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## Directive on Payment Services (PSD)

Please allow us to add the following further comments regarding the July 2013 draft "Directive on Payment Services" of the European Commission:

### 1. General:

The Austrian banking industry is also committed to achieving progress in efforts to improve the general environment for European credit transfers. The same holds true for reasonable consumer protection, but PSD I and the enforcement of the Austrian Payment Services Act (ZaDiG) already warrant a very high level of consumer protection. However, any further tightening of the laws to the detriment of providers, including the liability provisions (e.g. Article 66) for example, would be unacceptable, not least as this would be the wrong incentive to give in terms of the due care to be exercised by customers.

We have serious doubts as to the requirements for the protection of account holders' personal data (Articles 58, 80, 87 and others). What would need to be reconsidered is the situation where customers are given access to banking infrastructure without being asked to reasonably contribute towards the high costs incurred by the technical requirements and security.

Particularly for Austrian branches, the introduction of a fee adjustment based on indicators ("CPI adjustment") is important.

### 2. Our comments on the individual provisions:

- **Article 2 (2)**

The wording "...in any currency..." should be deleted and the previous PSD/I wording should be used:

"Titles III and IV shall apply to payment services made in euros or the currency of a Member State outside the euro area."

- **Article 4 Definitions**

4.11 (third party payment service provider) In view of the "business activities" referred to in point 7 Annex I, this definition is unclear. The role of a "third party payment service provider" is insufficiently defined; what would need to be made clear is that a third party payment service provider offers only services referred to in point 7 Annex I.

4.21 (authentication) - The scope and the used terms need to be specified. The formulation "or the checking of personalised identity documents" implies an additional mandatory physical check and should be removed.

4.22 (strong customer authentication)

The terms "possession" and "knowledge" suffice as a definition. The term "inherence" is rather confusing and would need to be explained.

Instead of "*Auslegung des Verfahrens*", the correct German translation of the English original would be preferable: "*Ausgestaltung des Verfahrens*".

4.26 (payment instrument) the original wording from PSD/I "... and used by the payment service user in order to initiate a payment order..." should be retained.

4.32 (payment initiation service),

The limitation to a "third party payment service provider" should be removed. Account servicing payment service providers can/may offer payment initiation services as well. The definition relating to the option "payment instruments can be used by the payer or the payee" needs to be further explained.

4.33 (account information service).

The wording "...consolidated and user-friendly information is provided to a payment service user on one or several payment accounts held by the payment service user with one or several account servicing payment service providers..." fails to explain the essence of the account information service in detail.

The main question that presents itself: what is "user-friendly information"?

- **Article 5 Applications for authorisation**

We welcome the requirement to have applications for authorisation accompanied by descriptions of the arrangements and mechanisms in place for the handling of security incidents and sensitive data and the guarantee that activities will be continued.

- **Article 7 Own funds**

We do not understand why the references to Article 57 through 61 and 63, 64 and 66 of Directive 2006/48/EC were removed, since all quality requirements applicable to own funds have thus been removed at the same time.

References to the corresponding provisions in the CRR (Regulation (EU) 575/2013) should be included.

- **Article 9 Safeguarding requirements**

We do not understand why all safeguards for payment institutions that only provide payment services have been waived - under the guise of harmonisation (cf. detailed explanation of the proposal Article 9) - since the payment service users need to be protected both in one and the other payment institution. This applies all the more since acc. to Article 17 (3) of the draft the money mounts accepted by the payment institutions

are neither deposits nor repayable funds. The deposit guarantee requirements also apply to credit institutions with regard to the funds located on the accounts they keep and used for payment services. We would therefore - alone as to ensure a level playing field and for security reasons - support the inclusion of safeguards for payment institutions which only provide payment services.

- **Article 14 (2b)**

The wording "portal serving as European electronic access point" is unclear. This is about the creation of a web portal that is supposed to enable access to the central register of the Member States. A clearer formulation of paragraphs 1 and 2 should be considered.

- **Article 17 (2)**

This formulation is unclear and should be rephrased.

