

## Evolution not revolution: European Commission publishes financial data access and payments package

As part of the European Commission's 2020 Retail Payments Strategy and following its 2022 review of PSD2 and related consultations, it has published legislative proposals to improve the functioning of PSD2. The first is for a Directive on payment services and electronic money services, focussing on licensing and supervision of payment institutions. The second is for a Regulation on payment services in the EU. Some points of interest for banks and other payment service providers (PSPs) include introduction of additional refund rights for consumers beyond unauthorised transactions and streamlining of the current 'complex' requirement for account servicing PSPs to maintain two Open Banking data interfaces. As part of the legislative package, the Commission has also published a legislative proposal on a framework for financial data access, extending financial data access and use beyond payment accounts to more financial services (a financial data access (FIDA) framework).

Commenting on the Commission's proposals, Lavan Thasarathakumar, Senior Advisor in Hogan Lovells' Digital Assets and Blockchain Practice, said:

*"The payments proposals come following the conclusion of the review of PSD2, which found that EU payments needed to improve and this was largely due to a lack of consistent application of the rules across EU member states and an unlevel playing field between banks and non-banks, which also led to increased fraud.*

*An area that may be of concern for clients is the merging of the e-money and payment services regimes. Whilst the rationale around this is sound, to streamline the process and close regulatory gaps, there will be concern and pushback from incumbents who will have to reapply for a licence under the new regime within 24 months of PSD3 coming into force. Whilst there is a grandfathering provision in place until then, there is concern at the administrative burden that this may pose and the costs involved in achieving this. Furthermore, there is a concern that a delay could result in having to pause activity in the EU until the new authorisation is given. Further information will no doubt be needed on this to reassure the industry. That being said, it is noted that should firms have their paperwork in place to show that they already meet the requirements for the new authorisation (including changes to initial capital and own funds and also winding up plans), this will be granted automatically without needing to reapply.*

*In FIDA, the European Commission has sought to open up financial data in the EU, beyond payment accounts. The Commission identified the promotion of data-driven finance as a priority in its 2020 Digital Finance Strategy. The idea of this proposal is that it builds on PSD2 which enables open banking but expands it to all financial services in scope through mandating a financial data sharing scheme. One thing that will no doubt come up is what impact this will have on the wider economy. With financial institutions being caught but other data industries outside of scope, will there be an unlevel playing field with other industries if/when this is expanded beyond finance? It*

*will also be important to make sure that any development of this proposal remains consistent with other EU initiatives such as the Digital Market Act, Digital ID and future plans for Open Data. DG Connect were closely involved in the discussions on this proposals and they will no doubt be following this through the co-legislatures to ensure consistency.*

*Looking at this from a global perspective, the EU should ensure that it stays in step with global developments so as not to inadvertently ringfence itself off. The EU will want to make sure that it still remains open to global innovation and therefore this proposal should not be restrictive.*

*By way of a quick comparator to the UK, the Smart Data Bill which was recently laid before Parliament outlined what looks likely to be more of an open data approach which gives HM Treasury the ability to open up certain sectors to sharing their data with each other. The proposal goes beyond finance and looks to move away from the open banking model in the UK, but does look to develop some sort of trust framework, which could in some ways have some similarities.”*

For more on some of the consultation activity that preceded the Commission’s legislative proposals, take a look at our Engage article [‘Snapshot of recent EU regulatory developments relevant to retail banking and payments’](#).

## **Conclusions from PSD2 review: evolution not revolution**

The Commission’s (delayed) [PSD2 review report](#) has also been published to accompany the legislative proposals. The Commission’s evaluation has found that PSD2 has had varying degrees of success in meeting its objectives, in particular:

- There are limits to the Directive’s effectiveness in achieving a level playing field, most notably the continuing imbalance between bank and non-bank PSPs resulting from the lack of direct access by the latter to certain key payment systems.
- There has been mixed success in the uptake of Open Banking in the EU, with the Commission citing issues relating to the performance of data access interfaces for OB service providers.
- Cross-border provision of payment services is increasing, but many payment systems - especially debit card systems - remain largely national. A fully pan-European payment solution is still awaited (although the [European Payments Initiative \(EPI\)](#) is currently developing one).
- Anticipated cost reductions for merchants from new cheaper payment means (eg based on OB) have not yet fully materialised.

