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Understanding credit markets for Europe

The Payment Services Directive

Pitfalls between the *Acquis Communautaire* and National Implementation

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University of Salento

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Abstract

The Payment Services Directive (PSD) was published in late 2007, constituting the legal basis for the Single Euro Payments Area (SEPA). The industry initiative launched on 28 January 2008 aims at replacing fragmented national markets for payment services with one integrated system. Although deadlines for both the transposition of the PSD into national law and the full availability for SEPA standards are set, many questions lack clear answers and need to be addressed accordingly. Given the numerous directives and different regulations affecting payment service providers, the partial duplication and interlinking between the various provisions are prone to creating a legislative labyrinth. This paper attempts to address the main concerns, as it tests the PSD against some of the most advanced payment business models, and to offer a comprehensive evaluation of the Community regulation of payment services within SEPA. While evidencing a number of critical issues in the reading and implementation of the PSD, the paper looks at this ambitious and challenging exercise of the European institutions and presents a number of provocative considerations that it is hoped will be of general value.

Contents

The Payment Services Directive
Pitfalls between the *Acquis Communautaire* and National Implementation

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Executive Summary

The Payment Service Directive (PSD) is aimed at building up a consistent framework for the regulation of payment service providers and the provision of payment services. It attempts to apply an innovative approach, simultaneously to detach the service of transferring money for the benefit of third parties from traditional financial services (particularly the opening of bank accounts) and to elaborate rules common to any transfer of money, independent of the instrument or means used to execute the transfer. All the while, the PSD mainly focuses on consumer protection and the consequences of the use of new technologies.

This exercise is new for regulators and legislators and as yet has no exact correspondent in any legislative effort outside the EU. Moreover, the harmonisation process has clearly shown the need for balancing existing conflicting values and different understandings among stakeholders of what shape a unified regulation should have to benefit the internal market.

As a result, the PSD presents a number of critical issues in terms of its reading and inherent policy choices, its interaction with other Community legislative acts, and more broadly its consistency with the *acquis communautaire*. Further problems might arise with regard to its adoption by domestic regulation, which might undermine legal certainty and inhibit a successful implementation of this ambitious set of measures.

As a first remark, the inclusion among ‘service providers’ of entities offering money remittance services, through which payment services are executed without the need for an account by the customer, breaches the traditional link between the execution of payments and the existence of an account. Their inclusion makes the qualification of this service enormously challenging and its financial nature extremely difficult to define, since in the past it had been inherently linked to the management of money deposited with a financial institution. This separation between opening accounts and providing payment services has an impact in particular on the determination of the role of non-financial institutions (such as telecom or mobile operators) in the provision of the service in all those cases where new technologies entail new payment instruments and channels, potentially excluding the traditional financial sector from execution.

This difficulty in qualification arises notably because the PSD does not clarify exactly what a payment service is, but simply lists a number of activities that do not substantially differ from those of existing directives on the taking up and pursuit of the business of credit institutions and on e-money. Neither does it help to define what actually qualifies a payment service provider (required to be licensed) against other actors providing services that are only ancillary to the execution of payments (not in themselves needing a license). Instead, a long and articulated list of exclusions is established that impedes any consistent conceptualisation (as discussed in section 2).

In addition, the PSD, which establishes a new category of 'payment institutions' (PIs) contemplating all those providers that are not already covered by Community regulation, chooses not to interfere with current prudential requirements for those entities already providing payment services. It thus inserts a new set of requirements for PIs. These different requirements, although to some extent justified by the different kinds of activities that each category is allowed to provide, might result in a barrier to a level playing field. This could occur especially in relation to e-money institutions, whose scope of action does not markedly differ from that of PIs. This situation would be aggravated by the further inclusion as service providers of those entities authorised to provide payment services by national authorities, such as post office giro institutions, which are subject to differing national prudential requirements (section 3).

To a similar extent, the PSD does not fully clarify the scope of application of rules on the provision of payment services. On the one hand, the territorial scope of the Directive partially contradicts general principles on the conflict of laws as also recently adopted by the Community, leaving customers partially unprotected (according to which country the transfer is directed or from where it is received) and potentially impairing the expected effects of the Single European Payments Area. On the other hand, it presents inconsistencies with existing rules on competition (chiefly in relation to system access) and on charges.

These emerging problems for how to interpret the PSD provisions on execution of the service seem mainly to stem from ambiguities between rules on business conduct, which should generally apply to any customer, and rules on payment instruments, which should vary according to the specificities of the instrument and possibly the interbank system used to execute it (section 4).

Finally, the PSD leaves a high degree of autonomy to member states to regulate several of the above-mentioned aspects. Although it is still premature to evaluate potential discrepancies in domestic implementation, this flexibility provides a number of advantages for coping with continual evolution in the field. Yet, the numerous and relevant derogations from the PSD by domestic regulation might further compromise the general framework of the payments system in the EU (section 5).

The Community's exercise is ambitious and challenging, and offers plenty of interesting suggestions. The flexibility it introduces between Community and member state measures is also generally positive. Still, such a complex framework should be supported by a more solid conceptualisation of each relevant element, driven by a clear identification of those qualities of the service that justify separate treatment from other traditional financial services. In the absence of this, the vagueness and inconsistencies that are described in this paper leave some doubt that the actual regulation is sufficiently equipped to cope with the modernity and complexity of this 'newly born' financial service.

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1. Introduction

The Payment Services Directive (PSD), adopted at the end of 2007,[1] essentially deals with three issues: i) it defines who may provide payment services, introducing rules on access to the service and its provision; ii) it establishes transparency requirements, to ensure that payment service providers give requisite information to their customers with respect to payments; and iii) it sets out the relative rights and obligations of payment service providers and payment service users.

This Directive is the result of a process that started in 2002, when the European Commission initiated a widespread consultation on a possible, new legal framework for payment services in the internal market.[2] In fact, at that time various issues were still largely unclear, in particular concerning the scope of potential new Community legislation as well as the nature of legal instruments to adopt. The major focus of attention was still on retail payments and the objectives were to enhance consumer protection and to ensure competition among operators.

The debate that followed covered a huge number of issues, highlighting how the existing Community legislation was fragmented and needed amendment and modernisation.[3] It also became clear that it was problematic to envisage a 'modern and coherent' legal framework that would not disrupt existing domestic and Community market structures, while simultaneously being capable of safeguarding the specificities of different payment instruments. All of this was especially difficult given that, despite a number of Community instruments and the introduction of a common currency in the euro area, this sector was mainly regulated by national legislation.

[1] See Directive 2007/64/EC 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, OJ L 319, 5.12.2007, p. 1.

[2] See European Commission, *A possible legal framework for the single payment area in the internal market*, Working Document, MARKT/208/2001 – Rev. 1, European Commission, Brussels, 7 May 2002(a). Previous versions had been presented shortly before to the Payment Systems Market Group and the Payment Systems Government Group, two discussion fora organised by the Commission itself. An 'informal' public consultation was launched in spring 2002, which led to a second working document, summarising answers from mayor stakeholders: *A possible legal framework for the single payment area in the internal market – Summary of Responses*, Working Document, MARKT/4007/2002 final, European Commission, Brussels, 17 October 2002(b).

[3] A number of Community acts already existed before the adoption of the PSD. Among them, only Directive 97/5/EC of 27 January 1997 on cross-border credit transfers (OJ L 43, 14.2.1997, p. 25) has been repealed, while other relevant acts have only been amended – see Table 1.

In December 2003, the Commission issued a Communication on a New Legal Framework for Payments in the Internal Market,[4] whose contents were less vague than previous efforts and which led to a second consultation of major stakeholders. Two years later, a proposal for a Directive on New Legal Framework for Payments (henceforth the '2005 Commission Proposal') was adopted.[5]

The PSD as finally adopted is thus the result of all these phases of elaboration and clarification, as well as the relevant amendments that the Council and the European Parliament contributed to the text. In some relevant points, it departs widely from the 2005 Commission proposal. More specifically, it a) abolishes the marked difference in treatment that the Commission had established between transactions under or above €50,000; b) limits its scope to payment services made in euros or in the currency of a member state outside the euro area, rather than to transfers in any currency; and c) newly regulates the role of telecommunication companies and other operators that may from time to time play different roles in the execution of transfers. Finally, it d) introduces the category of "money remittance" – a transfer not requiring the existence of a "payment account".

Although the Directive expressly refers to "payment services" and "payment services providers" as new categories and despite its intention to coordinate and make consistent existing Community measures in the sector under a general umbrella, the PSD presents numerous critical issues in terms of interpretation and inherent policy choices. Furthermore, the interaction with other EU legislative texts and more broadly the *acquis communautaire* may be problematic (see Table 1).

Table 1. Existing EC measures relevant to the provision of payment services

Directives, Regulations and Recommendations materially affected by the PSD
Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997
Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7 and 98/27/EC, OJ L 271, 9.10.2002
Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L 309, 25.11.2005
Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJ L 177, 30.6.2006
Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers, OJ L 43, 14.2.1997

[4] See European Commission, Communication concerning a New Legal Framework for Payments in the Internal Market, COM(2003) 718 final, European Commission, Brussels, 2 December 2003.

[5] See European Commission, *Proposal for a Directive of the European Parliament and of the Council on payment services in the internal market and amending Directives 97/7/EC, 2000/12/EC and 2002/65/EC*, COM(2005) 603 final, European Commission, Brussels, 1 December 2005.

Table 1. cont'd

Directives, Regulations and Recommendations not affected by the PSD
Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking-up, pursuit and prudential supervision of the business of electronic money institutions, OJ L 275, 27.10.2000
Directive 98/26/EC of the European Parliament and of the Council on settlement finality in payment and securities settlement systems, OJ L 166, 11.6.1998
Directive 2002/47/EC of the European Parliament and the Council on financial collateral arrangements as regards linked systems and credit claims, OJ L 168, 27.6.2002
Commission Recommendation 97/489/EC of 30 July 1997 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder, OJ L 208, 2.8.1997
Regulation (EC) No. 2560/2001 of the European Parliament and of the Council of 19 December 2001 on cross-border payments in euro, OJ L 344, 28.12.2001
Regulation No. 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfers of funds, OJ L 354, 8.12.2006
Commission Recommendation 87/598/EEC of 8 December 1987 on a European Code of Conduct relating to electronic payment (relations between financial institutions, traders and service establishment, and consumers), OJ L 365, 24.12.1987
Commission Recommendation 88/590/EEC of 17 November 1988 concerning payment systems, and in particular the relationship between cardholder and card issuer, OJ L 317, 24.11.1988

Source: Author's compilation.

