

PSD2 Legislative Tracker

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The Simmons & Simmons PSD2 Legislative Tracker

This Legislative Tracker provides you with an update on the recast Payment Services Directive (PSD2), setting out:

- a high level summary of the main aims of the Directive
- a table of the key dates in the process of agreeing the Level 1 text (with links to the relevant documents) and
- an annex setting out the specific Level 2 / Level 3 measures the EBA must develop, the timing of the EBA's work (where known) and which EBA document (discussion paper, consultation paper or Final Report) deals with each measure.

Background

The payment services industry has undergone a revolutionary change over the past decade fuelled, in large part, by the advent of online shopping and the increasing trend for consumers to pay for items on mobile devices. The emergence of financial technology ("FinTech") companies has challenged the traditional forms of payment, offering cheaper and easy to use services. These rapid changes have required constant monitoring from a regulatory perspective.

The Payment Services Directive (PSD) came into force in 2007 and was implemented in the UK through the *Payment Services Regulations (PSR)*. The overarching aim of the PSD was to establish a single market for payments in the European Union and to open the market to new entrants to provide greater choice for consumers. PSD also sought to codify the rights and obligations of payment service providers (PSPs) and their users, thereby increasing the level of transparency and information provided to consumers.

In 2013, technological advances in the financial sector and, in particular, the payment services sphere, prompted the European Commission (the Commission) to review the PSD. As part of the review, the Commission concluded that new and previously unregulated PSPs should now fall within scope of the directive. The Commission also proposed amendments to other legislation to reduce regulatory arbitrage and legal uncertainty – these included the Second Electronic Money Directive, the Capital Requirements Directive and the Distance Marketing of Consumer Financial Services Directive.

On 12 January 2016, PSD2 came into force, repealing PSD and amending the three directives listed above. Member States had until 13 January 2018 to transpose PSD2 into national law.

Summary

PSD2 makes significant changes to the regulatory regime established by PSD and is intended in particular to:

- establish increased certainty and efficiency within the European payments market;
- increase the level of consumer protection through security measures, including the advent of “strong consumer authentication” and secure communication, designed to limited abuses and fraudulent activity;
- encourage new entrants to the European payment services market – for example FinTechs – and bring previously unregulated PSPs within the regime;
- broaden the geographical scope and currencies covered by the PSD to include:
 - non-EEA currency payments between EEA-domiciled PSPs, and
 - ‘one-leg’ transactions (where one of the PSPs is located outside the EEA), in any currency;
- introduce two new payment services:
 - **payment initiation services**, offering more innovative and cheaper means to purchase goods and services from the internet using a credit or debit card; and
 - **account information services**, collecting and storing all information regarding a customer and allowing this information to be accessed online.
- facilitate the online payment initiation and account information services, licence and/or registered third party payment service providers (TPPs).
- allow TPPs greater access to payment initiation and account information services. PSPs will have to make certain customer information available to TPPs who are acting for payers, and to facilitate payments transmitted through payment initiation services in a non-discriminatory fashion;
- narrow the exclusions under PSD, such as that for limited networks, to ensure consistency throughout member states;
- bring payments initiated through telecom operators within the scope of PSD2. The existing exclusion will in future only cover low value payments for digital content, such as music, games and ringtones; and
- update requirements in relation to operational risk and security measures.

Member States had until 13 January 2018 to transpose the legislation into their national law.

PSD remained in force pending the implementation of PSD2 – the Commission, in its Frequently Asked Questions confirmed that, in the interim, Member States should interpret PSD in line with PSD2.

PSD2 and Multilateral Interchange Fees (“MIF”)

The *Regulation on interchange fees for card-based payment transactions* (also known as the “MIF Regulation”) was published in the Official Journal of the EU on 19 May 2015.

The MIF Regulation seeks to make card payment fees or ‘interchange’ fees which are charged by banks to process a customer’s transaction ‘clear and capped’.

Many of the aims and objectives of PSD2 and the MIF Regulation are aligned, such as reducing the costs of payments, increasing the number of payment services providers and improving security measures to better protect customer information.



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Where are we in the process?

