

POSITION PAPER



Input to the Council Working Group and the trialogue on the Commission's proposal to revise the Payments Services Directive:

Transparency and liability, the key to consumer protection and competition

ESBG (European Savings and Retail Banking Group)

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Under the ordinary legislative procedure the European Parliament adopted on 3 April 2014 in a first reading, partial vote a series of amendments to the Commission's proposal to revise the Payment Services Directive (aka: PSD2). ESBG should like to submit to the Council Working Group and participants in the trialogue the following key remarks on parts of the text adopted by Parliament.

These pertain to payment initiation and account information services by third party payment service providers and third party payment instrument issuers. ESBG values the enhancements already brought to the Commission's proposal with a view of protecting more appropriately the account holding consumer and beginning to balance the liability issues raised by the intervention of third party providers in the account holder to account servicing payment service provider relationship. In particular provisions which e.g. request third party payment service providers to provide payers with clear and comprehensive information with respect to their registration number, responsible supervisory authority and contact information, and request payees who offer to make use of third party payment service providers or third party payment instrument issuers to provide payees with the above information, are welcome.

Nevertheless ESBG still has to express deep concerns over a range of dispositions (Art. 53, 55, 57, 58, 61, 62, 63, 64, 65, 66, 67 and 70) concerning the right of a payer to select a third party provider and the consequences of such choice notably in case of loss. Whilst a payer holding an account with an account servicing payment service provider is at liberty to choose a third party provider, it may not be that the account servicing payment service provider becomes generally liable a) towards the payer for losses resulting from such choice, b) towards the payer and/or the third party payment service provider for every inconvenience in the execution of an intended transaction, and c) that this account servicing payment service provider always bears the cost of the payer's choice.

Whilst what is at stake is the trust that citizens will have in the digitalization of society, much of the debate has unfortunately been crystallised around a small set of technical constructions from which market models have been derived. ESBG would suggest that such an approach to legislation will constrain market development rather than trigger the competition called for by the initiators of the debate, without necessarily putting to rest legitimate concerns about consumer protection. The challenge is to reconcile a number of constraints – beyond and above account holder/payer protection:

- Allowing for a competitive marketplace conducive to innovation;
- Acknowledging that buyers (payers) – provided they are appropriately informed – should be at liberty of engaging with merchants (payees) and related providers as they deem suitable;
- Enabling merchants (payees) to achieve a high rate of transaction conversion;
- Acknowledging that to service such marketplace account servicing payment service providers and third party payment service providers must be at liberty to engage in bilateral or multilateral contractual relationships to provide value propositions to the market;
- Not prescribing any single technology solution for securing the communication between payer, account servicing payment service provider, and third party payment service provider;
- Recognising the regimes existing in a large number of Member States with respect to the notion of “vicarious liability”.



The following scenarios and related obligations of respectively payers, payees and third party payment service providers, and account servicing payment service providers should be considered, and incorporated into the PSD2 dispositions above (of course other, general obligations will apply too):

- i. The payer chooses a non-authorised (i.e. non-regulated, non-supervised) third party payment service provider: it is for the payer to claim redress from either the said third party payment service provider and/or the payee for any loss whether directly or indirectly related to the non-execution or wrongful execution of the intended transaction. Provided the account servicing payment service provider ascertained that the payer gave consent in accordance with Art. 57 in an express manner the said account servicing payment service provider bears no liability. The account servicing payment service provider will be allowed to charge to the payer (account holder) costs resulting from the use of such third party payment service provider.
- ii. The payer chooses an authorised third party payment service provider who has not entered into a contractual relationship with the account servicing payment service provider: the latter is only liable towards the payer for non-execution or wrongful execution of an intended transaction for those steps of the transaction which demonstrably are under its own control. The payer would have to seek redress from either the payee and/or the third party provider in every other circumstance.
- iii. The payer chooses an authorised third party payment service provider with whom the account servicing payment service provider has a contractual relationship (aka: “sponsors”): in such case the latter will be the first port of call for the payer in case of any issue, and can be liable towards the payer for non-execution or wrongful execution of an intended transaction – provided that both the payer and the third party payment service provider complied with the procedures established and communicated by the account servicing payment service provider. Neither the account servicing payment service provider nor the third party payment service provider will charge the payer for redressing the intended transaction.

