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WORKING DOCUMENT

From:	Presidency
To:	Working Party on Financial Services and the Banking Union (Payment Services/ PSR/PSD) Financial Services Attachés
Subject:	PSD/PSR Working Party on 29.11.23 - Presidency's Discussion Note on Presidency's landing suggestions on subject matter, scope (positive and negative), definitions and authorisations under PSD3 and PSR

29/11/2023

PRESIDENCY´S DISCUSSION NOTE ON PRESIDENCY´S LANDING SUGGESTIONS ON SUBJECT MATTER, SCOPE (POSITIVE AND NEGATIVE), DEFINITIONS AND AUTHORISATIONS UNDER PSD3 AND PSR

1. Background

The negotiations on PSD3/PSR kicked off on July 12th, where the Spanish presidency presented a Discussion Note, opening to discussion several topics, amongst which, the key changes of the proposals, and asked Member States their views on which topics should be prioritized for the discussion.

From the feedback received, both at the meeting, and later via written procedure, **fraud appeared to be one of the key changes that merited a prioritized discussion**, and as result the Presidency presented for the **second meeting** on PSD3/PSR held on September 26th, a thematic discussion note aiming at structuring the **discussion on fraud.** All points were covered and MS were invited to provide further written comments.

Other topics that merited prioritized discussion as per the feedback received from MSs were subject matter, scope (positive and negative), definitions, and authorisations under PSD3 and PSR, and as a result the Presidency presented a third meeting on PSD3 and PS3 on October 23rd, structuring the Discussion on the referred topics. All points, except for authorisations were convered and MS were invited to provide further written comments.

On October 30th, a fourth meeting on PSD3 and PSR was held, were the presidency presented several landing proposals on fraud. In addition, a discussion was held on authorisations given this topic was not covered at the October 23rd meeting, due to time constraints. The referred discussions were followed by a written procedure in order to further refine the views from MSs.

The Discussion Note aims at presenting several presidency´s proposals on authorisations, subject matter, scope (positive and negative) and definitions in light of the feedback received by MSs both at the meetings from October 23rd and 30th, as well as via written procedure, launched thereafter, and seeks MSs views on the referred proposals.

2. Authorisation of Payment Institutions

Applicants to payment institutions shall require to submit information requirements under article 2 of PSD3 (letters a-2). The regime is similar to that provided under PSD2, but with the following additions:

- Requirement for a winding-up plan;

- For applicant institutions wishing to enter information sharing arrangements with other payment service providers for the exchange of payment fraud related data, the conclusions of the data protection impact assessment referred to in Article 83(5) of Regulation XXX [PSR] and pursuant to article 35 of Regulation (EU) 2016/679 and, where applicable, the outcome of the prior consultation of the competent supervisory authority pursuant to article 36 of that Regulation;
- Reinforcement of EBA mandate. The Guidelines mandated under PSD3 are now mandated to be converted to RTS and should cover not only the documents to be presented at the point of authorisation, but also:
    - a common assessment methodology for granting authorisation as a payment institution, or registration as an account information service provider or ATM deployer, under this Directive;
    - what is a comparable guarantee, as referred in paragraph 4, first subparagraph, which should be interchangeable with a profesional indemnity insurance; and
    - the criteria on how to stipulate the minimum monetary amount of the professional indemnity insurance or other comparable guarantee as referred in paragraph 4.

2.1. Feedback received from MSs

- MS generally agreed with the additional requirements under PSD3;
- Several MS would like to include in the mandate of the EBA details for the winding-up plan (article 3.3 (s)). **One MS would like to see further detail of the winding up plan in level I text;**
- Regarding the grandfathering regime for Payment Institutions, e-money Institutions and exempted entities, MSs highlighted the need to make less burdensome the procedure by limiting the information to be provided to NCAs to the additional requirements under PSD3;
- One member would like to have a clarification in relation to Article 2 no. 4 PSD 3 in the recitals about the legal forms that are covered by the term “legal person” (e.g. only stock companies); and
- Several Ms raised in addition article 3.j (iii) which requires Payment Institutions to provide at the point of authorisation a security policy document which includes (iii) for applicant institutions wishing to enter information sharing arrangements with other payment service providers for the exchange of payment fraud related data as referred to in Article 83(5) of Regulation XXX [PSR], the conclusions of the data protection impact assessment referred to in Article 83(5) of Regulation XXX [PSR] and pursuant to Article 35 of Regulation (EU) 2016/679 and, where applicable, the outcome of the prior consultation of the competent supervisory authority pursuant to Article 36 of that Regulation. In the MSs view, the dependency with Article 36 can compromise the granting of authorisation, and should be done at a later stage. MSs views are requested in this particular point.

In addition, the presidency in light of the current divergent interpretations as regards the duration of the authorisation procedure, in light of the term “completeness” of information, proposed to clarify this point by upgrading to level I the provision under EBA GIs on

authorisation and registration under PSD3 that deals with this specific aspects of how to interpret completeness of information.

2.2. Presidency´s proposals in light of the feedback received by MSs

Regarding the authorization requirements, the presidency proposes the following amendment:

3.5 The EBA shall develop draft regulatory technical standards specifying: (a) the information to be provided to the competent authorities in the application for the authorisation of payment institutions, including the requirements laid down in paragraph 3, points (a), (b), (c), (e) and (g) to (k) ~~***and***~~ ***(r)***~~***;***~~ ***, and (s)***

Regarding the authorization procedure, the presidency proposes the following amendment:

Article 14 Communication of the decision to authorise or refuse authorisation
Within 3 months of receipt of an application for authorisation as referred to in Article 3, or, where such application is incomplete, of all of the information referred to in Article 3(3), 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.

An application for authorisation shall be deemed complete for the purpose of paragraph 1 if it contains all the information referred to in Article 3(3).

Where the request for authorisation does not contain all the information referred to in Article 3(3), the competent authority shall send, in paper format or by electronic means, a request to the applicant, stating the missing information and the deadline no longer than XX days for the applicant to submit the missing information.

Where necessary, the competent authority may request the applicant to provide clarification on the information provided pursuant to Article 3(3).

Member States shall ensure that the applicant informs the competent authority where the information provided pursuant to the first subparagraph is no longer valid and provides, without delay, the updated information.

On the grandfathering regime, the presidency has compared the authorization requirements under PSD3 with those under PSD2. Those that change are the following:

- initial capital (amounts slightly increase);
- safeguarding of psu´s funds given that the EBA has a new mandate to develop regulatory technical standards on safeguarding requirements, laying down in particular safeguarding risk management frameworks for payment institutions to ensure protection of users' funds, and including requirements on segregation, designation, reconciliation and calculation of safeguarding funds requirements;

- a description of the applicant's governance arrangements and internal control mechanisms, since it includes the applicant's arrangements for the use of ICT services as referred to in Articles 6 and 7 of Regulation (EU) 2022/2554;
- a description of the procedure in place to monitor, handle and follow up a security incident and security related customer complaints, including an incident reporting mechanism which takes account of the notification obligations of the payment institution laid down in Chapter III of Regulation (EU) 2022/ 2554;
- a description of business continuity arrangements including a clear identification of the critical operations, a description of the ICT business continuity plans and ICT response and recovery plans, and a description of the procedure to regularly test and review the adequacy and efficiency of such ICT business continuity and ICT response and recovery plans, as required by Article 11(6) of Regulation (EU) 2022/2554;
- a security policy document, including: …(iii) for applicant institutions wishing to enter information sharing arrangements with other payment service providers for the exchange of payment fraud related data as referred to in Article 83(5) of Regulation XXX [PSR], the conclusions of the data protection impact assessment referred to in Article 83(5) of Regulation XXX [PSR] and pursuant to Article 35 of Regulation (EU) 2016/679 and, where applicable, the outcome of the prior consultation of the competent supervisory authority pursuant to Article 36 of that Regulation; (points i) and ii) that refer, respectively to a detailed risk assessment in relation to the applicant's payment and electronic money services and a description of security control and mitigation measures to adequately protect payment service users against the risks identified, including fraud and the illegal use of sensitive and personal data is not needed given this is already foreseen under PSD2;
- an overview of EU jurisdictions where the applicant is submitting or is planning to submit an application for authorisation to operate as a payment institution;
- a winding-up plan in case of failure, which is adapted to the envisaged size and business model of the applicant;