Table 1: Key stages in development of Level 1 text

Level 1 Text	Date
<i>Commission proposal</i>	11 March 2014
<i>European Parliament adopted amendments to the proposal</i>	03 April 2014
<i>Council General approach</i>	08 December 2014
<i>Political Agreement</i>	05 May 2015
<i>European Parliament adoption</i>	08 October 2015
<i>European Council adoption</i>	16 November 2015
<i>Publication in OJ</i>	23 December 2015
Entry into force	12 January 2016
Application Date	13 January 2018

Table 2: Development of Level 2 / Level 3 measures

EBA *DP 2015/03* – Discussion Paper on future RTS on strong customer authentication and secure communication under PSD2

Covers	Published	Closed	Submission to Commission
Strong customer authentication and exemptions to its application, the protection of the personalised security credentials of the payment service users; the requirements for common and secure open standards of communication; and possible synergies with e-IDAs Regulation on electronic identities (Article 97 and 98(1))	08 December 2015	08 February 2016	N/A This work was continued in EBA's CP 2016/11 (see below)

EBA *CP 2015/25* - Consultation Paper on draft regulatory technical standards on the framework for cooperation and exchange of information between competent authorities for passport notifications under PSD2

Covers	Published	Closed	Submission to Commission
The method, means and details of cross-border cooperation between competent authorities on passport notifications of payment institutions, including the scope of information to be submitted, a common terminology and standard templates. (Article 28(5))	11 December 2015	11 March 2016	The EBA submitted a <i>Final Report</i> on draft RTS to the Commission on 14 December 2016. <i>Commission Delegated Regulation</i> was published in the OJ on 11 November 2017.

EBA *CP 2016/11* – Consultation Paper on RTS specifying the requirements on strong customer authentication and common and secure communication under PSD2

<u>Covers</u>	<u>Published</u>	<u>Closed</u>	<u>Submission to Commission</u>
Requirements related to the protection of the personalised security credentials, common and secure open standards of communication. (Article 97 and 98(1))	12 August 2016	12 October 2016	<p>The EBA submitted a <i>Final Report</i> on draft RTS to the Commission on 23 February 2017.</p> <p>By <i>letter</i> dated 24 May 2017, the Commission indicated its intention to amend the draft RTS.</p> <p>The EBA published an <i>Opinion</i> on the Commission’s decision on 29 June 2017.</p> <p>The European Commission published a <i>draft Commission Delegated Regulation and Annex</i> on 27 November 2017.</p> <p><i>Commission Delegated Regulation</i> was published in the OJ on 13 March 2018.</p>

EBA *CP 2016/12* – Consultation Paper on draft guidelines on the criteria on how to stipulate the minimum monetary amount of the professional indemnity insurance or other comparable guarantee under Article 5(4) of Directive (EU) 2015/2366

<u>Covers</u>	<u>Published</u>	<u>Closed</u>	<u>Submission to Commission</u>
Use of formula for the calculation of the minimum monetary amount of the PII or comparable guarantee; details on indicators for the criteria set out in the PSD2, and the calculation method proposed for some of the indicators (Article 5(4))	22 September 2016 ¹	30 November 2016	N/A

¹ *Amended version* published on 19 October 2016 to reflect the corrigendum on page 20.

EBA **CP 2016/18** – Consultation Paper on draft guidelines on the information to be provided for the authorisation as payment institutions and e-money institutions and for the registration as account information service providers

Covers	Published	Closed	Submission to Commission
The type of information applicants are required to submit in respect of the applicant's programme of operations; its business plan; evidence that the payment institution holds initial capital; the measures taken for safeguarding payment service users' funds; the applicant's governance arrangements and internal control mechanisms; and the procedure in place to monitor, handle and follow up a security incident and security related customer complaints. (Article 5(5))	03 November 2016	03 February 2017	The EBA published a <i>Final Report</i> containing final draft guidelines on 11 July 2017

EBA **CP 2016/23** – Consultation Paper on draft guidelines on major incidents reporting under the Payment Services Directive 2

Covers	Published	Closed	Submission to Commission
The criteria for classifying operational or security incidents as major; the template to be used by payment service providers when notifying them to the CAs; and the indicators CAs need to use when assessing the relevance of such incidents. (Article 96(3))	07 December 2016	07 March 2017	The EBA published a <i>Final Report</i> containing final draft guidelines on 27 July 2017.

EBA **CP 2017/01** – Consultation Paper on draft guidelines on procedures for complaints of alleged infringements of the Payment Services Directive 2

Covers	Published	Closed	Submission to Commission
The requirements for the channels to be used by complainants to file their complaints, the information that CAs should request from complainants when complaints are submitted to them and the information CAs should include in their responses to complaints. (Article 100(6))	16 February 2017	16 May 2017	The EBA published a <i>Final Report</i> containing final draft guidelines on 13 October 2017.

EBA **CP 2017/04** – Consultation Paper on draft Guidelines on the security measures for operational and security risks of payment services under PSD2

Covers	Published	Closes	Submission to Commission
The criteria relating to the monitoring, detection and reporting of security incidents and risks (Article 95(3))	05 May 2017	07 August 2017	The EBA published a <i>Final Report</i> containing final draft guidelines on 12 December 2017 .

