

2021

Title I: Subject Matter, Scope and Definitions (Art. 1 - Art. 4): the regulated field (object and subject)

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Source Publication:

Gabriella Gimigliano & Marta BožinaBeroš, eds, THE PAYMENT SERVICE DIRECTIVE II: A COMMENTARY (Cheltenham, UK Northampton, MA, USA: Edward Elgar, 2021) 5-30.

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Chapter 2

TITLE I: SUBJECT MATTER, SCOPE AND DEFINITIONS

(Art. 1 – Art. 4): the regulated field (object and subject)

Benjamin Geva*

Abstract

The PSD2 regulates ‘payment services’ provided within the European Union by ‘payment service providers’ (PSPs). PSPs are identified in art 1(1). ‘Payment services’ are set out in Annex I, to which art 4(3) directs.

Title I, consisting of arts 1 to 4, provides for the subject matter, scope and definitions of the PSD2. In addition to identifying the payment institutions to which the PSD2 applies, art 1 states that the Directive establishes PSPs’ disclosure and contractual framework requirements. Art 2 both provides for and finetunes coverage by addressing currencies and exemptions. Art 3 provides for exclusions. Art 4 sets out definitions of terms applicable throughout the Directive.

The chapter will critically deal with the interpretation of these provisions, as well as analyse their rationale and origins. It will draw a comparison with the 2007 PSD and similar enactments in other jurisdictions. It will address inconsistencies and synergies within the general EU-based framework and analyse Court of Justice case law and professional literature, if any.

Key words: Payment services, Payment service provider (PSP), Payment transactions, Payment instruments, Payment initiation and account information services.

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A. INTRODUCTION

- 2.01. The Second Payment Services Directive ('Directive' or 'PSD2')¹ regulates 'payment services' provided within the European Union by 'payment service providers' (PSPs). PSPs are identified in art 1(1). 'Payment services' are set out in Annex I, to which art 4(3) directs. Title I, consisting of arts 1 – 4, provides for the subject matter, scope, and definitions of the PSD2. In addition to identifying the payment institutions to which the PSD2 applies, art 1 states that the Directive establishes PSPs' disclosure and contractual framework requirements. Art 2 both provides for and fine-tunes coverage by addressing currencies and exemptions. Art 3 provides for exclusions. Art 4 sets out definitions of terms applicable throughout the Directive. The chapter discusses these provisions, as they address the subject matter and scope of the Directive.²
- 2.02. As originally adopted, the first Directive on payment services in the internal market - that is, the original 'Payment Services Directive' or 'PSD'³ - was stated in its art 2(1) to 'apply to payment services provided within the Community,' both national and cross-border.⁴ With the 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.⁵ Specifically, accommodation was required to enable bank customers—both

¹ 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] OJ L 337/35 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L2366>> accessed 28 May 2020 (hereinafter PSD2). Unless indicated otherwise, statutory provisions cited throughout this section are of the Directive.

² It thus addresses art 4 definitions only insofar as they relate to the first three articles.

³ 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] OJ L 319/1 <<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32007L0064>> accessed 28 May 2020 (hereinafter PSD).

⁴ *ibid* 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] OJ L 43/25, which was superseded by Title III and repealed by the PSD.

⁵ See European Commission, 'Towards an Integrated European Market for Card, Internet and Mobile Payments (Green Paper)' COM (2011) 941 final (envisaging the need for an upgrade); European Commission, 'Feedback Statement on European Commission Green Paper "Towards an Integrated European Market for Card, Internet and Mobile Payments"' (27 June 2012) <http://frob.pl/wp-content/uploads/2012/04/EC-feedback_statement_green-paper-card-internet-mobile-june-2012.pdf> accessed 28 May 2020 (responding to the Green Paper); Committee on Economic and Monetary Affairs, 'Report on "Towards an Integrated European Market for Card, Internet and Mobile Payments"' (2012/2040(INI)) (4 October 2012) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGML+REPORT+A7-2012-0304+0+DOC+PDF+V0//EN>> accessed 28 May 2020 (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] OJ C 419/05 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012IP0426&from=GA>> accessed 28 May 2020 (discussing the Green Paper).

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, PSD2 passed in 2015 and has been implemented in the various national legislations over the course of 2018.

B. PSD2 SUBJECT MATTER AND SCOPE

2.03. The subject matter of the PSD2 is stated in art 1 to be the establishment of rules:

1. in accordance with which Member States shall distinguish between [listed] categories of payment service provider, and
2. concerning:
 - a. the transparency of conditions and information requirements for payment services; and
 - b. the respective rights and obligations of payment service users and payment service providers in relation to the provision of payment services as a regular occupation or business activity.

2.04. PSD2 art 2(1) provides for the territorial scope of the PSD2 as follows: ‘This Directive applies to payment services provided within the [EU].’⁶ No currency limitation exists and thus payment services covered by the Directive may be denominated in euro, other national currencies of EU Member States, as well as in foreign currencies.

2.05. However, PSD2 art 2 goes on to provide for special rules that govern the scope of Titles III and IV. These titles respectively deal with transparency of conditions and information requirements for payment services, as well as rights and obligations in relation to the provision and use of payment services. By way of summary, depending on the currency in which payment is to be made,

- (a) 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’;⁷

⁶ Exemptions from the application of all or part of the provisions of PSD2 may be made by each Member State for ‘Institutions referred to in points (4) to (23) of Art. 2(5) of Directive 2013/36/EU’ (of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L176/338; PSD2 (n 1) art 2(5)). Broadly speaking, such institutions are typically credit unions, development and housing banks, and friendly societies.

⁷ PSD2 (n 1) art 2(2).

(b) 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.’⁸ However, a few exceptions exist. Thus, requirements in relation to the maximum execution time, value date, and deductions from the amount transferred (under PSD2 arts 45(1), 52(2)(e), 56(a), and 81–86) do not apply;⁹ and

(c) 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.’¹⁰ Exceptions similar to those of its predecessor exist, plus additional ones such as, for example, in respect to refunds for payment transactions initiated by or through a payee and liability.

C. PAYMENT SERVICE PROVIDERS AND USERS

2.06. Entities that provide such services to customers, are ‘payment service providers,’ or ‘PSPs’. Under art 37(1), in principle,¹¹ ‘natural or legal persons that are neither payment service providers nor explicitly excluded from the scope of this Directive [are precluded] from providing payment services’.

2.07. Under art 4(11) ‘payment service provider’ (PSP) is defined to be ‘a body referred to in Article 1(1) or a natural or legal person benefiting from an exemption pursuant to Article 32 or 33’. Exemptions under art 32 are for micro-PSPs¹² and are at the discretion of national authorities under national law. The exemption under art 33 is for the provision of a specific payment service discussed below - that of account information service.

⁸ PSD2 (n 1) art 2(3).

⁹ See generally PSD2 (n 1) arts 45(1), 52(2)(e), 56(a), 85–86.

¹⁰ PSD2 (n 1) art 2(4). The extension of the territorial scope ‘to transactions where one of the payment service providers is located outside the European Economic Area (EEA)’ was rationalized in Preamble recital 8 on the basis of the need ‘to avoid divergent approaches across Member States to the detriment of consumers.’

¹¹ PSD2 (n 1) arts 37(2) and (3) provide qualifications for exclusions under PSD2 arts 3(k) and (l) respectively, discussed (together with the qualifications) further below. Both the qualifications and the qualified parts of arts 3(k) and (l) have no predecessor in the original PSD.

¹² More specifically, under PSD2 (n 1) art 32(1)(a), they are ‘natural or legal persons providing payment services ...’ with ‘the monthly average of the preceding 12 months’ total value of payment transactions executed by the person concerned, including any agent for which it assumes full responsibility, does not exceed a limit set by the Member State but that, in any event, amounts to no more than EUR 3 million.’

2.08. For its part, art 1(1) enumerates six categories of payment service provider (PSP):

(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,¹³ 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/EC¹⁴, 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;

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

2.09. 'Credit institution' is defined in the abovementioned 'point (1) of Article 4(1) of Regulation (EU) No 575/2013' 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.' Effectively, it is a commercial bank.

