

## **EDiMA position on the proposed revision of the Directive on Payment Services**

EDiMA\* (the European Digital Media Association) assessed the European Commission's proposal for a review of the Payment Services Directive ("PSD"). We understand the need for the PSD review and fully support the Commission's objective of increased competition, efficiency and innovation in the field of payment services. However, EDiMA is concerned that the Commission proposal will not achieve these stated objectives as some of its provisions fail to provide sufficient legal clarity and may even distort the level-playing field. EDiMA has also analysed the amendments introduced by the European Parliament Rapporteur's draft Report (henceforth 'draft Report') and, despite some encouraging improvements on various provisions, we believe there is still need to fine-tune the language further to clarify the scope and effects of the revised PSD.

We would like to take this opportunity to raise issues that are, in our view, crucial to ensuring continuous innovation in the payment service market. In fact, EDiMA sees the PSD review as an opportunity to ensure that online platforms or merchants can provide secure and convenient customer experience - without unnecessary or onerous requirements - when they offer payment solutions allowing the sale and purchase of products on-line across the EU.

### **I. PSD scope review - general approach**

---

The Commission has decided to review the negative scope of PSD. However, several related provisions refer to specific technologies or solutions and do not take into consideration a risk-based approach. The draft Report did not introduce any amendment in this respect. We submit that clarification of the language is needed for the following reasons:

- Given the pace of technological evolution, any attempt to regulate specific types of service providers or limited types of payment services is bound to fail. The device, the channel and the payment form should no longer be relevant in deciding whether or not a service or a component of a service is a payment service that should be regulated under the PSD.
- A risk-based approach allows the companies to use their resources more efficiently by focusing on the payment transactions posing the highest risk. The regulatory requirements should therefore be commensurate with the risks posed by each specific type of activity.

#### **a. Commercial agent exemption**

In the current PSD revision proposal, the 'commercial agent' exemption still applies to commercial agents who act on behalf of either the payer or the payee. However, a recital has been included which indicates that this exemption is no longer available for online marketplaces (Art.3(b)). The draft Report did not introduce any amendment in this respect. For the sake of the continued development of e-commerce in Europe, this exemption should be better adapted to address online marketplaces to avoid unnecessarily burdensome requirements. Online marketplace platforms contribute significantly to the economic growth and employment in Europe by enabling third-party sellers – including SMEs and micro businesses – to grow their sales on the Internet and cross-border in the EU. It should also be noted that the inclusion of commercial agents in the scope of the PSD is not something that can be achieved by amending only Art.3(b). Any extension of the PSD scope would require a more thorough assessment of the existing legal framework.

EDiMA's suggested amendments:

1. The revision should focus primarily on clarifying the scope of the exemption, e.g. by drafting a definition that will identify (i) the type of commercial agents exempted and (ii) under which circumstances, or alternatively by specifying the legal relationship between the commercial agent and the payer/payee.
2. The role of the competent authority of the home Member State as sole authority to grant this exemption should also be clarified in order to ensure a consistent application across the EU.

**b. Limited network exemption**

The PSD proposal narrows down the definition of 'limited networks' (Art 3(k)), although the intention therefore is not clear. The draft Report provides a helpful clarification, specifying that the issuer and its affiliates belong to the same 'limited network'. This is effectively the most relevant factor in determining the 'limited network'. However, the wording of the proposed revision remains confusing due to a lengthy and not entirely clear definition of the exemption. For instance, the limitation set on the range of goods and services that can be provided to the instrument holder would entail a limitation of consumer choice and possibly hinder the business models of online merchants and/or platform providers offering a wide range of goods and services. By comparison, offline retailers could continue relying on this exemption for their gift certificates, even if they provided a selection as varied as online retailers.

For the benefit of customers and small merchants using e-commerce platforms, the services provided within 'limited networks', such as gift cards or loyalty cards, must continue to be eligible for this exemption. Gift or loyalty cards are offered by many online stores to customers that expect to be able to use them on all products offered via these platforms, be it products sold by the online stores themselves or by the third-party merchants using their marketplace platforms. If gift or loyalty cards issued and redeemed by e-commerce platform operators were subject to the licensing requirements of the PSD, platform operators may cease to offer these instruments due to the cost and complexity of offering a licensed service. This would hurt consumers, who would lose the ability to use these instruments, and small businesses that list and sell on these platforms.

EDiMA's suggested amendments:

1. We assume that a general principle of the sole competence of home member state is to apply in the case of granting the application of this exemption. However, we believe that a clarification to this end would be beneficial. Any approach not explicitly excluding the competence of other member states in approving the use of this exemption would undermine the harmonization objective of the PSD.
2. Finally, we would appreciate some guidance to understand the new definition proposed by the PSD, particularly regarding the concept of *"limited network of service providers under direct commercial agreement with a professional issuer"*.