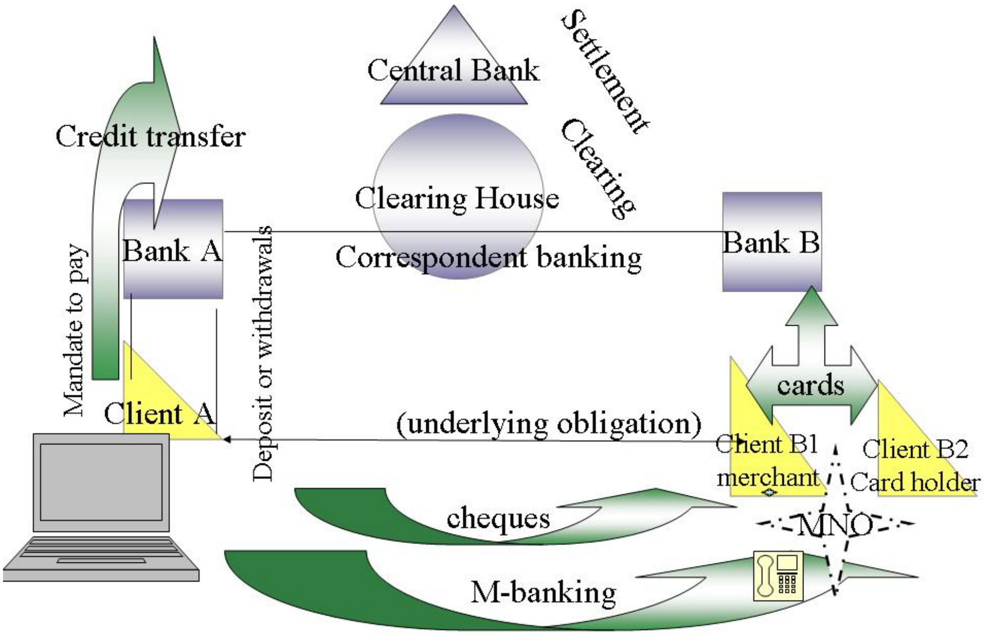
Such issues are the result of inherent difficulties in an exercise that is new for regulators and legislators, and which has no correspondent model in any legislative effort outside the EU. They are also partially the product of amendments coming from different bodies and the attempt to conciliate evident discrepancies in the way the needs for harmonisation are understood by different stakeholders as well as their conflicting values. Nonetheless, the resulting perception of the first reading of the PSD is of an extremely complex legal context, in which a number of open issues leave a high level of uncertainty as to how to insert this piece of legislation consistently into the existing *acquis communautaire* and the framework of the Single Euro Payments Area (SEPA), which might jeopardise its overall legal soundness. And we fear that the high degree of discretion left to member states in its adoption might not add clarity to this picture.

2. The heart of the matter: The 'payment service'

Traditionally, the service of executing transfers was intended to be ancillary to the opening of (bank) accounts. Indeed, the majority of domestic legal systems would include the possibility of depositing, withdrawing and transferring money as a banking or financial activity necessarily linked to the existence of an account, preferably a current account, where funds would be immediately redeemable at any time. It could be said that such a service was basically seen as a way of accessing one's account.

Since different ways of executing money obligations other than cash ('fiduciary money') have progressively been used – each presenting different features tailored to economic needs (including for some the negotiability of the instrument itself) – legislation has also started to regulate each payment instrument separately. (See Figure 1 for a general illustration of the main components of the payment industry when transactions are executed by fiduciary money.)

Figure 1. Payment by fiduciary money



Notes: M-banking refers to mobile banking; MNO refers to mobile network operator.

2.1 From the regulation of payment instruments to the regulation of payment services

In only a few countries has the whole process of regulation of the payments industry been accomplished, and very rarely has the legislator perceived it in overall unity. In general, regulation has been fragmented into three main areas of interest:

i) the bank–client relationship in the provision of bank account services, including transparency and fees in the execution of transfer orders by the bank, with an emphasis on consumer protection;

ii) the regulation of specific payment instruments to cover the legal consequences of each segment of the transaction (cheques, credit transfers, debit transfers and the like); and

iii) interbank relations, either focusing on the agency relationship underlying bilateral correspondent agreements or regulating multilateral payment systems for their inherent risks.

This fragmentation has somehow been replicated at the Community level, although of course the Community's competences are not those of a national legislator. In all phases of its attention to payments, the Commission has mainly centred on consumer protection and new technologies. The predominant concern of the European System of Central Banks (ESCB) and the European Central Bank (ECB), in charge of promoting the smooth operation of payment systems,[6] is the efficiency and soundness of clearing and settlement of transactions for the sake of financial stability. That of the European Commission has instead been primarily (although not

[6] See Arts 105(2) of the EC Treaty and 22 of the ESCB and the ECB Statute.

exclusively) directed at consumer protection and the freedom to provide the same services across the internal market, with a further interest in competition principles and non-discriminatory access.[7]

In the PSD, Community institutions seem to apply an innovative approach, by trying to detach the payment services from banking and other 'traditional' financial activities connected with the opening of an account (up to the point of introducing the new concept of "payment account" and of recognising the possibility of providing services without the opening of an account) and to simultaneously elaborate rules common to any money transfer, independent of the payment instrument used.[8] Yet, this significant step is undermined by a number of evident inconsistencies and structural complexities in the building-up of the institutional framework underlying the provision of the service.

2.2 Provision of payment services as an autonomous activity

Art. 4 of the PSD refers to a list of activities in Annex I to define what a "payment service" is. In fact, such a list does not identify a specific quality of these kinds of activities, but confirms the approach that can be found in Directive 2006/48/EC on the taking up and pursuit of the business of credit institutions.[9]

Annex I to this latter Directive lists among the activities subject to mutual recognition those of

i) acceptance of deposits or other repayable funds along with lending (activities traditionally qualifying banks),

ii) money transmission services, and

iii) issuance and administration of means of payment (i.e. instruments of payment) such as cheques, bills and certificates of deposit.

For its part, the PSD lists

i) services to enable cash deposits or withdrawals to and from a payment account, as well as any ancillary activities to these,

ii) execution of payment transactions, and

iii) issuance or acquisition of payment instruments (or both).

If a parallel can be drawn, the only substantial difference seems to rely on a logical priority (somehow reflected in the order of the items) of the existence of a deposit over the execution of money transfers in the case of the Directive on credit institutions, and the reverse focus on the execution of money deposit, withdrawal or transfer in the case of the PSD. No other structural difference seems to exist, and basically it could be concluded that since in Directive 2006/48/EC the provision of payment services is already an autonomous activity (not under the exclusive

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[7] For a reasoned division of Community institutions' elaboration over cross-border payments and payment systems into different periods, see M.C. Malaguti, *The Payment Systems in the European Union*, London: Sweet & Maxwell, 1997.

[8] As briefly mentioned above, payment instruments – such as cheques, credit transfers or debit transfers and the like – present special, individual features and hence they are traditionally regulated separately. The PSD attempts to find common rules to apply to money transfers, at least when executed by non-paper-based instruments. The real novelty lies in considering credit and debit transfers jointly.

[9] See Directive 2006/48/EC of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJ L 177, 30.6.2006, p. 1.

competence of credit institutions), although not specifically conceptualised, from a substantive point of view the innovation does not seem to be so striking.

The 2005 Commission proposal had instead attempted to offer a general definition of "payment services" in its Art. 2(1), stating that the Directive "shall apply only to business activities, listed in the Annex, consisting in the execution of payment transactions on behalf of a natural or legal person, hereinafter 'payment services', where at least one of the payment service providers is located in the Community". This attempt to qualify the activity as that of intermediation in the execution of money transfers ("payment transactions") was not retained, however.[10]

On the other hand, the PSD defines a general category of "payment account", with the intention to avoid linking the activity of providing payment services to existing concepts such as those of 'current' or 'savings account', which qualify specific activities of financial institutions. With such a new definition, the PSD seems to state that even assuming that for the execution of a transfer an account is needed, it does not mean that this automatically has to be an account of the kind that qualifies banks or other existing financial institutions providing deposit and lending services by means of such accounts.

Art. 4(14) defines a "payment account" as "an account held in the name of one or more payment service users which is used for the execution of payment transactions". Even so, a "payment transaction" under the PSD is no more than a money transmission, since it is "irrespective of any underlying obligations between the payer and the payee" and it includes deposits and withdrawals (Art. 4(5)). It could be concluded that the Commission's attempt here is to reflect the fact that fiduciary money, being scriptural in essence, needs an account in order 'to exist'. Still, so a vague definition does not enable the perimeters of the definition to be sufficiently limited.

Nor is this issue clarified by the way the Commission answered a question with regard to Art. 4(14) in its website service "Questions and Answers".[11] The question was whether a mortgage account that included payment facilities to reduce the overall mortgage balance could be considered a "payment account". The somewhat tautological answer of the Commission distinguishes between early repayments (where the lender is in fact the payee, excluding the account from the definition) and use of payment facilities to reduce the overall mortgage balance, which would be considered a payment account "as far as it is used for making payment transactions".[12]

This issue is further complicated by the fact that no explicit definitions of "deposit" or "repayable funds" exist in the Community's legislation. Directive 2006/48/EC on the taking up and pursuit of the business of credit institutions does not include any explanation of these concepts, only stating in recital (6) that measures to coordinate credit institutions should cover all institutions "whose business is to receive repayable funds from the public, whether in the form of deposits or in other forms such as the continuing issue of bonds and other comparable securities and to grant credits for their own account".[13]

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[10] The list of activities in the annex to the Commission proposal was clearly redundant and evidence of a lack of clarity on distinctions between payment instruments, operators and transmission channels.

[11] The version used in this paper is that updated as of 6 October 2008.

[12] See the answer of 22 May 2008, p. 8 (Question No. 11). See also Question No. 31, with the answer of 15 July 2008. In its answer to Question No. 25, the Commission enlightens the treatment of savings accounts and fixed-terms deposits by restating the usual difference between a current account and other forms of accounts aimed at savings (answer of 15 July 2008, p. 22).

[13] Case law exists on the meaning of these definitions under Directive 2006/48/EC. These respond to the needs of the concrete situation at hand and cannot be satisfactorily used for general assumptions.

On an equal basis, Directive 2000/46/EC[14] on electronic money (e-money) differentiates between situations in which funds received by the institutions are immediately exchanged for e-money (not in itself a deposit-taking activity) and situations in which the receipt of such funds from the public in exchange for e-money results in a credit balance left on the account with the issuing institution (which does constitute the receipt of deposits or other repayable funds).[15] In its recital (9), however, it states that “it is necessary for electronic money to be redeemable to ensure bearer confidence. Redeemability does not imply, in itself, that the funds received in exchange for electronic money shall be regarded as deposits or other repayable funds”, so making the distinction between a “deposit account”, a “current account” and a “payment account”, in our opinion, rather a matter of nuances and personal interpretation.

2.3 Credit as part of a payment service

The reading of the definition of “payment account” becomes even more complex through Art. 16(2) of the PSD, which states that

> [W]hen payment institutions engage in the provision of one or more of the payment services listed in the Annex, they may hold only payment accounts used exclusively for payment transactions. Any funds received by payment institutions from payment service users with a view to the provision of payment services shall not constitute a deposit or other repayable funds within the meaning of Article 5 of Directive 2006/48/EC or electronic money within the meaning of Article 1(3) of Directive 2000/46/EC.

