POSITION PAPER ON THE PROPOSED EU PAYMENT AND ELECTRONIC MONEY SERVICES DIRECTIVE AND THE PAYMENT SERVICES REGULATION

Driving Payment Innovation and Safety in the EU

September 2023

In June 2023, the European Commission presented a proposal for a directive on payment services and electronic money services (PSD3) as well as a proposal for a regulation on payment services (PSR).[1]

The two proposed legislative instruments aim to revise and update existing EU payment rules, including the currently applicable directive on payment services in the internal market[2] (PSD2) among others. The PSD3 contains provisions on the licensing regime and supervision of payment institutions, while the PSR sets out the rules that would apply to providers of payment and electronic money (e-money) services.

The Computer & Communications Industry Association (CCIA Europe) offers the following recommendations in order to contribute to further improving the PSD3 and PSR proposals.

I. Preserve the EU's thriving payment ecosystem

While the update of the EU's payments rules is timely and welcome, making sure that the new requirements preserve Europe's thriving payment ecosystem is essential.

Recommendations:

1. Improve strong customer authentication to the benefit of consumers
2. Find the right balance between merchants' rights and consumer protection
3. Set minimum thresholds to spare small e-money accounts from excessive rules
4. Maintain existing exemptions while ensuring more consistent implementation

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II. Increase legal certainty and streamline procedures

Ensuring a fair and balanced transition towards a new licensing regime, while streamlining the implementation and enforcement of the EU's payment rules, will increase legal certainty.

Recommendations:

5. Improve the implementation and enforcement of EU payment rules
6. Ensure proportionate re-authorisation processes for existing licences

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[1] European Commission, proposal for a directive on payment services and electronic money services in the internal market, 28 June 2023, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52023PC0366 ; European Commission, proposal for a regulation on payment services in the internal market, 28 June 2023, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52023PC0367.

[2] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L2366

Introduction

The Computer & Communications Industry Association (CCIA Europe) welcomes the European Commission's ambition to bring payments and the wider financial sector into the digital age. Both the modernisation of the EU's current payment rules and the choice of two legislative instruments, a directive and a directly applicable regulation, will help foster innovation and harmonisation across the EU.

CCIA Europe's Members have long-standing experience in developing and deploying new innovative technologies, including in the area of payments and finance. Ensuring consumer safety and guaranteeing the best user experience are always among their top priorities.

The Commission's choice to merge the directive on the taking up, pursuit and prudential supervision of the business of electronic money institutions[3] (EMD2) with the PSD3 and PSR proposals is a notable change that will need to be implemented cautiously. Overall, the new proposals' light-touch approach to reviewing current payment rules, building on past experiences and preserving the investments made by the stakeholders of the payment ecosystem, can be welcomed.

As the European Parliament and the EU Council will be developing their positions, CCIA Europe offers the following recommendations to improve the PSD3 and PSR:

- Preserve the EU's thriving payment ecosystem
    - Improve strong customer authentication to the benefit of consumers
    - Find the right balance between merchants' rights and consumer protection
    - Set minimum thresholds to spare small e-money accounts from excessive rules
    - Maintain existing exemptions while ensuring more consistent implementation

- Increase legal certainty and streamline procedures
    - Improve the implementation and enforcement of EU payment rules
    - Ensure proportionate re-authorisation processes for existing licences

[3] Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions, available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32009L0110

I. Preserve the EU's thriving payment ecosystem

While the update of the EU's payments rules is timely and welcome, making sure that the new requirements preserve Europe's thriving payment ecosystem is essential.

1. Improve strong customer authentication to the benefit of consumers

While strong customer authentication (SCA) has contributed to reducing certain types of fraud, the prescriptive nature of SCA measures under the currently applicable PSD2 has also created significant hurdles to customers, who want smooth and secure payment experiences, as well as to innovation. The adoption of a more outcome-focussed approach, and a stronger emphasis on the uptake of new technological developments, would further enhance the customer experience while combating fraud. In this respect, CCIA Europe calls on the EU co-legislators to further improve and clarify the SCA requirements of the PSR proposal.

Merchant-initiated transactions (MITs), i.e. payments initiated by the seller on behalf of a customer, are generally low-risk transactions as they are pre-agreed and mostly recurring. Under PSD2, MITs were therefore exempted from SCA if certain conditions were met. The Commission's efforts to clarify the provisions applicable to MITs, including the useful clarification in recital (108) PSR that SCA only applies at the set-up of the initial mandate and not for subsequent transactions, can be welcomed as they increase legal certainty.

