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Changes introduced to the European market for financial services by the Payment Service Directive 2

Zmiany wprowadzone na europejskim rynku usług finansowych dyrektywą o usługach płatniczych (Payment Service Directive 2)

In recent years, the use of new, innovative services, constituting a convenient alternative to traditional credit card payments or to standard account information services offered by banks has significantly increased. These changes demanded a more inclusive regulation of this market which would guarantee security to consumers and more clarity to the new providers of financial services. The Directive in question along with the Regulation introduce these changes, open the market and extend the regulation to many new providers of financial services. In the paper the bases for implementing the EU regulations are presented, as well as the most important of the introduced changes.

Keywords: finance, financial market, payment, European Union, PSD2, payment services

W ostatnich latach znacząco wzrosło wykorzystanie nowych, innowacyjnych usług finansowych, które stanowią wygodną alternatywę dla tradycyjnych płatności kartą kredytową lub dla standardowych usług informacji o rachunku oferowanych przez banki. Zmiany te wymagały kompleksowej regulacji tego rynku, która zagwarantowałaby bezpieczeństwo konsumentom i większą przejrzystość dla nowych dostawców usług finansowych. Opisana dyrektywa UE wraz z rozporządzeniem wprowadzają te zmiany, otwierają rynek i rozszerzają regulację na wielu nowych dostawców usług finansowych. W artykule przedstawiono podstawy implementacji tych uregulowań unijnych oraz najważniejsze zmiany przez nie wprowadzone.

Słowa kluczowe: finanse, rynek finansowy, płatność, Unia Europejska, PSD2, usługi płatnicze

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Background

During the last quarter of 2019, users of online payment accounts at each login to their bank accounts have been informed about the introduction of PSD2, which is the acronym for Directive (EU) 2015/2366,¹ and RTS, which is the ac-

¹ Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, (Text with EEA relevance), OJ L 337, 23.12.2015.

ronym for Regulatory Technical Standards contained in Commission Delegated Regulation (EU) 2018/389,² and the resulting changes. Although PSD2 and RTS could seem as yet another regulatory act that does not bring any practical changes to end users apart from making their use of online banking more burdensome, it was designed to bring an actual change to the stifled market of financial services. In particular, PSD2 aims at opening the payments sector by including non-bank providers in the regulation in order for them to offer to customers innovative, technologically advanced services, subject to control and supervision of relevant financial supervisory authorities. The introduction of this legislation should also enhance security of online payments and tackle fraud in electronic payment transactions by applying strong customer authentication to nearly all online payments.

Historical background of PSD2 in the context of new entrants to the market for financial services

New players on the European market of financial services, who offered innovative services as an alternative to traditional services provided by banks, started to appear on the market around the year 2005. The appearance of new players impacted the payments industry mostly due to their significant ability to bring – often disruptive – innovation to the market.³ Those entities, referred to as Third Party Providers (TPPs), offered in particular the so-called payment initiation services (PIS) and account initiation services (AIS). PIS enable quick online credit transfers and immediate information of the payment initiation to the merchant, facilitating an instant dispatch of goods or access to services purchased online.⁴ AIS allow their users to have a comprehensive overview of their finances by consolidating the information from different payment accounts and categorizing their spending to help with financial planning⁵. These innovative services provided by financial technology companies (so-called fintechs) were not covered by the scope of the regulatory framework that was applicable at that point. As a consequence, the development of fintechs occurred outside of the regulatory

² Commission Delegated Regulation (EU) 2018/389 of 27 November 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for strong customer authentication and common and secure open standards of communication (Text with EEA relevance.), C/2017/7782, OJ L 69, 13.3.2018.

³ F. Di Porto, G. Ghidini, 'I Access Your Data, You Access Mine'. *Requiring Data Reciprocity in Payment Services*, 30.11.2019.

⁴ European Commission, *Payment Services Directive: frequently asked questions*, 12.01.2018, Point 18.

