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Payment Transactions under the E.U. Second Payment Services Directive – An Outsider's View

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Introduction

In its proposal for a Directive on payment services in the internal market ("the Proposal"),[1] the Commission of the European Communities ("the Commission") purported

    1. *Implementing the Community Lisbon Programme: Proposal for a Directive of the European Parliament and of the Council on Payment Services in the Internal Market and Amending Directive 97/7/EC, and 2002/65/EC (presented by the Commission)* COM (2005) 603 final (Dec. 1, 2005), [hereinafter *Lisbon Programme Proposal*]. Quotations in the text are from the Explanatory Memorandum, under "Context of the Proposal," which further cites

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to provide for "a harmonised legal framework" designed to create "a Single Payment Market where improved economies of scale and competition would help to reduce the cost of the payment system."[2] Being "complemented by industry's initiative for a Single Euro Payment Area (SEPA) aimed at integrating national payment infrastructures and payment products for the euro-zone," the Proposal was designed to "establish a common framework for the Community payments market creating the conditions for integration and rationalisation of national payment systems."[3] Focusing on electronic payments, and designed to "leave maximum room for self-regulation of industry," the Proposal purported to "only harmonise what is necessary to overcome legal barriers to a Single Market, avoiding regulating issues which would go beyond this matter."[4] Stated otherwise, the measure was designed to fall short of providing for a comprehensive payment law.

As ultimately adopted, the first Directive on payment services in the internal market, that is, the original "payment services Directive" or "PSD," implemented this vision.[5] Its scope was stated in Article 2(1) to "apply to payment services provided within the Community," both national and cross-border.[6]

With advent of internet banking and other technological innovations in payments, the need arose to "upgrade" the PSD, primarily to accommodate an integrated European market for card, internet and mobile payments.[7] Specifically, accommodation was required to enable bank customers—both business and consumer—to give third-party service providers permission to retrieve their account data from their banks, as well as initiate payments on their behalf directly from their bank accounts. With the view of facilitating this, as well as some other revisions, particularly in relation to the authentication of payment transactions,

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Articles 47(2) and 95(1) of the EC Treaty as the legal basis for the proposal. *Id*. at 2–4. The proposal was discussed by this author previously. Benjamin Geva, *Recent International Developments in the Law of Negotiable Instruments and Payment and Settlement Systems*, 42 TEX. INT'L L.J. 685, 712–25 (2007) [hereinafter Geva, *Recent Developments*]. For a discussion of the original PSD, see, for example, Benjamain Geva, *The EU Payment Services Directive: An Outsider's View*, 28 Y.B. Eur. L. 177 (2009); Benjamin Geva, *The Harmonization of Payment Services Law in Europe and Uniform and Federal Funds Transfer Legislation in the USA: Which is a Better Model for Reform?*, 2009 EUREDIA 699 (discussing in a comparative context

2. *Lisbon Programme Proposal*, *supra* note 1, at 2.

3. *Id*.

4. *Id*. at 7–8.

5. Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on Payment Services in the Internal Market Amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and Repealing Directive 97/5/EC, 2007 O.J. (L 319) 1 [hereinafter PSD].

6. *Id*. at 9. This is in departure from Directive 97/5/EC of the European Parliament and of the Council of 27 January, 1997 on Cross-Border Credit Transfers, 1997 O.J. (L 43) 25 [hereinafter Transparency Directive], which was superseded by Title III and repealed by the Payment Service Directive.

7. *See Green Paper: Towards an Integrated European Market for Card, Internet and Mobile Payments* COM (2011) 941 final (Jan. 11, 2012) (envisaging the need for an upgrade); Feedback Statement on European Commission Green Paper "Towards an Integrated European Market for Card, Internet and Mobile Payments" (June 27, 2012), http://frob.pl/wp-content/uploads/2012/04/EC-feedback_statement_green-paper-card-internet-mobile-June-2012.pdf (responding to the Green Paper); Report on "Towards an Integrated European Market for Card, Internet and Mobile Payments" (2012/2040(INI)) (Oct. 4, 2012), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+ REPORT+A7-2012-0304+0+DOC+PDF+V0//EN (containing the Motion for a European Parliament Resolution on the Green Paper); European Parliament Resolution of 20 November 2012 on "Toward an Integrated European Market for Card, Internet and Mobile Payments" (2012/2040(INI)), 2015 O.J. (C 419) 19 (Nov. 20, 2012), (discussing the Green Paper).

the second Payment Services Directive ("Directive" or "PSD2") was passed in 2015.[8] Since then, it has been implemented in the various national legislations over the course of 2018.[9]

PSD2 is complemented[10] by Regulation (EU) 2015/751[11] "lay[ing] down uniform technical and business requirements for card-based payment transactions carried out within the Union, where both the payer's payment service provider and the payee's payment service provider are located therein."[12] Particularly, it sets caps on interchange fees for card-based transactions. Article 2(10) of the Regulation defines "interchange fee" to mean "a fee paid for each transaction directly or indirectly (i.e., through a third party) between the issuer and the acquirer involved in a card-based payment transaction."[13] This Regulation is not part of the Directive and will not be discussed here.

"Payment services" to which the Directive applies under Article 2(1) are defined in Article 4(3) to mean business activities listed in Annex I.[14] Entities that provide such services to customers, each of whom is a "payment service user" being either a payer or payees,[15] are "payment service providers," or "PSPs," discussed further below.[16] In principle, PSD2 concerns "only contractual obligations and responsibilities between the payment service user and the [PSP]."[17]

In the footsteps of the original PSD, "payment services" listed in Annex I[18] are cash deposits and withdrawals in and from payment accounts;[19] the execution of payment transactions[20] in funds[21] (including electronic money)[22] held either on deposit in a payment

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8.   Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on Payment Services in the Internal Market, Amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and Repealing 2007/64/EC, 2015 O.J. (L 337) 35, [hereinafter PSD2]. Unless indicated otherwise, statutory provisions cited throughout this section are of the Directive.

9.   *Id*.

10.   *Id*. pmbl. para. 2.

11.   Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on Interchange Fees for Card-Based Payment Transactions, 2015 O.J. (L 123) 1, [hereinafter Interchange Fee Regulation].

12.   *Id*. art. 1(1).

13.   *Id*. art. 2(10).

14.   PSD2, *supra* note 8, art. 4(3).

15.   See definition in Article 4(10) in conjunction with Articles 4(8) and (9), defining '"payer" and "payee." *Id*. art. 4.

16.   *Id*.

17.   *Id*. pmbl. para. 87. PSD2 Preamble Paragraph 87 further recognizes that the allocation of responsibilities and losses between PSPs and "their intermediaries, such as processors" is a matter of contract. *Id*.

18.   The list is, however, quite disorganized and repetitive; for example, three items (card payments, direct debits, and credit transfers) are enumerated separately according to whether they are used in connection with a "payment account" or credit line.

19.   "Payment account" is defined as "an account held in the name of one or more payment service users which is used for the execution of payment transactions." *Id*. art. 4(12). The Proposal required the account to be used "exclusively" for the execution of payment transactions, which was unnecessarily restrictive.

20.   "Payment transaction" is defined as "an act, initiated by the payer or on his behalf or by the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and the payee." PSD2, *supra* note 8, art. 4(5).

21.   "Funds" are defined as "banknotes and coins, scriptural money and electronic money as defined in point (2) of Article 2 of Directive 2009/110/EC." *Id*. art. 4(25).

22.   "Electronic money" is defined as "electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions…and which is accepted by a natural or legal person other than the electronic money issuer." Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the Taking Up, Pursuit and

account or covered by a credit line; execution of direct debits;[23] execution of payment transactions through a payment card or a similar device;[24] execution of credit transfers (including standing orders); execution of direct debits (including one-off direct debits); issuing of payment instruments[25] and/or acquiring payment transactions;[26] as well as money remittance services in funds accepted for the sole purpose of carrying out the payment transaction.[27] Under the original PSD, the concluding item in the Annex was the "[e]xecution of payment transactions where the consent of the payer to execute a payment transaction is given by means of any telecommunication, digital or IT device and the payment is made to the telecommunication, IT system or network operator, acting only as an intermediary between the payment service user and the supplier of the goods and services."[28] PSD2 deleted this item but added payment initiation services and account information services to Annex I, which will be further discussed below.[29]

Article 3 deals with the outer limits of the Directive. Thereunder, cash payments, professional physical transport of banknotes, and coins; payment transactions consisting of the non-professional cash collection and delivery within the framework of a non-profit or charitable activity; payment transactions through a commercial agent authorized to negotiate or conclude the sale or purchase of goods or services on behalf of the payer or the payee; as well as certain cash refunds are specifically excluded.[30] Also excluded from the coverage of the Directive are currency exchange transactions in the form of cash-to-cash operations; paper checks, drafts (bills of exchange), vouchers, traveler's checks and postal money orders; payment transactions carried out within a payment or securities clearing and settlement system; payments transactions related to securities asset servicing; payment processing services; specific payment instruments that can be used only in a limited way;[31] certain

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Prudential Supervision of the Business of Electronic Money Institutions Amending Directives 2005/60/EC and 2006/48/EC and Repealing Directive 2000/46/EC, 2009 O.J. (L. 267) 7, 11 (Sept. 16, 2009).

23. "Direct debit" is defined as "a payment service for debiting a payer's payment account, where a payment transaction is initiated by the payee on the basis of the consent given by the payer to the payee, to the payee's payment service provider or to the payer's own payment service provider." PSD2, *supra* note 8, art. 4(23). The Preamble addresses the mechanics of a direct debit. *Id*. pmbl. para. 76.

24. "Payment card" is not defined. However, the Preamble addresses "the use of a card or card-based payment instrument." *Id*. pmbl. para. 68.

25. "Payment instrument" is defined as "a personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used in order to initiate a payment order." *Id*. art. 4(14). "Payment order" is defined as "an instruction by a payer or payee to its payment service provider requesting the execution of a payment transaction." *Id*. art. 4(13). "Issuing of payment instruments" is defined as "a payment service by a payment service provider contracting to provide a payer with a payment instrument to initiate and process the payer's payment transactions." *Id*. art. 4(45).

26. "Acquiring of payment transactions" is defined as "a payment service provided by a payment service provider contracting with a payee to accept and process payment transactions, which results in a transfer of funds to the payee." *Id*. art. 4(44).

27. "Money remittance" is defined as "a payment service where funds are received from a payer, without any payment accounts being created in the name of the payer or the payee, for the sole purpose of transferring a corresponding amount to a payee or to another payment service provider acting on behalf of the payee, and/or where such funds are received on behalf of and made available to the payee." *Id*. art. 4(22).

28. PSD, *supra* note 5, annex.

29. PSD2, *supra* note 8, annex 1.

30. *Id*. art. 3.