Taking into account the differences detected between PSD2, and PSD3, the presidency proposes to amend Article 44 as follows:

Article 44: transitional provisions: Member States shall allow payment institutions that have been authorised pursuant to Article 11 of Directive (EU) 2015/2366 by [OP please insert the date = 18 months after the date of entry into force of this Directive] to continue to provide and execute the payment services for which they have been authorised, without having to having to seek authorisation in accordance with Article 3 of this Directive or to comply with the other provisions laid down or referred to in Title II of this Directive until [OP please insert the date = 24 months after the date of entry into force of this Directive]. Member States shall require such payment institutions as referred to in the first subparagraph to submit to the competent authorities all information that enables those competent authorities to assess, by [OP please insert the date = 24 months after the date of entry into force of this Directive], either of the following: (a) whether

those payment institutions comply with ~~Title II~~ article 3 c); d);e); f); h); j) iii); r) and s), and, where not, which measures need to be taken to ensure compliance; (b) whether the authorisation should be withdrawn. Payment institutions as referred to in the first subparagraph which upon verification by the competent authorities comply with Title II shall be authorised as payment institutions pursuant to Article 13 of this Directive and shall be entered in the registers referred to in Articles 17 and 18. Where those payment institutions do not comply with the requirements laid down in Title II by [OP please insert the date = 24 months after the date of entry into force of this Directive], they shall be prohibited from providing payment services.

The same amendment proposal applies to article 45 on transitional provisions for electronic money institutions authorised under EMD, in application of the mutatis mutandi application of PSD2, to EMD for the related article on authorisation requirements.

Notwithstanding the above referred, an additional amendment could be made both to article 45 and/ or in Article 1.3 to ensure that the electronic money license is treated as a Payment institution licence without the need for its formal conversion, in order to avoid unnecesary burden.

In addition, a few MSs raised the need for a transitional provision for distributors of cash via ATMs who do not service payment accounts (the so-called "independent ATM deployers") given that despite being exempted from the licensing requirements of payment institutions, they are for the first time subject to a registration requirement. The registration must be accompanied by certain documentation. Indeed, and taking into account the limited risks involved in the activity of such ATM deployers, it is appropriate, instead of excluding them totally from the scope, to subject them to a specific prudential regime adapted to those risks, requiring only a registration regime.

Drafting proposal:

Member States shall ensure that ATM deployers not servicing payment accounts that are operating in the market pursuant to Article 3 (o) of Directive (EU) 2015/2366 by [OP please insert the date = 18 months after the date of entry into force of this Directive] continue to provide this service without having to having to seek registration in accordance with Article 38 or to comply with the other provisions laid down or referred to in Title II until [OP please insert the date = 24 months after the date of entry into force of this Directive].

Regarding the request for clarification of legal forms that are covered by the term "legal person", the presidency considers this aspect merits discussion and would like to ask member states on their views on this.

One way forward would be to harmonise what legal forms are covered by the term legal person and to these effects the debate should be open as to whether there should be a differentiation or not to these effects as regards personal companies versus capital companies, stock company versus limited liabilities company or any other additional criteria that may merit clear delineation of the scope of authorisation.

Another way forward, which would provide legal clarity whilst at the same time ensuring national differences in this respect, is to include an Annex where each MS would include the types of companies that are considered legal person in their jurisdictions to the effects of PSD3.

Questions to MS:

1) Do MS agree with the landing suggestions made by the presidency on the extensión of EBA mandate to winding up plan and on the amendments to the transitional regime for PIs, EMIs and the new transitional regime for independant ATM deployers?
2) What are MSs views on requiring article 3.j (iii) at the point of authorisation?
3) What are MSs views on a potential clarification of legal forms that are covered by the term “legal person” and on the possible options to address this?

3. Regulation on subject matter and positive scope under PSD3 and PSDR

As already explained in previous meetings, the Directive lays down rules concerning: (a) access to the activity of providing payment services and electronic money services, within the Union, by payment institutions, and (b) supervisory powers and tools for the supervision of payment institutions.

Following the decoupling of the Directive into Directive and Regulation, PSD3 only covers authorisation and supervision, and hence only applies to payment institutions. It is important to note that **electronic money institutions no longer exist as a category of payment service provider**, and that hence in the scope of PSD3 are **the former electronic money institutions which are now configured as payment institutions providing e-money services**, hence e-money services is within the regulation of PSD3.

Following this, article 1.3 indicates that “unless specified otherwise, any reference to payment services shall be understood in this Directive as meaning payment and electronic money services” and Article 1.4 prays “unless specified otherwise, any reference to payment service providers shall be understood in this Directive as meaning payment service providers and electronic money service providers.

One MS raised the concern that by making the statement in art. 1 para. (3), the services are practically comingled, creating confusion. Furthermore, in the majority of cases,

”payment services” is used alongside ”electronic money services” (for eg: Art. 2 para 4, Art. 3 para. 1, Art. 8, Art. 9 para. 1, Art. 10, Art. 11 para. 4, Art. 13 para. 1 etc.). Therefore, this MS considers necessary to further analyse if there’s a rationale for maintaining this paragraph and should it remain, all the definitions should be revised, to ensure that the reference to payment services is correct. The Presidency has analysed this issue and is of the view that this provision should be deleted as a whole alongside the proposal stated below to delete annex II and having e-money services as a subcategory of payment services (as it is the case with digital euro payment services). Given e-money services should be considered as a payment service this statement is no longer needed.

The same applies to art. 1 para. (4) - Unless specified otherwise, any reference to payment service providers shall be understood in this Directive as meaning payment service providers and electronic money service providers.

”Payment service provider” is defined in Art. 2 point (12) with reference to the bodies in Art. 2 para. 1 of PSR, thus covering credit institution, post office giro institutions, payment institutions and others. “Payment institution providing electronic money services” is defined in Art. 2 point (39) of PSD3 as a payment institution and, consequently, falls under the generic category of payment service providers. Electronic money services could be provided by credit institutions or payment institutions that are authorized to provide e-money services. Therefore, in the presidency´s view this is redundant and should be deleted.

One MS indicated that the term electronic money service provider is not defined under neither PSD3 nor PSR. Following the above explanation, the presidency proposes to include the following definition: "***electronic money service provider” is a payment service provider that provides electronic money services.*** In turn, ***‘electronic money services’ means payment services set out in Annex I done in electronic money.***

Payment services in electronic money are the new payment services (8) and (9), but also other payment services when the funds that are the object of the service are e-money, for example, service (2) for execution of payment transactions (using e-money).

Following the logic of the merger of e-money and payment services directives, and following several comments from MSs in this regard, **the Presidency has assessed the need to maintain in the new framework the distinction between ‘agent’ and ‘distributor’** and has come to the conclusion that there is merit in **merging** the **current categories of ‘agent’ and ‘distributor’ in a new, single category of “general” agent**. This “general” agent would act on behalf of payment institutions in providing payment services (as already provided by Art. 2, par. 1 (28) PSD3) and, for those payment institutions that provides e-money services, could also be allowed to carry out the services of distributing/redeeming e-money on behalf of the institution, as per Art. 2, par. 1 (36). In this context, PSD3 provisions (in particular, Art. 17 PSD3) already require MS to operate and maintain a public register which specifies the services carried out by the agents and distributors when acting on behalf of the payment institution. ait may be also reasonable to include a non-exhausting list of activities carried out by agents, specifically clarifying what the activities of ‘distribution’ and ‘redemption’ of e-money entail.

In addition, and following the logic of the merger of e-money and payments services directive, several MSs consider that both payment services and e-money services should be under one single annex. Following this, the presidency proposes to delete Annex II and to include e-money services under annex I, point (8) and/or (9) of Annex I

ANNEX I

PAYMENT SERVICES

(as referred to in point 3 of Article 3)

(1)Services enabling cash to be placed on and/or withdrawn from a payment account.

(2)Execution of payment transactions, including transfers of funds from and to a payment account, including where the funds are covered by a credit line with the user´s payment service provider or with another payment service provider.

(3)Issuing of payment instruments.

(4)Acquiring of payment transactions.

(5)Money remittance.

(6)Payment initiation services.

(7)Account information services.

(8) Opening, holding, managing and closing of payment accounts storing electronic money units, including consulting balances and the transaction record.

