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The main regulatory changes introduced

PSD2 in a nutshell

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Which are the main regulatory changes introduced by the new Directive?

Directive 2007/64/CE (hereinafter "**PSD**") [1], as it is known, regulated the information requirements, the rights and the obligations of payment services users, as well as the prudential requirements for entering the market of entities qualified to provide these services (payment service providers or "PSP"). The establishment of uniform rules for the provision of payment services, has encouraged the creation of a EU internal market for payments.

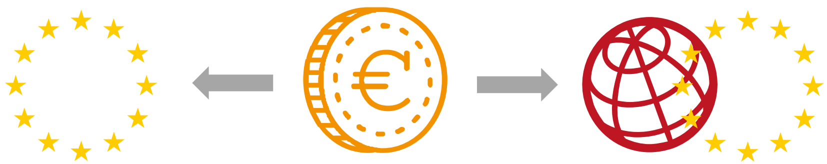
The **Directive** (EU) 2015/2366 (hereinafter "**PSD 2**" or the "**new Directive**") represents a step further towards complete harmonisation of the EU payments market, introducing some important new features, such as:

The regulatory changes

1. **The extension of the application** ("positive scope") of the transparency rules concerning the conditions and information requirements with regards to:

   i. **payment transactions in a currency that is not that of a Member State,** where the payment service provider of the payer and the payment service provider of the payee are both located in the Union, or where the sole payment service provider involved in the payment transaction is located within the Union, where it concerns those parts of the payment transaction carried out in the Union;

   ii. **payment transactions in all currencies** where only one of the payment service providers is located in the Union ("one leg"), however only concerning and limited to those segments of payment transactions carried out within the Union.



[1] The PSD finds application when the payment service provider of the payer and the payee are located in the European Community or the sole payment service provider involved in the payment transaction was located in the Community and payment services where made in euro or in the currency of a Member State outside of the euro zone.

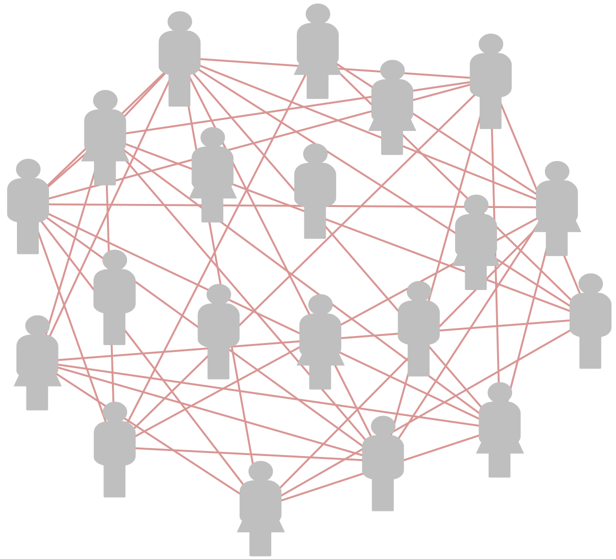
2. The restructuring of existing exemptions ("negative scope"):

iii. commercial agents: the exemption will only apply where commercial agents involved in the transaction act in favour of only one of the two parties (payer or payee) and not for both;

iv. telecomunications: exemptions applied only to payment transactions made through a provider of electronic communications services or networks for a subscriber to the service or network (e.g. telecommunications operators): (i) to purchase digital content and services in voice technology; or (ii) made by or through an electronic device and charged through the bill as part of a charitable activity or to purchase tickets; in both cases the value of the individual payment transaction shall not exceed 50 euros, while the total value of payment transactions for a single subscriber must not exceed 300 euros;

v. networks with a limited marketability (“limited network”): specified in a more precise manner the notion of networks, to counteract the excessive marketability of this exemption;

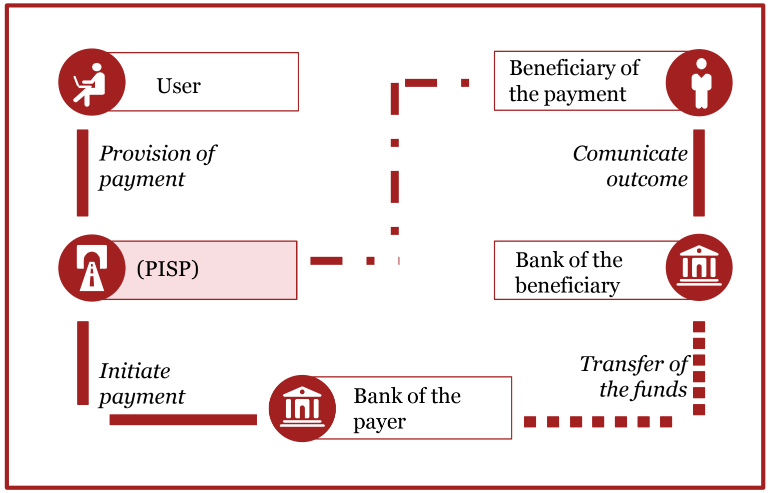
vi. independent cash machines (ATM): repealed the exemption included in PSD by which the service of cash withdrawals through ATMs of independent providers (“Independent ATM Deployers”) did not fall within the scope of the Directive.