Nevertheless, payment institutions that only provide “payment accounts” can also provide credit, although under a number of conditions fixed in Art. 16(3), by basically making the credit ancillary to the execution of the payment transaction and repayable within a short period (not exceeding 12 months under Art. 16(3)(b)). There is some discretion left to the member states to extend the time limit for purely domestic services.

It is firmly stated that such credit cannot be granted from the funds received or held for the purpose of executing a payment transaction. Still, in payment instruments where actual settlement of the transaction is delayed in time (i.e. inherently involving an element of ‘credit’), such as in the case of credit cards or charge cards where deferred debit is offered, the borderline between ‘credit’ under Art. 16(3) and ‘deposit taking’ fades.

Indeed, Art. 16 has evoked another question, as well answered in the aforementioned “Questions and Answers” website. This question relates to credit balances on card accounts, when refunds or overpayments produce credit balances that might appear in future monthly billing cycles. Here, the Commission clearly excludes this situation from being viewed as constituting the business of taking deposits or other repayable funds. Unfortunately, although this example intuitively leads to such an answer, the Commission does not explain why this is the case. It could have done so, for instance by stating that these amounts would not provide material financing to the card issuer or that the card terms typically do not envisage or invite credit balances, and do not indicate how such balances should be repaid, nor do they provide for payment of interest or the like.[16]

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[14] See Directive 2000/46/EC of 18 September 2000 on the taking-up, pursuit and prudential supervision of the business of electronic money institutions, OJ L 275, 27.10.2000, p. 39.

[15] See recitals (7) and (8).

[16] See the answer of 15 July 2008, p. 15, to Question No. 17.

In addition, Art. 9[17] states that if by the end of the business day following the day when the funds were received, these have not yet been delivered to the payee, they have to either be deposited in a separate account with a credit institution or must be invested in secure, liquid low-risk assets (as defined by the competent authorities of the home member state). This latter activity is not one of credit, but implies investment functions that are outside the scope of payment service provision, and which would include a business judgment on the use of such funds. This also carries an element of risk, albeit very limited in scope and subject to some sort of regulatory screening. Once again, boundaries between activities and categories fade away.

2.4 Payment services without a payment account: Money remittances

And yet, the Commission is aware that operators exist in the market that provide the transmission of money without the need for an account. These operators simply offer the service of transferring cash, either domestically or internationally. Among themselves, however, they may use fiduciary money to execute the order. The fact that they might not require any account favours the use of such services by a high number of immigrants intending to send money home. They may also be widely used by nationals wanting to reach payees in remote areas of the country where bank services are not widespread. If they are left unregulated, competition may be distorted. Over-regulation, however, may lead a number of them to go underground to conduct business.

From the point of view of systemisation of the matter, these operators, executing what are usually called ‘money remittance’ services, are objectively difficult to collocate: on the one side, they only intermediate cash transfers and do not play a role in the deposit taking, or in principle, in the safekeeping of money for customers; on the other side, they are inserted into the financial chain of payments transmission, by the very fact that they process the orders by fiduciary money. Furthermore, their role implies an element of liquidity and operational risk. Moreover, money remittance providers do intermediate in payment transactions by providing a service that has the same business characteristics as those of payment service providers also holding payment accounts. Actually, they are evidence that payment transaction services are a separate and autonomous activity, and consequently may deserve an autonomous regulation. At the same time, they also confirm that there is no need for an account to provide such services, opening the way to non-financial operators to enter the market.

Money remittance services were already included in Directive 2006/48/EC,[18] as one of the services that credit or other financial institutions could provide. The 2005 Commission proposal kept the same approach, by including money remittance services within the payment services listed in the annex, but viewing them as a kind of service deriving from typical banking or financial activities (cash deposits, cash withdrawals and the execution of payment transactions by way of traditional payment instruments, such as credit and debit transfers or cards). Money remittance services were indeed offered by the same kinds of institutions providing such other services. In particular, no mention was made of any lack of a payment account,[19] thus implying that one was needed.

[17] This article additionally establishes segregation of customers’ funds for payment institutions also providing other business activities as defined in Art. 16(1).

[18] See “Money transmission services”, point (4) of its Annex I.

[19] The description refers to “(7) [m]oney remittance services where the cash, scriptural money or electronic-money is accepted by the payment service provider from the payment service user for the sole purpose of making a payment transaction and transferring the funds to the payee”.

A different approach has been taken by the PSD: it inserts a specific definition of "money remittance" with a clear reference to the lack of a payment account,[20] and includes in this category non-financial institutions, such as merchants, supermarkets and retailers.[21] Finally, it obliges them to register and to comply with a sub-set of conditions, provided that certain ceilings in volumes of transactions are respected and they do not benefit from the rights of establishment or of freedom to provide services.[22]

While Community institutions consider that it is not appropriate for the PSD to apply to services where the transfer of funds from the payer to the payee or "their transport" (recital (6)) is executed solely in bank notes or coins (Art. 3(a)), it is deemed appropriate that this legal framework applies to money remittance services, introducing an intermediary in such transactions,[23] especially because of the risks brought to the system by the addition of an intermediary in the execution of these kinds of transfers.

2.5 Extended exclusions and the entry into possession of the funds

The result of all of this is that the qualification of "payment services" is especially elusive and seems more the result of the collection of fragmented aspects of the 'market reality' than the systematisation of a qualified service to be autonomously regulated.

This lack of clarity is exacerbated by the long list of exclusions contained in Art. 3, in the attempt to cover only those payment service providers whose main activity consists in the provision of payment services to users. Indeed, such a list contains a very heterogeneous range of elements.

First, Art. 3 excludes situations in which the service is part of a commercial transaction whereby the intermediary (holding money) is a commercial agent of one of the parties (letter b). Other situations excluded cover the simple physical transport of bank notes or coins (or both) (letter

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[20] In Art. 4(13), "money remittance means a payment service where funds are received from a payer, without any payment accounts being created in the name of the payer or the payee, for the sole purpose of transferring a corresponding account to a payee or to another payment service provider acting on behalf of the payee, and/or where such funds are received on behalf of and made available to the payee".

[21] Recital (7) states,

> Money remittance is a simple payment service that is usually based on cash provided by a payer to a payment service provider, which remits the corresponding amount, for example via [a] communication network, to a payee or to another payment service provider acting on behalf of the payee. In some Member States supermarkets, merchants and other retailers provide to the public a corresponding service enabling the payment of utility and other regular household bills. Those bill-paying services should be treated as money remittance as defined in this Directive, unless the competent authorities consider the activity to fall under another payment service listed in the Annex.

[22] Recital (15) states,

> Given the desirability of registering the identity and whereabouts of all persons providing remittance services and of according them all a measure of acceptance, irrespective of whether they are able to meet the full range of conditions for authorization as payment institutions, so that none are forced into the black economy and bring all persons providing remittance service within the ambit of certain minimum legal and regulatory requirements, it is appropriate and in line with the rationale of Special Recommendation VI of the Financial Action Task Force on Money Laundering to provide a mechanism whereby payment service providers unable to meet all those conditions may nevertheless be treated as payment institutions.

[23] Indeed, an additional ambiguity arises from the above-quoted definition of "money remittance" (Art. 4(13)), which does not refer to transfers of cash but to transfers of "funds", i.e. bank notes and coins, scriptural money and electronic money (as defined in Art. 4(15)).

c), any non-professional cash collection, including for non-profit or charitable activities (letter d), and situations in which the delivery of cash is ancillary and totally marginal within the context of merchant services, as in case of cash-back services by retailers (letter e).[24]

Second, it leaves out payments within groups (letter n) or within a limited network of service providers or within the same premises (letter k).[25]

Third, it excludes transactions executed as a service to other payment service providers, including within payment systems, clearing houses, settlement mechanisms and the like (letters (h) and (m)), as well as any transaction related to securities (letter i).

Each of these exclusions could be questioned; but they do not seem to strongly interfere with a general qualification of payment service provision. For the purposes of our considerations, only one point should be made: exclusions under letters (h) and (m) respond to a specific policy choice to limit the scope of the PSD solely to services to customers. The exclusion under letter (i) – any transaction related to securities – might instead lead to further uncertainties about the scope of the definition of a "payment account" because of the risk of overlap between this and the definition of a securities account, especially when the latter involves such highly liquid securities as to enable them to be considered economically equivalent to cash.[26]

Yet, two other 'general categories'[27] seem to be at the heart of the question. First, Art. 3 also excludes from the scope of the PSD payments executed by means of paper-based cheques, drafts, vouchers, traveller's cheques and postal money orders (letter g). Although there have been public declarations that the purpose of the PSD is to regulate payment services independent of the instrument used, it appears that in the end it only regulates fund transfers – the latter being credit or debit transfers initiated by an order of the customer placed with the service provider, and executed either electronically or through analogous technologies.

This approach confirms the traditional focus of the Commission on transfers executed through new technologies (in its attempt to lead towards not only a cashless, but also a paperless society), as well as one not yet fully emancipated from the regulation of payment instruments as opposed to payment services. If that is the approach of the PSD, however, the Commission should not have underestimated the substantial legal and business differences among the various payment instruments coming under the label of "new technologies-based payment instruments".

Second, the PSD excludes a number of operators involved in payment transactions when these are executed by electronic means. Indeed, one of the major points of difficulty in understanding the structure and parameters of the service is connected to the use of new technologies and the "intermission" of third service providers. In cases where the transaction is executed by telecommunication, other information technology or network operators, the PSD distinguishes between situations in which a) the operator provides services (e.g. ring tones, music or digital

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[24] This category generates difficulties in interpretation and it has been the subject of questions in the above-mentioned Commission website "Questions and Answers". See the answer to Question No. 24 of 15 July 2008, p. 21.

[25] The general reason for this exclusion seems to be that services provided for a cluster cannot be intended as being professionally provided, since they potentially only involve a limited and identified community. Indeed, the Commission explains in its answer of 15 July 2008 to Question No. 27 that letter (k) should cover instruments such as store cards and club cards (p. 24).

[26] This point is confirmed by the above-mentioned description of repayable funds in Directive 2006/48/EC (op. cit.).

[27] This division is the sole responsibility of the author and has no correspondence in any Community document or other sources.

newspapers) by adding value to them in the form of access, distribution or search facilities; and b) (on the contrary) the operator only acts as an intermediary without adding any value.

The PSD applies only in the second case, since in the first case it is understood that the service provided exceeds that of a payment service (recital (6)). Still, in this case Art. 3 also excludes services by operators that only support the payment service "without them entering at any time into possession of the funds to be transferred". These services include the processing and storage of data, data and entity authentication, communication network provision, provision or maintenance of terminals and devices used for payment services.