⁵ *Id.*, at Point 19.

framework for financial services.⁶ As the relevant authorities failed to take swift actions to provide fintechs with a secure legal environment for their operations, fintechs themselves had to request regulation of their activities, as it was essential for prompting development of the new payment technologies.⁷

Things began to change with the introduction of the first Payment Services Directive 2007/64/EC⁸ (PSD1). The European Union (EU) noticed that the regulation of the payments sector was fragmented and inconsistent between the EU Member States.⁹ The EU concluded that the principle of free movement of services required establishment of a consistent regulatory framework for financial services in order to ensure clarity and legal certainty for providers of payment services.¹⁰

Already while introducing PSD1, the EU emphasized the need of a further opening of the market for financial services to new payment service providers (PSPs).¹¹ Creating a neutral legal landscape which would apply to all payment systems was considered essential to introduce a level playing field to the market and to enable consumer choice to benefit the consumers cost-, safety- and efficiency-wise.¹² Although PSD1 did not establish a comprehensive legal framework for the new players, it brought important changes to the regulation of the payments sector. This finally created a future opportunity for disruptive providers of financial services to act on the market and compete head-to-head with incumbent market players.

PSD1 covered a range of payment services, including electronic and non-cash payments, such as direct debit, credit transfers, card payments or mobile and online payments. The activity of the fintech services was not explicitly mentioned in the provisions of PSD1. Nevertheless, PSD1 introduced a new category of non-bank providers of financial services, namely payment institutions. The main difference between payment institutions and bank players was that the former could not take deposit or issue electronic money, which meant that they were not allowed to hold funds of their users at any point of the transaction. This category was introduced to tackle barriers to market entry and to authorize a new category of regulated entities to provide payment services across the EU, subject to strict

⁶ F. Zunzunegui, *Digitalisation of payment services*, Ibero-American Institute for Law and Finance, 2018.

⁷ *Ibid.*

⁸ Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (Text with EEA relevance), OJ L 319, 5.12.2007.

⁹ *Id.* at Recital 2.

¹⁰ *Id.* at Recital 1, 3 and 4.

¹¹ *Id.* at Recital 5.

¹² *Id.*, at Recital 4.

and comprehensive conditions¹³. As a result, PSD1 was the first regulatory step to the legal recognition of bank-independent providers of payment services and to opening up the market of payment services to fintechs.¹⁴

Further development of the market for financial services

Fintechs that started to offer innovative financial services in Europe as of around the year 2005 developed a particularly strong presence in countries that already had a high-tech culture and technologically advanced banking environment, such as the Nordic countries, Germany, Austria or the Netherlands. As for the provision of their services TPPs required access to specific account information of payment service users (PSU), at that point their existence on the market depended on the cooperation of banks to provide them with the access to their customers account. The banks' control of the customer data, which is a key element to new payment services that in majority rely on innovative use of that data, has been traditionally very tight¹⁵. As a result, unsurprisingly, the new market players were widely obstructed by the incumbents on many European markets, in particular there where banks which started to offer similar services themselves, e.g., in Germany and the Netherlands. Often, the banks were trying to prevent fintechs from entering the market by prohibiting their customers explicitly in their general terms and conditions to share credentials of their bank account with TPPs. Eventually, many banks entered the PIS market created by TPPs themselves, by jointly introducing similar initiatives (see, e.g., GiroPay¹⁶ in Germany, iDEAL¹⁷ in the Netherlands or Blik¹⁸ in Poland), benefiting from an unobstructed access to their customers' data that they declined to share with their competitors, the TPPs. The role of banks as gatekeepers to customer data has started to be questioned and seen as an obstacle to the further broadening of the competition in the payments sector. The anti-competitive actions of banks against new non-bank players on the market of financial services finally attracted attention of national and European competition authorities.

In Germany, the banks have been obstructing activities of one of the biggest European PIS provider, the company Sofort/Klarna, not only individually but also by taking collective actions against TPPs in Germany. German banks, gathered in numerous banking associations, used for many years uniform online

¹³ Id. at Recital 10.

¹⁴ F. Zunzunegui, *Digitalisation...*

¹⁵ S. Vezzoso, *Fintech, access to data, and the role of competition policy*, 22.01.2018.

¹⁶ <https://www.giropay.de>.

¹⁷ <https://www.ideal.nl>.

¹⁸ <https://blikmobile.pl>.

banking General Terms and Conditions, which prohibited the online banking customers to use their login credentials in non-bank payment systems to allow access to third party systems, including PIS providers.¹⁹ After a bank-owned competitor started a court procedure against Sofort/Klarna, the German Federal Cartel Office (FCO) decided to intervene due to suspected breach of antitrust law by banks. The FCO believed that the banks illegally colluded against new entrants by jointly agreeing on uniform, anticompetitive online banking terms and conditions. In the decision B 4 – 71/10,²⁰ the FCO decided that those actions of the bank associations were illegal as they breached antitrust law. The Authority concluded that such rules had a significant negative impact on competition by hindering the use of non-bank online payment solutions.²¹

The FCO also emphasized the positive role of TPPs on the market of financial services by finding that they presented a convenient alternative to the payment solutions offered by bank players and created a quick, low-cost option for online payments, responding to the demand for such services on the market.²² Although the German bank associations appealed the FCO's decision and the case is still pending, the decision sent an important signal from the authority that the actions of banks and bank associations which aim at or have the effect of impeding access to the market may violate national and European antitrust law. In any case, the banks removed the anticompetitive clauses from their terms and conditions as of 13 January 2018, when PSD2 came into force.