- **Article 29**

With respect to the unrestricted access to payment systems, Article 29 continues to provide for an exemption whenever the entities are linked by capital and are controlled by one entity. Restricted payment systems should also be an option for other associated credit institutions (e.g. decentralised association of credit institutions).

- **Article 39**

The third party payment service provider's obligation to provide information  
We endorse any measure that improves transparency for the payer and the payee with respect to the activities and charges processed by the third party payment service provider.

- **Article 40**

As indicated by the heading, the payer should be removed from the explanation. Furthermore, the third party payment service provider should - not only in connection with fraud or dispute - make available the payment processes of the account servicing payment service provider.

- **Chapter 3 - Framework contracts**

Article 43 (Scope) stipulates that Chapter 3 applies only to payment transactions covered by a framework contract. This is why Chapter 3 addresses the account servicing payment service provider.

However, since Article 45 also quotes payment initiation services, which form part of the services offered by third party payment service providers, no such reference should be made. ("initiation or..." or "initiated or...")

If the intention is to create arrangements for third party payment service providers/payment initiation services as well, a separate provision would have to be included (which we would welcome).

- **Article 45**

The purpose of the supplement in Article 45 (5) (a) that reads "description of ... the secure procedure on notification of the customer" continues to be unclear as does the meaning of "secure procedures" on notification of the customers.

It must further be noted that the present draft includes no provision on the third party payment service provider's obligation to inform customers about fraud or irregularities (such an obligation could run counter to other statutory requirements the payment service provider must meet).

We therefore hold that this additional specification should be removed.

- **Article 47**

Article 47 (2) again only relates to interest rates and exchange rates and not to the charge adjustment based on indicators ("CPI adjustment"). This poses a considerable problem for Austrian banks and is objectively unjustifiable. Therefore, an **extension to include charge adjustments based on indicators ("CPI adjustment") would be of prime importance.**

- **Article 50**

The changes in paragraph 3 from "payer" to "payee" need to be undone, since Article 50 relates exclusively to the payer's information.

- **Art 55**

Article 55 of the "new" PSD determines that "the payee shall not request charges for the use of payment instruments for which interchange fees are regulated under Regulation xxx." In all other cases charges are allowed.

Article 52 (3) of Directive 2007/64/EC provides the option that "Member States may forbid or limit the right to request charges taking into account the need to encourage competition and promote the use of efficient payment instruments."

In Austria this was transposed in sec. 27 (6) Payment Services Act (ZaDiG) and surcharging was forbidden.

As in the "MIF Regulation" not all interchange fees are regulated (for example commercial card transactions are excluded) and this will lead to a very unclear situation - in some cases surcharging is allowed and in others forbidden. Therefore, a rule similar to Article 52 (3) of Directive 2007/64/EC should be integrated in the "new" PSD. Member States should additionally (for cases where provisions of the MIF regulation don't exist or are not applicable - e.g. commercial cards) have the right to ban or allow surcharging.

Paragraph (3)

In the last sentence of this sub-point, the payee is given the unlimited option of allocating incurred costs to the payer. This could interfere with the use of the related payment instruments. We would therefore propose to include a reasonable limitation.

- **Article 57**

Paragraph (2)

It is still unclear which payment service provider is being addressed. Therefore, the following should be added: "The third party payment service provider shall confirm to the account servicing payment service provider that the payer has authorised the third party service provider to initiate the payment process."

Paragraph (3)

In analogy to paragraph (2), the following should be added: "Consent to initiate a payment process may be withdrawn by the payer only from the respectively ordered payment service provider (third party service provider or account servicing payment service provider), but no ...".

Paragraph (4)

It is still unclear which payment service provider is being addressed. Therefore, the following should be added: "The procedure for giving consent shall be agreed between the payer and the account servicing payment service provider and, as the case may be, the third party payment service provider."

- **Paragraph 58 (2b) and Paragraph 87 (2):**

To provide for developments in credit transfers, we generally endorse the amendment proposed by the Commission to include third party payment service providers within the scope. However, against the backdrop of consumer protection, the issues of security and liability, we do not believe that a mere "authentication requirement" will suffice. We therefore suggest adding a **contractual agreement** between account servicing payment service providers and third party payment service providers that need to be concluded before the third party payment service provider is given access to the payment accounts.