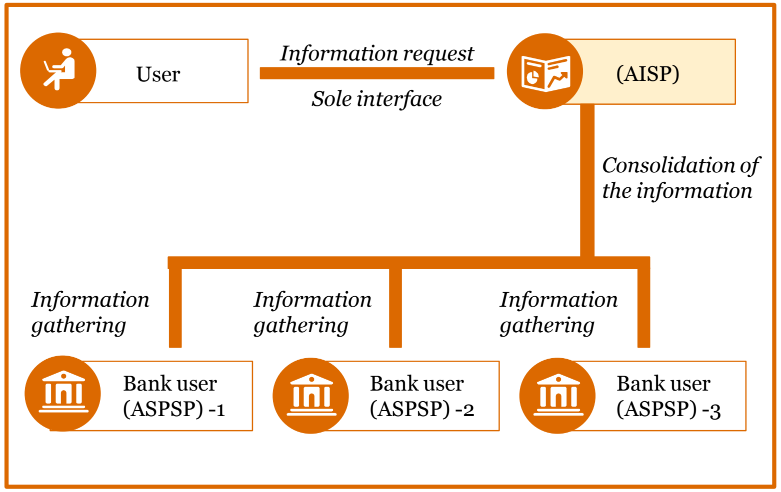
3. **The introduction of new payment services**, in particolar:

vii. Payment Initiation Service (or PISP):
Payment Initiation Services (or PISP): service provided by those that stand between the payer and his online payment account, by starting the payment to a third-party beneficiary. The payer can then make an online payment by direct debit on its account; provided that the PISP (person authorised only to exercise this new payment service) did not come into possession of funds from the payer and the payment service provider where the payers' or ASPSP account is held shall ensure the PISP access to the online account of the payer[2];

Overview PISP



Overview AISP



viii. Account Information Service (or AISP): service made available to users of payment services with online access to accounts through which the payer can get, thanks to an online platform, a consolidated view on all its payment accounts, even if those are held on multiple PSP; the AISP cannot use customer data or log on to its payment accounts for any purpose other can those provided by the service.

[2] The Directive foresees that the PISP does not have to necessarily be linked to the ASPSP (Account Service Payment Service Provider) from a contractual relationship to allow operations on the account of the payer.

4. The application

ix. **of the so-called SHA**, the tariff principle whereby the payer and beneficiary each support the fees charged by their respective payment services provider ("SHARE") also to all operations arranged in non-EU currencies, as well as operations in EU currencies that involve conversion;

x. **of applying a ban on "surcharge"** (i.e. applying an additional fee) in case of the use of payment cards as provided by EU regulation 2015/751 (hereinafter "Regulation MIF"), both for domestic and cross-border payments.

These new products described could result in the need to intervene on the contract documents in order to clarify the application of the SHARE principle in the terms indicated above.

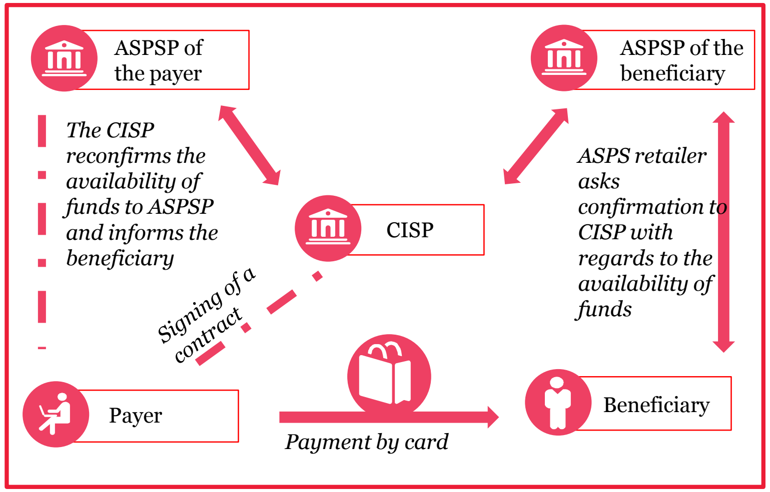
The coordination of the provisions contained in the Regulation MIF and PSD2 with regards to the fee applicable on payment transactions concluded through paper-based instruments could lead to: (i) the desire for uniformity in the application of both, the fee, as well as the relating reductions and/or premiums; (ii) the auditing of foreign transfer management processes, in order to inhibit the application of different pricing levels; and (iii) a potential development of new payment solutions, resulting in lower charges for customers and an increase in incentives to innovate by the player.