The large scale of anticompetitive behaviours of incumbent market players against TPPs eventually triggered the intervention from the side of the European antitrust authority – the European Commission (Commission). Similarly to what happened in Germany, banks from numerous other EU Member States, such as Austria, the Netherlands, Poland and Italy, were obstructing fintechs by hindering or prohibiting access to the account credentials.²³ This practice of the banks and bank associations became quite common on the European market and it was later suspected that the banks of several EU Member States engaged in anti-competitive practices against TPPs by blocking access to customers' bank account data.²⁴

¹⁹ Bundeskartellamt, Restriction of online payment services by German banking industry in violation of competition law, 05.07.2016.

²⁰ Bundeskartellamt, Beschluss der Spitzenverbände der deutschen Kreditwirtschaft, B4-71/10, 29.06.2016.

²¹ Bundeskartellamt, Restriction of online payment services ..., 05.07.2016.

²² Ibid.

²³ For "few Member States" including Poland and the Netherlands, see M. Khan, J. Shotter, *EU raids Polish and Dutch banking groups over fintech access*, "Financial Times", 08.10.2017.

²⁴ European Commission, Antitrust: Commission confirms unannounced inspections concerning access to bank account information by competing services, 6.10.2017.

Alarmed by the signals of anticompetitive actions of banks and their subsidiaries in the sector of financial services on the internal market, especially undertaken on the level of European bank associations, the Commission decided in 2011 to open an antitrust case against the European Payment Council (EPC).²⁵ The EPC is the coordination and decision-making body of the European banking industry for payments. The Commission wanted to take a closer look at the EPC's activities, especially in the context of the proposed standardization process for online payments. The Commission's main concern was that such standardization could unduly restrict competition by excluding non-bank payment providers from the market of online payments, which could result in higher prices for online merchants and ultimately consumers.²⁶ In the light of that concern expressed by the Commission during the investigation, the EPC withdrew from the standardization initiative and the case was closed in 2013. The Commission, however, emphasized the need of further monitoring of the market of online payments to make sure that competition remains on a healthy level and that all players on the market are allowed to compete on equal terms.²⁷ The Commission also officially signalled the intention of presenting a legislative proposal for an objective and inclusive framework for all financial services providers active in the field of online payments.²⁸

Introduction of PSD2 and the most important changes introduced by PSD2

The new legislation for electronic payment services was proposed by the Commission as a revision of the existing PSD1. In 2013, the Commission presented a proposal for a revised Payment Service Directive, referred to as PSD2. The proposal contained, among others, provisions which aimed at including new providers of payment services into regulatory framework, guaranteeing a level playing field for all providers and decreasing obstacles for competition on the market of online payments.²⁹

²⁵ Case COMP.39876 *EPC online payments*.

²⁶ European Commission, Antitrust: Commission opens investigation in e-payment market, 26.09.2011.

²⁷ European Commission, Antitrust: Commission closes investigation of EPC but continues monitoring online payments market, 13.06.2013.

²⁸ *Ibid.*

²⁹ Summary of the Proposal /* COM/2013/0547 final – 2013/0264 (COD) */ for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on payment services in the internal market and amending Directives 2002/65/EC, 2013/36/EU and 2009/110/EC and repealing Directive 2007/64/EC presented by the Legislative Observatory.

PSD2 was adopted and published in the EU Official Journal on 23 December 2015. The Directive brought many important changes to the regulation of financial services. Most importantly, the aim of PSD2 was to open up the market of payment services to new providers by extending the scope of regulatory regime, to create an environment for the development of new payment services and to decrease the cost of payment services.³⁰ Because of their direct implications for consumers by bringing more choice to the online payment services and enhanced safety of online transactions, two changes introduced by PSD2 are worth mentioning here:

- Extending the scope of the legal framework for financial services to the new, non-bank payment providers of financial services, such as fintechs, which aims at facilitating competition and providing consumers of online payments more choice for the online payments,³¹ and
- Enhancing safety and security of online payments by implementing so-called strong customer authentication.