(9) Issuance and redemption of electronic money

~~***ANNEX II***~~

~~***ELECTRONIC MONEY SERVICES***~~

~~***(as referred to in point 52 of Article 3)***~~

~~***Issuance of electronic money, maintenance of payment accounts storing electronic money units and transfer of electronic money units.***~~

Regarding the specific wording of the payment services under Annex I, the following comments were made:

- Further clarification on the definitions would be welcome;
- The content of the « services enabling cash to be placed on and/or withdrawn from a payment account » should be clarified in order to know whether it includes

the activity of servicing a payment account, in particular in line with the activity of ATM deployers;

- « Acquiring of payment transactions » should be clarified because of the diverging interpretations on the scope of this service that have significant implications in terms of own funds requirements. In the MS´s view, the acquiring service only covers the reception of funds on the payment account of the payee which is held by the acquiring PSP, and not the « cash out » transaction, which is covered by the execution of payment transaction service;
- The new service of 'execution of payment transaction' with the reference to the provision of a credit line is misleading and could lead to difficulties. Indeed, the provision of ancillary credit and the execution of payment transactions are different. It would be simpler to have a definition differentiating between types of payment transactions with a reference to (i) direct debit, (ii) credit transfer and (iii) card or card-based instrument. It would be useful to have a new payment service where the funds are covered by a credit line with the user's payment;
- One MS queried the rationale to maintain a service on « issuance of payment instrument » that could be redundant with the execution of payment transaction. If the execution of a payment transactions is always based on an underlying payment instrument, issuance and execution of payment transactions could be redundant;
- The definition of "**payer"** of PSD2 should be kept in PSD3, in particular as its takes into account the case where the payment order is placed on behalf of the payer and not by himself;
- The definition of "**money remittance**" should be further clarified to eliminate cases where it may be difficult to differentiate money remittance from other services such as credit transfers. In particular, the MS believes that it should be clarified whether or not a payment account should be created by or with the payment service provider offering the money remittance service solely, or if no payment account should be created at any time of the payment chain so that the funds would not be transferred from a payment account or to a payment account at all; and
- Concerning the e-money services, it is key to clarify the notion of « payment services linked to electronic money » in the context of the Paysera decision of Court of Justice. The maintaining of such notion could be detrimental and creates room for regulatory arbitrage between future payment institutions providing e-money services and those providing payment services in the meaning of Annex I of PSD3.

In addition, One MS raised that previous versions of PSD contain a recital stating that PSD only regulates the contractual obligations between PSP and PSU, e.g. recital 87 in PSD2. It appears that such recital is not included in this proposal and would like the Commission to elaborate on the rationale behind this.

On exemptions, following Article 1.2, **Member States may exempt the institutions referred to in Article 2 (5), points (4) to (23), of Directive 2013/36/EU** from the application of all or part of the provisions of this Directive. **Member states agreed to keep this exemption.**

In addition, **a national option is configured under article 34 of PSD3** whereby Member States may exempt or allow their competent authorities to exempt, natural or legal persons providing payment services as referred to in Annex I, points 1 to 5, or providing electronic money services from the application of all or part of the procedures and conditions set out in Chapter I, Sections 1, 2 and 3, with the exception of Articles 17, 18, 24, 26, 27 and 28, where:

(a) in the case of payment services, equally as under PSD2, the monthly average of the preceding 12 months' total value of payment transactions executed by the person concerned, including any agent for which the person concerned assumes full responsibility, does not exceed a limit set by the Member State but that, in any event, amounts to no more than EUR 3 million; or

(b) in the case of electronic money services, the total business activities generate an average amount of outstanding electronic money that does not exceed a limit set by the Member State but that, in any event, does not exceed EUR 5 million; and

(c) in the case of payment services and electronic money services, none of the natural persons responsible for the management or operation of the business has been convicted of offences relating to money laundering or terrorist financing or other financial crimes.

Two MSs have expressed their preference to remove the national option. They allege level playing field reasons. However, the majority prefers to keep it and are of the understanding that there are no level playing field concerns given exempted entities do not have passporting rights.

- **One member raised concerns regarding the reference to "agents" in <u>Article 34 (1) of PSD3</u>**. By definition, an applicant for an exemption is not authorized to mandate agents before the exemption is granted. In his view, this as an obligation for competent authorities to take into account, in the business plan proposed by applicants, transactions where an agent (mandated after the exemption) will be involved in order to assess overall future payment volumes. This reference to agents ("(a) in the case of payment services, the monthly average of the preceding 12 months' total value of payment transactions executed by the person concerned~~, including any agent for which the person concerned assumes full responsibility,~~ does not exceed a limit set by the Member State but that, in any event, amounts to no more than EUR 3 million ») could be deleted since it causes difficulties and this mention is a copy/paste from the PSD2.

Moreover, a partial exemption is contemplated under article 36 of PSD3 for account information service providers, whereby these providers are not subject to authorisation regimes, but to registration instead, and are exempted of several of the information requirements under Article 3, and more specifically from the following:

- evidence of initial capital;
- description of safeguarding measures;

- description to monitory security incident and security related customer complaints;
- description of the process in place to file, monitor, track and restrict access to sensitive payment data;
- description of the principles and definitions applied for the collection of statistical data;
- fit and proper requirements; and
- identity of statutory auditors and audit firms

Although several Member states raised concerns as regards these entities being subject to AML requirements at the meeting on October 23rd, and in particular raised the need to ensure that all Aml rules are applied equally in all MSs, particularly in terms of client onboarding, **MSs agreed to wait till the ongoing discussions under the AMLD review (Procedure 2021/0250/COD) further evolve as to whether account information service providers should or should not be subject to AML requirements.**

One MS added that in practice, however, PSPs apply for licences for both services, initiation and account information services.

In addition, one MS raised the concern on Article 36.5 since it creates legal uncertainty and a non-uniform implementation in the Member States and suggests that the provision should mention the exact provisions that apply to account information service providers. The EC rationale on Article 36.5 is welcome.

Also, a few MSs raised the concern of Article 36.6, pursuant which, account information service providers shall be treated as PIs and suggests that its meaning should be clarified.

- Concerning the AISPs, several MS have concerns regarding the temporary alternative to professional indemnity insurance (PII) in the form of an initial capital requirement (Article 36 (4) of PSD3). These MS understand that using initial capital as an alternative to PII would not cover the same risks as a professional indemnity insurance because there is no economic equivalence between PII and initial capital. One MS highlighted that especially, in case of insolvency of the TPP (if sufficient own funds/initial capital is no longer available), a PII would still ensure risk coverage by the insurer. This would also send an adverse signal to the market by implicitly asserting the fact that PII is not necessary and that it is normal for insurers to be wary of AISP. It would be like removing safeguarding requirements for payment institutions because they face difficulties to open banking accounts. Finally, there is some uncertainty regarding the timeline: the TPP must subscribe a PII "*without undue delay*" which is vague. It would leave the TPP with the possibility to provide services without any customer protection for an undefined period of time. Finally, the consequences attached to a lack of insurance coverage are unknown: what would happen if the AISP didn't find any PII? Should its registration be revoked?
- With a different view, other members believe that PII is not a good solution because the practice has shown the lack of interest by insurance companies to

offer such insurance policies, so the AISP/PISP often find it hard or even impossible to obtain adequate policy, which prevents the completion of authorisation procedures. These MS find the introduction of the initial capital as an alternative acceptable, but this should also be clarified because according to current wording, it is possible to hold initial capital only in the phase of authorisation, and afterwards it still has to be replaced by PII. According to one MS, it is possible that AISP/PISP encounter problems with obtaining PII even one year after the start of their operations, so there would be no much benefits from current solution with initial capital.

- Finally, one MS flagged that that the current wording requiring initial capital instead of PII may cause issues if an AISP is unable to secure PII once it commences activities. Questions arise as to what actions can or should be taken in such cases and as such, a more permanent alternative to PII should be considered.

  In light of all the concerns received, the presidency proposes to remove the option to provide, as alternative to PII, initial capital.

Questions to MS:

4) What are MSs views on the presidency´s proposal to remove the option to provide, as an alternative to PII, initial capital?
5) DO MS agree with the proposal to merge agentes and distributors in light of the merger of psd2 and emd2?
6) Do MS agree with the presidency´s conclusions and amendments on Subject matter under PSD3?