EBA **CP 2017/09** – Consultation Paper on draft RTS on the appointment and functions of central contact points

Covers	Published	Closed	Submission to Commission
The criteria for determining the circumstances in which the appointment of a central contact point is appropriate and the functions of those central contact points (Article 29(4))	29 June 2017	28 September 2017	The EBA published a <i>Final Report</i> containing final draft regulatory technical standards on 11 December 2017 .

EBA **CP 2017/12** – Consultation Paper on draft RTS on development, operation and maintenance of the electronic central register and on access to the information contained therein, under Article 15(4) and draft ITS on the details and structure of the information entered by competent authorities in their public registers and notified to the EBA under Article 15(5)

Covers	Published	Closes	Submission to Commission
Draft RTS on the requirements regarding access to the EBA register by its users; provision of information by CAs to the EBA and its validation; the safety, availability and performance of the EBA Register; the EBA's responsibilities in relation to the register; and searches of the EBA Register and the display of search results. (Article 15(4))	24 July 2017	18 September 2017	The EBA published a <i>Final Report</i> containing final draft regulatory technical standards on 13 December 2017 .
Draft ITS on information about specified categories of service provider; and the format and precise information to be inserted by CAs to the EBA register for each category of service provider. (Article 15(5))			The EBA published a <i>Final Report</i> containing final draft implementing technical standards on 13 December 2017 .

EBA *CP 2017/13* – Consultation Paper on draft guidelines on fraud reporting requirements under Article 96(6) of PSD2

<u>Covers</u>	<u>Published</u>	<u>Closes</u>	<u>Submission to Commission</u>
Draft guidelines on the reporting of “fraudulent payment transactions”, the methodology for collating and reporting data, including data breakdown, reporting periods, frequency and reporting deadlines and requirements for competent authorities on data aggregation and data reporting frequency and deadlines applicable to the EBA and the ECB. (Article 96(6))	02 August 2017	03 November 2017	The EBA published a <i>Final Report</i> containing draft guidelines on 18 July 2018.

EBA *CP 2017/16* – Consultation Paper on draft Regulatory Technical Standards on cooperation between competent authorities in the home and host Member States in the supervision of payment institutions operating on a cross-border basis under Art. 29 (6) of PSD2

<u>Covers</u>	<u>Published</u>	<u>Closed</u>	<u>Submission to Commission</u>
Draft RTS specifying the method, means and details of cooperation in the supervision of payment institutions operating on a cross-border basis, including the scope and treatment of information to be exchanged and the means, details and frequency of any reporting requested by host CAs from payment institutions on the payment business activities carried out in their territories through agents or branches. (Article 29(6))	27 October 2017	05 January 2018	The EBA published a <i>Final Report</i> containing draft guidelines on 31 July 2018.

ANNEX

1. Level 2 Measures

PSD2 contains a number of areas in which the Commission and/or the EBA are mandated to develop Level 2 measures.

Looking at each of these in turn:

- A. Applications for Authorisation (**Article 5**)
- B. EBA Register (**Article 15**)
- C. Application to exercise the right of establishment and freedom to provide services (**Article 28**)
- D. Supervision of payment institutions exercising the right of establishment and freedom to provide services (**Article 29**)
- E. Management of operation and security risks (**Article 95**)
- F. Customer authentication and secure communication (**Article 98**)
- G. Delegated Acts (**Article 104**)

A. Applications for authorisation (Article 5)

(i) What does Level 1 say?

Article 5 of PSD 2 states that:

1. For authorisation as a payment institution, an application shall be submitted to the competent authorities of the home Member State, together with the following:
 - (a) a programme of operations setting out in particular the type of payment services envisaged;
 - (b) a business plan including a forecast budget calculation for the first 3 financial years which demonstrates that the applicant is able to employ the appropriate and proportionate systems, resources and procedures to operate soundly;
 - (c) that the payment institution holds initial capital as provided for in Article 7;
 - (d) a description of the applicant's governance arrangements and internal control mechanisms, including administrative, risk management and accounting procedures, which demonstrates that those governance arrangements, control mechanisms and procedures are proportionate, appropriate, sound and adequate;
 - [...]
 - (g) a description of the process in place to file, monitor, track and restrict access to sensitive payment data;
 - (h) a description of business continuity arrangements including a clear identification of the critical operations, effective contingency plans and a procedure to regularly test and review the adequacy and efficiency of such plans;
 - (i) a description of the principles and definitions applied for the collection of statistical data on performance, transactions and fraud;

- (j) a security policy document, including a detailed risk assessment in relation to its payment services and a description of security control and mitigation measures taken to adequately protect payment service users against the risks identified, including fraud and illegal use of sensitive and personal data;

[...]