2.010. 'Electronic money institution' is defined in the abovementioned 'point (1) of Article 2 of Directive 2009/110/EC' to mean 'a legal person that has been granted authorisation under Title II to issue electronic money.' For its part, point (2) of that art 2 defines 'electronic money' to mean '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 as defined in point 5 of Article 4 of Directive 2007/64/EC, and which is accepted by a natural or legal person other than the electronic money issuer.' Directive 2007/64/EC is the original PSD and the meaning of 'payment transaction' will be addressed further below. According to recital 25 of its Preamble, the PSD2 'lays down rules on the execution of payment

¹³ 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 [2013] OJ L176/1, art 4(1).

¹⁴ Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC [2009] OJ L267/7, art 2(1).

transactions where the funds are electronic money' but does not 'regulate the issuance of electronic money.'

- 2.011. 'Payment institution' is defined in the PSD2 itself. Under art 4(4), 'payment institution' is said to mean 'a legal person that has been granted authorisation in accordance with Article 11 to provide and execute payment services throughout the Union'. This includes the execution of payment transactions involving electronic money but, as above, not the power to issue electronic money.
- 2.012. Preamble recital 67 acknowledges that '[w]hile this Directive recognises the relevance of payment institutions, credit institutions remain the principal gateway for consumers' – ie individuals acting for personal purposes¹⁵ - 'to obtain payment instruments.'
- 2.013. Both 'credit institutions' and 'electronic money institutions' are said in PSD2 art 1(1) to include branches located within the Union. Conversely, PSD2 art 1(1) does not indicate that 'payment institution' includes branches. Nevertheless, a definition of 'branch' appears in PSD2 art 4(39), albeit only by reference to payment institutions. Thereunder,
- 'branch' means a place of business other than the head office which is a part of a payment institution, which has no legal personality and which carries out directly some or all of the transactions inherent in the business of a payment institution; all of the places of business set up in the same Member State by a payment institution with a head office in another Member State shall be regarded as a single branch.
- 2.014. By reference to credit institution, 'branch' is defined in Regulation 575/2013 art 4(1)(17) to mean 'a place of business which forms a legally dependent part of an institution and which carries out directly all or some of the transactions inherent in the business of institutions.' Under PSD2 art 1(1)(a) this definition applies to a credit institution branch under PSD2. Compared to PSD2 art 3(4), this definition neither excludes the head office nor deems that 'all of the places of business set up in the same Member State by a[n] ... institution with a head office in another Member State shall be regarded as a single branch.'
- 2.015. In turn, by reference to electronic money institutions, Directive 2009/110/EC, while not defining 'branch', addresses in arts 1(1)(b) and 8 a situation in which a branch of such an institution is located within the Community while its head office is located outside it. This is the same situation under which PSD2 art 1(1)(a) is stated to apply to branches of electronic money institutions.

¹⁵ Under PSD2 (n 1) art 4(20), 'consumer' is defined to mean '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'.

2.016. This scheme is not tightly drawn. First, there is no definition of a branch of an electronic money institution. Second, such a branch is covered only where the head-office is located outside the Union. There is no such limitation for branches of credit and payment institutions.

2.017. A PSP customer to whom payment services are provided is a 'payment service user', defined in art 4(10) to mean 'a natural or legal person making use of a payment service in the capacity of payer, payee, or both'.¹⁶ For their part, respectively:

- 'payer' is defined in art 4(8) to mean 'a natural or legal person who holds a payment account and allows a payment order from that payment account, or, where there is no payment account, a natural or legal person who gives a payment order' and
- 'payee' is defined in art 4(9) to mean 'a natural or legal person who is the intended recipient of funds which have been the subject of a payment transaction.'¹⁷

2.018. Key terms used in the 'payer' and 'payee' definitions – as well as in connection with some 'payment services' as set out below – are defined in art 4 as follows:

(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;¹⁸

(13) 'payment order' means an instruction by a payer or payee to its payment service provider requesting the execution of a payment transaction;

(25) 'funds' means banknotes and coins, scriptural money or electronic money as defined in point (2) of Article 2 of Directive 2009/110/EC;

(5) 'payment transaction' means 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;¹⁹

The final clause of art 4(5) clarifies that not only contractual payments, but also those required by law or by way of gift, are covered.

¹⁶ Nonetheless, the context may require, as it does in PSD2 (n 1) art 71 for example, to read the definition to cover a holder of a payment account on which direct debits were executed without its consent: Case C-295/18 *Mediterranean Shipping Co (Portugal) v Banco Commercial Português SA* [2019] ECLI:EU:C:2019:320.

¹⁷ For a mobile phone customer and operator as respectively 'payer' and payee see eg Case C-616/11 *T-Mobile Austria v Verein* [2014] ECLI:EU:C:2014:242.

¹⁸ An account from which no payment can be made to third parties is not a payment account: Case C-191/17 *Bundeskammer v ING-Di-Ba Direktbank* [2018] ECLI:EU:C:2018:466.

¹⁹ For its part, 'remote payment transaction' is defined in PSD2 (n 1) art 4(6) to mean 'a payment transaction initiated via internet or through a device that can be used for distance communication'. The term appears in PSD2 (n 1) art 97, addressing authentication, and is outside the scope of this chapter.

2.019. PSD2 concerns ‘only contractual obligations and responsibilities between the payment service user and the [PSP].’ In turn, the allocation of responsibilities and losses between PSPs and ‘their intermediaries, such as processors’ is a matter of contract.²⁰ By way of comparison, Article 4A of the American Uniform Commercial Code (‘UCC Article 4A’),²¹ albeit being limited to non-consumer²² credit transfers,²³ is similar in focusing on each bilateral relationship in the funds transfer, as well as in not covering relationships between PSPs and processors. At the same time, UCC Article 4A is broader than the PSD2 in that it covers more than just the customer-bank relationship. Rather, UCC Article 4A also covers the interbank domain - namely, the relationship between a PSP and the participant with which it is in privity. This participant may be the other PSP²⁴ or an intermediary bank. Where applicable, UCC Article 4A also extends to the relationship between two intermediary banks in privity.

2.020. Under the PSD2, the ‘payment transaction’ is between the initiator and his or her PSP, which is one link in the entire payment process. The initiator is either the payer (in a deposit or credit transfer) or the payee (in a withdrawal or direct debit). Hence, the key ‘act’ in a ‘payment transaction’ is either ‘placing ... funds’ in a credit transfer or ‘withdrawing funds’, which should be interpreted to cover ‘collecting funds’ in a direct debit. *Quaere* as to why the definition states that the ‘act’ can be ‘initiated by the payer or on his behalf or by the payee’ – and does not expressly allow for the ‘act’ to be initiated on behalf of the payee – as it can be done for the payer. I would consider this as a drafting oversight²⁵ into which nothing ought to be read. For its part, the act of ‘transferring ... funds’ in art 4(5) is redundant and even misleading since no such ‘act’ is carried out by the payment initiator as opposed to that initiator’s PSP.

2.021. This conclusion is contrary to the judgment given in *Tecnoservice Int. Srl*²⁶ where the Tenth Chamber thought that it is apparent from PSD2 art 4(5) ‘that the term “payment transaction” refers to a single act as a whole between the payer and the payee, not only each of the relationships of the payer and the payee with their own respective payment service provider.’

²⁰ PSD2 (n 1) Preamble recital 87.

²¹ Uniform Commercial Code – Article 4A - Funds Transfers, UCC §§ 4A-101 et seq (2012) (hereinafter UCC Article 4A)

²² Consumer transactions governed by federal law are excluded by UCC Article 4A (n 21) § 4A-108.

²³ In principle, ‘Article [4A] applies to funds transfers defined in Section 4A-104 [(a)].’ The scope of UCC Article 4A (n 21) is further determined by several elements of the definition of ‘payment order’ in § 4A-103(a)(1). For the interpretation that a ‘funds transfer’ under UCC Article 4A means a credit transfer, see eg Benjamin Geva, *The Law of Electronic Funds Transfers* (Loose-leaf: updated to 2019, Matthew Bender 1992) § 2.02[3][c] (hereinafter Geva, *The Law of EFT*). For the distinction between credit and debit transfers (both covered by PSD2), see Section D in this chapter.

²⁴ Under UCC Article 4A (n 21), the corresponding term to PSP is ‘bank’, which is essentially defined under § 4-105(a)(2) to be a regulated deposit-taking institution. Specifically, ‘payment institutions’ are not PSPs.

²⁵ The phrase ‘or on his behalf’ in PSD2 (n 1) art 3(5) does not have a corresponding predecessor in the original PSD.

²⁶ Case C-245/18 [2019] ECLI:EU:C:2019:242.