31. Namely,

payment transactions by a provider of electronic communications networks or services which are provided in addition to electronic communications services for a subscriber to the network or service;[32] payment transactions carried out between payment service providers for their own account as well as between entities belonging to the same corporate group such as subsidiaries; and "cash withdrawal services offered by means of ATM by providers, acting on behalf of one or more card issuers, which are not a party to the framework contract with the customer withdrawing money from a payment account, on condition that those providers do not conduct other payment services as referred to in Annex I."[33] With the exception of payment initiation services and account information services, services provided by technical service providers are also excluded.[34]

In principle, payment transactions are either credit or debit transfers. In a credit transfer, the payer initiates the transaction by communicating directly to the payer's PSP and by instructing it to "push" funds to the payee's account at the payee's PSP.[35] Conversely, in a debit transfer, under the payer's authority, the payee' initiates the transaction by communicating to the payee's PSP and instructing it to "pull" funds out of the payer's account at the payer's PSP.[36] Another distinction is between payment by consumers and those made by businesses. Unlike U.C.C. Article 4A, the Directive is not limited to credit transfers and does not exclude consumer transactions.[37] Its coverage extends to both credit and debit transfers as well as to consumer and business payment transactions. Unfortunately, however,

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> "(i) instruments allowing the holder to acquire goods or services only in the premises of the issuer or within a limited network of service providers under direct commercial agreement with a professional issuer; (ii) instruments which can be used only to acquire a very limited range of goods or services; (iii) instruments valid only in a single Member State provided at the request of an undertaking or a public sector entity and regulated by a national or regional public authority for specific social or tax purposes to acquire specific goods or services from suppliers having a commercial agreement with the issuer."

Id. art. 3(k).

   32. Namely,

> "(i) for purchase of digital content and voice-based services, regardless of the device used for the purchase or consumption of the digital content and charged to the related bill; or (ii) performed from or via an electronic device and charged to the related bill within the framework of a charitable activity or for the purchase of tickets…" *Id*. art. 3(l). For this exclusion to apply, payment transactions must comply with monetary limits of either EUR 50 or 300."

Id.

   33. As to this last exclusion, "the customer shall be provided with the information on any withdrawal charges referred to in Articles 45, 48, 49 and 59 before carrying out the withdrawal as well as on receipt of the cash at the end of the transaction after withdrawal." *Id*. art. 3(o). Such information pertains to various details of the payment transaction.

   34. PSD2, *supra* note 8, art. 3(j).

   35. *See generally id*. art. 4(24).

   36. The original PSD defined neither credit nor debit transfer. *See generally* PSD, *supra* note 5. "Credit transfer" is defined as "a payment service for crediting a payee's payment account with a payment transaction or a series of payment transactions from a payer's payment account by the payment service provider which holds the payer's payment account, based on an instruction given by the payer," and "debit transfer" remains undefined. PSD2, *supra* note 8, art. 4(24).

   37. For the scope of U.C.C. Article 4A, see U.C.C. §§ 4A-102, 4A-104(a), 4A-108 (AM. LAW INST. & UNIF. LAW COMM'N 2012). *See also* PSD2 pmbl. para. 55 (discussing the continued application of consumer protection directives to transactions governed by PSD2).

this achievement is mitigated by two factors. First, the Directive is not as comprehensive as U.C.C. Article 4A in terms of the range of issues covered. Second, the provisions outlining the scope of the Directive, set out above, are not entirely clear; they do not focus on the conceptual framework covering both credit and debit transfers but rather are saddled with unnecessary long details, some of which are obscure, so that in the final analysis, in endeavoring to ascertain the underlying framework determining the scope of the Directive, one may get lost in a maze and not see the forest from the trees.

Unlike U.C.C. Article 4A, the Directive also provides for the regulation of non-bank "payment institutions" as well as for disclosure requirements, which cannot be contracted out for consumer payment transactions. Title I of the Directive (consisting of Articles 1–4) provides for subject matter, scope, and definitions. It is followed by three substantive components. Title II (consisting of Articles 5–37) covers payment service providers. Title III (consisting of Articles 38–60) deals with transparency of conditions and information requirements for payment services. Title IV (consisting of Articles 61–103) governs rights and obligations in relation to the provision and use of payment services. Under Article 2, both Titles III and IV apply only where both the payer's and payee's payment service providers are located in the Union. In a major departure from the Proposal, and yet in the footsteps of the original PSD, Titles III and IV are not limited to payment transactions of up to EUR 50,000;[38] there is no amount ceilings whatsoever for payment transactions governed by them. The three substantive components are followed by Titles V (consisting of Articles 104–106), dealing with delegated and regulatory technical standards, and Title VI (consisting of Article 107–115), providing for final provisions. [39]

Article 2 prescribes the following rules as to the scope of the Directive:

One. The Directive applies to payment services provided within the Union.[40]

Two. For payment transactions in the currency of a Member State, Title III and IV apply "where both the payer's payment service provider and the payee's payment service provider are, or the sole payment service provider in the payment transaction is, located within the Union."[41]

Three. For "payment transactions in a currency that is not the currency of a Member State," Titles III and IV apply "where both the payer's payment service provider and the payee's payment service provider are, or the sole payment service provider in the payment transaction is, located within the Union," albeit only "in respect to those parts of the payments transaction which are carried out in the Union."[42] However a few exceptions exist. Thus, there is no requirement in

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38. PSD2, *supra* note 8, art. 2(2).

39. In the original PSD, Article 84 (to which there is no counterpart in PSD2) provided that implementing measures may be adopted by the Commission with the view of (i) amending "non-essential elements of [the] Directive, relating to" the adaptation of the list of activities that constitute "payment services" under the Annex, and (ii) updating amounts specified in a few provisions "in order to take account of inflation and significant market developments." PSD, *supra* note 5, art. 84.

40. "Institutions referred to in points (4) to (23) of Article 2(5) of Directive 2013/36/EU" may be exempt by their Member state from the application of all or part of the provisions of PSD2. PSD2, *supra* note 8, art. 2(5).

41. *Id.* art. 2(2).

42. *Id.* art. 2(3).

relation to the maximum execution time, value date, and deductions from the amount transferred (under Articles 45(1), 52(2)(e), 56(a), and 81–86).[43]

Four. For "payment transactions in all currencies," Titles III and IV apply "where only one of the payment service providers is located within the Union," albeit only "in respect to those parts of the payments transaction which are carried out in the Union."[44] Exceptions similar to those of its predecessor exist, plus additional ones as, for example, in respect to refunds for payment transactions initiated by or through a payee and liability.

The balance of this paper will provide an overview of Title II, cover Title III in greater depth, and discuss Title IV even more extensively, with some comparison to corresponding provisions of UCC Article 4A.

I.　　TITLE II: PAYMENT SERVICE PROVIDERS

Article 1(1) enumerates six "categories of payment service provider" (PSP):[45]

(a) credit institutions as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council, including branches thereof within the meaning of point (17) of Article 4(1) of that Regulation where such branches are located in the Union, whether the head offices of those branches are located within the Union or, in accordance with Article 47 of Directive 2013/36/EU and with national law, outside the Union;

(b) electronic money institutions within the meaning of point (1) of Article 2 of Directive 2009/110/EC, including, in accordance with Article 8 of that Directive and with national law, branches thereof, where such branches are located within the Union and their head offices are located outside the Union, in as far as the payment services provided by those branches are linked to the issuance of electronic money;

(c) post office giro institutions which are entitled under national law to provide payment services;

(d) payment institutions;

(e) the ECB and national central banks when not acting in their capacity as monetary authority or other public authorities;

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43. *See generally id*. arts. 45(1), 52(2)(e), 56(a), 85–86.

44. *Id*. art. 2(4).

45. The provision is located in Title I, addressing subject matter, scope and definitions. Logically, however, it belongs to Title II and hence is addressed in its context. PSD2, *supra* note 8, art. 1(1). "Credit institution" is defined to mean "an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account." Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on Prudential Requirements for Credit Institutions and Investment Firms and Amending Regulation (EU) No 648/2012, art. 4(1), 2013 O.J. (L 176) 1, 18. Effectively, it is a commercial bank.

(f) Member States or their regional or local authorities when not acting in their capacity as public authorities.

Under Article 35(1), rules on access by "authorised or registered payment service providers…to payment systems" ought to be "objective, non-discriminatory and proportionate" and must not "inhibit access more than is necessary to safeguard against specific risks such as settlement risk, operational risk and business risk and to protect the financial and operational stability of the payment system."[46] For its part, "payment system" is defined in Article 4(7) to mean "a funds transfer system with formal and standardised arrangements and common rules for the processing, clearing and/or settlement of payment transactions."[47]

Among the various PSPs, the Directive regulates "payment institutions."[48] Most of Title II is dedicated to their regulatory aspects, such as licensing and capital requirements, which are topics outside the scope of the present discussion. Activities permitted to payment institutions are enumerated in Article 18(1).[49] Apart from the provision of payment services, such activities are "(a) the provision of operational and closely related ancillary services such as ensuring the execution of payment transactions, foreign exchange services, safekeeping activities, and the storage and processing of data; (b) operating payment systems…; and (c) business activities other than the provision of payment services, having regard to applicable Union and national law."[50] Payment institutions are authorized to execute transactions in electronic money, but not to issue it.[51]

Recognizing that access to the payment system is through links with banks, Article 36 requires "credit institutions" (i.e., banks) to give payment institutions "payment accounts services on an objective, non-discriminatory and proportionate basis."[52] Such access ought to "be sufficiently extensive as to allow payment institutions to provide payment services in an unhindered and efficient manner."[53]

As indicated, PSD2 added to Annex I two new types of payment services relating to payment initiation and account information.[54] "Payment initiation service" ("PIS") is defined in Article 4(15) as "a service to initiate a payment order at the request of the payment service user with respect to a payment account held at another payment service provider."[55] "Account information service" ("AIS") is defined in Article 4(16) as "an online service to provide consolidated information on one or more payment accounts held by the payment service user with either another payment service provider or with more than one payment service

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46. PSD2, *supra* note 8, art. 35(1).

47. *Id*. art. 4(7).

48. *Id*. tit. II, ch. 1.

49. *Id*. art. 18(1).

50. *Id*. The fourth category replaced Article 10(3) of the Proposal to the original PSD, under which permitted activities "shall not be restricted to payment services, having regard to the applicable national and Community law." *Lisbon Programme Proposal*, *supra* note 1, art. 10(3).

51. PSD2, *supra* note 8, pmbl. para. 25.

52. *Id*. art. 36.

53. *Id*.

54. Points 7 and 8, respectively. *See generally id*. annex I.

55. *Id*. art. 4(15).

provider."[56] Providers of such services are respectively "payment initiation service provider" ("PISP") and "account information service provider" ("AISP").[57] Both services are covered by the Directive, even to the extent that they may be viewed as "technical service providers," which provide services supporting "the provision of payment services, without them entering at any time into possession of the funds to be transferred."[58] Such services are otherwise excluded under Article 3(j).[59] While PISPs and AISPs are not enumerated by the Directive as PSPs, they provide "payment services," and as discussed below, are treated as "payment institutions," which of course are PSPs.[60]

The functions of PISPs and AISPs, in the provision of payment services and the rationale for their coverage by the Directive, are set out in the PSD2 Preamble. Thus, paragraph 27 explains that a PIS "play[s] a part in e-commerce payments by establishing a software bridge between the website of the merchant and the online banking platform of the payer's account servicing payment service provider in order to initiate internet payments on the basis of a credit transfer."[61]

Under a new definition, Article 4(17) defines "account servicing payment service provider" (ASPSP) to mean "a payment service provider providing and maintaining a payment account for a payer." [62] The ASPSP is the PSP in which the payer's payment account is held. Effectively then, the PISP initiates a payment order at the request of the payment service user, as the payer, out of a payment account the payer has with the ASPSP. Paragraph 29 goes on to explain that,

> [PIS]s enable the [PISP] to provide comfort to a payee that the payment has been initiated in order to provide an incentive to the payee to release the goods or to deliver the service without undue delay. Such services offer a low-cost solution for both merchants and consumers and provide consumers with a possibility to shop online even if they do not possess payment cards.[63]

On the other hand, paragraph 29 explains, lack of coverage to PIS would have "raise[d] a series of legal issues, such as consumer protection, security and liability as well as competition and data protection issues."[64]

For its part, Preamble paragraph 32 elaborates on the modes of access by an PISP to the payer's payment account held at the ASPSP as follows:

> [PIS]s are based on direct or indirect access for the [PISP] to the payer's account. An [ASPSP] which provides a mechanism for indirect access should also allow direct access for the [PISP]s.[65]

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56. PSD2, *supra* note 8, art. 3(j).