2. Member States shall require undertakings that apply for authorisation to provide payment services as referred to in point (7) of Annex I, as a condition of their authorisation, to hold a professional indemnity insurance, covering the territories in which they offer services, or some other comparable guarantee against liability to ensure that they can cover their liabilities as specified in Articles 73, 89, 90 and 92.
3. Member States shall require undertakings that apply for registration to provide payment services as referred to in point (8) of Annex I, as a condition of their registration, to hold a professional indemnity insurance covering the territories in which they offer services, or some other comparable guarantee against their liability vis-à-vis the account servicing payment service provider or the payment service user resulting from non-authorised or fraudulent access to or non-authorised or fraudulent use of payment account information.

(ii) What is the EBA's mandate?

Article 5(6) of PSD 2 empowers the Commission to adopt regulatory technical standards (RTS) specifying the information to be provided to the competent authorities in the application for the authorisation of payment institutions, including the requirements laid down in Article 5(1) (a), (b), (c), (e) and (g) to (j).

(iii) Timing

The Level 1 text specifies no time limit by which the EBA must submit draft RTS to the Commission under **Article 5(6)**.

The EBA is yet to consult on these measures.

B. EBA register (Article 15)

(i) What does Level 1 say?

Article 15 of PSD 2 states that:

1. EBA shall develop, operate and maintain an electronic, central register that contains the information as notified by the competent authorities in accordance with paragraph 2. EBA shall be responsible for the accurate presentation of that information.

EBA shall make the register publicly available on its website, and shall allow for easy access to and easy search for the information listed, free of charge.

2. Competent authorities shall, without delay, notify EBA of the information entered in their public registers as referred to in Article 14 in a language customary in the field of finance.
3. Competent authorities shall be responsible for the accuracy of the information specified in paragraph 2 and for keeping that information up-to-date.

(ii) What is the EBA's mandate?

Article 15(4) of PSD 2 requires the EBA to develop draft regulatory technical standards (RTS) setting technical requirements on development, operation and maintenance of the electronic central register referred to in **Article 15(1)** and on access to the information contained therein. The technical requirements shall ensure that modification of the information is only possible by the competent authority and the EBA.

Article 15(5) of PSD 2 requires the EBA to develop draft implementing technical standards (ITS) on the details and structure of the information to be notified pursuant to Article 15(1), including the common format and model in which this information is to be provided.

(iii) Timing

The EBA must submit **draft RTS** required under **Article 15(4)** to the Commission by **13 January 2018**.

The EBA was required to submit the **draft ITS** required under **Article 15(5)** to the Commission by **13 July 2017**.

The EBA consulted on these measures under EBA **CP 2017/12**, published on **24 July 2017**.

The EBA published a **Final Report** containing both final draft regulatory and implementing technical standards on **13 December 2017**.

C. Application to exercise the right of establishment and freedom to provide services (Article 28)

(i) What does Level 1 say?

Article 28 of PSD 2 states that:

1. Any authorised payment institution wishing to provide payment services for the first time in a Member State other than its home Member State, in the exercise of the right of establishment or the freedom to provide services, shall communicate the following information to the competent authorities in its home Member State:
 - (a) the name, the address and, where applicable, the authorisation number of the payment institution;
 - (b) the Member State(s) in which it intends to operate;
 - (c) the payment service(s) to be provided;
 - (d) where the payment institution intends to make use of an agent, the information referred to in Article 19(1);
 - (e) where the payment institution intends to make use of a branch, the information referred to in points (b) and (e) of Article 5(1) with regard to the payment service business in the host Member State, a description of the organisational structure of the branch and the identity of those responsible for the management of the branch.

Where the payment institution intends to outsource operational functions of payment services to other entities in the host Member State, it shall inform the competent authorities of its home Member State accordingly.

(ii) What is the EBA's mandate?

Article 28(5) of PSD 2 requires the EBA to develop draft regulatory technical standards (RTS) specifying the framework for cooperation, and for the exchange of information, between competent authorities of the home and of the host Member State in accordance with **Article 28**. The draft RTS must specify the method, means and details of cooperation in the notification of payment institutions operating on a cross-border basis and, in particular, the scope and treatment of information to be submitted, including common terminology and standard notification templates to ensure a consistent and efficient notification process.

(iii) Timing

The EBA consulted on these measures under EBA **CP 2015/25**, published on **11 December 2015**.

The EBA submitted a **Final Report** on draft RTS required under **Article 28(5)** to the Commission on **14 December 2016**.

The Commission published a **draft Commission Delegated Regulation** and **Annex** on **23 June 2017**.

Commission Delegated Regulation (EU) 2017/2055 was published in the OJ on **11 November 2017**.