²⁷ This interpretation does not meet the textual objection I raised as a matter of statutory interpretation. The alleged guarantee of a ‘fully integrated straight-through processing of transactions’ that the court mentioned²⁸ overlooks the fact that it is indisputable that all intermediary stages in the payment process are not covered in any event. As will be discussed in Chapter 10, the better interpretation of PSD2 is that a ‘payment transaction’ with one end participant may give rights to, and fastens obligations on, the other end participant who is nevertheless not a party to the payment transaction.

2.022. The approach of UCC Article 4A is different and clearer than that of the PSD2. A distinction is made under the UCC between the ‘payment order’ and ‘funds transfer’.²⁹ The former is an instruction to make payment,³⁰ giving rise to a bilateral relationship between a sender (the order giver)³¹ and a receiving bank.³² Addressing a bilateral relationship, the payment order under UCC Article 4A corresponds to, but is different from, the PSD2 ‘payment transaction’ in its focus on the instruction itself rather than on the ensuing act ‘of placing, transferring or withdrawing funds.’ At the same time, under UCC Article 4A, ‘funds transfer’, to which there is no PSD2 parallel, is the entire payment process from end to end.³³

D. PAYMENT SERVICES COVERED BY THE DIRECTIVE

2.023. ‘Payment services’ to which the Directive applies under art 2(1) are defined in art 4(3) to mean business activities listed in Annex I. The definition purports to be ‘technologically neutral’, so as to ‘allow for the development of new types of payment services, while ensuring equivalent operating conditions for both existing and new payment service providers’.³⁴ As such, the Directive is envisioned to cover ‘all types of electronic payment services’.³⁵ Operations and transactions carried out in providing payment services fall within the ambit of such ‘services’.

2.024. The Annex I list is quite disorganized and repetitive. For example, card payments, direct debits, and credit transfers are enumerated twice. First, they are enumerated in item 3 as ‘payment transactions, including transfers of funds on a payment account with the user’s payment

²⁷ *ibid* para 26.

²⁸ *ibid* para 28. Another argument, that of distinction between what is now PSD2 (n 1) arts 88(2) and (3), will be discussed in Chapter 10.

²⁹ For an extensive discussion, see Benjamin Geva, *The Law of EFT* (n 23) § 2.02[3][c].

³⁰ UCC Article 4A (n 21) § 4A-103(a)(1).

³¹ Under UCC Article 4A (n 21) § 4A-103(a)(5), ‘Sender’ is defined to mean ‘the person giving the instruction to the receiving bank.’

³² Under UCC Article 4A (n 21) § 4A-103(a)(4), ‘Receiving bank’ is defined to mean ‘the bank to which the sender’s instruction is addressed.’

³³ UCC Article 4A (n 21) § 4A-104(a).

³⁴ PSD2 (n 1) Preamble recital 21.

³⁵ *ibid* Preamble recital 22.

service provider or with another payment service provider'. Second, they are enumerated in item 4 as 'payment transactions where the funds are covered by a credit line for a payment service user'. However, 'credit line' is not defined and 'payment account' is broad enough to cover a credit account used for the execution of payment transactions. As well, the reference to 'another payment service provider,' namely, to a PSP other than that of the payment service user, is enigmatic in light of the strict privity requirements pointed out above.

Here is a summary of the payment services listed in the Annex:

(a) *Cash deposits and withdrawals in and from payment accounts;*

2.025. This item includes services enabling such transactions. 'Cash' is undefined and should be taken to mean banknotes and coins (notwithstanding their own mention), arguably in lieu of 'cash,' in art 3(c). As will be seen below, cash payments between a payer to a payee are generally excluded. So far as cash is concerned, PSD2 covers only transactions from and to payment accounts with PSPs. As discussed below, cash withdrawals in a money remittance transaction are not covered.

(b) *The execution of payment transactions in funds held either on deposit in a payment account or covered by a credit line falling into specified categories;*

2.026. As indicated, 'funds' are defined in art 4(25) to mean 'banknotes and coins, scriptural money or electronic money...' 'Payment transaction' is defined in art 4(5) to include 'transferring or withdrawing funds.' Item 4 in the Annex I list specifically speaks of the execution of payment transactions where 'the funds ... covered by a credit line' and thus excludes banknotes and coins. This is not all that clear from the text of item 3, speaking more ambiguously of the '[e]xecution of payment transactions, including transfer of funds on a payment account ...' Nevertheless, I suppose that payment in banknotes and coins is not covered in the first place, and not only because of its exclusion under art 3(a), as will be discussed below. The unnecessary duplication between items 3 and 4 in Annex I was addressed at the beginning of the section.

The specified categories of payment transactions in funds are the following:

(i) *Execution of direct debits, including one-off direct debits;*

2.027. 'Direct debit' is defined in art 4(23) to be:

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.³⁶

³⁶ This definition also covers an unauthorized direct debit such as for example, where it is initiated by the payee from a payment account of which it is not the holder, where the holder of the account to be debited does not consent to it. See Case C-295/18 *Mediterranean Shipping Co (Portugal) v Banco Commercial Português SA* [2019] ECLI:EU:C:2019:320.

Direct debit, known also as debit transfer, is commonly associated with a series of payments made at regular intervals. However, it can also be made for an ad hoc single payment, in which case it is termed 'one-off direct debit'.

(ii) *Execution of credit transfers including standing orders:*

2.028. 'Credit transfer' is defined in art 4(24) 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

There is no definition for 'standing order', which is usually taken to mean an instruction the payment account holder ('the payer') gives to his or her PSP to pay a set amount at regular intervals to another's ('the payee's') payment account.³⁷ Each time, such an instruction is carried out by means of a credit transfer.

2.029. The difference between a credit transfer and a direct debit is in the communication flow. Thus, a credit transfer originates by the payer's communication to the payer's PSP of the payer's payment order. It 'pushes' the funds to the payee. Conversely, a debit transfer (that is, direct debit) originates by the payee's communication to the payee's PSP of a payment order authorized by the payer. It 'pulls' funds from the payer and moves them to the payee. In both scenarios, the payment or funds flow is from the payer to the payee. However, the payment and communication flows are in the same direction in credit transfers, while they are in opposite directions in a debit transfer.

2.030. In the retail area, a good example for the use of a credit transfer scheme is payroll. A typical setting is that of the employer providing the employer's PSP with the list of employees and their payment accounts with their respective PSPs. The employer's PSP will then debit the employer's account with the total of the payroll and advance funds to the employees' payment accounts.

2.031. A good example for a direct debit application is the payment of insurance premium or loan instalment. In the latter case, the borrower will authorize the lender to collect each instalment from the borrower's payment account. A direct debit application fulfils the role of a post-dated cheque. From an operational perspective, the first impact of the issuance of a payment order by the payee is a provisional credit to the payee's account, pending a successful collection from the payer. Hence, a risk incurred in a direct debit operation is that of dishonour of the payment order, resulting in a reversal of payment.³⁸ Such a risk does not exist in a credit transfer where

³⁷ See in general eg Wikipedia, 'Standing Order (banking)' (last edited: 14 March 2020) <[https://en.wikipedia.org/wiki/Standing_order_\(banking\)](https://en.wikipedia.org/wiki/Standing_order_(banking))> accessed 28 May 2020.

the credit to the payee's payment account is posted only after the payer's payment account has been debited³⁹ and is thus final.⁴⁰

2.032. Regulation (EU) No 260/2012⁴¹ establishes 'technical and business requirements for credit transfers and direct debits in euro'. PSD2 Preamble recital 76 goes on to state that

[w]ith reference to direct debits, that Regulation envisages that the payer give consent both to the payee and to the payer's payment service provider (directly or indirectly via the payee), and that mandates, together with later modifications or cancellation, are stored by the payee or by a third party on behalf of the payee. The current and, so far, only pan-European direct debit scheme⁴² for consumer payments in euro developed by the European Payments Council is based on the principle that the mandate to execute a direct debit is given by the payer to the payee and, together with later modifications or cancellation, is stored by the payee. The mandate can also be stored by a third party on behalf of the payee. In order to ensure broad public support for SEPA and to ensure a high level of consumer protection within SEPA, the existing pan-European direct debit scheme provides for an unconditional right to a refund for authorised payments. Reflecting that reality, this Directive aims to establish an unconditional right to a refund as a general requirement for all euro-denominated direct debit transactions in the Union.⁴³

(iii) Execution of payment transactions through a payment card or a similar device:

³⁸ For a detailed explanation of this feature in the cheque collection system see eg Committee on Payment and Settlement Systems, *Core Principles for Systemically Important Payment Systems* (Basel, Bank for International Settlements, January 2001) 68 - 74, particularly at 70.

