EBA/Op/2022/06

23 June 2022

Opinion of the European Banking Authority on its technical advice on the review of Directive (EU) 2015/2366 on payment services in the internal market (PSD2)

Introduction and legal basis

1. The revised PSD2 regulates the provision of payment services across the EU and applies since 13 January 2018. In a number of areas, PSD2 has been a paradigm shift for the regulation of payment services. It introduced for the first-time in EU law detailed security requirements, in particular the requirement to apply two-factor strong customer authentication (SCA) for the initiation of electronic payment transactions and for accessing payment accounts online.

2. It also laid the foundations for the concept of open banking, by bringing into the scope of regulation two new payment services that are based on access by third party providers (TPPs) to customer data held primarily by credit institutions, namely payment initiation services (PIS) and account information services (AIS). Finally, the Directive had an explicit competition-enhancing objective by regulating services that are provided by legal entities that operate as competitors to incumbent credit institutions.

3. Since the entry into force of the Directive in January 2016, the EBA has supported the implementation of the Directive through the development of six Technical Standards, eight sets of Guidelines, eight Opinions, and more than 200 Q&As. They have all contributed to ensuring that the many (often competing) objectives of the Directive have been fulfilled, such as the aforementioned enhancement of competition, facilitating innovation, increasing security, protecting consumers, enhancing customer convenience, ensuring technological and business model neutrality and contributing to a single EU payments market.

4. The Directive also contains a review clause in Article 108, which requires the EU Commission to report on the application and impact of PSD2 to the co-legislators (the European Parliament and the Council), the European Central Bank and the European Economic and Social Committee. In that regard, on 20 October 2021, the Commission submitted to the EBA a Call for Advice (CfA) regarding the review of PSD2. The objective of the CfA is for the EU Commission to gather evidence on the application and impact of PSD2, which includes any benefits and challenges that may have arisen, and for the EBA to identify areas where amendments to the PSD2 might be appropriate.

5. This Opinion, and the extensive report attached to it, is the EBA's response to this CfA. In developing the response, the EBA has been guided by the general objectives and tasks set out in Article 1(5) of the EBA Regulation, which is to contribute to a sound, effective and consistent level of regulation and supervision, preventing regulatory arbitrage and promoting equal conditions of competition, ensuring risks are properly regulated and supervised, and enhancing consumer protection.

6. The EBA's competence to deliver this Opinion is based on Article 16a(4) of Regulation (EU) No 1093/2010[1] (EBA Regulation), as the call for advice from the EU Commission relates to the review of PSD2 and the activities of credit institutions, payment institutions (PIs) and electronic money institutions (EMIs), which are legal texts that are within the scope of action of the EBA under Article 1(2) and (3) of the EBA Regulation.

7. In accordance with Article 14(7) of the Rules of Procedure of the Board of Supervisors[2], the Board of Supervisors has adopted this Opinion which is addressed to the EU Commission.

General comments

8. The EBA welcomes the opportunity to provide input to the Commission's review of PSD2.

9. The EBA has observed that, overall, the objectives of PSD2 have started to materialise. For example, the security requirements, in particular SCA, are having the desired effect of reducing fraud, thus contributing to the objectives of PSD2 of improving security of payment transactions and payments data, and enhancing consumer protection. This was evidenced by EBA's preliminary analysis of payment fraud data[3] and the assessment of the SCA migration data for e-commerce card-based payment transactions[4], which suggested that fraud rates are

[1] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

[2] Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors of 22 January 2020 (EBA/DC/2020/307).

[3] As highlighted in the Discussion paper on the EBA's preliminary observations on selected payment fraud data under PSD2, as reported by the industry (EBA/DP/2022/01), for remote card payments reported by issuers, the share of fraud in total volume is five times higher for payments authenticated without SCA compared to the payments authenticated with SCA, and three times in terms of value.

[4] As highlighted in the Report on the data provide by PSPs on their readiness to apply SCA for e-commerce card-based payment transactions (EBA/REP/2021/16), the volume of fraudulent transactions for issuers fell from December 2020 to April 2021 by approximately 50% and with 40% for acquirers. In terms of value, the decrease was around 30%.

significantly lower for payment transactions where SCA is applied compared to those where SCA is not applied.

10. In addition, data from the EBA's central register under PSD2[5] reveals that more than 2700 PIs and EMIs, including 400 non-bank TPPs, have been authorised or registered in the EU, thus contributing to the competition enhancing objective of the Directive. Moreover, the EBA is of the view that the scope of the Directive, the regulatory approach taken in PSD2, and the main, high-level requirements are still fit for purpose.

11. Nevertheless, having monitored the implementation and the application of various provisions of PSD2 and the EBA's legal instruments in the past few years, and having assessed in detail the areas covered in the CfA, the EBA has arrived at the view that there are a significant number of issues that should be addressed in order to more fully achieve the objectives of PSD2 of enhancing competition in retail payments vis-a-vis incumbents, facilitating innovation, increasing security of payment transactions, protecting consumers, enhancing customer convenience, ensuring technological and business model neutrality, and creating a single EU retail payments market. The EBA, therefore, recommends that the EU Commission revises the PSD2 to address these issues and areas for improvement of the legal requirements.

12. To that end, the Opinion responds to the 28 questions that were set out in the Commission's CfA, leveraging on the experience gained by the EBA and national competent authorities (CAs), as well as some other issues that the EBA considers relevant. In so doing, the EBA assessed in detail more than 100 distinct issues and eventually developed more than 200 proposals across the nine different sections, which are described in detail in the extensive report in the Annex to the Opinion. The Opinion itself, in turn, focuses on some the most substantive of these proposals.

13. The Opinion does not include an impact assessment of all aspects that may be relevant in the context of each of the proposals, which is why, at times, the Opinion proposes that an additional such assessment may be warranted.

14. In addition to supporting the objectives of PSD2, the proposals put forward in this Opinion aim, inter alia, at contributing to further harmonisation and consistent application of the legal requirements, avoiding regulatory arbitrage, ensuring level-playing field between the different types of payment service providers (PSPs), increasing transparency for customers and supervisors, strengthening the supervision of the provision of payment services, providing legal certainty for market participants and ensuring the future-proofness of the legal requirements in the light of the continuous digitalisation of payment services.

Specific proposals to the Commission

Proposals on scope and definitions

15. Some of the more prominent of the EBA's proposals regarding scope and definitions refer to key concepts and definitions in PSD2, the regulatory approach to specific business models, and

[5] As of May 2022.

the merger of PSD2 and the Electronic Money Directive (EMD2). More specifically, on the scope and definitions, the EBA proposes for the Directive to:

- clarify on how to identify the place of provision of (payment) services when they are provided online;
- clarify the nature of each specific payment service, thus allowing to delineate more clearly between the various payment services;
- streamline and clarify the payment services set out in Annex I to PSD2, by merging service 1 and 2 related to enabling cash to be placed on and withdrawn from a payment account respectively; by merging services 3 and 4 on the execution of payment transactions due to their identical nature; by splitting issuing and acquiring into two separate services due to their different nature; and
- clarify key terms and definitions, such as 'payment account', 'payment instrument', 'electronic payment transaction', 'initiation of a payment transaction', 'remote payment transaction', 'sensitive payment data' and others.

16. In relation to the proposal for clarification on the regulatory approach to specific business models, the EBA proposes for the Directive to:

- introduce specific requirements for payment card schemes, payment gateways and merchants in relation to the implementation of key security requirements, such as SCA, where these actors play an important role, but without requiring them to be authorised under the Directive;
- clarify the application of the services excluded from the scope of application of PSD2 related to commercial agents, limited networks, and independent ATM providers under Article 3(b), (k) and (o) of PSD2 respectively; and
- clarify the regulatory treatment of specific white-label business models and cases where intermediaries act in their capacity as merchants, based on the specific examples detailed further by the EBA.

17. In relation to the merger of PSD2 and EMD2, the EBA expresses its strong support for doing so since this will be an opportunity to resolve a significant number of challenges faced by the industry and supervisory authorities in delineating between the two legal frameworks. Moreover, this would allow for further harmonisation, simplification and consistent application of the legal requirements for PIs and EMIs, avoiding regulatory arbitrage, ensuring level-playing field and a future-proof legal framework. In addition, the EBA put forward specific proposals, such as for the Directive to:

- cover the electronic money services in the existing payment services due to their very similar nature and applicable risks;
- apply identical legal requirements for PIs and EMIs, in particular in relation to the authorisation process and the requirements on safeguarding, initial capital and own funds; and

- clarify the nature and status of distributors of electronic money and apply a coherent framework to agents and distributors.

Proposals on the licensing of payment institutions and supervision of payment service providers under PSD2

18. Some of the more prominent proposals by the EBA in the section on 'Licensing of payment institutions and supervision of payment service providers under PSD2' relate to the need to revise the prudential framework, cover significant PIs and EMIs in a recovery and wind-down framework, enhance the role of the EBA central register, distinguish between right of establishment and freedom to provide services, assess the merits of introducing consolidated group supervision, and address issues related to the authorisation process.

19. In relation to the proposal to revise the prudential framework, the EBA proposes for the Directive to:

    - align the initial capital requirements for all PIs with the exception of payment initiation service providers (PISPs) and account information service providers (AISPs), with CAs having discretion to decide, depending on the business model of money remitters whether to apply the threshold for initial capital or the one for own funds;
    - apply Method B under Article 9 of PSD2 as a default method for the calculation of own funds requirements since it reflects in the best way the applicable risks arising from the activities. However, to address specific cases, the EBA also proposes CAs to have discretion to decide whether another method should be used based on uniform conditions and criteria, which should be set out in the Directive or by the EBA in a mandate;
    - introduce additional own funds requirements for granting of credit related to the provision of payment services; and
    - clarify the application of the professional indemnity insurance (PII), including its characteristics, risks to be covered, possibility of use of excess, deductibles and thresholds, and what could be considered as a comparable guarantee. The EBA also proposes to introduce initial capital requirements for AISPs as an alternative to PII during the process of authorisation.

20. In relation to the proposal on recovery and wind-down framework, the EBA proposes to introduce a simplified recovery and wind-down framework for significant PIs and EMIs, the liquidation of which may have a spill-over effect on other financial institutions and a negative impact on the repayment of funds to payment service users (PSUs). The EBA also proposes for CAs to have specific powers to manage the failure of these PIs and EMIs.

21. In relation to the proposal to enhance the role of the EBA central register, the EBA proposes to:

    - introduce a common deadline for CAs to update the registers of CAs and EBA and to require CAs to provide information to the EBA in an automated and real-time manner;

- introduce further granularity of the information contained on the national registers and the central register of the EBA by covering, for instance, dates of authorisation of each service, more detailed information of passporting requirements, and potential introduction of a common unique identification number; and
- introduce a central machine-readable database for all PSPs that provide PIS and AIS.

22. In relation to the proposal to distinguish between right of establishment and freedom to provide services, the EBA proposes, inter alia, for the Directive to:
    - provide clarity on the criteria delineating between the right of establishment and freedom to provide services overall and the use of agents and distributors; and
    - clarify on the admissibility of simultaneous exercise of the free provision of services and right of establishment.
23. In relation to the proposal to address issues related to the authorisation process, the EBA proposes for the Directive to:
    - clarify further the requirements on the provision of part of the PIs/EMIs services in the home Member State as set out in Article 11(3) of PSD2, with a specific proposal to introduce in the Directive requirements for specific core functions that need to be carried out by the PI in the home Member State;
    - address issues in relation to regulatory arbitrage stemming from forum shopping where applicants submit applications for authorisation in different Member States; and
    - reflect further on issues related to delays in the authorisation process where the EBA is currently in the process of carrying out a peer review.

Proposals on rights and obligations

24. Some of the more prominent proposals by the EBA in the section on 'Rights and obligations' relate to the blocking of funds, clarifications on the liability regime and related key terms, and adjusting the legal framework to fit the specific nature of instant payments.
25. In relation to the proposals to address issues related to the blocking of funds, the EBA proposes for the Directive to:
    - not introduce maximum limits for the amounts to be blocked on the payer's payment account when the exact transaction amount is not known in advance but to introduce a range of requirements for such blocking of funds, including for the PSP to have a justified reason, the provision of consent from the PSU for blocking funds, and setting out the time for the blocking; and
    - clarify the regulatory treatment of transactions where the final amount is different than the amount the payer was made aware of and agreed to when initiating the transaction, in particular that SCA should be applied in case the final amount is higher.
26. In relation to the proposals to address issues related to clarifications on the liability regime and related key terms, the EBA proposes for the Directive to:

- clarify the distribution of liability between TPPs and account servicing payment service providers (ASPSPs) and between the issuing and acquiring PSPs when an SCA exemption has been applied; and
- clarify in the Directive the terms 'reasonable grounds to suspecting fraud', 'fraudulent act', 'gross negligence' and others, the absence of which has led to legal uncertainty, inconsistent application of the Directive and pose difficulties for CAs to assess the responsibility of supervised institution regarding non-authorised transactions.

27. In relation to the proposal to adjust specific provisions of PSD2 to fit the specific nature of instant payments, the EBA identified areas of the Directive that should be amended accordingly. These included information to the PSU on the irrevocability of an instant payment order, the correct execution of a payment order, requirements on value-date, framework contracts and others.

Proposals on strong customer authentication

28. The EBA has not identified the need to bring into the scope of application of SCA additional types of transactions. Nevertheless, the EBA has a number of proposals in relation to the application of SCA, in particular regarding the regulatory treatment of merchant-initiated transactions and transactions excluded from the scope of SCA, the mitigation of social engineering fraud risks, and the need to ensure that certain groups of society are not excluded from using payment services as a fundamental financial service.

29. In relation to the clarifications on the application of SCA, the EBA proposes for the Directive to:

- clarify aspects on the application of SCA related to reliance on third party technology, delegation of SCA to TPPs and delegation to technical service providers, including digital wallet providers;
- clarify different aspects in relation to the use of the SCA elements 'knowledge', 'inherence' and 'possession';
- clarify the nature of the exemptions from SCA and whether these should be optional or mandatory; and
- clarify explicitly that the application of SCA should be considered as a corrective and preventive measure, thus being free of charge.

30. In relation to the regulatory treatment of merchant-initiated transactions and transactions outside the scope of SCA, the EBA proposes for the Directive to:

- introduce requirements in relation to the transactions excluded from the scope of application of SCA;
- introduce clear definitions of merchant-initiated transactions, clarify the regulatory approach to these transactions, introduce requirements on the set-up of the mandate and others; and

- introduce a clear definition of transactions based on mail order and telephone order, clarify the treatment of these transactions, introduce minimum level of security requirements for these transactions, and others.

31. In relation to addressing social engineering fraud risks, the EBA proposes for the Directive to introduce requirements on specific educational and awareness campaigns, incentivising PSPs to invest in more efficient transaction monitoring mechanisms and facilitating the exchange of information between PSPs in relation to known cases of fraud, specific fraudsters, and specific accounts used to carry out fraud.

32. In relation to the need to ensure that certain groups of society are not excluded from using payment services as a fundamental financial service, the EBA proposes for the Directive to introduce a general provision requiring PSPs to take into account the needs of different groups, including vulnerable groups, of the society in the provision of authentication solutions. The EBA also proposes to enhance the awareness and education campaigns in relation to the use of the authentication solutions.

Proposals on access to and use of payment accounts data in relation to PIS and AIS

33. In relation to some of the more prominent issues identified by the EBA in the section on 'Access to and use of payment accounts data in relation to PIS and AIS', including impediments of the access to and use of payment account data, the EBA proposes for the EU Commission to:

- Explore the possibility of having a common application programming interface (API) standard across the EU to be developed by the industry. The EBA, whilst acknowledging that introducing a single API standard at this stage would bring additional compliance costs, is of the view that it would also have significant benefits including reducing the burden for TPPs to connect and maintain connections to ASPSPs' interfaces, support innovation, reduce barriers for new market entrants, contribute to a level playing field across the EEA, and others;
- Require all ASPSPs to provide a dedicated interface for TPPs' access and remove the requirement for ASPSPs that offer a dedicated interface/API to also provide a fall-back mechanism; and
- Amend the approach taken in PSD2 and require AISPs to apply their own SCA, instead of ASPSPs, after an initial SCA has been performed with the ASPSP the first time the PSU accesses the payment account through the respective AISP. To support this change, the EBA also proposes that the allocation of liability between TPPs and ASPSPs towards the customer should be amended accordingly. The EBA also proposes that, in order for PSUs to remain in control of their data, they should be allowed to withdraw the consent given to the AISP via the ASPSP.

34. In addition, the EBA proposes for the Directive to:

- require ASPSPs to share with AISPs and PISPs the name of the PSU/account holder and of the person initiating the payment;

- consider the merits of requiring ASPSPs to share with PISPs information on the execution of a payment as soon as this becomes available to the ASPSP;
- clarify the scope of information to be shared with TPPs, such as information on standing orders, future-dated payments, overdrafts in relation to AIS, and others;
- clarify the type of information to be shared from TPPs to ASPSPs; and
- clarify what is considered 'online' access and others.

35. In relation to the potential move towards Open finance, or the expansion from access to payment accounts data towards access to other types of financial data (such as savings, investments and insurance data), the EBA has identified opportunities and challenges leveraging on the experience and knowledge accrued during the implementation of the PSD2 requirements on access to payment accounts. In particular, some of the recommendations made to the Commission, should it decide to introduce a legal framework on Open finance, refer to expanding the SCA requirements under PSD2 to access to other type of account data, assessing the feasibility of a single (industry led) EU API standard, clarifying the interplay with the GDPR requirements, setting the right incentives for all parties to invest and participate in the Open Finance ecosystem, and carefully considering the interplay between the PSD2 and any potential future legal framework on Open Finance to avoid any grey area regarding the legal regime(s) applicable to AISPs or loopholes in said regime(s).

Proposals on access to payment systems and access to accounts maintained with a credit institution

36. The EBA builds upon the proposals for amendment of PSD2 put forward in the Opinion on de-risking (EBA/Op/2022/01)[6]. In that regard, the EBA proposes for the Directive to clarify further the reference to 'duly justified reasons' for refusing and terminating access to PIs/EMIs to accounts with credit institutions. In particular, the EBA proposes to introduce criteria for refusing access to or terminating existing accounts. The EBA also proposes for the Directive to provide further details on the notification process set out in Article 36 of PSD2 by requiring credit institutions (CIs) to notify CAs within a specific timeframe for the reasons to refuse access to or to terminate existing accounts for PIs and EMIs.

Proposals on the enforcement of PSD2

37. Some of the more prominent proposals by the EBA in the section on 'Enforcement of PSD2' relate to the removal of obstacles to account access, implementation of SCA for e-commerce card-based payment transactions, and the merits of a harmonised sanction regime.

38. In relation to the removal of obstacles, the EBA acknowledges the challenges for CAs in the supervision of removal of obstacles and the obstacles that existed, for a long period of time, to the provision of AIS and PIS, thus having a negative impact on the activities of TPPs. While

6 https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Opinions/2022/Opinion%20on%20de-risking%20%28EBA-Op-2022-01%29/1025705/EBA%20Opinion%20and%20annexed%20report%20on%20de-risking.pdf

the clarifications to the application of the legal framework by the EBA and the measures taken by CAs have mitigated these obstacles, the EBA proposes for the Directive to introduce mechanisms to strengthen further the enforcement of the legal framework.

39. In relation to the unprecedented delay by the industry on the implementation of SCA for card-based e-commerce due to lack of preparedness of many actors in the payment chain, including non-regulated entities, and the need for CAs not to enforce the SCA requirements to avoid unintended consequences for PSUs and the economy as a whole, the EBA proposes a range of different measures to address such situation in the future, namely to:

    - introduce specific requirements to some of the actors in the payment chain that have an impact and influence on the implementation of security requirements; and
    - consider the introduction of phased implementation of similar wide-scale technical and complex projects, as well as collaboration mechanisms for CAs to ensure harmonised and consistent implementation.

40. In relation to the harmonised sanction regime, the EBA did not find compelling arguments to introduce such a framework. However, the EBA proposes the introduction of a centralised database on administrative sanctions and supervisory measures taken in the Member States under PSD2. The database can be developed and operated by the EBA, with the technical requirements for its development and operation, and the details and structure of the information to be notified to be set out in a mandate to the EBA.

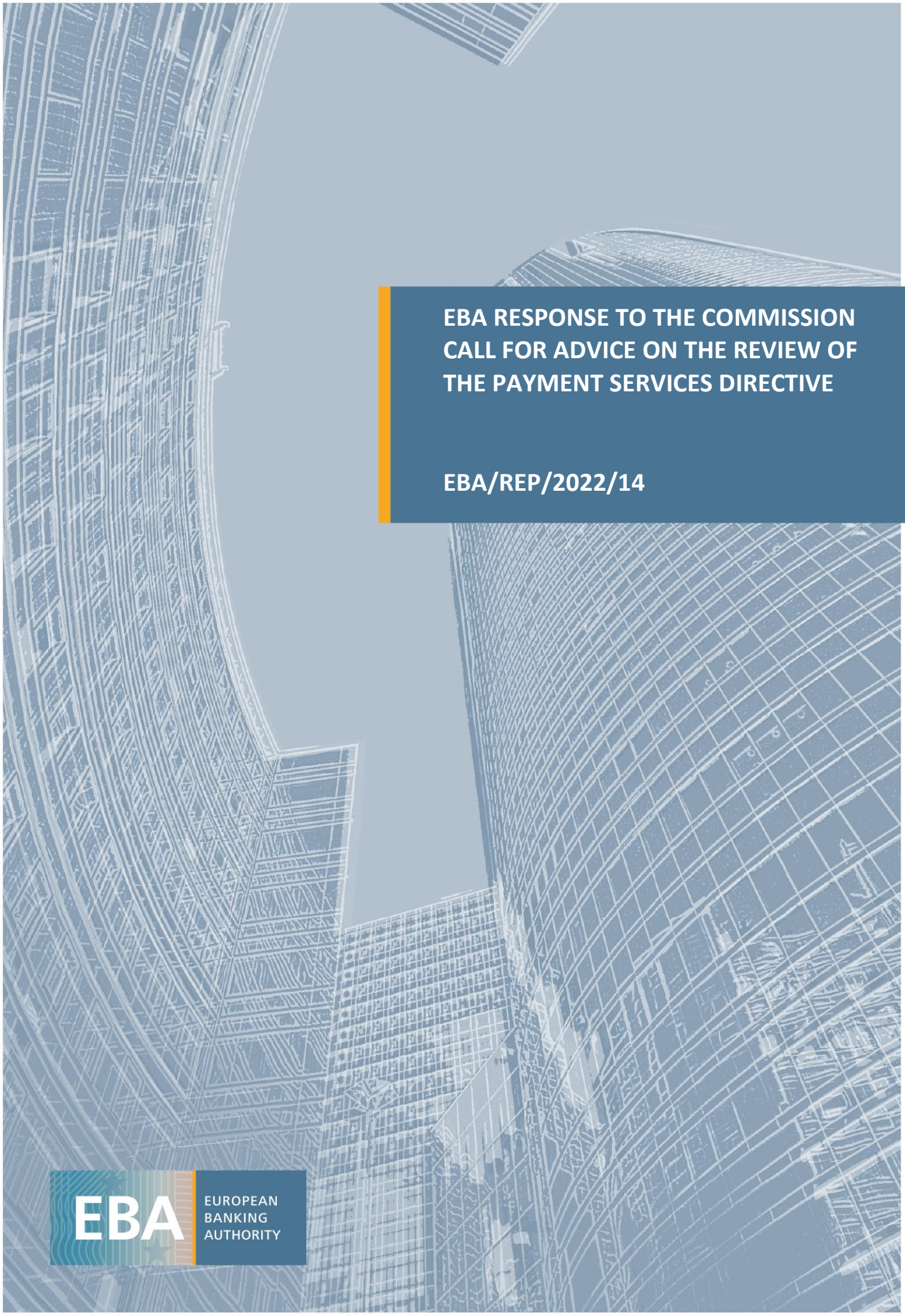
This Opinion will be published on the EBA's website.

Done at Paris, 23 June 2022

[signed]

José Manuel Campa

Chairperson
For the Board of Supervisors



EBA RESPONSE TO THE COMMISSION CALL FOR ADVICE ON THE REVIEW OF THE PAYMENT SERVICES DIRECTIVE

EBA/REP/2022/14

EBA EUROPEAN BANKING AUTHORITY

Contents

Abbreviations

AIS	Account information service
AISP	Account information service provider
AML	Anti-money laundering
AMLD	Directive (EU) 2018/843 on anti-money laundering and countering the financing of terrorism
API	Application programming interface
ART	Asset reference token
ASPSP	Account servicing payment service provider
ATM	Automated teller machine
BNPL	Buy now pay later
CA	Competent authority
CBPII	Card-based payment instrument issuer
CfA	Call for advice
CFT	Countering the financing of terrorism
CI	Credit institution
DGSD	Directive 2014/49/EU on deposit guarantee schemes
DORA	Digital Operational Resilience Act
EBA	European Banking Authority
EC	European Commission
ECB	European Central Bank
ECJ	European Court of Justice
EDPB	European Data Protection Board
EMD2	Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions
EMI	Electronic money institution
EMT	E-money token
ESAs	European Supervisory Authorities
EU	European Union
FPS	Freedom to provide services
GDPR	Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data
IBAN	International bank account number
ICT	Information and communications technology

ITS	Implementing Technical Standards
LNE	Limited network exclusion
MiCA	Proposal for a Regulation on markets in crypto-assets
MIT	Merchant initiated transaction
MOTO	Mail order or telephone order
NFC	Near field communication
OJ	The Official Journal of the European Union
OTP	One-time password
PAD	Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features
PI	Payment institution
PII	Professional indemnity insurance
PIS	Payment initiation service
PISP	Payment initiation service provider
POS	Point of sale
PSC	Personalised security credentials
PSD2	Directive (EU) 2015/2366 on payment services in the internal market
PSU	Payment service user
PSP	Payment service provider
ROE	Right of establishment
RTS	Regulatory Technical Standards
RTS on SCA&CSC	Regulatory Technical Standards on strong customer authentication and common and secure open standards of communication
SCA	Strong customer authentication
SFD	Directive 98/26/EC on settlement finality in payment and securities settlement systems
SMS	Short message service
TPP	Third party provider
TSP	Technical service provider
WTR	Regulation (EU) 2015/847 on information on the payer accompanying transfers of funds
Q&A	Question and answer

Background

1. The revised PSD2 has applied since 13 January 2018. The review clause in Article 108 of PSD2 requires the EC to report on the application and impact of the Directive to the co-legislators (the European Parliament and the Council), the European Central Bank and the European Economic and Social Committee. The EC is to accompany the report with a legislative proposal, if appropriate.

2. In that regard, on 20 October 2021, the EC submitted to the EBA a Call for Advice regarding the review of PSD2. The objective of the CfA is to gather evidence on the application and impact of PSD2, which includes any benefits and challenges that may have arisen with regard to the implementation and application of the Directive. Moreover, the EC invited the EBA, based on the experience and EBA's mandate, to identify areas where amendments to the PSD2 might be appropriate.

3. The scope of the CfA is very comprehensive comprising 28 questions under the following nine sections:

   - Scope and definitions;
   - Licensing of PIs and supervision of PSPs under PSD2;
   - Transparency of conditions and information requirements;
   - Rights and obligations;
   - Strong customer authentication;
   - Access to and use of payment accounts data in relation to AIS and PIS;
   - Access to payment systems and accounts maintained with a credit institution;
   - Cross-sectoral topics; and
   - Enforcement of PSD2.

4. The EBA was invited to deliver the report to the EC by 30 June 2022.

Methodological approach

5. To develop the response to the EC CfA on the review of PSD2, the EBA decided to follow a methodological approach whereby the EBA first identified the most significant and controversial issues related to the interpretation and application of the legal requirements of PSD2 and the EBA legal instruments within the scope of each question posed in the CfA. Second, the EBA collected feedback from CAs on these issues, together with the proposed solutions on how to address them. Finally, the EBA assessed the feedback received, discussed it with the CAs and agreed on the response to each question.

6. The EBA also leveraged on the experience accrued during the development and monitoring of the application of the EBA legal instruments under PSD2 and the additional own-initiative Guidelines, as well as the clarifications provided through a number of EBA Opinions and more than 200 answers to questions posed in the EBA Q&A tool.

7. The EBA decided to develop the response to the CfA solely based on input received from CAs, and not from external stakeholders to avoid duplication of work with the EC's parallel and public call for evidence and external study, which are part of the EC's formal process of the review of PSD2.

8. The EBA also presented its work on the CfA on the PSD2 review to the EBA's Banking Stakeholder Group and collected views and suggestions from the various members.

Section 1 - Scope and definitions

Question 1 - Are there any provisions regarding the scope of and definitions in the Directive that the EBA considers need to change due to market developments (e.g. no longer relevant, need to be clarified or added, etc.)?

1. The EBA has assessed various aspects related to the scope and definitions of PSD2 and puts forward specific proposals for amending the Directive on the following topics, which are elaborated further below:

   - Place of provision of the payment service;
   - Clarifications on the definitions of the various payment services;
   - The use of the confirmation on the availability of funds;
   - The term 'payment account';
   - The term 'payment instrument';
   - The term 'payment channel';
   - The term 'electronic payment transactions';
   - Initiation of a payment transaction;
   - The term 'remote payment transactions';
   - The term 'sensitive payment data'; and
   - Exclusions from the scope of PSD2.

1.1. Place of provision of the payment service

2. One of the most significant and frequently occurring issues is the place of provision of payment services, in particular when provided online. This issue relates to both, the place of authorisation of the PI/EMI and the provision of payment services in a cross-border scenario, and raises significant challenges from a supervisory point of view.

3. The EBA acknowledges that the issue is very complex and that it would require a broader approach for the entire financial sector and beyond, and that it should not be tackled only in payments legislation, in order to ensure a harmonised and consistent approach at EU level and to provide legal certainty to the market. In that regard, the EBA stresses the need for clarity at EU level on how to identify the place of provision of services online. The EBA has already expressed detailed views on this issue in other publications, which it will not repeat and instead provide the following cross references:

- paragraph 10 of the EBA Report on potential impediments to the cross-border provision of banking and payment services[7],
- paragraph 80 of the ESA Joint Committee report on cross-border supervision of retail financial services (JC/2019-22)[8],
- paragraph 222 of the Joint European Supervisory Authority response to the EC Call for Advice on digital finance and related issues (ESA 2022 01)[9], and
- Section 4.1.1 of the EBA's Response to the Commission's Call for Advice on the future AML/CFT Framework in the EU (EBA/REP/2020/25)[10].

1.2. Clarifications on the definitions of the various payment services

4. There is some uncertainty in the market in relation to the interpretation of various payment services. Having assessed some of these concerns, and taking note of the evolution of some of the payment services and the emergence of new and innovative business models, the EBA has arrived at the view that, while the payment services in Annex I to PSD2 are set out in a way that is technologically and business model neutral and therefore effective, there is merit in providing further clarity on some of the payment services, which should allow for a clear delineation between payment services that are perceived to be covering similar activities and business models. These relate to the clarifications on the delineation between credit transfers and money remittance, the services of placing and withdrawing cash on/from a payment account and the related services of operating a payment account, the delineation between the execution of payment transaction where an ancillary credit is provided and those where it is not, issuing of payment instruments and acquiring of payment transactions, PIS and AIS. All of these are explained in more detail below.

Delineation between credit transfer and money remittance

5. The EBA has observed that often there are business models for the provision of credit transfers and money remittance that are similar in their nature but that can be treated differently. Taking into account the difference in the initial capital and own funds requirements for PIs for the provision of both services, this can lead to level-playing field issues, inconsistent application of the legal requirements, and regulatory arbitrage.

6. Most of this issue depends on whether credit transfers always require the use of a payment account and whether the payment accounts of the PSU used for the provision of the payment service are operated by the PSP and used in the name of the PSU.