D. Supervision of payment institutions exercising the right of establishment and freedom to provide services (Article 29)

(i) What does Level 1 say?

Article 29 of PSD 2 states that:

1. In order to carry out the controls and take the necessary steps provided for in this Title and in the provisions of national law transposing Titles III and IV, in accordance with Article 100(4), in respect of the agent or branch of a payment institution located in the territory of another Member State, the competent authorities of the home Member State shall cooperate with the competent authorities of the host Member State.

By way of cooperation in accordance with the first subparagraph, the competent authorities of the home Member State shall notify the competent authorities of the host Member State where they intend to carry out an on-site inspection in the territory of the latter.

However, the competent authorities of the home Member State may delegate to the competent authorities of the host Member State the task of carrying out on-site inspections of the institution concerned.

2. The competent authorities of the host Member States may require that payment institutions having agents or branches within their territories shall report to them periodically on the activities carried out in their territories.

Such reports shall be required for information or statistical purposes and, as far as the agents and branches conduct the payment service business under the right of establishment, to monitor compliance with the provisions of national law transposing Titles III and IV. Such agents and

branches shall be subject to professional secrecy requirements at least equivalent to those referred to in Article 24.

[...]

4. Member States may require payment institutions operating on their territory through agents under the right of establishment, the head office of which is situated in another Member State, to appoint a central contact point in their territory to ensure adequate communication and information reporting on compliance with Titles III and IV, without prejudice to any provisions on anti-money laundering and countering terrorist financing provisions and to facilitate supervision by competent authorities of home Member State and host Member States, including by providing competent authorities with documents and information on request.

(ii) What is the EBA's mandate?

Article 29(5) of PSD 2 requires the EBA to develop draft regulatory technical standards (RTS) specifying the criteria to be applied when determining, in accordance with the principle of proportionality, the circumstances when the appointment of a central contact point is appropriate, and the functions of those contact points, pursuant to **Article 29(4)** taking into account:

- (a) the total volume and value of transactions carried out by the payment institution in host Member States;
- (b) the type of payment services provided; and
- (c) the total number of agents established in the host Member State.

Article 29(6) of PSD 2 requires the EBA to develop draft RTS specifying the framework for cooperation, and for the exchange of information between the competent authorities of the home Member State and of the host Member State.

(iii) Timing

The EBA was required to submit draft RTS required under **Article 29(5)** to the Commission by **13 January 2017**. The EBA consulted on these measures under **EBA CP/2017/09**, published on **29 June 2017**.

The EBA submitted **draft RTS** to the Commission on **11 December 2017**. If endorsed by the Commission, the draft RTS will be subject to scrutiny by the European Parliament and the Council, before being published in the Official Journal.

The RTS will enter into force on the twentieth day following publication in the *Official Journal of the European Union*.

The EBA was required to submit draft RTS required under **Article 29(6)** to the Commission by **13 January 2017**. The EBA consulted on these measures under **EBA CP/2017/16**, published on **27 October 2017**.

The EBA submitted **draft RTS** to the Commission on **31 July 2018**. If endorsed by the Commission, the draft RTS will be subject to scrutiny by the European Parliament and the Council, before being published in the Official Journal.

The RTS will enter into force on the twentieth day following publication in the *Official Journal of the European Union*.

E. Management of operational and security risks (Article 95)

(i) What does Level 1 say?

Article 95 of PSD 2 states that:

1. Member States shall ensure that payment service providers establish a framework with appropriate mitigation measures and control mechanisms to manage the operational and security risks, relating to the payment services they provide. As part of that framework, payment service providers shall establish and maintain effective incident management procedures, including for the detection and classification of major operational and security incidents.

(ii) What is the EBA's mandate?

Article 95(4) of PSD 2 requires the EBA, where requested to do so by the Commission, to develop draft regulatory technical standards (RTS) on the criteria and on the conditions for establishment, and monitoring, of the security measures referred to in Article 95(3) (See Section (ii), Level 3 Measures, B. Management of operational and security risks, below).

(iii) Timing

The Level 1 text specifies no time limit by which the EBA must develop the draft RTS required under Article 95(4).

F. Customer authentication and secure communication (Article 98)

(i) What does Level 1 say?

Article 97 of PSD 2 states that:

1. Member States shall ensure that a payment service provider applies strong customer authentication where the payer:
 - (a) accesses its payment account online;
 - (b) initiates an electronic payment transaction;
 - (c) carries out any action through a remote channel which may imply a risk of payment fraud or other abuses.
2. With regard to the initiation of electronic payment transactions as referred to in point (b) of paragraph 1, Member States shall ensure that, for electronic remote payment transactions, payment service providers apply strong customer authentication that includes elements which dynamically link the transaction to a specific amount and a specific payee.