³⁹ Or else, after the payer's PSP becomes liable for its amount.

⁴⁰ See in general Benjamin Geva, 'Payment Finality and Discharge in Funds Transfers' (2008) 83 Chi-Kent L Rev 633.

⁴¹ Regulation (EU) No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009 [2012] OJ L94/22 < <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32012R0260>> accessed 28 May 2020.

⁴² Regulation (EU) No 260/2012 (ibid) uses terminology similar to that of PSD2. In its art 2(7), it defines 'payment scheme' (which I take to cover both credit and direct debit schemes) to mean:

a single set of rules, practices, standards and/or implementation guidelines agreed between PSPs for the execution of payment transactions across the Union and within Member States, and which is separated from any infrastructure or payment system that supports its operation;

In turn, 'payment system' is defined in art 2(6) of that Regulation (as in PSD2 (n.1) art. 4(7)) to mean:

a funds transfer system with formal and standardised arrangements and common rules for the processing, clearing or settlement of payment transactions;

I take this to mean that a payment system may support the operation of more than one payment schemes

⁴³ See PSD2 (n 1) arts 76 and 77.

2.033. 'Payment card' is, however, not defined. Presumably, the drafters wished to refrain from tying the definition to technological restrictions. Indeed, historically, payment cards were plastic cards from which information was imprinted on a piece of paper, while the information facilitating payment was passed on to the issuer over the phone. These initial payment cards eventually developed into cards bearing magnetic stripes and later, into smart cards. At present, cards can be loaded with value, as well as facilitate contactless payments—in which case they may not be physical cards but rather, chips embodied in a bracelet, fob, or mobile device. Alluding to its historical origin, the word 'payment card' has thus become a generic reference to a machinery that facilitates a guaranteed or online payment. Preamble recital 68 describes the mechanism of the operation initiated by the use of a payment card as follows:

The use of a card or card-based payment instrument for making a payment often triggers the generation of a message confirming availability of funds and two resulting payment transactions. The first transaction takes place between the issuer and the merchant's account servicing payment service provider, while the second, usually a direct debit, takes place between the payer's account servicing payment service provider and the issuer. Both transactions should be treated in the same way as any other equivalent transactions.

2.034. The quoted statement is however problematic in several respects. First, and perhaps only as a matter of a drafting oversight, it speaks of 'the merchant's account servicing payment service provider'. However, 'account servicing payment service provider' is defined in art 4(17) as 'a payment service provider providing and maintaining a payment account for a *payer*' (emphasis added). This is to distinguish this service provider from a 'payment initiation service provider' defined in art 4(18) to mean 'a payment service provider pursuing business activities as referred to in point (7) of Annex I' discussed further below. Stated otherwise, strictly speaking there is no 'merchant's account servicing payment service provider', as the only account servicing PSP is that of the payer. It is, however, plausible to assume that the statement used, 'merchant's account servicing payment service provider', is the equivalent of the payee-merchant's PSP.

2.035. Second, as a matter of law, it is not all that clear that the issuer's guarantee does not inure directly to the benefit of the payee-merchant. Indeed, it may well be that it inures only to the benefit of the merchant's PSP – as the statement may suggest – and that in turn, that PSP guarantees payment to the merchant. In fact, the merchant would rather have the guaranty of the merchant's bank/PSP, which is typically located in the merchant's geographic vicinity and with which the merchant has an ongoing business relationship. The merchant is likely to prefer relying on that guaranty rather than that of the issuer, potentially a geographically remote PSP with which the merchant has no business relationship. True, even if the issuer is liable directly to the merchant, the law may fasten on the merchant's PSP the liability of either a guarantor or

as in the law of letters of credit, that of a confirmer.⁴⁴ This issue has not been settled and Preamble recital 68 is incorrect insofar as it may be read as limiting the issuer's guarantee as inuring only to the benefit of the payee's PSP and not addressing possible direct liability by the issuer to payee-merchant.

2.036. Third, the assertion that the initiation of payment by means of a card triggers 'two resulting payment transactions' is unfounded. In fact, every non-cash payment results in a debit to the payer's account and a credit to that of the payee. Every non-cash payment has its own sequence as to the posting of these entries, as manifested particularly in the difference between debit and credit transfers, discussed above. In any event, it is unclear which payment transaction exists 'between the payer's account servicing payment service provider and the issuer' as Preamble recital 68 states. Indeed, in the usual case, the two – payer's account servicing PSP and issuer – are the same institution. Where they are separate players, there is no payment transaction between the issuer and the payer's account servicing PSP – but rather a guarantee.

2.037. It will, however, be assumed that the issuer is the payer's account servicing PSP. Possibly then, the alleged second payment transaction is between the payee-merchant's PSP and the payee-merchant – in which case it is the only payment transaction carried out in the card payment. In such a case, it is very likely that, rather than involving two payment transactions, the card payment consists of two banking operations. One operation is the issuer's authorization or guaranty of payment, whether to the merchant's PSP or to the merchant. The other banking operation is the payment transaction which is direct debit. Thereunder, the payee-merchant collects from the issuer the sum of the authorized payment. Alternatively, and perhaps less likely, the payment transaction is between the payer and the payee's PSP. Under that interpretation, by analogy to a 'drawdown transfer,' merchant-payee's bank is acting as the payer's agent (as authorized under the payer-issuer card agreement) in instructing the issuer, being the payer's account servicing PSP, to carry out a credit transfer.⁴⁵

2.038. In the operation initiated through a payment card, the card issuer and transaction acquirer are indispensable PSP participants. Payment services provided by them are set out in Annex I:

(c) Issuing of payment instruments and/or acquiring payment transactions:

⁴⁴ For the confirming bank's liability under letter of credit law see eg Agasha Mugasha, *The Law of Letters of Credit and Bank Guarantees* (Leichhardt, NSW: The Foundation Press 2003) 32

⁴⁵ Thus, A [true] "drawdown transfer" is a transfer from the account of a customer in one bank ("Bank A") to an account of the same customer at another bank ("Bank B"), where the actual instructions are given to Bank A by Bank B as an agent of the customer. For [UCC] Article 4A to apply, there must be a pre-existing agreement between the customer and Bank A under which Bank A is authorized to follow instructions of Bank B.

Geva, *The Law of EFT* (n 23) § 2.02[3][c].

2.039. This payment service is linked to the immediately preceding sub-category of the execution of payment transactions through a payment card or a similar device. Relevant definitions are as follows:

- ‘Payment instrument’ is defined in art 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 in order to initiate a payment order’.⁴⁶

2.040. The court in *T-Mobile Austria v Verein* noted that notwithstanding the ‘personalised’ requirement in art 4(14), art 63(1)(b) recognizes that a payment instrument may be used anonymously. It went on and held that ‘both the procedure for ordering transfers by means of a transfer order form signed by the payer ... and the procedure for ordering transfers through online banking constitute payment instruments’ as they satisfy the ‘set of procedures’ requirement under art 4(14).⁴⁷

- ‘Issuing of payment instruments’ is defined in art 4(45) 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’.
- ‘Acquiring of payment transactions’ is defined in art 4(44) 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’.

2.041. By reference to the personal cheque, the added advantage to the payee of the card payment is the benefit from the issuer’s obligation, typically the payer’s PSP, triggered in the process of the card authorization. At their inception, card payments were paper-based. In a paper setting, the payer signs a sales draft. Having run (or ‘swiped’) the card at its POS terminal, the merchant seeks, via the merchant’s PSP, the authorization of the payer/cardholder’s PSP. Originally, this process took place by phone. Then, with the emergence of cards bearing magnetic strips, authorization became electronic. Card payments are carried out from either the payer’s credit line or the payer’s asset (or current) account. In the former case, we speak of a ‘credit card’ and

⁴⁶ Definitions of ‘payment service provider’, ‘payment service user’, and ‘payment order’, in PSD2 (n 1) art 4(11), (10), (13) respectively, are reproduced above.