**c. Digital exemption**

We welcome the fact that the revised PSD proposal retains this exemption which is crucial to a continued development of purchases and sales of digital contents made via digital devices such as mobile phones or e-book and tablet devices which customers increasingly rely on when shopping online. The elimination of the digital exemption could mean that the sale of digital content –

whether ringtones, wallpaper, apps, e-books, videos or MP3s – might require the use of a licensed entity if that digital content is made available by a digital platform (e.g. an application marketplace or store) which is not justifiable considering the minor financial amount of these transactions and the low risk associated to these purchases.

However, EDiMA is concerned about the transformation of the digital exemption to a ‘telecom’ exemption (Art. 3(l)) which disregards the need for a technology-neutral approach as well as the fact that telecom operators and other providers use the same business model or technology when reselling third party digital content. The exemption should apply regardless of whether digital goods are sold directly by a digital platform or by the digital content provider through the platform. The consumer bears no risk (delivery is immediate) and the content provider bears the same risk of collection from the digital platform or from a telecom operator. Unfortunately, the draft Report did not introduce any amendment in this respect, apart from a deletion of a related Recital 13 the rationale of which is unclear.

EDiMA’s suggested amendments:

1. The exemption should be revised so as to allow any digital content provider to sell digital content to customers. This would ensure a level-playing field, while also fostering the convenience and growth of purchases of digital goods.
2. Finally, while we do not oppose the idea of thresholds, we believe that these must be based on a sound impact analysis which should determine a value where an associated risk would justify that a purchase of digital content be processed by a licensed entity.

## **II. Other issues**

---

### **Strong authentication and security provisions**

The revised PSD proposal introduced a new Chapter 5 in Title IV addressing the operational and security authentication. The draft Report attempts to align these security requirements to the existing legal framework provided by the SecureRePay Forum Recommendations for the Security of Internet Payments (the “ECB Recommendations”).

EDiMA sees the amendment introduced by the draft Report as an improvement, as long as it aims at ensuring consistency and a closer tie between the PSD and the ECB Recommendations. However, we strongly advise against overregulation on security. The current approach (of both the PSD proposal and the Draft Report) risks causing confusion, especially for smaller players, as there are several overlapping requirements. Also, given the different transposition timings, there is a serious risk of security requirement duplication and inconsistent transposition: by the time the PSD2 is transposed, PSPs will, most likely, already be compliant with the ECB Recommendations as transposed by the relevant Home State’s Authorities.

EDiMA also welcomes the fact that the draft Report explicitly acknowledges that PSPs will have to deploy strong authentication proportionately to different business models. The application of a standard without taking a risk-based approach would eventually disrupt the customer experience without improving the security of online transactions. Requiring the use of strong authentication for all internet transactions is unwarranted, especially where merchants and payment service providers have heavily invested in and adopted equally or more effective techniques to limit fraud and protect

their customers, including proprietary software. Moreover, this approach correctly reflects the ECB Recommendations that provide for technologically neutral, non-prescriptive authentication and for the adoption of measures based on the actual risk presented by each merchant and transaction.

EDiMA supports the attempt of the draft Report to establish a close link between the security chapter of the PSD to the ECB Recommendations, however we believe there still needs to be closer alignment between the two sets of rules.

EDiMA's suggested amendment:

1. Inclusion of a security regulation into the PSD is not necessarily the best approach as it bears the risk of rules duplication and overregulation on a very sensitive matter. To avoid this we suggest a closer alignment with the ECB Recommendations: incorporating the ECB Recommendations into the PSD in a more legally robust way would help.
2. The PSD should refer to the ECB Recommendations for the definition of "strong authentication" of Art. 4. The current language - as amended by the draft Report - replicates word-by-word the ECB Recommendations definition. Rather than copying it into the PSD we suggest to simply cross refer to the *"strong customer authentication definition set forth by the SecuRePay Recommendations for the Security of Internet Payments, as may be amended from time to time"*. The unwanted effect of copying the definition into the PSD is that it will crystallise a concept that will need to evolve along with technological developments (as acknowledge by the SecuRePay Forum, which intends reviewing the Recommendations from time to time -- see page 3 of the SecuRePay Recommendations).

**The role of the EBA**

The European Commission's proposal aims to entrust the European Banking Authority (EBA) with the development of guidelines on the state of the art of customer authentication and any exemption to the use of strong authentication. The draft Report luckily clarifies that the EBA needs to adequately reflect the ECB Recommendations.