Including TPPs in the scope of PSD2

The fact that the activities of TPPs were not covered by the previous regulatory framework has been explicitly recalled in PSD2.³² The legislator concluded that this caused legal uncertainty and led to security issues and admitted that the lack of regulation was the most important obstacle for fintechs to offer innovative, secure and user-friendly digital payment services.³³ Moreover, the market of payment services has traditionally experienced a number of competition-related issues, such as significant barriers to entry, low demand elasticity and customer lock-in effect.³⁴ PSD2 aims at addressing those issues by securing a regulated access to the market also for new, non-bank players.

Importantly, PSD2 introduced the principle of business-model neutrality.³⁵ The EU legislator emphasized the need for the definition of payment services to be technologically neutral in order to allow non-bank service providers to access the market and to ensure that existing and new providers of payment services can

³⁰ A. Adeyemi, *A new phase of payments in Europe: the impact of PSD2 on the payments industry*, 21.01.2019

³¹ European Commission, *Payment Services Directive (PSD2): Regulatory Technical Standards (RTS) enabling consumers to benefit from safer and more innovative electronic payments*, 27.11.2017.

³² Directive (EU) 2015/2366 ..., Recital 4.

³³ Ibid.

³⁴ F. Di Porto, G. Ghidini, *"I Access Your Data..."*

³⁵ Directive (EU) 2015/2366, Recital 21.

be active on that market subject to equivalent operating conditions.³⁶ That way, not only traditional PSPs, but also providers of alternative services could enjoy a free and unhindered access to the market of payment services based on the same requirements that apply to incumbent players. This included TPPs that had been already present on the market for over a decade when PSD2 was enacted and which became regulated entities under PSD2. At the same time, this means that TPPs are subject to the same respective obligations for PSPs as incumbent market players, such as registration and licensing and that they are subject to supervision by relevant authorities. The principle of technological neutrality also requires that TPPs are provided with unobstructed access to customers' account data in a non-discriminatory manner which must be in line with the principle of proportionality. Such access must provide TPPs with information that is sufficient for efficient provision of their services.³⁷

PSD2 also introduced the principle of business continuity in the payments sector which requires that all PSPs already active on the market must be able to continue to offer their services within a clear and consistent regulatory framework.³⁸ It is the responsibility of the relevant authorities to ensure fair competition on the market of financial services. This provision also indicates that non-discriminatory access means that not only fintechs, but also incumbent market players, such as banks, must be able to offer PIS, which helps to prevent unjustifiable discrimination.³⁹ PSD2 refers in this context directly to AIS as well. These are defined in the legislation as complementary services⁴⁰ which must be covered by regulatory framework to provide consumers with adequate protection of their account data.

By defining these principles, PSD2 explicitly opens the scope of the regulation of financial services to non-bank PSPs and finally provides some more clarity on their legal status. Moreover, PSD2 and RTS include specific regulatory and technical solutions for providing fintechs with access to their customer data which is necessary for the provision of their services. PSD2 explicitly indicates that banks are obliged to provide or make accessible all the relevant data required by PIS providers⁴¹ and apply non-discriminatory treatment towards data requests presented by AIS providers.⁴² PSD2 specifies that detailed rules on the access to accounts should be established by regulatory technical standards which must remain technology-neutral.⁴³ Those standards were introduced in the RTS. As

³⁶ Ibid.

³⁷ Id. at Recital 39.

³⁸ Id. at Recital 33.

³⁹ Ibid.

⁴⁰ Id. at Recital 28.

⁴¹ Id. at Article 66 (4) b).

⁴² Id. at Article 67 (3) b).

⁴³ Id. at Recital 93.

noted above, TPPs were active in the payments sector long before being recognized by PSD1 or regulated by PSD2. To be able to provide their services in pre-regulatory times, TPPs used credentials of their customers to obtain the required data by accessing it through customer-facing bank interfaces. Despite efforts by some incumbent market players to block the access of TPPs through that channel (see, for example, the discussion above of the FCO decision in case B 4 – 71/10), this solution was in general not legally prohibited on the national level⁴⁴ and TPPs were acting in a regulatory grey zone to access their customers' data. However, RTS introduced another form for TPPs to obtain the necessary data, namely, through so-called Application Programming Interface (API) which were exclusively designed to connect regulated TPPs with the respective bank. The RTS emphasize that proper functionality of those interfaces is essential for the quality of the service provided by TPPs.⁴⁵ For that reason, in case of non-compliance of the interfaces with RTS, relevant authorities have to take steps to ensure business continuity of TPPs as their services cannot be blocked or obstructed.⁴⁶

