022-06%29/1036016/EBA%27s%20response%20to%20the%20Call%20for%20advice%20on%20the%20review%20of%20PSD2.pdf

2. “A study on the application and impact of Directive (EU) 2015/2366 on Payment Services (PSD2)” carried out by Valdani Vicari & Associati Consulting, delivered in September 2022, available at:
<https://data.europa.eu/doi/10.2874/996945>