3. With regard to paragraph 1, Member States shall ensure that payment service providers have in place adequate security measures to protect the confidentiality and integrity of payment service users' personalised security credentials.

Article 98 of PSD 2 states that:

3. The exemptions referred to in point (b) of paragraph 1 shall be based on the following criteria:
 - (a) the level of risk involved in the service provided;
 - (b) the amount, the recurrence of the transaction, or both;
 - (c) the payment channel used for the execution of the transaction.

(ii) What is the EBA's mandate?

Article 98(1) of PSD 2 requires the EBA to develop draft regulatory technical standards (RTS) addressed to payment service providers specifying:

- (a) the requirements of the strong customer authentication referred to in **Article 97(1) and (2)**;
- (b) the exemptions from the application of **Article 97(1), (2) and (3)**, based on the criteria established in **Article 98(3)**;
- (c) the requirements with which security measures have to comply, in accordance with **Article 97(3)** in order to protect the confidentiality and the integrity of the payment service users' personalised security credentials; and
- (d) the requirements for common and secure open standards of communication for the purpose of identification, authentication, notification, and information, as well as for the implementation of security measures, between account servicing payment service providers, payment initiation service providers, account information service providers, payers, payees and other payment service providers.

The EBA must develop the draft RTS referred to in **Article 98(1)** in order to:

- ensure an appropriate level of security for payment service users and payment service providers, through the adoption of effective and risk-based requirements;
- ensure the safety of payment service users' funds and personal data;
- secure and maintain fair competition among all payment service providers;
- ensure technology and business-model neutrality;
- allow for the development of user-friendly, accessible and innovative means of payment.

The exemptions referred to in **Article 98(1)** are to be based on the following criteria:

- the level of risk involved in the service provided;
- the amount, the recurrence of the transaction, or both;
- the payment channel used for the execution of the transaction.

(iii) Timing

The EBA consulted on these measures under:

- **EBA/DP/2015/03**, published on 08 December 2015 and
- **EBA/CP/2016/11**, published on 12 August 2016.

The EBA submitted its **Final Report** to the Commission on **23 February 2017**.

By *letter* dated 24 May 2017, the Commission indicated its intention to amend the EBA's draft RTS and published *revised draft RTS*.

The EBA published an *Opinion* on the Commission's decision to amend the draft RTS on **29 June 2017**.

The European Commission published a *draft Commission Delegated Regulation* and *Annex* on **27 November 2017**.

Commission Delegated Regulation (EU) 2018/389 was published in the OJ on **13 March 2018**.

G. Delegated Acts (Article 104)

(i) What does Level 1 say?

Article 32 of PSD2 states that

1. Member States may exempt or allow their competent authorities to exempt, natural or legal persons providing payment services as referred to in points (1) to (6) of Annex I from the application of all or part of the procedure and conditions set out in Sections 1, 2 and 3, with the exception of Articles 14, 15, 22, 24, 25 and 26, where:
 - (a) the monthly average of the preceding 12 months' total value of payment transactions executed by the person concerned, including any agent for which it assumes full responsibility, does not exceed a limit set by the Member State but that, in any event, amounts to no more than EUR 3 million. That requirement shall be assessed on the projected total amount of payment transactions in its business plan, unless an adjustment to that plan is required by the competent authorities; and
 - (b) none of the natural persons responsible for the management or operation of the business has been convicted of offences relating to money laundering or terrorist financing or other financial crimes.

Article 74 of PSD2 states that

1. By way of derogation from Article 73, the payer may be obliged to bear the losses relating to any unauthorised payment transactions, up to a maximum of EUR 50, resulting from the use of a lost or stolen payment instrument or from the misappropriation of a payment instrument.

The first subparagraph shall not apply if:

- (a) the loss, theft or misappropriation of a payment instrument was not detectable to the payer prior to a payment, except where the payer has acted fraudulently; or
- (b) the loss was caused by acts or lack of action of an employee, agent or branch of a payment service provider or of an entity to which its activities were outsourced.

The payer shall bear all of the losses relating to any unauthorised payment transactions if they were incurred by the payer acting fraudulently or failing to fulfil one or more of the obligations set out in Article 69 with intent or gross negligence. In such cases, the maximum amount referred to in the first subparagraph shall not apply.

Where the payer has neither acted fraudulently nor intentionally failed to fulfil its obligations under Article 69, Member States may reduce the liability referred to in this paragraph, taking into account, in particular, the nature of the personalised security credentials and the specific circumstances under which the payment instrument was lost, stolen or misappropriated.

(ii) What is the EBA's mandate?

