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## Title IV: Rights and Obligations in Relation to the Provision and Use of Payment Services (Chapter 3, Arts 78-93): execution of payment transactions

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## Chapter 10

### **TITLE IV: RIGHTS AND OBLIGATIONS IN RELATION TO THE PROVISION AND USE OF PAYMENT SERVICES**

#### **(Chapter 3, Arts 78-93): execution of payment transactions**

Benjamin Geva\*

#### **Abstract**

*PSD2 Title IV Chapter 3, consisting of arts 78 – 93, addresses rights and obligations between the payment service user and the payment service provider in connection with the execution of payment transactions. It innovates in providing for the liability of a payment initiation service, a newly defined payment service provider.*

*Section 1 deals with receipt, refusal and irrevocability payment orders as well as with amounts transferred. By references to all currencies, Section 2 covers execution time and value date. Addressing liability, Section 3, contains rules allocating responsibility in cases of non-execution or defective execution.*

*Discussion in this book chapter addresses the provisions of Title IV Chapter 3 both on their own and by reference to prominent elements of the relevant law in the United States.*

#### **Key words:**

*Payment order, Amount transferred, Execution, Value date, Liability*

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## A. INTRODUCTION

1.01. Title IV of the Second Payment Services Directive ('Directive' or 'PSD2')<sup>1</sup> deals with rights and obligations in relation to the provision and use of payment services. Title IV Chapter 3, consisting of arts 78 – 93, address such rights and obligations in connection with the execution of payment transactions. It is divided into three sections. Section 1, consisting of arts 78 – 81, deals with payment orders and amounts transferred. Section 2 consists of arts 82 – 87 and covers execution time and value date. Concluding Section 3 consists of arts 88 – 93 and addresses liability. This chapter addresses the provisions of Title IV Chapter 3 both on their own and by reference to prominent elements of the relevant law in the United States. Comparison is useful if only due to the comprehensiveness of the American statute in terms of relevant topics covered.

1.02. PSD2 arts 78 – 93 correspond to arts 64 – 78 of the first Directive on payment services in the internal market – that is, the original 'Payment Services Directive' or 'PSD'.<sup>2</sup> Among those PSD2 provisions, only art 90, addressing the liability of a payment initiation service, a newly defined payment service provider, has no predecessor in the original PSD. Each of the other provisions has a direct predecessor, though the PSD2 has introduced some changes. The non-semantic

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<sup>1</sup> 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 Directive 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 this Directive.

<sup>2</sup> 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).

changes introduced by the PSD2 will be pointed out throughout the course of the ensuing discussion.

- 1.03. As discussed in Chapter 2 of this Commentary,<sup>3</sup> the ‘payment services’ to which the Directive applies under PSD2 art 2(1) are defined in PSD2 art 4(3) to mean business activities listed in Annex I. For its part, ‘payment transaction’ is defined in art 4(5) to mean ‘an act, initiated by the payer or on his behalf or by the payee, of placing, transferring or withdrawing funds,<sup>4</sup> irrespective of any underlying obligations between the payer and the payee’.<sup>5</sup>
- 1.04. ‘Execution’ is not defined in the Directive. From the heading of Title IV Chapter 3, referring to the execution of the payment transaction, as well from the context elsewhere in the Directive, the term appears to denote the performance of the entire payment transaction, rather than merely the carrying out of the instruction contained in the ‘payment order.’ The latter is the meaning of ‘execution’ under Article 4A of the American Uniform Commercial Code (‘UCC Article 4A’).<sup>6</sup> At the same time, elsewhere in the Directive, reference is made to the ‘execution’ of a ‘payment order’,<sup>7</sup> defined in PSD2 art 4(13) to mean ‘an instruction by a payer or payee to its [PSP] requesting the execution of a payment transaction’. Hence, ‘execution’ appears to be inconsistently used.
- 1.05. However, as explained in Chapter 2 of this Commentary, PSD2 concerns ‘only contractual obligations and responsibilities between the payment service user and the payment service provider.’<sup>8</sup> Under PSD2 art 4(10), ‘payment service user’ (‘PSU’) is defined to mean ‘a natural

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<sup>3</sup> Particularly in Sections 4 and 5.

<sup>4</sup> ‘Payer’, ‘payee’ and ‘funds’ are defined in PSD2 (n 1) arts 4(8), (9) and (25). See discussion in Chapter 2, Section 3 of this Commentary.

<sup>5</sup> 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 art 97, addressing authentication, and is outside the scope of this chapter.

<sup>6</sup> Uniform Commercial Code – Article 4A - Funds Transfers, UCC §§ 4A-101 et seq (2012) (hereinafter UCC Article 4A)

<sup>7</sup> For example, PSD2 (n 1) art 79 deals with the refusal of payment orders and is discussed further below. For a discussion on when receipt occurs for the purposes of PSD2 (n 1) art 83, see also art 78(2).

<sup>8</sup> PSD2 (n 1) Preamble recital 87.

or legal person making use of a payment service in the capacity of payer, payee, or both'. 'Payment service provider' ('PSP') is defined in PSD2 art 4(11) by reference to the institution categories listed in PSD2 art 1(1).<sup>9</sup>

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1.06. By way of comparison, the scope of UCC Article 4A is broader than that of the PSD2 in more than just its coverage of bilateral relationships in the interbank domain.<sup>10</sup> Rather, UCC Article 4A also distinguishes between the 'payment order' and the 'funds transfer'.<sup>11</sup> Under the UCC, and similarly under the PSD2, a 'payment order' is an instruction to make payment,<sup>12</sup> giving rise to a bilateral relationship between a sender (the order giver)<sup>13</sup> and a receiving bank.<sup>14</sup> The 'funds transfer', to which there is no PSD2 parallel, is the entire payment process from end to end.<sup>15</sup> This fosters a more holistic picture, leading to a greater certainty of the law covering the payment process.