The overall conclusion is that despite certain shortcomings, the current PSD2 framework has enabled progress towards its objectives. The Commission is of the view that targeted amendments to the EU payments framework are necessary and timely, but those amendments should represent an evolution rather than a revolution.

The accompanying [impact assessment](#) for the payments framework changes identifies four specific objectives of the initiative, corresponding to the identified problems:

1. Strengthen user protection and confidence in payments;
2. Improve the competitiveness of OB services;
3. Improve enforcement and implementation in Member States; and
4. Improve (direct or indirect) access to payment systems and bank accounts for non-bank PSPs.

The Commission states in its review report that the proposed revisions to PSD2 represent a package of changes which will enhance the functioning of the EU payments market and substantially reinforce consumer protection. These changes are therefore fully in line with the objectives of its Retail Payments Strategy and complementary to ongoing initiatives such as the legislative proposal on instant payments (see our Engage article ['Instant credit transfers in euro: European Commission publishes legislative proposal'](#)) and the proposal on a financial data access (FIDA) framework (or Open Finance framework - see further below).

## **Overview of proposed changes to specific aspects of PSD2**

The Commission's review report summarises some key aspects of and reasons for the changes set out in its legislative proposals as follows:

- **Open Banking (OB)**
  - The Commission has chosen to make a number of targeted amendments to the OB framework to improve its functioning, but to avoid radical changes which might destabilise the market or generate significant further implementation costs.
  - For example, the Commission considers that the costs of introducing a new single API standard in the EU would outweigh the benefits, and it sees no merit in changing the PSD2 default rule of allowing access to data by TPPs without a mandatory contractual relationship and therefore without financial compensation for ASPSPs.
  - However, proposed changes include:
    - New minimum requirements for the performance of dedicated interfaces, including a non-exhaustive set of prohibited OB obstacles, to ensure optimal TPP data access for the full benefit of their clients.
    - Streamlining of the current 'complex' requirement for ASPSPs to maintain (except if they benefit from an exemption) two OB data interfaces, a principal interface and a "fallback interface". ASPSPs should instead only



be required to maintain one permanent “dedicated” OB interface, although the removal of the permanent fallback interface must be accompanied by a substantial upgrade of the interface’s performance level and a robust enforcement regime. TPPs must also be offered a means of preserving business continuity through temporary contingency data access in the event of a breakdown of the remaining interface.

- Banks and other ASPSPs will be required to offer a “dashboard” allowing their OB customers to see at a glance what data access rights they have granted and to whom and to cancel TPP access to their data via this tool, if they want to.
- The Commission examined the possibility of transferring AISPs from PSD to the future FIDA framework (see further below) but has decided to adopt a staged approach and provide for such a transfer when the FIDA framework is fully operational and only if and when the conditions for a smooth transfer are considered appropriate.

- **Scope**

- The Commission has decided that the PSD2 revision proposal will only make essential clarifications on the rules on scope where there are currently ambiguities, but without introducing significant changes to the existing position.
- As access to cash is a Commission priority, it proposes to allow retailers to offer “cashback without a purchase”, without having to obtain a PSP licence or being an agent of a payment institution (PI) (subject to some conditions).
- The distribution of cash via ATMs in general requires a PSP licence, but there is an exclusion in PSD2 for certain non-bank ATM operators, with specific conditions. As this exclusion has proved difficult to apply in practice, it will be removed. But ATM operators which do not service payment accounts will be included in the scope, with a lighter registration regime and an appropriate level of regulation (for example, transparency on fees will be required).
- The Commission highlights that DORA mandated it, in the context of the PSD2 review, to consider the inclusion of “operators of payment systems and entities involved in payment-processing activities” within the scope of PSD2, which would consequently allow their inclusion within the scope of DORA . The Commission has reached the conclusion that such inclusion would, at this stage, be premature. However, the Commission will, within 3 years of application of the revised legislation, carry out a thorough review, based on evidence and in close cooperation with the ECB/Eurosystem, to assess in particular whether a dedicated EU licensing and supervision regime for some of the hitherto excluded entities is necessary in addition to the existing oversight regime.