5. **The reduction from 150 to 50 euros of the exemption that a user could be forced to pay in the event of an unauthorised operation** related to lost, stolen or misappropriation of the payment device, except in cases where the payer has acted fraudulently or with gross negligence, in which case the exemption mechanism is not active.

In relation to the definition of key concepts such as "negligence", PSD2 provides space for each national legislator to decline this concept within their regulation.

6. **New method of checking the availability of funds ("fund checking"): possibility, offered to payment service providers based on card** other than ASPSP, **to receive confirmation of the availability of funds** in case of a payment transaction request by the payer through online platforms that use card based payment tools. The figure communicated by the ASPSP regarding the availability of funds of the payer corresponds to a simple confirmation or denial, and does not include any information of either a qualitative or a quantitative nature.

Overview fund checking

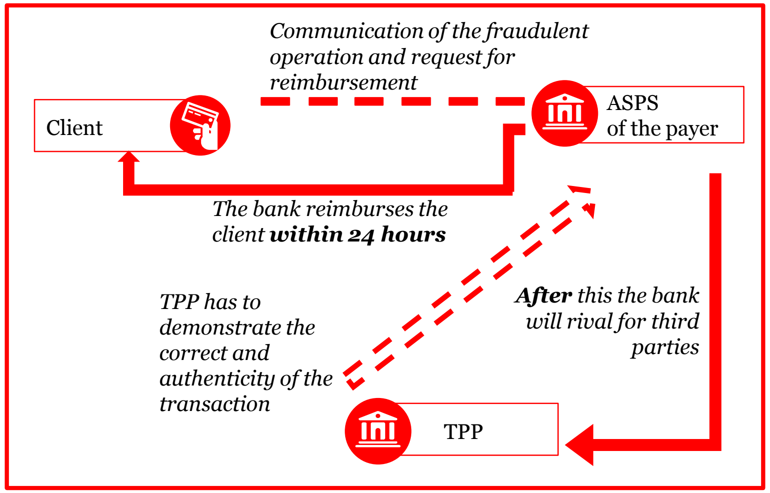


7. **The establishment of "Central Electronic Register" to strengthen the transparency of the functioning of authorised payment institutions**, held at the European Banking Authority "EBA", which contains all information relating to the payment institutions associated to individual national Registers.

EBA, free-of-charge, will make the contents available to the public on its website, while, in order to keep the Central Electronic Register updated, national authorities will be required to notify the EBA, immediately, concerning the information registered in their respective national registers, for which they remain responsible to guarantee the accuracy of the information.

8. **The concept of responsibility,** and, in particular, the sharing of responsibility between the different actors involved, represents a crucial topic closely connected to what can be identified as the major innovation introduced by PSD2, namely the extension of the scope of the new Directive to PISP and AISP.

Overview fraudulent operation



Specifically, as mentioned before, according to the **PSD2, the provision of a payment initiation service (or an account information service) does not depend on the existence of a contractual relationship between the PISP/AISP and the payment service provider where the account is held** (ASPSP).

This circumstance, together with the provisions of art. 73 co. 2 of the **new Directive**, which stipulates that, **in the event that you an unauthorised payment transaction is placed through PISP, the ASPSP will be expected to refund immediately prima facie**, and in any case by the end of the next business day, **the payer of the amount of the unauthorised payment transaction**, introducing the delicate issue of sharing of the responsibilities between payment service providers.

It is true that that provision introduces a right of recourse by the ASPSP against the PISP; if the latter is responsible for the unauthorised transaction of payment (on this point see also the provisions of art. 92 co. 1 of PSD2), the possible absence of a contractual relationship could make the application of that provision more difficult.

Which are the regulatory requirements for the PSP?

1. **In accordance with art. 109 of the new Directive, the payment providers already authorised** to continue to operate as payment institutions, shall submit, to the competent authorities, a report certifying that the conditions set out in title II are met by July 13, 2018 (~~i.e.~~ e.g. governance arrangements and proportionate, effective and adequate internal control mechanisms; procedures to monitor and manage security incidents, suitability of shareholders, integrity and professionalism of corporate officers, minimum capital, professional insurance for AISP and PSIP; segregation of own funds from those detained clients).