⁴⁷ Case C-616/11 *T-Mobile Austria v Verein* [2014] ECLI:EU:C:2014:242. The quote is from para 44 of the judgement. The case dealt with the corresponding provisions under the original PSD – for which the PSD2 has not made material changes to. Comparison of ‘the handwritten signature endorsed on the transfer order form with the sample handwritten signature lodged by the payer beforehand’ was considered proper ‘authentication’ (ibid para 34). The latter is defined in PSD2 (n 1) art 4(29) to be ‘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.’ Note that under UCC Article 4A (n 21) § 4A -201, ‘[c]omparison of a signature on a payment order or communication with an authorized specimen signature of the customer is not by itself a security procedure.’

in the latter, of a 'debit card'.⁴⁸ At present, card payments are predominantly electronic; that is, the payer's instruction is electronic and not on a signed paper, even where the latter is required for the purpose of availability in case of a dispute.

2.042. An electronic card transaction typically commences by the payer inserting the card into a merchant's terminal and authenticating the instruction by entering a secret code – a Personal Identification Number (PIN). A card transaction may, however, be initiated without the physical card by passing on card information in writing, by telephone, or from a computer terminal or digital device such as a smartphone, possibly over the internet, possibly via a website. Either way, even if the transaction is initiated by inserting the card and signing a sales draft, based on which funds are transferred and settled, information is passed on exclusively electronically. For a fully electronic initiation, several countries have recently embraced the EMV (standing for 'Europay, MasterCard, Visa') standard. This is an open-standard set of specifications for smart card payments and acceptance devices premised on 'chip' technology for a card, which provides enhanced security and fraud protection. The EMV standard also accommodates near-field communication (NFC) communication, enabling contactless PIN-less, as well as PIN, access.

2.043. Participants in a typical multi-institution (that is, four-party) payment card transaction are a cardholder-payer, a merchant-payee, an issuing bank, and an acquirer (the merchant's bank). The issuer incurs a payment obligation, which benefits the payee-merchant at least indirectly. The issuer and acquirer are member banks in a card network association, which establishes rules and standards governing the issuance and use of the cards. Usually, a member bank both issues cards and 'acquires' merchants who will accept the cards. In a given transaction, a member bank may thus act as either an issuer or acquirer (or both, in which case the transaction is not 'inter-bank'). Worldwide, two for-profit associations, Visa and MasterCard, with American Express trailing in third (albeit with a different business model), dominate the credit card landscape. All three are global multi-currency international systems. Debit card schemes have tended to be domestic and of smaller scope – but even this market undergoes penetration by global players.

2.044. In a credit card scenario that originated in the e-commerce space, small merchants may act as 'sub-merchants' using a card network indirectly through a 'master merchant', such as PayPal or Square, acting on their behalf. The 'master merchant' positions itself between such small merchants and the acquirer. More specifically, the 'master merchant' acts in the transaction as the payee – dealing directly with both the acquirer and the cardholder/payer — and separately accounting to the sub-merchant.⁴⁹

2.045. The PSD2 Preamble recital 10 highlights the 'neutral definition of acquiring of payment transactions' with the view 'to capture not only the traditional acquiring models structured

⁴⁸ The distinction between credit and debit card is by reference to whether what is to be debited is a credit or asset account - and has nothing to do with the distinction between a credit and debit transfer.

⁴⁹ Carol Coye Benson & Scott Loftesness, 'Interoperability in Electronic Payments: Lessons and Opportunities' (CGAP 2012) 14-16 <https://www.cgap.org/sites/default/files/Interoperability_in_Electronic_Payments.pdf> accessed 28 May 2020.

around the use of payment cards, but also different business models, including those where more than one acquirer is involved.⁵⁰

(d) Money remittance services in funds between a payer and payee where at least one of them does not have a payment account with a PSP involved in the transaction

2.046. More specifically, ‘money remittance’ is defined in PSD2 art 4(22) to mean

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.

2.047. Preamble recital 9 explains that:

Money remittance is a simple payment service that is usually based on cash provided by a payer to a payment service provider, which remits the corresponding amount, for example via a communication network, to a payee or to another payment service provider acting on behalf of the payee. In some Member States, supermarkets, merchants and other retailers provide to the public a corresponding service enabling them to pay utilities and other regular household bills. Those bill-paying services should be treated as money remittance, unless the competent authorities⁵¹ consider the activity to fall under another payment service.

2.048. It is obvious from most of the definition in art 4(22) that the ‘payment service’ of which the ‘money remittance’ consists is only that given to the payer, and not the payee. The only doubt comes from the closing clause of the definition, referring to ‘funds ... received on behalf of and made available to the payee.’ This is, however, an enigmatic clause; presumably it addresses a situation where the payer is an agent of the payee. Even this part of the definition refers to the receipt of the funds by a PSP and not to their disbursement. A typical money remittance is a cross-border or overseas person-to-person payment of a relatively low value, in the form of a credit transfer, frequently initiated by a migrant worker, sending funds to his or her family back in their home country. The typical PSPs providing access points to the payer and the payee are payment institutions but they may also be banks. For a remittance service to work, there must be a network consisting of access points in which funds can be ‘captured’ (ie placed) and ‘disbursed’ (ie paid), and procedures to link those access points to facilitate settlement and messaging. Service categories fall into four general categories

2.049. To begin with, non-bank global money transfer operators provide *franchised services*. Under a typical franchise service, a central provider provides a proprietary service without necessarily

⁵⁰ See eg Access Merchant Services, ‘Contingency planning with multiple acquiring banks’ (25 October 2016) <<https://www.accessms.com/wp-content/uploads/2016/10/AMS-Multiple-Acquirer-White-Paper-cmv1-261016.pdf>> accessed 28 May 2020. Reference is to the use of different acquirers by one business in different transactions.

⁵¹ The designation of competent authorities is provided for in PSD2 (n 1) art 22.

having any access point of its own. Rather, it creates infrastructure (such as messaging; settlement; advertising) to support the service, but obtains the necessary access points by inviting institutions in both sending and receiving countries to offer the service or act as franchises on essentially standardized terms. Alternatively, in a *negotiated service*, a remittance service provider (RSP) negotiates with a limited number of institutions in other countries to create an adequate network of access points. The essence of the negotiated service is the establishment by negotiation of a proprietary product by largely non-competing organizations. Schemes may be bilateral or multilateral.

2.050. Two other alternatives are unitary and open remittance services. In a *unitary service*, a proprietary product is provided unilaterally by a single RSP, without involving other entities as capturing or disbursement agents. This is possible only where the RSP itself, typically a global bank with an international branch network, has physical access points in both sending and receiving countries, or where the network is virtual - that is, a network in which access points are communication devices.

2.051. Finally, *open services* may be the most common remittance services provided by banks. In a typical case, an RSP offers a proprietary service to its customers in the sending countries and obtains access points in the receiving country using an open network to which any RSP can have direct or indirect access. 'Currently the only such network is the international banking network, consisting of national payment systems that can be accessed from another country either through correspondent banking or (less commonly) direct link between national payment systems.'⁵²

2.052. Under the original PSD, the concluding item in its 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.' PSD2 deleted this item but added to the Annex I two new services:

(e) *payment initiation services; and*

(f) *account information services.*

2.053. 'Payment initiation service' (PIS) is defined in art 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'. 'Account information service' (AIS) is defined in art 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

⁵² For more detail see Committee on Payment and Settlement Systems & The World Bank, 'General principles for international remittance services' (BIS January 2007) 10 <<http://documents.worldbank.org/curated/en/894291468313541470/pdf/388210ENGLISH01remittances01PUBLIC1.pdf>> accessed 28 May 2020.

payment service provider'.⁵³ A provider of such services is respectively a payment initiation service provider (PISP) and an account information service provider (AISP).⁵⁴

2.054. According to PSD2 Preamble recital 29,

Payment initiation services enable the payment initiation service provider 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.

2.055. PSD2 covers both PISPs and AISPs, 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'.⁵⁵ Such services are otherwise excluded under PSD2 art 3(j), discussed in the next section. While the Directive does not enumerate PISPs and AISPs as PSPs, they provide payment services and are treated as payment institutions, which of course are PSPs.⁵⁶

2.056. A PISP does not hold 'at any point of the payment chain the user's funds'.⁵⁷ It does 'not necessarily enter into a contractual relationship with the account servicing payment service providers ...' Rather, 'account servicing payment service providers should make it possible for payment initiation service providers to rely on the authentication procedures provided by the account servicing payments service providers to initiate a specific payment on behalf of the payer.'⁵⁸ As well, a PISP's access to the payer's account may be either direct or indirect.⁵⁹

2.057. Preamble recital 68 addresses the relationship in a payment transaction executed through a payment card between the account servicing PSP of the payer and the payer's PIS as follows:

⁵³ PSD2 (n 1) art 3(j). See also: *ibid* Preamble recital 28.