(c) The term "sensitive" payment data needs to be defined, since the wording as it presently stands does not explain what, specifically, this data includes.

As in other articles, the term "personalised security features" should be used here and "personalised security credentials" should not be introduced as new term.

In our view, it is absolutely necessary to clarify the use of personalised security features by adding a point (d) - as follows:

(d) The third party payment service provider may not use the payment service user's personalised security features for any payment services whose scope goes beyond the payment services under point 7 Annex 1.

The respective payment service referred to in point 7 Annex 1 must be ordered individually and specifically by the payment service user. The third party payment service provider shall not assume that the ordering of a payment service - and the accompanying access to personalised security credentials - without a commission from the payment service user may be used to call another payment service provider.

Paragraph (3)

The availability of sufficient funds cannot be immediately communicated since a system that would allow this has yet to be created and, moreover, since the law stipulates time

limits for the rejection of an order, the account servicing payment service provider must be granted a reasonable time to respond.

- **Article 59**

Generally, it must be said that the term "third party payment instrument issuers" has not been defined and it is impossible to infer a clear understanding of the term from the proposed provision. Therefore, a clarification would be absolutely necessary. A clarification of the type of cards referred to in this provision is needed, just as the mode for authorising the payment order needs to be clarified.

- **Article 61 (2)**

The last sentence that has been added in paragraph 2 ("The payment service users' obligations of care"...) runs counter to the preceding provisions of this article and should therefore be removed.

- **Article 62 (1)**

With respect to sub-point (a), it must be noted that, when a third party payment service provider becomes active, the payment service provider issuing a payment instrument can no longer make sure that the personalised security features are not accessible to any party other than the payment service user. For this reason, this provision must be amended accordingly.

Sub-point (d) should at least also provide that third parties may charge the payment service user any costs incurred by the blocking of a payment instrument.

- **Article 63**

Paragraph (1)

What was added here is that the payment service provider is obliged to ensure a rectification of a payment service. This amendment should be brought in line with the PSD/I and the specification "account servicing" should be removed.

The question as to which payment service provider is obliged to undertake the rectification is covered by Article 80 in much greater detail anyway.

Paragraph (2)

Generally, the wording in this paragraph appears to lack clarity. In view of the consistency of Article 63, this provision merely covers the notification obligation (duty to notify defects) but not the right for refund. For this reason, the proposed specification, i.e. that the account servicing payment service provider must ensure a rectification, is inappropriate and should be removed. If a third party payment service provider is involved in the payment transaction, the option of obtaining rectification should come with the requirement that the payment service user notify the third party payment service provider of the unauthorised or defective payment transaction.

- **Article 64 (1)**

Since this article addresses all payment service providers, the limiting clause "if involved and as appropriate" should be removed.

Moreover, in view of the amended definition for "authentication" (Article 4[21]) in the first paragraph, "was authenticated" should be changed to "was authorised".

- **Article 65**

Paragraph (1)

This sub-point is applicable only in cases where third party payment service providers are not involved. The payment service provider's liability in cases where a third party payment service provider is involved is regulated in paragraph (2).

Paragraph (2)

The proposed arrangement would provide for primary liability of the account servicing payment service provider whenever a third party payment service provider is involved and thus impose the risk of involving the third party payment service provider (e.g.: credit risk, technical risk, organisation risk) on the account servicing payment service provider. We consider this unreasonable.

Whenever a third party payment service provider is involved, this third party payment service provider should ensure that the amount of the unauthorised payment transaction in their system is again credited to the payer's payment account on the corresponding value date.

Paragraph (3)

The term "further financial compensation" seems unclear in this context and should be replaced by "further claims on the part of the payer", particularly in light of the previous regulation in this article.

- **Article 66 (liability)**

In the case of ordinary negligence, Article 66 of the "new" PSD stipulates the liability of the cardholder up to a maximum of EUR 50.