1.07. For its part, the PSD2 'payment transaction' does not correspond to the UCC 4A 'funds transfer'. Rather, as discussed, under PSD2 art 4(5), the payment transaction, to which there is no UCC 4A parallel, is the initiator's act 'of placing, transferring or withdrawing funds...' Effectively, such an act follows the communication of the payment order and occurs with the view of

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<sup>9</sup> For terminology, see Chapter 2, Section 3 of this Commentary,

<sup>10</sup> Although, in another sense it is narrower - being limited to non-consumer credit transfers. Consumer transactions governed by federal law are excluded by UCC Article 4A (n 6) § 4A-108. For an interpretation of 'funds transfer' under UCC Article 4A (n 6) § 4A-104 [(a)], as further determined by several elements of the definition of 'payment order' in § 4A-103(a)(1) so as effectively to mean '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 Chapter 2 Section 3 of this Commentary.

<sup>11</sup> For an extensive discussion see Geva, *The Law of EFT* (n 10) § 2.02[3][c].

<sup>12</sup> UCC Article 4A (n 6) § 4A-103(a)(1).

<sup>13</sup> Under UCC Article 4A (n 6) § 4A-103(a)(5), 'Sender' is defined to mean 'the person giving the instruction to the receiving bank.'

<sup>14</sup> Under UCC Article 4A (n 6) § 4A-103(a)(4), 'Receiving bank' is defined to mean 'the bank to which the sender's instruction is addressed.'

<sup>15</sup> UCC Article 4A (n 6) § 4A-104(a).

facilitating the PSP's execution. Thus, under PSD2, and similarly to the use of term in UCC Article 4A, 'execution' is carrying out the instruction contained in the payment order, as facilitated by the payment transaction - the latter being an intermediate stage that is not addressed by UCC Article 4A.

- 1.08. Taking place solely between the initiator and his or her PSP, the 'payment transaction' under PSD2 is only 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' but 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 a drafting oversight<sup>16</sup> 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.
- 1.09. It should be noted that arts 78 and 80 in particular appear to treat the payer as the payment order giver. As explained below, this is of course true in a credit transfer but not in a debit transfer. Indeed, PSD2 art. 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.
- 1.010. As further elaborated in Chapter 2, Section 4 of this Commentary, the difference between a credit transfer and a direct debit is in the communication flow. 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. For sure, in each scenario, 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 and in opposite directions in a debit transfer.

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<sup>16</sup> The phrase 'or on his behalf' in PSD2 (n 1) art 3(5) does not have a corresponding predecessor in the original PSD.

## **B. SECTION 1 (Arts 78 – 81): PAYMENT ORDERS AND AMOUNTS TRANSFERRED**

1.011. This PSD2 Section addresses the receipts of payment orders (art 78); refusal of payment orders (art 79); irrevocability of a payment order (art. 80) and amounts transferred and received (art. 81). These provisions correspond to arts 64 – 67 in the original PSD.

1.012. PSD2 art 78(1) provides that '[t]he payer's account shall not be debited before receipt of the payment order'.<sup>17</sup> To that end, it identifies 'the time of receipt' with 'when the payment order is received by the payer's [PSP]'. It goes on to state that if the point of time of receipt is not on a business day for the payer's [PSP], receipt is deemed to occur on the following business day. 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.<sup>18</sup> On this point, PSD2 art 78(1) and UCC § 4A-106 are to the same effect.

1.013. The original PSD art 64(1), being the predecessor of the present PSD2 art 78(1), was stated to apply 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.<sup>19</sup> 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 less usual but still possible 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.

1.014. In effect, the scenario in which the payee initiates the payment transaction by transmitting the payment order to the payer's PSP either directly or indirectly through the payee's PSP, may be conceptualized as a credit transfer. This is by analogy to a 'drawdown transfer', in which the payee's PSP is acting as the payer's agent (as authorized under the agreement between the payer and his or her PSP) in instructing the payer's PSP to carry out a credit transfer.<sup>20</sup> In the

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<sup>17</sup> PSD2 (n 1) art 78(1).

<sup>18</sup> *ibid.*

<sup>19</sup> PSD (n 2) art 64.

<sup>20</sup> Thus,

final analysis, what determines the characterization of the transfer is the banking operation – namely, whether it is pushing the funds or pulling them. In the former, the first entry is made by the payer’s PSP and is a debit to the payer’s account, in which case the transaction is a credit transfer. In the latter, the first entry is made by the payee’s PSP and is a credit (albeit provisional) to the payee’s account, in which case the transaction is a debit transfer.

1.015. The drafting of PSD art 64(1) was, however, imprecise. In a debit transfer, as well as in a credit transfer initiated by the payee that goes through the payee’s PSP, what is received by the payer’s PSP is not the payee’s payment order. Rather, assuming there are no intermediary banks involved, in such cases the payer’s PSP receives an instruction of the payee’s PSP carrying out the payee’s payment order. Otherwise, the payer’s PSP receives an instruction from the last intermediary in the chain. Regardless, such an instruction, being issued in the interbank domain, was not governed by the original PSD. Likewise, it is not governed by the present PSD2 either.

1.016. Regardless of their reasons for doing so, the PSD2 drafters are to be congratulated for excluding this problematic language of the original PSD art 64(1) from the newer PSD2 art 78(1). Indeed, the options stated in PSD art 64(1) are mutually exclusive and between them cover all possible grounds. As a general matter, PSD2 art 78, governing receipt by the payment order by the payer’s PSP, covers all variations of such receipt.