⁵⁴ PSD2 (n 1) arts 4(18) and (19), respectively.

⁵⁵ PSD2 (n 1) art 3(j).

⁵⁶ *ibid* Preamble recital 26.

⁵⁷ *ibid* Preamble recital 31.

⁵⁸ *ibid* Preamble recital 30.

⁵⁹ *ibid* Preamble recital 32, which goes on to provide that '[a]n account servicing payment service provider which provides a mechanism for indirect access should also allow direct access for the payment initiation service provider.' 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 PSP's webpage. Alternatively, in the indirect access mode, the PSP provides the PISP account access through a dedicated application interface (API). Regulatory standards favor the latter, which, unlike the former, is capable of limiting the data accessed by the PISP to only that which is required for the provision of the service.

Payment service providers issuing card-based payment instruments should enjoy the same rights and should be subject to the same obligations under this Directive, regardless of whether or not they are the account servicing payment service provider of the payer, in particular in terms of responsibility (e.g. authentication) and liability vis-à-vis the different actors in the payment chain. Since the payment service provider's request and the confirmation on the availability of the funds can be made through existing secure communication channels, technical procedures and infrastructure for communication between payment initiation service providers or account information service providers and account servicing payment service providers, while respecting the necessary security measures, there should be no additional costs for payment services providers or cardholders. Furthermore, whether the payment transaction takes place in an internet environment (the merchant's website), or in retail premises, the account servicing payment service provider should be obliged to provide the confirmation requested by the issuer only where accounts held by the account servicing payment service providers are electronically accessible for that confirmation at least online.⁶⁰

2.058. According to Preamble recital 93, PISPs and AISPs should not be forced by the account service PSP 'to use a particular business model, whether based on direct or indirect access.' All three types of payment institutions 'should observe the necessary data protection and security requirements established by, or referred to in, this Directive or included in the regulatory technical standards' which 'should be compatible with the different technological solutions available.'⁶¹

E. PAYMENT SERVICES EXCLUDED FROM THE DIRECTIVE

(a) cash payments

2.059. Art 3 deals with the outer limits of the Directive.⁶² Thereunder, specifically excluded are:

cash payments and related operations such as professional physical transport of banknotes and coins and foreign currency exchange;

⁶⁰ PSD2 (n 1) Preamble recital 68 concludes by stating that

Given the specific nature of electronic money, it should not be possible to apply that mechanism to payment transactions initiated through card-based payment instruments on which electronic money, as defined in Directive 2009/110/EC, is stored.

⁶¹ PSD2 (n 1) Preamble recital 93 dictates that common and open standards 'should ensure the interoperability of different technological communication solutions' and 'also ensure that the account service [PSP] 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 account servicing [PSP] and with the customers involved in a secure manner.'

⁶² According to Case C-191/17 *Bundeskammer v ING-Di-Ba Direktbank* [2018] ECLI:EU:C:2018:466, the list is not exhaustive.

2.060. Preamble recital 5 rationalizes PSD2 on the '[t]he continued development of an integrated internal market for safe electronic payments'. Recital 5 goes on to acknowledge the fact that this development 'is crucial in order to support the growth of the Union economy and to ensure that consumers, merchants and companies enjoy choice and transparency of payment services to benefit fully from the internal market.' For its part, Preamble recital 7 speaks of the increase in recent years of 'security risks relating to electronic payments' and the resulting need to provide protection to payment service users. Peculiarly, Preamble recital 23 even speaks of the existence of 'a single payments market for cash' as a reason for excluding 'payment transactions made in cash'.

2.061. Not surprisingly then, PSD2 does not purport to cover cash payment and services.⁶³ Indeed, this is in line with the analysis given above in Section 3 under which PSD2 uses 'payment transaction' to refer to the transaction or relationship between the payment initiator and this initiator's PSP. However, this conclusion is reached only upon contextualization of the definition of 'payment transaction'.⁶⁴ On its own, as 'an act, initiated by the payer or ... or by the payee, of placing, transferring or withdrawing funds', with funds being defined as including 'banknotes and coins,' with no reference to 'payment order',⁶⁵ 'payment transaction' could literally be read as also covering payment in cash - hence the need for specific exclusions. As indicated above in Section 4, while 'cash' is not defined in PSD2, it should be taken to mean banknotes and coins, notwithstanding their own mention (arguably in lieu of 'cash' in art 3(c)).

2.062. Exclusions of cash payments are reflected in the following provisions of art 3:

- Art 3(a) excludes 'payment transactions made exclusively in cash directly from the payer to the payee, without any intermediary intervention'. It is, however, unclear why and how the existence of an intermediary to pass on a cash payment⁶⁶ could be thought as bringing the transaction within the ambit of the PSD2.
- Art 3(c) excludes 'professional physical transport of banknotes and coins, including their collection, processing and delivery'. Preamble recital 12 explains that:

This Directive should not apply to the activities of cash-in-transit companies (CITs) and cash management companies (CMCs) where the activities concerned are limited to the physical transport of banknotes and coins.

⁶³ See PSD2 (n 1) Preamble recital 22.

⁶⁴ The role of contextualization in the meaning of PSD2 definitions is highlighted by cases such as: Case C-295/18 *Mediterranean Shipping Co (Portugal) v Banco Commercial Português SA* [2019] ECLI:EU:C:2019:320 and Case C-191/17 *Bundeskammer v ING-Di-Ba Direktbank* [2018] ECLI:EU:C:2018:466

⁶⁵ PSD2 (n 1) arts 4(5), (23), and (13)

⁶⁶ As for example, in Kenya, prior to the introduction of mobile payments. See Joy Malala, *Law and Regulation of Mobile Payment Systems: Issues arising 'post' financial inclusion in Kenya* (London and New York: Routledge 2018) 30.

The limitation of the exclusion to such ‘professional’ services should not be taken to mean that the physical carrying of banknotes and coins by ‘non-professionals’ is covered by the PSD2. Rather, under art 4(3), ‘payment services’ covered by Annex I that fall under the Directive must be ‘business activit[ies]’ in the first place – hence arguably must be carried out by ‘professionals’.

- Art 3(e) excludes ‘services where cash is provided by the payee to the payer as part of a payment transaction following an explicit request by the payment service user just before the execution of the payment transaction through a payment for the purchase of goods or services’.

What appears to be excluded is the situation where a buyer/payer makes a non-cash payment to the payee/seller governed by the PSD2 in a sum higher than the agreed price for the goods or services with the purpose, explicitly communicated to the payee/seller ‘just before’ payment, of receiving the difference in cash from the payee-seller. Thus, the ‘payment service user’ in art 3(e) is necessarily the payer.

- Art 3(f) excludes currency exchange transactions in the form of cash-to-cash operations. The provision targets the exchange of foreign currency in the form of banknotes (and in theory also coins).

(b) certain micro payments

2.063. Two exemptions are provided on this basis:

- Art 3(d) excludes ‘payment transactions consisting of the non-professional cash collection and delivery within the framework of a non-profit or charitable activity’.

While the plain language of the provision addresses ‘non-professional *cash collection and delivery* within the framework of a non-profit or charitable activity’ (emphasis added), Preamble recital 16 ties this exclusion to that ‘relating to certain payment transactions by means of telecom or information technology devices’, explained immediately below. It goes on to provide an explanation under which such payments are micro, albeit not necessarily in cash:

In order to ease the burden on entities that collect charitable donations, payment transactions in relation to such donations should also be excluded. Member States should, in accordance with national law, be free to limit the exclusion to donations collected in favour of registered charitable organisations. The exclusion as a whole should apply only where the value of payment transactions is below a specified threshold in order to limit it clearly to payments with a low risk profile.

- Art 3(l) excludes certain ‘payment transactions by a provider of electronic communications networks or services provided in addition to electronic communications services⁶⁷ for a subscriber to the network or service’.