Subject matter under PSR is regulated under article 1. The referred regulation lays down uniform requirements on the provision of payment services and electronic money services, as regards:

(a) the transparency of conditions and information requirements for payment services and electronic money services;

(b) the respective rights and obligations of payment and electronic money service users, and of payment and electronic money service providers in relation to the provision of payment services and electronic money services.

In addition, and as also foreseen under PSD3, unless specified otherwise, any reference to payment services shall be understood in this Regulation as meaning payment and electronic money services and any reference to payment service providers shall be understood in this Regulation as meaning payment service providers and electronic money service providers.

Differently from PSD3, PSR applies to all payment service providers and not only to payment institutions, as is the case under PSD3. More specifically, and pur it applies to the following type of payment service providers:

- (a) credit institutions as defined in article 4(1), point (1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council 61 , including branches thereof where such branches are located in the Union, whether the head offices of those are located within the Union or outside the Union;
- (b) post office giro institutions which are entitled under national law to provide payment services;
- (c) payment institutions;
- (d) the ECB and national central banks when not acting in their capacity as monetary authority or other public authorities;
- (e) Member States or their regional or local authorities when not acting in their capacity as public authorities.

Nonetheless, some MS have raised up the issue that **in fact PSR applies to many more market actors than PSPs**. In order to seek **further clarity** for a market operator reading PSR from the outset, legal clarity may recommend to better specify the scope of the PSR.

All MS, except from one, have expressed support for the Presidency's proposal on listing those entities that while not being PSPs, need to comply with some obligations of this Regulation. In this way, someone reading PSR from the first time will be able to understand the scope in a clearer way. The Presidencies proposes:

1 bis. This Regulation also applies to services provided within the Union by the following entities:

Regarding **technical service providers (TSPs**), the Presidency has identified the following relevant articles in the Regulation for technical service providers:

- Article 23(2) (termination requirements for framework contracts where the payment services are offered jointly with technical services, provided by the PSP or by a partnered third party).
- Article 58: liability of TSP for failure to support the application of SCA.
- Article 87: if a TSP provides and verifies the elements of SCA, the payer PSP needs to enter into an outsourcing agreement with the TSP. The PSP has the right to audit and control security provisions vis-à-vis the TSP. The PSP retains full liability for any failure to apply SCA.
- Article 89: EBA RTS with the requirements for the outsourcing agreements.
- Article 91: investigatory powers of NCAs.
- Article 93: relevant jurisdiction in case of infringement by TSP.

There are not applicable rules in PSD3 for TSP (no authorization, registration or ordinary supervision beyond the investigatory powers contemplated in PSR).

Some MS have the view that PSR should **go beyond the current proposal** regarding TSPs by **requiring notification to a NCA**, since not all of them are covered under the PISA oversight framework. In the view of these MS, the proposed oversight is not a matter of prudential treatment (since these entities do not hold clients' funds) but a question of **security and operational resilience** (linked to the existing possibility under

DORA to extends its scope to these entities), **fraud prevention** and **supervisory overview of the whole payments' ecosystem** (with reporting obligations). Indeed, entities such as payment processors or digital wallets are critical for the well-functioning of our financial system. According to these MS, for introducing these requirements, some definitions should be included in the PSR. Nonetheless, other MS warn against listing types of TSPs, since we may run the risk of creating loopholes, given the wide varieties of TSPs in the market.

(a) technical service providers, for the purposes of Articles 23(2), 58, 87, 89, 91, and 93;

Regarding the operators of payment systems and payment schemes, **the Presidency would like to point two issues (especially to the Commission)**: i) it seems that throughout the text there is **a lack of consistency in the use of the concepts "payment schemes" and "payment systems"**. There is no definition of "payment scheme" in the Definitions. Then some articles refer to operators of payment schemes, others to operators of payment systems, others to both (but for example, the review clauses of PSR and PSD have diverging references); ii) further harmonization is needed on the use of the expression "payment system" and "**operator** of payment system", in order to allocate liabilities in a clear way (vid. Article 80).

Beyond this, the Presidency has identified the following relevant articles in the Regulation for technical service providers:

- Article 31: access to payment systems.
- Article 58: liability of operator of payment schemes for failure to support the application of SCA.
- Article 80: data protection for payment systems.
- Article 91: investigatory powers of NCAs.
- Article 93: relevant jurisdiction in case of infringement by operators of payment systems.

(b) operators of payment systems and payment schemes, for the purposes of Articles 31, 58, 80, 91 and 93;

Regarding **providers of electronic communication services**, the Presidency notes that there is no Definition under article 3. A definition should refer to providers of electronic communications services as defined in Article 2, point (4), of Directive (EU) 2018/1972. Additional, further discussions are required on the need to include under this kind of obligations (cooperation against fraud) some categories of **gatekeepers** regulated under the Digital Markets Act since content leading to fraud can appear in an online marketplace as well as through a phone line. The same reasoning than with electronic communication providers apply.

The Presidency has identified the following relevant articles in the Regulation for providers of electronic communications services:

- Article 59: in case of impersonation fraud, duty to cooperate closely with PSPs and act swiftly to ensure that appropriate organizational and technical measures are in place to safeguard the security and confidentiality of communications in accordance with Directive 2002/58/EC, including with regard to calling line identification and electronic mail address.
- Article 91: investigatory powers of NCAs.
- Article 93: relevant jurisdiction in case of infringement by TSP.

Beyond this, some MS have expressed that further concretion of the responsibilities of electronic communication services providers is needed such as, for example, a duty to react in some way to the notification by the user or a PSP of fraud through the network. Also some MS wonder whether the liability of telcos should be restricted to the impersonation fraud, since the varieties of fraud are wider.

(c) providers of electronic communications services, for the purposes of Articles 59, 91 and 93.

In the previous CWP, the Presidency suggested that **ATM deployers** should be included in this list. However, the Commission rightly pointed out that, except from the authorization rules, ATM deployers shall be considered as payment institutions (therefore, PSPs), for other purposes. Regarding ATM deployers, one MS pointed out that given their new statue as PSPs, it should be made clear that Article 6[1] of Council Regulation 1338/2001, laying down measures necessary for the protection of the euro against counterfeiting, applies to them. (This is because the scope of the 2001 Regulation is payment service providers).

Regarding the **review of PSR/PSD3 for these purposes**, it is relevant to note that:

- Article 108 PSR mandates the Commission to elaborate a report within 3 years regarding the scope of PSR as what regards TSP, payment system operators and payment scheme operators.
- Article 43 PSD mandates the Commission to elaborate a report within 5 years regarding the scope of PSD at what regards TSP and payment system operators (no reference to schemes in this case?). This last provision highlights in particular the need to have processing digital wallets under the Directive (some kind of authorization/registration, and supervision).

Questions to MS:

7) Do MS agree with the wording of the new Article 1 bis?
8) Do MS have any view regarding the possibility to define some concrete types of technical service providers (e.g., digital wallets, payment processors), and

[1] Obligation to ensure that euro notes and coins which they have received and which they intend to put back into circulation are checked for authenticity and that counterfeits are detected.

increase the obligations for those in some concrete areas (e.g., operational resilience, notification to NCA)?

9) Do MS consider that some gatekeepers (core platforms), given their intermediary role, should also have the same kind of duties against fraud than electronic communication services providers?

10) Do MS consider that further concretion of the "duty to cooperate in impersonation fraud" or even an extension to other kinds of fraud, is needed for electronic communication services providers (and, if so, core platforms)?

4. Negative scope:

Article 2.2 PSR. This Regulation does not apply to the following services:

Before listing the negative scope of PSR, let's highlight that some MS have pointed out the need to **exclude these entities excluded in PSR also from PSD3** in art. 1, since these they do not need to be considered payment institutions. The Presidency suggests making a reference to Articles 37 (it deals with cash-in-shop) and 39 (limited network and telco exception), since indeed these Articles from PSD do apply to the entities outside of the scope of PSR as of Article 2.2 PSR.

Article 1 PSD

5. This Directive does not apply to services set out in Article 2 (2) of the Regulation XXX [PSR], with the exception of Articles 37 and 39.

Questions to MS:

11) Do MS agree with this proposal?