1.017. Refusal of payment orders is governed by PSD2 art 79. PSD2 art 79(1) fastens on the PSP that refuses to execute a payment order a duty to advise the user of the refusal and, if possible, the reason for it and the procedure for correction.<sup>21</sup> Per the framework contract,<sup>22</sup> the user may be

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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, *Law of EFT* (n 10) § 2.02[3][c].

<sup>21</sup> PSD2 (n 1) art 79(1).

<sup>22</sup> ‘Framework contract’ is defined in PSD2 (n 1) 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’.



charged for the notification of an objectively justified refusal.<sup>23</sup> For its part, the right to refuse is not entirely discretionary to the PSP. According to PSD2 art 79(2), and ‘irrespective of whether the payment order is initiated by a payer...or through a payee,’ in other words, both in a credit and debit transfer,<sup>24</sup> ‘[w]here all of the conditions set out in the payer’s framework contract are met, the payer’s account servicing [PSP]<sup>25</sup> shall not refuse to execute an authorised payment order’.<sup>26</sup> Typically, such conditions address funds or credit availability and compliance with requirements as to submission of the payment order.

1.018. By way of summary, PSD2 art 79 requires a PSP that refuses to execute a payment order or initiate a payment transaction<sup>27</sup> to give a reasoned notice supporting its refusal. At the same time, the PSD2 does not address the manner of giving notification, the consequences of a failure to give a notice of refusal, and the effect of a wrongful refusal– that is, refusal unsupported by valid grounds. Arguably, it leaves such questions for the determination of the applicable national law. This contrasts with UCC Article 4A, which provides for the manner in which a receiving bank gives notice of a rejection of a payment order but nevertheless, does not require a receiving bank to give it. Additionally, under UCC Article 4A, the consequences of a wrongful rejection are quite limited.

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<sup>23</sup> This is in fact enumerated as one of the ‘information obligations’ for which the PSP may charge the PSU: PSD2 (n 1) art 62(1). Notification is to be made ‘in an agreed manner at the earliest opportunity’: PSD2 (n 1) art 79(1). This duty is to be complied with ‘unless prohibited by other relevant Union or national law’: PSD2 (n 1) art 79(1).

<sup>24</sup> PSD2 (n 1) art 79(2). Also, in the absence of a prohibition by Union or national law.

<sup>25</sup> The term ‘account servicing [PSP]’ is defined in PSD2 (n 1) art 4(17) as ‘a [PSP] providing and maintaining a payment account for a payer’. See discussion in Chapter 2, Section 4 of this Commentary.

<sup>26</sup> *ibid.* According to the PSD2 (n 1) Preamble,

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

PSD2 (n 1) Preamble recital 77.

<sup>27</sup> Refusal to initiate a payment transaction is an addition to the PSD2 that did not exist in art 65 of the original PSD. Presumably, the addition is designed to ensure that refusal by a PISP is also covered. ‘Payment initiation service’ (PIS) is defined in PSD2 (n 1) art 4(15) as ‘a service to initiate a payment order at the request of the [PSU] with respect to a payment account held at another [PSP]’. Under PSD2 (n 1) art 4(18), ‘payment initiation service provider’ (PISP) is a PSP pursuing PIS business activities. See Chapter 2, Section 4 of this Commentary.

1.019. To begin with, the drafters of UCC Article 4A recognized that in general, the notice of rejection is a means of informing the sender that the account has inadequate funds, that the payment order is ambiguous or unclear, or that the receiving bank is unable to carry out the payment 'because of equipment failure, credit limitations on the receiving bank, or some other factor which makes proper execution of the order infeasible.'<sup>28</sup> As to the manner of giving the notice, under section 4A-210(a),

A payment order is rejected by the receiving bank by a notice of rejection transmitted to the sender orally, electronically, or in writing. A notice of rejection need not use any particular words and is sufficient if it indicates that the receiving bank is rejecting the order or will not execute or pay the order.

1.020. As for the contents, no specific language is mandated and no reasons for rejecting a payment order are required to be given or even to exist. As for the consequences, under UCC § 4A-210(d), the rejection of a payment order is irrevocable, so as to preclude a later acceptance - namely, execution, which is the only mode of acceptance by a receiving bank other than the beneficiary's bank.<sup>29</sup> At the same time, the failure to give a notice of rejection does not result in an automatic acceptance. Rather, under UCC § 4A-211(d), an unaccepted payment order is canceled by operation of law at the close of the fifth funds-transfer business day<sup>30</sup> of the receiving bank after the execution date<sup>31</sup> or payment date<sup>32</sup> of the order.

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<sup>28</sup> Official Comment 1 to UCC Article 4A (n 6) § 4A-210.

<sup>29</sup> Official Comment 2 to UCC Article 4A (n 6) § 4A-209.

<sup>30</sup> Under UCC Article 4A (n 6) § 4A-105(4),  
"Funds-transfer business day" of a receiving bank means the part of a day during which the receiving bank is open for the receipt, processing, and transmittal of payment orders and cancellations and amendments of payment orders.

<sup>31</sup> Under UCC Article 4A (n 6) § 4A-301(b),  
"Execution date" of a payment order means the day on which the receiving bank may properly issue a payment order in execution of the sender's order. ... [U]nless otherwise determined, [it] is the day the order is received.

<sup>32</sup> Under UCC Article 4A (n 6) § 4A-401,  
"Payment date" of a payment order means the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank. ... [U]nless otherwise determined, is the day the order is received by the beneficiary's bank.

1.021. As for the failure of a receiving bank to execute a payment order, whether or not it gave a notice of rejection, on its own, and without being contrary to a specific agreement, the failure to execute a payment order by a receiving bank is not actionable. Thus, under UCC § 4A-212,

If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, the bank is liable for breach of the agreement to the extent provided in the agreement or in this Article, but does not otherwise have any duty to accept a payment order ....