2.064. Preamble recital 15 explains that this exclusion applies to ‘certain payment transactions [initiated] by means of telecom or information technology devices where the network operator not only acts as an intermediary for the delivery of digital goods and services through the device in question, but also adds value to those goods or services:’

In particular, that exclusion allows for so-called operator billing or direct to phone-bill purchases which, starting with ringtones and premium SMS services, contribute to the development of new business models based on the low-value sale of digital content⁶⁸ and voice-based services. Those services include entertainment, such as chat, downloads such as video, music and games, information such as on weather, news, sports updates, stocks and directory enquiries, TV and radio participation such as voting, competition entry, and provision of live feedback. Feedback from the market shows no evidence that such payment transactions, trusted by consumers as convenient for low-threshold payments, have developed into a general payment intermediation service.

2.065. Having specifically expanded on the corresponding language in the original PSD with the view to remove ambiguities that led to inconsistent implementation, PSD2 art 3(l) exempts the following payment transactions:

- (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;

⁶⁷ For relevant terminology, PSD2 arts. 4(41) and (42) refer to art. 2(a) and (c) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L108/33 <<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32002L0021>> accessed 28 May 2020. Thereunder,

(a) ‘electronic communications network’ means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;

....

(c) ‘electronic communications service’ means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;

⁶⁸ Under PSD2 (n 1) art 4(43), ‘digital content’ is defined to mean ‘goods or services which are produced and supplied in digital form, the use or consumption of which is restricted to a technical device and which do not include in any way the use or consumption of physical goods or services.’

provided that the value of any single payment transaction referred to in points (i) and (ii) does not exceed EUR 50 and:

- the cumulative value of payment transactions for an individual subscriber does not exceed EUR 300 per month, or
- where a subscriber pre-funds its account with the provider of the electronic communications network or service, the cumulative value of payment transactions does not exceed EUR 300 per month

2.066. Preamble recital 16 explains that:

The exclusion relating to certain payment transactions by means of telecom or information technology devices should focus specifically on micro-payments for digital content and voice-based services. A clear reference to payment transactions for the purchase of electronic tickets should be introduced to take into account the development in payments where, in particular, customers can order, pay for, obtain and validate electronic tickets from any location and at any time using mobile phones or other devices. Electronic tickets allow and facilitate the delivery of services that consumers could otherwise purchase in paper ticket form and include transport, entertainment, car parking, and entry to venues, but exclude physical goods. They thus reduce the production and distribution costs connected with traditional paper-based ticketing channels and increase customer convenience by providing new and simple ways to purchase tickets. ...

2.067. Under art 37(3), ‘service providers carrying out an activity referred to in point (l) of Article 3 [must] send a [publicly available] notification to competent authorities and provide [them] an annual audit opinion, testifying that the activity complies with the limits set out in point (l) of Article 3.’

(c) payment transactions from the payer to the payee through a commercial agent authorised via an agreement to negotiate or conclude the sale or purchase of goods or services on behalf of only the payer or the payee;

2.068. Arguably, since this exclusion requires the payment transaction to be from the payer to the payee, it applies only to credit transfers and not to direct debits. As explained in Preamble recital 11, art 3(b), providing for this exclusion, purports to apply to e-commerce platforms and improves on the language of its predecessor in the original PSD in clarifying that the exclusion applies only to the case where a commercial agent acts exclusively for either the payer or they payee, but not to both:

The exclusion from the scope of [the original PSD] of payment transactions through a commercial agent on behalf of the payer or the payee is applied very differently across the Member States. Certain Member States allow the use of the exclusion by e-commerce platforms that act as an intermediary on behalf of both individual buyers and sellers without a real margin to negotiate or conclude the sale or purchase of goods or services. Such application of the exclusion goes beyond the intended scope set out in that Directive and has the potential to increase risks for consumers, as those providers remain outside the protection of the legal framework. Differing application

practices also distort competition in the payment market. To address those concerns, the exclusion should therefore apply when agents act only on behalf of the payer or only on behalf of the payee, regardless of whether or not they are in possession of client funds. Where agents act on behalf of both the payer and the payee (such as certain e-commerce platform), they should be excluded only if they do not, at any time enter into possession or control of client funds.

2.069. Compared to the corresponding PSD provision, PSD2 art 3(b) further clarifies that authorization must be by agreement (and hence not by conduct?) – though it does not clarify whether either an oral or implied agreement will suffice. ‘Agent’ is defined in art 4(38) to mean ‘a natural or legal person who acts on behalf of a payment institution in providing payment services’. ‘Commercial agent’ is, however, not defined.

(d) paper checks, drafts (bills of exchange), vouchers, traveller’s checks and postal money orders;

2.070. More specifically, the following ‘payment transactions based on any of the following documents drawn on the payment service provider with a view to placing funds at the disposal of the payee’ are excluded under art 3(g):

- (i) paper cheques governed by the Geneva Convention of 19 March 1931 providing a uniform law for cheques;
- (ii) paper cheques similar to those referred to in point (i) and governed by the laws of Member States which are not party to the Geneva Convention of 19 March 1931 providing a uniform law for cheques;
- (iii) paper-based drafts in accordance with the Geneva Convention of 7 June 1930 providing a uniform law for bills of exchange and promissory notes;
- (iv) paper-based drafts similar to those referred to in point (iii) and governed by the laws of Member States which are not party to the Geneva Convention of 7 June 1930 providing a uniform law for bills of exchange and promissory notes;
- (v) paper-based vouchers;
- (vi) paper-based traveller’s cheques;
- (vii) paper-based postal money orders as defined by the Universal Postal Union[.]

2.071. Effectively, art 3(g) excludes negotiable instruments (bill, cheques, and notes) and related circulating paper instruments or instructions. Their exclusion is rationalized in Preamble recital 23 on the fact that ‘paper cheques cannot be processed as efficiently as other means of

payment'. This is an unsatisfactory explanation, if only due to the availability of full automation in processing cheques collection and payment. Even as their exclusion is explained, hope is expressed in Preamble recital 23 that '[g]ood practice in that area should ... be based on the principles set out in this Directive'.

(e) payment transactions carried out within a payment or securities clearing and settlement system;

2.072. Such transactions are stated in art 3(h) to be 'between settlement agents, central counterparties, clearing houses and/or central banks and other participants of the system, and payment service providers.' This exclusion is however 'without prejudice to Article 35', addressing access to payment systems.

(f) payments transactions related to securities asset servicing;

2.073. This exemption covered by art 3(i) is linked to the previous point. It addresses payments incurred in the process of operating settlement systems, or more specifically,

payment transactions related to securities asset servicing, including dividends, income or other distributions, or redemption or sale, carried out by persons referred to in point (h) or by investment firms, credit institutions, collective investment undertakings or asset management companies providing investment services and any other entities allowed to have the custody of financial instruments;

(g) payment processing services; specific payment instruments that can be used only in a limited way;

2.074. This exclusion is covered by PSD2 art 3(k). The corresponding provision in the original PSD covered instruments to be used only on the issuer's premises, 'within a limited network of service providers[,] or for a limited range of goods or services.' The PSD2 Preamble observed that 'the payment activities covered by [this] limited network exclusion often comprise significant payment volumes and values and offer to consumers hundreds or thousands of different products and services.' It thus concluded that this 'does not fit the purpose of the limited network exclusion'.⁶⁹ Accordingly, PSD2 art 3(k) sets out the three types of instruments to which the exemption will apply. Effectively, it repealed the 'limited network exclusion' and added to the exemption a new category of instruments, valid only in one Member State, and provided at the request of a public sector body 'for specific social or tax purposes to acquire specific goods or services from suppliers having a commercial agreement with the issuer.' The three types of instruments excluded under art 3(k) are:

- (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;

⁶⁹ PSD2 (n 1) Preamble recital 13.

- (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;

2.075. Outside these three sets of circumstances, PSD2 Preamble recital 14 opines that

Instruments which can be used for purchases in stores of listed merchants should not be excluded from the scope of this Directive as such instruments are typically designed for a network of service providers which is continuously growing.

For its part,

The limited network exclusion should apply in combination with the obligation of potential payment service providers to notify activities falling within its scope.

2.076. The notification requirement is provided in art 37(2) and applies to ‘service providers carrying out either of the activities referred to in points (i) and (ii) of point (k) of Article 3 or carrying out both activities, for which the total value of payment transactions executed over the preceding 12 months exceeds the amount of EUR 1 million’. Notification ‘containing a description of the services offered, specifying under which exclusion referred to in point (k)(i) and (ii) of Article 3 the activity is considered to be carried out’ must be given to ‘the competent authorities’ and made publicly available. For their part, and on the basis of the notification,

the competent authority shall take a duly motivated decision on the basis of criteria referred to in point (k) of Article 3 where the activity does not qualify as a limited network, and inform the service provider accordingly.