Article 85(2)-(5) PSR also integrates previous guidance from the European Banking Authority (EBA) to establish that some card-based payments fall outside the scope of SCA measures, as they are initiated by the payee only.[4] These clarifications should be maintained in the final PSR. In general, seeking more consistent implementation and adoption of SCA exemptions across the EU's internal market and the payment ecosystem will enhance legal certainty and benefit the European economy.

In addition, the PSR substantially modifies the PSD2 by subjecting technical service providers (TSPs) to significant liability risks and outsourcing agreement obligations that are disproportionate and unjustified. First, Article 58 PSR provides that TSPs shall be liable for any financial damage for their failure to enable the application of SCA. This requirement imposes a disproportionate burden on TSPs, which are not payment services and do not enter at any time into possession of the funds to be transferred, as rightly acknowledged in recital (17) PSR. In its current shape, this wide-ranging liability requirement for TSPs will hamper innovation and negatively impact Europe's payment ecosystem.

Second, the obligation in Article 87 PSR for payment service providers (PSPs) and TSPs to enter into outsourcing agreements in cases where the latter provide and verify the elements of SCA is unjustified and will disproportionately impact TSPs. It must be underlined that the imposition of prescriptive outsourcing agreements will impact the

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[4] See, for example, European Banking Authority, Q&A 2018_4031, available at https://www.eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/2018_4031 ; European Banking Authority, Q&A 2019_4791 available at: https://www.eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/2019_4791 ; European Banking Authority, Q&A 2019_4794, available at https://www.eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/2019_4794.

flexibility for PSPs and TSPs to negotiate such arrangements between themselves. Any outsourcing requirements imposed by the PSR should apply only where a PSP has outsourced the execution of SCA to a third party. Where this is the case, the PSP should comply with the outsourcing requirements which are already set out in the EBA Guidelines on Outsourcing.[5]

While we agree that PSPs should retain full liability for any failure by operators to apply SCA, their new right to audit and control a payment operator's security provisions constitutes a wide-ranging intrusion in companies' operations and is likely to be unimplementable in practice. CCIA calls on the co-legislators to remove these disproportionate obligations.

Finally, we welcome the possibility for account information service providers (AISPs) to perform and be in control of SCA, as set out in Article 86 PSR. However, the requirement in Article 86(4) to renew SCA at least 180 days after SCA was applied constitutes an unnecessary obstacle that needs to be lifted or at least improved. We suggest either entirely removing the obligation for AISPs to renew SCA to access financial data to perform their services, or to extend the renewal period to 360 days.

2. Find the right balance between merchants' rights and consumer protection

Article 62(1) PSR substantially modifies the regime currently applicable to refunds for payment transactions initiated by or through the payee, by imposing an unconditional refund right for MITs. The provision at issue would align the refund right for MITs with existing requirements for direct debit (DD). However, MITs and DDs are very different, both in terms of set-up characteristics and use cases.

While both transactions are indeed initiated by the payee, DDs are usually used for essential services, such as electricity, internet, telecom and other common utilities. These essential services are typically less subject to fraud, as they are mostly provided by well-established operators. MITs, by contrast, are generally used by online businesses, e-commerce platforms and digital content marketplaces. These services are far more prone to abusive refund practices than DDs, which in the context of refund rights constitutes a substantial difference.

For instance, a consumer can download digital content or order a product, consume the content or product, and subsequently ask for a refund. In these cases, and more generally in the vast majority of MIT use cases, an unconditional refund right would be inappropriate and would likely have a disastrous impact on merchants. It must be underlined that especially merchants selling their products or services online rely on MITs for payment. As it stands, the PSR would incentivise abusive uses of refund rights by consumers and negatively impact merchants relying on balanced rules to obtain compensation for delivered products, content, and services.

The currently applicable consumer protection rules under the PSD2 already provide sufficient protection to consumers while sufficiently protecting merchants against the risk of MIT misuse. The PSD2 rightly recognises the need to strike the right balance between the

[5] See, for instance, European Banking Authority, Q&A 2018_4047, available at: https://www.eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/2018_4047.

interests at stake, by providing merchants with the ability to dispute a refund request. CCIA calls on EU lawmakers to maintain this approach by allowing merchants to dispute potentially abusive refund requests.