1.022. However, and again, regardless as to whether a notice of rejection was given, under UCC § 4A-210(b), where:

a receiving bank ... fails to execute a payment order despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order ... the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the execution date to the earlier of the day the order is canceled pursuant to Section 4A-211(d) or the day the sender receives notice or learns that the order was not executed ...

1.023. Liability for non-execution is discussed in Section 4 of this chapter.

1.024. PSD2 art 80(1) precludes the revocation of a payment order 'once it has been received by the payer's [PSP].'<sup>33</sup> For credit transfers, this is a noteworthy departure from UCC Article 4A, under which revocation is permitted until execution by the payer's service provider.<sup>34</sup> In any event, under the PSD2, the framework governing the ability of parties to provide for revocability is unclear. Thus, under PSD2 art 61(1), irrevocability may be contracted out only '[w]here the [PSU] is not a consumer.'<sup>35</sup> At the same time, under PSD2 art 80(5), and irrespective as to whether the payment transaction is a consumer or business one, revocability beyond points of time specified in PSD2 art 80 may be a matter of an agreement between the PSU and his or her PSP, for which the PSP may charge the PSU if so agreed in their framework contract.<sup>36</sup>

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<sup>33</sup> *ibid.* PSD2 (n 1) art 80(1).

<sup>34</sup> UCC Article 4A (n 6) § 4A-211.

<sup>35</sup> PSD2 (n 1) art 61(1).

<sup>36</sup> PSD2 (n 1) art 80(5). This is in fact enumerated in PSD2 (n 1) art 62(1) as one of the 'corrective and preventive measures'

1.025. Aside from an agreement, as above, for a payment transaction initiated by a payment initiation service provider [PISP]<sup>37</sup> or by or through the payee, revocability is barred even prior to receipt under PSD2 art 80(1). Thus, according to PSD2 art 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.’

1.026. However, under PSD2 art 80(4), revocability is available for payment orders instructing payment in the future, but must be done ‘at the latest by the end of the business day preceding the agreed day.’ For ‘a direct debit<sup>38</sup> and without prejudice to refund rights’, the same rule is specifically provided in PSD2 art 80(3).

1.027. In the United States, in connection with consumer remittance transfers, further discussed below in this Section, Regulation E § 1005.34 gives the sender a 30-minute window within which to cancel a remittance transfer. The 30-minute time period begins to run when the sender makes payment for the transfer and ends when the recipient picks up the funds, or when the funds have been deposited into the recipient’s account, even if that occurs less than 30 minutes after the sender pays for the transfer.<sup>39</sup> This seems to be more protective to consumers than PSD2 art 80(4).

1.028. PSD2 art 81 deals with the amount of a payment transaction. More specifically, it addresses the situation where the amount received by the payee is lower than the amount instructed by the payer due to fees charged by the end-PSPs and intermediary bank. The basic principle under PSD2 art 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. Fees are to be charged to the account as such and not be deducted from the amount transferred. Thus, under PSD2 art

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for which the [PSP] may charge the [PSU].

<sup>37</sup> For ‘payment initiation service’ (PIS) and ‘payment initiation service provider’ (PISP) see n 27.

<sup>38</sup> PSD2 (n 1) 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’: PSD2 (n 1) 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 [PSP] or to the payer’s own [PSP]’: PSD2 (n 1) art 4(23). This is distinguishable from an isolated debit transfer.

<sup>39</sup> 12 CFR § 1005.34.

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. Per PSD2 art 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.

1.029. This is much more favourable to the payee than the position under UCC § 4A-406(c) providing that:

.... if the beneficiary's bank accepts a payment order in an amount equal to the amount of the originator's payment order less charges of one or more receiving banks in the funds transfer,<sup>40</sup> payment to the beneficiary is deemed to be in the amount of the originator's order unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges.

1.030. Official Comment 5 to the provision explains the rationale of this rule as follows:

Subsection (c) recognizes the principle that a beneficiary is entitled to full payment of a debt paid by [credit] transfer as a condition to discharge. On the other hand, subsection (c) prevents a beneficiary from denying the originator the benefit of payment by asserting that the discharge did not occur because deduction of bank charges resulted in less than full payment.

1.031. This rationale is premised on the focus of UCC Article 4A on wholesale payments and supposes that charges are likely to be nominal in relation to the amount being paid by the payer. At the same time, Article 4A does not explain how the payer will pay the deficiency, in a mechanism in which the instructed amount will be that received by the beneficiary (payee).

1.032. The approach in the United States for consumer remittance transfers is, however, different. Pursuant to § 1073 of the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>41</sup>, the Consumer Financial Protection Bureau (CFPB) promulgated a Final Rule on remittance

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<sup>40</sup> For a discussion on the process of making deductions in the course of the funds transfer, see Official Comment 3 to UCC Article 4A (n 6) § 4A-302.

<sup>41</sup> Pub L No 111-203, HR 4173 (111th Congress, 1st Session) (2010).

transfers that became effective October 28, 2013.<sup>42</sup> It is commonly called the ‘Remittance Rule’ and is applicable to consumer remittance transactions in which funds are transmitted by a consumer in the United States to a party outside of the United States.