According to Article 31 RTS, banks must establish dedicated interfaces through which TPPs obtain the access to the interfaces used for authentication and communication with their customers' accounts. Based on the principle of non-discriminatory access to customers data established in PSD2, the RTS also require that the interfaces are equally available and have the same level of performance as the interfaces used by the consumers.⁴⁷ The RTS explicitly indicate that a dedicated interface should not create obstacles to services offered by PIS and AIS providers.⁴⁸ Should the interfaces not present the same level of availability or performance, banks must provide TPPs with a fallback mechanism which allows TPPs to access the data through customer-facing interfaces, as it was done pre-PSD2.⁴⁹ Only when it is established by competent authorities that a bank has in place a dedicated interface that is fully functional and compliant with RTS and ensures fair level of competition, this bank can be exempted from the obligation to provide the fallback mechanism. The exemption can be revoked if the exempted interface stops to comply with the relevant provisions.⁵⁰

⁴⁴ However, in some EU Member States the Financial Supervisory Authorities dissuaded the banks from enabling that channel due to security reasons. See the statement of the Polish Financial Supervisory Authority (Komisja Nadzoru Finansowego), *Ryzyko związane z podawaniem innemu bankowi danych do logowania do rachunku bankowego*, 14.04.2014.

⁴⁵ Commission Delegated Regulation (EU) 2018/389, Recital 22.

⁴⁶ *Ibid.*

⁴⁷ *Id.* at Recital 23.

⁴⁸ *Id.*, at Article 32 (3).

⁴⁹ *Id.* at Recital 24.

⁵⁰ *Ibid.*

In practice this means that all non-bank providers of financial services must be equipped by banks with continuous access to their customers' data, either through a dedicated interface or through a customer-facing interface. This solution should definitely extend the pool of providers of financial services and address the issue of bank as gatekeepers of their customers' data. It should also have a pro-competitive effect by bringing more competition to the market, as the fintechs can only provide their services if they have access to customers' data, which remain under sole control of banks.⁵¹

PSD2 ensures the increased level of competition on the market for financial services not only through establishment of basic principles which aim at opening the market, such as business-model neutrality or business continuity, but also through very specific, technological solutions defined in RTS. Those solutions impose on incumbent market players obligations to provide their competitors access to the relevant data of their customers that should enable them to act in an unobstructed way within the regulatory framework established by PSD2. Access to customer data should enable development of new financial products, possibly more personalized and adapted to customers' needs.⁵²

Already now, the consumers enjoy a wider selection in the field of online payments and can often choose between executing their online payments either through traditional credit card payments or via innovative PIS offered by both TPPs and banks. Also, in the field of AIS customers can decide to use either their banks' tools to better control their overall financial situation, or to use applications provided by new players on that market. Consequently, the current regulation definitely enhances competition on the market of financial services. The regulation is claimed to be future-proof as it does not refer to specific technology and allows for emergence of new financial services which will remain in the regulatory framework. Nevertheless, the currently ongoing implementation of PSD2 and RTS is causing the representatives of payments market some difficulties which will be presented below.

Enhancing safety of online payments through Strong Customer Authentication

PSD2 emphasizes the increased importance of security of electronic payments resulting from the extended worldwide use of growingly complex online payments and new types of online payment services.⁵³ The role of safe and secure payment services as an essential element of properly functioning market of financial ser-

⁵¹ F. Di Porto, G. Ghidini, "*I Access Your Data...*".

⁵² A. Adeyemi, *A new phase of payments...*

⁵³ Directive (EU) 2015/2366 ..., Recital 7.

vices has also been emphasized.⁵⁴ For that reason, PSD2 introduced an obligatory mechanism aimed at addressing frauds in online payments, which should also improve consumers' trust for online transactions,⁵⁵ in the form of strong customer authentication (SCA) which must be applied to online payments.

Before PSD2 was implemented, SCA was commonly used for traditional payments where the transaction must be confirmed by a personal identification number (PIN) introduced via a card reader. However, for online payments, especially with credit card, SCA had not been applied that often, as only in a few EU countries, such as Belgium, the Netherlands or Sweden, some PSPs decided to introduce SCA for electronic payments.⁵⁶ This has changed with PSD2 requiring PSPs to apply SCA in principle for all online transactions,⁵⁷ including online payments or accessing bank accounts.