Under none of the above scenarios should the payer be allowed to share with any third party the credentials provided by his account servicing payment service provider – not even when issued with a one-time password (contrary to what has been touted by some significant to a payer’s account may be perpetrated even when “only” a one-time non-reusable password is handed over to a third party). The security credentials provided by the account servicing payment service provider to the payer may not be communicated to any third party - including any third party payment service provider – there is thus no ground for compelling the latter how to treat them.

In addition ESBG should like to reiterate that the following considerations are of import in the revision of the Payments Services Directive:

- Under all above scenarios providers must remain at liberty to recover their costs (as well as a rate of return). Where costs cannot be recovered from payers (due to existing legislative constraints) then providers may not be prevented from recovering them from other parties in the chain.
- It would seem that policy makers and legislators have, throughout the PSD2 debate, only been marginally sensitive to the issue of data protection, and would be prepared, for the sake of as yet undemonstrated innovation or competition objectives, to allow third parties to make an unfettered use of the data that account servicing payment service providers hold on behalf of account holders. In particular the implications of existing and developing technology, such as search engines, would appear to have been much underestimated.



- Information to be provided by the account servicing payment service provider to a third party payment service provider will be limited to a “yes” or “no” response as to whether the payment account queried holds a sufficient balance to – at the time of the query - allow the transaction indicated to be performed.
- Similar to the existing rules for SEPA direct debits any payer should be allowed to provide his account servicing payment service provider with either a “white list” or a “black list” of third party payment service providers he is prepared to work with, or not.
- Whilst the proposal to acknowledge third party payment instrument issuers has certainly not been made clearer by deleting the Commission’s Art. 59 and integrating the issuer in Art. 58, the scenarios and obligations described above should also apply to third party payment instrument issuers. In addition costs for using any payment account infrastructure should be chargeable by the account servicing payment service provider to a third party payment instrument issuer.
- The unconditional refund right (currently 8 weeks after the date of debit to the payment account) granted by the existing Payment Services Directive to the payer when using a direct debit should be upheld. For the sake of consumer protection on one side, and on the other of payment system efficiency, there may not be any comingling of the notions of payment instruction execution and underlying transaction justification.
- The amendment (141) providing that the payment service user will never bear any loss if subject to a fraud which pattern has been known should not be retained. Fraudsters may follow many scenarios, and it is in instances very difficult to ascertain, even after the fact, whether a given fraud falls into an “already known” category.
- The Presidency recently proposed a new Art. 66a “Payment transactions where the transaction amount is not known in advance”. The proposal suggests that for such a transaction the payee should inform the payer prior to the transaction whether any funds will be blocked, for which maximum time, and the maximum amount that will be blocked. This disposition is acceptable provided it merely impacts the Terms and Conditions of the payee. Should the payer’s account servicing payment service provider have to be involved, then any such obligation has to be limited to a single transaction at any moment, for a maximum period of e.g. 5 minutes (i.e. the time necessary to the payer to complete the transaction, so that the amount can be known with certainty).



About ESBG (European Savings and Retail Banking Group)

ESBG brings together savings and retail banks of the European Union and European Economic Area that believe in a common identity for European policies. ESBG members support the development of a single market for Europe that adheres to the principle of subsidiarity, whereby the European Union only acts when individual Member States cannot sufficiently do so. They believe that pluralism and diversity in the European banking sector safeguard the market against shocks that arise from time to time, whether caused by internal or external forces. Members seek to defend the European social and economic model that combines economic growth with high living standards and good working conditions. To these ends, ESBG members come together to agree on and promote common positions on relevant matters of a regulatory or supervisory nature.

ESBG members represent one of the largest European retail banking networks, comprising of approximately one-third of the retail banking market in Europe, with total assets of over EUR 7,300 billion, non-bank deposits of EUR 3,480 billion and non-bank loans of EUR 3,950 billion (December 2012).



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