(a) payment transactions made exclusively in cash directly from the payer to the payee, without any intermediary intervention;

Regarding the **commercial agent** exception, some MS expressed that indeed Directive 86/653, a Directive not related to financial services, refer to commercial agents in the field of goods purchases, not including services. Therefore, according to these MS it would not be legally correct to refer to this Directive in order to define a commercial agent. In this sense, the elements of the COM definition and some clarifications that have been proposed to Recital 11 would be enough to identify commercial agents with general concepts.

Also some MS reflected on the fact that indeed the commercial agent should always be in the possession of funds, because otherwise there would not be any doubt in that commercial agents are not providing payment services, and would therefore be automatically out of PSR scope.

Regarding the possibility to include e-platforms in the text, most MS and the COM suggested to be future-proof, leave these considerations in the Recitals and allow NCAs to guide themselves with general criteria. The Presidency suggests including some wording from the EBA Q&A 2020_5355 in the Recital 11, in order to explain why most platforms are considered to operate both with payer and payee, with any real scope to negotiate.

Last, some MS added that there should be some common understanding across the EU about the concept of "power of attorney", since attorney usually accept payments on behalf of the payees when there is a mandate.

(b) payment transactions from the payer to the payee through a commercial agent, ~~as defined in Article 1(2) of Directive 86/653/EEC,~~ provided that all of following conditions are met : i) the commercial agent is authorised via an agreement to negotiate or conclude the sale or purchase of goods or services on behalf of only the payer or only the payee, but not both of them, ~~irrespective of whether or not the commercial agent is in the possession of the client's funds~~, and ii) such agreement gives the payer or the payee a real ~~margin~~ scope to negotiate with the commercial agent or conclude the sale or purchase of goods or services;

Article 2.7 PSR

By [OP please insert the date= one year after the date of entry into force of this Regulation], the EBA shall issue Guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010, addressed to the competent authorities designated under this Regulation, on the exclusion for payment transactions from the payer to the payee through a commercial agent referred to in paragraph 2, point (b) of this Article.

Recital 11

The exclusion from the scope of Directive (EU) 2015/2366 of payment transactions from the payer to the payee through a commercial agent acting on behalf of the payer or the payee has been applied very differently across Member States. ~~The concept of commercial agents is typically defined in national civil law, which might diverge form Member State to Member State, leading to inconsistent treatment of the same services in different jurisdictions. The concept of commercial agents under that exclusion should therefore be harmonised and clarified by making reference to the definition of commercial agents as laid down in Council Directive 86/653/EEC. In addition,~~ Further clarity should be provided on the conditions under which payment transactions from the payer to the payee through commercial agents may be excluded from the scope of this Regulation. This is achieved by requiring that agents should be authorised via an agreement with either the payer or the payee to negotiate or conclude the sale or purchase of goods or services on behalf of only the payer or only the payee, but not both of them, regardless of whether or not the commercial agent is in the possession of

client's funds. ***The commercial agent must have some real scope to negotiate or degree of decision-making with regard to the underlying transaction. This scope may relate, for example, to the modalities of distribution, the granting of discounts or the contractual autonomy.***

Electronic commerce platforms that act as commercial agents on behalf of both individual buyers and sellers without buyers or sellers having any real margin or autonomy to negotiate or to conclude the sale or purchase of goods or services should not be excluded from the scope of this Regulation. ***Many of these platforms bring together the sellers – payees – and the buyers – payers -- and thus facilitate the negotiation and the sale/purchase for both parties. Specifically, the platforms usually enlist the sellers and the buyers, display information about the goods, receive the buyers' orders, collect the payments before the respective goods are delivered and transfer the amounts to the sellers on a regular basis, in principle, after the delivery of the goods to the buyer. Many electronic commerce platforms contribute in an automated manner to the conclusion of the sale/purchase between the payer and the payee without any real scope to negotiate from any of these parties with the platform.***

The European Banking Authority (EBA) should develop guidelines on the exclusion for payment transactions from the payer to the payee through a commercial agent to provide further clarity and convergence among competent authorities. Those guidelines may include a repository of use cases typically covered by the commercial agent exclusion.

Questions to MS:
12) Do MS agree with the modifications and further precisions introduced in the regime of commercial agents (exemption in article 2.2, guidelines in article 2.7 and recital 11)?

Regarding the two exemptions that were mentioned in PSD2 but have been removed in PSR (cash-in-transit and cash-to-cash currency exchange), the COM explained in the October CWP that there are indeed many activities that one can think of that do not constitute payment services. According to the COM, there is no doubt that these two services do not have the characteristics of payment services. Therefore, there is no point in having a list of all possible services that cannot be mistaken with payment services. The COM proposed that a Recital could be introduced to clarify that these activities are not in the scope.

On the other hand, many MS have expressed in their written comments that we should reintroduce these exemptions in the core of the text. The reason is that the easiest interpretation for someone reading PSD2 and then PSR for the first time is that these activities are now in the scope of PSR. A Recital may prove useful in this sense since the reasoning of the COM is correct, but for legal clarity, it is more straightforward and clearer to assume that there is a legacy legislation (PSD2) and leave the exemptions in Article 2. Therefore, the Presidency proposes to reintroduce the exemptions as in PSD2.

(b´) professional physical transport of banknotes and coins, including their collection, processing and delivery (cash-in-transit);

(c) payment transactions consisting of the non-professional cash collection and delivery within the framework of a non-profit or charitable activity;

Regarding **cashback**, all MS agreed with the Presidency's proposal of introducing an obligation to inform on possible fees.

(d) services where cash is provided by the payee to the payer as part of a payment transaction for the purchase of goods and services, following an explicit request by the payment service user just before the execution of the payment transaction. The payment service user shall be provided with information on any possible charges for this service before the requested cash is provided;

Regarding the **cash-in-shop** regime in PSR and PSD COM proposal, the Presidency interprets that no rules of PSR apply to cash-in-shop services in general (except from fee transparency). Concerning possible registration or authorization requirements, Article 37 PSD should be read as an exemption from any access requirement to cash-in-shop up to 50 euros. Beyond this, the shop should apply for a PSP license, constitute a branch or become an agent of an authorized PSP that provides cash withdrawals (even if this is not clearly stated in the text).

There are divergent views among MS in what regards the cash-in-shop regime in the COM proposal. On the one hand, we can identify some MS that see the idea underneath the COM proposal in a positive way. Some of these MS would like to see the 50 euros amount increased to promote the use of cash-in-shop services. These MS consider that cash-in-shop could be even limited just by the cash that is available in the shop or that the retailer is willing to use for this purpose. These MS oppose to any licensing or registration regime for cash-in-shop activities.

On the other hand, we can identify some MS that oppose to the idea underneath the COM proposal. These MS argue that, in the first place, this activity as regulated in the proposal would pose AML risks, since there is not a time limit linked to the 50 euros limit (and no way of supervising a potential time limitation). These MS question therefore the applicability of the AML provision in Art. 37.2 PSD. Also, these MS consider that the security of banknotes and the "cash reutilization cycle" could be impeded since retailer shops are not obliged by the 2001 Regulation on counterfeiting or the ECB rules for cash. However, this was the case for independent until now, when they were not considered as PSP and therefore, subject to the counterfeiting rules. For these MS, the way forward should consist in attaching in somehow the shop to a PSP (either through an agency contract or other legal figures). In this way, the shop would be under the AML remit of the PSP.

Given the divergency of views, the Presidency considers that further analysis is needed. In this sense, the different policy objectives that are at stake are all very relevant (cash provision and financial inclusion, AML risk and level playing field). In any case, whatever the outcome, the Presidency suggests that from a formal point of view, some clarifications should be introduced in Article 37 PSD3 as what regards the applicable regime for those shops that provide cash beyond 50 euros (need to apply for a license or enter into an agent contract with a PSP).

(e) services where cash is provided in retail stores following an explicit request by the payment service user but independently of the execution of any payment transaction and without any obligation to make a purchase of goods and services. The payment service user shall be provided with information on any possible charges for this service before the requested cash is provided;

Article 37 PSD

Services where cash is provided in retail stores without a purchase

1. Member States shall exempt from the application of this Directive natural or legal persons providing cash in retail stores independently of any purchase provided the following conditions are met:

(a) the service is offered at its premises by a natural or legal person selling goods or services as a regular occupation;

(b) the amount of cash provided does not exceed EUR 50 per withdrawal.