PSD2 defines SCA as an authentication based on two or more elements categorized as knowledge (something that only the customer knows), possession (something that only the customer possesses) and inherence (something that the customer is), which are independent in that the breach of one does not compromise the reliability of the others.⁵⁸ The design of SCA must ensure that the authentication data remain confidential. As a mechanism introduced on the basis of PSD2, SCA must comply with all principles established in PSD2 in that they should not hinder competition in the payments sector through obstructing access of TPPs to their customers' account data.

Article 97 (1) PSD2 requires that PSPs apply SCA where the customer accesses its payment electronic account, initiates an online payment transaction or undertakes an action through a remote channel which may imply a risk of payment fraud or other abuses. For electronic payment transaction, PSD2 lays down a further requirement for all PSPs (including PIS providers) that SCA must necessarily include elements which dynamically link the transaction to a specific amount and a specific payee. PSPs must guarantee the confidentiality and integrity of customers' security credentials throughout the entire process.⁵⁹ This requirement applies also to PIS and AIS providers.⁶⁰ PSD2 also allows PIS and AIS providers to rely on banks' authentication procedures.⁶¹ This right for PIS and AIS providers applies regardless of the existing contractual link between those

⁵⁴ Ibid.

⁵⁵ European Commission, Frequently Asked Questions: Making electronic payments and online banking safer and easier for consumers, 13.09.2019, Point 2.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Directive (EU) 2015/2366 ..., Article 4 (30).

⁵⁹ Id. at Article 97 (3).

⁶⁰ Id. at Article 97 (4).

⁶¹ Id. at Article 97 (5).

entities and the bank;⁶² however, they are not allowed to share the security credentials with any other parties apart from the bank and the customer.⁶³

In order to ensure that SCA bring more safety to online payments, the RTS oblige PSPs to have in place a monitoring mechanism for detection of unauthorized or fraudulent transactions.⁶⁴ Moreover, security measures applied by PSPs have to be documented, regularly tested, evaluated and audited by independent entities.⁶⁵ The RTS further specify rules for the generation of an authentication code which is used to confirm the transaction⁶⁶ and the requirements for dynamic linking.⁶⁷

The RTS also foresee exemptions from SCA, for example, for transactions that are considered under with Article 98 (3) PSD2 as low-risk transactions, such as contactless payments at point of sale,⁶⁸ unattended terminals for transport fares and parking fees⁶⁹ or low volume transactions.⁷⁰ Those exemptions, which are listed in Chapter III RTS, are subject to further conditions as indicated in the RTS. The RTS also foresee a special exemption from SCA for AIS, which are also low risk operations⁷¹ and are performed on the basis of the customer's consent considered as a mandate for access to data to specific payment accounts and transactions that are related to that account.⁷²

SCA is a mechanism that aims directly at improving safety and security of online payments to the benefit of consumers. However, currently PSPs are experiencing numerous hurdles in the full implementation of SCA which make it difficult for consumers on some markets to perform even the simplest operations from their online accounts.

Difficulties related to the implementation of PSD2 and RTS

By introducing PSD2 and the RTS, the EU legislator aimed to bring more clarity to consumers and more legal certainty to the providers of payment services. Although many issues have been efficiently addressed by the new legislation, some questions remain open and both banks and TPPs face difficulties with the correct

⁶² Id. at Article 66 (5) and Article 67 (4).

⁶³ Id. at Article 66 (3) (b) and Article 67 (2) (b).

⁶⁴ Commission Delegated Regulation (EU) 2018/389 ..., Article 2 (1).

⁶⁵ Id. at Article 3 (1).

⁶⁶ Id. at Article 4.

⁶⁷ Id. at Article 5.

⁶⁸ Id. at Article 11.

⁶⁹ Id. at Article 12.

⁷⁰ Id. at Article 16.

⁷¹ Id. at Recital 10.

⁷² Ibid.

interpretation and timely implementation of some provisions of PSD2 and the RTS. These difficulties concern, among others, proper implementation of SCA as well as the introduction of dedicated interfaces for TPPs.