1.033. The Remittance Rule applies to a remittance transfer provider (RTP), defined as ‘any person that provides remittance transfers for a consumer in the normal course of its business, regardless of whether the consumer holds an account with such person.’<sup>43</sup> The Remittance Rule does not apply to RTPs of a hundred or fewer remittance transfers,<sup>44</sup> as well as to transfers of fifteen dollars or less.<sup>45</sup> According to an unofficial interpretation, the Remittance Rule also does not apply to a consumer providing a debit, credit or prepaid card or chequing account number directly to a foreign merchant as payment for goods or services; a consumer’s deposit of funds to a chequing or savings account located in the United States; and online bill payments and other electronic transfers that sending payers can schedule in advance, made through the website of a merchant located in a foreign country and via direct provision of a chequing account, credit card, debit card or prepaid card number to the merchant.<sup>46</sup>

1.034. Among other things, the Remittance Rule requires an RTP, prior to payment by the payer, to disclose to the payer:<sup>47</sup>

- (i) The amount that will be transferred to the designated recipient, in the currency in which the remittance transfer is funded;
- (ii) Any fees imposed and any taxes collected on the remittance transfer by the provider, in the currency in which the remittance transfer is funded;

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<sup>42</sup> 12 CFR Part 1005 - Electronic Fund Transfers (Regulation E) §§ 1005.30- .36. See in general: Arnold Rosenberg (Revision Authors), in Geva, *The Law of EFT* (n 10) § 6.10 [1]-[2].

<sup>43</sup> 12 CFR § 1005.30(f).

<sup>44</sup> 12 CFR § 1005.30(f)(2)(ii).

<sup>45</sup> 12 CFR § 1005.30(e)(2)(i).

<sup>46</sup> Consumer Financial Protection Bureau, ‘Unofficial Complete Remittance Rule and Interpretation’ (2013) 36-37 <[https://files.consumerfinance.gov/f/201308\\_cfpb\\_combined-rules.pdf](https://files.consumerfinance.gov/f/201308_cfpb_combined-rules.pdf)> accessed 28 May 2020.

<sup>47</sup> 12 CFR § 1005.31(b).

- (iii) The total amount of the transaction, which is the sum of paragraphs (b)(1)(i) and (ii) of this section, in the currency in which the remittance transfer is funded;
- (iv) The exchange rate used by the provider for the remittance transfer, rounded consistently for each currency to no fewer than two decimal places and no more than four decimal places;
- (v) The amount in paragraph (b)(1)(i) of this section, in the currency in which the funds will be received by the designated recipient, but only if covered third-party fees are imposed under paragraph (b)(1)(vi) of this section;
- (vi) Any covered third-party fees, in the currency in which the funds will be received by the designated recipient;
- (vii) The amount that will be received by the designated recipient, in the currency in which the funds will be received.
- (viii) A statement indicating that non-covered third-party fees or taxes collected on the remittance transfer by a person other than the provider may apply to the remittance transfer and result in the designated recipient receiving less than the amount disclosed pursuant to paragraph (b)(1)(vii) of this section;

1.035. For the purposes of sub-paras. (v), (vi), and (viii), third-party fees fall into two categories:<sup>48</sup>

- (1) 'Covered third-party fees': The term 'covered third-party fees' means any fees imposed on the remittance transfer by a person other than the remittance transfer provider, except for fees described in paragraph (h)(2) of this section.
- (2) 'Non-covered third-party fees': The term 'non-covered third-party fees' means any fees imposed by the designated recipient's institution for receiving a remittance transfer into an account except if the institution acts as an agent of the remittance transfer provider.

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<sup>48</sup> 12 CFR § 1005.30(h)(1).

1.036. Finally, on the point of amount transferred, UCC Article 4A addresses the situation in which the amount received by the payee is different - that is, either higher or lower than that instructed by the payer - due to an execution error of a receiving bank. Generally speaking, in such a case where the amount received is higher than instructed, UCC § 4A-303 dictates that the erring bank bears the loss and yet, albeit subject to the law of restitution, has a recourse against an overpaid beneficiary. In the converse case - that is, where the amount received is higher than instructed - the erring bank is liable to generate another funds transfer to the beneficiary, so as to make up for the difference. The PSD2 does not have a corresponding scheme.

### **C. SECTION 2 (Arts 82 – 87): EXECUTION TIME AND VALUE DATE**

1.037. PSD2 arts 82 – 87 deal with execution time and value date. These provisions correspond to arts. 68 – 73 in the original PSD. Per PSD2 art 82(1), Section 2 applies to

- (a) payment transactions in euro;
- (b) domestic ('national') payment transactions in the currency of a Member State outside the euro area;
- (c) payment transactions involving only one currency conversion between the euro and the currency of a Member State outside 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 euro.

1.038. According to PSD2 art 82(2), other than art 87 addressing value date and availability of funds, those provisions (namely, arts 82 - 86) apply to other situations as well. However, in such other situations (ie those situations not governed by PSD2 art 82(1)) they may be contracted out of and in one case, which is dealt with below in connection with PSD2 art 83, there is a time limit to a permissible contractual variation.

1.039. PSD2 arts 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 his or her PSP. In this context, it is not clear why receipt of funds by the payee's PSP 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. For example, UCC § 4A-402 enumerates several methods of interbank payment, such as 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. Most certainly, debit posted by the payee's PSP to the account of the payer's PSP is no less common between correspondent banks than credit posted to the account of the payee's PSP by its sending bank (whether it be the payer's PSP or an intermediary bank). The selection of the latter to the exclusion of the former by PSD2 drafters is thus enigmatic and unjustified.

1.040. 'Value date' is defined in PSD2 art 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'.<sup>49</sup> 'Funds availability' is not a term used by the PSD2; it is used in this Commentary chapter 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,<sup>50</sup> and having the use of it as it is cash in the payee's pocket—are distinct and separate and hence they do not necessarily happen simultaneously.<sup>51</sup>

1.041. Under PSD2 art 83(1), the payer's PSP is required to ensure that after 'receipt' of a payment order,<sup>52</sup> the amount of the payment transaction is credited 'to the payee's [PSP]'s account', namely, to the account of the PSP, 'by the end of the following business day'.<sup>53</sup> Such an account need not necessarily be held by the payer's PSP; rather, it could be held by a central

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<sup>49</sup> PSD2 (n 1) art 4(26).