Requirements for subjects

Regulated*: report attesting the suitability to operate as payment institution*

In exemption*: applying the new exemption or prohibition to provide payment services for subjects that have not been granted an exemption under PSD2 by January 13, 2019*

New subjects: *providing an authorisation request and professional liability insurance for the certification for payment institutions*

2. **For those already operating in exemption pursuant to art. 26 of the PSD**:
   a. provides that Member States allow those already operating in exemption to continue such activity in accordance with the PSD until January 13, 2019 without the need to present an authorisation to act as payment service provider as set down in art. 5 PSD2, that is requiring the application of the new system of exemption provided for by art. 32 of PSD2;
   b. in accordance with art. 109 co. 3 of the new Directive, to any party who has initiated its activities in line with their national legislation to transpose by January 13, 2018 and has not been granted permission, meaning it has not been granted an exemption under PSD2 by January 2019, it is prohibited to provide payment services in accordance with article 37 of the new Directive;
   c. however, under the new Directive, Member States may permit that the entities operating on the basis of exemptions provided to PSD, to exempt and automatically entered them in the Registrer provided for in articles 14 ("Registration in the Member State of origin") and 15 ("Register of ABE") of the new Directive provided that the competent authorities have evidence that the requirements are in line with those referred to in article 32 in PSD.

3. **Those subjects who wish to obtain authorisation for the first time as payment service providers** should:

   a. present an authorisation application, accompanied by the information already provided by the existing supervisory arrangements in which more details should be provided concerning: (i) existing procedures to track and manage incidents and complaints concerning safety; (ii) business continuity arrangements; (iii) principles and definitions applied for the collection of statistical data in relation to operations and fraud; and (iv) the policy on security;

   b. if applicants wish to submit the application in respect of payment initiation services, or account information services, they will also have to take out a professional indemnity insurance, or provide other similar guarantees.

   Following the granting of an authorisation by the competent national authority , the details relating to the new payment institutions (as authorised) are firstly grouped in the individual Registers and subsequently in the Central Electronic Register.

The things to expect will be addressed by EBA through the publication of specific technical regulations/guidelines by implementing the legislation in legal systems of the individual Member States.

Among other things, **the individual national regulators**, together with the competent authorities of the Member States, **shall provide specific instructions with reference to the rights and obligations** held by each party **in the relationship between providers of new payment services, the individual paying agencies and the providers of payment services** where the different accounts of the payers are held, by adjusting the system of responsibilities to each party.

Which are the future changes?

It is clear how PSD2 represents a turning point in the framework for the provision of payment services as well as in the regulation of relationships between the various stakeholders potentially involved in a single payment transaction.

The new Directive presents itself as the ideal continuation of a process that began with PSD aimed at creating a single market in increasingly integrated payment services, through the extension of rules for IP (already within the scope of the PSD) to TPP whose activity was regulated for the first time when PSD came into force.

The new operations governed by PSD2 can present an opportunity also for those service providers that are already operating under PSD and therefore have:

i) a solid organisational and supervisory structure in line with the provisions currently in force;
ii) a consolidated sales network and a broad portfolio of loyal customers;
iii) a strong experience in dealing with regulatory authorities.

Similarly, it is important to note how the **innovation and the requirements introduced in the "tech" field** *(please refer to PwC's "PSD in a nutshell n.2" for more information)* within the new Directive represent, from an operational point of view, the aspect of greater impact for the intermediaries.

In this regard it should be noted that under the new regulatory framework, EBA will be called upon to develop six "Regulatory Technical Standards" ("RTS ") and five "Guidelines".