3. Set minimum thresholds to spare small e-money accounts from excessive rules

The merger of the EMD2 with the PSD3 and PSR has far-ranging implications and will need to be implemented cautiously. In particular, the merger will subject e-money services to new, often stringent, rules that did not apply to such services previously. This is likely to negatively impact businesses whose services rely on small e-money accounts that can only be used for limited purposes. For example, numerous e-commerce and online platforms allow their customers to store small amounts of value balances to be spent directly on the platform, provided they have duly obtained an e-money licence. Customers can use these balances to book a subscription, order a ride, or make in-app purchases.

Due to its merger with EMD2, the PSR introduces – in Article 3(52) – a new definition of 'electronic money services', making a direct link to the concept of 'payment account'. Indeed, such services are defined as the issuance of e-money, the maintenance of payment accounts storing e-money units, and the transfer of e-money. This reading is confirmed by recital (20) PSR, which clarifies that a payment account needs to be defined "as an account that is used for sending and receiving funds to and from third parties".

This new development, which might seem harmless at first sight, will in fact subject e-money services to the obligations of account servicing payment service providers (ASPSPs). E-money providers would have to build costly application programming interfaces (APIs) to grant third-party access to AISPs and payment initiation service providers (PISPs). In the current scenario, and with regards to the narrowing of the exemptions under the PSR, these new rules appear to be excessive and could result in a decrease of useful and innovative e-money services.

It must be underlined that the obligations applicable to ASPSPs have been designed to target bank accounts, and not small, limited purpose value balances available on certain platforms. Subjecting e-money services to the same obligations would impose disproportionate infrastructure costs on platforms on the one hand, and have no benefits for consumers or third parties on the other end. While the cost of these services is likely to increase – or their availability to decrease altogether – PISPs and AISPs would not even benefit from these changes. The former cannot provide their services, as there are no transactions to initiate, and AISPs could reasonably continue to provide their useful services without accessing data from such small balance accounts.

While Article 39 PSR provides that national competent authorities may, upon request, exempt ASPSPs from the API requirements and that the Commission will develop regulatory technical standards for such exemptions, this provision is likely to lead to different interpretations across Member States. Hence, in order to preserve Europe's thriving payment ecosystem, CCIA recommends introducing a de minimis provision that would by virtue of the law exclude small balances from excessive requirements, in this case from the obligation to allow third parties to access these balances by building new APIs. A reasonable threshold could be set at stored values below €1,500, which would be effectively exempted from the requirements.

4. Maintain existing exemptions and ensuring more consistent implementation

Under the currently applicable PSD2, exemptions have been subject to different interpretations by national regulators, giving rise to market fragmentation and legal uncertainty. We understand the Commission's intention to narrow down existing exemptions, in particular the commercial agent and limited network exemptions. However, we would welcome the possibility for companies to rely on these useful exemptions to offer services in the EU, although in a limited setting. That is why CCIA calls on the co-legislators to maintain and further clarify these exemptions.

In particular, the upholding of the commercial agent exclusion in Article 2(2)(b) PSR is welcomed and should be maintained throughout the legislative process. Despite its narrower scope, this exemption will still allow specific services to continue to operate without having to shoulder a disproportionate regulatory burden. Additional clarifications on the concrete application of this exemption in recital (11) PSR will enhance legal certainty.

The limited network exemption has also proven useful under the PSD2, although having been subject to diverging interpretations. The retention of this exemption in Article 2(2)(j) PSR will ensure continuity, while Recitals (12) and (13) provide well-needed clarification on the exact scope of the exclusion.

CCIA recommends maintaining these exemptions, as well as the clarifications on the scope, to ensure continuity for businesses operating in this framework under the PSD2, while simultaneously ensuring a level playing field within the EU.

II. Increase legal certainty and streamline procedures

Ensuring a fair and balanced transition towards a new licensing regime, while streamlining the implementation and enforcement of the EU's payment rules, will increase legal certainty.

5. Improve the implementation and enforcement of EU payment rules

The implementation and enforcement of PSD2 has been a tedious process that gave rise to diverging interpretations across Member States and national authorities, and resulted in legal uncertainty for businesses. Streamlining the implementation and enforcement of the PSD3 and the PSR is therefore essential for Europe's payment ecosystem going forward. This will ensure that the new rules stand the test of time.