<sup>50</sup> 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.

<sup>51</sup> Notwithstanding *A/s Awilco of Oslo v. Fulvia SpA di Navigazione of Cagliari ('The Chikuma')* [1981] 1 WLR 314 [371] (HL) that effectively identified all three points.

<sup>52</sup> As identified in PSD2 (n 1) art 78.

<sup>53</sup> PSD2 (n 1) art 83(1).

counterparty such as a central bank.<sup>54</sup> All such periods 'may be extended by a further business day for paper-initiated payment transactions.'<sup>55</sup> Under PSD2 art 82(2), for payment transactions falling outside art 82(1), 'if the [PSU] and the [PSP] agree on a longer period,... for intra-Union payment transactions, that longer period shall not exceed 4 business days following the time of receipt...' According to PSD2 art 86, for 'national [domestic?] payment transactions', Member States may shorten all execution periods under PSD2 arts 82–87.

1.042. PSD2 art 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 the case of delay, the payee will sue the payer, who can then turn around and seek reimbursement from his or her PSP.

1.043. 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 been received by the payee's PSP.<sup>56</sup> Receipt of funds is in the form of credit *actually posted* to the account of the payee's PSP. The payee's right is by reference to the time credit is posted, rather than the time credit *should have been posted*, to the account of the payee's PSP. Thus, under PSD2 art 83(2), in conjunction with PSD2 art 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.'<sup>57</sup>

1.044. For its part, compared to its PSD predecessor, art 73, PSD2 art 87(2) is limited in PSD2 to apply only in circumstances where there is either

(a) no currency conversion, or

(b) a currency conversion between the euro and a Member State currency, or between two Member State currencies.

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<sup>54</sup> PSD2 (n 1) Preamble recital 85.

<sup>55</sup> PSD2 (n 1) art 83(1).

<sup>56</sup> *ibid.*

<sup>57</sup> PSD2 (n 1) art 87(1).

1.045. Under such circumstances, and also for intra-PSP payments, PSD2 art 87(2) goes on to require the payee's PSP 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.'<sup>58</sup> For its part, PSD2 art 87(3) requires that 'debit value date for the payer's payment account' will happen 'no earlier than the time at which the amount of the payment transaction is debited to that payment account.'<sup>59</sup>

1.046. Under PSD2 art 84, this timeframe for fund availability, by reference to the credit to the account of the payee's PSP, equally applies when the payee does not have an account with the PSP. However, in all of this, no remedy is provided to the payee for a delay in posting credit to the account of his or her PSP in contravention of PSD2 art 83(1).<sup>60</sup>

#### **D. SECTION 3 (Arts 88 – 93): LIABILITY**

1.047. PSD2 arts 88 - 89 correspond to arts 74 and 75 of the original PSD. PSD2 arts 91 - 93 correspond to arts 76 and 78 of the original PSD. PSD2 art 90 is new.

1.048. The central provision on liability is in PSD2 art 89, which contains rules allocating responsibility in cases of non-execution or defective execution.<sup>61</sup> However, PSD2 art 89 is binding only in consumer payments; PSD2 art 61(1) states that '[w]here the [PSU] is not a consumer, [the parties] may agree that Article ...89 [does] not apply in whole or in part.'<sup>62</sup>

1.049. Each of the rules set out in PSD2 art 89 is stated to be 'without prejudice to Article 71, Article 88(2) and (3), and Article 93'.<sup>63</sup> PSD2 art 71 provides for the PSU's right to obtain rectification from the PSP upon notifying him 'without undue delay on becoming aware of any such

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<sup>58</sup> PSD2 (n 1) art 87(2). Art 87(2) also applies to payments within on PSP.

<sup>59</sup> PSD2 (n 1) art 87(3).

<sup>60</sup> PSD2 (n 1) art 83(1).

<sup>61</sup> PSD2 (n 1) art 89. See generally Reinhard Steenot, 'Erroneous Execution of Payment Transactions According to the New Payment Services Directive' (2007) 6 IJTTC 145.

<sup>62</sup> PSD2 (n 1) art 61(1).

<sup>63</sup> PSD2 (n 1) art 89(1).

transaction giving rise to a claim, including that under Article 89.<sup>64</sup> PSD2 art 93 exempts from liability a party successfully pleading ‘abnormal and unforeseeable circumstances beyond the control of the party’.<sup>65</sup>

1.050. PSD2 art 88 protects a PSP that acted in reliance on an incorrect unique identifier. Under PSD2 art 4(33), ‘unique identifier’ is defined to mean ‘a combination of letters, numbers or symbols specified to the [PSU] by the [PSP] and to be provided by the [PSU] to identify unambiguously another [PSU] and/or the payment account of that other [PSU] for a payment transaction’.<sup>66</sup>

1.051. The simplest example is an account number. PSD2 art 88(1) deals with a payment order executed in accordance with a unique identifier. The provision, which seems to be limited to credit transfers, 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.’<sup>67</sup> It follows, and it is so provided in PSD2 art 88(2), that the PSP 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.’<sup>68</sup> Moreover, under PSD2 art 88(5), where the PSU furnishes the PSP with additional information to the unique identifier, ‘the [PSP] shall be liable only for the execution of payment transactions in accordance with the unique identifier provided by the [PSU].’<sup>69</sup> Under PSD2 art 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’, an effort for which the PSP may charge the PSU, if it is agreed to in the framework contract.<sup>70</sup> PSD2 art 88(3) also requires the payee’s PSP to cooperate in those efforts by communicating all relevant information for the

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<sup>64</sup> PSD2 (n 1) art 71(1).

<sup>65</sup> PSD2 (n 1) art 93.

<sup>66</sup> PSD2 art 4(33).