- **Consumer protection**

- The Commission is proposing to extend the surcharging ban to all credit transfers and direct debits in all currencies.
- For credit transfers and money remittances from the EU to third countries, the Commission is proposing an obligation to inform the payment service user about the estimated charges for currency conversion, in line with current information requirements for intra-EU transactions, as well as the estimated time for the funds to be received by the payee's payment service provider in a third country. However, no maximum time for the execution of credit transfers and transfers of funds from the EU to third countries is proposed, as this partly depends on banks outside the EU which are not subject to EU rules.
- The Commission is not proposing changes to the thresholds related to the exclusion of electronic communications networks but will continue to monitor their adequacy.
- The Commission is proposing changes to speed up the pay-out of unused blocked funds and to require that the blocked amount be proportionate to the expected final amount, rather than proposing the introduction of absolute maximum amounts.

- **Security and fraud prevention**

- The Commission will require PSPs to facilitate the use of SCA by, for example, persons with disabilities, older people, and others experiencing difficulties using SCA, in line with the European Accessibility Act.
- To help in tackling new forms of fraud such as "social engineering" fraud, the Commission proposes new measures regarding both fraud prevention and redress. These include improvements to the application of SCA (eg clarifications of when a transaction qualifies as merchant-initiated or a mail or telephone order), the creation of a legal basis for PSPs to share fraud-related information in full respect of GDPR, as universally requested by the market, an obligation by PSPs to carry out education actions to increase customers awareness of payments fraud and an extension to all credit transfers - not only instant payments - of IBAN/name verification services, which (the Commission comments) have already proved their efficiency against fraud and mistakes in those markets where they were introduced.
- With the advent of social engineering, the difference between authorised and non-authorised transactions is becoming more blurred and complex to apply in practice. The Commission therefore proposes to introduce additional refund rights for consumers beyond unauthorised transactions, but only for some specific situations and subject to some conditions. The relevant situations are where the consumer suffers loss caused by a failure of the IBAN/name verification service, or where a consumer is a victim of a fraud where the fraudster pretends to be an employee of

the consumer's bank, for example using the bank's telephone number or e-mail address ("impersonation fraud", or "spoofing"). Exceptions to the refund right include gross negligence by the consumer or where the consumer is part of the scam. See our Engage article on measures being taken forward by the UK Payment Systems Regulator in this area: ['APP fraud: UK PSR confirms introduction of 'world first' reimbursement requirement'](#).

- **De-risking and competition-related issues**

- Under the Commission's proposals, requirements on banks regarding bank account services to non-bank PSPs will be considerably toughened, with a stronger requirement to explain refusal. Unlike under PSD2, this will also cover withdrawal of service. Central banks will also be allowed to provide account services to non-bank PSPs, at their discretion. The Commission is also proposing to amend the Settlement Finality Directive (SFD) to include PIs as possible participants in designated payment systems. The revised payment rules will include reinforced rules on the admission of PIs as participants in payment systems, with appropriate risk assessment.

- **Enforcement**

- The Commission's proposals will strengthen the enforcement powers of national competent authorities, in particular in the field of penalties, and ensure uniform application of EU rules on payments by transforming the greater part of the rules in PSD2 into a directly applicable Regulation (see below 'What's the rationale for splitting the payments framework into two main instruments?').

- **Other issues**

- ***Simplification - streamlining with e-money services:*** The Commission has concluded that a merger of the electronic money and payment services regimes is appropriate, bringing them together in one single piece of legislation and harmonising them to the extent possible, while still leaving room for specificities where justified. The Commission states that this will address concerns and challenges with delineating the two legal frameworks, in particular at the licensing stage. It also believes that this will ensure a higher degree of harmonisation, simplification and consistent application of the legal requirements for PIs and EMIs, preventing regulatory arbitrage, ensuring a level playing field and a future-proof legal framework.
- ***Smaller PIs:*** The Commission proposes to update the thresholds regarding executed payment transactions for inflation, and to do so periodically in future using delegated legislation.

## **What's the rationale for splitting the payments framework into two main instruments?**



The 2022 PSD2 review concluded that use of a directly applicable Regulation for payments would enhance the coherence of implementation in the Member States. The Commission points out that this approach has already been used in various areas of EU financial services legislation (eg prudential rules for banks or rules on securities markets).

The Commission considers that a Directive is appropriate for licensing and supervisory rules, given that licensing and supervision of financial institutions in general (including PIs and other categories of PSPs, such as credit institutions) remains a national competence of the Member States, and no EU-level licensing or supervision is being proposed.