The reason for this exclusion would seem to be that these operators only provide the infrastructure for transmission of the financial service (or related services) and not the financial service itself. Nonetheless, in answering a question on this matter, the Commission focuses on the fact that the technical service provider never enters into a relationship with the users directly.[28]

We would disagree with this reconstruction, also in light of Art. 17, allowing payment service providers to outsource operational functions under a number of conditions. The joint reading of these provisions means that technical service providers by themselves do not provide a payment service and thus do not need to comply with the regulatory requirements of the PSD. That being stated, technical services may be one of the essential functions of payment transmission that the payment service provider can offer as part of its financial services (or outsource under the conditions established by Art. 17).

As a consequence, it would seem that what is relevant is not the existence of a direct link with the customer, but rather the financial nature of the service, qualified – in our opinion – by the fact that the technical service provider *would not enter into possession of the funds to be transferred*.

Indeed, this distinction has a wider scope in our understanding: the 2005 Commission proposal, as reported above, in qualifying a payment service seemed to rely on the function of executing payment transactions on behalf of someone else. If we only focus on this, the lack of a direct link with the customer, although not decisive, could still play a relevant role (as a sign of the lack of an underlying agency relation). Even so, the general understanding of the PSD would induce a more proper focus on the element of entry into possession of the funds to be transferred, either by having them deposited in a payment account or physically accepting cash to be subsequently transferred in the case of money remittance providers.

In all cases, although the service provider cannot dispose of the funds of the customer and must only use them to execute the transfer (unless the provider also performs other financial activities), its intermediation role implies the possession of the funds. Here, the open question could eventually be what 'funds' are and whether a classification of the kind made in the PSD (distinguishing between cash, scriptural money and electronic money under definition (15) of Art. 4) is reasonable. In any case, any operator coming into possession of such funds from the public for the purposes of transferring them should be deemed as providing a payment service.

[28] The answer of 15 July 2008 to Question No. 26, p. 23 is as follows: "They themselves never enter in relationship with the users directly and are *therefore* not covered as such by the PSD" (emphasis added).

3. Payment service providers: A level playing field?

If the above construction is shared, then consideration should be given to whether the categories under which the PSD divides payment service providers would result in a barrier to a level playing field by implying different degrees of regulatory compliance for each of them.

3.1 The regulatory constraints

Art. 1 requires member states to permit the execution of the payment services only by operators that are included in one of the categories contemplated in the Directive itself. These include credit institutions that take deposits from users which can be used to fund payment transactions, and which would continue to be subject to the prudential requirements under Directive 2006/48/EC. Also included are e-money institutions that issue e-money as defined by Directive 2000/46/EC, and which continue to be subject to the prudential requirements under this Directive.

Furthermore, post office giro institutions are entitled to provide payment services to the extent that these are so entitled under national law. In these instances, the operator would be subject to relevant national prudential requirements, if any.

Finally, the PSD introduces a new category: that of a "payment institution" (PI), defined as "a legal person that has been granted authorization in accordance with Art. 10 to provide and execute payment services throughout the Community".[29] This is basically a residual category covering any operator intending to provide payment services without being included in one of the other categories.

The overall regulation of these operators suffers from stratification: Directive 2006/48/EC establishes an authorisation for credit institutions based on the assumption that they would provide a wide range of services. Moreover, prudential requirements are based on the grounds that credit institutions would perform a credit function involving the use of the funds deposited by the customers, while customers would individually keep the right to withdraw such funds at any time. Since the provision of payment services, at least originally, was meant to be functional for those of deposit-taking and lending as two combined activities, the Directive, also in its recast version of 2006, reflects this background. In parallel, Directive 2000/46/EC on e-money institutions was meant to cope with the issuance of means of payment (i.e. monetary value) other than cash or scriptural money, and hence prudential requirements were consistently fixed with such assumptions.

Since Directive 2000/46/EC considers e-money institutions to be credit institutions (and indeed they are so defined by Art. 4(1) of Directive 2006/48/EC), their prudential regime is based on the regime for credit institutions. Directive 2006/48/EC applies, but since e-money institutions are not full blown credit institutions and their activities are limited in scope and do not involve the taking of deposits, it applies with derogations.[30] Since the keeping of stored value presents risks of mismanagement, however, Directive 2000/46/EC includes a number of investment restrictions, an imposition of governance schemes and limitations on business activities.[31]

[29] See Art. 4(4). The Commission proposal of 2005 covered both natural and legal persons (Art. 1(1)(d)). Two additional categories are recognised as legitimately executing payment services, i.e. central banks and public authorities not acting under their public functions. These categories could indeed raise an issue of competition for the reputational advantage they have over private competitors. Yet, the analysis of this matter is outside the scope of this report, because of the specific issues it raises.

[30] In particular, see Arts 2 and 4.

[31] See Arts. 5, 7 and 1(5).

Prudential tools are thus combined with forms of oversight, mainly centred on management tools and governance schemes.

Finally, PIs need an authorisation by the relevant authority of a member state before legitimately providing payment services. This process requires proof of adequate initial and ongoing capital, and a number of governance tools. The criteria differ markedly from those of

both credit and e-money institutions, and seem to rely on oversight more than prudential tools. Table 2 gives a schematic comparison of the three main categories of payment service providers.

Table 2. Institutions allowed to provide payment services

Credit institutions	**E-money institutions**	**Payment institutions**
Receipt of repayable funds from the public, whether in the form of deposits or in other forms such as the continuing issuance of bonds	Receipt of funds from the public in exchange for electronic money Stored value (credit balance) Redeemability not an issue	Forbidden from taking deposits or other repayable funds Customers' funds can be taken until end of day following reception; credit granted under limited conditions

Source: Author's compilation.

The PSD itself recognises that the different methods of calculation of own funds described in Art. 8 are complex and might require adjustment according to the needs further expressed by market participants. In addition, the mechanism of authorisation established by Art. 5 leaves a degree of discretion to national authorities, which can combine such criteria with other oversight tools.[32] Therefore, the PSD itself establishes that an articulated system of controls is put in place that somehow can only be fully traced *ex post*.

Moreover, in spite of the recognised need for different methods to evaluate the capital of PIs, the main parameter has still been the regime of credit institutions. Starting from the treatment of credit institutions, some requirements have been taken out in light of the fewer risks borne by the activities performed by PIs. Additional requirements of a different nature have then been added because the relevant entities are not financial institutions, but mainly regular companies (telecom companies or the like).[33]

This way of reasoning and approaching the issue is reflected in Directive 2000/46/EC, where recital (13) clearly states that pending the harmonisation of prudential supervision of outsourced activities for credit institutions, it is appropriate that e-money institutions have sound and prudent management and control procedures.

There are serious doubts that this general arrangement can preserve a level playing field:

[32] See recital (11).

[33] Against such a background, the issues of capital requirements in the financial sector and of consistency among different Community texts should be addressed, especially in light of the Commission's recent proposal for the revision of bank capital requirements to reinforce financial stability (European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/48/EC and 2006/49/EC as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management*, COM(2008) 602/3, European Commission, Brussels, 2008(a)). See also European Commission, "State aid: Commission requests Italy to recover €123 million of unlawful fiscal aid from nine privatised banks", Press Release IP/08/433, European Commission, Brussels, 1 October 2008(b).

- The main reason for this is that e-money institutions are defined as credit institutions, although a very special kind.
- The insertion of an additional category of providers of payment services treated differently from the other two categories gives rise to inherent contradictions, since PIs are subject to a further prudential and oversight regime, still different from that of e-money institutions.
- Although PIs are able to issue instruments of payment, and provide and execute payment services, the different treatment of PIs is justified because PIs are prohibited from taking deposits and cannot use funds but to transfer them, and thus the prudential requirements can be lowered.[34] Similar recognition is not given to e-money institutions, however, since these are deemed to receive funds from the public and keep stored value, although it is generally understood that this is functional to the execution of payment services.

If a general assumption can be made here, it seems that the essential constraint resides in the incapability of dealing with the fact that a financial service can be performed by 'non-traditional' financial institutions or even a non-financial institution. Consequently, very timid attempts are made to apply regulatory tools traditionally elaborated for financial institutions to these new entities in a sort of rudimentary tailor-made approach.

3.2 Issuing e-money versus transferring it

That a level playing field is not guaranteed because of regulatory discrepancies (and that in some cases national authorities bear a relevant degree of autonomy) has been expressly admitted by the Commission in its very recent proposal for the amendment of Directive 2000/46/EC.[35]

It is recognised that the prudential requirements for e-money institutions are disproportionate compared with those of credit institutions. The Commission also admits the emergence of discrepancies between e-money institutions and PIs. And indeed, whereas e-money institutions are currently subject to the principle of exclusivity of activities, PIs are not, with the effect that obtaining a license under Directive 2000/46/EC would lead to operating under more restrictive terms than when obtaining one under the PSD.

Since e-money institutions are actually no more than a narrower category of payment service providers, i.e. operators providing such a service by means of pre-paid arrangements (where value is stored in an electronic device or the like), the result is that direct competitors are put on clearly different levels. This argument holds because it is evident that the reason for storing value in an electronic device is solely functional for the provision of payment services, and such funds are not 'deposits' (since, as noted, e-money institutions, albeit defined as credit institutions, are not permitted to take deposits under Directive 2006/48/EC). Moreover, PIs may

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[34] Indeed, reference is also made to the engagement of PIs in specialised and limited activities as grounds for different treatment:

> The requirements for the payment institutions should reflect the fact that payment institutions engage in more specialized and limited activities, thus generating risks that are narrower and easier to monitor and control than those that arise across the broader spectrum of activities of credit institutions. In particular, payment institutions should be prohibited from accepting deposits from users and permitted to use funds received from users only for rendering payment services. (PSD, recital 11)

[35] See European Commission, *Proposal for a Directive of the European Parliament and of the Council on the taking up, pursuit and prudential supervision of the business of electronic money institutions, amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC,* COM(2008) 627 final, European Commission, Brussels, 9 October 2008(c).

similarly be in the situation of storing funds received by customers, as implied by Art. 9 (even if for a very limited duration of time).

Thus, it is clear that the activities of the two kinds of institutions not only compete from a business perspective, but can also be at least abstractly composed of the same activities, such as those of storing funds. And all of this does not even touch upon the content of the activity of "safekeeping" (permitted to PIs to the same extent this is permitted to credit institutions),[36] which has never been exactly distinguished from the other activities.[37]

It is clear that the reason Community institutions believe different treatment must be applied to e-money institutions as opposed to PIs is that the former issue means of payment (i.e. monetary value), whereas the latter only transfer it (in addition to other activities PIs are entitled to engage in according to Art. 16 of the PSD). These two activities are considered to bear varying risks and therefore need different treatment. So, the real issue is to understand what qualifies e-money to justify such differentiation.

The recent Commission proposal to amend Directive 2000/46/EC redefines e-money in a way that may lead to a better understanding of the underlying reasoning, although we are still far from a consistent systematisation of the whole matter. Indeed, such a definition may even lead to more confusion and overlapping when it comes to justifying a different prudential treatment of e-money institutions versus PIs.

