European Payment Institutions Federation aisbl

EPIF Position Paper on the PSD3 and PSR

On 28 June 2023, the European Commission adopted its new Payment Services Package, encompassing a revised Payment Services Directive (PSD3) and a new Payment Services Regulation (PSR). **EPIF very much welcomes these proposals, in particular the ambitious approach taken by the European Commission to move towards a Single Rulebook**. This is an important step to further deepen the EU's Single Market for payments and reduce divergences in national implementation that EPIF members have always supported.

This new Package brings many significant improvements to the current framework, levelling the playing field between the bank and non-bank payment sectors through a targeted amendment to the **Settlement Finality Directive (SFD),** allowing for **safeguarding** of accounts and reinforcing **de-risking** provisions. It also enhances the rules for **fraud prevention data sharing**. EPIF in particular welcomes the progress made in the European Commission's proposal on **Strong Customer Authentication (SCA).** Furthermore, the proposal makes important advancements on **Open Banking.**

Notwithstanding, several provisions still cause concern and introduce frictions in the payments space. This relates to the proposals to **merge the PSD2 and the e-money Directive (EMD2)**, the treatment of current **exemptions to the scope, SCA** and other provisions around **surcharging, liability, refund rights** and **transparency.**

EPIF stands ready to collaborate with the European Commission, European Parliament and Council to ensure a smooth process and guarantee a new payments framework which is balanced and fit-for-purpose.

Our more detailed views on the PSD3/PSR are set out below.

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The Payment Services Directive (PSD3)

EPIF has in particular four high-level comments on the proposed revised Directive:

Merger of the PSD and E-Money Directive

The new PSD3 is a big paradigm shift in the payments space, **merging the PSD2 and the existing EMD2.** Our membership includes both payments and e-money institutions. We understand the synergies between the two Directives. Nonetheless it is important to remember that the nature and function of e-money products have their own distinct characteristics. Against this background, we urge the European Commission, European Parliament and Council **not to overhaul the definition of e-money and its specificities**.

Our members have three very concrete concerns rising from this merger.

Firstly, the draft Directive is proposing a re-authorization process for payment and e-money institutions with the repeal of the PSD2 and the EMD2. It is essential to ensure that the **re-authorization process remains as smooth as possible** for both payment service providers (PSPs) and supervisors. We welcome the 24-month transitional period envisioned in the legislation but additionally call for a simplified re-authorization process for pre-existing regulated institutions ("grandfathering"). This is to avoid overburdening these institutions with additional bureaucracy at a time where they also need to adjust to the new legislative requirements. Grandfathered institutions should only be required to satisfy new PSD3 authorisation requirements and not have to submit information provided as part of authorisation under PSD2.

The proposed PSD3 already **partially foresees such a "simplified" re-authorization process** by giving Member States the discretion to automatically grant PSD3 licenses to PSD2/EMD2 licensed entities. We would call for this provision to be a European rule rather than a discretionary power to Member States. This would avoid giving an unfair advantage to certain licensed entities solely based on their licensing Member State.

Secondly, payment and e-money institutions will, under the PSD3, be subject to the same licensing and authorization regime but it is crucial to keep in mind the differences between the types of services and arrangements. Notably, the draft PSD3 imposes the same requirements for both **agents and distributors**. This does not reflect the current e-money business model. Agents and e-money distributors have very different functions and activities which must be reflected also in EU legislation. Distributors are essentially independent contractors who own the goods. The new PSD3 *de facto* eliminates the distinction between the two by providing for the same registration requirements. It would be disproportionate to require regulated institutions to submit the same information requirements as for agents which act as intermediaries for a product or service.

Thirdly, the practicalities of merging the two licensing regimes and regulatory framework **should not lead to new additional requirements** for e-money institutions.

New safeguarding possibilities

The PSD3 introduces the possibility that national Central Banks can open, at their discretion, **safeguarding accounts** for payment institutions. This is a great improvement for the functioning of the non-bank sector, especially for those players who will not have access to payment systems that process

credit transfers or direct debits. Safeguarding of accounts has been a longstanding call from EPIF members, who believe this will be an important step to counter unwarranted de-risking as well.

Central Contact Points

EPIF continues to call for a revision of the **requirement for Central Contact Points (CCP),** which remain unchanged in relation to the PSD2. As expressed in the EPIF Recommendations for the PSD2 Review[1], the discretion given to national Member States in the implementation of CCPs is creating divergences across the Union. They also impose unnecessary administrative and compliance burdens for companies operating across the Single Market. EPIF urges the European Commission, European Parliament and Council to remove the requirements to establish CPPs drawing on the provisions in the Treaty on freedom of establishment. At a minimum each Member State should only be permitted to establish a single CCP in their jurisdiction. This will enable compliance with AML and PSD3/PSR requirements via a single CCP. PSPs should also not be required to appoint CCPs in countries where they operate under freedom of services.

Credit Passporting

In the context of passporting, under the current framework PSPs have r**estraints for the issuance of credit cards** on a pan-European basis due to the 12-month credit term limitation established in article 18(4) (b) of PSD2, which is not addressed in this revision.

This restriction only applies to PSPs and not to banks, which creates arbitrary discrimination and a competitive disadvantage, contrary to the fundamental principles that underpin the single market.

Particularly, EPIF welcomes a solution to foster competition between banks and PSPs for issuing credit cards across the single market. For this purpose, the PSR should include a provision under which PSPs may grant credit relating to payment services, without a period that limits the repayment of the credit. An alternative solution can be provided by allowing Member States to extend such a period for repayment or eliminate completely such restraint.