The proposed amendments to PSD2 are therefore set out in two separate legislative acts:

- A proposal for a Directive, containing in particular rules concerning licensing and supervision of PIs (PSD3); and
- A proposal for a Regulation, containing the rules for payment service providers (PSPs) (including PIs and some other categories of PSPs) providing payment and electronic money services.

## **PSD3 legislative proposal**

The Commission explains that the [legislative proposal](#) for a Directive on licensing and supervision of PIs is largely based on Title II of PSD2, regarding “Payment Service Providers”, which only applies to PIs. The Directive is a full harmonisation Directive. Some key points include:

### *Subject matter, scope and definitions*

- The proposal concerns access to the activity of providing payment services and electronic money services by PIs (not by credit institutions).
- A number of key definitions are clarified and aligned with the proposal for a Regulation (see below).

### *Licensing and supervision of PSPs*

- The procedures for application for authorisation and control of shareholding are mostly unchanged from PSD2, with the exception of a new requirement for a winding-up plan to be submitted with an application, but made fully consistent for institutions providing payment services and electronic money services.
- Regarding calculation of own funds for PIs not offering electronic money services, the rules now state that an increase of up to 20% in own funds may be required by competent authorities, based on an evaluation of the PI’s risk management processes, risk loss data base and internal control mechanisms. This is similar to the additional Supervisory Review and Evaluation Process (SREP) own funds requirements for banks.

- Safeguarding rules for PIs are unchanged except that:
  - the possibility of safeguarding in an account of a central bank (at the discretion of the latter) is introduced in order to extend the options for PSPs;
  - PIs must avoid concentration risk to safeguarded funds by ensuring that the same safeguarding method is not used for all such funds and, in particular, by trying not to safeguard all consumer funds with one credit institution;
  - the EBA is mandated to develop regulatory technical standards on risk management of safeguarded funds; and
  - for PIs providing electronic money services, the safeguarding rules are fully aligned with those applying to PIs only providing payment services.
- More detailed provisions on internal governance of PIs, including an EBA mandate to adopt related guidelines, are introduced.
- Provisions regarding agents, branches and outsourcing are unchanged from PSD2, but a new definition of distributors of electronic money and related provisions, closely aligned with those applicable to agents, have been added.
- Provisions on cross-border provision of services by PIs, and the supervision of such services are broadly unchanged. With respect to the exercise of the right of establishment and freedom to provide services where PIs use agents, distributors and branches, specific provisions are laid down for cases where three Member States are involved (the Member State of establishment of the PIs, that of the agent, and a third Member State to which the agent provides services on a cross-border basis – so-called “triangular passporting”), with the aim of enhancing clarity.
- Member States and the EBA will develop a list of machine-readable payment initiation services providers and account information service providers in addition to the current register of authorised PIs.

#### *Provisions concerning cash withdrawals*

- Operators of retail stores are exempted from the requirement for a PI licence when they offer cash withdrawal services without a purchase on their premises (on a voluntary basis), if the amount of cash distributed does not exceed EUR 50, in line with the need to avoid unfair competition with ATM deployers.
- Distributors of cash via ATMs who do not service payment accounts (so-called “independent ATM deployers”) are exempted from the licensing requirements of PIs, and are only subject to a registration requirement. The registration must be accompanied by certain documentation.



## *Transitional provisions*

- The Commission considers that transitional measures are appropriate in relation to existing activities under PSD2, given the creation of a new legal licensing regime. For example, existing licences for PIs and EMIs are “grandfathered” until 24 months after entry into force of PSD3 on condition that application for a PI licence under PSD3 is made at the latest 24 months after entry into force. There is also provision for automatic authorisation under PSD3 where the competent authorities have evidence that the PI or EMI concerned already comply with PSD3.

## *Repeals and amendments to other legislation*

- The second Electronic Money Directive (Directive 2009/110/EC) will be repealed with effect from the date of application of PSD3.
- PSD2 will be repealed as of the same date. A correlation table of articles with respect to the corresponding articles of PSD2 and EMD2 is annexed to the legislative proposal (see Annex III in the [Annexes](#) to the proposal).
- An amendment is made to the SFD (Directive 98/26/EC) to add PIs to the list of institutions which have the possibility to participate directly in payment systems designated by a Member State pursuant to that Directive (but not to designated securities settlement systems). An amendment is also made to the definition of indirect participation in the SFD, to revert the definition to the text which existed before 2019, when Directive (EU) 2019/87925 changed this definition.
- Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers is amended to bring into its scope the proposed new Regulation on a FIDA framework (see further below). This amendment will allow representative actions to be brought against infringements of the proposed new Regulation.