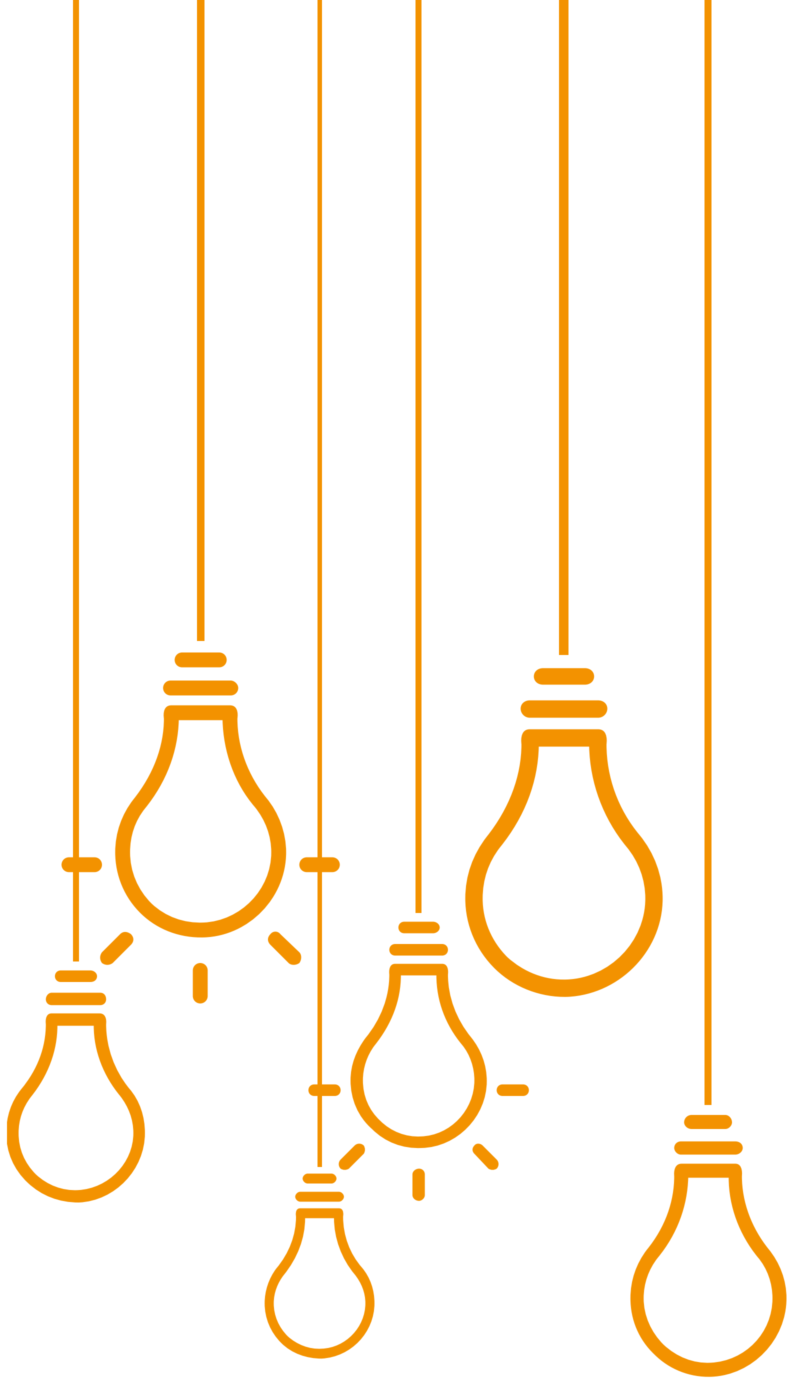
In December 2015 EBA has already published:

i) a **"discussion paper"** relating to **enhanced customer identification** under PSD2**;**
ii) a **"consultation paper" on cooperation and excahnge of information** for the purposes of the PSD2 passport. In addition, with regard to security for payments made via the internet, on May 17, 2016 the Bank of Italy has published a new "supervisory provisions for payment institutions and electronic money institutions" which under Italian law transpose the EBA guidelines of December 2014 on the security of Internet payments.

The new provisions repeal and replace the existing supervisory arrangements for payment institutions and electronic money institutions in June 2012: implantation of the regulatory text remained virtually unchanged; however, the Supervisory Authority (Autorità di Vigilanza) took the opportunity to make some adjustment and in the meantime intervened on the primary and secondary regulatory framework.

When updating the "supervisory provisions for payment institutions and electronic money institutions", the Bank of Italy has published the 16th update of the "supervisory provisions for banks" (circular No. 285/2013) which introduced a specific section to regulate obligations imposed on banks that provide payment services via internet.

In conclusion, it seems relevant to emphasize that the "tech" aspects earlier described will play a key role even from a legal point of view, proving **decisive in the event of a dispute on the division of responsibilities between the different IPs involved in a payment transaction**. In particular, the evidentiary value that the new Directive seems to ascribe to certain technical solutions (e.g. "strong authentication"), as well as the ability to provide proof of proper execution, registration and accounting, using purely operational solutions, will determine the need for a proper reading of the given regulation in order to understand and correctly implement the development of information systems needed to seize the new opportunities offered by PSD2.



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Christoph Obermair

Partner
+43 699 10871262
+43 1 501 88-3629
christoph.obermair@at.pwc.com

Stefan Moser

Senior Manager
+43 699 16305012
+43 1 501 88-1156
stefan.moser@at.pwc.com