(h) payment transactions carried out between payment service providers for their own account

2.077. This exemption provided for by art 3(m) covers payments in which both end-parties, the payer and payee, are PSPs.

(i) Payment transactions and related services between entities belonging to the same corporate group such as subsidiaries;

2.078. This exemption provided for by art 3(n) is explained by Preamble recital 17 as follows:

The Single Euro Payments Area (SEPA) has facilitated the creation of Union wide - ‘payment factories’ and ‘collection factories’, allowing for the centralisation of payment transactions of the same group. In that respect payment transactions between a parent undertaking and its subsidiary or between subsidiaries of the same parent undertaking provided by a payment service provider belonging to the same group should be excluded from the scope of this Directive. The collection of payment orders on behalf of a group by a parent undertaking or its subsidiary for onward transmission to a payment service provider should not be considered to be a payment service for the purposes of this Directive.

(l) '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'

2.079. This exclusion is provided for in art 3(o). 'Framework contract' is defined in art 4(21) to mean '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'. 'ATM' is not defined, but is taken to refer to 'Automated Teller Machine' for cash withdrawals.

2.080. This is an exclusion of cash withdrawals that would otherwise fall within the ambit of PSD2.⁷⁰ It covers 'payment services offered by deployers of automated teller machines (ATMs) independent from account servicing payment service providers.'⁷¹ Lack of privity between the withdrawer and the customer resulting from the absence of a 'framework contract' between them is thus a necessary but not sufficient condition for the application of this exemption. For example, the exemption will not apply where a customer of Bank A withdraws cash from an ATM operated by Bank B. Conversely, it will apply to 'a cash withdrawal service offered by a gaming arcade operator ... where the [latter] does not carry out any operation on ... customers' payment accounts'.⁷²

2.081. As explained by Preamble recital 18, in maintaining this exclusion, PSD2 went in the footsteps of the original PSD and yet endeavored to ensure 'clarity with regard to withdrawal charges ... without prejudice to Regulation (EC) No 924/2009.'⁷³ The latter provides that charges for cross- border payments in euro are the same as for corresponding payments within a Member State.⁷⁴ Accordingly, having established the exclusion, PSD2 art 3(o) goes on to provide that:

Nevertheless, 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.

2.082. For their parts.

- Art 45 requires the PSP to make available to the payment service user specified 'information and conditions' relating to the service and its execution;

⁷⁰ PSD2 (n 1) Annex I point 2, as discussed previously, at the beginning of Section 4.

⁷¹ *ibid* Preamble recital 18.

⁷² Case C-568/16 *Rasool v Rasool Entertainment* [2018] ECLI:EU:C:2018:211 para 39.

⁷³ *ibid*.

⁷⁴ Regulation (EC) No 924/2009 of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) No 2560/2001 [2009] OJ L266/1 < <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:266:0011:0018:en:PDF> > accessed 28 May 2020.

- Art 48 requires the PSP to provide the payer with specified information after the receipt of the payment order;
- Art 49 requires the PSP to provide the payer with specified information after the execution of the payment transaction;
- Art 59 requires a PSP that offers a ‘currency conversion service’ to advise the payer of ‘all charges as well as the exchange rate to be used for converting the payment transaction.’

2.083. Strictly speaking, information to be provided by the third-party ATM provider under art 3(o) is limited to ‘any withdrawal charges’. Arguably, however, the intent has been to cover all charges, if not all information, set out in arts 45, 48, 49, and 59.

(m) services provided by technical service providers other than payment initiation services (PISs) and account information services (AISs),

2.084. The PSD2 does not define ‘technical service providers’. At the same time, art 3(j), which provides for their exemption, identifies them as those ‘technical service providers, which support the provision of payment services ... including processing and storage of data, trust and privacy protection services, data and entity authentication, information technology (IT) and communication network provision, provision and maintenance of terminals and devices used for payment services’. This is, of course, not an exhaustive definition and yet, it is quite helpful in determining whether a given entity falls under art 3(j).

2.085. To the same end, Preamble recital 10 clarifies that ‘[t]echnical services provided to payment service providers, such as the mere processing and storage of data or the operation of terminals, should not be considered to constitute acquiring.’⁷⁵ Hence, they are not payment services covered by the PSD2. To fall within this exemption, art 3(j) requires technical service providers not to enter ‘at any time into possession of the funds to be transferred, including processing and storage of data, trust and privacy protection services’. Coverage by PSD2 of PISs and AISs, notwithstanding the exclusion of other ‘services provided by technical service providers’, is discussed at the end of Section 4 of this chapter.

F. CONCLUSION

2.086. The PSD2 Preamble opens by citing ‘significant progress [that] has been achieved in integrating retail payments in the Union, in particular in the context of the Union acts on payments, [and] in particular through [the original PSD].’⁷⁶ The Preamble goes on to point out that ‘[s]ince then, the retail payments market has experienced significant technical

⁷⁵ ‘Acquiring’ payment transaction is a payment service under point 5 of PSD2 (n 1) Annex I, discussed previously, in Section 4.

⁷⁶ PSD2 (n 1) Preamble recital 1.

innovation, with rapid growth in the number of electronic and mobile payments and the emergence of new types of payment services in the market place, which challenges the current framework.⁷⁷ Noting ‘[s]ignificant areas of the payments market, in particular card, internet and mobile payments, [that] remain fragmented along national borders,’ and lack of complete coverage for ‘[m]any innovative payment products or services,’⁷⁸ the Preamble goes on to mention ambiguous and out-dated regulation causing ‘difficulties in launching innovative, safe and easy-to-use digital payment services.’⁷⁹ Observing that ‘[t]he continued development of an integrated internal market for safe electronic payments is crucial in order to support the growth of the Union economy and to ensure that consumers, merchants and companies enjoy choice and transparency of payment services to benefit fully from the internal market,’⁸⁰ the Preamble thus rationalizes the PSD2 on the need to promulgate ‘rules [that] should be established to close the regulatory gaps while at the same time providing more legal clarity and ensuring consistent application of the legislative framework across the Union.’⁸¹

2.087. Title 1 addresses the regulated field in great detail. It has been quite successful in closing gaps and both expanding and ‘upgrading’ the original PSD. However, it has carried with it some of the original PSD’s drawbacks as well. Particularly, my own opinion is that in covering payment services, the focus should have been on the establishment of a broad conceptual framework for non-cash payment transactions, rather than on addressing the various services in a piecemeal fashion. As well, I favour a transactional end-to-end coverage that follows in the footsteps of UCC Article 4A,⁸² rather than addressing merely the bilateral relationships between each payment service user end-participant and his or her PSP. Finally, core rules to payment

⁷⁷ PSD2 (n 1) Preamble recital 3.

⁷⁸ PSD2 (n 1) Preamble recital 4

⁷⁹ PSD2 (n 1) Preamble recital 4

⁸⁰ PSD2 (n 1) Preamble recital 5

⁸¹ PSD2 (n 1) Preamble recital 6

⁸² For a comprehensive definition covering both credit and debit transfers see eg Article 2(32) of Law on Negotiable Instruments and Payment Transactions 2005 (Cambodia) <http://www.cambodiainvestment.gov.kh/wp-content/uploads/2011/09/Law-on-Negotiable-Instruments-and-Payment-Transaction_051024.pdf> accessed 28 May 2020, under which ‘payment transaction’ is defined to mean:

- a transfer of funds from the payor’s account to the payee or to the payee’s account. A payment transaction
- (i) May be either a credit or a debit transfer;
 - (ii) Is initiated by the originator’s payment order given to the originating bank, instructing it to carry out the payment transaction;
 - (iii) Is carried out by the payor’s bank debiting the payor’s account, with the payee’s bank either crediting the payee’s account or otherwise placing the funds at the payee’s control and disposal as instructed by the originator;
 - (iv) May be a transfer of funds from a payor to a payee who may be the same or two different individuals or legal entities; and
 - (v) May be a transfer of funds in which the payor’s account is held, and payment to the payee takes place, in either the same or two different banks.

The originating bank is the payer’s one in a credit transfer and the payee’s bank in a debit transfer.

transactions should cover all such transactions. In the final analysis, the details on what is included and excluded under the PSD2 are formidable. Furthermore, practically speaking, the present approach is workable; it is not bound to cause a reader to miss the forest for the trees.

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