57. Articles 4(18) and (19), respectively. *Id.* arts. 4(18)–(19).

58. *Id.* art. 3(j).

59. *Id.*

60. *Id.* pmbl. para. 26.

61. PSD2, *supra* note 8, pmbl. para. 27.

62. *Id.* art. 4(17).

63. *Id.* pmbl. para. 29.

64. *Id.*

65. *Id.* pmbl. para. 32.

In a direct access mode, known as screen scraping, the PISP uses the customer's account login and accesses the customer's account, exactly as the customer would do, via the ASPSP's webpage.[66] Alternatively, in the indirect access mode, the ASPSP provides the PISP account access through a dedicated application interface (API).[67] Regulatory standards favor the latter which unlike the former is capable of limiting the data accessed by the PISP to only what is required for the provision of the service.[68]

The need to regulate both PISPs and AISPs, particularly by reference to their position towards the ASPSP, is explained by the PSD2 Preamble in paragraph 93 as follows:

> It is necessary to set up a clear legal framework which sets out the conditions under which [PISP]s and [AISP]s can provide their services with the consent of the account holder without being required by the [ASPSP] to use a particular business model, whether based on direct or indirect access, for the provision of those types of services. The [PISP]s and the [AISP]s on the one hand and the [ASPSP] on the other, should observe the necessary data protection and security requirements established by, or referred to in, this Directive or included in the regulatory technical standards. Those regulatory technical standards should be compatible with the different technological solutions available. In order to ensure secure communication between the relevant actors in the context of those services, EBA should also specify the requirements of common and open standards of communication to be implemented by all [ASPSP]s that allow for the provision of online payment services. This means that those open standards should ensure the interoperability of different technological communication solutions. Those common and open standards should also ensure that the [ASPSP] is aware that he is being contacted by a [PISP] or an [AISP] and not by the client itself. The standards should also ensure that [PISP]s and [AISP]s communicate with the [ASPSP] and with the customers involved in a secure manner. In developing those requirements, EBA should pay particular attention to the fact that the standards to be applied are to allow for the use of all common types of devices (such as computers, tablets and mobile phones) for carrying out different payment services.[69]

Specific provisions cover capital requirements of payment institutions.[70] They address the safeguarding by segregation of funds placed for payment transactions;[71] the authorization process, the maintenance as well as the withdrawal of authorization, and the registration of authorized payment institutions; [72] compliance with accounting and statutory audit

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66. Markus Demary & Christian Rusche, *Strengthened Competition in Payment Services* 4 (IW-Kurzbericht, No. 4/2018, 2018), https://www.econstor.eu/bitstream/10419/173454/1/101095413X.pdf.

67. *Id*.

68. *Id*.

69. PSD2, *supra* note 8, pmbl. para. 93.

70. Articles 7–9 provide for initial capital, own funds, and two alternative methods for calculation of own funds. *Id*. arts. 7-9.

71. *Id*. art. 10.

72. *Id*. arts. 5, 11–14, 16.

requirements;[73] the use of branches and third-parties by payment institutions;[74] record-keeping requirements;[75] and professional secrecy.[76] They also provide for the designation of competent authorities[77] for prudential regulation and supervision as well as their activities and exchange of information;[78] and right to apply to the courts.[79]

For their part, to obtain authorization, PISPs and AISPs are required to "hold a professional indemnity insurance, covering the territories in which they offer services, or some other comparable guarantee against liability."[80]

In relation to capital requirements, PISPs are categorized as payment institutions. More directly, Article 33(2) mandates that AISPs "shall be treated as payment institutions."[81] However, "Titles III and IV shall not apply [to AISPs],"[82] other than specified provisions addressing information requirements (Articles 45 and 52); burden of proof as to compliance with information requirements (Article 41); rules on access to and use of payment account information in the case of account information services (Article 67); obligations of the payment service user in relation to payment instruments and personalized security credentials (Article 69); and operational and security risks and authentication (Articles 95–98). Article 33(1) further relaxes the application of rules governing applications for authorization (Article 5) and registration (Article 15).

Paragraph 33 of the PSD2 Preamble states that "[a]ny payment service provider, including the [ASPSP] of the payment service user, should be able to offer [PIS]s."[83] As for the access of a PISP to the payer's funds, and position vis-à-vis the ASPS, paragraph 30, explains,

> The personalised security credentials used for secure customer authentication by the payment service user or by the [PISP] are usually those issued by the [ASPSP]s. [PISP]s do not necessarily enter into a contractual relationship with the [ASPSP]s and, regardless of the business model used by the [PISP]s, the [ASPSP]s should make it possible for [PISP]s to rely on the authentication procedures provided by the [ASPSP]s to initiate a specific payment on behalf of the payer.[84]

In rationalizing the application of the Directive to AISs, Preamble Paragraph 28 explains that they "provide the payment service user with aggregated online information on one or more payment accounts held with one or more other [PSP]s and accessed via online interfaces of the [ASPSP]."[85] They thus enable the payment service user "to have an overall view of its

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73. *Id.* art. 17.

74. PSD2, *supra* note 8, arts. 19–20.

75. *Id.* art. 21.

76. *Id.* art. 24.

77. For the designation of "competent authorities…to ensure and monitor effective compliance with the Directive," see *id.* art. 100.

78. *Id.* arts. 22-23.

79. PSD2, *supra* note 8, art. 25.

80. *Id.* arts. 5(2)–(3).

81. *Id.* art. 33(2).

82. *Id.*

83. *Id.* pmbl. para. 33.

84. PSD2, *supra* note 8, pmbl. para. 30.

85. *Id.* pmbl. para. 28.

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financial situation immediately at any given moment."[86] In this context, the Directive coverage is thus required "to provide consumers with adequate protection for their payment and account data as well as legal certainty about the status of [AISP]s."[87]

II.   TITLE III: TRANSPARENCY AND DISCLOSURES

Title III governs transparency of conditions and information requirements for payment services for payment transactions throughout the Union. It is designed to provide users with standardized "high level of clear information" enabling them "to make well-informed choices and be able to choose freely within the Union" and yet to ensure that "[l]ow-value payment instruments should be cheap and easy-to-use alternative in the case of low-priced goods and services and should not be overburdened by excessive requirements."[88]

There is no ceiling on the amount of a payment transaction governed by Title III.[89] However, per Article 38, "[t]he parties may agree that it shall not apply in whole or in part when the payment service user is not a consumer."[90] The latter is defined in Article 4(20) to mean, "a natural person who, in payment service contracts covered by this Directive, is acting for purposes other than his trade, business or profession."[91] Article 38(2) allows Member States to provide that Title III applies to micro-enterprises "in the same way as to consumers."[92]

Title III applies to "single payment transactions, framework contracts and payment transactions covered by them."[93] Since "single payment transaction" is undefined, it must be taken to refer to an isolated or one-time payment transaction, or better, to any payment transaction not governed by a framework contract. A "framework contract" is defined in Article 4(21) as "a payment service contract which governs the future execution of individual and successive payment transactions and which may contain the obligation and conditions setting up a payment account."[94] No requirements are laid out as to either the medium in which such a contract is to be contained or as to whether the contract must be express.

"Payment transaction" is defined in Article 4(5) as "an act, initiated by the payer or on his behalf or by the payee, of placing, transferring or withdrawing funds, irrespective of any

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86. *Id*.

87. *Id*.

88. PSD2, *supra* note 8, pmbl. paras. 54, 81 (respectively).

89. *Compare* Transparency Directive, *supra* note 6, pmbl. para. 7 (covering only cross-border—and not national—credit transfers not exceeding EUR 50,000), *with* PSD2, *supra* note 8, tit. III (failing to include an upper limit).

90. PSD2, *supra* note 8, art. 38.

91. *Id*. art. 4(20).

92. *Id*. art. 38(2). "Microenterprise" is defined as "an enterprise, which at the time of conclusion of the payment service contract, is an enterprise defined in Article 1 and Article 2(1) and (3) of the Annex to Recommendation 2003/361/EC." *Id*. art. 4(36). In principle, this is an enterprise (namely an entity engaged in economic activity irrespective of its legal form) that employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million. Commission Recommendation 2003/361/EC of 6 May 2003 Concerning the Definition of Micro, Small and Medium-Sized Enterprises, annex arts. 1, 2(3), 2003 O.J. (L 124) 36, 39.

93. PSD2, *supra* note 8, art. 38(1).

94. *Id*. art. 4(21).

underlying obligations between the payer and the payee."[95] Under Article 4(12), "payment account" means "an account held in the name of one or more payment service users which is used for the execution of payment transactions."[96] The end participants to a payment transaction are the payer and the payee, respectively defined in Article 4(8) and (9). "Payment order" is defined in Article 4(13) to mean an "instruction by a payer or payee to its payment service provider requesting the execution of a payment transaction."[97] It can thus be either an instruction by the payer to his or her payment service provider to "push" funds, in which case the resulting payment transaction is a "credit transfer," or an instruction by the payee to his or her payment service provider to "pull" or collect funds, in which case it is a "debit transfer."[98]

Per Articles 59–60, payments are to be made in the currency agreed between the parties. Similarly, all charges, including those associated with currency conversion are to be advised in advance.[99] For its part, "[t]he payer shall only be obliged to pay for the charges" where "their full amount was made known prior to the initiation of the payment transaction."[100] Under Article 41, "the burden of proof lies with the payment service provider to prove that it has complied with the information requirements" set out in Title III.[101]

There is some overlap in disclosure requirements for both single payment transactions and framework contracts. For both, information and conditions are to be "given in easily understandable words and in a clear and readable form,"[102] "on paper or on another durable medium,"[103] and "before the payment service user is bound."[104] In each case, conditions consist of description of respective obligations and liabilities which include information or unique identifier[105] to be provided by user in order for a payment order to be properly executed; execution time; pertinent charges and as applicable, relevant exchange rates; information as to liability rules; indication of the redress and complaint procedure; description on the payment service provided, communication equipment and procedures, as well as the payment service provider; and information on changes and termination of contracts.[106]

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95. *Id.* art. 4(5).

96. *Id.* art. 4(12).

97. *Id.* art. 4(13).

98. For the distinction, see *supra* notes 35–36. *See also supra* note 23.

99. PSD2, *supra* note 8, art. 59(2).

100. *Id.* art. 60(3).

101. *Id.* art. 41.

102. *Id.* art. 44(1).

103. *Id.* "Durable medium" is defined as "any instrument which enables the payment service user to store information addressed personally to that payment service user in a way accessible for future reference for a period of time adequate to the purposes of the information and which allows the unchanged reproduction of the information stored." *Id.* art. 4(35). The counterpart in Paragraph 57 of the PSD2 Preamble adds a few examples: "[I]nformation should always be provided on paper on another durable medium, such as printouts by account printers, CD-ROMs, DVDs, the hard drives of personal computers on which electronic mail can be stored, and internet sites, provided that such sites are accessible for future reference." *Id.* pmbl. para. 57.