Article 61 of Directive 2007/64/EC determines a maximum of up to EUR 150 and provides Member States with the option to set a lower limit.

The PSD does not take the difference in "buying power" into account; the "real value" of certain amounts is quite different from Member State to Member State.

In wealthy Member States, EUR 50 might be considered to have lesser financial consequences for cardholders and could therefore lead to less prudent behaviour with negative consequences for the overall risk situation.

Therefore- similar to Article 61 of Directive 2007/64/EC - the maximum liability should be limited with EUR 150 and it is seen as absolutely necessary that Member States have the option to reduce this limit.

The strong customer authentication in distance marketing based on "knowledge, possession and inherence" is new. If payments without "strong authentication" are allowed, the customer is not liable for the consequences of misuse, even in the event of gross negligence. That does not only concern the credit card companies, but also the credit institutions that allow payment to be made by direct debit, for instance, without having a written mandate to do so. Since many online shops do not allow payment to be made without "strong authentication", the risk of misuse is passed on to the payment service provider. The payee's right of recourse in Article 66 (apart from the question of recovery) is difficult to implement in practice if the payee would have offered strong

authentication anyway but the payer made no use of this option because the right to recourse is contingent on "fail to accept".

- **Article 67 (1) last paragraph**

With direct debits, the payer has the right for refund within the time limits set by Article 68, except where the payee has already fulfilled the contractual obligations and the payer has received the services or consumed the goods. On the payment service provider's request, the payee must prove that the conditions put forward in sub-point 3 have been met.

It is impossible for the payment service provider to verify and decide whether goods or services have actually already been received and consumed. We reject the proposed limitation of the right for refund. This paragraph should therefore be deleted.

If the paragraph is not deleted, then this paragraph should be shortened to: "For direct debits the payer has an unconditional right for refund within the time limits set in Article 68".

- **Article 71 (2)**

In our mind, extending the grounds for irrevocability to include payment transactions initiated by a third party payment service provider is unreasonable. This arrangement unreasonably favours the business model of third party payment service providers to the detriment of account servicing payment service providers. If, apart from the payment transactions initiated by or on behalf of a payee, other payment transactions are declared irrevocable once they have been ordered, we would suggest using an objective criterion in the payment transaction as a point of reference. We would therefore propose the following wording for Article 71 (2):

"Where the payment transaction is initiated by the payee or on behalf of the payee, the payer may not revoke the payment order after transmitting the payment order or giving consent to execute the payment transaction to the payee. The payment order shall not be revocable even where the payer's payment service provider has given the payee a payment commitment for the initiated payment transaction on the payer's behalf."

- **Article 78**

The insertion of "...including payments within one payment service provider." does not improve the erstwhile provision, but merely adds a confusing element, which is why we would suggest removing this addition again.

- **Article 80**

Paragraph (1) 2<sup>nd</sup> sub-paragraph

With regard to the addition in the first paragraph we would recommend making a separate paragraph out of the second sub-paragraph so that the first paragraph consists merely of the previous first paragraph of Article 80 (1) and the second paragraph provides for the following new arrangement:

"(2) Where a payment order is initiated by the payer through a third party payment service provider, the third party payment service provider shall, without prejudice to Article 63, Article 79 (2) and (3), and Article 83, be liable to the payer for correct execution of the payment transaction, unless it can prove to the payer and, where relevant, to the payer's account servicing payment service provider that the payment initiation was received by the payer's account servicing payment service provider in

accordance with Article 69. In that case, the payer's account servicing payment service provider shall be liable to the payee for the correct execution of the payment transaction, unless it can prove to the payer and, where relevant, to the payee's payment service provider that the amount of the payment transactions was received by the payee's payment service provider in accordance with Article 74 (1). In that case, the payee's payment service provider shall be liable to the payee for the correct execution of the payment transaction."