[7] Draft report - Obstacles to cross-border provision of services (for BoS) 021019.docx (europa.eu)

[8] Final Report on cross-border supervision of retail financial services.pdf (europa.eu)

[9] https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Reports/2022/1026595/ESA%202022%2001%20ESA%20Final%20Report%20on%20Digital%20Finance.pdf

[10] Microsoft Word - EBA Report on the future of AML CFT framework in the EU.docx (europa.eu)

7. In that regard, the EBA proposes that the Directive be amended such that a payment account opened by the PSP in the name of the PSU is always needed to qualify a payment transaction as a credit transfer. Relatedly, the EBA sees merit in explicitly clarifying in the Directive that having a payment account opened by the PSP in the name of the PSU is a prerequisite for the execution of payment transactions according to item 3 of Annex I to PSD2.

8. In addition, in order to distinguish between credit transfers and money remittance services, the EBA sees merit in clarifying in the Directive whether the following two cases would constitute a credit transfer or a money remittance:

   - where transfer of funds is initiated from the payment account of the payer, with the account being held at a PSP other than the one providing the money remittance service, and the funds are transferred to a payee who does not hold a payment account, and
   - where the payer, who does not hold a payment account, initiates a transfer of funds to a payment account of the payee, with the account being held at a PSP other than the one providing the money remittance service.

9. Finally, the EBA is of the view that, in order to ensure that the definition of the payment service under item 3 of Annex I to PSD2 is future proof and does not impede innovation, the EBA proposes to limit the definition to 'execution of payment transactions' only and include the reference to credit transfers, card payments and direct debits as examples in the recitals of PSD2. By doing so, the scope of the service will be broadened to capture potential future innovative payment instruments/solutions.

The services of placing and withdrawing cash from a payment account and the related services of operating a payment account

10. The EBA has identified divergent approaches across the EU in relation to the authorisation of payment services that are linked to a payment account. In particular, some jurisdictions have taken an approach where, in order to open and maintain a payment account of the PSU, the PI would need to be authorised for services under items 1, 2 and 3 of Annex I to PSD2, while in other jurisdictions, there is no such dependency and PIs can open and maintain payment accounts of the PSU and provide individual payment services. The EBA is of the view that PIs operating payment accounts for their PSUs should not be obliged to obtain an authorisation for payment services that they do not intend providing. Such an approach can also be considered as a barrier for entering the payments market.

11. The EBA has also identified an issue in relation to the approach towards the services linked to 'the operations required for operating a payment account' as set out in items 1 and 2 of Annex I to PSD2. The EBA has observed that these operations are treated as a separate payment service, thus requiring an authorisation under PSD2, irrespective of whether or not payment services are in practice carried out from the account. The EBA is of the view that operating a payment account is not a payment service requiring a separate authorisation and sees merit in clarifying this in the Directive.

12. In relation to the above, the EBA proposes to clarify in the Directive that the operation of payment accounts should not be treated as a standalone payment service requiring authorisation under PSD2 and that PIs operating payment accounts can be authorised for individual payment services and that it does not require PIs to obtain authorisation for services under items 1 and 2 of Annex I to PSD2.

13. Finally, the EBA sees merit in merging the payment services under items 1 and 2 of Annex I to PSD2 due to their similar nature, which is that they require the use of cash. The EBA, therefore, proposes the following definition – 'Services enabling cash to be placed on and/or withdrawn from a payment account.'

Delineation between the execution of payment transaction where an ancillary credit is provided and those where it is not

14. The EBA is of the view that the payment services under items 3 and 4 of Annex I to PSD2 are identical in their nature and relate to the execution of payment transactions, with the only difference being whether or not the funds are covered by a credit line for the PSU. Therefore, the distinction between these two services becomes artificial and even raising potential challenges and risks of divergent interpretation on the provision of credit.

15. Since Article 18(4) of PSD2 already envisaged the possibility to provide ancillary credit to the provision of payment services, to simplify the legal framework, the EBA, therefore, sees merit in merging these two services into one and clarifying that ancillary credit can be granted in relation to the provided payment services.

16. The EBA, therefore, proposes to merge payment services under items 3 and 4 of Annex I to PSD2 into a single service. The EBA also sees merit from a consumer protection point of view in introducing a requirement for CAs to indicate in their national registers whether the PIs/EMIs are providing ancillary credit.

Issuing of payment instruments and acquiring of payment transactions

17. The EBA is of the view that the services of issuing of payment instruments and acquiring of payment transactions are very different in their nature and require different supervisory approach and treatment. In that regard, the EBA proposes for these to be split into two separate payment services.

18. Another related issue is the divergent approach in the authorisation of PIs providing these services, with some CAs requiring PIs also to be authorised for the execution of payment transactions under items 3 or 4 of Annex I to PSD2. The EBA is of the view that the acquiring of payment transactions does not require PIs to obtain an additional authorisation for the payment services under items 3 or 4 of Annex I to PSD2 since the definition of acquiring set out in Article 4(44) of PSD2 is clear that the service entails the acceptance and processing of payment transactions, which results in the transfer of funds to the payee.

19. On a separate note, the EBA is also of the view that the definition of issuing of payment instruments in the Directive is not clear as to whether it includes the execution of payment transactions with said payment instrument. Article 4(45) of PSD2 defines the issuing of a payment instrument 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'. Since the definition focuses predominantly on the provision of the payment instrument to the payer, it is not clear whether it also entails the execution of payment transactions with said payment instrument by the issuing PSP or whether the execution of payment transactions with the instrument requires an authorisation for the provision of the payment services under items 3 or 4 of Annex I to PSD2.

20. In relation to the above, the EBA proposes to amend the Directive so as to split it into two separate payment services: the issuing of a payment instrument and the acquiring of payment transactions, and to clarify in the Directive whether the execution of payment transactions with an issued payment instrument requires an authorisation for the payment service under item 3 of Annex I to PSD2.

PIS

21. The EBA has assessed different business models for the provision of PIS and has arrived at the view that some specific business models do not entail the same level or risk and may not necessarily need to fall within the scope of the service under PSD2. These relate to corporate payment processes and protocols that are only made available to payers that are not consumers as individuals and that are based on specific, often bilateral, agreements for the provision of services through a custom-built IT system.

22. In that regard, the EBA proposes to narrow down the scope of the PIS by excluding certain corporate payment initiation services that are based on specific IT systems. Following this, third parties would be able to initiate payment transactions from a PSU's payment account either through ASPSPs' dedicated interfaces by having a PISP license or via a bilateral agreement with the ASPSP through specific IT systems.

AIS

23. The EBA has often received, including through the EBA Q&A tool, questions related to the scope of AIS, in particular whether AIS requires that consolidated account information to always be provided to the PSU or whether AIS allows said information to be submitted directly to third parties that are different from the PSU. In that regard, Q&A 4098 clarified that 'Articles 4(16) and 67(1),(2) PSD2 do not require that the account information service provider (AISP) provides the consolidated information to the payment service user (PSU) in order for the service to constitute an 'account information service' according to PSD2. The AISP may therefore transmit the consolidated information to a third party with the PSU's explicit consent. Regarding the use made by any third party of the consolidated information transmitted, other provisions of EU law may apply, for instance the GDPR.

24. In relation to the above, the EBA proposes to clarify in the Directive the overall intention behind AIS and to reflect the answer to Q&A 4098 in the legal provisions of the Directive while ensuring transparency to PSUs and protection of customers' data.

1.3. The use of the confirmation on the availability of funds

25. The EBA is of the view that the use of confirmation of funds to CBPII is not sufficiently clear in the Directive, including on the PSP that can make use of it. The EBA has also observed challenges in its implementation, especially in relation to the provision of consent.

26. In addition, the EBA has observed that there has not been significant demand for the service in its current form where it provides a snapshot of the availability of funds and that the confirmation on the availability of funds has not been that useful for market participants without providing information in relation to the execution of the payment transaction. Moreover, CAs have indicated that there have not been many business models that have developed on the basis of this service. Some market players have indicated to CAs that they rely on the use of AIS as an alternative for checking the availability of funds.

27. In relation to the above, taking also into account the legal uncertainty around the service, the EBA proposes that the provision of Article 65 of PSD2 related to the confirmation on the availability of funds to CBPII is removed from the Directive.

1.4. The term 'payment account'

28. The EBA has observed that there had been different interpretations in the market of the definition of 'payment account', which has led to divergences in the application of the legal requirements. In particular, questions arose as to whether certain types of accounts, such as electronic money accounts linked to prepaid cards, savings accounts, reference accounts, credit card accounts and others, should be treated as payment accounts. This has been particularly relevant for the legal requirements related to the provision of AIS and PIS and whether AISPs and PISPs should have access to these accounts held by ASPSP.

29. The EBA is of the view that the ECJ ruling C-191/17 and Q&A 4272 brought about some clarity to the market on how the term 'payment account' should be interpreted. The EBA also takes note that the ECJ ruling is based on the provisions not in the PSD2 but in the PAD, which has introduced a slightly different definition of payment accounts focused on consumers only, rather than all PSUs, and which also clarified that the scope of payment accounts for the purpose of PAD relates to payment accounts through which consumers are able at least to place funds in a payment account, withdraw cash from a payment accounts and execute and receive payment transactions, including credit transfers, to and from a third party. The approach taken in the PAD can therefore be said to be stricter and, if applied directly to PSD2, would narrow down the scope of the payment accounts under PSD2 significantly.

30. The EBA is therefore of the view that, in order to ensure a level playing field across the EU, the revised Directive should have a clear and more detailed definition of a payment account for

the purpose of PSD2, and with clear criteria and/or features and a clarification of the notion of a 'third party'. In so doing, specific examples of payment accounts should be avoided since these may be misinterpreted or applied differently by market participants.

31. Moreover, in order to ensure business model neutrality and facilitate the development of different and innovative payment solutions, the definition of a payment account should not limit the scope of the payment services that can be executed to/from a payment account to a particular payment service or a combination of payment services. In other words, the definition of a payment account under PSD2 should not be narrowed down to the specific use case where a combination of payment services is provided cumulatively, as those covered in the scope of PAD, but should allow for variety of use-cases, including those where only a single payment transaction is executed from/to the payment account, without any restrictions on the applicable payment services. This can potentially be addressed in the Directive by requiring PIs/EMIs to use payment accounts for the execution of payment transactions and to clarify separately the payment services that require the use of a payment account. The EBA sees, however, merit in assessing the effect these changes will have on the application of SCA and the requirements on access to and use of payment accounts data in relation to PIS and AIS.

1.5. The term 'payment instrument'

32. Article 4(14) of PSD2 defines payment instrument 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'.

33. The EBA is of the view that the current definition of a 'payment instrument' requires further clarification since it leaves too much room for interpretation. In particular, it is not clear what is to be considered a payment instrument and what the specific features of a payment instrument are. In terms of specific examples, it is not clear whether a mobile phone or a computer can be considered as a payment instrument.

34. Another issue identified by the EBA relates to the lack of clarity on the delineation between the device used for authentication and the device used for the initiation of a payment transaction.

35. The treatment of applications to which payment cards are linked, such as tokenised version of payment cards, also requires clarification. The EBA understands that the issuance of a token that is linked to the cardholder and their respective primary account number/IBAN of the payment instrument/account, which also allows to initiate a payment order, would constitute an issuance of a payment instrument. However, at the same time, a delineation should be made between the issuance of a token and the services related to operation of a digital wallet, which are of a technical nature, and do not constitute a payment service and, therefore, do not require authorisation. The EBA is of the view that the requirements of PSD2 are not sufficiently clear on these points.

36. Another issue relates to the use of NFC. In ECJ judgment C-287/19, the court ruled that Article 4(14) of PSD2 must be interpreted as meaning that the NFC functionality of a personalised multifunctional bank card, by means of which low-value payments are debited from the associated bank account, constitutes a 'payment instrument', as defined in that provision. The EBA has identified potential contradictions with the application of the contactless payments at the POS exemption from SCA under Article 11 of the RTS on SCA&CSC, as well as an unintended consequence on the application of the liability regime under Article 74 of PSD2 to payers in case of unauthorised or fraudulent payment transactions. The EBA is, therefore, of the view that in case of a potential revision of the Directive, the definition of a payment instrument should be amended such that NFC is to be considered as a functionality of a payment instrument and not a payment instrument itself.

37. The ECJ ruling C-616/11 further stated that 'the procedure for ordering transfers by means of a transfer order form signed by the payer in person and the procedure for ordering transfers through online banking constitute payment instruments within the meaning of that provision'. The EBA is of the view that online banking should ideally be considered as a payment channel rather than a separate payment instrument. The EBA, therefore, proposes to reflect this in the definition of a payment instrument in case of a potential revision of the Directive.

38. Another issue identified relates to the reference in the definition to a personalised device. Since there are pre-paid cards where the name of the holder of the instrument is not printed on the card, this could leave these cards outside the scope of the definition of a payment instrument. The EBA, therefore, sees merit in amending the reference to one that refers to 'individualised' device instead.

39. Based on the above, the EBA proposes that the definition of a 'payment instrument' be amended in the Directive.

1.6. The term 'payment channel'

40. Articles 97 and 98 of PSD2, as well as some of the Recitals of the Directive, refer to 'payment channel'. However, the term is not defined in PSD2, which brings legal uncertainty, different interpretations by market participants and, sometimes, challenges in the assessment of specific authentication approaches. In particular, it is, at times, difficult to delineate between 'payment channel' and other related terms, e.g. 'payment instrument' or a 'payment device', if a distinction is intended in the first place. This is further evidenced by the text of Recital 67 of PSD2, which seems to use the term 'payment channel' interchangeably with the term 'payment instrument'.

41. In that regard, the EBA proposes that, if it is indeed desired to use the term 'payment channel' at all, the Directive be amended to define that term allowing the clear delineation between the term and other related terms, such as a 'payment instrument'.

1.7. The term 'electronic payment transactions'

42. Article 97(1)(b) of PSD2 requires PSPs to apply SCA when the payer initiates an electronic payment transaction. However, the term electronic payment transaction has not been properly defined in PSD2, which has given rise to many challenges in the interpretation and application of various provisions of PSD2, including in relation to the types of transactions that are within the scope of SCA and those that are not. Recital 95 of PSD2 prescribed that 'there does not seem to be a need to guarantee the same level of protection to payment transactions initiated and executed with modalities other than the use of electronic platforms or devices, such as paper-based payment transactions, mail orders or telephone orders', thus providing some clarification on the payment transactions that do not fall within the scope of the electronic payment transactions.

43. However, the EBA views the guidance provided in Recital 95 of PSD2 as insufficient, especially taking into account that all payment transactions, with the exception of those based on cash, have some electronic component in their execution. The issues in relation to the interpretation of the exclusions from the scope of application of SCA were also evident in the light of the clarifications sought on the use of MOTO in Q&A 4788 where the answer provided by the EC concluded that all card-based payment transactions qualify as electronic payment transactions and thus fall within the scope of SCA, as well as in Q&A 5124 in relation to PSP's staff assisted devices within the premises of PSPs. These gave rise to further questions on which transactions fall outside the scope of SCA.

44. The EBA has, therefore, arrived at the view that the term 'electronic payment transaction', which is crucial for the application of the most important security requirements for payment transactions introduced by PSD2, namely SCA, needs to be properly and clearly defined in the Directive itself or that the Directive explicitly specifies the transactions that fall in the scope of SCA and those that fall outside the scope of SCA.

45. In that regard, to ensure legal certainty and simplification of the legal requirements, the EBA proposes, instead of introducing a definition of 'electronic payment transaction', which some may find to be quite complex and giving room for different interpretation, to require the application of SCA to the initiation of 'payment transactions' more generally and to specify explicitly the payment transactions that are not subject to the application of SCA.

1.8. Initiation of a payment transaction

46. The EBA is of the view that the process of 'initiation of a payment transaction' needs to be further clarified in the Directive.

47. One of the specific issues identified relates to the interplay between the initiation of a payment transaction and the authentication of the PSU, in particular whether the authentication process should be considered part of the initiation of the transactions or a separate process beforehand. A related issue has been raised with regard to 'remote payment transactions' in item 1.9. below.

48. Another issue identified by the EBA relates to the need to specify clearly the steps of the initiation process and point in time when the initiation has been finalised, which is interlinked with the requirements of Article 80 of PSD2 in relation to the irrevocability of the payment order. In particular, the EBA proposes to clarify in the Directive whether the initiation of the payment transaction should be considered as finalised at the time when the payment order is received and authorized by the PSP or at another time.

49. A third issue relates to the application of Article 66(4)(b) of PSD2, which prescribes that ASPSPs shall 'immediately after receipt of the payment order from a payment initiation service provider, provide or make available all information on the initiation of the payment transaction and all information accessible to the account servicing payment service provider regarding the execution of the payment transaction to the payment initiation service provider'. The interpretation of this requirement has raised some issues in the TPP community on the information that needs to be provided from ASPSPs to PISPs during the different stages of initiation of payment transactions and also, and more importantly, on the information related to the execution of the payment transaction. While the latter part of the issue was addressed through the answer to Q&A 4601, further clarification on what is to be captured by the initiation of a payment transaction and when it is considered as finalised will provide legal certainty to the market and facilitate a harmonised application.

50. A fourth aspect related to clarifications in relation to the initiation of payment transactions relates to the provision of instant payments. In particular, it is crucial to know the exact moment of initiation of payment transactions for instant payments since the execution time is usually measured from that point onwards. The EBA proposes that the Directive be clarified with regard to the process of 'initiation of a payment transaction' and the different steps to be considered part of the process and the point in time when the initiation can be considered finalised.

1.9. The term 'remote payment transactions'

51. Article 4(6) of PSD2 defines 'remote payment transaction' as a payment transaction initiated via internet or through a device that can be used for distance communication. Relatedly, Article 97(2) of PSD2 prescribes that for the initiation of electronic remote payment transactions, PSPs shall apply SCA that includes elements which dynamically link the transaction to a specific amount and a specific payee.

52. The answer to Q&A 4594 further clarified that a 'payment transaction is remote where it is initiated via internet or, in the case where the transaction is initiated via a device, where the physical presence of the device is irrelevant for the initiation of the payment transaction'.

53. The EBA is of the view that the term 'remote payment transaction' is not sufficiently clear in PSD2, in particular in relation to:

- the specific cases where a device, including a smartphone, is used for the initiation of a remote payment transaction;

- the unclear delineation between the transactions initiated through a device that can be used for distance communication and transactions initiated via the internet; and
- the specific case where the initiation of a payment transaction in a physical point of sale, including the authentication of the PSU, is carried out through a device that requires the use of the internet.

54. In relation to the last bullet, Q&As 5247 and 5367 provide examples of specific questions stemming from the lack of clarity of the term 'remote payment transaction'. In particular, these Q&As cover and provide clarity within the PSD2 legal framework on the cases where the initiation of a transaction at a point of sale takes place offline or where the authentication of the PSU is carried out on a mobile device through the use of the internet.

55. In relation to the above, the EBA proposes that the scope and definition of a 'remote payment transaction' be clarified in the Directive, by addressing the issues highlighted above and leveraging on and improving further the clarifications provided in Q&As 4594, 5247 and 5367.

56. The EBA has also considered but discarded other potential approaches for addressing the issue. One of these alternative approaches is a potential delineation between cases where the PSU is physically present at the POS on the one hand and online payment transactions on the other, and to clarify in the Directive that the former are not remote transactions, or that in the case of a remote transaction the payment instrument and the point of interaction used to initiate the transaction are not physically interacting. While this alternative approach could simplify the legal framework and ensure legal certainty, the EBA discarded it since it may not cover cases where transactions are initiated at a physical POS, with the authentication of the payment transactions being carried out through a device that requires the use of internet and thus being prone to man in the middle attacks.

57. Another alternative approach is the removal of the concept of a 'remote payment transaction' from PSD2 altogether and to focus only on the initiation of electronic payment transactions and applying the same rules, including the application of the dynamic linking requirements, for remote and proximity payment transactions. The EBA considered that such an approach would simplify the legal framework significantly, ensure legal certainty and address relevant risks, including man in the middle attacks. However, the EBA discarded it since the compliance cost for PSPs would be very extensive, with significant changes to existing proximity payment solutions, and possibly disproportionate when compared to the lower fraud risk of the very limited uses cases that would require dynamic linking for proximity payments.

1.10. The term 'sensitive payment data'

58. The EBA has observed that many stakeholders interpret the term 'sensitive payment data' differently and that some stakeholders are not certain on the specific types of data that fall within the scope of the term. This has led to some negative impact on AISP business models and can also impact the rollout of Single Euro Payments Area (SEPA) instant credit transfers. The more specific issues flagged included whether sensitive payment data cover the SCA

elements, Customer ID, IBAN outside the inter-PSP environment, IBAN not related to the provision of PIS/AIS, specific types of data accessible to AISPs, and others.

59. The EBA is of the view that 'sensitive payment data' should be further clarified in the Directive. However, introducing a closed definition may not work since it will go against the technological neutrality principle and may impede innovation. The EBA, therefore, proposes for the Directive to provide guidance by introducing examples, including negative examples, on what sensitive payment data is. These examples should be sufficiently agile and future proof. In addition, the EBA is of the view that PSPs should also be allowed, depending on their business arrangements, to decide whether additional data should be considered 'sensitive payment data'.

1.11. Exclusions from the scope of PSD2

60. The EBA has identified issues in relation to the interpretation and application of some of the exclusions from the scope of PSD2. These relate to the 'limited network exclusion' under Article 3(k) of PSD2, the 'commercial agent' exclusion under Article 3(b) of PSD2 and the 'independent ATM providers' exclusion under Article 3(o) of PSD2, the issues of which and the proposed solutions to address them being explained in detail below.

Limited network exclusion

61. Since the publication of PSD2, the EBA has received a large number of queries on the application of the LNE and the related notification requirements. The EBA has assessed these queries and arrived at the view that the implementation and application of the requirements on the LNE under Article 3(k) and 37(2) of PSD2 diverge significantly between Member States, thus impeding the single market for payment services in the EU and creating opportunities for regulatory arbitrage. The EBA also considered that consumers carrying out transactions with the excluded payment instruments are sometimes not aware that they do not benefit from the protection envisaged under PSD2. To address these issues, the EBA issued Guidelines on the limited network exclusion under PSD2 (EBA/GL/2022/02)[11] covering provisions on the use of specific payment instruments under the LNE, criteria and indicators for qualifying a limited network of service providers or a limited range of goods and services as such, the application of the exclusion by regulated entities, clarifications on the notification requirements and thresholds, and others.

62. However, the EBA has with these Guidelines not been able to address issues that are related to the interpretation of definitions and specific terms set out in PSD2 or provisions that the Directive may have left intentionally open. These relate to:

    a) the difference between the terms 'professional issuer' and 'issuer' as referred to in Article 3(k) of PSD2; and
    b) the geographical limit of each specific exclusion under Article 3(k) of PSD2, taking into account that Recital 13 of PSD2 sets out expectations about the geographical limits to some of the exclusions.

[11] Final Report on draft Guidelines on the limited network exclusion under PSD2.pdf (europa.eu)

63. On b) above related to the geographical limit, the EBA takes note of the clarification provided by the EC through the response to Q&A 4604 but sees merit in clearly addressing this point in the Directive.

64. In addition, the Guidelines on the LNE under PSD2 introduced provisions in Guideline 3 that payment instruments allowing the holder to acquire goods or services only in the premises of the issuer can only be used in physical premises and cannot be used in online stores. The EBA is of the view that it would be beneficial for the EC to clarify the interpretation of the term 'premises' in the Directive.

65. In relation to the above, the EBA proposes that the Directive clarify the topics on the geographical limit of the provision of the excluded services and the interpretation of the terms 'professional issuer' and 'premises'.

66. The EBA is also of the view that significant clarifications have already been provided on the application of the LNE with the EBA Guidelines. As a result, the EBA also proposes the EC to assess whether to incorporate the Guidelines, or parts thereof, in the Directive or to introduce an explicit mandate to the EBA on the topic. Should the EC decide that it is more appropriate for the EBA to develop the specific requirements on the application of the LNE, the EBA proposes the mandate to be in the form of RTS in order to ensure full harmonisation of the application of the requirements and to avoid an unlevel-playing field in the EU.

The commercial agent exclusion

67. The EBA has identified a large number of issues related to the interpretation and application of this exclusion under Article 3(b) of PSD2. These relate to the:

- Lack of clarity in the specific use-cases that are intended to be covered by the exclusion, taking into account that commercial agents are usually defined in national civil law, which can diverge from one Member State to another;
- Lack of clarity whether the reference to 'commercial agents' in Article 3(b) of PSD2 should be understood in accordance with Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents;
- Lack of clarity on the criteria to be met in order to consider the agent excluded from the scope of the Directive;
- Lack of clarity on interpretation of the terms 'negotiate or conclude' the sale or purchase of goods or services under Article 3(b) and the reference to 'real margin' under Recital 11, especially when contracts are concluded electronically;
- Lack of clarity on whether the selling element is necessary for qualification as a commercial agent;
- Lack of clarity as to whether the case of a person delivering goods and accepting a payment in the name of a seller can be considered within the scope of the exclusion;
- Lack of clarity regarding the applicability of the 'commercial agent' exclusion to escrow agent companies and platforms that the EBA has observed as spreading across the EU;

- Lack of clarity in the delineation between the activities falling in the definition of 'agent' under Article 4(38) of PSD2 and the commercial agent exclusion;
- Difficulty, at times, in distinguishing between PIS, acquiring payment transactions and services provided by commercial agents;
- Concerns that the exclusion is exploited to circumvent requirements of PSD2 (e.g. by e-commerce platforms), in particular the need for authorisation as a PI; and
- Lack of clarity in the relationship between payer, commercial agent and payee, especially in the context of e-commerce platforms where the platform acts on behalf of both payers and payees. Q&A 5355 has provided clarification on the subject matter.

68. In relation to the above issues, the EBA proposes to clarify these aspects in the Directive, in particular the activities falling within the scope of the exclusion, the interplay with Directive 86/653/EEC, the interplay between the exclusion and the agency framework in PSD2, and the references to 'negotiate or conclude' in Article 3(b) of PSD2.

The independent ATM providers exclusion

69. The EBA is aware of some uncertainty in the treatment of the independent ATM providers exclusion under Article 3(o) of PSD2. In particular, there is a lack of clarity about the cases when an ATM provider acts on behalf of card issuing PSPs and whether this requires the conclusion of a direct contract between the ATM provider and each card issuer or whether it can also cover cases where the ATM provider signs a framework agreement with a card payment network/scheme, thus covering many issuing PSPs.

70. In addition, the appropriate supervision of this exclusion is put at risk, since these arrangements require supervisors to assess them in order to come to a view whether the activities of independent ATM providers qualify as provision of payment services or whether it falls within the exclusion under Article 3(o) of PSD2, while at the same time these activities and providers are outside of the scope of PSD2 and therefore outside of the supervisory remit of CAs.

71. Moreover, it is worth noting the potential interplay between the independent ATM providers exclusion and the exclusion under Article 3(j) of PSD2 related to the activities of TSP that support the provision of payment services because even these independent ATM providers are brought into the scope of the Directive, some may argue that they provide a technical service, thus benefitting from the exclusion under Article 3(j) of PSD2.

72. In that regard, the EBA proposes that the Directive be clarified in respect of the application of the independent ATM providers exclusion in the Directive. The EC may consider, taking into account the uncertainty in the application and supervision of the exclusion and that these services seem to be growing in prominence, whether there is merit in bringing these services into the scope of PSD2.

73. On a separate but related topic, there has been some uncertainty in the market on the treatment of cash-in-shop services where PSUs withdraw cash from a merchant by using their

payment card at a POS without making a purchase. Some market participants interpret the service as falling under the acquiring of payment transactions and similar to cash-back services, while others query whether the service could be considered within the scope of the independent ATM providers exclusion under Article 3(o) of PSD2. In that regard, the EBA proposes to clarify the treatment of these services and, in particular, whether (i) they should fall within the scope of an already existing payment service and who is the actual provider of the service or (ii) to be excluded from the scope of the Directive due to their alleged lower risk. In that context, the EBA would like to stress the impact any potential regulation of these services may pose on the administrative burden to merchants and CAs, depending on the regulatory approach chosen.

Question 2 - Has the EBA identified issues regarding the application of PSD2 provisions to one-leg transactions?

74. The EBA has assessed the application of requirements of PSD2 to one-leg transactions and identified two issues, namely the application of SCA to one-leg transactions and the practice of EU merchants to try circumventing the requirement to implement/apply SCA by contracting acquirers from third countries outside the EU. These two topics are elaborated further below.

2.1. Application of SCA to one-leg transactions

75. The EBA has over the years received a number of requests for clarification on the application of the SCA requirements for one-leg transactions. In relation to this, the EBA has clarified in paragraph 32 of its Opinion on the implementation of the RTS on SCA and CSC (EBA-Op-2018-04)[12] that '*SCA applies to all payment transactions initiated by a payer, including to card payment transactions that are initiated through the payee within the EEA and apply only on a best-effort basis for cross-border transactions with one leg out of the EEA. In such a case, the liability regime stated by Article 74(2) PSD2 applies*.'

76. Following the publication of this Opinion, some market participants sought further clarity through the EBA Q&A tool and submitted a Q&A 4236[13] on whether the scope of SCA covers one-leg transactions. The EBA's subsequent response to Q&A 4233 clarified that SCA applies 'to those parts of the transactions which are carried out within the Union'. The Q&A also clarified that:

'In the case of card-based payments where the payee's PSP (the acquirer) is located outside the Union (the so-called "one-leg out transactions"), the acquirer is not subject to PSD2. Where the payer wishes to make a card-based payment at the point of sale (POS) or in an online environment of a merchant whose acquirer is located outside the Union and the issuer cannot

[12] https://www.eba.europa.eu/sites/default/documents/files/documents/10180/2137845/0f525dc7-0f97-4be7-9ad7-800723365b8e/Opinion%20on%20the%20implementation%20of%20the%20RTS%20on%20SCA%20and%20CSC%20%28EBA-2018-Op-04%29.pdf

[13] https://www.eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/2018_4233

technically impose the use of SCA, the issuer shall make its own assessment whether to block the payment or be subject to the liability requirements under Article 73 PSD2 vis-à-vis the payer in the event that the payment has been unauthorised.

In the case of card-based payments where the payer's PSP (the issuer) is located outside the Union (the so-called "one-leg in transactions"), the issuer is not subject to PSD2. Where the payer wishes to make a card-based payment at a POS or in an online environment of a merchant whose acquirer is located in the Union, the acquirer is subject to PSD2 as it offers its services in the Union. As such, it is required to be in a position to accept SCA and thus has to put in place mechanisms that allow for SCA.

As regards the application of the rules on SCA in relation to "one-leg out" credit transfers, the payer's PSP that is located within the Union has to apply SCA and does not need to rely on the payee's PSP to apply SCA as credit transfers are initiated by the payer with its own PSP.

As regards the application of the rules on SCA in relation to "one-leg in" credit transfers, since the payer's PSP is located outside the Union it is not subject to PSD2 and does not have to comply with the rules on SCA.'

77. In this context, the EBA acknowledges that some of the issues stemming from the application of one-leg transactions are due to the different regulatory frameworks in other jurisdictions and the fact that EU PSPs have to rely on compliance with the SCA requirements by third parties that are not subject to them.

78. In relation to the above, the EBA proposes that the Directive clarifies the application of SCA to one-leg transactions in the light of the answer to Q&A 4233 and on how the liability regime under Article 74 of PSD2 would apply when the PSP located within the EU fails to apply or accept SCA in a one-leg transaction.

2.2. EU merchants circumventing the requirement to implement/apply SCA by contracting acquirers from third countries outside the EU

79. During the migration to SCA-compliance for remote card-based payment transactions used in e-commerce, the EBA has observed the practice that EU merchants contracted with acquirers from third countries outside the EU where SCA was not required in order to postpone or circumvent the requirement to apply SCA.