However, despite the importance of the homogeneous and consistent application of the EU's payment rules, the PSD3 and PSR proposal currently still leave a wide margin of interpretation to the EBA. CCIA stresses the importance of the fair interpretation and implementation of EU law, and underlines that all relevant stakeholders must be involved in the process. While recital (139) PSR clarifies that the EBA should – when developing guidelines, draft regulatory technical standards (RTS) and draft implementing technical standards (ITS) – consult all relevant stakeholders, we note that stakeholder involvement has not always been satisfactory or representative in the past.

As it stands, the EBA's Banking Stakeholder Group (BSG), whose role is to help facilitate consultation with stakeholders in areas relevant to the tasks of the EBA, is largely dominated by representatives of large banks and traditional market players.[6] We call on the co-legislators to,, on the one hand, directly clarify applicable rules in the PSR and PSD3 (instead of leaving a too broad margin of interpretation to the EBA and regulators), and on the other hand, to mandate the creation of a stakeholder advisory group by the EBA that is representative of all interests in the payment and finance ecosystem.

CCIA is also particularly concerned with the very tight timeline for implementation of PSR and PSD3, as the majority of PSR obligations would apply within 18 months after their entry into force. However, much of the details of the concrete measures will need to be defined in subsequent RTS and ITS, which are expected to be published one year after the regulation's entry into force. Such a short time frame would only leave only six months for stakeholders to implement and adapt to the new rules. It cannot be reasonably expected from market participants to adapt to such significant changes within such a short time frame. Hence, CCIA urges the co-legislators to extend the deadline for the entry into application of the PSR to 24 months, thus leaving market participants a 12-month implementation window.

Moreover, CCIA expresses utmost concerns on the introduction of new product intervention powers for the EBA. In particular, the broad wording of Article 104 PSR leaves the EBA a wide margin of interpretation regarding the possibility of temporarily prohibiting or restricting payment or electronic money services in the EU. In view of the wide-ranging consequences of these new intervention powers, we urge the co-legislators to narrow down these powers to clearly defined, exceptional circumstances, and to introduce proportionality and due process safeguards. Any legal person subject to EBA decisions adopted in the framework of these new powers shall have the right to be heard and to challenge such decisions.

Finally, while the strengthening of the enforcement powers of national competent authorities can be commended, the investigation powers introduced in Article 91(3) PSR appear to be particularly broad and should be subject to additional safeguards. In particular, the enforcement powers towards TSPs seem disproportionate, as these providers are for the most part out of scope of the PSR.

6. Ensure proportionate re-authorisation processes for existing licences

Article 44 and 45 of the PSD3 foresee transitional measures to ensure a smooth transition from the existing licensing regime under PSD2 to the new regime set out in the PSD3. We welcome the measures prolonging the validity of existing payment and electronic money institutions' licences until 30 months after the entry into force of the PSD3. This on the condition that application for a licence under PSD3 is made at the latest 24 months after its entry into force.

Likewise, we welcome the transitional measures and consider that the preservation of existing licences for 24 months is reasonable and proportionate. Streamlining the

[6] European Banking Authority, Banking Stakeholder Group, Members, available at: https://www.eba.europa.eu/about-us/organisation/banking-stakeholder-group/members (last seen on 8 August 2023).

re-authorisation procedures and reducing bureaucracy to a minimum will be key to ensure a smooth transition between the old and new regimes.

CCIA Europe invites the co-legislators to maintain the preservation provisions presented by the Commission in the PSD3 and to ensure that re-authorisation procedures remain proportionate.

Conclusion

The PSD3 and PSR proposals have the potential to strengthen Europe's payment ecosystem and to guarantee safe and seamless payments for almost 450 million Europeans. However, for the new rules to also work in practice, they will need to preserve the EU's thriving payment ecosystem, while increasing legal certainty and streamlining procedures.

CCIA Europe welcomes the Commission's ambition to bring payments and the wider financial sector into the digital age, and stands ready to support the European institutions in delivering this vision.

About CCIA Europe

The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications, and internet industry firms.

As an advocate for a thriving European digital economy, CCIA Europe has been actively contributing to EU policy making since 2009. CCIA's Brussels-based team seeks to improve understanding of our industry and share the tech sector's collective expertise, with a view to fostering balanced and well-informed policy making in Europe.

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For more information, please contact:
CCIA Europe's Head of Communications, Kasper Peters: kpeters@ccianet.org