Furthermore, Article 86 of the PSD suggests the EBA in conjunction with the ECB will develop guidelines on the establishment of security measures. The draft Report, while wisely removing most of the references to the draft Network Information and Security Directive (which is currently in the process of being adopted) maintains the EBA's central role on the operation security matters. The enhanced role for the EBA triggers transparency concerns and raises substantial risk of duplication of security rules.

EDiMA's suggested amendments:

1. In view of the prominent role to be acquired by the EBA, it is crucial to ensure transparency of the working methods of EBA. Timelines for action, structure and resources of the EBA should be further clarified. In particular, it should be stipulated that the EBA must adequately involve relevant stakeholders in its working sessions, including Member States' authorities and industry representatives, or that these are - at the very least – appropriately consulted on the EBA proposals prior to their submission to the Commission.
2. Likewise, a consultation process must be set forth prior to the adoption by the Commission of the regulatory standards elaborated by the EBA as well as prior to adoption of the Commission delegated acts.

3. The EBA guidelines on the state of the art of customer authentication should not introduce additional security requirements for PSPs but rather provide guidance on the “best practices” of customer authentication. As mentioned, given the different transposition timings between the revised PSD and the ECB Recommendations, there is a serious risk of overregulation. The same applies for the exemptions to the use of strong authentication: the EBA should provide the Member States with simple guidance, while the ultimate decision on the application/exemption of strong authentication should remain with the relevant Home State Authority. This should be adequately clarified in the PSD to avoid any ambiguity as to the applicable legal requirements.

#### **'Paper vouchers'**

The exemption for paper-based vouchers in Article 3(g) appears anachronistic since vouchers today are often made available to consumers in plastic or other physical or electronic forms. We recommend that this point is amended to explicitly include all kinds of vouchers.

#### **Coverage of EU currencies other than the Euro**

The extension of the Directive to transactions involving EU currencies other than the Euro would be problematic: meeting the one-day execution time is challenging and unrealistic because non-euro currency transactions typically involve an additional step, the currency conversion. As far as non-euro currency transactions are concerned, there is a 2 day term that is necessary in general to process the currency conversion. It would therefore be extremely challenging and costly for the EU payment industry to change the current system to accommodate the one-day execution time for non-euro transactions.

Moreover, we note that it may be very difficult if not impossible for PSPs to fulfill the requirements for all articles in Title III because information would be required from countries outside the EU, over which EU legislation has no jurisdiction (e.g., articles 38(b), 41(c), 45(2)(e), 49, 51). We are concerned that the consequence of this would be to introduce an additional level of cost and complexity that may potentially reduce competition and impact innovation by forcing smaller players to stop offering certain payment services.

EDiMA is not supportive of the draft Report suggestion to extend also the application of Titles III and IV to one-leg-out transactions. Although the Rapporteur has correctly identified that it is not possible to apply Articles 72 and 74(1), there are a number of other articles in Title IV where it will not be possible for EU PSPs to apply the requirements, which may inadvertently put EU PSPs at a competitive disadvantage to non-EU PSPs.

#### **EDiMA's suggested amendments:**

We advise against including non-euro payments in the scope of the PSD: alternatively, we recommend extending the execution time of at least one additional day compared to euro transactions. Moreover, EDiMA suggests to carefully selecting which PSD provision should apply to one-leg-out transactions, as there are a number requirements that will not be possible for EU PSPs to apply, and which may inadvertently put them at a competitive disadvantage to non-EU PSPs.

#### **SEPA Governance**

Following the draft Report, the SEPA Governance review is now extensively mentioned into the PSD draft. The current text specifically refers to the SEPA Governance review in both the recitals (Recitals 15 and 74.a) and in Article 94.a. More in detail, pursuant to the draft Report the PSD now includes: (i) the reference to the European Retail Payments Board (ERPB) as successor of the SEPA Council; (ii) clarification on the ECB and Commission roles in setting up the ERPB; (iii) extension of the representation within the ERPB to all stakeholders, in particular *“payment service providers and users”*; (iv) mention of the need to ensure that the SEPA governance is reinforced to *“empower all stakeholders to take a more active role in the conception and realization of retail payments policy”*.

EDiMA welcomes the inclusion of the SEPA Governance review into the PSD. However, we also note that there is currently no clarification on the future role and composition of the European Payment Council (EPC), currently the scheme owner for the SEPA Direct Debit and Credit Transfer Rulebooks. According to the latest ECB proposal<sup>1</sup>, the ERPB will consist of 7 representatives of the supply side and 7 representatives of the demand side. On the supply side there will be: (i) 4 representatives of the banking community, (ii) 2 representatives of Payment Institutions, (iii) 1 representative of e-Money Institutions and (iv) the EPC, representing the banking sector only. The EPC is an independent organization and the ERPB has no formal oversight of the EPC. Therefore the open question is whether - to allow a balanced representation of all payment providers - the EPC will eventually open up and include also non-banking payment providers' members.