2. This Article shall be without prejudice to Directive (EU) 2015/849 or any other relevant Union or national anti-money-laundering/terrorist financing laws.

Questions to MS:

13) Taking into account the fundamental discrepancies among MS and the policy goals explained by the Presidency, how do MS envisage a way forward regarding cash-in-shop?

(e´) cash-to-cash currency exchange operations where the funds are not held on a payment account;

(f) payment transactions based on any of the following documents drawn on the payment service provider to place funds at the disposal of the payee:

(i) paper cheques governed by the Geneva Convention of 19 March 1931 providing a uniform law for cheques;

(ii) paper cheques similar to those referred to in point (i) and governed by the laws of Member States which are not party to the Geneva Convention of 19 March 1931 providing a uniform law for cheques;

(iii) paper-based drafts referred to in the Geneva Convention of 7 June 1930 providing a uniform law for bills of exchange and promissory notes;

(iv) paper-based drafts similar to those referred to in point (iii) and governed by the laws of Member States which are not party to the Geneva Convention of 7 June 1930 providing a uniform law for bills of exchange and promissory notes;

(v) paper-based vouchers;

(vi) paper-based traveller's cheques;

(vii) paper-based postal money orders as defined by the Universal Postal Union;

(g) payment transactions carried out within a payment or securities settlement system between settlement agents, central counterparties, clearing houses or central banks and other participants of the system, and payment service providers, without prejudice to Article 31;

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

~~***(i) without prejudice to Article 23(2), and Articles 58 and 87, services provided by technical service providers;***~~

Concerning the **limited network exemption**, the new COM proposal has added over PSD2 the following elements: i) the requirement to use the payment instrument in only one network; ii) move from EBA Guidelines to EBA RTS; iii) further indications in Recital 13 on criteria that NCA can use to assess a limited network (see in the next page the lines underlined by the Presidency); iv) further narrowing of the exemption in Recital 13 (only to be used in physical premises).

There are divergent views among MS. On the one hand, some MS considered that this exemption is allowing the processing of big volumes of payments without AML checks or other relevant payment rules (fraud, reporting). Therefore, these MS would support the introduction of a cap, beyond which a PSP license is necessary. Some MS suggest that this cap could be introduced in the EBA guidelines, differentiating among different market segments (B2B vs B2C) or business sectors (depending on the level of risk in each sector).

On the other hand, some MS are against further narrowing of this exemption and indeed oppose the limitation in the proposal to a "single" network. According to these MS, this requirement would go against some business models that are key for the future of the EU economy (for example, energy stations where a variety of energy brands are provided for different networked goods: LNG, hydrogen, electricity chargers). As a way forward to agree on the wording for the limited network exemption, one MS proposes to specify that gas stations and convenience models, especially e-mobility business models are directly outside of the scope of the PSR (independently from the limited network criteria).

Also some MS favour the prohibition (in Recitals) of online premises for granting the exemption, whereas others look favourable to this consideration.

In any case, MS agree on the need to have further harmonization in the notification process, which could be achieved through the new EBA RTS. Therefore, the Presidency is introducing this requirement in Article 2.8 PSR and a deadline for NCAs to assess the notification of the service provider in Article 39 PSD3 (three months deadline, as it is the common practice in financial law). Some minor changes have also been proposed by the Presidency, and a clarification for the business-to-business market segment.

(j) services based on specific payment instruments that meet one of the following conditions:

(i) instruments allowing the holder to acquire goods or services only in the premises of the issuer or within a single limited network of service providers under direct commercial agreement with a professional issuer;

(ii) instruments which can be used only to acquire a very limited range of goods or services, including instruments restricted to be used in business-to-business transactions;

(iii) instruments valid only in a single Member State, which are provided at the request of an undertaking or a public sector entity and regulated by a national or regional public authority for specific social or tax purposes to acquire specific goods or services from suppliers having a commercial agreement with the issuer;

(13) To assess whether a limited network should be excluded from scope, the geographical location of the points of acceptance of such network as well as the number of the points of acceptance should be considered during the notification process. Specific-purpose instruments should allow the holder to acquire goods or services only in the physical premises of the issuer, whereas usage in an online store environment should not be covered by the notion of premises of the issuer. Specific-purpose instruments should include, depending on the respective contractual regime, cards that can only be used in a particular chain of stores or a particular shopping centre, fuel cards, membership cards, public transport cards, parking ticketing, meal vouchers or vouchers for specific services, which may be subject to a specific tax or labour legal framework designed to promote the use of such instruments to meet the objectives laid down in social legislation, such as childcare vouchers or ecological vouchers. Specific-purpose instruments

should also include electronic money-based instruments once they meet the requirements of this exclusion. Payment instruments which can be used for purchases in stores of listed merchants should not be excluded from scope, as such instruments are typically designed for a network of service providers which is continuously growing.

Article 2.8 PSR

The EBA shall develop draft Regulatory Technical Standards to specify the conditions of the exclusions referred to in paragraph 2, point (j) of this Regulation and to promote convergence among national competent authorities in the notification process set out in Article 39 of Directive XXX [PSD]. The EBA shall take into account the experience acquired in the application of the EBA guidelines of 24 February 2022 on the limited network exclusion under Directive (EU) 2015/2366.

Article 39 PSD

Duty of notification

1.Member States shall require service providers that carry out either of the activities referred to in Article 2(1), points (j), (i) and (ii), of Regulation XXX [PSR] or carrying out both activities, for which the total value of payment transactions executed over the preceding 12 months exceeds EUR 1 million, to inform the competent authorities about the services offered, specifying under which exclusion as referred to Article 2(1), points (j), (i) and (ii), of Regulation XXX [PSR] the activity is considered to be carried out.

On the basis of that notification, the competent authority shall take a duly motivated decision within three months on the basis of criteria referred to in Article 2(1), points (j), (i) and (ii) of Regulation XXX [PSR] where the activity does not qualify as a limited network, and inform the service provider thereof.

2.Member States shall require service providers that carry out an activity as referred to in Article 2(1), point (~~j~~k), of Regulation XXX [PSR] to send a notification to competent authorities and provide competent authorities an annual audit opinion, testifying that the activity complies with the limits set out Article 2(1), point (j), of Regulation XXX [PSR].

3.Member States shall ensure that competent authorities shall inform the EBA of the services notified pursuant to

paragraph 1, stating under which exclusion the activity is carried out.

4.The description of the activity notified under paragraphs 2 and 3 shall be made publicly available in the registers referred to in Articles 17 and 18.

Questions to MS:

14) Do MS agree with the proposals introduced by the Presidency to improve the notification regime?
15) Do MS agree with the introduction by the Presidency of the business-to-business consideration?
16) What is the view of MS regarding the exemption for the instruments in art. 2 (j)(iii), such as meal vouchers? In view of the proposal of the European Parliament to remove this exemption, what is the view of the MS? These business models have been traditionally outside of the scope of PSD.
17) Does your MS favour a further narrowing of the exemption (and if yes, how exactly)? Or, Does your MS agree with the COM proposal? Or, Does your MS favour more room for exempting some kind of business models (and if yes, how exactly)?

Regarding **payments in electronic communications networks**, the Presidency corrects the typo in Article 39.2 PSD where an audit is required for payment transactions by a provider of electronic communications networks, as it was the case in PSD2 (otherwise, the audit requirement would read as applicable to limited networks).

The majority of MS have shown no issues regarding the wording of this provision. However:

- One MS has suggested to remove this exemption since there is no justification to have a "payment system" that does not protect against fraud and that lacks from transparency vis-à-vis the consumer (for example, not notifying the payment transactions). In this same line of reasoning, one MS have suggested to oblige providers of *direct carrier billing*, where there is a disposal of clients' funds, to become a PSP, since there is no level playing field treatment among MS for these providers.
- One MS has suggested to specify that the exempted electronic communication provider should have a direct contractual link with the telephone subscriber for the exemption to apply, following the EBA clarification in 2018.
- Last, some MS have suggested to update the amounts with inflation, as done in Article 10 PSR.