Article 104 requires that the Commission adopt delegated acts concerning the updating of the amounts specified in **Article 32(1)** and **Article 74(1)** to take account of inflation.

(iii) Timing

The Level 1 text specifies no time limit by which the Commission must develop the delegated acts required under [Article 104](#).

2. Level 3 Measures

PSD2 contains a number of areas in which the EBA is mandated to develop Level 3 measures.

Looking at each of these in turn:

- (a) Applications for Authorisation ([Article 5\(4\)](#) and [Article 5\(5\)](#))
- (b) Management of operation and security risks ([Article 95\(3\)](#))
- (c) Incident reporting ([Article 96\(3\)](#))
- (d) Competent authorities ([Article 100\(6\)](#))

A. Applications for authorisation ([Article 5\(4\)](#) and [Article 5\(5\)](#))

(i) What does Level 1 say?

[Article 5](#) of PSD 2 states that:

1. For authorisation as a payment institution, an application shall be submitted to the competent authorities of the home Member State, together with the following:
 - (a) a programme of operations setting out in particular the type of payment services envisaged;
 - (b) a business plan including a forecast budget calculation for the first 3 financial years which demonstrates that the applicant is able to employ the appropriate and proportionate systems, resources and procedures to operate soundly;
 - (c) evidence that the payment institution holds initial capital as provided for in [Article 7](#);
 - (d) a description of the applicant's governance arrangements and internal control mechanisms, including administrative, risk management and accounting procedures, which demonstrates that those governance arrangements, control mechanisms and procedures are proportionate, appropriate, sound and adequate;
 - [...]
 - (g) a description of the process in place to file, monitor, track and restrict access to sensitive payment data;
 - (h) a description of business continuity arrangements including a clear identification of the critical operations, effective contingency plans and a procedure to regularly test and review the adequacy and efficiency of such plans;
 - (i) a description of the principles and definitions applied for the collection of statistical data on performance, transactions and fraud;
 - (j) a security policy document, including a detailed risk assessment in relation to its payment services and a description of security control and mitigation measures taken

to adequately protect payment service users against the risks identified, including fraud and illegal use of sensitive and personal data;

[...]

(ii) What is the EBA's mandate?

Article 5(4) of PSD 2 requires the EBA to develop guidelines on the criteria on how to stipulate the minimum monetary amount of the professional indemnity insurance or other comparable guarantee referred to in Articles 5(2) and (3), taking into account:

- (a) the risk profile of the undertaking;
- (b) whether the undertaking provides other payment services as referred to in Annex I or is engaged in other business;
- (c) the size of the activity:
 - (i) for undertakings that apply for authorisation to provide payment services as referred to in point (7) of Annex I, the value of the transactions initiated;
 - (ii) for undertakings that apply for registration to provide payment services as referred to in point (8) of Annex I, the number of clients that make use of the account information services;
- (d) the specific characteristics of comparable guarantees and the criteria for their implementation.

Article 5(5) of PSD 2 requires the EBA to develop guidelines concerning the information to be provided to the competent authorities in the application for the authorisation of payment institutions, including the requirements laid down in Article 5(1)(a), (b), (c), (e) and (g) to (j).

(iii) Timing

The EBA was required to issue guidelines under **Article 5(4)** by **13 January 2017**.

The EBA consulted on these measures under **EBA/CP/2016/12**, published on 22 September 2016.

The EBA published its **Final Report**, "On the criteria on how to stipulate the minimum monetary amount of the professional indemnity insurance or other comparable guarantee under Article 5(4) of [PSD2]" (EBA/GL/2017/08) on **07 July 2017**.

The final Guidelines were published in the official languages of the EU on **13 September 2017** and become effective on **13 January 2018**. National competent authorities have two months from publication (i.e., to **13 November 2017**) in which to inform the EBA whether or not they intend to comply with the Guidelines.

The EBA was required to issue guidelines under **Article 5(5)** by **13 January 2017**.

The EBA consulted on these measures under **EBA/CP/2016/18**, published on 03 November 2016.

The EBA published its **Final Report**, "On the information to be provided for the authorisation of payment institutions and e-money institutions and for the registration of account information service providers" (EBA/GL/2017/09) on **11 July 2017**, setting out final Guidelines

The Guidelines will apply from **13 January 2018**.

B. Management of operational and security risks (Article 95(3))

(i) What does Level 1 say?

Article 95 of PSD 2 states that:

1. Member States shall ensure that payment service providers establish a framework with appropriate mitigation measures and control mechanisms to manage the operational and security risks, relating to the payment services they provide. As part of that framework, payment service providers shall establish and maintain effective incident management procedures, including for the detection and classification of major operational and security incidents.