According to the RTS, SCA should have been implemented across the entire European market by 14 September 2019. However, in June 2019 the European Banking Authority (EBA) published an opinion on SCA pointing out to the complex nature of the European payment markets and to the fact that the PSD2 and RTS changes must be implemented not only by PSPs but also by other entities, such as e-merchants.⁷³ Not having the competence to extend the deadline by itself, EBA recommended the national competent authorities to agree with PSPs and relevant stakeholders on additional time limit to fully implement the SCA mechanism.⁷⁴ Following that EBA opinion, numerous national authorities decided to refrain from taking measures against PSPs who have not timely implemented fully functioning SCA mechanisms. For example, the Board of the Polish Financial Supervisory Authority pointed out to the fact that the deadline extension was necessary considering the level of preparation of the participants of the Polish market of payment services in order to prevent disruption on that market, especially for consumers.⁷⁵ Similarly, the British Financial Conduct Authority agreed on a phased implementation of SCA and concluded that although the new mechanism was essential for tackling of fraud in online payments, it was necessary to ensure that no material harm to customers is caused.⁷⁶ Similar decisions were taken by the competent authorities in Italy,⁷⁷ Denmark,⁷⁸ and Germany.⁷⁹

As EBA noticed that this fragmented implementation across European markets may cause difficulties for entities obliged to apply SCA, it issued another opinion⁸⁰ recommending a uniform deadline of 31 December 2020 for the full

⁷³ European Banking Authority, Opinion of the European Banking Authority on the elements of strong customer authentication under PSD2, EBA-Op-2019-06, 21.06.2019, para. 12.

⁷⁴ Id. at para. 13.

⁷⁵ Board of Polish Financial Supervisory Authority, Communication on strong customer authentication in the case of certain means of payment using payment instruments, 19.08.2019.

⁷⁶ Financial Conduct Authority, FCA agrees plan for a phased implementation of Strong Customer Authentication, 13.08.2019.

⁷⁷ Banca d'Italia, Comunicato Stampa, Tempi di attuazione delle misure di sicurezza per i pagamenti online con carta, 29.11.2019.

⁷⁸ Finanstilsynet, Finanstilsynet tillader længere implementeringsperiode for nye regler om stærk kundeautentifikation, 04.09.2019.

⁷⁹ Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin), PSD 2: BaFin ermöglicht Erleichterungen bei Kundenauthentifizierung, 21.08.2019.

⁸⁰ European Banking Authority, Opinion of the European Banking Authority on the deadline for the migration to SCA for e-commerce card-based payment transactions, EBA-Op-2019-11, 16.10.2019.

implementation of SCA for e-commerce card-based payment transactions for all European markets. The stakeholders consulted by EBA on that matter indicated the need of a single deadline and consistent and uniform implementation of SCA, considering the cross-border character of online payments.⁸¹ For that reason, EBA recommended a consistent approach for all national competent authorities. Consequently, the above-indicated deadline for implementation of SCA is currently binding and only beyond that date the national authorities will take enforcement action against non-compliance with PSD2 and RTS.

The 14 September 2019 deadline also applied to the implementation of dedicated interfaces for TPPs which were supposed to enhance competition on the market for financials services. As of 14 September 2019, banks should have had in place fully functional dedicated interfaces, through which TPPs could obtain the access to their customers' data, or otherwise they had to keep allowing access of TPPs through customer-facing interface (fallback mechanism). The banks that introduced a properly performing dedicated interface, which had been adequately tested, could have applied for an exemption from the fallback mechanism from the same date onwards. The exemption can only be granted if a fully functional, RTS-compliant dedicated interface has been widely used by PSPs for at least three months.⁸² However, in practice many dedicated interfaces offered by banks to TPPs have not been fully functioning on 14 September 2019 and TPPs experienced numerous difficulties with access to account data from that day. Many interfaces were not ready or not sufficiently tested. Accordingly, national competent authorities in some EU Member States decided to address those issues. For example, in a circular letter issued in August 2019, the German Financial Supervisory Authority (BaFin) expressed concerns whether dedicated interfaces implemented by some German banks comply with PSD2 and RTS requirements and it emphasized that the banks are not allowed to disable the fallback mechanism until their APIs are fully functional and they are granted an exemption from the fallback mechanism.⁸³ This shows that BaFin found the level of readiness of APIs at that point as insufficient and it indicated that further work to ensure the compliance was necessary.⁸⁴ It appears that the regulator has inadequately assessed the time needed for the implementation of quite complex technical requirements imposed by PSD2.

However, other, more serious issues than the inadequate timeline of PSD2 and RTS were raised by some market participants. It has been claimed that the pillars of PSD2 and RTS presented in this paper, namely, opening the market

⁸¹ Id. at para. 9.

⁸² Commission Delegated Regulation (EU) 2018/389 ..., Article 33 (6).