<sup>67</sup> PSD2 (n 1) art 88(1).

<sup>68</sup> PSD2 (n 1) art 88(2).

<sup>69</sup> PSD2 (n 1) art 88(5).

<sup>70</sup> PSD2 (n 1) art 88(3). See also PSD2 (n 1) art 62(1), including efforts to recover the funds as one of the ‘corrective and preventive measures’ for which the [PSP] may charge the PSU.

collection of funds to the payer's PSP.<sup>71</sup> 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.<sup>72</sup>

1.052. One effect of PSD2 art 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 UCC Article 4A, which does not protect a PSP acting on the basis of the incorrect unique identifier with knowledge of the error or discrepancy.<sup>73</sup> Regardless, under UCC Article 4A, a nonbank payer who identified the payee by the right name and wrong number will bear the loss only where two conditions have been fulfilled. First, the payer must have failed to prove that the person identified by (the erroneous) number was not entitled to receive payment. Second, the payer's PSP must prove that the payer, before acceptance of his or her order, had notice 'that payment of a payment order issued by the [payer] might be made by the [payee]'s bank on the basis of an identifying or bank account number even if it identifies a person different from the named [payee].'<sup>74</sup>

1.053. In *Tecnoservice Int. Srl*<sup>75</sup> the Tenth Chamber noted a difference between what is now PSD2 art 88(2) and (3). While the obligation to 'make reasonable efforts to recover [misdirected] funds' is fastened by PSD2 art 88(3) only on the payer's PSP, the exoneration from liability for non-execution or defective execution under PSD2 art 88(2) applies to the PSP in general, without making any distinction between whether it is that of the payer or payee.<sup>76</sup> The court concluded that this proves that PSD2 art 88(2) is not limited to the payer's PSP.<sup>77</sup>

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<sup>71</sup> PSD2 (n 1) art 88(3).

<sup>72</sup> PSD2 (n 1) art 88(3).

<sup>73</sup> UCC Article 4A (n 6) § 4A-207(b).

<sup>74</sup> UCC Article 4A (n 6) § 4A-105(a)(7), by reference to § 1-201(b)(8).

<sup>75</sup> Case C-245/18 [2019] ECLI:EU:C:2019:242.

<sup>76</sup> *ibid* para 25.

<sup>77</sup> *ibid* para 26.

1.054. With respect, this reasoning is not persuasive. PSD2 art 88(2) exonerates from liability only the PSP that would have been otherwise liable, which is that of the initiating PSU. In fact, a stronger argument for the court would have been the reference to the present PSD2 art 88(3) for *both* payer's and payee's PSPs. While the former is required to 'make reasonable efforts to recover [misdirected] funds' the latter is required to cooperate. However, as explained in Chapter 2 Section 3 of this Commentary, 'payment transaction' under PSD2 art 4(5) is limited to the bilateral relationship between either the payer or the payee and the respective PSP. At the same time, there is nothing to preclude reading the PSD2 as conferring rights and obligations to a participant in the payment process even where s/he is not a party to the payment transaction that triggered the process.

1.055. Additionally, under the Remittance Rule<sup>78</sup> in the United States, an RTP that misdirected funds on the basis of an erroneous payee account number provided by the payer is released from responsibility. This is so only if (i) prior to carrying out the remittance transfer, the RTP advised the payer of the possible result of acting on an incorrect account number, and (ii) the RTP 'promptly used reasonable efforts to recover the amount that was to be received by the designated recipient.'<sup>79</sup>

1.056. As indicated, 'without prejudice to Article 71, Article 88(2) and (3), and Article 93,'<sup>80</sup> PSD2 art 89(1) allocates losses caused by *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'. Effectively, this is stated to mean 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.'
  
- 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.' Under a new paragraph of PSD2 art 89(1), 'the credit value date for the payee's payment

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<sup>78</sup> 12 CFR Part 1005 - Electronic Fund Transfers (Regulation E) §§1005.30- .36.

<sup>79</sup> 12 CFR § 1005.33(h).

<sup>80</sup> PSD2 (n 1) art 89(1).

account shall be no later than the date on which the amount would have been value dated, had the transaction been correctly executed’.

- 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.
  
- Fourth, a payer’s PSP in breach of its obligation as in Step One 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.’ Under an addition provided in the PSD2, the credit value date for the payer’s payment account shall be no later than the date on which the amount was debited.
  
- Fifth, under a new paragraph added to PSD2 art 89(1), upon late execution of a payment transaction, ‘the payee’s payment service provider shall ensure, upon the request of the payer’s payment service provider acting on behalf of the payer, that the credit value date for the payee’s payment account is no later than the date the amount would have been value dated had the transaction been correctly executed.’
  
- Sixth, regardless of breach or defence to liability, in the case of non-execution of defective execution, and on request, the payer’s PSP shall (under an addition in the PSD2), without charging the payer, ‘make immediate efforts to trace the payment transaction and notify the payer of the outcome.’

1.057. This overall scheme for credit transfers follows in the footsteps of UCC Article 4A in two major respects. First, the Directive fastens responsibility on the payee’s PSP as of the time of receiving funds.<sup>81</sup> 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.<sup>82</sup> At the same time, the Directive does not specify that the

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<sup>81</sup> See UCC Article 4A (n 6) § 4A-104(a) (stating that a credit transfer is completed by the ‘acceptance’ of a payment order by the beneficiary’s bank, which, under § 4A-209(b)(2), could be in the form of receipt of funds). Upon ‘acceptance’, under UCC Article 4A (n 6) § 4A-404, the beneficiary’s bank becomes obligated to pay to the beneficiary: *ibid* § 4A-405.