104. PSD2, *supra* note 8, art. 54(1).

105. Defined as "a combination of letters, numbers or symbols specified to the payment service user by the [PSP] and to be provided by the payment service user to identify unambiguously another payment service user and/or the payment account of that other payment service user for a payment transaction." PSD2, *supra* note 8, art. 4(33). Examples given in the corresponding provision of the Proposal consisted of "the IBAN (International Bank Account Number), the BIC (Bank Identifier Code), a bank account number, a card number or a name." *Lisbon Programme Proposal*, *supra* note 1, art. 4(15).

106. PSD2, *supra* note 8, arts. 45, 52.

For all payment transactions, the payment service provider is mandated[107] to make available to the payer a reference enabling the identification of the payment transaction, including information relating to the payee, fees and charges, the amount of payment, and applicable exchange rates.[108] Subsequent to the execution of a payment transaction, the payment service provider is required[109] to make a similar disclosure to the payee,[110] though information as to the payer replaces information as to the payee.

For a framework, contract-specific provisions are made in Articles 53, 54, and 55 to govern accessibility of information and conditions of the contract, changes in contractual provisions, and termination. Thus, under Article 53, during the term of the contract, the payment service user has "a right to receive, on request, the contractual terms of the framework contract" as well as the contents of required disclosures.[111] In principle, under Article 54, changes in the terms of the contract are subject to the same disclosure requirements that applied to the original terms.[112] Finally, the payment service user's and provider's respective right to terminate the framework contract unilaterally is governed by Article 53.[113]

Under Article 42, disclosure requirements are substantially reduced in connection with low-value payment instruments and electronic money, i.e., "payment instruments which, according to the relevant framework contract, concern only individual payment transactions that do not exceed EUR 30 or that either have a spending limit of EUR 150 or store funds that do not exceed EUR 15…."[114]

In a case of a contract for such "micro payments," Article 42 requires the payment service provider to communicate to the payer "only…information on the main characteristics of the payment service, including the way in which the payment instrument can be used, liability, charges levied and other material information needed to take an informed decision."[115] Required information is to be made available "in an easily accessible manner."[116] Subsequent to the execution of such a payment transaction, a payment service provider is to make available "only a reference enabling the payment service user to identify the payment transaction, the amount…[and] any charges."[117]

In connection of a single payment transaction Article 45(2) requires a PISP to give the payer "clear and comprehensive information" prior to initiation contact information.[118] Under Article 46, "immediately after initiation," a PISP is required to "provide or make

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107. *See id.* art. 48 (for a single payment transaction); *id.* art. 57 (for a payment transaction executed pursuant to a framework contract).

108. *Id.* art. 48.

109. *See id.* art. 49 (for a single payment transaction); *id.* art. 58 (for a payment transaction executed pursuant to a framework contract).

110. Either way, disclosure is to be made as required under Article 44(1) for single transactions and 51(1) in connection with a framework contract for initial disclosure. *Id.* arts. 44(1), 51(1).

111. PSD2, *supra* note 8, art. 53.

112. *Id.* art. 54.

113. *Id.* art. 53.

114. *Id.* art. 42(1).

115. *Id.* art. 42(1)(a).

116. PSD2, *supra* note 8, art. 42(1)(a).

117. *Id.* art. 42(1)(c)(i). Questions exist as to whether these requirements are specific enough to guide PSPs as to what they ought to do.

118. *Id.* art. 45(2).

available…to the payer and, where applicable, the payee," a confirmation, reference number and the amount paid, as well the applicable amount of charges.[119] Article 47 requires the PISP, upon initiation, to "make available to the payer's [ASPSP] the reference of the payment transaction."[120]

III.   TITLE IV: RIGHTS AND OBLIGATIONS RELATING TO THE PROVISION AND USE OF PAYMENT SERVICES

A. Scope

Title IV provides for substantive law for major aspects of payment transactions. There is no ceiling whatsoever on the amount of a payment transaction governed by Title IV.

Other than in consumer[121] payment transactions, Article 61 provides for the ability of parties to contract out of or vary some of the provisions of Title IV. Also, Article 61 allows Member States to exempt consumers from Article 102 requirements covering out-of-court redress; it further allows Member States to provide that Title IV applies to micro-enterprises[122] "in the same way as to consumers."[123]

Specifically, Article 61 provides for the power of parties to contract out of or vary some provisions other than in connection with a consumer payment service user.[124] Thus, in non-consumer payment transactions, parties may contract out of: provisions dealing with allocation of charges (Article 62(1)); authorization by consent by means of an agreement (Article 64(2)); time for notifying an unauthorized or incorrectly executed payment transaction (Article 71(1)); onus of proof in connection with an alleged unauthorized payment transaction (Article 72(1)); allocation for losses for unauthorized payments (Article 74); refund for debit transfers (Articles 76 and 77); irrevocability of a payment order (Article 80); and loss allocation in connection with non-execution or defective execution (Article 89).

Another common provision in Article 63 deals with derogation for low value payment instruments and electronic money. It applies to payment instruments which "solely concern individual payment transactions not exceeding EUR 30 or which either have a spending limit of EUR 150, or store funds which do not exceed EUR 150 at any time."[125]

Finally, a common provision, not enumerated as such, is in fact Article 93, which is located at the end of Chapter 3, providing for defense to liability under the liability provisions of Title IV. Thus, under Article 93, liability under Chapter 2 and 3—namely, liability in

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119. *Id*. art. 46.

120. *Id*. art. 47.

121. "Consumer" is defined as "a natural person who, in payment service contracts covered by this Directive, is acting for purposes other than his or her trade, business or profession." PSD2, *supra* note 8, art. 4(20).

122. For a definition of "microenterprise" see *supra* note 92.

123. PSD2, *supra* note 8, art. 61(3).

124. The required agreement is that the specified provisions of the Directive "do not apply in whole or in part." *Id*. art. 61(1).

125. *Id*. art. 63(1). However, for national payment transactions, "Member States…may reduce or double [these] amounts….They may increase them for prepaid payment instruments up to EUR 500." *Id*. art. 63(2). "Prepaid payment instruments" is undefined.

connection with either the authentication[126] or the execution of payment transactions—shall not arise,

> in cases of abnormal and unforeseeable circumstances beyond the control of the party pleading for the application of those circumstances, the consequences of which would have been unavoidable despite all efforts to the contrary, or where a payment service provider is bound by other legal obligations covered by Union or national law.[127]

B.   Authorization

Authorization of payment transactions is governed by Chapter 2, which consists of Articles 64–77. The provisions cover authorization, electronic authorization, onus of proof, liability for losses, and reversal of authorized debit transfers.

"Authorization" in the form of "consent" is to be given for the execution of a "payment transaction." Article 64 treats authorization only in terms the payer's consent, which is obviously required also for "debit-pull" withdrawals by the payee from the payer's account.[128] No reference is made to the payee's authorization given to the payee's PSP as to carrying out a debit transfer out of the payer's account.

Authorization in the form of payer's consent may be given under Article 64 "prior to or, if agreed between the payer and the [PSP], after the execution of the payment transaction" and "in the form" as well as under "[t]he procedure" agreed between them.[129] "Consent to execute a payment transaction may also be given via the payee or the PSP. "In the absence of [such] consent, a payment transaction shall be considered to be unauthorised."[130]

While in departure from the Proposal to the original PSD, where consent is not necessarily required to be "explicit,"[131] the reference to an agreement as well as a procedure weakens the possibility of an implied authority and may be read to eliminate altogether the possibility of an apparent authority[132] as when a cardholder voluntarily delivered the card and advised the associated code to a friend or relative.[133] It is, however, noteworthy that as discussed below, under Articles 65–67, consent to be given to a PISP, ASPSP and AISP is required to be explicit.

Under Article 64, consent "may be withdrawn by the payer at any time, but no later than at the moment of irrevocability" of the payment order under Article 80.[134] Also withdrawable

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126. "Authentication" is defined as "a procedure which allows the payment service provider to verify the identity of a payment service user or the validity of the use of a specific payment instrument, including the use of the user's personalised security credentials." *Id*. art. 4(29).

127. *Id*. art. 93.

128. PSD2, *supra* note 8, art. 64.

129. *Id*.

130. *Id*. art. 64(2).

131. *See Lisbon Programme Proposal*, *supra* note 1, art. 41 ("Consent shall consist in an explicit authorisation for the payment service provider to effect a payment transaction or a series of transactions.").

132. As a matter of agency law, authority can be actual or apparent. *Agency*, BLACK'S LAW DICTIONARY (10th ed. 2014). Actual authority may be express or implied. *Authority*, BLACK'S LAW DICTIONARY (10th ed. 2014).

133. In this case, liability may nevertheless be fastened on the cardholder. PSD2, *supra* note 8, art. 74(1); *see also infra* III.C.2.

134. PSD2, *supra* note 8, art. 64(3).

is "[c]onsent to execute a series of payment transactions," in which case "any future payment transaction shall be considered as unauthorised."[135]

According to Article 65, at the request of a PSP card issuer, the ASPSP shall immediately advise it as to the availability of funds on the payer's payment account "for the execution of a card-based payment transaction," but only where the payer has given explicit consent to the ASPSP to respond to such requests from that PSP.[136] Confirmation is required to be laconic; the ASPS ought not to disclose the account balance and is not allowed to block funds. For its part, the PSP may not store or use the response other than for the execution of the card-based payment transaction.[137]

Under Article 66(1), Member States are required to "ensure that a payer has the right to make use of a [PISP]," but only where the payment account is accessible online.[138] For a payment to be authorized, the payers explicit consent may be given to a PISP.[139] Under Article 66(3), a PISP shall not hold the payer's funds in connection with the provision of the PIS; prevent unauthorized access to the personalized security credentials[140] of, and other information about, the payment service user; identify itself towards the payer's ASPS and communicate with it and the parties to the payment transaction in a secure way; not store sensitive payment data of the payment service user and not request from him data other than those necessary to provide the payment initiation service; not use, access, or store any data for purposes other than for the provision of the payment initiation service as explicitly requested by the payer; and not modify any feature of the transaction.[141] For its part under Article 66(4), the ASPS is required to communicate securely with the PISP, promptly provide information to it, and "treat payment orders transmitted through the services of a [PISP] without any discrimination…"[142]

The payment service user's right to make use of an AISP for a payment account accessible online is provided for by Article 67(1).[143] Under Article 67(2), the AISP is required to provide services only where based on the payment service user's explicit consent; prevent unauthorized access to the personalized security credentials of the payment service user; identify itself towards the payer's ASPS and communicate with it in a secure way; access only the information from designated payment accounts and associated payment transactions; and not use, access, or store any data for purposes other than for performing the AIS explicitly requested by the payment service user.[144] For its part the ASPS, under Article 67(3), is

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135. *Id*. The withdrawal of consent to a single future payment transaction (rather than to a series of them) falls under the previous sentence.

136. *Id*. art. 65(1).

137. *See id*. art. 65(6) ("This Article does not apply to payment transactions initiated through card-based payment instruments on which electronic money as defined in point (2) of Article 2 of Directive 2009/110/EC is stored.").