Directive 2000/46/EC (Art. 1) defines e-money as monetary value represented by a claim on the issuer that is

i) stored in an electronic device,

ii) issued on receipt of funds of an amount not less in value than the monetary value issued, and

iii) accepted as a means of payment by undertakings other than the issuer.

Art. 3 of the same Directive also imposes that e-money be redeemable at par value at any time.

The Commission proposal widens the definition to not only include value stored in electronic devices but generally "electronically" stored and eliminates the requirement that this is issued on receipt of funds of the same amount. The latter provision is basically permitting the issuer to charge a fee.

Yet, the real element of interest is that the Commission proposal qualifies e-money by referring to the purpose for which the e-money institution would store such monetary value:

> '[E]lectronic money' means a monetary value as represented by a claim on the issuer which is stored electronically and issued on receipt of funds, *for the purpose of making payment transactions* as defined in Article 4(5) of Directive 2007/64/EC, and accepted by natural or legal persons other than the issuer (Art. 2, definition (2)) (emphasis added).

Therefore, if the Commission proposal makes clear that not only are payment instruments storing monetary value in a card (a "device") covered by this definition, but also monetary value remotely stored on a server and managed by the holder through a payment account with the payment service provider (recital (7)), it closely relates e-money institutions to PIs as sharing

[36] See Art. 16(1)(a) of the PSD.

[37] By contrast, it is generally known how relevant this distinction is for instance in the securities market, especially in cases where securities are fully de-materialised (for which a distinction exists between depository and custodian).

the common final purpose of transferring funds rather than managing savings (or more generally taking deposits).

In line with this, the Commission proposal suggests amending Directive 2006/48/EC to exclude e-money institutions from the definition of credit institutions, and although keeping prudential requirements linked to the "issuance" of monetary value, it acknowledges that prudential requirements in this context are more related to consumer protection than to systemic or financial risk (as is the case for credit institutions, where prudential requirements have more an eye on systemic effects).[38] The prudential and oversight measures proposed for e-money institutions hence draw from those of PIs rather than those of credit institutions.

An issue is still pending, however. Under the assumptions of Directive 2000/46/EC, a specific directive on e-money institutions is justified given that e-money represents monetary value of a kind different from cash or scriptural money (as the definition of "funds" in the PSD envisages). The Commission proposal makes this justification less evident, however: leaving aside the issue of whether it is correct to differentiate scriptural money from electronic money and also disregarding considerations on whether the use of such money for executing payments to third parties (as opposed to the issuer itself) is a qualifying element of the legal definition of money, the question arises of where exactly the difference lies between the "issuance" and "transfer" of e-money.

It is undisputed that it is not the storage of monetary value itself that is the production of monetary value, but that a credit balance is reflected on an account with the issuing institution to permit the service.[39] This feature constitutes the receipt of deposits or other repayable funds. And indeed measures are established to cover outstanding balances, since this feature does imply a financial liability of the issuer. It is equally undisputed that when, in the opposite circumstance, outstanding balances are not permitted, as in the case of PIs (which can maintain customers' funds only for a very limited period), this phenomenon does not arise and less cumbersome prudential measures can be foreseen. A general categorisation can thus be inferred between issuing monetary value (implying an authorisation under Directive 2000/46) and sole transfer under PSD authorisation.

If this is the case, whereas the Commission proposal widens the definition of e-money and reduces the existing prudential distortions against credit institutions in a way that has to be judged positively, it unfortunately does not make things easier in comparison with PIs, when it links the operation of storage to the execution of transfers.[40]

The question arises of why e-money institutions are not simply regulated within the PSD and under the same authorisation umbrella. According to the Commission proposal, e-money institutions are subject to the same safeguard measures as PIs. Hence, e-money institutions are clearly prohibited from any kind of pooling of funds. Moreover, they would be required to maintain customer funds only for the purposes of transferring them and they could not use these

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[38] See recitals (9) and (10).

[39] In the Commission proposal, "outstanding electronic money" is defined as the monthly average of the preceding 12 months' financial liabilities related to electronic money (Art. 2, def. (3)).

[40] On 5 December 2008, the ECB issued an Opinion on the Commission proposal to amend the E-Money Directive (CON/2008/84). It strongly objects to the change of definition of e-money institutions from credit to financial institutions. This opposition, although very well articulated in its exposition, in fact seems to fundamentally derive from the monetary policy consequences driven by the wording of Art. 19.1 of the ESCB Statute. This article authorises the ECB to impose reserves within the ECB or a national central bank only against credit institutions. The very legitimate ECB concern, however, could be better addressed under a broader picture, considering the consequences of the execution of payments as a separate and autonomous activity.

funds for any other purposes. They would basically hold payment accounts as any PI and be subject to any other requirements such as governance schemes and the outsourcing of services.

They would also be allowed to perform the same kinds of activities as PIs, with restrictions currently imposed on e-money institutions being eliminated in the Commission proposal. In light of the amendments proposed by the Commission, e-money institutions would be nothing more than PIs providing payment services by way of pre-paid mechanisms. Even under the assumption that this business model leads to the issuance of monetary value, this can be easily addressed within the PSD framework. Keeping two different regimes (albeit similar, if the Commission proposal is adopted as drafted) risks generating regulatory discrimination between entities that provide the same kind of service through different business models.

Indeed, if what really distinguishes a payment service provider is the fact that it enters into possession of the customer’s funds to execute the payment transaction (as we would assume), this situation is common to PIs and e-money institutions, the latter only receiving those funds at a time that is precedent of an undetermined period from the real time of execution of the transfer. Yet, since the same safeguard measures would be equally imposed on e-money institutions under the Commission proposal as on PIs under the PSD, their relationship with the client would be no different or their intermediation in no way departing from that of PIs.

3.3 Testing the Directive against mobile banking

The persisting inconsistencies of this general framework, also once the proposed amendment of the E-Money Directive is adopted, can be tested against concrete examples of modern payment services.

The distinction of telecom or other operators as payment service providers according to the PSD has been discussed in the previous pages. Nevertheless, the considerations just made on the qualification of payment service providers call for a better qualification of such entities and of the roles they play. Indeed, payment service providers other than credit institutions are mainly, at least at present, telecom, mobile or computer companies that – by operating a widespread communication network – can also offer to their customers the financial service of executing payments through their communication channels.

In a number of instances, new payment instruments or schemes have been invented by non-financial institutions, with potentially no need to rely on a traditional financial institution. From there, the issue has arisen of whether they could be permitted to do so or whether such a service could only be provided by credit or financial institutions.

Having taken the policy decision that non-financial institutions could be permitted to provide this service, at the Community level it has been considered that this activity would still need a license. In the difficulty of defining the scope of the service to determine which activities would require a license and which entities would consequently have to apply for one, the focus in the case of these operators has mainly been on technicalities and on the methods of providing the service (as the issue of a direct versus indirect link with the client discussed above shows). It has already been stressed in the previous pages how the focus should instead be on the entry into possession of customers’ funds to provide the service and connected risks or other financial parameters to qualify payment intermediaries. This emphasis would also affect payment services offered by non-financial operators of this kind.

Item 7 of the Annex to the PSD and its recital (6), both dealing with the execution of payment transactions where the consent of the payer is given by means of a telecom, digital or IT device and the payment is made through that channel, not only refer to situations in which the operator offers a limited number of products or services aside from its own airtime (such as movie tickets or metro fares). They also cover general schemes open to the public and potentially substituting traditional payment instruments for any kind of transfer. For instance, this is the situation in 'mobile banking' (m-banking). Here, the customer can deposit, withdraw or transfer money to any bank account or other mobiles by using a specific menu on the mobile phone.

In this context, a variety of business and legal schemes exist in the market that may widely differ. In addition, the system requires the involvement of merchants or other kinds of local stores/offices (such as post offices) to provide deposit and withdrawal services to a broad range of customers. Such an intermediary executes the requested transactions by way of its own mobile, a point of sale machine or any other device connecting it to the same common network and basically executing the same kinds of procedures as any customer. These agents have an account as anyone else does and execute deposits and withdrawals, debiting and crediting their own account against the reverse operation on the account of the person depositing or withdrawing the relevant money.

Figure 2 illustrates three scenarios, one showing an m-payment model (where no credit institution is involved), another showing an m-banking model (involving the opening of bank accounts) and a third one more difficult to qualify.

This third scenario deserves better understanding. Working on a simplified structure of services already provided in a number of countries, just take an m-banking product through which each of the clients of the mobile network operator (MNO) can execute and receive transfers to and from other mobiles (of the same company) in real time. They can equally execute payments to and receive payments from bank accounts (for instance receiving their salary). The MNO has an agreement with a bank under which it executes payment transactions for the benefit of the mobile owners as an agent of the bank.

If the customer has a bank account, the transfer is immediately settled against the bank account. If the customer has none, the MNO itself has an account with the bank (which it holds in its own name but on behalf of each and all of its clients) where the balances of clients are constantly reconciled. Finally, to enable deposits and withdrawals, the MNO has a contractual relationship with a number of merchants, which are qualified as agents of the MNO.

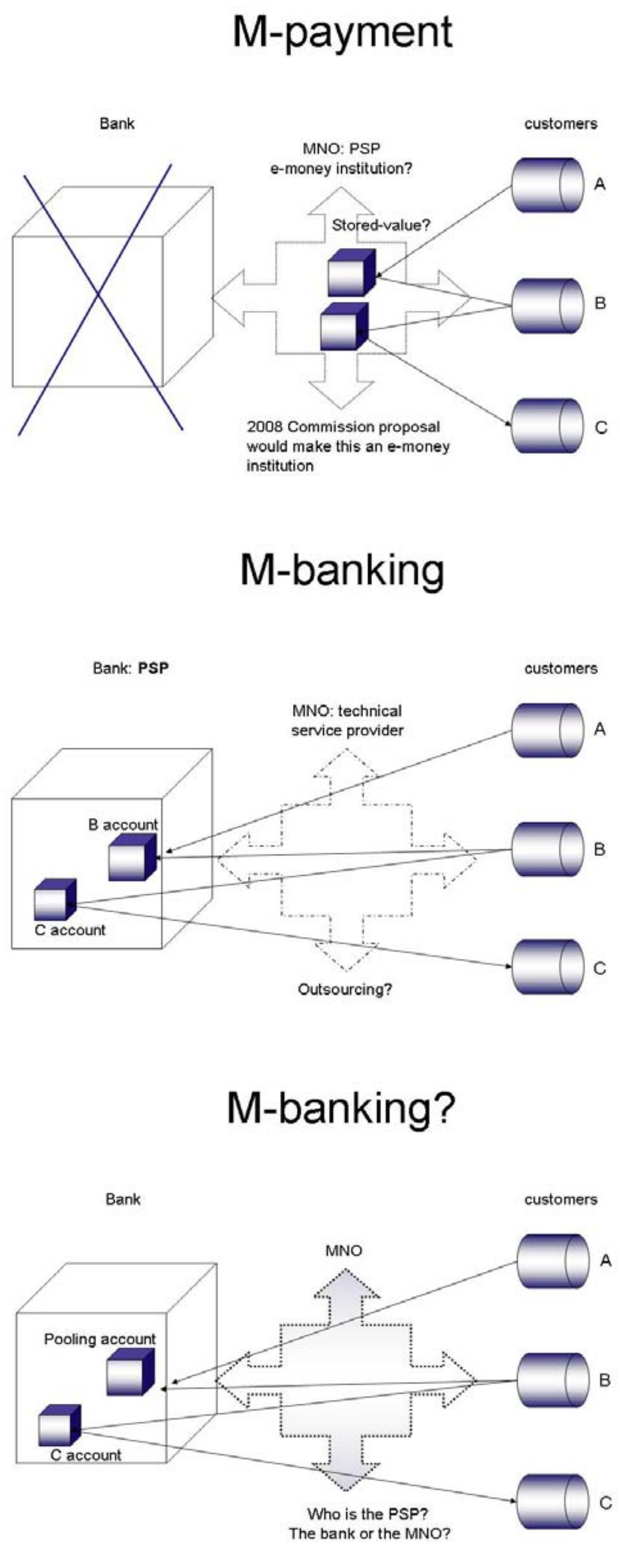
Undoubtedly, the bank is a credit institution under Directive 2006/48/EC, permitted to execute payments under its general license. The reading of the PSD could thus easily lead one to conclude that the payment service provider in the example is the bank, which is also authorised to outsource operational functions or provide services through agents under Art. 17 of the PSD and bear the connected liabilities under Art. 18.