80. The EBA views such practices as non-compliant and non-permissible under PSD2 since the service is provided within the EU and the respective PSP that provides it should be authorised within the EU. In this regard, the EBA proposes that the Directive provides clarity on the place of provision of services, especially in the online space, as set out in item 1.1. above and to explicitly address the observed practices of EU merchants to circumvent the implementation of the SCA requirements by contracting acquirers from third countries outside the EU. In particular, the EBA proposes a clarification that, in cases where the online sale of goods and

services is carried out within the EU, the acquiring of payment transactions is considered as being carried out in the EU.

Question 3 - Should specific business models or services that are currently not in the scope of the Directive be included? Please include in the assessment in particular new service providers (e.g. “white label”-business models), payment instruments with limited purposes, and services provided by “technical service providers” (such as “gateways” or intermediaries in the payment chain).

81. The EBA has assessed various business models and types of services and the merits of potential approaches to their regulatory treatment. These have included TSPs in the payment chain that are not supervised entities, ‘white label’ business models, intermediaries acting as merchants, and BNPL business models. All of these, including the issues identified as arising from them are elaborated further below.

3.1. TSP in the payment chain that are not supervised entities

82. The EBA has assessed different services provided by technical service providers and actors in the payment chain that may be considered for inclusion in the scope of PSD2. These services covered services provided by payment gateways, services provided by digital wallet providers, operations of card schemes, and services provided by processing entities.

83. The EBA discarded many of these options for various reasons, which are assessed below for each entity, but has also taken into account that these services do not give rise to significant risks that are not already covered by requirements addressed to PSPs. In the view of the EBA, bringing some of these services within the scope of PSD2 will unnecessarily overcomplicate the Directive and can introduce disproportionate requirements. In the specific case of the operation of card schemes, it was viewed that these are already covered by the oversight function of central banks aiming and ensuring safety and efficiency of financial market infrastructures and that there is no specific service that is not already covered by the responsibility of authorised PSPs, and that would therefore require a separate and additional authorisation. Nevertheless, the EBA is of the view that payment card schemes play a crucial role in the compliance with key legal requirements under PSD2, such as SCA. This is mainly due to the fact that they provide communication protocols used by PSPs for the application of SCA and other security requirements. Therefore, the delay in the provision of the respective communication protocols, led to lack of readiness by issuing and acquiring PSPs to implement the SCA requirements, as further elaborated in item 25.2. of this report. In addition, merchants, which are not regulated under PSD2 and are not financial institutions anyway, also have an important role in the implementation and support in the application of SCA and the other security requirements.

84. In that regard, while the operation of payment schemes may not require authorisation under the Directive and acknowledging that payment schemes are subject to oversight frameworks, the EBA sees merit in introducing specific requirements in the Directive to payment schemes and to merchants to ensure that such key security requirements are properly implemented in the future. One particular suggestion that the EBA can propose in the case of merchants is to consider that in the cases where SCA and other potential future security requirements have not been applied because merchants have not implemented IT solutions supporting their application, merchants could bear the liability for any unauthorised and/or fraudulent transactions under the Directive instead of their PSPs under the second sentence of Article 74(2) of PSD2. However, the EBA acknowledges also potential downsides of this approach, namely that CAs will not be able (i) to enforce easily the requirements towards merchants since the latter will not be in the scope of the Directive and (ii) to ensure that merchants bear the liability for unauthorised and/or fraudulent transactions instead of their PSP where they have not implemented IT solutions supporting the application of the security requirements. An additional challenge that may arise relates to the allocation of the supervision and enforcement of the requirements between the home and host CA in the case of cross-border provision of services.

85. In relation to the services provided by digital wallet providers, the EBA is of the view that part of the services, such as the issuance of a token that is linked to an underlying payment instrument or the payment account of the PSU, constitutes an issuance of a payment instrument and is within the scope of application of PSD2 already. The EBA did not find merit in bringing additional services provided by the digital wallet provider, such as the operation of a digital wallet, which the EBA viewed as a service of a technical nature (e.g. the operation of a platform) that does not require authorisation. Nevertheless, the EBA proposes for the Directive to clarify the nature and regulatory treatment of digital wallets.

86. When it comes to the services provided by processing entities, the EBA does not consider these would require authorisation since they are of a technical nature and relate to the authentication and authorisation of payment transactions. Moreover, processing entities do not come in possession of funds during the payment transaction. The EBA overall discarded the possibility of bringing into the scope of the Directive services provided by technical service providers since these tend to fall within the responsibility of PSPs and are usually outsourced.

87. When it comes to the service of payment gateways, the EBA considered the important role payment gateways play in the payment ecosystem by providing technological services supporting the payment infrastructure, facilitating the implementation of security requirements, including SCA, by merchants, and ensuring business continuity to e-commerce. They also accept and process payment transactions for merchants, without entering into possession of funds. Taking this into account, the EBA is of the view that the services provided by payment gateways are of a technical nature and there is therefore no merit in bringing them fully into the scope of PSD2. However, the EBA sees merit in introducing specific requirements in the Directive to ensure that the security requirements are implemented properly by acquiring PSPs and merchants and in a timely manner, possibly without bringing the payment

gateways into the full scope of the Directive and all its requirements. The EBA would also like to highlight that CAs may face the same challenges in the supervision and enforcement of these specific requirements as those set out in paragraph 84 above in relation to payment card schemes and merchants.

3.2. Regulatory approach to 'white label' business models

88. The EBA has observed that 'white label' business models are applied also outside the provision of payment services. Having said that and taking into account that the observed business models fall within the scope of the Directive already, the EBA does not see the need to bring specific services based on white label models in the scope of the Directive as a separate payment service since these services are usually provided on behalf of PSPs or in support to the provision of payment services.

89. In the case where the services are provided in support of the provision of a payment service, such as API aggregation services, PSPs outsource specific functions to the white label provider, which acts in the capacity of a TSP, and would require a case-by-case assessment to inform whether they can be treated as technical services or not.

90. In business models where the white label provider carries out payment services on behalf of the PI/EMI, the EBA has identified specific risks that need to be addressed. This is particularly the case where the white label provider obtains control over the business and over the relationship and communication with PSUs, and the PSU is not aware, at times, who the actual authorised provider of the payment service is. In addition, sometimes the white label providers come into possession of funds and obtain control of the financial flow. Moreover, some of these models can pose specific ICT and operational risk, as well as risk for money laundering and reputational risks.

91. In that regard, the EBA is of the view that, in order to ensure transparency for PSU about the actual authorised entity they are contracting with, protection of PSU's data and transparency for supervisors to identify practices of selling of licenses to firms that do not hold proper operational and governance frameworks, these business models where the white label provider acts on behalf of the PI/EMI should fall within the scope of the agency framework. There is also merit for the Directive to acknowledge some of these agency-related white label business models and that they should be treated as provision of services by agents acting on behalf of the PI/EMI. Supervisory authorities will then be in a position to assess properly each specific white label business model against the applicable risk arising from it and whether the particular provision of services should fall within the scope of the agency framework, of the outsourcing arrangements, or require authorisation.

3.3. Intermediaries acting as merchants

92. The EBA has assessed a specific case where intermediaries (common in the fuel card issuing business), based on the contractual set-up with certain merchants, purchase the goods and services from the original merchant and re-sell them to the customer on their own behalf at

the time when a transaction is initiated with a card issued by the respective intermediary. These providers argue that they do not act in their capacity as intermediaries but as merchants themselves, thus not falling within the scope of PSD2. Depending on the contractual set-up, this may lead to circumvention of the PSD2 requirements, especially if the re-seller does not bear the responsibility for the goods and/or services being provided and, at the same time, is in control of the financial flows.

93. The EBA is of the view that that such business models should be clearly reflected in the Directive, which should state explicitly how they should be treated and delineated. On the one hand, the providers in some of the models set up the provision of payment services so that they circumvent the need to authorise as a PI. On the other hand, however, the assessment of some of the models should be carried out with caution because these re-sellers may actually and legally act in their capacity as merchants that are responsible for the goods and/or services being provided and that bear the risk of the activity, thus falling outside the scope of the Directive since no intermediary services are provided.

3.4. Buy-now-pay-later business models

94. The EBA has assessed different business models for the provision of BNPL services and has arrived at the view that the core service provided is of a lending nature and should be consider as granting credit. The EBA acknowledges that the provision of BNPL services often also entails a provision of a payment service within the scope of PSD2 but is also of the view that the specific payment service to be carried out will depend on the specific business model. These payment services include the execution of payment transactions, acquiring, or money remittance. The EBA is of the view that the scope and requirements of PSD2 are sufficient to assess the payment services used in more common BNPL business models and do not require an additional regulatory approach.

95. On a separate but related topic, Article 18(4) of PSD2 allows PIs to under certain conditions grant ancillary credit related to the provision of payment services. However, it is not clear whether BNPL services can be treated as ancillary credit or not, nor how to capture the interplay between the provided payment service and the BNPL lending.

96. In relation to the above, the EBA proposes to clarify in PSD2 the nature of the ancillary credit to the provision of payment services and whether it covers BNPL services and how the interplay between BNPL services and the provision of payment services should be treated.

Question 4 - What is the EBA's position on the potential merging of PSD2 and EMD2? What would be the opportunities and challenges?

97. The EBA has assessed the opportunities and challenges of a potential merger of PSD2 and EMD2 and has arrived at the view that the opportunities vastly outnumber the potential challenges. The EBA is, therefore, strongly supportive of the merger between PSD2 and EMD2 because it is an opportunity to harmonise the application of the legal framework, streamline and simplify the applicable requirements for PIs and EMIs, avoid regulatory arbitrage, and ensure technological and business model neutrality, a level-playing field between different PSPs, and a legal framework that is future proof. Such a merger will also resolve the significant number of challenges faced by the industry and supervisors in delineating between the two legal frameworks.

98. Some of the more prominent issues that the EBA has observed while these two frameworks have existed in parallel, and which would be resolved by their merger, were:

- Distinguishing between payment accounts and electronic money accounts;
- Distinguishing between payment services and electronic money-related services;
- Distinguishing between scriptural money and electronic money;
- The difference in some of the applicable legal requirements, such as those related to authorisation, own funds and safeguarding;
- The status of distributors of electronic money; and
- Treatment of pre-paid instruments and whether they are based on electronic money in all cases.

99. Each of these is explained in more detail below.

4.1. Clarification on the distinction between payment accounts and electronic money accounts

100. One of the issues identified by the EBA is the difficulty in distinguishing between payment accounts and electronic money accounts. The two types of accounts are very similar, if not identical, in nature since they have the same elements and serve the same purpose, namely, to execute payment transactions. In addition, there is no difference between the process of crediting money to a payment account and issuing electronic money that is then stored on an electronic money account. Therefore, taking into account the principle ‘same activity, same risk, same rules’, there is merit in merging these two terms.

101. Moreover, merging the two terms will address issues in the interpretation of the legal requirements that apply to them. In relation to electronic money accounts, which are not even properly defined in the EMD2, the merger will resolve issues with the lack of clarity in the applicable legal requirements. For instance, Articles 73 and 74 of PSD2 related to liability for unauthorised payment transactions clearly apply to both, electronic money accounts and

payment accounts, while other provisions, such as those under Article 83 and 89 of PSD2 do not seem to apply.

102. When it comes to payment accounts, such a merger will address questions on whether funds stored on payment accounts necessarily need to be based on an existing payment order related to the execution of payment transactions, including future-dated transactions. Relatedly, the EC provided a clarification in the answer to Q&A 4221 that 'a payment institution may hold clients' funds on payment accounts for the purpose of providing payment services, including the execution of not yet specified future payment transactions, in accordance with the framework contract for setting up the referred payment account'. This clarification further contributed to the view that there is not much difference between payment accounts and electronic money accounts.

103. An additional issue in the regulatory treatment of these accounts is the interpretation of Article 18(3) of PSD2, which provides that 'any funds received by payment institutions from payment service users with a view to the provision of payment services shall not constitute a deposit or other repayable funds within the meaning of Article 9 of Directive 2013/36/EU, or electronic money as defined in point (2) of Article 2of Directive 2009/110/EC'. Many market stakeholders have struggled to delineate between funds for the execution of payment transactions, electronic money and repayable funds.

104. In relation to the above, the EBA sees the merger of PSD2 and EMD2 as an opportunity to address the issue on the delineation between payment accounts and electronic money accounts and proposes the term payment account to be the sole term used in the Directive and for it to include electronic money accounts.

4.2. Clarification on the distinction between payment services and electronic money-related services, as well as between scriptural money and electronic money

105. Another issue identified by the EBA from the parallel existence of PSD2 and EMD2 has been the difficulty in distinguishing between payment services and electronic money-related services, as well as between scriptural money and electronic money.

106. The difference between electronic money and scriptural money in their practical use is very negligible and often poses issues in the treatment of innovative business models and payment solutions, which is expected to exacerbate further with the broader rollout of crypto assets. In addition, the bookkeeping on the large majority of payment accounts and electronic money accounts is done electronically and usually relies on the use of the same back-end systems for processing payment services and electronic money-related services, thus making the delineation between these services somewhat artificial.

107. Moreover, since electronic money has very cash-like characteristics, such as anonymity and the ability to be transferred between individuals, the possibility to exchange electronic money to scriptural money poses further challenges in the treatment of these two terms.

108. The very broad nature of the term electronic money as defined in Article 2(2) of EMD2 and the issues identified above on the delineation between scriptural money and electronic money, as well as those in the previous sub-section related to payment accounts and electronic money accounts, result in additional challenges on the distinction between payment services and electronic money-related services. In particular, the execution of payment transactions carried out with electronic money and those with scriptural money, as well as the other services, such as issuing payment instruments and operating an account, are identical and exposed to the same risks. Therefore, delineation between payment services and electronic money-related services does not seem necessary.

109. The EBA has, therefore, arrived at the view that a single legal framework with one consistent set of rules applicable to payment services and electronic money-related services is the desired approach going forward, which will also address issues of regulatory arbitrage. The EBA has identified two potential ways to achieve that and proposes them to the EC for further consideration in the light of the review of PSD2.

110. The first option is to consider all electronic money-related services to be covered by the existing payment services in Annex I to PSD2. This will also remove the need to delineate between scriptural money and electronic money, which can both be encompassed in the term 'funds'.

111. The second option is to introduce hardware-based electronic money services, which are stored on pre-paid cards that are not linked to accounts as an additional payment service in Annex I to the Directive with the remaining electronic money-related services to be covered with the already existing payment services in Annex I to PSD2. This approach will also ensure that any additional and specific risks, such as money laundering and terrorist financing, arising from traditional electronic money services related to the use of pre-paid cards can be mitigated.

4.3. Difference in the applicable legal requirements to PIs and EMIs

112. As indicated in the previous sub-sections related to the potential merger of PSD2 and EMD2, the EBA is of the view that the activities carried out by PIs and EMIs are of very similar, if not identical, nature and give rise to the same risks. Therefore, following the principle 'same activity, same risks, same rules', taking a consistent approach in their treatment will be desirable. This also relates to the legal requirements that apply to PIs and EMIs, in particular those related to the requirements on authorisation, safeguarding, initial capital, and own funds.

113. In relation to the safeguarding requirements, the EBA acknowledges that EMIs are required under Article 7(1) of EMD2 to safeguard funds that have been received in exchange for electronic money that has been issued by no later than five days after the issuance of electronic money. At the same time, Article 10(1)(a) of PSD2 requires PIs to safeguard funds, which have been received from the PSUs or through another PSP for the execution of payment transactions, where 'these funds are still held by PI and not yet delivered to the payee or

transferred to another PSP by the end of the business day following the day when the funds have been received'.

114. The EBA is of the view that such differentiation between the applicable timelines for triggering the safeguarding obligation are not desirable and to ensure level-playing field proposes that the Directive is amended such that the provisions are aligned to the shorter timeline applicable to PIs under PSD2.

115. When it comes to the requirements on initial capital and own funds, PIs are required under Article 7 of PSD2 to have an initial capital of not less than EUR 20 000, 50 000 and 125 000, depending on the payment services they provide. Furthermore, PIs are required under Article 8(1) of PSD2 to hold own funds that shall not fall below the amount of initial capital or the amount of own funds calculated in accordance with Article 9 of PSD2 related to the payment services they provide. By contrast, EMIs are required under Article 4 of EMD2 to have an initial capital of not less than EUR 350 000. EMIs are also required under Article 5 of EMD2 to hold own funds that shall not fall below the amount of initial capital or the combined amount of the own funds for the activity of issuing electronic money, which shall amount to at least 2% of the average outstanding electronic money, and for the activity of provision of payment services not linked to the issuance of electronic money, which shall be calculated in accordance with Article 9 of PSD2.

116. This differentiation, together with the similar business models for carrying out payment services and electronic money-related services, has led to concerns about regulatory arbitrage and unlevel-playing field, as well as issues with the circumvention of the requirements of EMD2 where some institution issuing electronic money, taking advantage of the similarity between payment services and electronic money services, apply for authorisation as a PI.

117. In relation to the above, and in line with the proposals in the treatment of electronic money-related services and the issues related to the application of the own funds requirements part of the response to question 6 of the CfA (further below), the EBA has arrived at the view that a harmonised application of the requirements for initial capital and own funds for PIs and EMIs is desirable. That said, the EBA also proposes that the EC assesses further what the appropriate level of initial capital is, taking into account that in most cases the amount required based on the calculation of the own funds requirements exceeds the requirements for initial capital. In addition, further assessment would be needed on whether, in order to address underlying risks, there is a need to adjust the calculation of the own funds requirements by introducing an additional buffer, similarly to the approach taken in Method D under Article 5 of EMD2, for those payment services where funds are held for longer periods of time.

4.4. Nature and status of distributors of electronic money

118. Another controversial issue related to the interplay between PSD2 and EMD2 is the nature and status of distributors and the different approaches that may be taken across the EU in their treatment by the industry, and also by CAs. Distributors and their respective obligations have not been properly defined in EMD2, where Article 3(4) of EMD2 only prescribes that EMIs shall

be allowed 'to distribute and redeem electronic money through natural or legal persons which act on their behalf'.

119. The EBA is of the view that said provision is insufficient in providing clarity on the nature and status of distributors and views that the revision of PSD2 and the potential merger with EMD2 will be a good opportunity to resolve this.

120. Another point related to the nature of distributors is the evolution of the business models, which now share many features with agents of PIs. For instance, agents play an essential role in the movement of scriptural money, while distributors play the same role in the movement of electronic money. Said evolution has led to convergence in the activities of agents and distributors, which, taking also into account the proposal above for the majority of electronic money-related services to be covered by the existing payment services, would require the application of a coherent legal framework to both of these actors. Such a framework would ensure clarity on the status and treatment of distributors of electronic money, greater transparency for PSUs since distributors will be added to the public registers and for CAs who will obtain a better overview of the activities of distributors. It would also enhance supervision by CAs, including by addressing some concerns that distributors may be providing payment services on behalf of EMIs without being properly registered, and lead to additional legal certainty for the provision of cross-border activities.

121. The EBA therefore proposes the application of a single and coherent framework to agents and distributors of electronic money. On a separate but somewhat related note, such a coherent framework would also be a good opportunity to clarify the current grey area in the EU legal framework on the use of agents for the provision of payment services by CIs.

4.5. Overall complexity of the legal framework

122. The EBA is of the view that merging PSD2 and EMD2 is an opportunity to reduce the overall complexity of the legal framework. This is not only from the perspective of bringing about clarity in the legal requirements highlighted above but also taking into account the interplay of EU payment legislation with other EU legal acts. This is particularly relevant for the proposed EU Regulation on MiCA, which will bring another layer of complexity and interlinked legal provisions, especially in relation to the issuance of e-money tokens, which is currently linked to the concept of electronic money.

123. However, the EBA accepts that the interplay between MiCA and EMD2 that has emerged since the MiCA proposal was originally published may also be a potential challenge for a merger between PSD2 and EMD2, but this would be more from a procedural perspective since the currently envisaged MiCA references to EMD2 should be amended to the corresponding payment services in PSD2. To mitigate this, a potential future revision of PSD2 should avoid limiting the definitions of 'funds' to scriptural money only since it will not be relevant for the purpose of MiCA. The interplay between MiCA and PSD2 is elaborated further in chapter 28.1 below.

Question 5 - Does the EBA consider the current level of thresholds in PSD2 (e.g. Article 3(l) and Article 32(1)(a) appropriate)?

124. The EBA has not identified any significant issues in relation to the current levels of the various thresholds set out in PSD2.

Section 2 - Licensing of PIs and supervision of PSPs under PSD2

Question 6 - Does the EBA see a need to change the prudential requirements under PSD2, such as the calculation of own funds for particular types of payment services or the application of the requirements on professional indemnity insurance?

125. The EBA has assessed the prudential requirements under PSD2 and arrived at the view that there are certain areas that may need slight amendments reflecting the evolution of the business models for provision of payment services, and address ambiguous provisions and concerns with the application of certain requirements. These areas cover the:

- initial capital requirements;
- calculation of own funds;
- own funds of hybrid payment institutions;
- use of professional indemnity insurances;
- framework for recovery and wind-down; and
- safeguarding requirements.

6.1. Initial capital requirements

126. The EBA has observed evolution in different business models for provision of payment services. In particular, the EBA viewed that the risk involved in the provision of some money remittance services and the execution of other payment transactions, in particular those provided online, is quite similar. The EBA has also observed that sometimes it is difficult to differentiate between the business models for the provision of some payment services, e.g. online provision of credit transfers and the provision of money remittance in relation to provision of foreign exchange services, which gives rise to different interpretation and application of the legal requirements, the level of initial capital and own funds in particular. This can subsequently lead to regulatory arbitrage and forum shopping.

127. At the same time, the EBA acknowledges that some business models for the provision of money remittance services are not complex and may not carry the same level of risk as the other payment services.

128. In relation to the provision of AIS and PIS, and taking into account the proposal in item 6.4. below in relation to PII, as well as that TPPs do not enter into possession of funds, the EBA is of the view that the initial capital requirements should be lower compared to the other

payment services. The EBA has not identified any issues regarding the 50 000 EUR initial capital requirement for PISPs, apart from the slight discrepancy between Recital 35 and Article 7(b) of PSD2 for the activities of PISPs that are authorised to provide PIS only. The EBA, therefore, considers this amount of initial capital for PISPs, as well as potentially for AISPs going forward, as appropriate.

129. The EBA has also assessed whether there is merit in introducing additional initial capital requirements for the provision of the additional services under Article 18 of PSD2, the provision of credit in particular, but arrived at the view that such a change would not be necessary. On the one hand, CAs are allowed under Article 11(5) of PSD2 to request the separation of the payment services activity in a separate entity where the non-payment services activities of the PI impair or are likely to impair either the financial soundness of the payment institution or the ability of the CAs to monitor the PI's compliance with the obligations under PSD2. On the other hand, some of these additional requirements, may be subject to specific and separate national own funds' requirements. In the cases where PIs/EMIs engage in the provision of other activities (such as, for example, credit granting), the EBA sees merit in introducing an explicit reference in the Directive, clarifying the respective legal frameworks (e.g. CRR), where the respective own funds requirements for the specific activity are defined. This should ensure that these other activities are equally treated across the EU, thus ensuring a levelled playing field. Furthermore, and more importantly, the inclusion of such a clarification in the Directive would provide CAs with a more robust legal framework when institutions engage in the provision of other services, in particular credit granting activities.

130. Finally, the EBA has assessed whether the initial capital requirements for all payment services should be amended. The EBA did not find specific evidence or compelling arguments to do so. Nevertheless, the EBA acknowledges that the initial capital requirements have not been changed since the adoption of PSD1 and have not reflected the level of inflation or a potential negative change of the economic conjuncture that can be absorbed by PSPs.

131. Based on the above analysis, the EBA proposes that the initial capital requirements for money remittance services are aligned with the payment services as referred to in points (1) to (5) of Annex I to PSD2 in order to ensure level-playing field and that applicable risks are properly mitigated. The EBA sees sufficient tools already available in PSD2 to ensure proportionality for the money remittance services, namely:

- the scaling factor 'k' as set out in Article 9(2)(a) of PSD2, which is twice lower for money remittance services than PIs providing any of the payment services as referred to in points (1) to (5) of Annex I; and
- the possibility for CAs under Article 9(3) of PSD2 to permit the PI to hold an amount of own funds which is up to 20% lower than the amount required under Article 9(1) of PSD2.

132. Nevertheless, the EBA takes note that Article 8(1) of PSD2 on own funds requires PIs to hold own funds that '*shall not fall below the amount of initial capital as referred to in Article 7 or*

the amount of own funds as calculated in accordance with Article 9 of this Directive, whichever is the higher'. This requirement would not be proportionate for smaller PIs that provide money remittance service only, whose own funds requirements based on the calculation under Article 9 of PSD2 are lower than the newly proposed threshold of 125 000 EUR. In that regard, to ensure business continuity of already existing money remitters and to avoid introducing barriers for new entrants, the EBA proposes for these specific cases, CAs to have discretion to decide, based on their assessment of the respective business model against specific criteria set out in the Directive or in an EBA mandate, whether they should require the money remitter to hold own funds equal to the initial capital requirements or to the amount calculated under Article 9 of PSD2.

133. The EBA is also of the view that the Directive may be introducing mechanisms for the adjustment of the initial capital requirements for all PIs over time, either based on the inflation rate or potential periodic review of the requirements.

134. In line with the views expressed above, the EBA also proposes for the Directive to have lower initial capital requirements envisaged for PISPs and AISPs compared to the other payment services, with the amount of 50 000 EUR deemed reasonable.

6.2. Calculation of own funds

A) Methods for calculation of own funds

135. Based on the feedback from CAs, it becomes evident that the most widely used method for calculation of own funds of PI across the EU under Article 9 of PSD2 is Method B. This method is based on the volume of payment transactions executed by the PI in the preceding year. CAs view Method B as addressing best the applicable risks to the activities of PIs and ensuring proper capitalisation of institutions. Methods A and C as set out in Article 9 of PSD2, in turn, have been used for the calculation of specific business models, in particular some business models based on smaller number of transactions with higher amounts, where the own funds requirements under Method B can be disproportionately high. The EBA sees the need for further harmonisation in the application of the methods for calculation of own funds but has not found compelling arguments or identified the need to remove any method that is less frequently used.

136. The EBA has also observed divergent application of the requirement on who should be responsible for choosing the method for the calculation of own funds where, at times, PIs were allowed to choose the method, thus giving rise to potential regulatory arbitrage. The EBA is of the view that, taking into account the need to assess relevant risks and ensure the safety of the funds of PSUs, the decision should be taken by the respective CA.

137. In order to ensure harmonised and consistent application of the own funds requirements and to avoid regulatory arbitrage, the EBA proposes for the Directive to have a single default method for the calculation of own funds. The EBA is of the view that this should be Method B

under Article 9 of PSD2 since it to a greater extent covers the applicable risks and is the most widely used method across the EU.

138. However, since there are specific cases, which may require the application of a different method for calculation of own funds in order to ensure proportionate level of own funds requirements, the EBA is of the view that Methods A and C should be retained in the Directive but for CAs to have discretion to decide on the specific limited cases where these methods need to be applied. The conditions and criteria for CAs' assessment on whether a method for calculation of own funds different from Method B should be chosen, should be specified in the Directive itself and/or set out by the EBA in a potential future explicit mandate.

139. Finally, the EBA has assessed the possibility for calculating own funds based on the different payment services and business models for their provision, as well as the risk involved. The EBA discarded this option since such distinction will be very complicated to carry out and is likely to lead to significant administrative burden for institutions and CAs. Nevertheless, the EBA has identified a specific risk arising from chargebacks which is addressing in subsection c) below on 'Additional issues'.

B) Calculation of own funds under Method B

140. On a separate but related topic, the EBA received in the EBA Q&A tool two questions (see Q&A 4298 and 4299) seeking clarification on the calculation of the own funds' requirements under Method B of Article 9 of PSD2. Both questions were related to the interpretation of the Directive and thus within the responsibility of the EC to provide an answer to. Q&A 4298 sought clarification on 'how to calculate the 'total amount of payment transactions executed' in the calculation of 'payment volume' for Method B for acquiring services. The EC clarified that '*the acquiring of payment transactions may entail two steps. One step is crediting the funds from the acquired transaction to an account held by the acquirer; the other step may entail an actual transfer of the funds to the payee's account, which can be held with the acquirer or another payment service provider. In the case where the acquirer transfers the funds to the merchant's account within another PI and therefore both steps take place, the acquiring entails crediting and subsequent transferring of funds, which are two separate payment transactions. PSD2 does not stipulate to whom the execution of these payment transactions should be attributed where such transactions entail transferring of funds between two PIs. Therefore, Method B of Article 9(1) PSD2 allows for an approach whereby each of these transactions are counted in order to calculate the total amount of payment transactions executed by the acquiring PI*.'

141. However, Q&A 4298 may still be open for further interpretation for the calculation of the payment volume in the particular case where the same PI/EMI acquires the funds and maintains the payment account of the merchant (e.g. observed in some cases in e-commerce). In these cases, it may not be clear how the PI/EMI should calculate the payment volume.

142. Q&A 4299 sought clarification on how to calculate the 'total amount of payment transactions executed' in the calculation of 'payment volume' for Method B when 'input funds' on the

payment account are based on credit transfers and 'output funds' are based on direct debits. The EC concluded that both direct debits and credit transfers, in line with the definitions set out in Article 4(23) and (24) of PSD2, '*entail the transferring of funds - debiting one account and crediting another - by the PI of the payer and the PI of the payee involved in the execution of those transactions'*. EC further clarified that *'PSD2 does not stipulate to whom the execution of a direct debit and/or a credit transfer should be attributed where such a payment transaction entails transferring of funds between two PIs. Therefore, Method B of Article 9(1) PSD2 allows for an understanding whereby all transactions that the PI executes are to be included in the calculation of the PI's own funds, regardless of whether for the purpose of executing those transactions the PI is crediting or debiting its user's account'*.

143. The EBA is of the view that these clarifications contribute to the harmonised and consistent application of the own funds' requirements, in particular the calculation of the payment volume under Method B of Article 9 of PSD2 and proposes for them to be clearly articulated and built upon in the Directive itself to address any remaining gaps, especially in the cases where more than one PI is involved in the provision of payment services. In addition, the specific case of acquiring services where both transactions are carried out by the same PI/EMI can be further clarified, in particular to whom to attribute the volume of payments generated in the acquired transactions. Finally, the Directive could clarify the calculation of own funds requirements for payment transactions where the payer and the payee are clients of the same PI/EMI ('on us' transactions).

C) Granting credit relating to payment services

144. As indicated in item 6.1. above, the EBA has not found merit in increasing the initial capital requirements for the provision of additional services under Article 18 of PSD2. However, the EBA saw merit in introducing additional own funds requirements for the granting of credit relating to payment services. In EBA's view, it is necessary to include in the Directive a uniform calculation method to determine own funds requirements for credit risk based on the standard method under CRR. Accordingly, PIs/EMIs that grant credit relating to payment services should cover with own funds the associated credit since it can have an impact on the solvency of the institution.

145. An additional issue raised relates to the requirement under Article 18(4)(d) of PSD2 which provides that '*the own funds of the payment institution shall at all times and to the satisfaction of the supervisory authorities be appropriate in view of the overall amount of credit granted'*. In the view of some CAs, it is not clear how the term 'appropriate' should be interpreted in order to justify a decision for the increase of the own funds requirements of PIs on that basis. Therefore, should the EC not introduce the proposal in the previous paragraph, the EBA proposes that the Directive clarifies the term 'appropriate' as referred to in Article 18(4)(d) of PSD2 and to consider whether additional own funds requirements to cover the credit activity may be warranted.