138. *Id*. art. 66(1).

139. PSD2, *supra* note 8, art. 64(2); *see also id*. art. 80(2) ("[w]here the payment transaction is initiated by a [PISP]…the payer shall not revoke the payment order after giving consent to the [PISP] to initiate the payment transaction…").

140. "Personalised security credentials" are defined as "personalised features provided by the payment service provider to a payment service user for the purposes of authentication." *Id*. art. 4(31).

141. *Id*. art. 66(3).

142. *Id*. art. 66(4)(c); *see also id*. art. 68(5) (discussing denial "for objectively justified and duly evidenced reasons relating to unauthorised or fraudulent access to the payment account by…that [PISP]").

143. *Id*. art. 67(1).

144. PSD2, *supra* note 8, art. 67(2).

obligated to communicate securely with the AISPS and treat data requests involving it "without any discrimination."[145]

The Directive contemplates authorization to be given either in an electronic form or otherwise.[146] An electronic authorization is referred to as authorization given by means of a payment instrument. Important aspects of such authorization are governed by Articles 68–70. "Payment instrument*"* is defined in Article 4(14) as "a personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used [by the payment service user] in order to initiate a payment order."[147] A card used with or without a personal code will satisfy this definition. Moreover, any agreed upon security procedure will be a "payment instrument."

Limits to the ability to initiate a payment transaction by means of a payment instrument are provided for in Article 68. Thus, under Article 68(1), where a specific payment instrument is used for the purposes of giving consent, authorization may be given within agreed "spending limits for payment transactions executed through that payment instrument."[148] Also, according to Article 68(2), under the "framework contract, the [PSP] may reserve the right to block the payment instrument for objectively justified reasons relating to the security of the payment instrument, the suspicion of unauthorised or fraudulent use of the payment instrument" or similar reasons.[149] Similarly, under Article 68(5), "[a]n [ASPSP] may deny an [AISP] or a [PISP] access to a payment account," albeit only "for objectively justified and duly evidenced reasons relating to unauthorised or fraudulent access to the payment account by that [AISP] or that [PISP], including the unauthorised or fraudulent initiation of a payment transaction."[150] In such cases the ASPSP shall promptly inform the payer and, per Article 68(6), report the incident to the authorities.[151]

Reciprocal obligations of payment service user and provider in relation to payment instruments are governed by Articles 69 and 70. Thus, under Article 69, the payment service user is required to "use the payment instrument in accordance with the terms governing the issue and use of the payment instrument," and in particular, to take all reasonable steps to keep the personalized security payment instrument safe.[152] The user is further required to notify the PSP "without undue delay upon becoming aware of loss, theft or misappropriation or unauthorised use of the payment instrument."[153]

In turn, the PSP issuing a payment instrument is required under Article 70(1):

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145. *Id.* art. 67(3); *see also id.* art. 68(5) (discussing denial "for objectively justified and duly evidenced reasons relating to unauthorised or fraudulent access to the payment account by…that [PISP]").

146. Stated otherwise, a payment transaction falling under the Directive needs not be electronic from end to end; instead, authorization can be given in writing. In fact, even an oral authorization is not precluded.

147. PSD2, *supra* note 8, art. 4(14).

148. *Id.* art. 68(1).

149. *Id.* art. 68(2).

150. *Id.* art. 68(5).

151. *Id.* art. 68(6).

152. PSD2, *supra* note 8, art. 69.

153. *Id.* This requirement does not apply to "payment instruments which, according to the framework contract, solely concern individual payment transactions not exceeding EUR 30 or which either have a spending limit of EUR 150, or store funds which do not exceed EUR 150 at any time," and which "does not allow its blocking or prevention of its further use." *Id.* art. 63(1)(a).

(a) to make sure that the personalized security credentials of the payment instrument are not accessible to third parties;[154]

(b) to refrain from sending an unsolicited payment instrument other than as a replacement to an existing one;[155]

(c) to ensure that appropriate means are available at all time to enable the payment service user to make required notifications as for example upon the loss, theft, or misappropriation of the payment instrument;[156]

(d) to provide the payment service user with an option to make such a notification free of charge[157] and to charge, if at all, only replacement costs directly attributed to the payment instrument;[158]

(e) to prevent the use of the payment instrument once such notification has been made.[159]

Article 70(2) allocates to the PSP "the risk of sending a payment instrument or any personalised security credentials relating to it to the payment service user."[160] No reciprocal broad general duties of care to prevent and detect unauthorized use are fastened on the payment service user and provider.

C. Unauthorized payments

Under Article 72, where a purported payer denies authorization for a payment transaction as debited to his or her account, it is for his payment service provider "to prove that the payment transaction was authenticated, accurately recorded, entered in the accounts and not affected by a technical breakdown or some other deficiency of the service provided by the payment service provider."[161] However, "authenticated" is defined by reference to the verification of the authorization by means of a payment instrument.[162] The provision goes on

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154. *Id*. art. 70(1)(a).

155. *Id*. art. 70(1)(b).

156. *Id*. art. 70(1)(c). This requirement does not apply to "payment instruments which, according to the framework contract, solely concern individual payment transactions not exceeding EUR 30 or which either have a spending limit of EUR 150, or store funds which do not exceed EUR 150 at any time," and which "does not allow its blocking or prevention of its further use." *Id*. art. 63(1)(a).

157. PSD2, *supra* note 8, art. 70(1)(d). This requirement does not apply to "payment instruments which, according to the framework contract, solely concern individual payment transactions not exceeding EUR 30 or which either have a spending limit of EUR 150, or store funds which do not exceed EUR 150 at any time," and which "does not allow its blocking or prevention of its further use." *Id*. art. 63(1)(a).

158. *Id*. art. 70(1)(d).

159. *Id*. art. 70(1)(e).

160. *Id*. art. 70(2).

161. *Id*. art. 72(1).

162. "Authentication" is defined as a "procedure which allows the payment service provider to verify the identity of a payment service user or the validity of the use of a specific payment instrument, including the use of the user's personalised security credentials." PSD2, *supra* note 8, art. 4(29). There is no requirement comparable to U.C.C. § 4A-202(b) for a "security procedure," which is "a commercially reasonable method of providing security against unauthorized payment orders." U.C.C. § 4A-202(b) (AM. LAW INST. & UNIF. LAW COMM'N 2012).

to state that "the use of a payment instrument recorded by the [PSP], including the [PISP] as appropriate, shall in itself not necessarily be sufficient to prove either that the payment transaction was authorised by the payer or that the payer acted fraudulently or failed with intent or gross negligence[163] to fulfil one or more of the obligations under Article 69."[164] Stated otherwise, evidence as to the use of a payment instrument recorded by the service provider is an important element in meeting the required standard of proof for fastening civil liability for authorized use; yet, standing on its own, such evidence creates neither an unrebuttable presumption[165] nor a rebuttable presumption that reverses the onus of proof as to whether use was authorized.[166] Rather, some corroboration is required.[167]

Allocation of losses for unauthorized payments is governed by Articles 71, 73, and 74. First, under Article 71(1), unless the PSP failed to make disclosures required under Title III, the payment service user is entitled to obtain rectification from it only if the user notifies the provider "without undue delay on becoming aware of any such transaction giving rise to a claim…and no later than 13 months after the debit date."[168] The same applies "[w]here a [PISP] is involved."[169] Under Article 73, whether or not the payment transaction was initiated through a PISP, refund by the payer's PSP to the payer is to be made immediately for the amount of the unauthorized payment transaction.[170] "Further financial compensation may be

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163. According to the PSD2 Preamble,

"[i]n order to assess possible negligence or gross negligence on the part of the payment service user, account should be taken of all of the circumstances. The evidence and degree of alleged negligence should generally be evaluated according to national law. However, while the concept of negligence implies a breach of a duty of care, gross negligence should mean more than mere negligence, involving conduct exhibiting a significant degree of carelessness; for example, keeping the credentials used to authorise a payment transaction beside the payment instrument in a format that is open and easily detectable by third parties. Contractual terms and conditions relating to the provision and use of a payment instrument, the effect of which would be to increase the burden of proof on the consumer or to reduce the burden of proof on the issuer should be considered to be null and void. Moreover, in specific situations and in particular where the payment instrument is not present at the point of sale, such as in the case of online payments, it is appropriate that the payment service provider be required to provide evidence of alleged negligence since the payer's means to do so are very limited in such cases."

PSD2, *supra* note 8, pmbl. para. 72.

164. *Id.* art. 72(2). Per Article 61(1), "where the payment service user is not a consumer, the payment service user and the [PSP] may agree that…Article[] 72…[does] not apply in whole or in part." *Id.* art. 61(1). Also, under Article 63(1)(b), in connection with low-value payments, Article 72 does not apply "if the payment instrument is used anonymously or the [PSP] is not in a position for other reasons which are intrinsic to the payment instrument to prove that a payment transaction was authorised." *Id.* art. 63(1)(b), 72.

165. Judd v. Citibank, 107 Misc. 2d 526, 529 (Civ. Ct. 1980) (stating that the court was "not prepared to go so far as to rule that where a credible witness is faced with the adverse 'testimony' of a machine, he is as a matter of law faced also with an unmeetable burden of proof.").

166. *Compare* PSD2, *supra* note 8, art. 72(2), *with* U.C.C. § 4A-203 (AM. LAW INST. & UNIF. LAW COMM'N 2012).

167. Such as lack of credibility or some support to user's version.

168. PSD2, *supra* note 8, art. 71(1). The notification requirement is stated to apply also to a claim for incorrectly executed payment transactions governed by Article 89. *Id.* art. 89.

169. *Id.* art. 71(2). Article 71(2) adds that the payment service user's rectification from the ASPSP is "without prejudice to Article 73(2) and Article 89(1)," which is discussed further below. *Id.*

170. Under Article 73(2),

determined in accordance with the law applicable to the contract concluded between the payer and his [PSP] or the contract concluded between the payer and the payment initiation service provider if applicable."[171] Presumably, such loss will also be for wrongful dishonor for items that lacked cover due to the debit for the unauthorized payment.

Second, Article 74 provides for the liability of the payer for unauthorized payment transactions.[172] Under Article 61(1), the provision can be contracted out where the payment service user is not a consumer.[173] Its rules can be set out—albeit not in the sequence they are provided in the Article itself—as follows:[174]

1. "The payer shall bear all of the losses relating to any unauthorised payment transactions if they were incurred by the payer acting fraudulently or failing to fulfil one or more of the obligations set out in Article 69 with intent or gross negligence."[175]

    As recalled, under Article 69, the payment service user is required "to "use the payment instrument in accordance with the terms governing the issue and use of the payment instrument," and in particular, to take all reasonable steps to keep safe the personalized security payment instrument.[176] However, not any breach of such term results in an unlimited liability; rather, per the language of Article 74(1), the failure to fulfil an obligation under Article 69 must have been made "with intent or gross negligence."[177] Arguably however, unlimited liability for gross negligence may be fastened in cases that would have otherwise be treated as those of apparent authority, as for example, where the payment service user delivers the payment instrument to one considered by the payment service user to be a trusted agent who nevertheless betrays him or her. Other than in low-value payments where the payment instrument does not allow its blocking or prevention of its further use, the payer is further required to notify the PSP "without undue delay on becoming

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"If the [PISP] is liable for the unauthorised payment transaction, it shall immediately compensate the [ASPSP] at its request for the losses incurred or sums paid as a result of the refund to the payer, including the amount of the unauthorised payment transaction. In accordance with Article 72(1), the burden shall be on the [PISP] to prove that, within its sphere of competence, the payment transaction was authenticated, accurately recorded and not affected by a technical breakdown or other deficiency linked to the payment service of which it is in charge."