(k) payment transactions by a provider of electronic communications networks as defined in Article 2, point (1), of Directive (EU) 2018/1972 ~~of the European Parliament and of the Council~~, or services provided in addition

to electronic communications services as defined in Article 2, point (4), of that Directive to a subscriber to the network or service:

(i) to purchase digital content and voice-based services, regardless of the device used for the purchase or consumption of the digital content and charged to the related bill; or

(i) performed from or via an electronic device and charged to the related bill within the framework of a charitable activity or for the purchase of tickets;

provided that the value of any single payment transaction does not exceed EUR 50 and:

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

(l) payment transactions carried out between payment service providers, their agents or branches for their own account;

Questions to MS:
18) The three specific points raised by some MS are quite relevant. How does your MS assess those comments?

Regarding, **intragroup payments**, MS agreed with the proposal of the Presidency to encapsulate incoming payments.

(m) payment transactions and related services between a parent undertaking and its subsidiary or between subsidiaries of the same parent undertaking, without any intermediary intervention by a payment service provider other than an undertaking belonging to the same group, ~~and~~ as well as the ~~collection~~ execution of payment orders on behalf of ~~a~~ group entities by a parent undertaking or its subsidiary for onward transmission and processing to a payment service provider, and the collection of funds from external third parties on behalf of group entities by a parent undertaking or its subsidiary.

Questions to MS:
19) Do MS have any other comment related to the negative scope?

5. Definitions under PSD3 and PSR

Definitions are contained under Articles 2.1-39 of PSD3 and 3.1-29 of PSR.

At the last meeting in September 26th, MS pointed some **inconsistencies of definitions in both regulations, as well as a desire to include two additional definitions: payments account and gross negligence.**

On the inconsistencies detected, one MS noted that the definition of 'technical service provider' in Art. 2 (24) PSD 3 and Art. 3 (36) PSR are inconsistent.

In addition, and as a technical Remark, this MS indicated that the definition Art 2 paragraph 3 PSD 3 the reference should be made to Annex II, as Annex I only lists payment services, while electronic money services are described in Annex II. (comment we have not addressed in light of the presidency´s proposed change to delete Annex II and include e-money services under Annex I)

In the context of the discussions held by the working group on fraud, several MSs requested both a definition or clarification via examples of gross negligence and a definition of authorized transaction.

On a potential definition/clarification via examples of gross negligence, the Presidency asked MS views on whether they had a preference for a classical definition or rather of including examples and wording suggestions were welcomed.

The following comments were made in this regard: (FURTHER TO BE COMPLETED)

- The majority of MSs would like to keep refering to gross negligence, instead of negligence;

- “Gross negligence” is not defined by the PSR or EU law. A few MSs are scheptical about a definition of gross negligence in the PSR, but believe the legislation and addressees of PSR would benefit from more examples of gross negligence in Recital 82 PSR. More specifically, one MS recommended to be cautious on a possible definition of gross negligence, which is fundamentally characterized on a case-by-case approach by case law. With PSD2, such notion exclusively depended on national civil law, which could make the drafting of a common definition difficult. The referred MS noted that they would be in favor of introducing more examples in recitals to ensure a common and converging understanding of this notion. As an example taken from national case law, a case law of 28 March 2018 regarded as a gross negligence the circumstance under which user of a payment service disclosed his personal security details in response to a message containing indications which would have lead a normally attentive user to doubt the origin or legitimacy of this message;
- Some MSs would like to see the examples developed by EBA GLs, whereas other MSs indicate that these are not enforceable before court, and should be at level

- The majority of MSs support inclusion of a non-exhaustive list of circumstances that PSPs should take into consideration in order to determine if a case constitutes "gross negligence", as propose by the Lithuanian non-paper;
- A few MSs flagged they don't want a definition nor examples. In their view, gross negligence is a broad concept that should be able to capture all the circumstances of the case which is why a case-by-case analysis better suits it. Introducing a definition would not allow to take into account, for example, circumstances related to more vulnerable consumers. Secondly, the problem with listing examples of situations which would qualify as 'gross negligence' is that the situations become outdated quickly when the business and operational environment changes. Therefore, this MS would prefer leaving the concept under the discretion of national courts and dispute resolution bodies.

Following this, and based on MSs comments raised as well as on the wide acceptance of the suggested way forward by Lithuania in its non paper to include in legislation some evaluation criteria, the presidency proposes the following drafting suggestion:

Drafting suggestion regarding evaluation criteria:

"When assessing the possible negligence or gross negligence on the part of the payment service user, all the following circumstance shall be taken into account

(a) payer's behavior or communication with third parties, where relevant;
(b) means used by third parties to illegally take over personalized security credentials of payment instruments owned by the payer;
(c) innovativeness, complexity of fraud;
(d) whether the payer has taken adequate steps in order to properly ensure the confidentiality of the personalized security credentials of the payment instruments;
(e) the known characteristics of the payer that might make it more likely to fall victim to fraud;
(f) in the event that the payer used its means of identification, the circumstances , whether and what the payer saw in its messages asking to enter the PIN codes that confirmed the disputed payment;
(g) whether the personalized security credentials of the payment instrument have been appropriated by third parties, while the payer was using the payment instrument according to its purpose
(h) the PSPs actions, taken in order to familiarize the payer with the risks and methods of fraud in the electronic space, as well as the meaning and legal consequences of the safe use of identification means and payment instruments issued by the PSP, the disclosure of their personalized security data, etc."

Also in the context of the discussion on fraud, it was agreed that concept of authorisation of the payment transactions remains unclear. In addition, it was noted that the proposal of the commission replaced the word "consent" by permission. MSs would like to ask the EC for the rationale of this change. One MS explains that should

the rationale be the risk of confusion with the notion of consent used in the data protection regulation, then the introduction of of a definition of consent in the meaning of the PSR should eliminate any risk of confusion.

Currently, where the user notifies an incident with his payment instrument, many PSPs invoke those provisions by arguing that, if the transaction was authenticated, the holder of the payment instrument has consented to the transaction. In this case, since the transaction is considered authorised, the payer, who has been the victim of fraud, does not benefit from the liability regime for "unauthorised transaction".

Following the above referred, one M suggests to clarify the authorisation process by adding a definition of "consent" and amending the corresponding recital as follows:

(69) The parallel use of the term 'explicit consent' in Directive (EU) 2015/2366 and Regulation (EU) 2016/679 of the European Parliament and of the Council has led to misinterpretations. The object of the explicit consent under Article 94 (2) of Directive (EU) 2015/2366 is the permission to obtain access to those personal data, to be able to process and store these personal data that are necessary for the purpose of providing the payment service. Therefore, a definition of consent is introduce by this regulation in order to increase legal certainty and have a clear differentiation with data protection rules. ~~Where the term 'explicit consent' was used in Directive (EU) 2015/2366, the term 'permission' should be used in the present Regulation. When reference is made to 'permission' that reference should be without prejudice to obligations of payment service providers under Article 6 of Regulation (EU) 2016/679. Therefore, permission should not be construed exclusively as 'consent', or 'explicit consent' as defined in Regulation (EU) 2016/679.~~

For the purposes of this Regulation, consent means that the payment service user has freely and intentionally consented to the transaction. This means that a transaction is authorised if at the time of the initiation of a payment transaction, both the amount and recipient (or purpose) of the transaction are known to the payment service user.

Article 3

(56) 'consent' means that the payment service user has freely and intentionally consented to the transaction.

On MIT and MOTO transactions, following several comments from MSs in the discussion on fraud the Presidency has moved this description from Article 85 into definitions for further legal clarity, as follows:

(56) "merchant-initiated transaction (MIT)" means a payment transaction that is initiated by the payee, provided that those transactions do not need to be preceded by a specific action of the payer to trigger their initiation, as long as the payer has previously given a mandate to the payee authorizing to place a payment order for a payment transaction or a series of payment transactions through a

particular payment instrument that is issued to be used by the payer to place payment orders for the payment transactions, and where the mandate is based on an agreement between the payer and the payee for the provision of products or services.

The Presidency highlights that the key difference between a MIT and a direct debit is that the definition of MIT required the use of a particular payment instrument to place the payment order (typically, a payment card).

(57) "mail order or telephone order transaction (MOTOs)" means a payment transaction for which payment orders are placed by the payer with modalities other than the use of electronic platforms or devices, such as paper-based payment orders, mail orders or telephone orders.

In the following CWP, we will come back to these issues with the implications of MIT and MOTO for SCA, refund rights, etc.