D) Additional issues

146. Another issue raised relates to the lack of PIs' and EMIs' liquidity risk monitoring and management, which may merit the introduction of specific provisions related to liquidity monitoring and management, in particular to the introduction of liquidity buffers. This is also relevant since some of the own funds can be covered by intangible assets that are not liquid, and also because some institutions may not have sufficient level of liquidity due to the lack of revenue.

147. A final issue raised by some CAs relates to 'chargeback risks' for the specific cases where certain PIs/EMIs issuing card-based payment instruments or provide acquiring of payment transactions based on card-based payment instruments that are specialised in a particular sector of the economy or have large exposures to specific merchant(s) may be exposed to. The higher risks stem from the potential insolvency of the merchant(s) and the fact the PSPs have to cover regularly the chargebacks based on contractual obligations arising from their card schemes' participation and thus facing the risk of liquidity shortages.

6.3. Own funds of hybrid payment institutions

A) Double counting of own funds

148. The EBA has identified occasional issues in relation to the delineation between regulated payment services and the other activities under Article 18 of PSD2 in relation to the calculation of own funds for different regulatory purposes, such as own fund requirements related to the provision of credit under a separate national or EU legislation. The EBA has observed that this may give rise to challenges for CAs to assess and be assured that PIs are properly capitalised.

149. The EBA, therefore, proposes that the Directive further clarifies on the delineation between the calculation of own funds for regulated and non-regulated activities, especially for entities operating within a group, to avoid double-counting.

B) Impact on the provision of payment service by the additional activities

150. Article 11(5) of PSD2 prescribes that CAs can request the separation of the payment services activity in a separate entity where the non-payment services activities of the PI impair or are likely to impair either the financial soundness of the PI or the ability of the CAs to monitor the PI's compliance with the obligations under PSD2.

151. The EBA has observed that it is not clear what the criteria and/or conditions are for CAs to base their assessment on whether the financial soundness of the PI is impaired or likely to be impaired. Moreover, the provision may give rise to divergent application and interpretation of the requirement, this potentially leading to regulatory arbitrage. Finally, CAs can be challenged in court on their decision to request the separation of the payment services activity without tangible criteria to base their assessment on.

152. In relation to this, the EBA proposes for the Directive to clarify Article 11(5) of PSD2 in relation to the assessment of CAs on whether the financial soundness of the PI is impaired or likely to

be impaired, including by introducing specific criteria and/or conditions to be taken into account by CAs.

C) Additional issues

153. The EBA has also considered whether there is a need to introduce own funds requirements for the additional activities other than the provision of credit, whether the own funds requirements for the provision of payment services should be calibrated when the PI engages in other business activities, and whether to introduce a limit on the volume or potential revenue on the non-payment service-related activities. The EBA, however, did not find compelling arguments at present to propose such a change in the Directive to accommodate these considerations.

6.4. Use of professional indemnity insurances

154. Since the application of the PSD2, the EBA has identified and observed a significant number of issues in relation to the use of the professional indemnity insurances (PIIs). In particular:

- TPPs have experienced significant issues in finding insurers offering PIIs, thus prevented or delaying access to the payment market by new firms intending to offer PIS and AIS by posing an obstacle in the authorisation process;
- Insurers were not fully prepared to offer PIIs to the unfamiliarity with the business of TPPs and the related risks that should be covered;
- Often, it has been very costly for TPPs to obtain and maintain PIIs;
- The clauses and economic conditions in the terms and conditions of the insurance policies have, at times, been difficult to understand by TPPs and supervisors and, thus, may impede covering all applicable risks;
- Due to lack of offering of PIIs by insurers in some EU Member States, TPPs authorised in these jurisdictions had to approach insurers from abroad. This has introduced unlevel-playing field for small entities who may not be able to approach foreign insurers easily in the absence of such insurers in the respective jurisdiction;
- The implementation and application of the PII requirements lead to different interpretation and application by market participants; and
- Insurers have not provided adequate insurance product coverages complying with PSD2 and the EBA Guidelines on the PII.

155. The EBA has been very active in supporting market participants, TPPs in particular, by providing various clarifications and tools to address many of these issues. These included the publication of a 'Tool for calculating the minimum monetary amount of the PII under PSD2' made available on EBA's website in early 2018, providing clarifications through the Q&A tool and facilitating the exchange of information between CAs on available insurers offering PIIs across the EU.

A) PII and initial capital/own funds

156. While TPPs faced significant issues with the use of PII in the first years of application of PSD2, the EBA has observed that the market has settled and the provision of PII is no longer such a significant obstacle for entering the payments market by new TPPs.

157. Nevertheless, the EBA has observed that obtaining a PII may still be considered as an obstacle to the authorisation process leading to significant delays for some TPPs in obtaining a license. In addition, in order to ensure proportionality and level-playing field for smaller institutions who may not be able to allocate easily an insurer within their jurisdiction or in another Member State, an alternative to the PII may be needed in order to facilitate access to the payments market for new TPP entrants.

158. The EBA, therefore, proposes that the Directive introduces initial capital requirements for both AISPs and PISPs as an alternative to the PII for the purpose of authorisation. However, to address the potential liquidity risks in case repayment to the PSU is needed, the corresponding assets to the capital requirements should be sufficiently liquid and TPPs should be required to secure a PII without undue delay after being authorised.

159. The EBA does not see merit in introducing specific own funds requirements for TPPs, in addition to the proposed initial capital requirements, since these will be disproportionate to their activities and will not address the same risks, in particular liquidity shortages.

B) Essential characteristics and risks

160. Another issue identified by the EBA is the lack of clarity in the Directive on what the essential characteristics of and risks covered by the PII policies should be. PSD2 has been silent on that, which led to divergent interpretations and applications of the requirements.

161. In particular, the EBA is aware of clauses of PII policies, which prevent or contradict key requirements of PSD2 related to data protection and addressing security risks, such as cyber-attacks. In addition, PSD2 is not clear on how damages should be calculated and who is responsible for calculating them, especially in the case of AISPs.

162. In relation to the above, the EBA proposes that the Directive clarifies the characteristics of the PII policies and the specific main risks that should be covered.

C) Excess, deductibles and thresholds in PIIs

163. A significant issue related to the use of PIIs identified by the EBA was on whether excess, deductibles and thresholds could be applied to PIIs. The EBA has observed that insurers had been reluctant to offer PIIs without any excess, deductible, or threshold.

164. Furthermore, many market participants sought clarification, including through the EBA Q&A tool, on whether excess, deductibles or thresholds can be applied to PIIs under PSD2 and the related EBA Guidelines. In that regard, the EBA clarified in Q&A 4542 that '*the PII or the comparable guarantee should cover the potential costs and expenses that may be incurred by*

all payment service users of the third party provider (TPP) and ASPSPs resulting from one or more of the liabilities that are referred in Article 5(2) and (3) of PSD2. Where the amount of the cover, has any excess, deductible or any threshold whatsoever, these should not prejudice repayments to payment service users and/or ASPSPs and should be covered by any safeguards the TPP may have put in place, such as a deposit that can be withdrawn within certain conditions, an additional insurance or another comparable guarantee.'

165. While the EBA has provided clarity in the light of the application of the EBA Guidelines on the PII under PSD2, to achieve legal certainty, the EBA is of the view and, therefore, proposes for the Directive to articulate whether excess, deductibles and thresholds could be applied to PIIs. If the EC decided excess, deductibles and thresholds should be permissible under a potential revised PSD2, the EBA further proposes that the Directive:

- clarifies that the amount of the excess/deductible should be covered by the TPP and not the PSU;
- introduces requirements to safeguard and cover risks assumed by the TPP (e.g. by having a separate guarantee, a deposit or own funds), thus ensuring prejudice repayments to PSUs and/or ASPSPs; and
- introduces requirements for regular monitoring of the coverage on ongoing basis.

D) Comparable guarantee

166. The EBA has observed challenges in the interpretation of what could be considered as a comparable guarantee under the Article 5(2) and (3) of PSD2 in the absence of any guidance in the Directive. The EBA had also received a related question in its Q&A tool (Q&A 5335) seeking clarification on whether it is possible to use third party (other than credit institutions) commitments that are covered by a guarantee from a credit institution as a comparable guarantee instead of a PII.

167. In relation to the above, the EBA proposes that the Directive clarifies what could be considered as a comparable guarantee to the PII, in particular by providing specific examples of comparable guarantees acceptable under PSD2 (e.g. a guarantee from a credit institution or a deposit in a credit institution that can be withdrawn under certain conditions) or introducing requirements of the specific characteristics of the insurances that should be met. In addition, the Directive could clarify how the comparable guarantee should determine the beneficiary/creditor or identify them properly.

6.5. Framework for recovery and wind-down

168. The EBA has observed that the number of authorised/registered PIs and EMIs has constantly increased (based on the data on the EBA central register under PSD2), together with, at times, the complexity of their business models and the overall size of their business. At the same time, the EBA notes that there are no specific provisions in PSD2 for recovery and wind-down of PIs and EMIs ensuring that potential future failures of PIs and EMIs are managed in an

orderly fashion without affecting the wider financial stability and without requiring public financial sources for dealing with their potential failure.

169. The EBA takes note that many PIs and EMIs are small with relatively simple business models and structures, and that the wide variety of business models for the provision of payment services that may not allow for a common approach. In addition, there are Member States where there are no significant PIs and EMIs that may pose a risk to the national payments' market. Therefore, having a fully-fledged recovery and wind down framework for all PIs and EMIs will be too rigid and disproportionate.

170. In relation to the above, the EBA proposes a simplified recovery and wind down framework to be used for significant PIs and EMIs, which are more likely to have an impact on the payments' market and the economy overall, or to have a spill-over effect on other financial institutions, including across borders. The significant PIs and EMIs can be identified based on pre-defined criteria of relevance. The EC may take into account the approach on recovery and wind-down frameworks taken in other EU law.

171. Such a framework could cover the information to be provided by PIs and EMIs to their CAs and what conditions should be fulfilled if the institution wants, or the respective CA decides, to liquidate their business. It should also ensure that all funds of PSUs are returned without undue delay and without any barriers or obstacles, as well as liquidity, operational and resilience risks for the respective national market mitigated.

172. In order to achieve that, the EBA is also of the view that CAs should have specific powers, to deal with the failure of PIs/EMIs, which may involve powers to appoint temporary administrators, recovery, possible early intervention measures and resolution-like measures and/or orderly wind down strategies. It should also be noted that the requirements on recovery and wind-down will have an interplay with national law and other EU legal frameworks.

173. The EBA acknowledges that having only significant PIs and EMIs being subject to a recovery and wind-down framework may give rise to level-playing field issues and different treatment of clients of non-significant PIs/EMIs and significant PIs/EMIs. However, the EBA is of the view that introducing a recovery and wind-down framework for non-significant PIs/EMIs will be disproportionate and will introduce significant administrative burden to these institutions to adopt the respective rules and procedures.

174. Finally, the EBA is of the view that the EC may consider introducing in the Directive criteria for delineating between significant and non-significant PIs/EMIs for the purpose of recovery and wind-down framework, with the EBA also standing ready to develop further details on it in RTS.

6.6. Safeguarding requirements

175. The EBA has arrived at the view that there have been aspects of the safeguarding requirements under Article 10 of PSD2 that would require further elaboration and clarification in order to

ensure harmonised approach at EU level and to ensure level-playing field between various PSPs.

A) Comparable guarantee and secure liquid low-risk assets

176. One of the specific issues identified by the EBA was the lack of clarity in relation to what is a secure liquid low-risk asset under Article 10(1)(a) of PSD2. The EBA understands that some Member States and CAs have provided at national level an interpretation on what a secure liquid low-risk asset is, namely:

- Cash and cash equivalents;
- Listed debt securities issued by the government of the Central bank or subject to specific risk coefficients;
- Deposit in a payment account or comparable short-term account with a Central bank;
- Spot-deposits;
- Units in an undertaking for collective investment;
- Assets under Article 336 (1) of Regulation (EU) No 575/2013 that do not exceed the respective thresholds;
- Insurance policies or other guarantees;
- Rating of the securities to be taken into account; and
- Other assets equivalent to the quality and liquidity of the above.

177. Another approach taken is to provide clarity on 'liquidity' (assets being freely transferrable without restrictions in an active market with diverse group of buyers and sellers with reliable), 'security' (assets being protected by the institutions against the various risks inherent in their nature) and 'low degree of risk' (limitation of the various inherent risks).

178. Clarity on this point is further needed since many PIs and EMIs seem to be exploring options to safeguard funds in such secure liquid low-risk assets because of the current negative interest environment having an impact on the cost of holding funds on accounts.

179. Another specific issue is on what could be considered as a comparable guarantee from an insurance company or a credit institution under the Article 10(1)(b) of PSD2 in the absence of any guidance in the Directive.

180. In relation to the above, the EBA proposes that the Directive clarifies what can be considered as a comparable guarantee and what can be considered as a secure liquid low-risk asset for the purpose of safeguarding of funds under Article 10 of PSD2. The EBA sees also merit for the Directive to introduce requirements of the specific characteristics of such guarantees and assets. This should contribute to the single EU payments' market, consistent application of the safeguarding requirements, consumer protection, as well as to avoid regulatory arbitrage.

B) Safeguarding accounts in credit institutions

181. Another issue identified by the EBA related to safeguarding of funds of the PSU has been whether safeguarding accounts of PIs and EMIs can be opened in CIs outside the EU. Market participants in a few jurisdictions have argued that the requirement in Article 10 of PSD2 is open to the interpretation that safeguarding accounts could be opened in banks in third countries outside the EU.

182. The EBA is of the view that credit institution as referred to in Article 10 of PSD2 covers credit institutions authorised in the EU only because the term is explicitly defined in Article 4(1) of Regulation (EU) No 575/2013. However, since there are risks of potential different approaches, the EBA proposes that the Directive articulates clearly that these safeguarding accounts can be opened in CIs authorised in the EU or EU branches of CIs.

C) Coverage of safeguarded funds in a credit institution by a deposit guarantee scheme

183. The EBA has also identified an issue in relation to the lack of clarity on whether the funds safeguarded in a separate account in a CI should be protected by a deposit guarantee scheme.

184. In line with Recommendation 1 in the Opinion on the treatment of client funds under the Deposit Guarantee Schemes Directive (EBA/Op/2021/11)[14], published on 27 October 2021, the EBA proposes to EC to clarify in the Deposit Guarantee Schemes Directive and align in PSD2 and EMD that client funds placed by a PI or an EMI on behalf of their clients in a safeguarding account held in a CI are protected by a deposit guarantee scheme in case that CI were to fail. The EBA is of the view that the expected benefits of such a clarification, such as harmonisation and equal treatment of consumers across the EU, better protection for consumers, consistency with the safeguarding requirements, and assumed limited impact on the deposit guarantee scheme contributions of CIs across the EU outweigh any potential downsides identified and summarised in the above-mentioned Opinion.

Question 7. Has the interplay between the EBA Register under PSD2 and the respective national registers caused any issues, including on harmonisation of data at EBA level?

185. The EBA has assessed the interplay between the EBA Register under PSD2 and the respective national registers, together with the observations accrued since the EBA Register went live in early 2019. As a result of the assessment, the EBA proposes changes to the Directive in the following three areas:

- Occasional discrepancies between the data contained on the national and EBA registers;
- Divergence in some of the data held across national registers; and

14 https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Opinions/2021/1022906/EBA%20Opinion%20on%20the%20treatment%20of%20client%20funds%20under%20DGSD.pdf

- The role of the EBA central register under PSD2.

7.1. Occasional discrepancies between the data contained on the national and EBA registers

186. Article 15 of PSD2 requires the EBA to develop operate and maintain an electronic central register under PSD2. CAs, in turn, are required to provide the information to be contained on the central register, which should be mirroring the content of the information contained on their national registers. CAs are also responsible for the accuracy of the information on the central register and for keeping that information up-to-date. The EBA, in turn, is responsible for the accurate presentation of that information, as provided by the competent authorities.

187. In relation to the above, the EBA has observed occasional discrepancies between the data contained on the EBA. The main issues identified are related to the different options available for transmission of information by competent authorities to the EBA and the lack of specific deadline for the submission of said information. These have led to minor delays in the submission of information from individual CAs to the EBA, which may put the overall reliability of the information on the EBA central register for said Member States in question.

188. In relation to the options for provision of information to the EBA, in line with the requirements of PSD2 and to follow a proportionate approach, the EBA proposed in its RTS on the EBA Register under PSD2, subsequently published in the Official Journal of the EU as Commission Delegated Regulation (EU) 2019/411[15], two alternatives – a web user interface for manual input of information and an application-to-application interface for automated submission of information. Based on the experience accrued by the EBA and the feedback received from CAs the EBA has arrived at the view that the manual input of information, while ensuring at times real-time update of information, is more prone to errors, depends on the availability of staff who input information on the EBA Register and is not appropriate for multiple changes. Therefore, having a single automated channel for submission of information to the EBA will be desirable.

189. The second issue related to the absence of a specific deadline for submission of information to the EBA has led to some occasional delays in updating the information contained on the EBA central register under PSD2 for individual Member States. Most competent authorities have chosen the approach with automated submission of information to the EBA, however, some CAs have set it up on a daily basis, due to the absence of a deadline for submission of information to the EBA, which means that any changes on the national register of these individual CAs will be reflected on the EBA Register on the next day. When it comes to the manual update of information, as highlighted in the previous paragraph, multiple changes or absence of staff who are responsible for inputting information may lead to a delay in the submission of information to the EBA.

[15] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0411&from=EN

190. In relation to the above, the EBA proposes that the Directive introduces a specific common deadline for updates of the EBA central register and the national central registers. In addition, the EBA proposes the introduction of requirements for automated and real-time submission of information to the EBA.

7.2. Divergence in some of the data held across national registers

191. Article 14 of PSD2 sets out the information to be contained on the national register of CAs under PSD2. The ITS on the EBA Register, published in the Official Journal as Commission Implementing Regulation 2019/410[16], set out the details and format of the information to be submitted to the EBA central register under PSD2 as contained on the national registers.

192. After assessing the information that is available on the national registers and the information that would ensure that national and EBA registers reach their objective of enhancing transparency for market participants and ensuring consumer protection, the EBA has arrived at the view that further harmonisation, greater level of consistency and granularity of the information across the national registers is needed.

193. After having assessed various options and taking into account the objectives of enhancing transparency and ensuring consumer protection, the EBA has arrived at the view that the Directive can include the following additional mandatory information on the national registers:

a) The dates of authorisation/registration of each payment service;

b) Information on temporary suspension of particular payment service (so far only withdrawal of authorisation is available as an option);

c) The dates of registration and de-registration of agents;

d) The payment services that agents are allowed to carry out on behalf of the PI;

e) More detailed information about the passporting, including the services notified to be provided in host Member States, indicative date on when the PI commences/intends commencing the provision of payment services in the host Member State, and other;

f) The potential introduction of a common unique identification number for entities to use across the EU, namely one that could be recognised worldwide such as the Legal Entity Identifier, as per the ESRB Recommendation on identifying legal entities (ESRB/2020/12)[17] and FSB recommendations to the G20[18]. On top of its increasing adoption at worldwide and EU level, the LEI is widely used across EBA's IT ecosystem. The importance and benefits of the LEI has been well documented in a recent ESRB occasional paper[19].

[16] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0410&from=EN

[17] See ESRB/2020/12.

[18] See FSB recommendations of June 2012 to the G20.

[19] See https://www.esrb.europa.eu/pub/pdf/occasional/esrb.op.18~7977fb4f23.en.pdf.

194. When it comes to the last point on the common unique identification number the EBA took into account that introducing such identification number will be beneficial from many aspects, namely to

- allow the unequivocal identification of PIs/EMIs across the EU, including the identification of TPPs and the issuance of eIDAS certificates in support of the requirements on access to payment accounts, as well as in support of the passporting requirements;
- improve data collection, aggregation, sharing and processing in general;
- facilitate the reporting obligations and integrating the data for each PI/EMI into master data;
- ensure interoperability between different systems;
- allow for increased automation and advanced analytics in the field of risk analysis and financial stability, namely when merging datasets and lists of institutions compiled for distinct areas of the regulatory data landscape; and
- facilitate comparability of data.

195. At the same time, the EBA has identified some challenges in the introduction of such a unique identification number, namely that:

- some parts of the national identification numbers are being used as part of the IBAN (both for CIs and PIs/EMIs), therefore, moving to another unique identification number may pose challenges to the creation of IBANs in some jurisdictions;
- the approach at national level, at times, there is a common approach in relying on tax numbers or commercial register numbers for all financial institutions, therefore, introducing a common identifier may introduce challenges at national level and require transitional period and arrangements;
- the approach for common unique identification numbers should not be introduced in isolation for PIs and EMIs but consistent with other financial institutions, such as CIs, investment firms and others;
- Using a common unique identification number, depending on the approach taken, may lead to additional costs, including small PIs/EMIs in case a fee needs to be paid; and
- Some supervisory authorities have not fully recognised the relevance of the LEI.

196. In relation to the above, in order to enhance transparency, ensure consumer protection and harmonise the information contained in the national registers, the EBA would propose that the Directive introduces further granularity in the information contained on the national registers under PSD2 by adding the information set out in a) – e) of paragraph 193 above and to consider whether there is merit in introducing a common unique identification number for PSPs, in particular LEI, taking into account the advantages and disadvantages highlighted

above. The EC may consider providing CAs with transitional time to collect the additional information and input it on their national registers.

7.3. The role of the EBA central register under PSD2

197. The EBA developed the central register under PSD2, in line with the RTS on the EBA Register under PSD2, including a machine-readable downloadable copy in JSON format of the entire database that is available on EBA's website. The register went live the day following the application day of the RTS. Based on the data on the operation of the register and the feedback received from market stakeholders since the go-live, the register has proved a very valuable source of information for market participants, averaging 200 000 downloads per month, with peaks reaching more than 1 000 000 downloads in some months. Moreover, the register has been accessed from close to 200 countries around the world.

198. The EBA register under PSD2 has also been used by international standard setting bodies when developing technical specification documents, in particular for the purpose of the issuance of eIDAS certificates related to the requirements in Article 34 of the RTS on SCA&CSC and for market participants verifying the authorisation status of different PIs/EMIs.

199. Nevertheless, a few issues have been flagged to date to the EBA and CAs, in particular (i) the occasional discrepancies between the information contained on individual national registers and the EBA central register, (ii) the lack of a single database for all PSPs authorised in the EU since the EBA central register under PSD2 covers PIs and EMIs and does not cover CIs, which are entitled to provide all payment services, including AIS and PIS, requiring an eIDAS certificate for the purpose of identification towards ASPSPs, and (iii) the need to introduce a machine-readable interface to verify the authorisation status of a PSP since qualified trust service providers issuing eIDAS certificates are not required to check on ongoing basis and to update the authorisation status of TPPs.

200. To address these issues, the EBA is of the view that a more prominent role of the EBA central register under PSD2 can be introduced in PSD2 in order to address the above issues. Taking into account that the EBA has developed and has been operating two separate central registers – the register for payment and electronic money institutions under PSD2 and the credit institutions register, which have specific roles and mirror the approach taken in national level, the EBA is of the view that it may be disproportionate to bring CIs into the central register under PSD2.

201. Nevertheless, the EBA sees merit in having a central machine-readable database for all PSPs that are currently authorised to provide PIS and AIS. This will facilitate the verification of the current authorisation status of these PSPs and the issuance of eIDAS certificates in line with the RTS on SCA&CSC. The EBA, therefore, proposes that the Directive envisages for the EBA to set-up such a list of authorised PISPs and AISPs leveraging on the information contained on the EBA central register under PSD2 and the EBA credit institutions register. This data can cover the name and unique identification number of the PSP and the authorisation status of the entity.

Question 8. Does the EBA see a need for PSD2 to allow for more proportionality?

202. The EBA focused its assessment on whether PSD2 needs to allow for more proportionality in relation to the requirements applicable to PISPs and AISPs. These are elaborated further below.

8.1. Introducing lighter requirements for PISPs

203. The EBA has assessed whether there is a need to introduce lighter requirements in the Directive for PISPs, including in the authorisation process. However, while acknowledging that PISPs do not hold client funds, the EBA viewed the current legal framework applicable to PISPs as proportionate and that the requirements are adequate for the nature of the service, the observed business models and the risk associated with the activity. In particular, the EBA has viewed the lower initial capital requirements for PISPs and the possibility to use a PII as measures introducing sufficient level of proportionality for these PSPs.

204. In addition, the EBA did not identify any evidence that would justify lighter authorisation and/or supervision requirements for PISPs.

205. In relation to the above, the EBA has arrived at the view that there is no sufficient evidence and justification to introduce more proportionality in the Directive for the activities carried out by PISPs.

8.2. Introducing lighter requirements for AISPs

206. PSD2 has already envisaged lighter requirements for the activities of AIS and introduced an exemption from certain requirements in Article 33 of PSD2 for AISPs that provide exclusively AIS. Nevertheless, the EBA has assessed whether there is a merit in streamlining the applicable requirements to the activities of AISPs even further.

207. Following the assessment, the EBA arrived at the view that the applicable legal framework is appropriate and proportionate for the nature of the service, the observed business models and the risk associated with the activity. There is no sufficient evidence and justification to streamline the applicable requirements for AISPs even further.

208. This is without prejudice to the proposals in the section on prudential requirements for introducing greater flexibility for AISPs by allowing them to rely on initial capital and own funds as an alternative to the use of PII.

209. Finally, the EBA reflected on the question whether AISPs should be obliged entities under AMLD in item 28.9 of this report.

Question 9 - Does the EBA see a need for further clarification in PSD2 and EMD2 on when payment services and electronic money services are provided based on ROE and FPS?

210. The EBA focused its assessment on the need for further clarification on whether payment services and electronic money services are provided based on the ROE and FPS and has decided to bring forward to the attention of the EC the following four topics, together with specific proposals on each of them:

- Delineation between the ROE and FPS;
- Reporting requirements regarding activities carried out under the FPS;
- Issues related to the so called 'triangular passporting'; and
- Treatment of simultaneous provision of services under FPS and the ROE.

9.1. Delineation between the ROE and FPS

211. The EBA has observed divergent practices amongst CAs in assessing whether activities carried out cross-border by PIs and EMIs using agents or distributors fall under the ROE or the FPS. These divergences arise due to the lack of clear criteria in the EU legislation to delineate between the ROE and FPS. This in turn sometimes leads to disagreements and protracted discussions between CAs and/or between CAs and financial institutions as to the applicable regulatory requirements and supervisory powers. This may also lead to difficulties for consumers in identifying the applicable consumer protection measures and which authority is the relevant authority for specific supervisory purposes and complaints handling.

212. These issues are not new and have been flagged in the past by the EBA to the EC*, inter alia*, through work performed by the Joint Committee of the three ESAs[20] and also by the EBA through the publication of a number of opinions and reports[21].

213. In its 2019 Opinion on the nature of passport notifications for agents and distributors under the PSD, the EMD2 and the AMLD (EBA-Op-2019-03)[22], the EBA has identified a number of criteria stemming from the EU Treaty provisions on the ROE and the FPS and the case law of the Court of Justice of the European Union on the interpretation of these provisions to help CAs assess whether the use of an agent or distributor by a PI/EMI triggers an establishment of the appointing institution in the host Member State.

[20] JC Report on cross-border supervision of retail financial services (JC/2019-22)

[21] See for example the EBA Report on the Future AML/CFT Framework in the EU (EBA/REP/2020/25) (pages 46-48) and the ESAs response to the EC CfA on Digital Finance (ESA 2022 01) (pages 69-71)

[22] Opinion on the nature of passport notifications for agents and distributors under the PSD, the EMD2 and the AMLD (EBA-Op-2019-03)

214. The Opinion sets a strong expectation of the approach CAs should take, but it does not carry the same degree of enforceability as Regulations or Technical Standards. Also, as the criteria identified in the Opinion are based on the criteria in the existing case-law that is not specific to the case of agents and distributors of PIs/EMIs, they still leave room for interpretation and are subject to change as case law develops. This means that legal certainty for CAs or financial institutions cannot be achieved through EBA Opinions or Guidelines alone, but should instead be based on clear legal provisions that are both, enforceable and do not change as case law changes.

215. Therefore, the EBA reiterates the recommendation for the Directive to clarify the criteria for delineating between the ROE or the FPS, having regard to the specific case of PIs and EMIs using agents or distributors but also considering the need to ensure a holistic and coherent approach at EU level as regards the exercise of these fundamental freedoms under the EU Treaties across the banking, investment and insurance sectors.

9.2. Reporting requirements regarding activities carried out under the FPS

216. Related to the above issue, some CAs have indicated in their feedback that (i) the CA of the host Member State does not always have sufficient visibility of the activities carried out in its territory by PIs and EMIs operating under the FPS, and (ii) the risks arising from failure to comply with conduct rules which affect consumers located in the host MS. CAs also flagged that the CA of the host Member State is in a better position to assess potential infringements by incoming passporting PIs/EMIs of the national legislation in the host Member State. To address the issue regarding the lack of visibility by the host CA, some CAs were of the view that the Directive should allow the CA of the host Member State to request information directly from the respective PIs/EMIs.

217. In this respect, the EBA is of the view that this issue should be addressed by improving the cooperation process between the CAs of the home and host Member States. In addition to this, the provisions of Article 29(2) PSD2 can also be revisited in order to allow the CA of the host Member State the possibility of requesting direct reporting from PIs on the activities carried out in its territory under the FPS. As regards the latter option, the EBA is of the view that such information should be limited to what is necessary in order to allow the CA of the host Member State to perform its responsibilities, including under Article 30(2) PSD2, and should be without prejudice to the fact that the primary responsibility and supervisory powers in the context of passporting belong to the CA of the home Member State. Also, this should not create a disproportionate burden for PSPs providing services under the FPS. In terms of scope of the information that could potentially be covered by such reporting, the EC may wish to adjust accordingly the scope of the mandate granted to the EBA under Article 29(6) PSD2 to also capture the reporting of information to the host CA by PIs operating under the FPS.

9.3. Issues related to the so called ‘triangular passporting’

218. In addition to the above issues, the EBA has also identified divergent practices amongst CAs as regards the treatment of passporting notifications in the case of the so-called “triangular

passporting". This refers to cases where a PI/EMI authorised in a country "A" uses an intermediary (such as an agent, distributor or branch) located in a country "B" for offering payment services in another country "C". In particular, CAs have taken divergent interpretations regarding the permissibility of such passporting notifications that are not explicitly envisaged in the PSD2. The so called 'triangular passporting' also raises supervisory challenges as regard the supervision of the activities carried out in the host Member State (including from an AML/CFT perspective) and in determining which AML/CFT and consumer protection regulations are applicable to the services provided by the intermediary in the host Member State.

219. These aspects are the subject matter of Q&A 5726 that will be answered by the EC. Whilst this Q&A is expected to bring some clarifications regarding the permissibility of triangular passport notifications, the EBA proposes to address this type of passporting explicitly in the Directive itself and to provide clarity regarding the allocation of supervisory responsibilities between the relevant CAs involved. This would ensure supervisory convergence across the EU, support a level playing field and provide legal certainty to CAs and PSPs.

9.4. Treatment of simultaneous provision of services under FPS and the ROE

220. Another issue related to the passporting procedure that the ESAs have previously flagged to the EC[23] relates to the simultaneous exercise of the FPS and the ROE. In this respect the EBA reiterates the observation outlined in paragraphs 77 and 78 of the JC report from 2019 that the simultaneous exercise of the FPS and the ROE may be confusing for customers and creates uncertainty regarding the allocation of supervisory responsibilities between the CAs of the home and host Member States, as financial institutions might not be able to relate clearly the services they provide to either FPS/ROE.