Id. art. 73(2).

171. *Id.* art. 73(3). Under Article 63(1)(b), in connection with low-value payments, Article 73 does not apply "if the payment instrument is used anonymously or the [PSP] is not in a position for other reasons which are intrinsic to the payment instrument to prove that a payment transaction was authorised." *Id.* art. 63(1)(b).

172. *Id.* art. 74.

173. PSD2, *supra* note 8, art. 61(1).

174. Hereinafter referred to as Rules 1-5.

175. *Id.* art. 74(1). Inasmuch as he did not "allow…a payment order from [the] payment account" nor "[gave] a payment order" as required for a "payer" under Article 4(8), reference should have been in Article 74 (and hence to all the rules set out below) to the "purported payer" and not the "payer."

176. *Id.* art. 69.

177. *Id.* art. 74(1).

aware of the loss, theft or misappropriation or unauthorised use of the payment instrument."[178]

2.   A payer who has not acted fraudulently[179] is released from liability where:

   (a)   "the loss, theft or misappropriation of a payment instrument was not detectable to the payer prior to a payment";[180]

   (b)   the payer's PSP does not require "strong customer authentication,"[181] defined in Article 4(30) to mean "an authentication based on the use of two or more elements categorised as knowledge (something only the user knows), possession (something only the user possesses) and inherence (something the user is) that are independent, in that the breach of one does not compromise the reliability of the others, and is designed in such a way as to protect the confidentiality of the authentication data."[182] PIN used in conjunction with a card will meet this standard which is not the case for either a PIN and card alone. Under Article 97(1), a PSP is required to apply strong customer authentication where the payer "(a) accesses its payment account online; (b) initiates an electronic payment transaction; (c) carries our any action through a remote channel which may imply a risk of payment fraud or other abuse[]."[183] For remote electronic payment transactions,[184] PSPs are required by Article 97(2) to "apply strong customer authentication that includes elements which dynamically link the transaction to a specific amount and a specific payee."[185] For their part, PSPs are to be mandated under Article 97(3) to "have in place adequate security measures to protect the confidentiality and integrity of payment service users' personalised security credentials."[186] In turn, under Article 97(5), PISPs and AISPs may "rely on the authentication procedures provided by the [ASPSP] to the payment service user."[187]

   (c)   other than in connection with a payment instrument (for low-value transactions) which does not allow its blocking or prevention of its further use, after prompt notification, in accordance with Article 69(1)(b), upon becoming

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178. *Id*. art. 69(1)(b).

179. Note that under the plain meaning of the provision, a payer who has acted with gross negligence is still protected under the prescribed circumstances.

180. PSD2, *supra* note 8, art. 74(1)(a).

181. *Id*. art. 74(2) (providing that "[w]here the payee or the [PSP] of the payee fails to accept strong customer authentication, it shall refund the financial damage caused to the payer's payment service provider."). *Id*. art. 74(2).

182. *Id*. art. 4(30).

183. *Id*. art. 97(1).

184. "Remote payment transaction" is defined as "a payment transaction initiated via internet or through a device that can be used for distance communication." *Id*. art. 4(6). There is no definition for "electronic payment transaction." *Cf*. reference to definitions elsewhere of "electronic communications network" and "electronic communications service" respectively under Article 4(41) and (42) as well as of "electronic money" in Article 18(3).

185. PSD2, *supra* note 8, art. 97(2).

186. *Id*. art. 97(3).

187. *Id*. art. 97(5).

      aware of loss, theft, or misappropriation of the payment instrument or its unauthorized use;[188] or

(d) the payment service provider does not provide appropriate means for the notification at all times of a lost, stolen or misappropriated payment instrument, in breach of Article 70(1)(c) (which does not apply to in low-value payments where the payment instrument does not allow its blocking or prevention of its further use).[189]

3. The payer is released from liability where "the loss was caused by acts or lack of action of an employee, agent or branch of a [PSP] or of an entity to which its activities were outsourced."[190]

4. In other circumstances, "the payer may be obliged to bear the losses relating to any unauthorized payment transactions, up to a maximum of EUR 50, resulting from the use of a lost or stolen payment instrument or from the misappropriation of a payment instrument."[191] Such could be the case where the failure to fulfil one or more of the obligations set out in Article 69 was neither intentional nor with gross negligence as set out in Rule 1.

5. Where the payer has neither acted fraudulently nor intentionally failed to fulfil his or her obligations under Article 69 (summarized in Rule 1 above), "Member States may reduce the liability referred to in [Rules 1 and 4], taking into account, in particular, the nature of the personalised security credentials and the specific circumstances under which the payment instrument was lost, stolen or misappropriated."[192]

D. Debit transfers

Article 75 addresses payment transactions initiated by or through the payee in a card-based payment transaction. It applies in cases in which the transaction amount is not known in advance. Under such circumstances, when the payer gives consent to execute the payment transaction, the payer's PSP may block funds on the payer's payment account only if the payer has given consent to the exact amount of the funds to be blocked.[193] The payer's PSP is required to release the funds blocked on the payer's payment account without undue delay after receipt of the information about the exact amount of the payment transaction and, at the latest, immediately after receipt of the payment order.[194]

Articles 76 and 77 deal with a limited right for refund in connection with authorized debit transfers.[195] Specifically, Article 76 provides for a refund to which a payer is entitled

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188. *Id.* art. 69(1)(b). *Cf.* Minskoff v. Am. Express Travel Related Servs. Co., 98 F.3d 703 (2d Cir. 1996) (holding that receipt of a statement reasonably putting the customer on notice that one or more fraudulent charges have been made precludes an argument based on lack of knowledge of these charges).

189. *Id.* art. 70(1)(c).

190. PSD2, *supra* note 8, art. 74(1)(b).

191. *Id.* art. 74(1).

192. *Id.*

193. *Id.* art. 75.

194. *Id.*

195. PSD2, *supra* note 8, arts. 76–77. Per Article 61(1), where the service user is not a consumer, the parties may agree that Articles 76 and 77 shall not apply "in whole or in part." *Id.* art. 61(1).

from his or her PSP for an authorized completed debit transfer, that is, a "payment transaction which was initiated by or through the payee which has already been executed."[196] Such a right is available to the payer where the authorization did not specify an exact amount for the payment transaction and its amount "exceeded the amount the payer could reasonably have expected taking into account his previous spending pattern, the conditions in his framework contract and relevant circumstances of the case."[197] Such conditions may be waived in a framework contract[198] governing a direct debit. At the same time, a framework contract may provide that "the payer has no right to a refund where: (a) [he] has given his consent to execute the payment transaction directly to his [PSP]; and (b) where applicable, information on the future payment transaction was provided or made available in an agreed manner to the payer for at least four weeks before the due date."[199] Per Article 77, a request for a refund governed by Article 76 is to be made within eight weeks of the debit to the payer's account.[200] The payer's service provider is to comply or respond within 10 days.[201]

E. Execution

Articles 78–93 deal with the execution of payment transactions. "Execution" is not defined in the Directive; however, from the chapter heading containing provisions referring to the execution of the payment transaction as well as from context elsewhere in the Directive, the term denotes the performance of the entire payment transaction, rather than carrying out the instruction contained in the "payment order," as it is under U.C.C. Article 4A.[202] Elsewhere in the Directive, reference is made to the "execution" of a "payment order;"[203] hence, the use of the term is inconsistent.

It should be pointed out that Articles 78 and 80, in particular, appear to treat the payer as the payment order giver. This is true in a credit transfer but not in a debit transfer. Indeed, Article 4(13) effectively acknowledges that in a debit transfer, the payment transaction is initiated by the payee's payment order. Accordingly, what is communicated to the payer's PSP in a debit transfer is an instruction executing the payee's payment order issued to the payee's PSP under the payer's authority. In connection with debit transfers, "payment order" may be read to refer to such communication.

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196. *Id.* art. 76.

197. *Id.* art. 76(1)(b). However, under Article 76(2), for that purpose, "the payer shall not rely on currency exchange reasons if the reference exchange rate agreed with its [PSP]…was applied." *Id.* art. 76(2).

198. A "framework contract" is defined as "a payment service contract which governs the future execution of individual and successive payment transactions and which may contain the obligation and conditions for setting up a payment account." *Id.* art. 4(21).

199. *Id.* art. 76(3). Also, under Article 76(4), "[f]or direct debits in currencies other than euro, Member States may require their payment service providers to offer more favourable refund rights in accordance with their direct debit schemes provided that they are more advantageous to the payer." *Id.* art. 76(4).

200. PSD2, *supra* note 8, art. 77.

201. *Id.* art. 77(2) (providing that a negative response must include a "justification for refusing the refund" accompanied by an indication of "the bodies to which the payer may refer the matter in accordance with Articles 99 to 102 if the payer does not accept the [justification] provided"). PSD2, *supra* note 8, art. 77(2).

202. U.C.C. § 4A-301(a) (AM. LAW INST. & UNIF. LAW COMM'N 2012).

203. For example, Article 79 deals with the refusal of payment orders and is discussed further below. For a discussion on when receipt occurs for the purposes of Article 83, see also Article 78(2). PSD2, *supra* note 8, art. 78(2).

Article 78(1) provides that "[t]he payer's account shall not be debited before receipt of the payment order."[204] To that end, it identifies "the time of receipt" with "when the payment order is received by the payer's [PSP]."[205] It goes on to state that if the point of time of receipt is not on a business day for the payer's payment service provider, receipt is deemed to occur on the following business day.[206] Additionally, the payer's service provider may establish a cut-off time near the end of the business day beyond which receipt will be deemed to occur the following business day.[207]

The original PSD Article 64, the predecessor of present PSD2 Article 78, applied to a payment order transmitted to the payer's PSP either (i) directly by the payer, in which case it is a credit transfer, or (ii) indirectly by or through a payee.[208] In the latter case, where, in the usual scenario, the payee transmits the payment order to the payee's PSP for further transmission to the payer's PSP, the payment transaction is a debit transfer. However, in the unlikely but not impossible scenario in which the payee transmits the payment order to the payer's PSP directly, effectively as the payer's agent, and not through the payee's PSP, the payment transaction is a credit transfer. Because the options were mutually exclusive, they were deleted from PSD2, which covers all variations of the receipt by the payment order in Article 78.

Refusal of payment orders is governed by Article 79. Under 79(1), the PSP who refuses to execute a payment order has a duty to advise the user of the refusal and, if possible, the reason for it and the procedure for correction.[209] Per the framework contract, the user may be charged for the notification of an objectively justified refusal.[210] On its part, the right to refuse is not entirely discretionary to the PSP. According to Article 79(2), in all transfers "[w]here all of the conditions set out in the payer's framework contract are met, and "irrespective of whether the payment order is initiated by a payer…or through the payee,"[211] the payer's [ASPSP] shall not refuse to execute an authorised payment order."[212]

Article 80(1) precludes the revocation of a payment order "once it has been received by the payer's [PSP]."[213] For credit transfers, this is a noteworthy departure from U.C.C. Article

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204. *Id*. art. 78(1).

205. *Id*.

206. *Id*.