Nonetheless, assuming for the sake of simplicity that this is not an e-money institution since no pre-paid arrangement has been put in place,[41] the MNO could still act as the payment service provider. In this case, it would need to have a license under Art. 5 of the PSD to be able to provide the service. In the opposite case, it would not.

As a first reaction, it could be said that when the customer has a bank account, the MNO is not a PI, because all transactions occur through the bank. Of course, it could be argued that the customer has a direct relationship with the MNO and that s/he is its client. Still, the MNO acts as an agent of the bank and it is through this role that it presents itself to the client, who will have two different contractual relationships with the MNO according to the services entailed (either payment or voice mail).

[41] This assumption is highly unrealistic, since MNOs work on the basis of pre-paid arrangements. In that instance, an evaluation should at least be made of whether the Commission proposal for amendment of the E-Money Directive would cover this situation (since in the example the money is not stored in the SIM card).

Figure 2. Alternative business models



Note: PSP refers to payment service provider.

When the customer has no bank account and the money flows into a general account in the name of the MNO, there is the question of whether the MNO itself is providing a payment service and whether it should be subject to the authorisation requirements of the PSD. This would also impose on the MNO the obligation to either segregate the customers' funds or adequately insure them (as required by Art. 9).

It could be legitimately sustained that in this scenario, as well as in that of individual bank accounts in the names of the customers, the aforementioned general account is with the bank. It should also be noticed that this account does not correspond to the definition of a payment account given by the PSD, which requires that such an account be held *in the name of one or more payment service users*. These elements would confirm that the payment service provider is in fact the bank.

Even so, the fact that the bank account is in the MNO's name but on behalf of the customers would rather qualify the MNO as the payment service provider, since it interposes itself between the customers and the bank and enters into possession of the customers' money to execute payment transactions. Indeed, it is the MNO that manages such an account, operating reconciliation in a way that is not under the control of the bank and of which the bank has no trace. The latter institution cannot monitor the volume of transactions but only be aware of the existing general outstanding balance at time of settlement.

Indeed, it could be sufficient to modify some of the elements of the example to obtain different conclusions, since the final evaluation will depend on the overall legal scheme and resulting allocation of activities, responsibilities and risk. For instance, should the bank bear the liability of ensuring each customer for his/her individual outstanding balance, this element might influence the final evaluation.

It is questionable whether the current legal and regulatory set-up of the existing three EC Directives (on credit institutions, e-money institutions and PIs) would be able to cope with these different situations in a way to ensure a level playing field. The absence of clear general guidance on the essence of the definitions and categories as previously explained, makes it extremely difficult, at least at first reading, to predict consistent answers that could not only guarantee competition on an equal footing but also avoid exposing customers and the market as a whole to unpredicted risks owing to lack of clarity on the allocation of liabilities.

4. The regime for the provision of payment services

Payment service providers are subject to a number of obligations in the provision of the payment services. In particular, Title III provides for rules of transparency on the conditions and information requirements for payment services, whereas Title IV fixes rights and obligations in relation to the provision and use of payment services. The above-mentioned overlapping and lack of clarity in separating rules on the provision of services from rules pertaining to legal consequences and enforcement of payment transactions pose some challenges in this context as well. Other inconsistencies can be registered in relation to competition principles and rules on charges.

4.1 Territorial scope of the PSD and payments outside the Community

Although the PSD applies to any payment service "provided within the Community" (Art. 2), provisions under Titles III and IV only apply when both payment service providers (those of the payer and of the payee) are located within the Community.[42] Furthermore, the payments must be made exclusively in euros or the currency of a member state outside the euro area. Whereas the prerequisites to access the market and the resulting prudential requirements apply to anyone intending to provide payment services within the Community, the conduct of business rules established by the PSD would only apply in situations in which the payment service provider of the payer and that of the payee are both located in the Community.

Yet, no definition exists of when a payment service is provided within the Community; since the definition of payment services refers to the business activities enabling the customer to execute either a deposit, a withdrawal or a payment, it could be reasonably assumed that the relevant location of the service should be where the payment service provider renders the service to its customer. This criterion could lead to a case-by-case solution, whereby the location of the customer or the place to which s/he addresses the payment service provider is relevant.

In the past, this has also given rise to a number of conflicts of jurisdiction and law when credit institutions were executing the services through a chain of correspondent bilateral agreements, each potentially subject to a different legal order.

Still, according to the most recent criteria on applicable law in the Community, a contract for the provision of services, unless otherwise provided by agreement, shall be governed by the law of the country in which the service provider has its habitual residence, since this is basically considered to be the place where it executes the service to its client (Rome I Regulation).[43]

Borrowing the underlying rationale of this rule (as meant to be consistent with the preconditions of the PSD), it would appear reasonable that the PSD applies when the individual service provider is located within the Community.[44] Indeed, the 2005 Commission proposal had defined the scope of the Directive as to apply when at least one of the payment service providers is located in the Community Art. 2(1).

Under the PSD as finally adopted, however, provisions under Titles III and IV only apply when *both* the payment service providers of the payer and the payee are established within the Community.[45] As a result, any payment service provider intending to execute payment transactions from a location in the Community towards payees located outside the Community would require a license and comply with all relevant requirements, but shall not be subject to Titles III and IV. By way of example, money remittance providers, when providing services to customers within the Community for the benefit of a foreign payee are not requested to comply with Titles III and IV. In parallel, any Community beneficiary could not be protected in the event that the payer is outside the Community.

This principle is understandable only for provisions affecting the legal consequences and enforceability of payment transactions (roughly, those contained in Title IV). Indeed, it is

[42] The sole exception is Art. 73 (on the value date and availability of funds) to general application (Art. 2(1)).

[43] See Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), in OJ L 177, 4.7.2008, p. 6. See in particular Art. 4(1)(b) and recitals (19) and (21).

[44] This distinction is made as opposed to where the customer is located. See, however, Art. 6 of the (Rome I) Regulation on consumer contracts.

[45] The definition of "payee" under Art. 4(8) seems to refer to the final beneficiary of the transaction, not to each intermediary in the chain, although in a complex chain of correspondent bilateral relationships the "intended recipient of the fund" might be meant to be each of the intermediaries. The joint reading of this definition with that of "payment transaction" under Art. 4(5) supports such a conclusion.

evident that for rules such as those relating to the irrevocability of payments or the timing of execution, coordination among payment service providers is of the essence. Moreover, most of these services are provided through payment systems requiring a certain level of certainty and standardisation. Therefore, the requirement that both parties be within the Community sounds reasonable. Much less evident seems to be this limitation in the case of those rules relating to transparency of information, charges and the like, which more broadly refer to the provision of the service as such.

The main difficulties in this regard emerge from a lack of general consistency. As stated above, the PSD attempts to overcome the current fragmented regulation of payment instruments in favour of a general framework for payment services. Rules on information and the like, referring to the services of the payment service provider independent of the kind of instrument at stake, should certainly apply to any situation in which the client is requesting a payment service. There is no understandable reason to exclude from these rights customers who execute transactions with a party outside the Community.[46]

In parallel, there are other rules that strictly pertain to regulation of the instrument: the PSD reaches the ambitious goal of simultaneously regulating credit and debit transfers, including cards as far as transactions are executed by way of payment orders. These rules, as opposed to those broadly referring to the provision of the service, might have a different territorial scope. An additional factor is the realisation of SEPA, which would justify the limitation that both payment service providers are located within the Community.[47]

Within SEPA, the issue of application of the provisions of the PSD to transactions executed between payment service providers located within the Community is also strictly overlapping with the projects that the European Payments Council (EPC) is adopting. More specifically, the issue at stake is what requirements could be imposed on those payment service providers that come under the SEPA Rulebooks but which are located outside the Community and therefore not bound by the PSD. These institutions are of course not required to comply with prudential requirements and other prerequisites to access the market, nor are they required to comply with Titles III and IV. Will their participation make them de facto comply with such requirements (at least those strictly relating to the execution of transactions) or will such differentiation imply distortions or a lack of efficiency of the model?

With the exclusion of transparency and information rules, would the conduct of business rules then require legislative regulation or would market arrangements be sufficient to regulate the matter?[48] Here again, it is believed that a better conceptualisation is needed of what rules

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[46] An additional question that needs to be addressed is the extent to which a member state could also extend the scope of the PSD to transactions in respect of a payee whose payment provider is outside the Community, limiting such extension of course only to its territory. At first glance, no legal obstacles seem to emerge, although it appears that the real issue would be the willingness of other member states to make these transactions come under the benefits of the SEPA Community schemes. Actually, the real issue does not lie in the interpretation of the PSD but on the openness of the SEPA schemes to application outside the Community. Art. 28 of the PSD on access to payment schemes – as further discussed in this paper – shall bear a role.