⁸³ J. Wirtz, M. Juenemann, *PSD2: BaFin zieht bei Kontoschnittstellen die Notbremse. Fin-techs profitieren, Banken müssen nachbessern*, August 2019.

⁸⁴ Ibid.

of financial services and introduction of SCA are contradictory and one cannot be implemented by PSPs without undermining the other.⁸⁵ Banks must provide TPPs with access to accounts through a dedicated interface which cannot create obstacles to TPPs' activities.⁸⁶ At the same time, banks must introduce SCA, which can be perceived as an obstacle *per se* in that it may require additional logins from the customer and it adds extra steps to the customer journey. As a result, the two most important mechanisms of PSD2 could be considered to some extent as conflicting.

Another important issue is the design of dedicated interfaces that require mandatory redirection of the customer to bank's webpage for logging in. Redirection means that while using AIS or PIS, customers would at some point be redirected from the app of their AIS or PIS provider to the interface of their bank in order to perform strong customer authentication. According to the interpretation of RTS presented by EBA redirection is not an obstacle *per se*, but it may constitute an obstacle if it is introduced by banks in obstructive manner.⁸⁷ TPPs, on the other hand, are aware that the entire customer experience depends on provision of quick, convenient service with the number of steps limited to the minimum. TPPs claim that redirection is always an obstacle for some providers and that it would threaten their business and lead to loss of customers.⁸⁸ As a result, the lack of clear regulation of the issue of redirection in PSD2 and RTS is currently causing numerous problems for both banks and TPPs.

The main idea behind PSD2 and the RTS was to bring more choice and better quality financial services to the benefit of the consumers. However, the sometimes incoherent or unclear wording and in particular the still incomplete implementation of the provisions of PSD2 and RTS in relation to SCA or obligatory redirection are causing difficulties for PSPs, preventing them in many cases from providing reliable service to their customers. It also appears that the new regulation fails to provide an incentive to share the customer data by banks which are concerned that their role will be reduced to mere account and deposit holders, while the more profitable customer-facing activities will be dominated by fintechs.⁸⁹ This has a direct, negative impact on customer experience. The period immediately following the implementation deadlines has brought reports⁹⁰

⁸⁵ ETTPA, *The Unintended Consequences of PSD2 RTS. An assessment of PSD2 Implementation Challenges and Risks*, May 2019.

⁸⁶ Commission Delegated Regulation (EU) 2018/389 ..., Article 32 (3).

⁸⁷ EBA, *Opinion of the European Banking Authority on the implementation of the RTS on SCA and CSC*, EBA-Op-2018-04, 13.06.2018, para. 49.

⁸⁸ ETTPA, *The Unintended Consequences of PSD2 RTS...*

⁸⁹ S. Vezoso, *Fintech, access to data...*

⁹⁰ See T. Kanning, *Neue Vorgaben für Online-Zahlungen sorgen für Ärger*, 07.10.2019 or K. Schneider, *Chaos beim Onlinebanking: Immer mehr Kunden ärgern sich über komplizierten Kontozugriff*, 15.10.2019.

about difficulties faced by consumers while trying to access their accounts related to the implementation of PSD2 and RTS. Also while using AIS and PIS, many consumers were left frustrated as some AIS and PIS providers could not access their customers' data necessary to provide reliable services.⁹¹ Considering these negative implications, the question arises whether the practical implementation of PSD2 will not bring more detriment than benefit to the consumers of financial services, contradicting at the same time the underlying principles of PSD2. After all, as representatives of the payment services sector have jointly admitted, the most important thing for the entire market of payment services is to avoid unintended customer detriment.⁹² At this point, it remains in the hands of the European and national financial supervisory authorities to address the chaos caused to consumers of financial services and to get the implementation of PSD2 and RTS back on the right track. The first step of the relevant authorities in order to help the market participants with a smooth transition to the new regulatory landscape for payment services could be to provide a uniform interpretation of the essential provisions of PSD and the RTS which would consider conflicting interests of different PSPs. Further, the relevant authorities should also strictly enforce the regulatory obligations related to access to accounts imposed by PSD2 and the RTS. Without having the authorities taking these preliminary steps, the underlying aim of PSD2 of opening up the market of payment services to competition is likely to remain only on paper.

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⁹¹ H. Dohms, *Diagnose „unbrauchbar“: Das wahre Drama der PSD2-Reform*, 1.10.2019.

⁹² ETPPA, FDATA and the three European Credit Sector Associations, *Joint Statement*, 26.07.2019.

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