#### EDiMA's suggested amendments:

In view of the relevance of the SEPA project to sustain the development of an integrated, competitive and innovative market for retail payments in the EU, the PSD should clarify composition and mandate of the new SEPA governing body. More in details, EDiMA considers that – to *“empower all stakeholders to take a more active role in the conception and realization of retail payments policy”*<sup>2</sup> - the PSD needs to ensure a balanced representation within the ERPB, either opening up the EPC to non-banking PSPs or including an additional non-bank representative on the supply side. This would enhance legal certainty and finally address the expectations of the EU payment stakeholders that are currently not represented in the SEPA Council.

#### Timeframe of the changes to the Framework Agreement

Based on five years of experience with the original PSD, the requirement for a 2-month prior notice of changes to the Framework Agreements appears overly restrictive. This period does not allow PSPs sufficient flexibility for introducing timely and innovative changes to their systems which would be for the benefit and convenience of consumers. Our experience shows that 1 month would provide a sufficient timeframe for a notice to be given to payment service users and, in a worst case, for them to make arrangements to move their account/payment services to another PSP.

#### Credit Card Fees

According to the newly proposed article 55(4) of the PSD payees will no longer be able to onward charge the transaction fee for credit card payments if these fees are regulated by the draft Regulation on Multilateral Interchange fees ('MIF Regulation'). EDiMA believes that intermediaries should remain free to allow customers to choose their preferred payment instrument based on the

---

<sup>1</sup> The ECB proposal on the ERPB dates 19 December 2013, and can be found on the following link : [http://www.ecb.europa.eu/paym/sepa/pdf/ERPB\\_mandate.pdf?64325c4d1638ad275aa64b1a8d1e23e6](http://www.ecb.europa.eu/paym/sepa/pdf/ERPB_mandate.pdf?64325c4d1638ad275aa64b1a8d1e23e6)

<sup>2</sup> Art. 94.a of the draft Report.



cost associated. The Consumer Rights Directive already limits this charge to actual costs borne by the payee for the use of the specific payment instrument.

The following should be taken into consideration:

- The draft MIF Regulation proposes to limit the interchange fees to 0.2% of the transaction for debit card and 0.3% for credit card payments. This cap will only apply to cross-border transactions in the first two years after adoption before also limiting national transactions. Consequently, the transaction fees are still not reduced to zero, while the new PSD proposal would not allow merchants to onward charge these transaction costs to the consumer within the limits of the Consumer Rights Directive (i.e. the actual cost borne), thus making these costs “captive” on the intermediary.
- For intermediaries facilitating a transaction between a customer and supplier (for example in the travel sector), it is common practice that the customer has the choice of payment instrument, paying an additional transaction cost on the basis of the actual cost borne. If the PSD prohibited the recovery of the transaction cost for the regulated credit cards, this would likely lead to an increase in booking costs per transaction, resulting in a higher base cost for all consumers and reducing consumer choice. Moreover, it would create additional cost for consumers if transaction costs were recovered through an overall booking fee where corporate credit cards or unregulated credit cards not allowing for the recovery of the transaction costs are used.
- By way of example, in some EU countries, the regulator gets fees from each transaction (like MIFs). This creates costs on the PSP side, thus if “no surcharges” are possible after reduction of MIFs, then an addition should be made to include “after reduction of regulator fees”. This is of particular importance as regulator fees vary greatly between one Member State and another. In Poland, citizens can use the payment service PayU to pay their speeding fines to the police. If the police were to be charged for this service, PayU would need to enter into procurement procedures for each and every local police authority concerned. Instead, PayU prefers to levy a surcharge on the citizen in a highly transparent manner.
- Given the importance of growing the Digital Internal Market in the EU, it is important to assure a harmonised approach across member states on this point by not amending the proposal in a way that would allow Member States to introduce different rules on credit card transaction charges across the internal market.

EDiMA’s suggested amendments:

In light of the negative effects for merchant intermediaries and consumers as described above, article 55(4) should be deleted and article 55(3) should remain as proposed by the Commission.

---

\* EDiMA is an alliance of new media and Internet companies whose members include Amazon EU, Apple, eBay, Expedia, Google, Microsoft, MIH Group (along with Polish Allegro and Gadu Gadu), Nokia, Yahoo! Europe, Orange, and others. EDiMA’s members provide Internet and new media platforms offering European consumers a wide range of online services, including E-content, media, E-commerce, communications and information/search services. EDiMA represents the interests of the new media and Internet sectors in Europe in policy-making.