On e-money services, the majority of MSs raised concerns as to why redemption and withdrawal of e-money services was no longer on the definition of e-money services. In addition, several MSs raised questions as to why the referred definition does not refer to managing e-money since this activity is intrinsically associated with the issuance of e-money. One Member does not support including "maintenance of payment account storing electronic money units". In his his view, maintenance of payment account is not a payment service and we therefore have to be to be consistent and also maintenance of e-money account should not be e-money service.

Moreover a few Ms would like to specify that these payment accounts are pre-paid payment accounts. We believe that with this definition of services (Annex I and Annex II), the PI that is authorised only for "issuance of electronic money, maintenance of payment accounts storing electronic money units and transfer of electronic money units" – can provide all the payment services with pre-paid funds (e-money) and that there is no need for that institution to be authorised for other payment services.
This institution can be authorised for other payment services only if it also intends to provide payment services with other funds (for example – if issues credit cards and acquires payment transactions with credit cards – it should also be authorised for payment services 3 and 4 of the Annex I).
Clarifications from the EC would be welcome in this regard.

As presented earlier, the presidency proposes to delete Annex II and to include in Annex I, e-money services, that should be considered as payment services:

(8) Opening, holding, managing and closing of payment accounts storing electronic money units, including consulting balances and the transaction record.

(9) Issuance and redemption of electronic money

Please note that the Presidency has not included explicitly "withdrawal of electronic money" or "execution of transactions in e-money" as a specific service, given that in its view the other payment services may constitute e-money services when the "funds" is "e-money". In this way the Presidency hopes to achieve better integration of both Directives.

Following this, the presidency proposes the following definition:

(52) 'electronic money services' means payment services set out in Annex I done in electronic money

On the definition of sensitive payments data, several members raised concerns on a different definition under PSD3 from that under PSD2. The EC explained that the definition remained unchanged, but that part of it had moved to the narrative of the text for further clarity. Several MSs states would like to go back to the previous version under PSD2, and the presidency proposes to go back to the referred version.

On virtual ibans, at the last meeting in September, which was thematic on fraud, several MSs were of the view that the referred should be contemplated, potentially under PSD3/PSR. At the following meetings on October 23rd and 30th, **MSs concluded that although this is a very important topic, there is not enough evidence to regulate at this moment the referred service and that it would be more appropriate to await the exercise the EBA is currently undertaking to gather evidence, and in respect which a Report is expected by Q12024**. In addition, both the European Commission and several member states highlighted that virtual ibans serve also legitimate purposes, such as addressing iban discrimination.

On the definition of Payment Instrument (Art. 3 paragraph 18 PSR): in line with ECJ C-616/11, T-Mobile Austria GmbH/Verein für Konsumenteninformation, no personalisation/individualisation of a payment instrument should be necessary**.**

On the definition of Payment account, several MSs have raised concerns, and flag that as it is currently drafted credit accounts would not be included. Moreover, one MS indicates It would be helpful to insert a separate term for "credit card accounts" in the definition of terms in PSD III / PSR. According to their NCA it is difficult in practice to determine whether credit card accounts meet the requirements for payment accounts.

2 MSs flagged there are two issues related to this definition.

- Firstly, the definition and the corresponding recital 9 may not be fully aligned. The definition states that a payment account is something that allows for sending and receiving funds to and from third parties while some parts of the recital ("The possibility of making payment transactions to a third party from an account or of benefiting from such transactions…") seems to consider these features as alternatives. Clarification from the EC would be welcome.

- The second issue is that if both sending and receiving capability is required, some account-models would be excluded from the scope. An example would be an account from which payments can be made to third parties but which is linked to another account (of the same owner) from which funds are received. In accordance with the recital such an account would fall outside the scope ("Situations where another intermediary account is needed to execute payment transactions from or to third parties should not fall under the definition of a payment account…"). The MS asks for explanation why such accounts should be excluded from the definition of payment account. Clarifications from the European Commission is welcome in this respect. This provision is interpreted differently by another MS, which considers that the definition should be completed to emphasize that a payment account is an account which allows for the "direct" sending and receiving of funds to and from third parties without the need of another intermediary account.

- In addition, one MS flagged that the term "third parties" needs to be clarified in order to allow the transfer of funds from the account of the same PSU held at another PSP.

One MS suggests a more functional and precise definition of payment account, as "a bookkeeping system held by a payment service provider which allows this provider to know the balance of funds it holds and which is available to each of its users for payment transactions, which is used for the execution of one or more payment transactions and which allows for the transfer and reception of funds to and from third parties". The objective is to have a more precise and functional definition of payment account. This is a key concept of the PSD2 and there can still be divergence regarding the interpretation of such notion. A more functional definition would ensure convergence in that regard.

In addition, MSs have requested the introduction of the following definitions:

- "Brand" (as registered trade name(s) used by a payment institution) should be added in order for its addition in the register to be useful for consumers and not too burdensome for competent authorities. The suggested definition is as follows: ***'brand' means registered trade name(s) used by a payment institution.***
- It would also be useful to align the definition of 'technical service provider' in PSD3 with the definition given in PSR, which are not consistent.
- 'Management body' as followed***: "management body' means the body or bodies of a payment institution, which are appointed in accordance with national law, which are empowered to set the entity's strategy, objectives and overall direction, and which oversee and monitor management decision-making and include persons who effectively direct the business of the entity".*** This definition would be useful to ensure full consistency regarding fit & proper practices among all the Member States and to ensure conformity with the FATF

Recommendations that prescribe such fit & proper test for all financial institutions, which cover the payment institutions.

- A new definition of 'acquiring of payment transactions' as followed: ***'acquiring of payment transactions' means a payment service provided by a payment service provider contracting with a payee to accept and process payment transactions, which results in a transfer of funds to the payment account of the payee held by the payment service provider".*** *Rationale:* there are diverging interpretation of the scope of this service, as to whether or not it includes "cash out" transaction from the payment account of the payee held by the acquiring PSP to the bank account of the payee. Several MSs flagged that the acquiring service only covers the reception of funds on the payment account of the payee which is held by the acquiring payment service provider, and not the cash out transaction, which needs to be covered by another payment service (execution of transaction). The acquiring service ultimately only amounts to holding a payment account and processing incoming transactions (other than direct debits) on it. Should this difference not be made, then the difference between acquiring and execution of payment operation would be irrelevant.
- A new definition of 'ATM deployers' in alignment with article 38 of PSD3, as followed: ***"ATM deployers' means operators of automated teller machines which are legal persons providing cash withdrawal services as referred to Annex I, point 1, and who do not service payment accounts and do not provide any other payment services referred to in Annex I".***
- A new definition of the term electronic money service provider , which is not currently defined under PSD nor PSR. The presidency proposes to include the following definition: ***"electronic money service provider" means a payment service provider providing electronic money services***.
- Proposal for a definition of digital wallets taking inspiration of ECB glossary: the Presidency proposes to await the debate foreseen in this CWP under the positive scope regarding technical service providers where the Presidency asks the question to MSs whether this definition is needed (and for which purposes).
- (17) ***'mandate' means the explicit expression of authorisation given by the payer to the payee and (directly or indirectly via the payee) to the payer's payment service provider allowing the payee to initiate a payment transaction for debiting the payer's specified payment account and to allow the payer's payment service provider to comply with such instructions;***
- (29) ***'instant credit transfer' means a credit transfer ~~which is immediately executed, regardless of the day or hour~~ as referred to in Regulation XXX (IPR);***

Questions to MS:
20) Do MS agree with the conclusions and proposed amendments to the definitions?

6. Next steps

As next steps Member States are invited to send additional comments to the ones provided orally at the meeting, in writing, and in response to the questions contained in the discussion note, by December 1st.

The comments provided both at the meeting and via written procedure will be processed and assessed by the ES presidency team, who will finalise the first draft of the Report by December 6th. This Report will be send for written comments by December 12th and a final fatal flow will follow from December 14th-15th.
In addition, the feedback received by MSs in the written procedure on fraud has been assessed and amendments to Directive and Regulation have been made following the feedback received. The amendments will be discussed at the next meeting on December 11th, together with any other pending aspects MSs may want to discuss in light of the content of the draft Report they will have already received (on December 6th).

Questions to Member States:

Questions to MS:
21) Do MS have any comments on next steps?