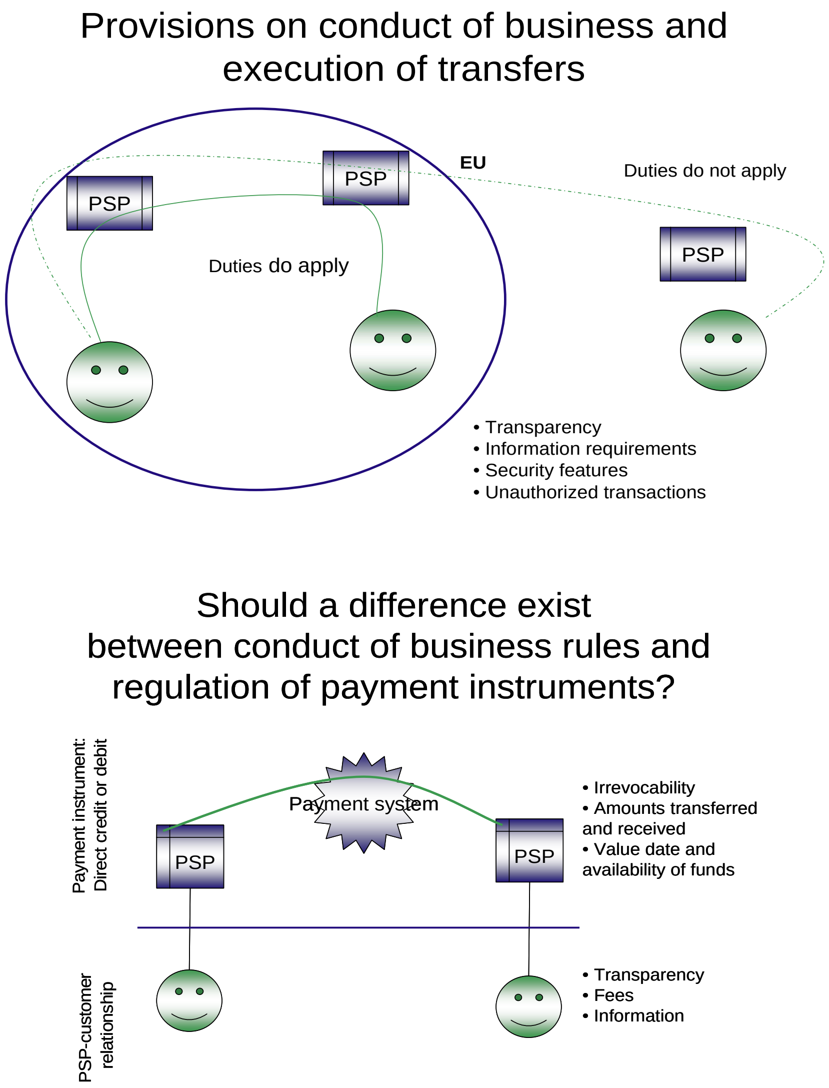
[47] Indeed, the 2005 Commission proposal had made a distinction for a limited number of rules. In its recital (28) it states,

> [G]iven the differences between the rules governing the operation of payment systems within the Community and those governing payment systems in third countries, it is appropriate that the provisions on execution for the full amount and execution time be restricted to cases where the payment service providers both of the payer and of the payee are located in the Community.

[48] This is a long-standing issue, dating back to the insertion of Art. 4A in the US Uniform Commercial Code in 1989 and the UNCITRAL Model Law on cross-border credit transfers of 1992. The issue has

pertain to consumer protection and the general provision of services by the relevant institutions, on the one side, and what rules pertain to harmonisation of rules on the execution of direct payment transactions (both credit and debit, if meant to be consistently regulated by the same set of provisions) on the other. The latter case clearly needs coordination with interbank rules and payment system rules. This differentiation would not only improve clarity and legal certainty, but also contribute to ensuring a level playing field (see Figure 3).

Figure 3. Territorial scope



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been solved in different ways: in the US, credit transfers have been specifically regulated, whereas in only a few countries has the UNCITRAL Model Law been adopted.

4.2 The PSD and competition principles

The general framework of payment services is also strongly affected by competition rules. In this context, Art. 28 of the PSD, regulating access to payment systems, establishes that payment system rules on access shall be objective, non-discriminatory and proportionate. This summarises a consolidated approach of regulatory authorities on access to systems that can be of particular use to competitors to provide the relevant service (basically referring to theories such as that of essential facilities).

At the same time, Art. 28 expressly sets guidelines on how this general statement should be read under specific circumstances, stating that those rules should not inhibit access more than is necessary to safeguard against specific risks such as settlement risk, operational risk and business risk, and to protect the financial and operational stability of the payment system.

Indeed, whereas market operators are usually free to set the objectives to limit access, once it can be shown that this is done with sound judgment and is applied in a non-discriminatory way, the PSD creates a precedent whereby it is the legislator that tells the market which objectives are legitimate. Art. 28 thus adopts a standard that is much more restrictive than usual practice.[49]

In addition, Art. 28 lists a number of requirements that the payment system cannot impose on payment service providers or on payment service users. These prohibitions address institutional issues, in the sense that the payment system cannot discriminate according to the institutional status or kind of authorisation. Again, it seems that the major concern of the PSD is to ensure equal treatment of non-credit institutions vis-à-vis credit institutions, rather than to impose on payment systems a general rule concerning access.[50] Such prohibitions are also extended to payment service users that are not competitors, whereas competition principles should only be concerned with equal treatment of actual or potential competitors.

It could thus be concluded that this provision is not a competition rule or the reformulation of general Community practices for rules concerning access, but rather a regulatory measure aimed at controlling the power of the incumbent and paving the way towards interoperability rather than competition per se as intended by broad principles of EC law.

This reconstruction is confirmed by a number of exemptions to this rule, established by Art. 28(2):

- Along with payment systems designated under the Settlement Directive, which are generally exempted by the PSD,[51] the described principles do not apply to payment

[49] See recital (16). In this recital, it is also affirmed that differences in price conditions should only be allowed when these are motivated by differences in costs, induced by the payment service providers. Among many, the recent Commission decision in the anti-trust case *Morgan Stanley Dean Witter/Visas International and Visa Europe* had indeed applied traditional standards to judge access barriers, permitting the defendant to list the objectives that in its belief would have justified the exclusion of the competitor (see the Commission Decision of 3 October 2007, COMP/37.860). This decision has been appealed by Visa (case T-461/07, action brought on 19 December 2007, OJ C51 of 23.2.2008, p. 49). The proceedings are pending.

[50] This reading seems confirmed by the answers of 22 May 2008 to Question No. 13.1, p. 10, and of 6 October 2008 to Question No. 116, p. 98.

[51] The answer of 22 May 2008 to Question No. 13.3 (p. 12) seems to misinterpret the question: the questioner asks what treatment to apply to a situation in which a card scheme employs a payments system exempted under Art. 28(2)(a) (a designated system) for the purpose of clearing and settlement, in the event that the exclusion of a PI from such a designated system would imply the impossibility of taking part in the card scheme (itself meant to be a payment system under Art. 28(1)). The Commission does not appear to recognise that in this example, there are two different systems and it simply applies the exemption of Art. 28(2)(a) to the entire scheme.

systems that entail one service provider or are composed of service providers belonging to the same group.

- Recital (17) clearly affirms that these providers merit exemption because, although in principle competing with payment systems, they more often act in a market niche not adequately covered by payment systems. The reason for the exemption is thus to favour coverage of insufficiently served sectors of the population or the economy, and to spur competition of smaller systems against more consolidated ones.[52]
- Indeed, recital (17) expressly states that "[n]evertheless, such systems should always be subject to Community and national competition rules which may require that access be granted to the schemes in order to maintain effective competition in payments markets".

Moreover,

- In its Communication of 31 January 2007 on competition in retail banking,[53] the Commission states that it has also monitored the regulatory (and self-regulatory) measures to address competition concerns (as opposed to intervention in private agreements). In this context, it stresses as solutions the expected pro-competitive effects of SEPA, the benefits of attempts to spur customer mobility (included in the PSD) and finally the need to generally control the prices set by banks for specific financial services.
- The very recent decision on MasterCard's interchange fees for credit cards[54] and the new formal proceedings on Visa's interchange fees for point of sale transactions[55] confirm that competition principles are commingled with consumer protection concerns. Indeed, in the MasterCard case, the alleged infringement would have also violated the PSD provisions on the transparency of charges, permitting the card company to artificially increase the costs of cards by merchants.[56]

4.3 Consistency between the PSD and Regulation EC No. 2560/2001 on charges

In connection with charges, the question of evident inconsistencies between the PSD and Regulation EC No. 2560/2001 likewise needs to be addressed, although this is more of an incidental nature to the general discourse on the overall framework of payment services according to the PSD and other relevant Community legislation. Directive 97/5/EC on cross-

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[52] This makes express reference to the fact that these would typically be three-party schemes, as opposed to four-party schemes covered by Art. 28(1). In addition, the recital clearly states that "in order to stimulate the competition that can be provided by such payment systems to established mainstream payment systems, it should in principle not be appropriate to grant third parties access to these payment systems".

[53] See European Commission, Communication on a Sector Inquiry under Article 17 of Regulation (EC) No. 1/2003 on retail banking, COM(2007) 33 final, European Commission, Brussels, 31 January 2007(a).

[54] See European Commission, "Antitrust: Commission prohibits MasterCard's intra-EEA Multilateral Interchange Fees", Press Release IP/07/1959, European Commission, Brussels, 19 December 2007(b) and "Antitrust: Commission prohibits MasterCard's intra-EEA Multilateral Interchange Fees – Frequently asked questions", Memo/07/590, European Commission, Brussels, 19 December 2007(c).

[55] See European Commission, "Antitrust: Commission initiates formal proceedings against Visa Europe Limited", Memo/08/170, European Commission, Brussels, 26 March 2008(d).

[56] See also the remarks of the Committee on Economic and Monetary Affairs of the European Parliament of 15 May 2008 (*Report on Competition: Sector Inquiry on Retail Banking (2007/2201(INI)*, A6-0185/2008, European Parliament, Rapporteur: Gianni Pittella).

border credit transfers,[57] which also contains a number of provisions on the transparency of conditions and information, is repealed by the PSD (Art. 93), but Regulation EC No. 2560/2001 on cross-border payments in euros is not.[58]

The latter was adopted to address the issue, even after the introduction of the euro, of cross-border euro payments continuing to cost considerably more than an equivalent domestic payment. For cross-border payments in euros under €50,000, the Regulation applies the principle of equal charges and obliges institutions to transparency requirements. Finally, it imposes a number of measures to facilitate cross-border transfers, such as communication of IBAN and BIC codes (Art. 5). The Regulation covers payment card transactions and withdrawals from cash machines (from 1 July 2002) and credit transfers (from 1 July 2003). It also covers cheques, but only to the extent of the principle of transparent charges.[59]

Independent of the adoption of the PSD, Regulation No. 2560/2001 presents a number of difficulties in its application. Notably, clarification was required of the notion of "corresponding payments", necessary to compare a cross-border transfer with the corresponding domestic one in order to apply equal charges, which was offered by the Commission in a note of March 2004.[60]

The major element of concern arises in comparison with the PSD, however: the Regulation contains definitions of "electronic payment instrument", "remote access payment instrument" and "electronic money instrument" that do not coincide with definitions in the PSD meant to cover the same factual situations. Consequently, this can generate inconsistencies and ambiguities. In addition, rules on charges for information as regulated by the PSD might overlap with the general principle of equal charges, including in terms of derogations for low-value payment instruments, set in the PSD at a lower level in than the Regulation.[61] In particular, PSD rules on amounts transferred and received (Arts. 52 and 67) can conflict with those contained in the Regulation, especially when insisting on the "share" method of allocating costs between payment service providers (Art. 52(2)).[62]

Moreover, the Regulation does not cover debit transfers, which are instead covered by the PSD. Finally, recital (13) of the Regulation urges member states to ensure that there are adequate and effective procedures for lodging complaints or appeals for settling any disputes between the originator and his/her institution or between the beneficiary and his/her institution. The PSD establishes in Art. 83 out-of-court redress procedures, which in the event of cross-border disputes should also ensure cooperation among relevant bodies. In light of this rule, and to the benefit of customers' protection, it would probably be advisable that a single procedure be put in place to cover all situations, including those contemplated by Regulation EC No. 2560/2001 (see Table 3).