207. *Id*.

208. PSD, *supra* note 5, art. 64.

209. PSD2, *supra* note 8, art. 79(1).

210. *Id*. This is in fact enumerated as one of the "information obligations" for which the payment service provider may charge the payment service user. *Id*. art. 62(1). Notification is to be made "in an agreed manner at the earliest opportunity." *Id*. art. 79(1). This duty is to be complied with "unless prohibited by other relevant Union or national law." *Id*.

211. *Id*. art. 79(2). Also in the absence of a prohibition by Union or national law.

212. *Id*. According to the PSD2 Preamble,

"Users should be able to rely on the proper execution of a complete and valid payment order if the payment service provider has no contractual or statutory ground for refusal. If the payment service provider refuses a payment order, the refusal and the reason for the refusal should be communicated to the payment service user at the earliest opportunity, subject to the requirements of Union and national law. Where the framework contract provides that the payment service provider may charge a fee for refusal, such a fee should be objectively justified and should be kept as low as possible."

Id. pmbl. para. 77.

213. *Id*. art. 80(1).

4A, where revocation is permitted until execution by the payer's service provider.[214] However, the framework governing the ability of parties to provide for revocability is unclear. Thus, under Article 61(1), irrevocability may be contracted out only "[w]here the payment service user is not a consumer."[215] At the same time, under Article 80(5), and irrespective as to whether the payment transaction is a consumer or business one, revocability beyond points of time specified in Article 80 may be a matter of an agreement between the payment service user and his or her PSP for which the PSP may charge the payment service user if so agreed in their framework contract.[216]

Aside from an agreement, as above, for a payment transaction initiated either by a PISP or by or through the payee, revocability is denied even prior to receipt under Article 80(1).[217] Thus, according to Article 80(2), for such a payment transaction, "the payer shall not revoke the payment order after giving consent to the [PISP] to initiate the payment transaction or after giving consent to execute the payment transaction to the payee."[218]

However, under Article 80(4), revocability is available for payment orders instructing payment in the future, though "at the latest by the end of the business day preceding the agreed day."[219] For "a direct debit[220] and without prejudice to refund rights" the same rule is specifically provided in Article 80(3).[221]

Article 81 deals with the amount of a payment transaction. The basic principle under Article 81(1) is that the full amount instructed is to be transferred, so that no charges are to be deducted by the payee's service provider and any intermediary.[222] Fees are to be charged to the account as such and not be deducted from the amount transferred.[223] Thus, under Article 81(2), an agreed charge may be debited separately to the payee's account by his PSP, rather than made as a deduction to the amount credited.[224] Per Article 81(3), it is up to the service provider of the party initiating the payment transaction to ensure that the payee receives the full amount of the payment transaction.[225]

Articles 82–87 deal with execution time and value date. Per Article 82(1), they apply to (a) payment transactions in Euro; (b) domestic ("national") payment transactions in the currency of a Member State outside the Euro area; and (c) payment transactions involving only one currency conversion between the euro and the currency of a Member State outside

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214. U.C.C. § 4A-211 (AM. LAW INST. & UNIF. LAW COMM'N 2012).

215. PSD2, *supra* note 8, art. 61(1).

216. *Id.* art. 80(5). This is in fact enumerated in Article 62(1) as one of the "corrective and preventive measures" for which the payment service provider may charge the payment service user. *Id.* art. 62(1).

217. *Id.* art. 80(1).

218. *Id.* art. 80(2).

219. *Id.* art. 80(4).

220. PSD2, *supra* note 8, art. 80(3). A direct debit is a debit transfer carried out as part of "a payment service," namely, a "business activity listed in Annex I." *Id.* art. 4(3). A "debit transfer" is defined as "a payment transaction…initiated by the payee on the basis of the consent given by the payer to the payee, to the payee's payment service provider or to the payer's own payment service provider." *Id.* art. 4(23). This is distinguishable from an isolated debit transfer.

221. *Id.* art. 80(3).

222. *Id.* art. 81(1).

223. *Id.*

224. *Id.* art. 81(2).

225. PSD2, *supra* note 8, art. 81(3).

the Euro area, provided that the required currency conversion is carried out in the Member State outside the Euro area concerned and, in the case of cross-border payment transactions, the cross-border transfer takes place in euros.[226]

Articles 82–87 deal with three distinct concepts: execution, value dating, and funds availability. Execution is used in the context of the completion of the payment transaction. Such completion is addressed by reference either to the receipt of funds by the payee's PSP in the form of credit to its account, or to crediting the payee's account by its PSP. In this context, it is not clear why receipt of funds by the payee's service provider is necessarily limited to the situation where funds are so received by means of credit posted to the account of the payee's PSP. Certainly, funds can be received in other ways, as for example, debit by the payee's PSP to the account of the payer's PSP.[227]

"Value date" is defined in Article 4(26) to be "a reference time used by a [PSP] for the calculation of interest on the funds debited from or credited to a payment account."[228] "Funds Availability" is not a term used by PSD2; however, it is used in this Article to denote the unconditional availability of the payee's unrestricted use of the amount of the payment transaction. In theory, each of such events—namely receipt by having the amount credited to an account, eligibility for earning interest on the amount,[229] and having the use of it as it is cash in the payee's pocket—are distinct and separate, hence they do not necessarily happen simultaneously.[230]

Under Article 83(1), the payer's PSP is required to ensure that after "receipt" of a payment order,[231] the amount of the payment transaction is "credited to the payee's [PSP]'s account by the end of the following business day."[232] Such an account need not necessarily be held by the payer's PSP; rather, it could be held by a central counterparty such as a central bank.[233] All such periods "may be extended by a further business day for paper-initiated payment transactions." [234] According to Article 86, for national (domestic) payment transactions, Member States may shorten all execution periods under Articles 82–87.

Article 83(1) appears to apply to both debit and credit transfers. It does not provide a remedy to the payee against a breach by the payer's PSP. Presumably, the theory is that, in case of delay, the payee is to sue the payer who can turn around and seek reimbursement from his PSP.

Indeed, the payee is accorded a right against his or her own PSP. However, this right is for the failure to value date the credit to the account and make it available once funds have

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226. *Id.* art. 82(1).

227. *See, e.g.,* U.C.C. § 4A-402 (AM. LAW INST. & UNIF. LAW COMM'N 2012) (enumerating several methods of interbank payment, *i.e.*, through a funds transfer system, by crediting the receiving bank's account, by having the receiving bank debiting the sending bank account as well as netting and any other means).

228. PSD2, *supra* note 8, art. 4(26).

229. Presumably, the actual earning of interest, as opposed to the eligibility to earn interest, may well depend on the type of account into which the amount in question is credited.

230. Notwithstanding A/s Awilco of Oslo v. Fulvia S.p.A. di Navigazione of Cagliari ('The Chikuma') [1981] 1 W.L.R. 314, 371 (HL) that effectively identified all three points.

231. As identified in Article 78.

232. PSD2, *supra* note 8, art. 83(1).

233. *Id.* pmbl. para. 85.

234. *Id.* art. 83(1).

been received by the payee's PSP.[235] Receipt of funds is in the form of credit *actually made* to the account of the payee's PSP. The payee's right is by reference to the time credit is made, rather than the time credit *should have been made*, to the account of the payee's PSP. Thus, under Article 83(2), in conjunction with Article 87(1), the payee's PSP is obligated to value date the credit to the payee's account "no later than the business day on which the amount…is credited to the payee's [PSP]'s account."[236] Article 87(2) goes on to require the payee's PSP, in circumstances where there is either no currency conversion or a currency conversion between the euro and a Member State currency or between two Member State currencies, to ensure "that the amount of the payment transaction is at the payee's disposal immediately after that amount is credited to the payee's [PSP]'s account."[237] For its part, Article 87(3) requires that the "debit value date for the payer's payment account" happen "no earlier than the time at which the amount of the payment transaction is debited to that payment account."[238]

The timeframe for fund availability under Article 84's reference to the credit to the account of the payee's PSP applies equally when the payee does not have an account with the PSP.[239] However, all of this does not permit the payee any remedy for a delay in posting credit to the account of his or her PSP in contravention of Article 83(1).[240]

The central provision on liability is in Article 89, which contains rules allocating responsibility in cases of non-execution or defective execution.[241] Accordingly, Article 61(1) instructs "[w]here the payment service user is not a consumer, [the parties] may agree that Article…89 [does] not apply in whole or in part."[242]

Each of the rules set out in Article 89 is stated to be "without prejudice to Article 71, Article 88(2) and (3), and Article 93."[243] Article 71 provides for the payment service user's right to obtain rectification form the PSP upon notifying to him "without undue delay on becoming aware of any such transaction giving rise to a claim, including that under Article 89."[244] Article 93 exempts from liability a party successfully pleading "abnormal and unforeseeable circumstances beyond the control of the party."[245]

Article 88 protects a PSP that acted in reliance on an incorrect unique identifier. Under Article 4(33), "unique identifier*"* is defined to mean "a combination of letters, numbers or symbols specified to the payment service user by the [PSP] and to be provided by the payment service user to identify unambiguously another payment service user and/or the payment account of that other payment service user for a payment transaction."[246] The simplest

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235. *Id*.

236. *Id*. art. 87(1).

237. PSD2, *supra* note 8, art. 87(2). Article 87(2) also applies to payments within on PSP.

238. *Id*. art. 87(3).

239. *Id*. art. 84.

240. *Id*. art. 83(1).

241. *Id*. art. 89. *See generally* Reinhard Steennot, *Erroneous Execution of Payment Transactions According to the New Payment Services Directive*, 6 INTL. J. TECH. TRANSFER & COMMERCIALISATION 145 (2007).

242. PSD2, *supra* note 8, art. 61(1).

243. *Id*. art. 89(1).

244. *Id*. art. 71(1).

245. *Id*. art. 93.