221. In this respect, the EBA reiterates the recommendation in the JC report that the Directive clarifies further the admissibility of simultaneous exercise of the FPS and ROE and to assess the feasibility of two potential ways to address the issues identified. One way could be to assess the legal feasibility of clarifying that, where a financial institution provides services in a host Member State simultaneously under the ROE and FPS, unless proven otherwise, all services provided in the respective Member State shall be deemed as being carried out under the ROE. Another way could be to require financial institutions exercising simultaneously the FPS and the ROE to clearly disclose to the respective CAs which activities are being provided under the FPS and which activities are carried out under ROE, as well as to ensure an appropriate level of disclosure towards their customers, so that these latter are fully aware of their rights and of the relevant communication channels (e.g. to submit any claims) they may use.

[23] JC Report on cross-border supervision of retail financial services (JC/2019-22)

Question 10 - Does the EBA see a need to introduce consolidated group supervision in PSD2?

222. The EBA recognises the significant transformation of the EU financial sector linked applications of innovative technologies to financial services in the recent years. This transformation has invested firstly and more profoundly the payment market, with the entry of many non-bank digital providers, in the shape of start-up firms specialised in a specific service or customer niche as well as large digital players offering payment services to complement their core proposition. Over time, these firms, as well as incumbents, have often evolved their structure together with their product/service offering, resulting in corporate group, which may hold different types of financial service licences and be incorporated in different jurisdictions.

223. In this respect, the EBA acknowledges the operational, reputational and financial interdependencies that may exist within mixed activity groups and resulting risks, as already indicated by the ESAs in their response to the EC's Call for Advice on digital finance.

224. As set out in the joint-ESA response, Recommendation 7 in particular, there are several approaches that could be considered to mitigate these risks, including, prudential consolidation and financial conglomerates (FiCOD)-style structured supervision.

225. These approaches could also help address risks of regulatory arbitrage and protect the level playing field with respect to banking and other groups already subject to consolidated/conglomerates supervision.

226. As to the risks that could be better captured under consolidated group supervision, also based on the input of the CAs, the EBA indicates primarily liquidity and cross default risks, but also operational risks, money laundering/terrorist financing and other conduct risks, governance and strategic risks, step-in and solvency risks.

227. In particular, the EBA underlines the opportunity to get an overview of the group's situation as a whole, including capital allocation and overall strategy, for some business models where the services of the regulated entity (PI/EMI) are tightly interlinked with the group's activity as a whole.

228. More specifically, the EBA underlines the benefit of establishing own funds requirements at a consolidated level - e.g. for groups in which the parent company is in the IT business and offers technological platforms or services to PIs or EMIs in the same group, or where the main activity is offering cryptocurrencies services and an EMI is constituted as an instrumental company - also for the sake of a level playing field.

229. On the other hand, the EBA acknowledges the challenges of the consolidated supervisory approach and the importance of taking proportionality into account. In fact, disproportionate burden and costs both for the operators and the CAs could stem from a generalised application of consolidated supervision, in particular for small PIs/EMIs where the impact of possible

business or operational failures on other operators and the market as a whole can be deemed as limited.

230. The risk of fragmentary practices due to different consolidation frameworks applicable, and the inherent complexity of determining the level of applicability of each regulation according to the underlying operation, possibly involving the intervention of different supervisory authorities, should also be taken into account.

231. The EBA, therefore, proposes to the EC to assess carefully the advantages and challenges of the introduction of consolidated group supervision in the PSD2, as emerging from the arguments presented above, taking also into account other potential approaches. As a potential way forward, one balanced option worth exploring could be to consider introducing consolidated group supervision, but limiting its scope to significant or systemic PIs/EMIs only. The EC may consider introducing criteria for delineating between significant and non-significant PIs/EMIs for the purpose of consolidated group supervision, with the EBA also standing ready to develop a mandate on it.

Additional issues not covered in the questions from this section

232. In addition to the specific questions posed by the EC in the section on Licensing of PIs and supervision of PSPs under PSD2, the EBA proposes changes in the Directive on the following three topics, which are elaborated in detail further down:

- Provision of part of the PI/EMI's services in the home Member State;
- Delays in the authorisation process; and
- Parallel applications for authorisation submitted in different Member States in the context of forum shopping.

10a.1. Provision of part of the PI/EMI's services in the home Member State

233. Article 11(3) of PSD2 prescribes that 'a payment institution which, under the national law of its home Member State is required to have a registered office, shall have its head office in the same Member State as its registered office and shall carry out at least part of its payment service business there'. The EBA is of the view that the reference to 'part of the activity' is too vague, broad and gives rise to different interpretations and approaches across the EU, thus leading to inconsistent and non-harmonised application of the legal framework.

234. The EBA considered how Article 11(3) of PSD2 can be further clarified. This included the potential introduction of a threshold with a minimum percentage of the activities to be carried out in the home Member State. The advantage of such an approach will address issues with forum shopping since the PIs will be expected to apply for authorisation in the Member States where the highest volume of their actual activity is carried out, thus ensuring proximity between supervisors and the most relevant market for the institution.

235. However, the EBA discarded this possibility because it will:

- go against the principle of the right of establishment set out in the Treaty on the Functioning of the European Union (TFEU), as well as Directive 2006/123/EC on services in the internal market;
- be discriminatory to smaller Member States where authorized PIs often rely on cross-border provision of services;
- be difficult to set out balanced threshold because of the difference in the size and specificities of national markets, and the specificity of the different payment services that are being provided; and
- pose challenges on the supervision of specific institutions if the percentage of the activity changes over time and may require the domicile of the PI/EMI to be moved (and potentially re-authorised) in another Member State.

236. Nevertheless, to address the issue at hand, the EBA proposes to introduce in the Directive, in addition to the requirement for PIs to carry out at least part of their payment service business in the home Member State, additional requirements for core functions that need to be carried out by the PI in the home Member State. These functions can include but not be limited to the control of the business, location of management and other key staff, location of marketing campaigns, and others. However, the EBA acknowledges the potential disadvantages of this approach that relate to the application of this requirement at group level where some of the functions are centralised or the cases where some of the functions may be outsourced.

10a.2. Delays in the authorisation process

237. Article 12 of PSD2 prescribes that 'within 3 months of receipt of an application or, if the application is incomplete, of all of the information required for the decision, the competent authorities shall inform the applicant whether the authorisation is granted or refused. The competent authority shall give reasons where it refuses an authorisation'.

238. The EBA is aware of concerns by applicants in relation to the duration of the authorisation process in some Member States where, at times, it can exceed one year. The EBA has, therefore, assessed these challenges in the context of the Call for Advice on the review of PSD2 in order to inform whether the requirements of Article 12 of PSD2 require some amendments.

239. However, based on the feedback received from CAs, the EBA understands that the process usually takes longer than 3 months since:

- CAs require additional information from the applicants in order to take an informed decision;
- PSD2 has increased the number and complexity of the documents submitted with the application of authorisation;

- CAs need to assess different and specific, often innovative, business models, which requires the provision of specific information and time to understand properly the business proposition and the applicable risks for PSUs and the market in general;
- Some applicants lack knowledge on the legal framework and thus requiring clarifications and guidance from CAs with the additional information that is usually being requested; and
- Some applicants provide legally sound applications that do not reflect the specific business model of their activities, thus requiring further adaptation.

240. In addition, CAs highlighted that the current 3-month timeline envisaged in Article 12 of PSD2 is appropriate and already quite strict.

241. Finally, and crucially, CAs stressed on the fact that application of a stricter authorisation regime will be disadvantageous to applicants since business propositions that are not fully in line with the requirements but that could be, will need to be rejected by the CA, thus giving rise to reputational issues for these applicants. Stricter authorisation regime will also put an additional administrative burden to CAs.

242. In relation to the above, the EBA does not see the immediate need to amend the provision of Article 12 of PSD2. Nevertheless, the EBA has initiated a Peer review on the Guidelines on the information to be provided for the authorisation of PIs and EMIs and for the registration of AISPs (EBA/GL/2017/09)[24]. The EBA envisages for the Peer review to be finalised by the end of 2022 where the EBA will assess this issue in greater detail and may come up with specific proposals or best practices to be implemented by CAs.

10a.3. Parallel applications for authorisation submitted in different Member States in the context of forum shopping

243. The EBA has identified issues in relation to regulatory arbitrage stemming from forum shopping (choosing the jurisdiction with the most lenient approach for authorising PIs), which had resulted in parallel applications for authorisation being submitted to different CAs. Acknowledging that such practices cannot be forbidden, the EBA is of the view that submitting parallel applications to different CAs is not a desired practice and calls into question the compliance with the requirements of Article 11(3) of PSD2, which prescribes that PIs should carry out at least part of their payment service business in the home Member State.

244. The EBA acknowledges that it may be difficult to fully resolve this issue because of different approaches and internal processes in the assessment of application by CAs, such as establishing a dialogue between the potential future applicants and the CA, the speed of the authorisation process, the respective workload of and available resources to the CA and others. Nevertheless, the EBA is of the view that further actions should be taken in order to

[24] https://www.eba.europa.eu/sites/default/documents/files/documents/10180/1904583/f0e94433-f59b-4c24-9cec-2d6a2277b62c/Final%20Guidelines%20on%20Authorisations%20of%20Payment%20Institutions%20%28EBA-GL-2017-09%29.pdf?retry=1

ensure a harmonised and consistent application of the authorisation process, thus mitigating the issues with parallel submissions of applications for authorisation and limiting forum shopping.

245. In that regard, the EBA has already proposed in this report two measures that can mitigate the issue at hand, namely the proposal in item 10a.1. to introduce requirements in the Directive for core functions that need to be carried out by the PI in the home Member State and the proposal in item 22.1. to convert the Guidelines on authorisation under PSD2 into an RTS.

246. In addition, to mitigate these issues by enhancing the transparency towards CAs, the EBA proposes that the Directive introduces requirements for mandatory disclosure of information by the applicants in relation to other jurisdictions where the applicant has submitted or intends submitting an application for authorisation under the Directive.

Section 3 - Transparency of conditions and information requirements

Question 11 – Has the EBA identified any need for clarification or amendments of specific provisions in PSD2 on the application of the requirements for transparency of conditions and information requirements?

247. The EBA has assessed the requirements under Title III of PSD2 on Transparency of conditions and information requirements for payment services and identified the following topics, which are elaborated in detail further down:

- Information requirements applicable to TPPs;
- Notification to the payer prior to the execution of a payment transaction and/or when setting-up a new mandate for payee-initiated transactions; and
- Clarifications related to the name of the payee.

11.1. Information requirements applicable to TPPs

248. The EBA has observed some inconsistencies of the legal framework in relation to the application of the requirements for framework contracts to TPPs. These lead to lack of legal certainty for TPPs and divergent interpretation and application of the respective legal requirements. Overall, the EBA understands that the provision of AIS and PIS can be based (and often is) on a framework contract.

249. When it comes to PISPs, there has been a divergent approach in the drafting of Chapters 2 and 3 of Title III of PSD2, related to single transactions and framework contracts respectively. In particular, Chapter 2 on single transactions refers to PSPs and PISPs separately, while Chapter 3 on framework contracts refers to PSPs only. The EBA is of the view that the Directive should take a harmonised and consistent approach by referring to PISPs only when specific requirements apply to them only or when they are explicitly exempted from a specific requirement.

250. In addition, taking into account that Article 66 of PSD2 refers only to the 'payer' and not to the 'payee', a question arose on the treatment of business models where the PISP has a contractual relationship with the payee. In that regard, the EBA is of the view that PISPs should always have a contractual relationship with the payer who requests the initiation of a payment order from their payment account. Where PISPs also have a contractual relationship with the payee for offering PIS, both the payer and the payee, in their capacity as PSUs, will be subject

to the respective rights and obligations envisaged in the Directive. The EBA proposes that the Directive clarifies these aspects.

251. In relation to the case of AIS, the EBA has identified discrepancy in the applicable requirements for PSPs that, in addition to the provision of other payment services, provide AIS and AISPs that are exempted under Article 33 of PSD2. In particular, this relates to the provisions Articles 40, 53, 54 and 55 of PSD2, which relate to charges for information, accessibility of information and conditions of the framework contract, changes in conditions, and termination of the framework contract. Since this discrepancy gives rise to level-playing field issues between the different providers of AIS, the EBA is of the view that, following the principle 'same activity, same risk, same rules', the Directive should apply in the same manner for all AISPs and not differentiate between those exempted under Article 33 of PSD2 and those that are not. The Directive should also clearly articulate, which requirements are not applicable to AIS and explicitly exempt all AISPs from applying those.

252. Based on the above, the EBA proposes that the Directive clarifies the information requirements related to framework contracts that are applicable to PISPs and AISPs.

11.2. Notification to the payer prior to the execution of a payment transaction and/or when setting-up a new mandate for payee-initiated transactions

253. The EBA has assessed whether there is merit in introducing a requirement for the payer's PSP to notify the payer prior to the execution of payment transactions. The advantages and disadvantages are listed below.

254. In relation to the advantages that such notification requirements can bring, the EBA has arrived at the view that that they may be related to:

- Increase in consumer protection due to higher PSU awareness and transparency, including on the mandates provided to merchants in the cases of MITs; and
- Prevention of unauthorised and/or fraudulent transactions, in particular those based on social engineering, subscription scams, errors and fraudulent mandates, due to the possibility of an immediate reaction by PSUs since they will be able to identify the payee in the cases where SCA and dynamic linking requirements are not being applied.

255. In relation to the disadvantages that such notification requirements can bring, the EBA has arrived at the view that that they may be related to:

- Unnecessary PSU information overload if these notifications are applied for all payment transactions, including payer-initiated transactions;
- Confusing or misleading PSUs since they may think that the transaction they are initiating will be suspended until they give consent, thus introducing friction;
- Higher costs for PSPs and the need for additional technical developments;
- Fraudsters also use notifications when intending to manipulate PSUs;

- Such a notification system may not be applicable to specific groups of population such as elderly and vulnerable people who may not often use technologies allowing for the use submission of these notifications;
- Excessive requirement for PSPs due to the strong refund rights for PSUs with regard to direct debits;
- Excessive requirement for PSPs due to the need to apply SCA prior to the initiation of the series of payment transactions; and
- Concerns about the feasibility to introduce a notification prior to the execution of an MIT operation.

256. In relation to the above, the EBA has arrived at the view that it will be disproportionate to require PSPs to notify their PSUs about the upcoming execution of all payment transactions, since the disadvantages clearly outweigh the advantages. However, taking into account that most disadvantages relate to payer-initiated transactions, which are subject to many requirements, including the application of SCA and dynamic linking for remote electronic payment transactions allowing the PSU to identify the payee, the EBA is of the view that there is merit in introducing notification requirements for payee-initiated transactions, such as MITs and direct debits, prior to the execution of the payment transaction. This should enhance the protection of consumers who may not be aware that merchants have a mandate to initiate payment transactions from their account and can potentially address issues related to phishing attacks, subscription scams, errors or fraudulent mandates given.

257. In relation to some of the disadvantages, in particular the unnecessary PSU overload and PSU confusion, PSUs may be given the possibility to opt out of these notification requirements and the language to be clear, simple, and understandable for the PSU.

258. In addition, when it comes to the communication channel, to address the concerns about cost for PSPs, imposing excessive requirement to PSPs, the EBA has arrived at the view that a preference should be given to cheaper and more efficient channels and means, relying on push notifications, emails, etc. At the same time, this should be leveraged against the competing concern on the impact on specific groups of population who may not be using internet or mobile phones, which would also require other alternatives for these groups of population. In that regard, the EBA proposes that the notification channel and means should be agreed between the PSP and the PSU.

259. Finally, to reflect on the concern about the potential high cost for PSPs, there may be merit in carrying out a cost benefit analysis.

260. In relation to the above, the EBA proposes that the Directive introduces notification requirements from the payer's PSP to payers for payee-initiated transactions but to take into account the need to base these on an additional cost-benefit analysis to address concerns about the cost for and challenges in implementation by PSPs.

11.3. Clarifications related to the name of the payee

Whether the name of the payee should be the same as the commercial name of the payee

261. Since the application of PSD2, the EBA has observed issues arising from the mismatch between the name of the payee and the commercial name of the payee, which are not consistently used in account statements and when the name of the payee is displayed, as part of the dynamic linking requirements under Article 97(2) of PSD2, during the authentication of the PSU for remote electronic payment transactions. These issues led to lack of transparency for retail PSUs and inability to identify unauthorised and/or fraudulent transactions. The latter also having a negative impact on the fight against fraud since some of the fraud-prevention measures introduced in the Directive, such as dynamic linking, may not fully reach their objectives.

262. The EBA, acknowledging that there are market initiatives to solve the issue between the mismatch of the name of the payee and the commercial name, has assessed the advantages and disadvantages from supervisory point of view on matching the two names.

263. The advantages identified are listed below:

- Enhanced transparency for beneficiary information since the payers will be able to recognise payees in their account statements and potential unauthorised and/or fraudulent transactions during authentication of remote payment transactions; and
- Enhance PSU awareness and confidence in making payments.

264. The disadvantages identified are listed below:

- Challenges for market participants to add the commercial/brand name in the authentication or the account statements;
- Impact on existing payment infrastructure and rules in relation to the attributes contained in the messaging systems;
- Complex and divergent types of transactions and corporate structures that make the practical implementation challenging; and
- Differences in how commercial names are displayed in different languages across the EU.

265. In relation to the above, while the EBA finds merit in matching the official name of the payee and the commercial/brand name or displaying both to the PSU, the EBA takes note of the challenges at present. In that regard, the EBA proposes to the EC to consider introducing requirements in the Directive to address the issue but suggest for the EC to carry out a detailed impact assessment on it before introducing specific requirements.

Whether the name of the payee should be used for identification together with the IBAN

266. The EBA has also assessed the possibility to use the name of the payee, together with the IBAN, as part of the identification of the beneficiary. The advantages identified in doing so related to:

- Ensuring that payment transactions are sent to the correct beneficiary;
- Protect the PSU against fraud, social engineering fraud in particular;
- Improving overall transparency for PSUs;
- Facilitating the uptake of instant payments; and
- Protecting against mistakes by the payer.

267. The EBA, however, identified the below disadvantages, the extent to which would depend on the specific process of identification and verification of the payee:

- Unintended rejections of transactions due to minor discrepancies between the name provided by the payer and the actual name of the payee, mistakes stemming from the use of different languages, as well as specific cases where the payer is aware of the commercial name of the payee only, rather than the payee's legal name and the payee's legal name is used for identification;
- Potential high cost for infrastructure and IT implementation;
- Negative impact on the overall execution time of payment transactions, thus leading to less convenient and efficient payment transactions;
- Difficult and time-consuming to implement;
- Introduction of more complexity in the liability regime;
- Operational burden; and
- Many different use-cases that need to be taken into account.

268. Acknowledging that there are confirmation of payee-related services on the market, the EBA has arrived at the view that further assessment on the impact of potential regulatory requirements would be needed before introducing specific requirements in legislation. This is also to ensure that the disadvantages highlighted above do not outweigh the advantages. In addition, the underlying issues, such as transparency for PSUs, preventing fraud, and improving financial education, may be addressed also through other means and legal requirements.

Informing PSUs that PSPs do not check whether the IBAN and the name of the payee match

269. Following up on the previous issues, the EBA has observed that often PSUs are not aware that PSPs do not check whether the IBAN and the name of the payee match. This subsequently decreases the vigilance of PSUs over potential fraudulent payment transactions, in particular those based on social engineering where the fraudster manipulates the PSU in performing a

certain action, such as initiating a payment transaction. In that regard, and taking into account that it may by disproportionate and impractical to introduce general requirements in relation to matching the name of the payee and the IBAN of the payee, but that PSUs bear the liability and the related financial loss under Article 88 of PSD2 if they have provided a wrong IBAN, the EBA arrived at the view that to mitigate to some extent the issue identified, PSUs should be made aware that such checks are not being carried out by PSPs and the consequences in case they provide a wrong IBAN.

270. In relation to the above, EBA propose that the Directive introduces requirements requiring PSPs to inform PSUs that their PSP and the PSP of the payee are not required to check whether the IBAN of the payee and the name of the payee match.

271. Finally, while the EBA assessed the issues related to the name of the payee from PSD2 point of view, the EC may take into account also the interplay of the issues with the provisions of the WTR.

Section 4 - Rights and obligations

Question 12 – Has the EBA identified any issues with respect to the application of the requirements in Article 75 of PSD2, i.e. payment transactions where the transaction amount is not known in advance and funds are blocked? Does the EBA see merit in introducing maximum limits for the amounts to be blocked on the payer's payment account when the exact transaction amount is not known in advance?

272. The EBA has assessed the provisions of Article 75 of PSD2 to reflect on the questions posed by the EC. As a result, the EBA has identified and elaborated in detail further down the following distinct topics:

- Blocking of funds and potential introductions of maximum limits on the amounts to be blocked for transactions where the final amount is not known in advance; and
- Additional clarifications related to transactions where the final amount is not known in advance, including when the final amount is different than the amount blocked.

12.1. Blocking of funds and potential introductions of maximum limits on the amounts to be blocked for transactions where the final amount is not known in advance

273. The EBA has identified that, at times, the funds blocked for transactions where the final transaction amount is not known in advance may be disproportionately and unreasonably high for the specific purchase/transaction. In addition, it has not always been justified to block funds of PSUs for potential expenses that in many cases will never materialise, thus reducing the funds available for spending on other goods and services.

274. Another related issue that brings further detriment to consumers is on the divergent practices in relation to the time of release of blocked funds. Funds often have not been immediately released after the execution of the payment transaction or the receipt of the payment order, or even, at times, have required an additional action in the form of explicit request from the payer.

275. In order to address these, the EBA has assessed a few options, in particular the introduction of a limit on the amounts to be blocked and introducing additional requirements in relation to blocking of funds. While the EBA understands the rationale for the request to the EBA to assess whether the introduction of limits on the amount to be blocked will address the existing issues, the EBA is of the view that setting such limits will be challenging because of the different types of transactions, divergent amounts of transactions, specificity about each purchase of goods or services, the inherent risks of the transaction and the customer risk profile. In addition,

should such a limit be introduced, it would pose a risk that PSPs apply the limit for all transactions, irrespective of the specificity and the potential amount of the underlying transaction.

276. Therefore, the EBA is of the view that maximum limits for the amounts to be blocked on the payer's payment account when the exact transaction amount is not known in advance should not be introduced in the Directive. Nevertheless, the EBA sees merit in addressing the two issues mentioned above and proposes that the Directive introduces specific requirements in relation to the blocking of funds. In particular, these may cover requirements for:

- PSPs to have a justified reason for blocking funds for the respective transaction, thus preventing unnecessary block of funds and limit the reasons for blocking funds.
- PSPs to agree with the PSU on the exact blocking limits that can be applied.
- The provision of consent for blocking of funds.
- The applicable timeline for keeping the funds blocked and the conditions, under which, the funds should be unblocked. The release of funds could (i) take place immediately after there is no further need for keeping the funds blocked, (ii) be based on a requirement towards the payee to release the funds within a certain deadline after the delivery of the goods/services, or (iii) be based on a pre-defined date specified in the consent given by the PSU.
- The timeline for the confirmation of the final amount by the payee.

12.2. Additional clarifications related to transactions where the final amount is not known in advance, including when the final amount is different than the amount blocked

277. The EBA is of the view that the provision of Article 75 of PSD2 is too narrow. First, the requirements refer only to card-based payment transactions initiated by the payer, which brings uncertainty to the market in relation to the possibility to block funds with other payment instruments, for instance credit transfers initiated through a PISP.

278. Second, the provision of Article 75 of PSD2 does not address cases where the final amount of the transaction may not be known in advance and where funds are not blocked. This is particularly relevant from the perspective of the application of SCA for these transactions. Relatedly, the EBA has clarified in Q&A 5133 that 'for card-based payment transactions where the exact transaction amount is not known in advance, if the final amount is higher than the amount the payer was made aware of and agreed to when initiating the transaction, the payer's PSP shall apply SCA to the final amount of the transaction or decline the transaction. If the final amount is equal to or lower than the amount agreed, the transaction can be executed and there is no need to re-apply SCA, as the authentication code would still be valid in accordance with Article 5(3)(a) of the Delegated Regulation. This applies also to card-based payment transactions where the exact amount is not known in advance and funds are not blocked by the payer's PSP in accordance with Article 75(1) of PSD2.

279. In relation to the above, the EBA proposes that the Directive clarifies these two aspects in the Directive.

Additional topics to the section

280. In addition to the specific questions posed by the EC in this section on Article 75 of PSD2, the EBA has assessed the requirements under Title IV of PSD2 on Rights and obligations and puts forward specific proposals on the following five topics where further clarification in the Directive is needed:

- Distribution of liability between PSPs, including in the cases where an exemption from SCA has been applied;
- Clarification on the terms used in relation to evidence of authentication and execution of payment transactions, as well as unauthorised or fraudulent payment transactions under Articles 72-74 of PSD2;
- Adjustment of specific provisions of PSD2 to fit the specific nature of instant payments;
- Addressing issues to unilateral increase by PSPs of the spending limits for payment transactions executed through payment instruments that are also used for giving consent; and
- Clarification on the possibility for the PSPs to block a payment transaction in case of suspicion of fraud.

12.3. Distribution of liability between PSPs, including in the cases where an exemption from SCA has been applied

281. Articles 73 and 74 of PSD2 mainly regulate the distribution of liability between the PSU and the PSP, as well as between different PSPs. Overall, the EBA is of the view that the liability regime has worked well and does not need to be changed significantly. Nevertheless, the EBA is of the view that some specific areas may require further fine-tuning and clarification. In particular, when it comes to the distribution of liability between PSPs, the EBA sees merit in clarifying the liability rules when a TPP is involved, in particular when a payment transaction is initiated through a PISP, and in relation to the application of the liability regime when an exemption from SCA has been applied.

Distribution of liability between TPPs and ASPSPs

282. In relation to the application of the liability requirements in the cases where a TPP is involved, the Directive can be further clarified in how liability is distributed between the PISP and the ASPSP when a payment transaction has been executed incorrectly and losses have occurred. Another related issue is that PSUs may not know whether they should complain to the ASPSP or the TPP in these cases. If not addressed, this can lead to an increase in disputes between

PSPs, introduce deficiencies in the resolution of the case and the reimbursement of funds, where applicable.

283. In relation to the above, the EBA proposes that the Directive clarifies the distribution of liability between TPPs and ASPSPs and on the PSP that PSUs need to approach with any complaints they may have.

Distribution of liability between PSPs when an SCA exemption has been applied

284. In relation to the application of the liability regime when an exemption from SCA has been applied, the EBA is of the view that there is a lack of clarity in PSD2 on the application of the liability requirements in the cases when an SCA exemption has been applied by the payer's PSP and the cases when the SCA exemption has been applied by the payee's PSP. Article 74(2) of PSD2 states that 'where the payer's payment service provider does not require strong customer authentication, the payer shall not bear any financial losses unless the payer has acted fraudulently' but does not address the issue at hand.

285. Relatedly, the EBA has clarified in paragraphs 37 and 38 of the Opinion on the implementation of SCA that the PSP that decides whether or not to apply an exemption from SCA is the PSP that issues the personalised security credentials. In relation to the question who can apply an SCA exemption, paragraph 40 and table 2 of the same Opinion has clarified the specific cases where the payer's PSP and/or the payee's PSP can apply an SCA exemption, but the EBA stressed that 'the payer's PSP always makes the ultimate decision on whether or not to accept or apply an exemption'.

286. Q&A 4042 has also clarified that 'if the PSP of the payee triggers an SCA exemption and the transaction is carried out without an SCA, the payee's PSP will be liable towards the payer's PSP for the financial damage caused. This is without prejudice to the obligations of the payer's PSP towards the payer as referred to above'.

287. In that regard, to ensure legal certainty and clarity, smooth resolution of complaints from PSUs related to fraudulent transactions and contribute to the overall efforts in reducing fraud, the EBA proposes that the Directive clarifies the application of the liability requirements in the cases where an SCA exemption has been applied either by the payer's PSP or by the payee's PSP, leveraging on the clarification provided in Q&A 4042. Relatedly, the EBA proposes to clarify whether Articles 73 and 74 of PSD2 cover the cases of 'unauthorised payment transactions' for which an SCA exemption has been applied.

12.4. Clarification on the terms used in relation to evidence of authentication and execution of payment transactions, as well as unauthorised or fraudulent payment transactions under Articles 72-74 of PSD2

288. The EBA has identified as a significant issue the very broad nature and divergent interpretations of the terms 'reasonable grounds to suspecting fraud' in Article 73 of PSD2, 'fraudulent act' and 'gross negligence' in Articles 72(2) and 74(1) of PSD2, and the provision of

Article 74(1)(a) of PSD2. This has led to many complaints and disputes between PSPs and PSUs and to the lack of legal certainty of the interpretation of the legal requirements.

Clarification on the term 'reasonable grounds to suspecting fraud'

289. In relation to the reference in Article 73 of PSD2 to 'reasonable grounds to suspecting fraud', the term is not sufficiently clear. This poses difficulties for CAs to assess the responsibility of supervised institution regarding non-authorised transactions, which subsequently leads to challenges in applying the liability regime. The EBA, therefore, sees merit in providing clarity or examples of what the reasonable grounds to suspect fraud may be, including whether the authentication of the PSU should be considered as such.

290. The EBA has observed that PSPs sometimes delay refunds because of the need to communicate these grounds to CAs and, at times, use the delay in notification by the PSU as a reason to reject the refund. In relation to the latter, the Directive is not sufficiently clear whether the timeline for the PSU to notify the PSP could be considered as a reason for not refunding the PSU, since Article 69(1)(b) of PSD2 requires PSUs to notify PSPs 'without undue delay on becoming aware of the loss, theft, misappropriation or unauthorised use of the payment instrument'.

291. Further, Article 73 of PSD2 specifies that the payer's PSP refunds the payer the amount of the unauthorised payment transaction immediately, 'except where the payer's payment service provider has reasonable grounds for suspecting fraud and communicates those grounds to the relevant national authority in writing'. Recital 71 of PSD2 clarifies that the PSP should be able to conduct, within a reasonable time, an investigation before refunding the payer 'where there is a high suspicion of an unauthorised transaction resulting from fraudulent behaviour by the payment service user and where that suspicion is based on objective grounds which are communicated to the relevant national authority'.

292. The EBA, in line with Recital 71, understands the objective of this article being for PSPs to communicate to CAs the reasonable grounds for suspecting fraud committed by the PSU and not all cases where fraud may be committed. The EBA, therefore, suggests that Article 73 of the PSD2 is amended by clarifying that the relevant 'fraud' in that regard is the one committed by the PSU.

Clarification on the term 'fraudulent act' and 'gross negligence'

293. In relation to the reference in Articles 72(2) and 74(1) of PSD2 to 'fraudulent act' and 'gross negligence', it is difficult to distinguish between these two terms and PSPs assess the PSU behaviour differently. While Recital 72 of PSD2 provides a single example of gross negligence, namely 'keeping the credentials used to authorise a payment transaction beside the payment instrument in a format that is open and easily detectable by third parties', fraud has become more sophisticated, especially in the case of card not present transactions. Relatedly, the EBA has observed that sometimes PSPs consider gross negligence to cover cases where the PSU is a victim of social engineering fraud since the latter were manipulated to hand over their PSU's

credentials to a fraudster. The EBA sees such approaches as undesirable because PSPs are also required under Article 2 of the RTS on SCA&CSC to carry out transaction monitoring mechanisms, including cases of well-known fraud scenarios, as well as expected to raise PSUs' awareness and provide assistance and guidance in the light of new threats and vulnerabilities under Guideline 3.8 of the Guidelines on ICT and security risk management (EBA/GL/2019/04)[25]. In relation to the above, based on the vague wording of the terms 'fraudulent act' and 'gross negligence' under Articles 72(2) and 74(1) of PSD2, CAs are limited in their ability to evaluate some fraud cases.