Paragraph (1) third sub-paragraph

In addition to the previous remarks, the third sub-paragraph would become the new paragraph (3) of Article 80 with the following wording:

"(3) Where the payer's payment service provider or the third party payment service provider is liable under the first or the second paragraph, the relevant payment service provider shall without undue delay refund to the payer the amount of the non-executed or defective payment transaction, and, where applicable, restore the debited payment account to the state in which it would have been had the defective payment transaction not taken place. The credit value date for the payer's payment account shall be no later than the date the amount had been debited."

The following would have to be deleted: In case a payment transaction is executed late, the payer may decide that the amount is value dated on the payee's payment account no later than the date the amount should have been value dated in case of correct execution.

The removed part of the sentence would create an unreasonable and in many practical cases an impracticable situation. Not in all cases is a correction of the value date technically possible. Moreover, a request for a value date correction should not be possible without the payee's consent.

We would like to point out that an identical arrangement was likewise proposed in the penultimate and ultimate sub-paragraph of paragraph (2) and that the same correction would have to be made there.

Paragraph (1) sixth sub-paragraph

The ban on charging a fee for tracing a payment transaction needs to be worded in a more precise manner in that the payment service provider concerned needs to be mentioned. The ban on charging a fee for this service presumably applies only to the payment service provider responsible for the non-executed or defectively executed transaction.

We would like to point out that an identical arrangement was likewise proposed in the fifth sub-paragraph of paragraph (2) and that the same correction would have to be made there.

Paragraph (1) sixth sub-paragraph

A better wording for the final sub-paragraph of paragraph (1) would be:

"In the case of a non-executed or defectively executed payment transaction where the payment order is initiated by the payer, the payment service provider through whom the payer initiated the payment transaction shall, regardless of liability under this paragraph, on request, make immediate efforts to trace the payment transaction and notify the payer of the outcome. (...)"

We would like to point out that an identical arrangement was likewise proposed in the fifth sub-paragraph of paragraph (2) and that the same correction would have to be made there.

- **Article 87**

Paragraph (1)

A payment service provider - explicitly a "third party payment service provider" in this case - must ask for strong customer authentication from the payer.

It is therefore unclear how the "third party payment service provider" should be allowed to "rely" on the authentication methods of the account servicing payment service provider.

This permission must presumably be granted under the bilateral agreement between the provider of a strong customer authentication method and the use of such methods. The costs incurred by the installation and operation of such a method merit special mention as does the use of or permission to rely on such a method, since this cannot be granted free of charge. The free use of infrastructure investments by competitors would run counter to the "level playing field" principle and give rise to undue competitive advantages.

Moreover, "third party payment service providers" must also be able to undertake appropriate customer authentication on their own and to verify whether the knowledge needed to establish the identity of the user, i.e. this "third party payment service provider", which serves as basis for such authentication is given. (KYC- know-your-customer principle).

In addition, Annex I (definition of payment services) provides that the payment initiation services referred to in sub-point 7 can also be provided on the basis of payment transactions using payment cards at the "point of sale". See also Article 4/Definitions (S 41) point 32. payment initiation service: "...or where payment instruments can be used by the payer or the payee...".

Therefore, in order to ensure a comparable quality in terms of the security measures, we would suggest making strong authentication methods a requirement for these card-based payment initiation services, as well, or subject them to the common minimum standards applicable for cards.

We need to ensure, at any rate, that the "state-of-the-art" security technologies used nowadays in internet and mobile banking but also for cards are not watered down by "third party payment service providers".

Paragraph (2)

With respect to Article 87 (2), it must be made clear that authentication of the third party payment service provider to the account servicing payment service provider can only be ensured on the basis of a bilateral agreement. This provision should therefore be supplemented as follows:

"Article 87 (2): Where a payment service provider provides services referred to in point 7 of Annex I, it shall authenticate itself towards the account servicing payment service provider of the account owner using the contract concluded with it for this purpose."

- **Point 7 Annex 1, further indent "Account information services"**  
Instead of merely mentioning "account information services", a more precise wording is necessary. The definition provided is too broad and does not accord with the activity of third party payment service providers as envisaged by the Directive. With reference to Article 59 (2), we would propose the following wording: "Obtaining account information on the availability of sufficient funds".

Sincerely,

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