## *Implementation and review*

- The proposed Directive will enter into force 20 days after publication in the Official Journal. The deadline for Member States to transpose it and the date of application of the transposing measures is 18 months after entry into force (except for amendments to the SFD, in which case it is 6 months).
- A review report will have to be presented 5 years after the entry into force of the Directive, focusing in particular on the appropriateness of the Directive’s scope, on its possible extension to payment systems and technical services, and on the impact of the safeguarding of PIs’ funds on the [rules proposed](#) by the Commission on 18 April 2023 which, when adopted, would amend Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.

## **Payment Services Regulation legislative proposal**

Key points on the [legislative proposal](#) for a Regulation on payment services in the EU (PSR) include:

### *Subject matter, scope and definitions*

- The proposal lays down rules applicable to payment services providers related to payments. It does not change the list of payment services established in PSD2, and the list of exclusions is largely unchanged.
- The list of definitions is extended and contains more terms and clarifications of certain terms. Definitions of Merchant Initiated Transactions (MITs) and of Mail Orders or Telephone Orders (MOTOs) are introduced. The definition of 'remote payment transaction' under PSD2 is streamlined to allow for a clearer delineation of 'initiation of a payment transaction' and 'remote initiation of a payment transaction'.

### *Payment systems and access to accounts held with credit institutions*

- Regarding payment system operators, the requirement to have access rules and procedures which are proportionate, objective and non-discriminatory is extended to payment systems designated by a Member State pursuant to the Settlement Finality Directive. Payment system operators are required to carry out an assessment of relevant risks when considering an application for participation from a PSP. A decision on an application must be provided in writing and a right of appeal is established. Competent authorities must be designated by Member States in cases where no oversight by the European System of Central Banks exists; where there is ECSB oversight, that can be relied upon to address insufficiencies in admission rules and procedures of payment systems.
- The PSD2 rules relating to access (opening and closing) by a PI to an account with a credit institution are reinforced. Applicants for a PI licence (given the importance for them to have a bank account to obtain their licence) are also covered, as well as PI's agents and distributors. Any refusal or withdrawal of access must be based on serious grounds, for example reasonable suspicion of illegal activity or risk to the credit institution. Reasons for refusal or withdrawal of access must be provided in writing and justified in detail with regard to the specific situation of the PI in question.

### *Transparency of conditions and information requirements for payment services*

- The option for Member States to adjust the spending limit amounts relating to the derogation from information requirements for low-value payment instruments and electronic money for national payment transactions has been deleted.

- On credit transfers and money remittances from the EU to a non-EU country, an obligation is introduced for PSPs to provide the payment service user with the estimated time for the funds to be received by the PSPs of the payee located outside the EU. To achieve better comparability, the estimated currency conversion charges of such international transactions must be expressed in the same way as for credit transfers within the EU, namely as a percentage mark-up over the latest available euro foreign exchange reference rates issued by the ECB.

## *Rights and obligations in relation to the provision and use of payment services*

- Changes are introduced to extend the surcharging prohibition to credit transfers and direct debits in all currencies of the EU.
- The rules for merchant initiated transactions (MITs) and direct debits are aligned, applying the same consumer protection measures, such as refunds, to direct debits and MITs as both are transactions initiated by the payee.

## *Open Banking (AIS and PIS)*

- The provisions on Open Banking (OB) contain a number of modifications compared with PSD2, and incorporate certain provisions currently contained in the SCA RTS. Key changes include:
  - The removal (except in authorised exceptional circumstances) of the requirement on ASPSPs to maintain a permanent ‘fallback’ interface, but there is a requirement to have a dedicated interface for OB data access (except in exceptional circumstances);
  - Introduction of additional requirements on dedicated interfaces in relation to performance and functionalities.
  - To enable OB users to manage their OB permissions in a convenient way, there is also the introduction of a requirement on ASPSPs to offer them a “dashboard” allowing the withdrawal of data access from any given OB provider.
- The provision on confirmation on the availability of funds has been removed as a stand-alone OB service due to lack of market demand.