Clarification on Article 74(1)(a) of PSD2

294. When it comes to the provision of Article 74(1)(a) of PSD2, it is difficult to determine that the loss, theft or misappropriation of a payment instrument was not detectable to the payer prior to a payment and that the PSU has acted fraudulently, especially in the cases of theft of data.

Proposals to the EC

295. In relation to the above, to provide greater clarity in the application of the liability regime and legal certainty for market participants, as well as to enhance consumer protection, the EBA proposes that the Directive clarifies the terms 'reasonable grounds to suspecting fraud', 'fraudulent act' and 'gross negligence', and the provision of Article 74(1)(a) of PSD2. In particular, the EBA is of the view that the suspicion of fraud should be based on sound and robust evidence, taking into account well-known fraud scenarios, and that further clarity should be provided on what is to be considered an authorised transaction. Finally, the EBA proposes that these terms should also be aligned with the powers and functions of CAs to ensure the effective supervision of the legal requirements.

12.5. Adjustment of specific provisions of PSD2 to fit the specific nature of instant payments

296. The EBA is of the opinion that with the rollout of instant payments, the legal framework should be adjusted accordingly in order to reflect on their nature and specificities. While PSD2 is overall fit for the provision of instant payments, the EBA sees merit in introducing specific requirements to cover their distinct features, such as execution time, instant finality and others, but also the specific risks faced.

297. Among the latter risks, the EBA underlines the vulnerability to fraud, due to the very limited time available for anti-fraud controls and the practical unviability of the recovery of the funds. The EBA was made aware that fraudsters have notably targeted instant payments for their deceptions. Other risks also stem from the augmented impact of operational errors both from the PSU and the PSP side.

25 https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Guidelines/2020/GLs%20on%20ICT%20and%20security%20risk%20management/872936/Final%20draft%20Guidelines%20on%20ICT%20and%20security%20risk%20management.pdf

298. With particular regard to provisions related to Titles III and IV of PSD2, the EBA proposes that the Directive introduces specific provisions regarding:

- the obligation for the PSP to duly inform the PSU of the irrevocability of an instant payment order;
- the obligation for the PSP to immediately notify the correct execution of an instant payment order to the PSU. In case of failed execution, due to any reasons including technical issues, the PSU should be notified immediately, with contextual full restoration of the funds;
- to envisage in the requirements for framework contracts the need of a specific consent by the PSU for the use of instant payment instrument and the possibility for the PSU to opt-out from this service; and
- the ability of the PSU to choose between the payment methods to be used (i.e. instant credit transfer vs. traditional credit transfer), excluding any discretion of the PSP in this regard.

299. In that regard, the EBA proposes for the Directive to introduce amendments to the provisions of the current Title IV, Chapter 3, Section 2, in order to clarify that more stringent limits (e.g. for the execution time) can be contractually defined by the PSP with the PSUs and that in case of instant payment the PSU cannot revoke the payment order issued. Moreover, in view of the continuous (24/7) provision of service, the EBA proposes that the Directive clarifies the precise time of the end of the business day to be applied, taking into account the need to ensure uniform value-dating and debiting/crediting on payment accounts for the entire payment sector. Finally, the limits for the amounts to be transferred and the liabilities of the PSU could also be considered for adjustment.

12.6. Addressing issues to unilateral increase by PSPs of the spending limits for payment transactions executed through payment instruments that are also used for giving consent

300. The EBA has identified an issue in relation to the unilateral increase by the PSP of spending limits agreed between the PSP and the PSU under Article 68(1) of PSD2. Since this can bring consumer detriment, especially when the provision of payment services is linked to a credit line, and is non-compliant with the requirements of Article 54 of PSD2 in relation to changes in the conditions of framework contracts, the EBA is of the view that the practice of unilateral increase of the agreed spending limits by PSPs should be more explicitly forbidden under PSD2.

301. When it comes to the unilateral decrease of the agreed spending limits agreed between the PSU and the PSP, the EBA is of the view that there is merit for PSPs to be able to decrease unilaterally these limits due to potential concerns on fraud or breach of legal requirements, however, this should be explicitly envisaged and specified in the respective framework contract between the PSP and the PSU.

302. In relation to the above, the EBA proposes that the Directive explicitly forbids the practice of unilateral increase of the agreed spending limits by PSPs and that such increase would always require the agreement with the PSU.

12.7. Clarification on the possibility for the PSPs to block a payment transaction in case of suspicion of fraud

303. Article 68(2) of PSD2 prescribes that 'if agreed in the framework contract, the payment service provider may reserve the right to block the payment instrument for objectively justified reasons relating to the security of the payment instrument, the suspicion of unauthorised or fraudulent use of the payment instrument or, in the case of a payment instrument with a credit line, a significantly increased risk that the payer may be unable to fulfil its liability to pay'. However, PSD2 does not envisage explicitly the possibility for PSPs to block specific payment transactions.

304. The EBA, therefore, proposes that the Directive explicitly covers the possibility for PSPs to block a 'payment transaction' if they have suspicions of fraud, as well as other related potential steps that PSPs need to take, such as reporting to CAs, process of unblocking, communication to PSUs and others.

Section 5 - Strong customer authentication

Question 13 - Has the EBA identified any need to clarify or amend specific provisions in PSD2 related to the application of SCA? If so, please indicate which provisions and to what extent they should be amended, and why.

305. Article 97(1) of PSD2 requires PSPs to apply SCA where the payer accesses its payment account online, initiates an electronic payment transaction, or carries out any action through a remote channel which may imply a risk of payment fraud or other abuses. Article 97 of PSD2 and the RTS on SCA&CSC introduce further security requirements applicable to PSPs.

306. The EBA has provided a large number of clarifications on the application of the SCA requirements and the other related security measures through few Opinions, in particular the Opinion on the implementation of the RTS on SCA&CSC (EBA-Op-2018-04)[26] and the Opinion on the elements of SCA under PSD2 (EBA-Op-2019-06)[27], as well as in more than 100 Q&As in the EBA Q&A tool[28]. Many of these Q&As stem from lack of clarity in specific aspects in the Directive and, therefore, the EBA is of the view that there is the need for specific security requirements to be improved.

307. The EBA has, therefore, identified specific areas in the Directive that can be further clarified. These are specified in the sub-sections below and cover:

- Outsourcing/delegating/relying on SCA;
- The regulatory treatment of MITs and transactions excluded from the scope of SCA;
- The need for clarification on the inherence SCA element, its interplay with GDPR and the treatment of behaviour biometrics;
- Independence of SCA elements;
- Nature of the exemptions from SCA;
- Clarification on the treatment of refunds and the application of SCA to them;
- Clarification on the application of the liability regime for cases where an SCA exemption has been applied;

[26] Opinion on the implementation of the RTS on SCA and CSC (EBA-2018-Op-04).pdf (europa.eu)

[27] BoS 2019 XX (EBA Opinion on SCA elements under PSD2 - Opinion clean).docx (europa.eu)

[28] List of Q&As | European Banking Authority (europa.eu)

- Potential need for introducing security measures (authentication solutions) other than SCA;
- Dynamic linking; and
- SCA as a corrective and preventive measure thus being free of charge.

Issue 13.1. Outsourcing/delegating/relying on SCA

308. In terms of general remarks, the EBA is of the view that, the current approach where the responsibility for the application of SCA lies with PSPs that has issued the PSC has worked well. However, in order to address some specific issues and use-cases that are covered in greater detail below, the EBA would propose that the Directive clarifies and articulates further the requirements on who is responsible and liable for the application of SCA and the related requirements on delegation of SCA. This should ensure protection of customers, legal certainty, and transparency of the related requirements.

309. The EBA has observed that delegation of SCA to TPPs and TSPs may have positive effect on the introduction of new authentication solutions facilitating the development of new business models for payment services, as well as customer convenience. This could allow for seamless, efficient and integrated SCA solutions. However, it should be clear that, if the current legal requirements under PSD2 are retained, outsourcing of SCA to TPPs and TSPs requires an outsourcing agreement to be concluded between the PSP and the third party. In this case, the outsourcing requirements of PSD2 and the EBA Guidelines on outsourcing arrangement (EBA/GL/2019/02)[29] should apply.

310. The EBA is also of the view that delegation of the SCA to the payer should not be allowed. It should be considered whether a similar prohibition should not be applied to the payee because of the concentration of risk. The EBA proposes for the Directive to clarify also this more explicitly and to leverage on the clarification provided by the EBA in Q&As 4047, 4133, 4651, 4937, 4910, 5643 and 6141 on the topic of outsourcing of SCA.

Reliance on third party technology

311. The EBA has clarified in Q&A 4047 that PSPs 'may use third party technology, such as a smartphone fingerprint reader, to support SCA and to ensure they fulfil all the security measures established in the Delegated Regulation'. Q&A 4651 has further clarified that PSPs 'may use biometric credentials that are stored at the device level for the application of the strong customer authentication, provided that the PSPs has ensured that technology used has a satisfactory level of security'.

312. These clarification aimed at reflecting on the specific case where issuers were relying on the authentication solutions integrated in smartphones, such as fingerprint or retina reader, provided that the PSPs ensure compliance with the applicable legal framework, in particular

[29] https://www.eba.europa.eu/sites/default/documents/files/documents/10180/2551996/38c80601-f5d7-4855-8ba3-702423665479/EBA%20revised%20Guidelines%20on%20outsourcing%20arrangements.pdf?retry=1

that the smartphone has a satisfactory level of security, mitigating measures for ensuring independence of the authentication elements have been applied and that the security measures are documented, periodically tested, evaluated and audited in accordance with the applicable legal framework. This covers specific cases where applications of the PSP installed on the mobile device use the underlying technology but there is an interaction between the PSP and the mobile device in relation to the management of the PSC.

313. However, the EBA acknowledges that there is not a contractual relationship between the PSP and the smartphone manufacturer when the smartphone is used for applying SCA and that the control of the SCA, although depending on the implementation, may be with the mobile phone manufacturer, which gives rise to potential concerns in case PSPs do not apply any controls or checks on the security measures and their compliance with the requirements of PSD2 and the RTS on SCA&CSC.

314. The EBA, therefore, proposes that the Directive clarifies whether such use of third-party technology would require an outsourcing agreement or not and whether some conditions need to be applied in case the EC arrives at the view that an outsourcing agreement is not needed. The EBA will then be in a position to develop the technical details on the use of such third-party technology and the actions that PSPs should take.

Delegation of SCA to TSPs

315. The EBA has provided a large number of clarifications in its Q&A tool on the topic, including in Q&As 4047, 4651, 4937, 5643 and 6141. These included that PSPs may outsource the execution of SCA to a third party, provided that the general outsourcing requirements, including the provisions of the EBA Guidelines on outsourcing arrangements, and other applicable requirements from the RTS on SCA&CSC are met.

316. Many of these clarifications covered specific cases, such as those related to digital wallets, where SCA is outsourced on the basis of an outsourcing agreement between the PSP and the TSP. However, the EBA has observed that PSPs often find it difficult to conclude such outsourcing agreements with e.g. Big Techs who argue that they are providing a third-party technology. It should be noted that the specific cases referred to in this sub-section differ from the cases where a third party technology (such as mobile phones) is used since the PSP does not have control over the credentials provided by the TSP and, subsequently, cannot ensure compliance with the legal requirements of PSD2 and the EBA RTS on SCA&CSC.

317. The EBA, therefore, proposes that the Directive clarifies that delegating the application of SCA to TSPs, including digital wallet providers, is allowed but that it would require an outsourcing agreement between the PSP and the TSP.

Delegation of SCA to TPPs

318. Another issue that has been raised often by TPPs to the EBA is on the PSP that is responsible for the application of SCA in the case of AIS and PIS, especially since Article 97(1) of PSD2

requiring PSPs to apply SCA does not specify which type of PSP is responsible for the application of SCA. Moreover, Article 97(5) of PSD2 requires ASPSPs to allow PISPs and AISPs to 'rely on the authentication procedures provided by the ASPSP to the PSU'. In relation to this, the EBA clarified in the Opinion on the implementation of the RTS on SCA&CSC that Articles 67(2)(b) and 97(5) of PSD2 and Recital 30 of PSD2 'are to be read in conjunction with one another, which means that the PSP applying SCA is the PSP that issues the personalised security credentials. It is consequently also the same provider that decides whether or not to apply an exemption in the context of AIS and PIS. The ASPSP may, however, choose to contract with other providers such as wallet providers or PISPs and AISPs for them to conduct SCA on the ASPSP's behalf and determine the liability between them.'

319. The assessment and proposals of the EBA on this particular topic are elaborated in the section on 'Access to and use of payment accounts data in relation to payment initiation services and account information services' because of its interdependencies with other parts of that section.

Issue 13.2. The regulatory treatment of MITs and transactions excluded from the scope of SCA

320. Recital 95 of PSD2 clarifies that 'there does not seem to be a need to guarantee the same level of protection to payment transactions initiated and executed with modalities other than the use of electronic platforms or devices, such as paper-based payment transactions, mail orders or telephone orders'. The exclusion from the application of SCA for non-electronic payment transactions has proved to be difficult to apply and supervise in practice based on the current formulation of this Recital since only cash payments would clearly fall outside the scope of SCA. All other types of payment transactions would in some part of the payment execution be handled electronically.

321. Relatedly, the treatment of MITs has been clarified by the EC through responses to questions posed in the EBA Q&A tool, in particular Q&A 4031 on payee-initiated transactions.

322. In relation to the above, the EBA is of the view that such important requirements related to the exclusion from the scope of application of the main security requirement in PSD2, namely SCA, should not be left without a proper provision in the Directive itself. The EBA, therefore, proposes that the Directive introduces specific requirements in relation to the exclusions from the application of SCA specified in Recital 95, such as paper-based payment transactions, MOTOs, and in relation to the use of MITs. In the case where the potential future requirements retain a wording similar to the one of Recital 95, the EBA finds merit in clarifying whether both the initiation and execution of a payment transaction should be non-electronic or only the initiation of the payment transaction, in order to fall within an exclusion from the application of SCA. In relation to the reference to electronic payment transactions, the EBA has put forward more concrete views and proposals in the section on 'Scope and definitions'.

323. When it comes to the specific requirements on MITs, to ensure legal certainty, transparency, level-playing field between different payment transactions, and sufficient level of security of MITs, the EBA proposes to the EC to:

- Introduce a clear definition of an MIT and provide clarification on the general treatment of these payment transactions;
- Introduce requirements in relation to the set-up of the (electronic) mandate for payee-initiated transactions, including the need to apply SCA at the set-up of said mandate without the need to apply SCA for subsequent payment transactions;
- Potentially introduce limits on the maximum number of payment transactions to be executed and/or the duration of the mandate before the mandate needs to be renewed by the PSU;
- Clarify the regulatory approach to MITs and direct debits. Since these two transactions are quite similar in their nature but currently differ in the regulatory approach applied to them, there is merit to clarify how these differ, e.g. in relation to the setting up of the mandates and the applicable consumer protection measures, such as strong refund rights for direct debits, or whether there is merit in aligning the applicable legal requirements to MITs and direct debits, which could potentially mean applying the same consumer protection measures applied to direct debits to MITs;
- Consider whether additional security requirements may not be needed for MITs; and
- Leverage on and build upon the clarifications provided through the EBA Q&A tool, in particular in Q&A 4031, but also Q&As 4131, 4404, 4791, 4792 and 4794.

324. In relation to the specific requirements on MOTOs, again for the same reasons as stated above for MITs, the EBA proposes to the EC to:

- Introduce a clear definition in the Directive of transactions based on MOTO and provide clarification on the general treatment of MOTOs;
- Narrow down the scope of MOTOs as much as possible to the specific use-cases that may be intended to be captured since the fraud levels and fraud risk related to the currently broad interpretation and application of MOTOs, based on feedback received from CAs, are much higher than other payment transactions;
- Consider introducing some minimum level of security requirements for these transactions, such as authentication of the PSU or specific checks that need to be carried out over the phone;
- Clarify the interplay with the exclusion for electronic communications networks or services under Article 3(l) of PSD2;
- Delineate between MOTOs and 'remote payment transactions' considering that the telephone can be perceived as 'a device that can be used for distance communication';
- To adapt the legal requirements in a way that would prevent the use of MOTOs to circumvent the application of SCA;

- Leverage on the clarifications provided through the EBA Q&A tool, in particular in Q&As 4058, 4790, and 4788; and
- Leveraging on the answer to Q&A 4031, to clarify further the extent of PSU involvement or actions needed for a payment transaction to be considered as initiated by the payer.

Issue 13.3. Need for clarification on the inherence SCA element, its interplay with GDPR and the treatment of behaviour biometrics

325. The EBA has received a number of requests for clarification on the use of the inherence SCA element and in particular whether behaviour biometrics could be considered as an inherence element. In that regard, the EBA clarified in paragraph 34 of the Opinion on the implementation of the RTS on SCA&CSC that the elements based on inherence are typically based on biometrics, including behaviour biometrics. The EBA further clarified in the Opinion on the elements of SCA under PSD2 that inherence, which includes biological and behaviour biometrics, relates to physical properties of body parts, physiological characteristics and behavioural processes created by the body, and any combination of these. The EBA provided further clarity on the topic in Q&As 4238, 4237, 4671 and 5620.

326. Some market participants argued that behavioural characteristics related to the environmental analysis and payment habits, such as those related to location of the PSU, time of transaction, device being used, spending habits, online store where the purchase is carried out, should qualify as inherence. In line with the above clarifications, the EBA has shared the view that while these contribute to improving the security of payment transactions and data, they can be viewed in the light of the transaction monitoring mechanisms under Article 2 of the RTS on SCA&CSC or under the transaction risk analysis exemption from SCA under Article 18 of the same RTS. These behavioural characteristics do not relate to a physical property of the body and thus cannot be considered as an inherence SCA element.

327. Another issue identified by the EBA was related to the concern that capturing 'physical properties of body parts, physiological characteristics and behavioural processes' may lead to the development of solutions that profile individuals using sensitive information in conflict with the requirements of GDPR. Additional issues flagged in relation to the use of inherence SCA element was the need to obtain an explicit consent from the PSU.

328. In relation to the above, the EBA is of the view that the clarifications are sufficient and there is not any need for amendments in the Directive. If further clarity is needed, the EBA can address these through the RTS on SCA&CSC. However, the EBA sees merit on clarifying the application of the behaviour biometrics and their interplay and compliance with the GDPR requirements.

Issue 13.4. Independence of SCA elements

329. The EBA has identified in the past different interpretations of the requirements of PSD2 and the RTS on SCA&CSC on the independence of the elements of SCA. In particular, some market participants were of the view that the SCA elements can be of the same category.

330. The definition of SCA under Article 4(30) of PSD2 provides that SCA means 'an authentication based on the use of two or more elements categorised as knowledge (something only the user knows), possession (something only the user possesses) and inherence (something the user is) that are independent, in that the breach of one does not compromise the reliability of the others, and is designed in such a way as to protect the confidentiality of the authentication data'. Article 9 of the RTS on SCA&CSC provides further detail on the requirements related to the independence of the SCA elements.

331. To address said different interpretations, the EBA has clarified in paragraph 33 of the Opinion on the implementation of the RTS on SCA&CSC and Q&A 5619 that the two authentication elements need to belong to different categories. While some SCA-compliant authentication approaches may not provide the same level of security as others, the EBA is of the view that the combined strength of the two elements from different categories leads to an increased security of the payment transaction.

332. To ensure legal certainty and harmonised application of the legal requirements, the EBA proposes for the Directive to clarify the definition of SCA in PSD2, in particular that at least two of the authentication elements should be from different categories.

Issue 13.5. Nature of the exemptions from SCA

333. In line with the legal advice received at the time of the development of the RTS on SCA&CSC as to how to interpret the nature of the exemptions from SCA that the EBA had been mandated to develop, the EBA has construed the exemptions from SCA to be of a voluntary nature. This means that PSPs were allowed, but not obliged, to use the exemption and at any time can choose to apply SCA to the actions falling within the scope of the exemption. However, in order to address issues related to friction for customers when using AIS and to mitigate the impact that the frequent application of SCA and the inconsistent application of the exemption from SCA for payment account information, the EBA has introduced in the Final Report on amending RTS on SCA&CSC(EBA/RTS/2022/03)[30] a new mandatory exemption to SCA that will require ASPSPs not to apply SCA when customers use an AISP to access their payment account information, provided certain conditions are met.

334. However, since introducing a mandatory exemption from the application of SCA is a suboptimal approach, which can easily be avoided by introducing specific clear legal requirements on the application of SCA in the Level-one legislation, the EBA proposes to the EC to clarify in potential future mandates related to exemptions from the application of SCA

[30] Regulatory Technical Standards on strong customer authentication and secure communication under PSD2 | European Banking Authority (europa.eu)

(or similar requirements) the nature of these exemptions and in particular whether they should be optional or whether they could also be of mandatory nature.

Issue 13.6. Clarification on the treatment of refunds and the application of SCA to them

335. Another issue observed by the EBA is the lack of clarity on the application of SCA to refunds. In particular, a question that arose was whether a refund constitutes a stand-alone payment transaction, which is independent from other payments services or whether refunds could be considered as an automatic right for merchants in the context of the acquiring of payment transactions.

336. The EBA has provided clarity on the application of SCA to refunds in Q&A 4855, in particular that 'the refund initiated by a merchant, which in this case acts in its capacity as a payer, is an electronic payment transaction initiated by the payer. Therefore, this would require the PSP of the merchant to apply SCA, unless an exemption from SCA applies'. This clarification related to the current legal framework, but the EBA is of the view that there have not been many well-known fraud scenarios related to refunds.

337. The EBA, therefore, proposes for the Directive to clarify whether refunds should be considered as stand-alone payment transactions or not and, subsequently, whether they fall within the scope of application of SCA. If the EC arrives at the view that refunds should be treated as a separate payment transaction, the EBA suggest reflecting the answer to Q&A 4855 in the Directive. The EBA is then to assess the risk that applies to refunds, which as mentioned can be considered low, and whether there is merit in introducing an exemption from SCA to these particular transactions in the RTS on SCA&CSC.

Issue 13.7. Clarification on the application of the liability regime for cases where an SCA exemption has been applied

338. The EBA is of the view that there is a lack of clarity in PSD2 on the application of the liability requirements in the cases where an SCA exemption has been applied. The EBA has clarified in paragraphs 37 and 38 of the Opinion on the implementation of SCA that the PSP that decides whether or not to apply an exemption from SCA is the PSP that issues the personalised security credentials. In relation to the question who can apply an SCA exemption, paragraph 40 and table 2 of the same Opinion clarified the specific cases where the payer's PSP and/or the payee's PSP can apply an SCA exemption, but the EBA stressed that 'the payer's PSP always makes the ultimate decision on whether or not to accept or apply an exemption'.

339. Q&A 4042 also clarified that 'unless the payer acted fraudulently, the payer's PSP is liable towards that payer for transactions carried out without SCA' and that 'if the PSP of the payee triggers an SCA exemption and the transaction is carried out without an SCA, the payee's PSP will be liable towards the payer's PSP for the financial damage caused. This is without prejudice to the obligations of the payer's PSP towards the payer as referred to above'.

340. In that regard, the EBA proposes that the Directive clarifies the application of the liability requirements in the cases where an SCA exemption has been applied either by the payer's PSP or by the payee's PSP. Relatedly, to increase legal certainty and clarity, the EBA proposes for the Directive to clarify whether Articles 73 and 74 of PSD2 cover the cases of 'unauthorised payment transactions' for which an SCA exemption has been applied.

Issue 13.8. Potential need for introducing security measures (authentication solutions) other than SCA

341. Based on the assessment of fraud data in EBA's Discussion paper on the EBA's preliminary observations on selected payment fraud data under PSD2 as reported by the industry (EBA/DP/2022/01)[31], the EBA has observed that the security requirements in PSD2 have had the desired effect since in almost all instances the share of fraudulent payment transactions in the total payment volume and value of transactions is significantly lower for transactions that are authenticated with SCA than those that are not. Relatedly, in its report on the data provided by PSPs on their readiness to apply SCA for e-commerce card-based payment transaction (EBA/REP/2021/16) [32], the reported data showed a significant reduction of between 40 and 50% in the volume and value of fraudulent e-commerce card-based payment transactions between September 2020 and April 2021 coinciding with the gradual increase in the application of SCA in that period.

342. Based on the above and the feedback from CAs, the EBA is of the view that the security requirements introduced in PSD2, in particular SCA, transaction monitoring mechanisms and the dynamic linking requirements for remote electronic payment transactions, are achieving their objective. The EBA views the requirements as sufficient and proportionate and that there is no need to take a different approach for the authentication of PSUs. The EBA has not identified the need to introduce other or additional authentication solutions.

343. In relation to the above, some of the general security measures related to the PSU authentication that have been used to the detection of unauthorised or fraudulent payment transactions, thus being effective in mitigating fraud, are the transaction monitoring mechanisms under Article 2 of the RTS on SCA&CSC. The EBA views these security measures as fundamental and, therefore, proposes that the Directive introduces a general requirement on the need for PSPs to have in place transaction monitoring mechanisms, with the EBA being mandated to set out the specific technical requirements related to the transaction monitoring mechanisms. This will also facilitate distinguishing between transaction monitoring mechanisms and behaviour biometrics as set out in issue 13.3 above.

Issue 13.9. Dynamic linking

344. Article 97(2) of PSD2 provides that for electronic remote payment transactions, PSPs shall apply SCA that includes elements which dynamically link the transaction to a specific amount

[31] Discussion Paper on payment fraud data received under PSD2 (europa.eu)

[32] Report on the data provided by PSPs on their readiness to apply SCA for e-commerce card-based payment transactions (europa.eu)

and a specific payee. The EBA specified further the requirements applicable to authentication codes and the dynamic linking in Articles 4 and 5 of the RTS on SCA&CSC respectively. The EBA introduced also further clarifications in relation to the application of the dynamic linking requirements in Q&As 4414, 4415, 4435, 4556, 5133, and 5366.

345. The EBA is of the view that the applicable legal requirements have been sufficiently clarified for market participants, that they have been applied consistently and that there has not been the need to amend them. However, in order to ensure that these requirements are future proof and that they address all applicable risks, the EBA proposes to the EC to articulate in the Recitals of the Directive the intended objective and principles related to the application of the dynamic linking requirements, as well as the risks that are intended to be addressed with them, which the EBA currently understands to be the risk of man in the middle attacks.

Issue 13.10. SCA as a corrective and preventive measure thus being free of charge

346. Article 62(1) of PSD2 provides that the PSP 'shall not charge the payment service user for fulfilment of its information obligations or corrective and preventive measures'. The EBA is of the view that the legal text is not sufficiently clear on whether the application of SCA should or should not be considered as a 'corrective and preventive measure'.

347. Since the EBA is aware of divergence in the approaches taken by PSPs where in some Member States PSPs charge for the application of SCA, in particular in relation to solutions based on SMS OTP. The EBA proposes that the Directive clarifies this aspect. Since the application of SCA aims at increasing security of electronic payment transactions and online access to payment account information and reducing the risk of fraud, the EBA proposes to clearly articulate in the Directive that the application of SCA is a preventive measure.

Question 14 – Has the EBA identified any security risks that are not addressed by the requirements in PSD2

348. The EBA has identified the increased risk of social engineering fraud as an area where further improvements in the legal framework are needed to address the increase of fraudulent transactions, in particular authorised push payment fraud where fraudsters use social engineering scams (i.e. phishing) in combination with more sophisticated online attacks.

349. The applicable security requirements mitigate this risk to some extent, in particular:

- The transaction monitoring mechanisms set out in Article 2 of the RTS on SCA&CSC since PSPs may be able to identify unauthorised and fraudulent transaction due to unusual patterns;
- The requirements on dynamic linking set out in Article 97(2) of PSD2 and further elaborated in Article 5 of the RTS on SCA&CSC since, depending on the way the payee is displayed, payers may check whether the IBAN of the beneficiary and the name of the

payee match, thus being able to identify that the payee is different from the intended recipient of the funds; and

- Having two authentication elements in an SCA since the second independent factor may prevent fraud in case the first authentication element has been compromised.

However, the legal framework does not fully mitigate these risks and additional actions and requirements may be needed.

350. In addition, the EBA has identified specific issues that further contribute to the increased risk of social engineering, in particular that PSPs have little incentives to invest in effective transaction monitoring mechanisms that could mitigate the social engineering risks, because in most cases the losses are passed on to the PSUs. Relatedly, victims of social engineering scams often encounter difficulties to prove the transaction has not been authorised and are not able to claim reimbursement.

351. In relation to the above, while there may not be a specific solution that could easily address the risk of social engineering fraud, the EBA proposes that the Directive introduces a combination of measures that could have a positive effect and further mitigate these types of risks. The measures could include:

- Introducing specific requirements in the Directive on educational and awareness programs for applicable risks, leveraging on those set out in the EBA Guidelines on ICT and security risk management (EBA/GL/2019/04)[33], in particular Guideline 3.8. These programs could be addressed towards PSUs and focus on specific key messages rather than provision of comprehensive and detailed information. Some programs could also be addressed towards employees of PSPs;
- Incentivising PSPs to invest in more efficient transaction monitoring mechanisms by covering payment transactions that have been authorized by the payer under manipulation of the fraudster within the scope of unauthorized payment transactions; and
- Facilitating the exchange of information between PSPs in relation to known cases of fraud, specific fraudsters and accounts used to carry out fraud.

Question 15 – Has the EBA identified any unintended consequences related to the application of SCA which, in the EBA's view, would justify an amendment of the Directive, e.g. on customer journeys, fraud prevention, costs, etc.?

33 https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Guidelines/2020/GLs%20on%20ICT%20and%20security%20risk%20management/872936/Final%20draft%20Guidelines%20on%20ICT%20and%20security%20risk%20management.pdf

352. The EBA has identified two more significant unintended consequences stemming from the way how the SCA requirements have been implemented and applied. These relate to the exclusion of certain (vulnerable) groups of population because of particular authentication approaches chosen by PSPs and the use of MITs and MOTOs to avoid the application of SCA. These topics are elaborated in detail further down.

Issue 15.1. The exclusion of certain (vulnerable) groups of population because of particular authentication approaches chosen by PSPs

353. PSD2 and the RTS on SCA&CSC do not prescribe a specific authentication approach that should be used for applying SCA. The Directive has, therefore, left it for PSPs to choose the authentication approach to be used by their customers. However, since the application date of PSD2, the EBA has been made aware by some market participants, including consumers, that some authentication approaches, in particular those that rely on the use of smartphones, have led to exclusion of certain groups of society from using remote electronic payment transactions and online access to payment accounts as fundamental financial services. These groups of populations include customers that are less tech savvy or those that do not have access to digital channels/devices, customers with specific disabilities and elderly people. Some market participants argued that the objectives of PSD2 to facilitate innovation and promote customer convenience, have led to the development of SCA requirements in PSD2 that are more appropriate for new and innovative authentication solutions, based on smartphones, inherence authentication elements, and others.

354. The EBA has acknowledged the issue and has, inter alia, tried to provide greater clarity in the EBA Opinion on the elements of SCA by introducing a list of non-exhaustive elements of SCA that may comply with the legal requirements, thus facilitating PSPs to choose authentication approaches that may be suitable for all groups of population, including vulnerable ones. Some of these authentication elements based on card readers, hardware token generators, may be more appropriate for certain groups of population, but as indicated above, the decision on the authentication approaches lies with each PSP. Therefore, the issue needs to be addressed in another way.

355. In relation to the above, the EBA proposes for the Directive to introduce specific measures to address these issues.