246. *Id*. art. 4(33).

example is an account number. Article 88(1) deals with a payment order executed in accordance with a unique identifier. It authorizes a PSP to rely on the unique identifier so that "the payment order shall be deemed to have been executed correctly with regard to the payee specified by the unique identifier."[247] It follows, and is so provided in Article 88(2), that the payment service provider that acted on the basis of the incorrect unique identifier provided by the user "shall not be liable…for non-execution or defective execution of the payment transaction."[248] Moreover, under Article 88(5), where the user furnishes the payment service provider with additional information to the unique identifier, "the [PSP] shall be liable only for the execution of payment transaction in accordance with the unique identifier provided by the payment service user."[249] Under Article 88(3), having acted on the basis of the incorrect unique identifier, the PSP bears liability limited only to the making of "reasonable efforts to recover the funds involved in the payment transaction;" the PSP may charge the payment service user for the effort, if it is agreed to in the framework contract.[250] Article 88(3) also requires the payee's PSP to cooperate in those efforts by communicating all relevant information for the collection of funds to the payer's PSP.[251] In turn, where the recovery of the misdirected funds is not possible, the payer's PSP shall provide to the payer all information available to it that is relevant to the payer in order for the payer to file a legal claim to recover the misdirected funds.[252]

One effect of Article 88 is that a PSP, which receives a payment order identifying a user by name and number, is free to act on the number alone. This goes, unnecessarily further than U.C.C. Article 4A, which does not protect a PSP acting on the basis of the incorrect unique identifier with knowledge of the error or discrepancy.[253]

Thus, and as indicated, "without prejudice to Article 71, Article 88(2) and (3), and Article 93,"[254] Article 89(1) allocates liability for the non-execution or defective execution of a payment order initiated by the payer, as follows:

First, the payer's "[PSP] shall . . . be liable to the payer for correct execution of the payment transaction."[255] Effectively, this means that the payer's PSP is discharged at the point of time in which "the payee's [PSP] [timely] received the amount of the payment transaction."[256]

Second, at the point in which the payer's PSP discharged its liability to the payer, "the payee's [PSP] shall be liable to the payee for the correct execution of the payment transaction."[257] The credit value date for the payee's payment account shall be no later than

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247. PSD2, *supra* note 8, art. 88(1).
248. *Id.* art. 88(2).
249. *Id.* art. 88(5).
250. *Id.* art. 88(3). *See also id.* art. 62(1) (including efforts to recover the funds as one of the "corrective and preventive measures" for which the payment service provider may charge the payment service user).
251. *Id.* art. 88(3).
252. PSD2, *supra* note 8, art. 88(3).
253. U.C.C. § 4A-207(b) (AM. LAW INST. & UNIF. LAW COMM'N 2012).
254. PSD2, *supra* note 8, art. 89(1).
255. *Id.*
256. *Id.*
257. *Id.*

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the date on which the amount would have been value dated, had the transaction been correctly executed.[258]

Third, the liability of the payee's PSP to the payee is discharged by immediately placing the amount of the payment transaction at the payee's disposal and, where applicable, crediting the corresponding amount to the payee's payment account.[259]

Fourth, a payer's PSP in breach with its obligation as in the first step above, "shall, without undue delay, refund to the payer the amount of the non-executed or defective payment transaction, and, where applicable, restore the debited payment account to the state in which it would have been had the defective payment transaction not taken place."[260] The credit value date for the payer's payment account shall be no later than the date on which the amount was debited.[261]

Fifth, regardless of breach or defense to liability, in the case of non-execution of defective execution, and on request, the payer's PSP shall, without charging the payer, "make immediate efforts to trace the payment transaction and notify the payer of the outcome."[262]

This overall scheme for credit transfers follows in the footsteps of U.C.C. Article 4A in two major respects. First, the Directive fastens responsibility on the payee's PSP as of the time of receiving funds.[263] Second, it entitles the payer to a "money-back guarantee" from the payer's PSP in case funds do not reach the payee's PSP.[264] At the same time, the Directive does not specify that the arrival of funds to the payee's PSP marks the occurrence of payment by the payer to the payee.[265] Rather, it leaves this to national laws.[266] More troublesome is the lack of definition of "defective execution" and "lack of adjustment of remedies" or the provision of a comprehensive scheme—for example, in cases of underpayment, overpayment, and payment to the wrong payee.[267] Certainly, the "money-back guarantee" under Article 89(1) provides for only one aspect in such cases. Yet this is the only remedy specifically provided for in all cases of defective execution.

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258. *Id.*

259. PSD2, *supra* note 8, art. 89(1).

260. *Id.*

261. *Id.*

262. *Id.*

263. *See* U.C.C. § 4A-104(a) (AM. LAW INST. & UNIF. LAW COMM'N 2012) (stating that a credit transfer is completed by the "acceptance" of a payment order by the beneficiary's bank, which, under U.C.C. § 4A-209(b)(2), could be in the form of receipt of funds). Upon "acceptance," under U.C.C. § 4A-404, the beneficiary's bank becomes obligated to pay to the beneficiary. *Id.* § 4A-405.

264. *E.g.*, *id.* § 4A-402(c) (AM. LAW INST. & UNIF. LAW COMM'N 2012); *see also id.* § 4A-402 cmt. 2.

265. *Compare*, PSD2, *supra* note 8 art. 89(1), *with* U.C.C. § 4A-406 (AM. LAW INST. & UNIF. LAW COMM'N 2012).

266. *See generally*, PSD2, *supra* note 8 (failing to address whether arrival of funds to PSP constitutes an occurrence of payment).

267. *Compare id.*, *with* U.C.C. § 4A-303 (AM. LAW INST. & UNIF. LAW COMM'N 2012).

F. Non-execution and defective execution

As for non-execution or defective execution of a payment order initiated by or through the payee, and as indicated, "without prejudice to Article 71, Article 88(2) and (3) and Article 93."[268] Article 89(2) allocates liability, as follows:

First, to begin with, the payee's PSP "shall be liable to the payee for correct transmission of the payment order to the [PSP] of the payer in accordance with Article 83(3),"[269] that is, "within the time limits agreed between the payee and the [PSP], enabling settlement, as far as direct debit is concerned, on the agreed due date."[270]

Second, upon becoming liable under the first step above, the payee's PSP "shall immediately re-transmit the payment order in question to the [PSP] of the payer."[271] In addition, it "shall…be liable to the payee for handling the payment transaction in accordance with its obligations under Article 87"[272] and "ensure that the amount of the payment transaction is at the payee's disposal immediately after that amount is credited to the payee's [PSP's] account."[273] Article 87 requires that credit to the payee's [PSP] is to be value dated "no later than the business day on which the amount of the payment transaction is credited to the payee's [PSP]'s account" and that the payee's [PSP] ensure that funds become available to the payee immediately.[274] Article 89(2) requires that the amount available at the payee's disposal "shall be value dated on the payee's payment account no later than the date the amount would have been value dated had the transaction been correctly executed."[275] As in connection with Article 87, the assumption is that payment to the payee's payment service account is necessarily by posting credit to its account.

Third, where the payee's PSP is not liable as above, "the payer's [PSP] shall become liable to the payer."[276] It will refund him by posting a credit value dated no later than the date the amount was debited.[277] The implicit but unstated assumption is that the non-execution is not attributed to insufficient funds or any other breach by the payer. Indeed, the payer's PSP is released form this obligation where it proves that the payee's PSP has received the amount of the payment transaction.[278]

Fourth, where the payer's PSP is liable under the third step above, it shall "as appropriate and without undue delay, refund to the payer the amount of the non-executed or defective payment transaction and restore the debited payment account to the state in which it would have been had the defective payment transaction not taken place."[279]

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268. PSD2, *supra* note 8, art. 89(1).
269. *Id.* art. 89(2).
270. *Id.* art. 83(3).
271. *Id.* art. 89(2).
272. *Id.*
273. PSD2, *supra* note 8, art. 89(2).
274. *Id.* art. 87(1).
275. *Id.* art. 89(2).
276. *Id.*
277. *Id.*
278. PSD2, *supra* note 8, art. 89(2).
279. *Id.*

Fifth, regardless of liability, in the case of a non-execution or defective execution, and on request, the payee PSP shall, without charging the payee, "make immediate efforts to trace the payment transaction and notify the payee of the outcome."[280]

In principle, Article 89(1) covers credit transfers while Article 89(2) covers debit transfers. And yet, Article 89(2) is also stated to cover credit transfers initiated by the payer through the payee. Indeed, as indicated, depending on the architecture of a system, payment transactions initiated through the payee could be either debit or credit transfers; that is, when they are routed through the payee's PSPs, they are debit transfers, and when they are routed from the payee to the payer's PSP—whether directly, through a switch, or even through the payee's PSP acting merely as a communication channel—they are credit transfers. As credit transfers, such payment transactions initiated through the payee ought to be covered by Article 89(1) and not 89(2).

Liability for non-execution, defective or late execution of payment transactions initiated by the payer through the payer's PISP is governed by Article 90.[281] Thereunder, where a payment order is initiated by the payer through a PISP "without prejudice to Article 71 and Article 88(2) and (3)," the ASPSP is required refund to the payer the amount of the non-executed or defective payment transaction.[282] Where applicable, the ASPSP is mandated to restore the debited payment account to the state in which it would have been had the defective payment transaction not taken place.[283] The burden shall be on the PISP to prove (1) that the payment order was properly received by the payer's ASPSP and (2) that "the payment transaction was authenticated, accurately recorded and not affected by a technical breakdown or other deficiency linked to the non-execution, defective or late execution of the transaction."[284] For its part, a PISP liable for the non-execution, via defective or late execution of a payment transaction, shall immediately compensate the ASPSP for the losses incurred or sums paid as a result of the refund to the payer.[285]

G. Miscellaneous

A few provisions address the scope of liability, though not in a comprehensive manner. Thus, according to Article 89(3), "[PSP]s shall be liable to their respective payment service users for any charges for which [the PSPs] are responsible, and for any interest to which the payment service user is subject as a consequence of non-execution or defective, including late, execution of the payment transaction."[286] Under Article 91, any additional financial compensation "may be determined in accordance with the law applicable to the contract concluded between the payment service user and the [PSP]."[287] That is, in departure from U.C.C. Article 4A, such additional compensation—*e.g.*, for consequential loss—is not

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280. *Id*.

281. *Id*. art. 90.

282. *Id*. art. 89(1). As discussed, Article 71 deals with notification and rectification of unauthorised or incorrectly executed payment transactions and Article 88 covers incorrect unique identifiers. *Id*. arts. 71, 88.

283. PSD2, *supra* note 8, art. 89.

284. *Id*. art. 90(1).

285. *Id*. art. 90(2).

286. *Id*. art. 89(3).

287. *Id*. art. 91.

rejected altogether, but its determination is to be made by reference to the law applicable to the relevant contract.[288]

Additionally, Article 92(1) reassigns losses incurred by a PSP liable under Articles 73 (for unauthorized payment) and Article 89 (for non-execution, defective or late execution of payment transactions).[289] Losses are reassigned where liability for them is attributed to another PSP or to an intermediary. In such a case, "that [PSP] or intermediary shall compensate the…[PSP liable under Articles 73 and 89] for any losses incurred or sums paid under Articles 73 and 89," including "compensation where any of the [PSP]s fail to use strong customer authentication."[290] Similar to Article 91, Article 92(2) goes on to provide that "[f]urther financial compensation may be determined in accordance with agreements between [PSP]s and/or intermediaries and the law applicable to the agreement concluded between them."[291]

The final provisions of Title IV, Articles 99–103, address ADR procedures of settlement disputes and will not be discussed here.

CONCLUSION

Unfortunately, most glitches in the language, as well as substantive omissions of the original PSD have not been addressed in PSD2. Particularly, PSD2 retains the confusing treatment as to payment services covered; the ambiguity in the term "execution" by reference to the entire payment transaction and the payment order initiating it; the irrevocability of a payment order upon receipt even prior to execution; the broad protection accorded to a PSP acting on a unique identifier; and the failure to recognize that a payee's PSP may be paid other than by means of credit posted to its account. Additionally, no reference is made to the payee's authorization given to the payee's PSP as to carrying out a debit transfer out of the payer's account. The confusion between the payment order initiating a debit transfer and its communication to the payer's PSP has not been eliminated. Finally, following in the footsteps of the original PSD, Title IV of the PSD2 does not provide for core provisions binding in no-consumer payment transactions.

At the same time, PSD2 successfully enhanced the legal framework for an integrated European payment market and extended its coverage to card, internet, and mobile payments. In the context of not completely harmonized national private laws, this is a true accomplishment towards achieving legal certainty to facilitate the smooth operation of payments in the European Union.

288. U.C.C. § 4A-305 (AM. LAW INST. & UNIF. LAW COMM'N 2012).
289. PSD2, *supra* note 8, art. 92(1).
290. *Id*.
291. *Id*. art. 92(2).