## *Authorisation of payment transactions*

- A new IBAN/name verification service is being introduced. The Commission proposal on instant payments in euro proposes a similar provision related to the discrepancies between the name and unique identifier of a payee for instant credit transfers denominated in euro. Therefore, the provision in the PSR proposal applies to credit transfers which are not instant credit transfers in all currencies of the EU and instant credit transfers in currencies which



are not in euro. The notification must be given before the payer finalises the payment order and before the PSP executes the credit transfer. The user is free to decide whether to submit the payment order for a credit transfer in all cases.

- On unauthorised payment transactions:
  - A clarification is added to the provision on a PSP's liability for unauthorised payment transactions to the effect that only reasonable grounds for suspecting fraud by the payer can lead to a refusal to refund by the PSP. In such a case, the PSP must provide a justification for refusing the refund and indicate the bodies to which the payer may refer the matter.
  - The PSP of the payer is to be held liable for the full amount of the credit transfer in cases where that PSP has failed to notify the payer of a detected discrepancy between the unique identifier and the name of the payee provided by the payer. A PSP is also held to be liable where a consumer has been manipulated into authorising a payment transaction by a third party pretending to be an employee of the consumer's PSP using lies or deception. An obligation for electronic communications services providers to cooperate with PSPs is introduced, with a view to preventing such fraud.
  - Where the liability is attributable to the PSP of the payee, the latter is to refund the financial damage incurred by the PSP of the payer. The provisions on notification and rectification of unauthorised or incorrectly executed payment transactions, information requirements and right of recourse are updated in order to reflect the new liability provision for incorrect application of the matching verification service.
- New liability provisions for technical service providers and operators of payment schemes are included for failure to support SCA.
- A clarification has been added that the payer shall not bear any financial losses where either the PSP of the payer or the payee applies an exemption from the application of SCA.
- For payment transactions where the transaction amount is not known in advance and funds are blocked on a payment instrument, a legal obligation is introduced for the payee to inform the PSP of the exact amount of the payment transaction immediately after delivery of the service or goods to the payer, as well as a requirement that the amount of the blocked funds must be proportionate to the amount of the future payment transaction that can reasonably be expected at the time of blocking of the funds.

#### *Execution of payment transactions*

- In cases where a PISP provides an incorrect unique identifier of a payee, that PISP is held to be liable for the amount of the transaction.

## *Operational and security risks and authentication*

- A new provision is added requiring PSPs to have transaction monitoring mechanisms in place to provide for the application of SCA and to improve the prevention and detection of fraudulent transactions. According to the Commission, this provision clarifies the notion of 'inherence', by detailing that such transaction monitoring mechanisms must be based on the analysis of payment transactions, taking into account elements which are typical of the payment service user in the circumstances of a normal use of the personalised security credentials, including environmental and behavioural characteristics such as those related to location of the payment service user, time of transaction, device being used, spending habits, online store where the purchase is carried out.
- For the purpose of transaction monitoring, provisions have been added allowing PSPs to voluntarily exchange personal data such as unique identifiers of a payee subject to information sharing arrangements. Before concluding such arrangements, the PSPs must conduct a data protection impact assessment and, where necessary, carry out prior consultation of the supervisory authority, according to the GDPR.
- There is clarification that in the case of merchant-initiated payment transactions (MITs), SCA must be applied at the set-up of the mandate, but there is no need to apply it for subsequent MITs.
- There is also clarification that in the case of mail orders and telephone orders (MOTOs), only the initiation of a payment transaction needs to be non-digital in order for that transaction to fall outside of the SCA obligations. However, payment transactions based on paper-based payment orders, mail orders or telephone orders placed by the payer should be subjected to security standards and checks by the PSP of the payer allowing authentication of the payment transaction in order to prevent abusive circumvention of the SCA requirements.
- The scope of the SCA exemption has been narrowed in the case of payment transactions for which payment orders are placed by the payee based on a mandate given by the payer (direct debits), and an obligation to require SCA has been introduced in cases where a mandate is placed through a remote channel with the direct involvement of a PSP.
- SCA is only required for AIS on the occasion of the first data access, but AISP's must require SCA when their customers access aggregated account data on the AISP's domain, at least every 180 days.
- Provisions have been added to improve the accessibility of SCA, in particular to ensure that all customers, including people with disabilities, older people, people with low digital skills and those who do not have access to digital channels or a smartphone, have at their disposal at least one means enabling them to perform SCA.