356. One approach that can be taken in addressing this issue is to introduce a general requirement in the Directive for PSPs to take into account the needs of all their customers when designing their authentication solutions and/or that PSUs are able to initiate and execute electronic payment transactions irrespective of the authentication device they use, including considering introducing specific authentication approaches, different from those reliant on smartphones or similar technological devices, at no additional cost for said vulnerable groups of population. By doing so, PSPs will be required to take into account the needs of vulnerable and less tech savvy groups of population. At the same time, PSPs will have the flexibility to choose the

authentication approaches they deem most appropriate, also taking into account the specific risks related to the respective payment transactions.

357. An alternative approach, which poses some risks, such as introducing administrative burden for PSPs to implement, challenges for CAs to supervise, conflict with other national legal requirements and overcomplicating the PSD2 framework, would be to introduce specific requirements in the Directive, which can include but not be limited to:

- Introduction of requirements related to awareness and education campaigns in relation to the use of the authentication solutions chosen by each PSP; and
- Introduction of information requirements requiring PSPs to inform their customers about the different SCA solutions offered by the PSP and information relevant for their use.

358. It should be noted that the issue may not be addressed by introducing specific implementation techniques or to promote certain authentication solutions since it will go against the objectives of the Directive and would prevent PSPs to apply more secure authentication approaches should they wish to do so.

359. Finally, the EBA would propose to the EC to take into consideration the potential interplay with the EU Accessibility Act (Directive (EU) 2019/882 on the accessibility requirements for products and services)[34] in order to avoid overlaps or potential contradiction between the two legal frameworks.

Issue 15.2. The use of MITs and MOTOs to avoid the application of SCA

360. The EBA has observed that some market participants have relied on the use of MITs and MOTOs as an alternative to payer-initiated payment transactions and with the aim to circumvent the need to apply SCA thus abusing the legal framework. These have been observed in some instances during the migration to SCA-compliance for e-commerce card-based payment transactions, especially in the cases where soft declines were used or when the issuer requested the application of SCA via the communication protocol 3DS2.

361. In relation to the use of MITs, some acquiring PSPs flagged transactions as MITs incorrectly, despite the PSU actually being in a session and carrying out actions that directly lead to the purchase of goods and service and subsequent payment. The EBA understands these practices may have been introduced in order to improve the customer experience, but they are not in line with the legal requirements under PSD2 and the RTS on SCA&CSC.

362. In relation to the use of MOTOs, the EBA is aware of instances where some merchants have unlawfully qualified remote electronic payment transactions, initiated by the payer online, as MOTO in order to circumvent the application of SCA.

[34] EUR-Lex - 32019L0882 - EN - EUR-Lex (europa.eu)

363. The EBA is of the view that clear regulatory treatment of MITs and MOTOs and overall narrowing down the scope of the services to specific cases envisaged explicitly in the Directive will likely address these issues, the specific proposals to which can be found in the issue 13.2 above.

Question 16 – Are there transactions currently not subject to SCA (e.g. MITs) that should be included in the SCA scope? Or are there transactions currently covered by SCA requirements that should not be?

364. The EBA has not identified any transactions that are currently not subject to SCA that should be included in the scope of the SCA requirements. In relation to the reference to MITs, the EBA has provided specific proposals in issue 13.2 above on aspects that can be clarified further in the Directive in relation to their use. The EBA does not see the need for introduction of MITs in the scope of SCA, apart from the application of SCA when setting up the initial mandate, since these are payee-initiated transactions and the application of SCA with the active and direct involvement of the payer may not always be possible and feasible.

365. The EBA has also not identified any transactions that are currently in the scope of the SCA requirements that should be excluded.

Section 6 - Access to and use of payment accounts data in relation to payment initiation services and account information services

Question 17 – Has the EBA identified impediments in terms of access to and use of payment account data?

366. The response to this question covers three main issues that the EBA has identified in the implementation of the PSD2 provisions on account access and puts forward a proposal on how to address them. These relate to:

- API fragmentation;
- Overreliance on the use of the customer interface for access by TPPs; and
- The application of SCA to AIS.

17.1. API fragmentation

367. The experience acquired in the implementation of the PSD2 has shown that the absence of a single API standard has led to the emergence of different API solutions across the EU. This creates significant challenges for TPPs as they have to invest significant efforts into connecting to different ASPSPs' APIs and adapting their connections to changes of APIs across time.

368. Whilst the different API standardisation initiatives that coexist in the EU (such as the Berlin Group standards, the French STET standards or the Czech and Polish API standards) have brought some degree of standardisation, the level of fragmentation in the market remains high, given the different implementations of these standards by ASPSPs as well as the fact that some ASPSPs have developed their own customised interfaces. This has required significant efforts from TPPs to integrate and maintain connections to ASPSPs' interfaces. It has also created challenges for CAs in assessing compliance of ASPSPs' interfaces with the regulations and addressing issues that arose in the implementation of these interfaces, particularly in cases where ASPSPs that operate across several Member States use the same API standard across several Member States that may be assessed differently by the respective CAs.

369. To address these issues, the EBA proposes that the EC explores the possibility of having a common API standard across the EU. In this respect, the EBA acknowledges that introducing a single API standard at this stage would bring additional compliance costs for ASPSPs and TPPs that have already invested extensive resources in the implementation of current APIs, but on balance, a single API standard across the EU would have significant benefits including to:

- provide technical uniformity so that TPPs would spend less time and resources connecting and maintaining connections to ASPSPs' interfaces, and focus more on innovation, thus supporting the innovation and competition enhancing objectives of PSD2;
- reduce market entry barriers for new entrants in the future that could immediately scale up their offering at EU level;
- provide clarity to ASPSPs regarding compliance of their interface with the legal requirements;
- in the long term potentially lower costs for ASPSPs in maintaining and adapting their APIs and for TPPs in connecting to ASPSPs' APIs;
- contribute to a level playing field across the EEA and to a single payment services market in the EU;
- facilitate CAs in assessing compliance of ASPSPs' APIs with the legal requirements; and
- lay down a firmer foundation for Open Finance and future data sharing.

370. Should a single API standard be introduced, the EBA is of the view that the industry would be best placed to develop such technical standards, leveraging on the work done by the existing market standardisation initiatives, and ensuring an equal representation of all stakeholders, in particular TPPs, in the decision making of the respective standardisation body. To ensure that the design of such single standard is in line with the legal requirements, a mechanism for EBA/CAs to provide steer/guidance to the respective standardisation body should be considered.

17.2. Overreliance on the use of the customer interface for access by TPPs

371. The experience acquired in the implementation of PSD2 has also shown that the choice given to ASPSPs between offering a dedicated interface (API) to TPPs and allowing TPPs to use the ASPSPs' customer interfaces, together with the fact that ASPSPs must provide these interfaces free of charge to TPPs, have not created the right incentives for ASPSPs to invest into developing high quality APIs. In this respect, the EBA has observed an overreliance by some ASPSPs on the use of the customer interface as a primary or fall-back access interface for TPPs. In particular, some small and medium sized ASPSPs are offering only their adapted customer interface as a primary access method for TPPs and have chosen not to provide an API. Also, some ASPSPs that have opted to offer an API are not putting enough efforts into improving those APIs and instead rely on the frequent use of the customer interface as a fallback mechanism.

372. In the EBA's opinion, there is merit in addressing these issues in the Directive by requiring all ASPSPs to provide a dedicated interface/API for TPPs' access and removing the choice given to ASPSPs in Article 31 RTS on SCA&CSC to choose between providing a dedicated interface/API or allowing TPPs to use their customer interface, as well as the requirement for ASPSPs who have chosen to provide a dedicated interface/API to also adapt their customer interface to be

used as a fallback access by TPPs (which was introduced by the EC in the final RTS submitted by the EBA in 2017).

373. In the EBA's view, this would:

- create better incentives for ASPSPs to use APIs and concentrate their efforts into providing high-quality in their APIs;
- reduce the efforts for TPPs in integrating different customer interfaces and subsequent changes/upgrades to these interfaces;
- allow TPPs to reach more ASPSPs, thus supporting the innovation and competition enhancing objectives of PSD2;
- support the objective of PSD2 of enhancing security by enabling safe access to the customer payment account data;
- contribute to a level playing field across the EU; and
- allow to simplify and streamline the legal framework and support a more harmonised, uniform and consistent application of the legal requirements.

374. Furthermore, the EBA is of the view that, while the use of the customer interface as a fall-back access for TPPs may have had merit in a transitional period while APIs were introduced, there should not be the same need in the future, as by the time a potential revised PSD2 would come into effect, the quality of ASPSPs' APIs should have improved significantly, thus diminishing the need to have such a fallback access. Also, while the use of the customer interface as a fallback access for TPPs may have some merit in the case of new market entrants, until their API is fully functional, the EBA is of the view that this issue could also be addressed in the review of the Directive by allowing a certain transition period to new entrants to provide an API. Furthermore, it should be considered that new entrants are today in a better position to offer well-functioning APIs quicker than it was the case when PSD2 APIs were first introduced (for example by having recourse to TSPs that provide quick API implementation solutions).

375. Exemptions from the requirement to provide a dedicated interface/API could be considered for cases where it may be disproportionate to require all ASPSPs to offer a dedicated interface, in particular those that are specialised in niche activities that do not service retail customers. In this respect, the EC could consider mandating the EBA to develop a set of criteria for granting such exemptions.

17.3. The application of SCA to AIS

376. Another key issue that has created significant challenges for TPPs is the application of SCA for AIS. Articles 97(1)(a) and 97(4) of PSD2 require SCA to be applied each time a PSU accesses its payment account online, 'including through an AISP'. In order to avoid that such a requirement does not undermine the business viability of AIS that the PSD2 has sought to promote as a new innovative service in the EU, when developing the RTS on SCA&CSC the EBA introduced an

exemption (in Article 10) allowing PSPs to apply SCA every 90-days instead of for each account access.

377. When developing the RTS in 2016, the EBA construed this exemption, as well as all other exemptions to SCA in the RTS, to be voluntary for ASPSPs, meaning that the latter is allowed, but not obliged, to make use of this exemption. This took into account the fact that ASPSPs are responsible under PSD2 for performing SCA and bear the liability for protecting the security of the PSU's data and funds.

378. However, the experience acquired in the application of this exemption showed that its voluntary nature has led to divergent practices across the EU, with some ASPSPs requesting SCA every 90-days, others more frequently, whilst a third group of ASPSPs have not applied the exemption at all and request SCA for every account access. In cases where ASPSPs have not applied the exemption or request SCA more frequently than as allowed by the RTS, the application of SCA is limiting the provision of AIS that rely on the AISP's ability to retrieve the data without the customer being present (such as some personal financial management services and cloud accounting service). This limited the possibility for TPPs to innovate and provide value-added customer services and also their ability to effectively compete against incumbents. Moreover, even in case where ASPSPs apply the exemption and request SCA every 90-days, TPPs have reported significant churn rates every 90 days when SCA is required, as also highlighted by the respondents to the public consultation on the amendment of the RTS[35].

379. In order to mitigate these issues, the EBA submitted to the EC on 5 April 2022 a draft amending RTS which introduces a mandatory exemption that requires ASPSPs *not* to apply SCA when customers use AISPs' services, provided that SCA is applied for the first access and is renewed every 180 days. However, this amendment can only address the issue within the boundaries of the current Directive, which is why the EBA was prevented from assessing the merits of additional or different amendments to the RTS.

380. To fully address the aforementioned issues, the EBA is of the view that there is a need to amend the Directive and reconsider more fundamentally the application of SCA for AIS, taking into account that AISPs are regulated and supervised entities and the need to ensure that the requirements are proportional to the level of risk involved. In particular, the EBA is of the view that there is merit in amending the Directive so as to require AISPs to apply their own SCA, using their own security credentials, instead of the ASPSP, after an SCA has been performed with the ASPSP the first time the customer accesses the payment account through the respective AISP. Such SCA with the AISP should be required:

- each time the PSU accesses the data in the AISP's platform/channel, unless an exemption applies; and
- at least every 180 days after the first SCA with the ASPSP, in order for the PSU to confirm the AISP's access rights to the account.

[35] See for example comment 1 of the feedback table in the Final Report on the amendment of the RTS on SCA&CSC (EBA/RTS/2022/03)

381. This would mean that for subsequent access requests after the SCA performed with the ASPSP, SCA would need to be performed by the AISP and not the ASPSP.

382. This would also entail that the allocation of liability in PSD2 should be amended accordingly, with the PSP responsible for performing SCA (i.e. either the ASPSP or the AISP) also bearing the full liability towards the customer in case of unauthorised or fraudulent access, including for data security breaches.

383. In the EBA's view, this should be complemented with the possibility for the PSU to withdraw the consent given to the AISP via the ASPSP, including via a dashboard or similar solutions offered by the ASPSP allowing PSUs to check which entities have been granted access to their data and revoke consent via the ASPSP (as further detailed in item 18.1. below).

384. Such an approach would:

- eliminate the 90-day or 180-day churn issues for AISPs;
- enhance security by requiring TPPs to also set up SCA to secure access to their own platforms;
- ensure a level playing field between TPPs and ASPSPs who also have to apply SCA when customers access directly their account information with the ASPSP;
- enhance security by requiring AISPs to also apply SCA to secure access to customers' data in their own platforms;
- promote the development of more convenient and customer-friendly AIS services by allowing AISPs to be in control of the customer authentication experience; and
- clarify the allocation of liability between ASPSPs and AISPs.

385. At the same time, the EBA acknowledges that some TPPs may find it challenging to issue their own security credentials and may prefer instead to rely on the ASPSPs' SCA procedures. In this respect, the EBA also considered the possibility of giving TPPs the choice to apply their own SCA or rely on the ASPSP's SCA procedures. However, the EBA discarded such an option as it would create significant implementation challenges, bring legal uncertainty and also create unlevel playing field issues.

Question 18 - Has the EBA identified any need for clarification or amendments of specific provisions in PSD2 on the application of the requirements for access to payment accounts?

386. In addition to the issues covered in the response to question 17 above, this sub-section addresses six additional issues that, in the EBA's view, require further clarifications and amendments in the Directive. These relate to:

- Revocation of consent via the ASPSP;
- Scope of the information to be shared with TPPs;
- Exchange of information from TPPs to the ASPSP;
- Delineation between mandatory API functionalities and 'premium' services;
- Clarification of what 'online' access means; and
- Use of agents by AISPs.

18.1. Revocation of consent via the ASPSP

387. The current legal framework is silent on whether the PSU can revoke the consent given to the TPP via their ASPSP. In Q&A 4309, the EC clarified that 'it is only the PSU that can give consent to the provision of PIS and AIS services' and that, consequently, 'the ASPSP cannot revoke the consent', nor offer PSUs the possibility to 'generally "opt-out" from being able to use the services of bank-independent TPPs'.

388. In the EBA's view, there is merit in addressing these issues in the Directive and to allow PSUs to revoke consent given to a TPP via their ASPSP, including via a dashboard/portal offered by the ASPSP allowing PSUs to check which entities have been granted access to their data and to revoke consent in the ASPSPs' domain in a convenient and consumer friendly manner. In such case, if consent is revoked via the ASPSP, the EBA proposes that the EC explores the possibility of requiring ASPSPs to inform the AISP when consent is revoked via the ASPSP in order to give legal certainty to AISPs regarding the validity of the contractual consent granted by the PSU.

389. In the EBA's view this would:

- give PSUs more control over their data and enhance consumer protection;
- foster consumers' trust in open banking; and
- provide legal clarity on whether the use of such dashboards is in line with the PSD2.

390. At the same time, clear rules should be set to avoid potential abuses by ASPSPs. In particular, it should be clear that any type of dissuading language or similar actions used by ASPSPs to incentivise customers to revoke consent is not allowed. Also, it should be clear that if the PSU changes his/her mind and wishes to use again the AISP's services after consent was revoked, ASPSPs should allow the PSU to do so, subject to a new SCA, and should not create obstacles to AISPs' services such as checking the (new) consent given by the PSU to the AISP.

18.2. Scope of information to be shared with TPPs

391. The EBA proposes that the Directive further clarifies the scope of the information that ASPSPs are required to share with TPPs. In particular, the EBA is of the view that more clarifications is required as regards:

- the sharing with AISPs of the list of standing orders and future-dated payments;
- the sharing with AISPs of information on overdraft lines and daily spending limits;
- the sharing with AISPs and PISPs of the name of the PSU/account holder and of the person initiating the payment when different from the account holder; and
- the sharing with PISPs of information on the payment status.

392. Regarding the sharing of the name of the PSU, Q&As 4081 and 5165 clarified that, in line with the parity principle, the ASPSPs should share the name of the PSU:

- with AISPs, 'if the name is made available to the PSU when directly accessing his account information'; and
- with PISPs, 'if the name is included in the information on the initiation and execution of the payment transaction provided or made available to the PSU when the transaction is initiated directly by the latter'.

393. Whilst the information on the name of the PSU is in most cases available to the PSU through their online banking interface, and therefore should be shared with TPPs via the API, the EBA understands that this is not always the case. The EBA sees merit in requiring ASPSPs to share with AISPs and PISPs the name of the PSU/account holder, and of the person initiating the payment (where different from the account holder), in all cases, even if this information might not be available to the PSU through the ASPSPs' online banking interface. This is because this information is essential for AISPs and PISPs for providing their services as well as for effective fraud monitoring and AML/CFT purposes. This being said, it should be considered that ASPSPs might not be able to share this information with PISPs in advance of the actual payment initiation, but only after the authentication of the PSU has taken place.

394. Regarding the sharing with PISPs of information on the payment status, Article 66(4)(b) of PSD2 prescribes that ASPSPs shall "immediately after receipt of the payment order" from a PISP provide to the PISP, "all information on the initiation of the payment transaction and all information accessible to the [ASPSP] regarding the execution of the payment transaction". In this respect, the EC clarified in Q&A 4601 that:

- if the ASPSP is not aware "immediately after the receipt of the payment order" whether the payment will be executed or not, it is not required to provide such information to the PISP at a later stage; and that
- in such case, it is sufficient for the ASPSP to provide the PISP, upon request, with a yes/no answer whether the amount necessary for the execution of a payment transaction is available on the payer's payment account in accordance with Article 36(1)(c) of the RTS on SCA&CSC.

395. In this respect, if the ASPSP is not aware "immediately after the receipt of the payment order" whether the payment will be executed or not (as is for example the case of ASPSPs using batch processing), the EBA proposes for the EC to consider the merits of requiring ASPSPs to share with PISPs information on the execution of a payment as soon as this becomes available to the ASPSP. In the EBA's view, this would support the uptake of PIS that the PSD2 has sought to promote as a new innovative service in the EU and allow PISPs to better assess the risk of non-payment and to effectively compete against incumbents. In addition, pushing information to the PISP on the payment status may also have benefits for ASPSPs as this would eliminate the need for PISPs to make frequent calls to the API in order to receive updates on the payment status and therefore reduce traffic on ASPSPs' APIs. On the other hand, these benefits should be considered against the implementation costs that such requirement would imply for ASPSPs.

18.3. Exchange of information from TPPs to the ASPSP

396. One of the issues that market participants have raised with CAs and the EBA is that ASPSPs' fraud monitoring may not be able to detect some suspicious or fraudulent transactions when the PSU uses an AISP or PISP because of lack of data (such as https access logs, including IP address and device specification) needed for their transaction monitoring mechanisms to identify whether a certain connection is risky or not. On the other hand, AISPs and PISPs have argued that they do not have legal clarity on whether they are allowed to share such type of data with ASPSPs from a GDPR perspective. In this respect, the EBA proposes that the Directive clarifies the type of information that TPPs are required to share with the ASPSP, including whether this should include information for the purpose of ASPSP's transaction monitoring, such as the PSUs' location, IP-address and other device data.

397. In the EBA's view, this would:

- enhance security by allowing ASPSPs to make better use of their transaction monitoring mechanisms;
- provide a clear legal basis for TPPs to share this data with the ASPSP and provide more clarity regarding compliance with GDPR; and
- also, it would provide legal clarity to ASPSPs whether they need to make available such functionality in their APIs.

398. In the scenario in which the responsibility for performing SCA would be transferred to the AISP as proposed in item 17.3. above, the issue would become less relevant for AISPs, as in such case the AISP, and not the ASPSP, would be responsible for carrying out transaction monitoring.

18.4. Delineation between mandatory API functionalities and 'premium' services

399. The EBA also proposes that the Directive provides more clarifications regarding the delineation between services that ASPSPs must make available to TPPs via their PSD2 APIs free of charge

on the one hand, and on the other hand "premium" services or added-value functionalities that go beyond the scope of the PSD2 requirements, such as for example mobile payment services using the phone number as a proxy for the payee's unique identifier, as referred to in Q&A 5498.

400. As business models are continuously evolving, the EC should find ways to provide clarifications in a way that avoids prescribing a closed list of 'premium' services.

401. In the EBA's view, this would provide more legal clarity regarding the functionalities that ASPSPs' APIs should meet and support a level playing field across the EU.

402. Finally, in considering this issue, the EBA proposes that the EC also takes into account that requiring ASPSPs to provide innovative 'premium' solutions to TPPs free of charge may hinder ASPSPs from developing such innovation solutions in the future and could raise level playing field issues between different types of PSPs.

18.5. The meaning of 'online' access

403. The EBA proposes that the Directive clarifies what is considered as 'online' access to payment accounts within the meaning of PSD2, and in particular whether this covers secured corporate protocols and machine-to-machine communication, as those referred to in Q&A 6235.

404. This clarification is essential in order to provide legal clarity regarding the application of the SCA requirements in Article 97(1)(a) and the access interface requirements in Articles 66 and 67 of PSD2 and ensure a level playing field across the EU.

18.6. Use of agents by AISPs

405. Article 33(1) PSD2 provides that persons providing only AIS are exempt from the application of section 2 of PSD2 (including Article 19 PSD2 on the registration of agents), whereas section 3 of PSD2 (including Article 28(1)(d) PSD2 on passporting that cross-refers to Article 19 PSD2) apply to AIS.

406. Based on these provisions it is unclear whether AISPs' agents need to be registered, and whether the provisions Article 28(1)(d) on passporting apply with regard to AISPs' agents.

407. The EBA proposes that these provisions are clarified in the Directive in order to provide legal clarity and support a level playing field across the EU.

Question 19 - Has the EBA identified technical barriers related to access of payment accounts data (e.g. related to interoperability, different standards or data sets)? Should the access to payment accounts be further standardised (e.g. regarding the actual

technical access requirements/interfaces to promote interoperability)?

408. Please refer to the answers to question 17 and 18 above.

Question 20 - What opportunities and challenges does the EBA see with respect to the potential expansion from access to payment account data towards access to other types of financial data?

409. Open Finance, or the expansion from access to payment accounts data towards access to other types of financial data (such as savings, investments and insurance data) has the potential to further spur innovations in the financial sector, to the benefit of consumers and the overall financial ecosystem. It is an opportunity to build on the sharing of data enabled by the PSD2 and allow consumers to access and share their data with third party providers who can then use this data to develop innovative products and services better suited to customers' needs.

410. In particular, Open finance has the potential to:

- allow consumers and businesses to benefit of more tailored services better suited to their needs;
- support the development of new and innovative services and products;
- empower consumers to make more informed financial decisions and increase their access to information about their products and spending habits;
- improve access for consumers to a wider range of financial products and services; and
- make it easier for consumers and businesses to compare prices and product features and switch products or providers.

411. Expanding access to other types of financial data also comes with challenges and risks.

412. One key challenge for legislators and supervisory authorities is to create an appropriate legal framework that addresses the risks arising from the expansion to Open Finance and gives consumers the confidence to use Open finance services.

413. The EBA believes that any future legal framework on Open Finance would need to ensure that there are adequate security requirements in place to ensure the safety of customers' data and reduce the risk of fraud and scams. This is essential in order to build customers' trust in Open Finance. In this regard, the EBA proposes to expand the requirements on SCA under PSD2 to access to other type of account data.

414. The experience acquired from the PSD2 implementation also shows that, in order to avoid a repetition of the issues faced with the PSD2, any future legal framework on Open Finance

should set clear expectations regarding the scope of data to be shared with third parties and clear requirements for the interfaces that firms should use to access the data. In light of the PSD2 experience, the EBA proposes that the EC assesses the viability of a single EU API standard that would provide the foundation for Open Finance. The EBA believes that the development of such a standard should be industry-led, leveraging on the work done by the existing market standardisation initiatives, and ensuring an equal representation of all stakeholders, in particular third parties, in the design of the standard, and with a mechanism for competent authorities to provide steer and guidance in the development of the standard.

415. Moreover, in order to avoid a repetition of the issues faced under PSD2 in terms of its interplay with the GDPR and the uncertainty this created for market players, any future Open finance regulatory framework should provide clarity on how firms are expected to ensure compliance with the GDPR when granting access to the data or accessing the data, including how they should apply the data minimisation principle under GDPR in this context, and the legal grounds for processing of special categories of data under GDPR and of the so-called 'silent party' data.

416. Furthermore, in order to foster consumers' trust in Open Finance, it is essential that consumers remain in control of their data, understand with whom it is shared, and be able to easily revoke their consent at any time. In this respect, the use of consent dashboards as described in item 18.1. above could enhance transparency and customer's control over their data by allowing them an easy way to revoke consent.

417. The costs for market participants to implement a new Open finance framework should also be carefully considered, as the cost of investing in the relevant infrastructure to share data could be very high. In particular, the cost impact on smaller entities should be carefully considered as these may more likely experience the need to recoup the cost from their customers and thus lose competitive advantage.

418. The success of Open Finance will also depend on having high quality APIs for the sharing of data and on firms having commercial incentives to invest and participate in the Open Finance ecosystem. In this respect, in order to provide more incentives for financial institutions to develop high quality APIs as a foundation for Open Finance, the EBA proposes that the EC explores the possibility of leaving it to market to decide on the appropriate compensation for the use of these APIs by third parties.

419. The EBA believes that the implementation of a future legal framework on Open Finance should be phased. It could potentially start with opening access to non-payment accounts and banking products and subsequently extend to other financial products. Also, it should first and foremost focus on viable consumer propositions, business models and use-cases, to avoid setting requirements that require substantial costs to implement for a solution that is hardly used in the end.

420. Last, but not least, the interplay between any future legal framework on Open Finance and the PSD2 would need to be carefully considered. In particular, should the EC consider bringing

AISPs within the scope of such separate legal framework on Open Finance, and removing them from the scope of the PSD2, it is important to ensure that this does not inadvertently create a grey area regarding the legal regime(s) applicable to AISPs or loopholes in said regime(s).

Section 7 - Access to payment systems and access to accounts maintained with a credit institution

Question 21 - Has the EBA identified any impediments to the ability of PIs and EMIs to access payment systems, and/or payment accounts of PIs and EMIs maintained with credit institutions, in a way that would undermine the competition enhancing objective of PSD2?

421. In response to the question, the EBA has identified three specific areas that require further clarification and/or elaboration in the Directive. These relate to the notification process under Article 36 of PSD2, including CAs to be notified, and the interplay between the requirements on access to payment systems under PSD2 and the SFD. The EBA has elaborated these topics, together with specific proposals, further below.

Issue 21.1. Notification process under Article 36 of PSD2

422. In the EBA Opinion on de-risking (EBA/Op/2022/01)[36], the EBA noted that 'Article 36 of the PSD2 provides that 'Member States shall ensure that payment institutions have access to credit institutions' payment accounts services on an objective, non-discriminatory and proportionate basis' and that 'credit institution shall provide competent authorities with duly motivated reasons for any rejection'. The EBA's findings in the Opinion also suggest that the high-level nature of this provision and the lack of guidance for credit institutions on the circumstances in which the closure of an account must be notified have given rise to divergent application across the EU and divergent interpretations across CAs'. Furthermore, the EBA noted that Article 36 limits the notification process to the onboarding stage and recommended for the EC to consider expanding this requirement to include also decisions made by credit institutions to offboard payment institutions in existing business relationships. Finally, in its Opinion, the EBA recommended to the EC 'to consider mandating the EBA to develop technical standards to ensure the consistent application of Article 36. Such a mandate could include the creation of a template that credit institutions would be required to use when notifying competent authorities when they decide to reject an account. Regulators at EU level could gain more robust insight on the most common reasons for rejection and take targeted steps to address those reasons if necessary'.

36 https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Opinions/2022/Opinion%20on%20de-risking%20%28EBA-Op-2022-01%29/1025705/EBA%20Opinion%20and%20annexed%20report%20on%20de-risking.pdf

423. In relation to the above, the EBA reiterates that there are indications that CIs have been refusing opening accounts to PIs/EMIs, as well as terminating existing relationships with these providers. Various reasons have been brought forward by CIs, such as high levels of ML/TF risk associated with some business models of PIs/EMIs and a lack of confidence in PIs/EMIs' own AML/CFT systems and controls, which means that taking on such PIs/EMIs as customers could increase the money laundering and terrorist financing risks to which the CI is exposed.

424. PIs/EMIs rely on CIs to carry out their activities because they need to have settlement accounts to provide payment services and often safeguarding accounts to protect all funds that have been received from PSUs or through another PSP for the execution of payment transactions.

425. PIs and EMIs that do not have access to such accounts will not be able to carry out their business activities, which, in turn, may lead to disruptions in their business continuity and/or higher costs to already established PIs/EMIs that have been de-risked, which will need to find a new credit institution to open accounts and to transfer their clients. This may subsequently reduce competition in the EU payments market, decrease the payment choice for consumers and lead to regulatory arbitrage. In addition, since PIs and EMIs are often introducing innovative payment solutions and are often a driver for financial innovation, lack of access to accounts for settlement and safeguarding purposes will pose a risk to the objective of the Directive of fostering innovation.

426. Another significant issue identified, in line with the EBA Opinion on de-risking, was the high-level nature of Article 36 of PSD2 and the lack of guidance for credit institutions on the circumstances in which the closure of an account must be notified to CAs. Relatedly, the EBA has identified as issues:

- the way CAs can monitor compliance with this requirement;
- the absence of a timeline for the submission of notifications to CAs under Article 36 of PSD2;
- the lack of transparency of the information exchanged between CIs and PIs/EMIs on the reasons why the latter are being de-risked; and
- the offboarding of PIs/EMIs by CIs in cases where the material situation of the business activities of the PI/EMI has not changed.

427. In order to address the issues highlighted above, and in addition to the recommendations already set out in the EBA Opinion on de-risking, the EBA proposes that the Directive clarifies the reference to 'duly justified reasons' for refusing access to PIs/EMIs to accounts with credit institutions and the reasons for terminating contracts on accounts of PIs/EMIs that have already been maintained by the CI. In particular, the EBA proposes the Directive to introduce criteria for refusing access to or terminating an existing account, such as demonstrable shortcomings in ML/TF controls, the risk profile of the CI or PI/EMI, a breach of contract, the particular business model of the CI or PI/EMI, lack of information and documents received from the PI/EMI, and others. The EBA also stands ready to develop a mandate to develop

criteria to help supervisors assess whether the reasons of CIs to provide accounts or to terminate existing accounts for PIs/EMIs are justified.

428. The EBA also proposes for the Directive to provide further details on the notification process set out in Article 36 of PSD2. In particular, the EBA proposes for the Directive to require from CIs, without undue delay after they have taken the decision, to notify their CA of the reasons for the decision to refuse access or to close existing accounts of PIs/EMIs. This should include a specific deadline to submit the notification to their CAs. The EBA stands ready to develop a mandate setting out the specific details of the notification process.

429. In order to ensure greater transparency, CIs may need to keep records of their communication with PIs/EMIs and also relevant information that has been taken into consideration when taking the decision to refuse access or to close existing accounts of PIs/EMIs.

430. All of these proposals should contribute to meeting the objectives of PSD2 to enhance competition and foster innovation. In addition, they should increase the clarity and transparency of the legal framework, contribute to its harmonised and consistent application and avoid regulatory arbitrage.