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[57] See Directive 97/5/EC of 27 January 1997 on cross-border credit transfers, OJ L 43, 14.2.1997, p. 25.

[58] See Regulation (EC) No. 2560/2001 of the European Parliament and of the Council of 19 December 2001 on cross-border payments in euro, OJ L 344, 28.12.2001, p. 139.

[59] See recital (8).

[60] See the European Commission's Note on the practical aspects of the implementation of Art. 3 of Regulation 2560/2001 and the notion of "corresponding payments" for credit transfers, MARKT/F-4/CP/lds 3713, European Commission, Brussels, 10 March 2004. This note was also needed to avoid the risk of inconsistency with Directive 97/5/EC.

[61] See Art. 34 of the PSD.

[62] The opportunity for making the 'share' option compulsory also under the Regulation had already been addressed by the Commission in the previously mentioned explanatory note on corresponding payments. This article has been the subject of a large number of questions in which the Commission has been asked to explain the consequences of charges wrongfully imposed.

Table 3. Inconsistencies between the PSD and Regulation EC No. 2560/2001

Payment Services Directive	**Regulation EC No. 2560/2001**
Applies to both domestic and cross-border transfers	Only applies to cross-border transfers
There are no thresholds, yet derogations exist for transactions of small amounts (less than the Regulation threshold)	Applies only to transfers under €50,000
Covers debit transfers as well	Different definitions (in comparison to the PSD) for - e-money instrument - e-payment instrument - remote access payment instruments
Out-of-court redress procedures	

Source: Author's compilation.

Since the differences in approach between the two texts are evident and a comprehensive and consistent regulation of payment transactions within the Community could be jeopardised by the maintenance of two texts, consideration should be given to whether Regulation EC No. 2560/2001 would not be better reflected within the corpus of provisions of the PSD.

As the two texts stand now, inconsistencies are unavoidable, given that on the one side the PSD is subject to implementation rules by the member states, and on the other the provisions of Regulation EC No. 2560/2001 have a direct effect on domestic legal orders. Indeed, to resolve the described issues and inconsistencies, on 13 October 2008 the Commission issued a proposal for a new regulation on cross-border payments.[63] This text contains new definitions to align them with those contained in the PSD, extends its scope to debit transfers and opts for the appointment of a competent authority for out-of-court redress procedures. The new proposal is a clear amelioration in terms of the alignment of rules, although the maintenance of two separate texts, one being a directive and one being a regulation, does not guarantee full consistency, especially (as previously noted) because of the wide discretion left to member states.[64]

This point leads to the final element to consider, which is impact of the high number of derogations available to member states on the complexity of the PSD and the overall framework of payment services within the Community.

5. Member states' derogation powers

Art. 86 of the PSD calls for full harmonisation. In this context, however, "full harmonisation" does not have the original meaning it had when Community legislation was requested to cover all aspects of law on any given topic. In this context, it is the opposite of the principle of "minimal harmonisation" introduced with the insertion of the principle of subsidiarity in the Community Treaty.

[63] See European Commission, *Proposal for a Regulation of the European Parliament and of the Council on cross-border payments in the Community*, COM(2008) 640 final, European Commission, Brussels, 13 October 2008(e). This proposal was issued following an assessment report that was concluded at the beginning of 2008 (11 February 2008).

[64] In line with this evaluation, see also the ECB Opinion of 6 January 2009 on this proposal (CON/2009/1) (retrieved from http://www.ecb.int/home/html/index.en.html).

In the PSD, full harmonisation seems to simply imply that member states shall apply their best efforts to homogeneously implement the Directive's provisions. And indeed, the same Art. 86 also states that derogations by service providers to the detriment of users are not permitted, but derogations by the service providers to the benefit of the users are allowed. The member states thus have a sort of 'good faith commitment' or an obligation to reach the common result of a legal framework leading to the accomplishment of a single payments area (which they had anyhow as a general obligation under Community principles).

By contrast, the PSD leaves enormous discretion to member states to depart from the common regime, creating a complex and multilayered system of derogations (see Table 4).

Table 4. Main derogation powers of member states

Institutional derogations
– Waiver under Art. 26
– Different methods for calculating ongoing capital
Derogations linked to behaviour
– Art. 52(3) on charges and competition principles
Derogations for national transactions
– Art. 72 permitting shorter execution times

Source: Author's compilation.

5.1 Institutional derogations

Art. 2(3) enables member states to waive some or even all of the provisions of the PSD for institutions listed in Art. 2 of Directive 2006/48/EC on the taking up and pursuit of the business of credit institutions (with the exception of central banks and post office giro institutions). The latter are also excluded from the application of that directive and are made up of institutions carrying out specific kinds of operations.

Of much wider relevance, however, is the waiver that member states may grant under Art. 26 to the application of part or all of the procedures and conditions set out in the PSD with regard to establishing a PI. As a result, a category of entities (including natural persons) may exist that following registration in national public registers can provide payment services without fully complying with the general requirements imposed by Community legislation. Along with being registered, these entities are subject to the control of the national authorities designated by member states to monitor all PIs in the country. Moreover, they do not benefit from the Community freedoms to provide services in the Union and therefore can only provide services within their home member state (Art. 26(3)). Finally, this special regime is limited to natural and legal persons executing payment transactions for an average low volume (€3 million per month in 12 consecutive months).

The fact that these entities can only provide services in the home member state surely reduces overall risks; yet, it is undeniable that categories of operators may exist that provide the service under different conditions and compete with other PIs while being subject to lower regulatory constraints. The post office giro institutions exemplify this situation, in that they are subject to national legislation without being prevented from providing their services cross-border. Of course, this diversification is justified by the great heterogeneity of circumstances that the PSD attempts to cover. Nevertheless, the general intent to somehow regulate any entity providing (some) payment services when balanced with the specificities of each leads to a fragmentation of regimes (especially if diversified by member states instead of by specific qualities or services). This seriously hinders the attainment of a level playing field.

Moreover, the authorities in the member states that are designated to monitor the activities of PIs are competent only with respect to the prudential requirements of PIs, whereas credit institutions will continue to be subject to the national authorities already charged with supervising them. These two authorities do not necessarily coincide and they are only requested to cooperate.

The authorities designated under Art. 20 of the PSD (unlike those controlling credit institutions) can select among the diverse methods for calculating own funds established by the PSD and choose among different instruments to ensure that the objectives of the PSD are met. These arrangements apply, for instance, to the safeguarding measures under Art. 9. The designated authorities will thus have at their disposal different tools from those of other authorities charged with analogous functions, possibly resulting in factual discrepancies in the consequences of control, which in turn confirm those already illustrated as a direct result of inconsistencies within the PSD or between the PSD and other relevant directives.

Finally, the PSD permits different regimes for transactions of different volumes. Whereas the Commission proposal of 2005 had fixed a general threshold, the Directive finally adopted eliminates any overall ceiling, but then provides assorted partial regimes that apply according to various thresholds. For example, under Art. 9(3) member states or competent authorities may also limit safeguarding requirements to funds of those payment service users whose funds individually exceed a threshold of €600.

5.2 Derogations linked to behaviour

In addition, the PSD contemplates a long list of derogations concerning the duties of service providers as well as those of payment service users. This long list cannot be exhaustively analysed, partly because its relevance should be tested against effective implementation of the Directive by member states. In the absence of implementing legislation, any detailed evaluation would risk being highly speculative and missing the broad picture.

For the most part, these derogations permit member states to adopt provisions that result in more favourable treatment of payment service users (Arts. 45(6), 47(3), 48(3) and 61(3), just to mention some). Still, some have broader effects, such as those mentioned in relation to competition principles: Art. 52(3) enables member states to forbid or limit the right to request charges, taking into account the need to encourage competition and promote the use of efficient payment instruments. This provision leaves a wide margin of discretion to member states and can thus lead to substantial differentiation in the treatment of similar behaviours.

5.3 Derogations for national transactions

Finally, the main objective of the PSD is to treat cross-border and national payments alike. Art. 72, however, allows member states to provide shorter maximum execution times than those provided for in the PSD in the case of national transactions. The approach to regulating the matter as articulated has the benefit of flexibility. Indeed, it combines Community harmonisation and the discretion of member states in various areas, *ex ante* general binding rules and *ex post* evaluation of concrete situations in light of the wide discretion given to designated national authorities, and finally diversification according to the size of the operator or volume of transactions.

Such flexibility would indeed be very positive, if strongly supported by a clear conceptualisation of the matter, driven by general guidance on the qualities of the service justifying different or just separate treatment. The enormous number of ambiguities and inconsistencies that the described scenario seems to propose to the reader leaves some doubt that the actual regulation is sufficiently equipped to cope with the modernity and complexity of this 'newly born' financial service.

6. Conclusions

This paper has aimed at offering a first assessment of the PSD, in order to highlight the main areas of concern, particularly in view of existing Community measures on payments and the *acquis communautaire* in some relevant areas, such as competition.

Yet, starting from the analysis of the PSD, this study has also attempted to offer some tentative suggestions to open a more general debate about the most appropriate way to regulate payment services, using as a benchmark concrete business models such as those referred to as 'm-banking' or 'm-payment'.

In this context, two main arguments emerge, as follows:

i) The qualification and regulation of payment services should primarily rely on the fact that the provider enters into possession of the customer's funds to execute the transaction as the element qualifying the (financial) essence of the service.

ii) An accurate differentiation should support regulation of the provision of the service, distinguishing between rules concerning business behaviour in relation to the customer (the service provider's obligations) and rules on regulation of the payment instruments (the legal treatment of the chain of transfers).

These lines of thought would help reorganise the matter under a common conceptualisation of each substantial element of the service. It is also hoped that they would help reduce inconsistencies and allow payment service providers to benefit from a level playing field, where any requirement is proportionate to the specific activity performed and balanced against relevant risks.

List of Abbreviations

EC	European Commission
ECB	European Central Bank
EPC	European Payments Council
ESCB	European System of Central Banks
MNO	Mobile network operator
PIs	Payment institutions
PSD	Payment Service Directive
PSP	Payment service provider
SEPA	Single Euro Payments Area

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