- With regard to the requirement for “remote payments” for PSPs to apply SCA that includes elements which dynamically link the transaction to a specific amount and a specific payee, there is clarification that this obligation applies to electronic payment transactions for which a payment order is placed through a payer’s device using proximity technology for the exchange of information with the payee’s infrastructure, and for which the performance of SCA requires the use of internet on the payer’s device.
- There is a provision requiring PSPs and technical service providers to enter into outsourcing agreements in cases where the latter provide and verify the elements of SCA.

#### *Product intervention powers of the EBA*

- The EBA will be able to temporarily prohibit the sale of certain payment products which would present certain risks, subject to certain criteria.

#### *New and existing RTS*

- The EBA is given the power to introduce new RTSs and amend existing RTSs. If the EBA does not amend existing RTSs, they will remain in force.

#### *Entry into force and application*

- The proposed Regulation will enter into force on the twentieth day after publication in the Official Journal, and will apply 18 months after that.
- As for the PSD3 proposal, a correlation table of articles with respect to the corresponding articles of PSD2 and EMD2 is annexed to the legislative proposal (see Annex III in the [Annexes](#) to the proposal).

### **FIDA framework legislative proposal**

The [legislative proposal](#) for a Regulation on a framework for Financial Data Access (FIDA) stems from the Commission’s 2020 [Digital Finance Strategy](#), in which it identified the promotion of data-driven finance as one of the strategy’s priorities. More widely, in the 2020 communication on a [European strategy for data](#) the Commission set out how the EU should create an attractive policy environment so that, by 2030, its share of the data economy at least corresponds to its economic weight.

The proposal aims to enable consumers and firms to better control access to their financial data, making it possible for them to benefit from financial products and services that are tailored to their needs based on the data that is relevant to them, while avoiding the inherent risks. The general objective is to:

- improve economic outcomes for financial services customers (both consumers and businesses) and financial sector firms by promoting digital transformation; and



- speed up adoption of data-driven business models in the EU financial sector.

According to the Commission, once this objective is achieved:

- Consumers would be able to access personalised, data-driven products and services.
- Firms, notably SMEs, would have wider access to financial products and services.
- Financial institutions would be able to take full advantage of digital transformation trends.
- Third party service providers would be able to take advantage of new business opportunities in data-driven innovation.

The proposal looks to establish a framework governing access to and use of customer data in finance. The Commission explains that financial data access refers to the access to and processing of business-to-business and business-to-customer (including consumer) data on the request of the customer across a wide range of financial services.

Key points on the legislative proposal include:

*Subject matter, scope and definitions*

- The Regulation establishes the rules in line with which certain categories of customer data in finance may be accessed, shared, and used. It also establishes the requirements for the access, sharing, and use of data in finance, the respective rights and obligations of data users and data holders and the respective rights and obligations of financial information service providers in relation to the provision of information services as a regular occupation or business activity.
- The scope of the Regulation is limited to certain exhaustive sets of customer data including in relation to:
  - mortgage credit agreements, loans and accounts (except payment accounts as defined in PSD2);
  - savings, investments in financial instruments, insurance-based investment products, crypto-assets, real estate and other related financial assets as well as the economic benefits derived from such assets;
  - certain pension rights;
  - certain non-life insurance products; and
  - data which forms part of a creditworthiness assessment of a firm which is collected as part of a loan application process or a request for a credit rating.

- The firms to which the Regulation applies, when they are acting as data holders or data users, include:
  - credit institutions;
  - PIs, including AISPs and PIs exempted under PSD2;
  - electronic money institutions, including electronic money institutions exempted under EMD2;
  - investment firms;
  - crypto-asset service providers;
  - issuers of asset-referenced tokens;
  - managers of alternative investment funds;
  - management companies of undertakings for collective investment in transferable securities;
  - insurance and reinsurance undertakings;
  - insurance intermediaries and ancillary insurance intermediaries;
  - institutions for occupational retirement provision;
  - credit rating agencies;
  - crowdfunding service providers;
  - PEPP providers; and
  - financial information service providers.
- However, the Regulation will not apply to the entities referred to in Article 2(3), points (a) to (e), of DORA.
- Key terms and definitions include 'data holder', 'data user', and 'financial information service provider'.

#### *Legal obligation on data holders*

- There is introduction of a legal obligation on data holders to make data within the scope of the Regulation available to a customer 'without undue delay, free of charge, continuously and in real-time', following a request from that customer 'submitted by electronic means'.