21.2. Competent authority to be notified

431. Article 36 of PSD2 prescribes that 'the credit institution shall provide the competent authority with duly motivated reasons for any rejection'. The EBA understands that the CA to be informed under Article 36 of PSD2 is the authority responsible for the supervision of the CI. However, there are cases where the CA responsible for the supervision of the CI differs from the CA supervising the activities of the PI/EMI, especially in cross-border context where PI/EMI established in one Member State may have opened settlement and/or safeguarding accounts in CI established (and supervised) in another Member State.

432. In these cases, the CA of the PI/EMI should ideally also be aware of the closure of the settlement and/or safeguarding accounts and the reasons for the CI to do so, since these will have an effect on the supervised activities and, depending on the size of the PI/EMI, the respective national payments market. The EBA, therefore, proposes to the EC to envisage also a notification to the CA responsible for the supervision of the activities of the PI/EMI, which can be done either by the CI or by the CA supervising the CI.

21.3. Interplay between the requirements on access to payment systems under PSD2 and the SFD

433. The EBA has identified divergent practices in relation to access to payment systems by PIs and EMIs where some Member States allow for direct participation of PIs and EMIs in payment systems with settlement finality, while others do not. In the latter cases, PIs and EMIs are dependent and reliant on CIs, through which they obtain indirect participation in said payment systems, to carry out their business. This subsequently leads to competitive advantage for CIs and gives rise to general level-playing field issues and regulatory arbitrage.

434. While the EBA acknowledges these issues, and taking into account the provision of Article 35(2)(a) of PSD2, the EBA is of the view that the issues are more closely related to the restrictions on direct participation of PIs and EMIs stemming from the Settlement Finality Directive[37] and that any changes to be introduced in relation to access to payment systems, should be reflected in said Directive.

[37] Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems.

Section 8 – Cross-sectoral topics

Question 22 - The EBA is invited to provide advice as to whether and to what extent some requirements currently contained in Guidelines should be transferred to Level 2 acts, and to whether and to what extent some requirements contained in Level 2 acts (e.g. Regulatory Technical Standards) could be 'upgraded' to Level 1. For example, should the Guidelines on authorisation of payment and electronic money institutions be converted into a Regulatory Technical Standard (as outlined under Article 5(6) of PSD2)?

435. Throughout the report, the EBA has articulated a large number of proposals how particular issues can be addressed through clarifications and amendment in the Directive. These include, at times, aspects related to and provisions of level-2 acts. The EBA has, therefore, focused the response to question 22 on the aspects related to the potential transformation of mandates for the EBA to develop Guidelines to potential future mandates for the development of RTS. These cover the Guidelines on authorisation of PIs and EMIs, the Guidelines on PII and the mandate on fraud reporting.

22.1. Guidelines on authorisation of PIs and EMIs

436. Article 5(5) of PSD2 conferred a mandate on the EBA to issue Guidelines […] concerning the information to be provided to the competent authorities in the application for the authorisation of payment institutions…' Article 5(6) of PSD2, in turn, envisaged that taking into account the experience acquired in the application of the Guidelines on authorisation of PIs and EMIs, that the 'EBA may develop draft regulatory technical standards specifying the information to be provided to the competent authorities in the application for the authorisation of payment institutions…'.

437. In that regard, in order to ensure further consistency and harmonisation in the authorisation process, thus ensuring level-playing field and avoiding regulatory arbitrage, the EBA has arrived at the view that it would be appropriate for the EBA to be mandated in a potential future revised PSD2 to develop RTS, not merely on the information to be provided in the application for authorisation, but on the authorisation of PIs and EMIs more generally.

438. As indicated in item 10a.2. related to the application of the authorisation process for PIs and EMIs, the EBA has initiated a Peer review on authorisation of PIs and EMIs, which is envisaged to be finalised by the end of 2022. The EBA will assess specific issues related to the authorisation process and the application of the Guidelines in greater detail and may arrive at

specific proposals for amendment of the Directive or the details of a potential future mandate conferred on the EBA.

22.2. Guidelines on the PII

439. Article 5(4) of PSD2 mandates the EBA to issue Guidelines addressed to CAs on the criteria on how to stipulate the minimum monetary amount of the PII or other comparable guarantee for PIS and AIS. The EBA developed the Guidelines on PII under PSD2 (EBA/GL/2017/08)[38] and they have applied since 13 January 2018. In order to support the harmonised and consistent application of the Guidelines, thus contributing to convergence of supervisory practices, the EBA also developed an MS Excel-based tool for calculating the minimum monetary amount of the PII under PSD2, which is available on the EBA website for CAs and legal entities to use at their discretion[39].

440. The EBA, however, has identified a significant number of issues in relation to the use of PII as elaborated in detail in item 8.4 of this report, where the EBA proposed to EC to clarify further in the Directive aspects related to the use of initial capital/own funds as a potential alternative to PII, the characteristics of the PII policies and the specific main risks that should be covered, whether excess, deductibles and thresholds could be applied to PIIs, and clarifications on what could be considered as a comparable guarantee to the PII. In addition to these, the EBA is of the view that in order to ensure further harmonisation and a level-playing field and to develop a more homogeneous legal framework for the use of PIIs, the mandate to develop Guidelines on PII should be converted into RTS.

22.3. The mandate on fraud reporting

441. Article 96(6) of PSD2 prescribes that 'Member States shall ensure that payment service providers provide, at least on an annual basis, statistical data on fraud relating to different means of payment to their competent authorities. Those competent authorities shall provide EBA and the ECB with such data in an aggregated form'. To fulfil this mandate, the EBA, in close cooperation with ECB, developed the Guidelines on fraud reporting under PSD2 (EBA/GL/2020/01)[40], which were further amended in January 2020.

442. The EBA is of the view that such important reporting requirement should be introduced in the form of a more formal mandate with an explicit reference to the type of legal instrument to be developed by the EBA, as this has been absent in PSD2 and required the EBA to use the strongest legal instrument it can issue at its own initiative, which are Guidelines. In that regard, the EBA sees merit for these reporting requirements, which are crucial for assessing the effectiveness of the security measures in PSD2, including SCA, to be developed in the form of RTS. This would also allow for the EBA to rely on robust quantitative data in the said

[38] Final Guidelines on PII under PSD2 (EBA-GL-2017-08).pdf (europa.eu)

[39] https://www.eba.europa.eu/sites/default/documents/files/documents/10180/1901998/7cce8083-b2ee-4b31-bd56-6996c1fedc5f/Tool%20for%20calculating%20the%20minimum%20monetary%20amount%20of%20the%20PII%20under%20PSD2.xlsm

[40] Guidelines amending EBA GL on Fraud reporting under PSD2.pdf (europa.eu)

assessment. RTS would also provide legal certainty to the market, ensure level-playing field between different PSPs and avoid regulatory arbitrage, as well as lead to harmonised and consistent application of the legal requirements and to a more effective enforcement by CAs. Relatedly, to ensure that the data is submitted to the EBA in a standardised way, the EBA sees merit to receive a mandate to develop ITS establishing the standard forms and templates for the submission of the payment fraud data from CAs to the EBA.

Question 23 - Has the EBA identified further areas or issues that may require additional Regulatory Technical Standards, Implementing Technical Standards or Guidelines?

443. The EBA has identified specific areas where the EBA sees merit in receiving a mandate to prescribe technical requirements or expectations complementing and further elaborating on specific provisions set out in PSD2. The EBA has put these proposals forward across the document but is providing a complementary overview in the list below:

- Developing a mandate, potentially RTS, on the LNE under PSD2, as proposed in item 1.11 of this report;
- Mandate providing more clarification on the reasons of CIs to refuse access or to close existing accounts of PIs/EMIs under Article 36 of PSD2, as proposed in item 21.1. of this report;
- Mandate on the criteria for granting an exemption for some ASPSPs to develop a dedicated interface/API for TPP access, as proposed in item 17.2. of this report;
- Developing technical standards of setting out the details and structure of a template that CIs would be required to use when notifying CAs when the former decide to reject an account, as proposed in item 21.1. of this report;
- Mandate on setting out the specific details of the notification process under Article 36 of PSD2, as proposed in item 21.1. of this report; and
- Mandate on the details and structure of the information to be notified and the technical requirements for the development and operation of a database on sanctions, as proposed in the response to question 27.

444. The EBA has also put forward proposals on potential mandates in case the EC arrives at the view that the specific proposals for changes in the Directive put forward by the EBA on certain topics are of a technical nature and more appropriate to be handled through level-2 or level-3 instruments. These mandates are covered in the following, shorter list:

- On the criteria and conditions for the assessment of CAs whether a method for calculation of own funds that is different from Method B should be chosen, as proposed in item 6.2. of this report;

- On the development of criteria to help supervisors assess whether the reasons of CIs to provide accounts or to terminate existing accounts for PIs/EMIs, are justified as proposed in item 6.2. of this report; and
- On the criteria for delineating between significant and non-significant PIs/EMIs for the purpose of recovery and wind-down framework and potentially consolidated group supervision as proposed in items 6.5. and 10 of this report.

445. In addition, a topic that has not yet been covered in the response to the other questions of the CfA relates to the applicable requirements on governance arrangements for PIs/EMIs. Based on the feedback received from CAs, the EBA has observed that market participants and supervisors find the requirements on internal governance arrangements set out in PSD2 as not sufficiently clear and of a too high-level nature, without providing any indication on the expected internal governance arrangements to be implemented by PIs/EMIs and supervised by CAs. These give rise to concerns about the consistent application of the requirements, regulatory arbitrage and level-playing field issues, for example compared to CIs, which have to comply with significantly more demanding requirements under the EU Capital Requirements Regulation and Directive (CRR and CRD).

446. In that regard, the EBA is of the view that there is room for specific requirements on governance arrangements for PIs/EMIs, including a clear organisational structure with well-defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks PIs/EMIs are or may be exposed to, and adequate internal control mechanisms. These requirements should be proportionate to the nature, scale and complexity of the risks inherent in the business model and the activities of PIs/EMIs, as well as taking into account the difference in size between PIs/EMIs, some of which may be very large institutions of systemic importance in individual jurisdictions or very small entities comprising a few members of staff only.

447. The EBA, therefore, proposes to the EC to take a similar approach to the one under Article 74 of Directive 2013/36/EU (CRD) and Article 26 of Directive (EU) 2019/2034 (IFD) and to mandate the EBA to develop a mandate on the internal governance arrangements, processes and mechanisms for PIs/EMIs under PSD2.

Question 24 - Does the EBA have any views on clarifications provided through Q&As and Opinions that might need to be further specified and/or clarified in PSD2 or introduced in new or existing Level 2 and Level 3 mandates? Please provide your reasoning.

448. The EBA has proposed throughout this report specific clarifications that are currently provided through Q&As and EBA Opinions to be further specified and/or clarified in a revised Directive. These relate to the specific topics covered in the responses to the other questions from the CfA and can be found in the respective sections.

Section 9 – Enforcement of PSD2

Questions 25 and 26 - Has the EBA identified any shortcomings in the enforcement by the National Competent Authorities of PSD2 rules? Does the EBA have views on whether any enforcement shortcomings observed are due to the PSD2 framework?

449. The EBA has identified two specific areas where supervisory challenges and/or shortcomings have occurred in the implementation and application of the requirements of PSD2 and the related RTS on SCA&CSC. These mainly relate to the supervision of the compliance of the requirements on access to payment accounts and the implementation of SCA for e-commerce card-based payment transactions. These are elaborated further below.

25.1. Challenges in supervising compliance with the requirements on access to payment accounts

450. CAs indicated that they have faced challenges in the implementation and supervision of the requirements on access to payment accounts. Some of the challenges mentioned included:

- The need for specific skills to supervise technical specifications of innovative IT systems and solutions;
- The significant time and resources needed to supervise these requirements;
- The high-level requirements in PSD2 and the RTS on SCA&CSC that led to uncertainties in the interpretation of certain provisions, regarding for example the functionalities that ASPSPs' dedicated interfaces must meet;
- Absence of a single API standard across the EU, which required CAs to invest significant resources into assessing a large number of different API implementations by ASPSPs; and
- Lack of TPP presence in some markets, which made it more difficult for supervisors to obtain first-hand experience and information about issues in the implementation of ASPSPs' APIs.

451. To overcome some of these challenges, one of the proposals put forward in this report related to the introduction of a single API standard across the EU. The topic has been elaborated in the section on access to payment accounts, in particular item 17.1.

452. Separately, in the past few years, the EBA has observed a number of issues in relation to the application of the requirements on access to payment accounts, including but not limited to:

- Obstacles arising to TPPs services in the context of the use of redirection as a sole method of carrying out the authentication of the PSU supported by ASPSPs;

- The use of multiple SCA in a TPP journey;
- Additional unnecessary steps and friction in a TPP journey compared to when the PSUs are directly accessing their payment accounts or initiating payment transactions with the ASPSP;
- Checks by the ASPSPs on the consent given from the PSU to the TPP;
- Additional registration steps; and
- The uncertainties on the use and reliance on eIDAS certificates for the purpose of identification.

453. To address these issues and to ensure that ASPSPs' dedicated interfaces do not create obstacles to the provision of PIS and AIS, as well as to fulfil its statutory objective of contributing to supervisory convergence across the EU, the EBA has provided a large number of clarifications, including by developing the Opinions on the implementation of the RTS in SCA&CSC, the Opinion on the use of eIDAS certificates, the Opinion on obstacles, the Guidelines on the conditions to benefit from an exemption from the contingency mechanism under Article 33(6) of the RTS on SCA&CSC, a large number of responses to questions posed in the Q&A tool and responses to issues raised by the EBA industry API working group. In addition, in February 2021, the EBA published the Opinion on supervisory actions to call on national CAs to ensure the removal of obstacles on account access under PSD2 (EBA/Op/2021/02)[41], ensure that ASPSPs comply with the requirements of PSD2 and the RTS on SCA&CSC, and to ensure that they remove any obstacle identified within the shortest possible time and without undue delay.

454. In addition, CAs have taken measures to ensure that ASPSPs in their jurisdictions comply with PSD2 and the RTS, and that ASPSPs remove the identified obstacles.

455. The extent and nature of these issues and obstacles, their continued existence for a long period in time, and the extensive interventions required by the EBA during that time prevented the competition-enhancing objective of PSD2 from materialising as early and as full as the Directive had envisaged. This raises the question as to whether there may not be a better way to ensure compliance with legal requirements in particular those that aim to enhance competition in a particular financial sector, and where any delay in fulfilling that objective can cause detriment to market challengers.

456. Complementary to the above, the EBA is of the view that the clarification and amendments of the Directive proposed in this report, including those in support of further standardisation through a single API standard, whose development would be industry-led but with a mechanism for the EBA and CAs to potentially provide guidance and steer in its development, would contribute to a clearer legal framework to be complied with by the industry, thus mitigating some of the issues mentioned above and reducing the need for CAs to take

[41] EBA calls on national authorities to take supervisory actions for the removal of obstacles to account access under the Payment Services Directive | European Banking Authority (europa.eu)

supervisory measures, however, these would not be sufficient to fully address the observed issue and the need to strengthen the enforcement of the legal framework. In relation to this, the EBA proposes for the EC to consider introducing mechanisms to strengthen the enforcement of the legal framework.

25.2. Implementation of SCA for e-commerce card-based payment transactions

457. The EBA recalls that in early 2019, ahead of the application date of the RTS on SCA&CSC on 14 September 2019, a number of industry participants had expressed concerns regarding the state of preparedness of e-commerce for the new SCA requirements, in particular in relation to card-based payment transactions. Some of these deemed the envisaged transitional period of 18 months for the application of the RTS on SCA&CSC envisaged under Article 115(4) of PSD2 as insufficient for the complexity of the implementation projects required at EU level with the impact on the industry allegedly being underestimated. Others argued that the legal requirements of PSD2 and the RTS on SCA&CSC have not been sufficiently clear and require a lot of clarifications from the EBA and the EC.

458. In relation to the above, while the EBA has put significant efforts in providing clarifications on the implementation and application of SCA through a few Opinions and a very large number of answers to questions received in the EBA Q&A tool, the card industry still struggled to meet the application date of the RTS on SCA&CSC. And this was so despite the final PSD2 having been published as early as November 2015 with the provision on SCA included, thus giving the industry sufficient time to make the required changes.

459. With its Opinion on the elements of SCA, the EBA acknowledged the complexity of the payments markets across the EU and the necessary changes that had to be implemented throughout the payment chain to apply SCA, including by actors that are not regulated, such as merchants, were challenging and were likely to lead to some actors in the payments chain not being ready. In that regard, the EBA accepted that, on an exceptional basis and in order to avoid unintended negative consequences for PSUs and the overall economy, CAs may decide to work with PSPs and relevant stakeholders, including consumers and merchants, to provide limited additional time to allow issuing PSPs to migrate to authentication approaches that are compliant with SCA and acquiring PSPs to migrate their merchants to solutions that support SCA. The EBA also highlighted at the time that it was imperative that all actors, including card schemes and merchants, take the steps necessary to apply or request SCA and thus avoid situations in which payment transactions are rejected, blocked or interrupted.

460. To contribute to a harmonised and consistent migration to SCA readiness and compliance for e-commerce card-based payment transactions, the EBA provided further details on the expectations for the migration in the Opinion on the deadline for the migration to SCA for e-commerce card-based payment transactions.

461. This latter Opinion set out a deadline for the migration to SCA, recommended CAs to take a consistent approach in the migration to SCA, and set out the actions to be taken by CAs with their specific deadlines. These actions included identification of authentication approaches

and solutions to be used for the application of SCA by PSPs, the provision of detailed migration plans from PSPs to CAs, regular updates from PSPs to CAs on the overall readiness and progress made to apply SCA, and active communication with the PSUs.

462. In that regard, taking into account the alleged non-compliance by many PSPs with the SCA requirements for e-commerce card-based payment transactions, CAs faced the unprecedented situation where they had to decide whether to strictly enforce the legal requirements leading to severe consequences for the economy and PSUs due to potential large-scale declines of payment transactions across the EU, or to allow temporary non-enforcement but being exposed to reputational risks, among others.

463. In relation to the above, the EBA is of the view that there are different aspects that can be improved going forward for both, the implementation/application of the requirements of SCA and from the perspective of undertaking similar novel, complex and wide-scale legislative-driven initiatives requiring simultaneous migration of different actors, including non-regulated ones, to compliance with specific requirements.

464. In relation to the specific requirements of SCA, the EBA proposes for the EC to consider introducing in the Directive additional and more effective enforcement measures ensuring the strict application of the legal requirements of PSD2 and the RTS on SCA&CSC. The EBA is also of the view that the proposals put forward in item 3.1. of this report, namely to:

- introduce specific requirements in the Directive addressed to payment schemes, payment gateways and to merchants to ensure that key security requirements are properly implemented in the future, and
- shift the liability for any unauthorised and/or fraudulent transactions from payee's PSPs towards merchants in the cases where SCA and other potential future security requirements have not been applied because merchants have not implemented IT solutions supporting their application,

could support the compliance with the legal requirements for the application of SCA, thus reducing the need for CAs to take supervisory, including enforcement, measures.

465. In relation to similar novel, complex and wide-scale legislative-driven payments-related initiatives, the EBA proposes for the EC to:

- Focus on introducing clear and unambiguous level-1 requirements;
- Assess carefully the impact the legal requirements will have on complex chains where the implementation of the legal requirements and its pace depend on non-regulated actors (as was the case in the implementation of SCA where card-schemes and merchants had a role in the implementation of solutions to support SCA);
- Introduce, similar to the approach taken by the EBA with the staged migration to SCA-compliance set out in the Opinion on the SCA migration, a phased and sequential implementation approach with different steps in cases where the implementation of

the legal requirements by some actors is dependent on the progress made and readiness by others (e.g. as it has been the case with card schemes, issuing PSP, acquiring PSPs, technical service providers and merchants in the case of e-commerce card-based payment transactions) and where the provision of services is done on a cross-border basis; and

- Introduce collaboration mechanisms for CAs to ensure harmonised and consistent implementation of the legal requirements.

Question 27 - Does the EBA consider that inclusion of a sanction regime for service providers would ensure better application of the PSD2? If affirmative, for which Articles of PSD2 would the EBA consider including sanctioning provisions?

466. In general terms, the EBA recognises the dissuasive effects of sanctions and the other benefits that the introduction of a sanction regime in a revised PSD2 would bring, with a view to strengthening and harmonising the enforcement powers of CAs, increasing the level of consumer protection, ensuring further level-playing field across the EU and a more consistent application of the Directive overall.

467. On the other hand, it should be taken into account that the application of sanctions is currently governed by national administrative law provisions, resulting in a diverse and often lengthy process in each MS. Therefore, the introduction of a sanction regime in the PSD2 may not lead to the consistent application of supervisory measures by CAs across the EU.

468. The EBA has, therefore, arrived at the view that, on balance, the disadvantages and challenges of introducing a harmonised sanction regime in the PSD2 outweigh the potential benefits. Nevertheless, it may be worth exploring the opportunity of complementing the current provisions on penalties, such as those under Article 103 of PSD2 by:

- Indicating that infringements of prudential and conduct requirements, including the relevant provisions under Title IV of PSD2, should be considered in the rules to be laid down by Member States;
- requiring Member States to define criteria of relevance of the infringements, taking into account i.e. the capability of the infringement to i) expose PSUs to significant risks, such as fraud and data breaches, losses or any other detriment; ii) affect market efficiency, competition and level-playing field, and iii) prejudice the compliance with obligations towards the CA, including notification.

469. On a separate but related note, the EBA sees merit in and, therefore, proposes to require in the Directive the establishment of a centralised database on administrative sanctions and measures taken in the Member States under PSD2, which would be developed and operated

by the EBA and available to the EBA and CAs only and where CAs will be responsible for submitting the information to the EBA. In the EBA's view, such database will improve transparency on supervisory measures taken among CAs, promoting the application of consistent supervisory measures across the EU, and facilitate and streamline the communication between home and host CAs. Other possible benefits are foreseeable for AML/CFT and consumer protection purposes.

470. The EBA proposes for the details and structure of the above-mentioned information and the relevant technical requirements for the development and operation of the database (e.g. access rules, data formats, type of infractions and classification of their seriousness) to be set out in a mandate to the EBA.

Question 28 - Has the EBA identified any specific issues in the interplay between PSD2 and other European Regulations and Directives (GDPR, WTR, AMLD, SFD) and forthcoming legal acts (DORA, MiCA)?

471. The EBA has assessed the interplay between PSD2 and other EU Regulations, Directives and forthcoming legal acts. The EBA has focused its response to the question on the most significant topics and issues in relation to the interplay between PSD2 and MiCA, DORA, DGSD, SFD, GDPR and AMLD.

28.1. Interplay between PSD2 and MiCA

472. The EBA is of the view that a potential future revision of PSD2 should carefully take into account the interaction with MiCA, in particular for ensuring alignment and consistent application of the requirements. The EBA stresses the need for the potential future revised PSD2 to pay close attention on the treatment of e-money tokens (EMTs), the issuers of which are proposed to be required to conform to requirements under the EMD2, and which are proposed to fall in scope of the definition of 'funds' for the purposes of PSD2.

473. Additionally, going forward, and leveraging any experience acquired from the application of MiCA in relation to ARTs, special regard should be had to those ARTs that are identified as being used widely as a means of exchange, including on whether the tokens should fall under the scope of the definition of 'funds' under Article 4(25) of PSD2, how the payment transactions with these tokens will be treated, and whether it is required to apply SCA to them.

474. In addition, it would be worth ensuring that the legal framework under MiCA and a potential revised PSD2 ensures the same level of consumer protection and rights to the PSUs when carrying out payment transactions, irrespective of the underlying technology used.

475. Moreover, taking into account that there may be different authorities responsible for the supervision of EMTs and ARTs on the one hand and the supervision of payment services on the other hand, it will be worth clarifying how the supervisory frameworks will interact and how the supervisory architecture will be developed in order to ensure that these supervisors can closely cooperate with each other in carrying out their respective tasks and duties, including in the context of supervisory colleges envisaged under MiCA.

476. Finally, since, in response to question 4 of the CfA, the EBA proposes to merge PSD2 and EMD2, including by covering all electronic money-related services by the existing payment services in Annex I to PSD2 in item 4.2 of this report, the EBA is of the view that this may have consequential implications in terms of the interplay between MiCA and PSD2, in particular on the impact on the requirements for EMTs. These issues would need to be considered carefully and resolved in any new legal framework.

28.2. Interplay between PSD2 and DORA

477. The EC published, in September 2020, a Proposal for Digital Operational Resilience Act (DORA), which was provisionally agreed at political level on 10 May 2022. DORA will cover, inter alia, the topics of ICT risk management and ICT-related major incident reporting requirements for all financial entities across the EU, including PSPs and electronic money issuers. These requirements interplay with the provisions set out in Article 95 and 96 of PSD2 related to the management of operational and security risks and the incident reporting respectively, as well as the EBA Guidelines developed in support of these requirements as mandated by PSD2, namely the Guidelines on major incident reporting under PSD2 (EBA/GL/2021/03)[42], which were revised in June 2021, and the Guidelines on the security measures for operational and security risks of payment services (EBA/GL/2017/17)[43], which were subsequently repealed by the Guidelines on ICT and security risk management (EBA/GL/2019/04)[44].

478. These two sets of EBA Guidelines will most likely be covered by the requirements and mandates in DORA, which will address the topics more holistically in a harmonised manner across the entire financial sector. The EBA understands that the related provisions on these two topics and the related EBA mandates will be removed from PSD2. The EBA also understands that DORA will be lex specialis to the EC's proposal for the revision of Directive (EU) 2016/1148 concerning measures for a high common level of security of network and information systems, which will not have an impact on the related provisions of PSD2 on major incident reporting.

479. On a separate but related topic on the EBA Guidelines on ICT and security risk management, it is worth noting that the specific provisions in paragraphs 92-98 related to the 'PSU relationship management' are not covered by DORA. The EBA acknowledges these may not be directly

[42] EBA BS 2021 xx (Final revised GL on major incident reporting under PSD2).docx (europa.eu)

[43] Final Report on EBA Guidelines on the security measures for operational and security risks under PSD2 (EBA-GL-2017-17).pdf (europa.eu)

[44] EBA BS 2019 XXX (Final draft Guidelines on ICT and security risk management).docx (europa.eu)

related to the subject matter of DORA, which focuses on operational resilience, however, the EBA sees merit in reflecting these provisions in a potential future revision of PSD2 since they cover important aspects related to consumer protection and transparency to PSUs. Moreover, these provisions are also relevant in the light of some of the proposals put forward in this report, including in items 12.9. and 14.1. in relation to the possibility to block suspicious payment transactions and the mitigation of the risks of social engineering fraud respectively.

480. Finally, DORA will introduce harmonised requirements for third party risk management applicable across the entire financial sector, including banking. In that regard, the applicable requirements on outsourcing related to ICT services provided by ICT third party providers related to the provision of payment services will be covered by DORA, which would mean that specific requirements on these activities currently mentioned in PSD2 (e.g. Article 19 of PSD2) should be revisited in the revision of PSD2 to ensure full alignment with the requirements of DORA. However, the EBA proposes that the EC considers whether there are additional non-ICT related third party arrangements that may need to be reflected or acknowledged in PSD2, also taking into account Recommendation 1a of the Joint-ESAs response to the EC Call for Advice on digital finance and related issues.

28.3. Interplay between PSD2 and DGSD

481. The EBA has addressed the interplay between PSD2 and DGSD in item 6.6. of this report related to the application of the safeguarding requirements under Article 10 of PSD2.

28.4. Interplay between PSD2 and the SFD

482. The EBA has addressed the interplay between PSD2 and Settlement Finality Directive in item 21.3. of this report related to the access to payment systems with settlement finality by PIs and EMIs.

28.5. Interplay between PSD2 and GDPR

483. The interplay between the PSD2 and the GDPR has created some legal uncertainty for market stakeholders as to how ASPSPs and TPPs should apply the GDPR requirements in the context of the PSD2 framework regarding access to payment account data.

484. While the European Data Protection Board (EDPB) Guidelines on the interplay of PSD2 and GDPR[45] have clarified some of these aspects, such as the confirmation that explicit consent under Article 94 PSD2 is different from (explicit) consent under the GDPR, the EBA is of the view more clarity is needed on other aspects, in particular on:

- the implementation of the data minimisation requirements under GDPR into the design of the interfaces that ASPSPs are required to provide under PSD2, taking into account that under PSD2, ASPSPs are obliged to provide AISPs with the same information from designated payment accounts and associated payment transactions made available to

[45] Guidelines 06/2020 on the interplay of the Second Payment Services Directive and the GDPR

the PSU when the latter is directly requesting access to the account information (Article 36(1)(a) of the RTS on SCA&CSC);

- the processing of special categories of personal data, and in particular whether the processing of payment transaction data is subject to the requirements in Article 9 GDPR, taking into account that such an interpretation could have far-reaching effects on the processing of all payment transactions and on the financial system as a whole;
- the legal ground for processing of the so-called 'silent party' data as referred to in the EDPB Guidelines;
- the compatibility of screen scraping techniques with the principle of data minimisation in GDPR; and
- the possibility for TPPs to share with ASPSPs data such as the PSUs' location, IP-address and other device data to support the ASPSP's transaction monitoring, as mentioned in the section on account access above.

485. The EBA, therefore, proposes that a revised Directive clarifies these aspects taking into account the PSD2 principles and requirements, in order for all stakeholders to have legal clarity as regards their obligations under the GDPR, ensure coherence with the principles in PSD2, and support a level playing field within the EEA. Also, in order to provide further legal clarity, the EBA recommends to the EC to further clarify in the review of the Directive the allocation of supervisory responsibilities between the CAs under PSD2 and data protection authorities as regards the application of data protection requirements in Articles 66, 67 and 94 PSD2.

28.6. Interplay between PSD2 and AMLD

486. One of the issues most frequently raised by market participants as regards the interplay between the PSD2 and the AMLD is the inclusion of AISPs within the scope of the AMLD requirements.

487. In its Report on the EC's call for advice on the future EU legal framework on AML/CFT (EBA/REP/2020/25)[46], the EBA reiterated that AISPs are obliged entities under the AMLD and that they are therefore required to comply with the AMLD requirements but can adjust, on a risk-sensitive basis, the extent of some of the measures they take to comply. The EBA also re-iterated that while Article 33 of PSD2 exempts AISPs from certain requirements set out in PSD2, including the requirement to provide a description of their AML/CFT internal control mechanisms when applying for registration, this does not affect the fact that AISPs are obliged entities under the AMLD. This has also been confirmed by the EC in Q&A 4712.

488. Furthermore, the EBA set out in the Guidelines on money laundering and terrorist financing risk factors (EBA/GL/2021/02)[47] how AISPs can adjust their AML/CFT systems and controls in a risk-sensitive and proportionate way and also clarified that the low level of inherent risk

[46] EBA Report on the future of AML CFT framework in the EU.docx (europa.eu)

[47] Guidelines on money laundering and terrorist financing risk factors

associated with AIS business models means that in most cases simplified due diligence will be the norm.

489. In this respect, the EBA reiterates the recommendation expressed in its Report on EC's call for advice on the future EU legal framework on AML/CFT for the EC to assess the costs and benefits of AISPs' continued inclusion in the list of obliged entities, taking due account of the principle of proportionality enshrined in EU law, and the fact that, although ML/TF risks inherent to their activity are very limited, the nature of AISPs' activities means that they are well positioned to identify and report suspicious transactions that are or have been executed by other obliged entities. The EBA proposes to the EC to address the question on whether AISPs should or should not be considered as obliged entities as part of the AMLD review.

490. Another issue frequently raised by stakeholders relates to the topic of de-risking. The EBA has addressed it in items 21.1. and 21.2. of this report.

**

EUROPEAN BANKING AUTHORITY

Tour Europlaza, 20 avenue André Prothin CS 30154
92927 Paris La Défense CEDEX, FRANCE

Tel. +33 1 86 52 70 00

E-mail: info@eba.europa.eu

https://eba.europa.eu