[...]

(ii) What is the EBA's mandate?

Article 95(3) of PSD 2 requires the EBA, in close cooperation with the ECB and after consulting all relevant stakeholders, to issue guidelines with regard to the establishment, implementation and monitoring of the security measures, including certification processes where relevant and to review the guidelines on a regular basis and in any event at least every 2 years.

(iii) Timing

The EBA was required to issue guidelines under Article 95(3) by 13 July 2017.

The EBA consulted on these measures under EBA/CP/2017/04, published on 05 May 2017.

The EBA published its *Final Report*, "Guidelines on the security measures for operational and security risks of payment services under Directive (EU) 2015/2366 (PSD2)" (EBA/GL/2017/17) on 12 December 2017, setting out final Guidelines.

The Guidelines will apply from 13 January 2018.

C. Incident reporting (Article 96(3))

(i) What does Level 1 say?

Article 96 of PSD 2 states that:

1. In the case of a major operational or security incident, payment service providers shall, without undue delay, notify the competent authority in the home Member State of the payment service provider.

Where the incident has or may have an impact on the financial interests of its payment service users, the payment service provider shall, without undue delay, inform its payment service users of the incident and of all measures that they can take to mitigate the adverse effects of the incident.

2. Upon receipt of the notification referred to in paragraph 1, the competent authority of the home Member State shall, without undue delay, provide the relevant details of the incident to EBA and to the ECB. That competent authority shall, after assessing the relevance of the incident to relevant authorities of that Member State, notify them accordingly.

EBA and the ECB shall, in cooperation with the competent authority of the home Member State, assess the relevance of the incident to other relevant Union and national authorities and shall notify them accordingly. The ECB shall notify the members of the European System of Central Banks on issues relevant to the payment system.

On the basis of that notification, the competent authorities shall, where appropriate, take all of the necessary measures to protect the immediate safety of the financial system.

[...]

(ii) What is the EBA's mandate?

Article 96(3) of PSD 2 requires the EBA to issue guidelines addressing each of the following:

- (a) payment service providers, on the classification of major incidents referred to in **Article 96(1)**, and on the content, the format, including standard notification templates, and the procedures for notifying such incidents;
- (b) competent authorities, on the criteria on how to assess the relevance of the incident and the details of the incident reports to be shared with other domestic authorities under **Article 96(2)**.

Article 96(4) of PSD 2 requires the EBA to issue the guidelines referred to in **Article 96(3)** on a regular basis and in any event at least every 2 years.

Article 96(5) of PSD 2 requires the EBA, whilst issuing and reviewing the guidelines referred to in **Article 96(3)**, to take into account standards and/or specifications developed and published by the European Union Agency for Network and Information Security for sectors pursuing activities other than payment service provision.

Article 96(6) of PSD2 requires Member States to ensure that payment service providers provide, at least on an annual basis, statistical data on fraud relating to different means of payment to their competent authorities and that competent authorities provide the EBA and European Central Bank with such data in an aggregated form.

(iii) Timing

The EBA was required to issue the guidelines required under **Article 96(3)** by **13 January 2018**.

The EBA consulted on these measures under **EBA/CP/2016/23**, published on **07 December 2016** and published its **Final Report**, "Guidelines on major incident reporting under Directive (EU) 2015/2366 (PSD2)" (EBA/GL/2017/10) on **27 July 2017**.

The EBA consulted on the measures under **Article 96(6)** by **EBA/CP/2017/13**, published on **02 August 2017** and published its **Final Report**, "Guidelines on fraud reporting under the Payment Services Directive 2 (PSD2)" (EBA/GL/2018/05) on **18 July 2018**.

D. Competent Authorities (Article 100(6))

(i) What does Level 1 say?

Article 100 of PSD 2 states that:

1. Member States shall designate competent authorities to ensure and monitor effective compliance with this Directive. Those competent authorities shall take all appropriate measures to ensure such compliance.

They shall be either:

- (a) competent authorities within the meaning of Article 4(2) of Regulation (EU) No 1093/2010; or
- (b) bodies recognised by national law or by public authorities expressly empowered for that purpose by national law.

They shall not be payment service providers, with the exception of national central banks.

(ii) What is the EBA's mandate?

Article 100(6) of PSD 2 requires the EBA to issue guidelines on the complaints procedures to be taken into consideration to ensure compliance with Article 100(1).

(iii) Timing

The EBA consulted on these matters under *EBA/CP/2017/01*, published on **16 February 2017** and published a *Final Report*, "Guidelines on procedures for complaints of alleged infringements of Directive (EU) 2015/2366" (EBA/GL/2017/13), setting out final guidelines on **13 October 2017**.

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