<sup>82</sup> *eg* UCC Article 4A (n 6) § 4A-402(c); see also *ibid* § 4A-402 comment 2.

arrival of funds to the payee's PSP marks the occurrence of payment by the payer to the payee.<sup>83</sup> Rather, it leaves this to national laws.<sup>84</sup> However, PSD2 departs from UCC § 4A-305 in not ruling out payer's PSP's liability for consequential foreseeable losses for non-execution or deficient execution by either the payer's PSP itself or an intermediary bank. Rather, the Directive leaves the question to national laws. Under UCC § 4A-305, contrary to the common law,<sup>85</sup> except for under 'an express written agreement', a receiving bank may be liable to the payer only for the payer's 'expenses in the funds transfer and for incidental expenses and interest losses', as well, under some circumstances, legal costs.

1.058. There are, however, neither definitions of 'defective execution' or 'lack of adjustment of remedies', nor a provision of a comprehensive liability scheme. Such a scheme could have addressed, for example, cases of underpayment, overpayment, and payment to the wrong payee.<sup>86</sup> Certainly, the 'money-back guarantee' under PSD2 art 89(1) provides for only one aspect in such cases. And yet, this is the only remedy specifically provided for in all cases of defective execution.

1.059. As for *the non-execution or defective execution of a payment order initiated by or through the payee*, and as indicated at the beginning of this Section, 'without prejudice to Article 71, Article 88(2) and (3) and Article 93',<sup>87</sup> PSD2 art 89(2) allocates liability as follows:

- First, 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)' - 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.'<sup>88</sup>

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<sup>83</sup> cf PSD2 (n 1) art 89(1) with UCC Article 4A (n 6) § 4A-406.

<sup>84</sup> See generally PSD2 (n 1) (failing to address whether arrival of funds to PSP constitutes an occurrence of payment).

<sup>85</sup> The classic case is *Evra Corp v Swiss Bank Corp*, 673 F 2d 951 (7th Cir 1982); rev'g 522 F Supp 820 (ND Ill 1981); cert denied, 459 US 1017, 103 S Ct 377, 74 L Ed 2d 511 (1983).

<sup>86</sup> cf *ibid* with UCC Article 4A (n 6) § 4A-303.

<sup>87</sup> PSD2 (n 1) art 89(1).

<sup>88</sup> PSD2 (n 1) art 83(3).



- Second, upon becoming liable under Step One, the payee's PSP 'shall immediately re-transmit the payment order in question to the [PSP] of the payer' and, under a clause that did not exist in the original PSD, apply the value date that would have applied had the transaction been correctly executed. In addition, it shall 'be liable to the payee for handling the payment transaction in accordance with its obligations under Article 87' 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.' PSD2 art 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.<sup>89</sup> PSD2 art 89(2) requires (in a clause that did not exist in the original PSD) 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.' As in connection with PSD2 art 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.' It will refund the payer by posting a credit that, under a clause that did not exist in the original PSD, must be value dated no later than the date the amount was debited. The implicit but unstated assumption is that the non-execution is not attributed to insufficient funds or any other breach by the payer. Indeed, in a clause without a predecessor in the original PSD, the payer's PSP is released from this obligation where it proves that the payee's PSP has received the amount of the payment transaction.
  
- Fourth, where the payer's PSP is accountable under Step Three, 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.'
  
- Fifth, regardless of breach or defence to liability, in the case of non-execution of defective execution, and on request, the payee PSP shall, without charging the payee, under a

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<sup>89</sup> *ibid* art 87(1).

clause that did not exist in the original PSD, 'make immediate efforts to trace the payment transaction and notify the payee of the outcome.'

1.060. In principle, PSD2 art 89(1) covers credit transfers while PSD2 art 89(2) covers debit transfers. And yet, PSD2 art 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, whereas 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. However, as credit transfers, such payment transactions initiated through the payee ought to be covered by PSD2 art 89(1) and not art 89(2). The plot further thickens when we recall that the PSD2 may confer rights and fasten liability on the payer in a debit transfer and on the payee in a credit transfer.

1.061. Liability for non-execution, defective, or late execution of payment transactions initiated by the payer through the payer's PISP is governed by PSD2 art 90.<sup>90</sup> PISPs did not exist at the time of the original PSD, hence this provision in the PSD2 is without a predecessor in the PSD. 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 to refund to the payer the amount of the non-executed or defective payment transaction.<sup>91</sup> 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.<sup>92</sup> The burden shall be on the PISP to prove that the payment order was properly received by the payer's ASPSP and 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.'<sup>93</sup> For its part, a PISP liable for the non-execution, via defective or late execution of a payment

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<sup>90</sup> PSD2 (n 1) art 90.

<sup>91</sup> *ibid* art 89(1). As discussed, art 71 deals with notification and rectification of unauthorized or incorrectly executed payment transactions and art 88 covers incorrect unique identifiers: *ibid* arts 71, 88.

<sup>92</sup> *ibid* art 89.

<sup>93</sup> *ibid* art 90(1).

transaction, shall immediately compensate the ASPSP for the losses incurred or sums paid as a result of the refund to the payer.<sup>94</sup>

## **E. CONCLUSION**

1.062. The Preamble speaks of '[c]ertainty as to the length of time that the execution of a payment order will take.'<sup>95</sup> In fact, legal certainty is one cornerstone of efficient and secure payment services. To that end, in terms of comprehensively addressing and effectively providing for the rights and obligations of parties in relation to the provision and use of payment services, Title IV Chapter 3 is a giant leap forward. At the same time, beyond overcoming inevitable drafting issues, the goal of the next stage of legislative reform should be a statute covering the payment transaction from end to end, as UCC Article 4A does for non-consumer credit transfers.

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<sup>94</sup> *ibid* art 90(2).

<sup>95</sup> *ibid* Preamble recital 77. See also recitals 4, 15, 28, 80, 87 and 105.

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

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