- The customer has the right to request that the data holder shares this data with a data user (Article 5). Where personal data is concerned, the request must comply with a valid legal basis as referred to in the GDPR that allows for the processing of personal data.
- Data users receiving data at the request of customers are subject to certain obligations. There should only be access to the customer data made available under Article 5 and this data should be used only for the purposes and the conditions agreed with the customer. The customer's personalised security credentials should not be accessible to other parties and the data should not be stored for longer than necessary.

#### *Requirements to ensure responsible data use and security*

- There is guidance on how firms should use data for given use cases and the relevant provision aims to ensure that there will not be any discrimination or restriction in the access to services as a result of the use of the data. It ensures that customers that refuse to grant permission to use sets of their data will not be refused access to financial products just because they refused to grant permission.
- Financial data access permission dashboards are established to ensure that customers can monitor their data permissions by being able to access an overview of them, grant new ones and withdraw permissions if necessary.

#### *Requirements for the creation and governance of financial data sharing schemes*

- The aim of financial data sharing schemes is to bring together data holders, data users and consumer organisations to develop data and interface standards, set the coordination mechanisms for the operation of financial data access permission dashboards as well as a joint standardised contractual framework governing access to specific datasets, the rules on governance of these schemes, transparency requirements, compensation rules, liability, and dispute resolution.
- The Regulation provides that the data falling within its scope must be made available only to members of a financial data sharing scheme, making the creation and membership of such schemes mandatory.
- The governance processes of a financial data sharing scheme are also set out in the Regulation, including rules on the contractual liability of its members and the mechanism to resolve disputes out-of-court.
- There is provision for the development of common standards for data sharing and the creation of technical interfaces to be used for data sharing.
- Data sharing schemes must be notified to the national competent authorities, they must benefit from a passport for operations across the EU, and for transparency purposes the schemes must be part of a register to be maintained by the EBA.



- The minimum arrangements for a financial data sharing scheme should state that data holders must be entitled to compensation for making the data available to data users, according to the terms of the scheme they are both part of. Compensation in any case must be reasonable, based on a clear and transparent methodology previously agreed by the scheme members and should aim to reflect at least the costs incurred for making available a technical interface to share the data requested.
- The Commission will have the power to adopt a delegated act in the event that a financial data sharing scheme is not developed for one or more categories of customer data.

#### *Authorisation and operating conditions of financial information service providers*

- There are requirements relating to the content of an application, the appointment of a legal representative, the scope of the authorisation, including the EU passport of financial information service providers and the right granted to competent authorities to withdraw an authorisation.
- A register of financial information service providers and data sharing schemes will be established and held by the EBA. Article 16 provides for the organisational requirements of financial information service providers.

#### *Powers of competent authorities*

- There are a number of provisions on the powers of competent authorities, including in relation to administrative penalties and periodic penalty payments that they can impose.

#### *Amendment to DORA*

- The scope of DORA is amended to include financial information service providers.

#### *Entry into force and application*

- The proposed Regulation will enter into force on the twentieth day following the day of its publication in the Official Journal of the EU. It will apply 24 months after its entry into force, except for Title IV (on schemes) that enters into application 18 months after the Regulation's entry into force.

#### **Next steps**

These are not the final texts. These are the proposals that have been sent to the European Parliament and the Council of the EU. They will now amend this text to be able to pass it through their respective houses. Whilst a lot of this has already been discussed by the institutions, it is highly political and we can expect there to be quite significant push back and modifications. After the amended text is agreed, there will be inter-institutional negotiations (trilogues), where the Commission, Council and Parliament negotiate on a compromised text.

In terms of timelines, the fact that the European elections take place next year complicates things. It reduces the time in which negotiations can be had before attention turns to campaigning in home member states. As such, there will have to be a tight timeline if we are to see this concluded in this legislature. It remains a tall order for this entire package to run through each house, be voted on and for successful trilogues.

That being said, as long as the relevant proposal is not rejected and sent back to the Commission, the key is that it has been published. Therefore it leaves two options on the table: an accelerated timescale with a conclusion by March 2024 or a delayed timescale with negotiations restarted under the new parliament which will take its seat in September 2024. Either way, we still have a long way to go to see the final text and then even further for this to enter into force.

If you would like to discuss the potential impact of any aspect of the Commission's legislative proposals on your business, please get in touch with one of the people listed below or your usual Hogan Lovells contact.

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