Registration of Agents

EPIF also stresses the importance of the *agent model* for the provision of financial services in the Single Market, in particular for the provision of certain services such as remittances in more remote areas. In this context, we note that the current envisioned **registration periods** for agents is too lengthy, creating obstacles for the provision of services. Our members would then support a shortening of the registration period for agents from 2 months to 1 month for home country agents and from 3 months to 6 weeks for host country agents' registrations.

Our members also see scope to harmonize the **notification regime** for the use of agents at the EU-level. A uniform notification regime for the entire Single Market can facilitate not only the use of the EU passporting regime but also provide legal and regulatory certainty for payment institutions operating cross-border.

Moreover, EPIF sees merit in additional guidance by the European Banking Authority (EBA) with regards to **agents on-site visits.** EBA draft Guidelines could help create an EU-wide framework and

[1] https://paymentinstitutions.eu/wp-content/uploads/2023/05/EPIF-recommendations-for-the-PSD2-review.pdf

standards for how agent off-site visits can and should be conducted, with the additional benefit of creating a more unified and comparable supervisory framework in the EU.

The interaction with MiCA

The new proposal clarifies that PSPs can issue and provide e-money tokens as defined under the **MiCA Regulation**. This is a welcomed clarification which puts payment institutions under the PSD on the same footing as e-money institutions. It also opens the possibility for the non-bank payment sector to explore the use of Stablecoins for payment purposes.

EPIF believes there might be a number of very specific use cases where this option could be welcomed by customers. This should not be seen in competition with the digital euro. Use cases could include integrated solutions with certain online applications, such as gaming. Stablecoins could also facilitate cross-border transactions involving multiple currencies.

The Payment Services Regulation (PSR)

We would like to reiterate that EPIF has been a strong supporter of the introduction of a directly applicable Regulation to minimise divergent national views and implementation of the legal regime. We believe the new framework will allow for a smooth functioning of the EU Single Market in payments and bring legal certainty to the sector, allowing payment service providers to offer their services more seamlessly across the EU.

The interplay between level 1, level 2 and level 3 measures – the need for legal stability

Since PSD2 was adopted, the payment industry has gone through a significant transition. The implementation of PSD2 was not smooth. In particular, the implementation process for Strong Customer Authentication (SCA) involved delays by Members States, additional standards from the EBA and multiple Opinions by the European Commission and EBA via Q&As and other tools. The legal uncertainty impacted the implementation timelines and the ability of payment services providers (PSPs) to develop innovative and convenient solutions. The industry has now completed this process and would urge legal certainty to be preserved.

We would call on the European Parliament and Council to **avoid adding further layers of legislation and complexity in the form of secondary legislation and supervisory guidance at Level 2 and 3**, namely by ensuring that the Regulation sets out clear outcomes and objectives for PSPs to meet. It would then be up to each payment provider, in close coordination with their supervisory authorities, to determine the means in which to achieve these objectives.

To ensure the aim of a consistent approach, there should also not be scope for individual Member States to impose additional obligations beyond those contained in the Regulation in line with the current Article 107 of the PSD2. In addition, EPIF would urge the European Parliament and Council to adopt a cautious approach when reviewing parts of the Regulation.

The Regulation includes language that codifies guidance that the EBA developed at Level 2 and 3 during the implementation of PSD2. Examples include the Limited Network Exception (LNE), Merchant Initiated Transactions (MITs) or Mail Orders or Telephone Orders (MOTOs). EPIF would urge the co-legislators not to amend this text further, given it is based on widely accepted EBA regulatory standards which the industry has now implemented. Legal certainty should be maintained in these areas.

We moreover call on the co-legislators to ensure that the mandates for Level 2 measures are limited to where these are strictly necessary:

- EPIF supports the mandate for the EBA to revise the existing RTS on SCA in line with the additional clarity provided in the Regulation – for instance on the definition of SCA itself, updating the inherence criteria to include environmental and behavioral characteristics, the need for accessible solutions, as well as providing clarity on dynamic linking. However, some of the new mandates, such as on transaction monitoring mechanisms, are already clearly set out in the Regulation and based on already-implemented Level 2 and Level 3 measures. In such instances, the legislation should not introduce a further review.

- Moreover, some of the new mandates envisaged go into a level of detail that seem to duplicate existing legislation and supervision, such as DORA or the PISA framework. Examples include the guidance on the internal governance for payment institutions or the mandate to develop RTS on outsourcing arrangements between PSPs and their technical service providers (TSPs) when verifying SCA (Article 87 of the PSR). Such a prescriptive approach impacts the flexibility for PSPs and TSPs to negotiate such arrangements between themselves and in line with the current outsourcing rules. Any outsourcing requirements imposed by the PSR should apply only

where a PSP has outsourced the execution of SCA to a third party. Where this is the case, the PSP should comply with the outsourcing requirements in line with the EBA Guidelines on Outsourcing.

- Other mandates are self-explanatory, such as the mandate for the EBA to develop guidelines on PSPs establishing programs for their clients and employees on payment fraud risks. EPIF believes that this is an unnecessary duplication of existing Level 2 measures.

Additionally, EPIF calls on the European Parliament and Council to **extend the RTS implementation timelines**. According to the current draft, the draft RTS must be published by the EBA within 1 year of the PSR entering into force. Given that the majority of PSR obligations apply within 18 months, this would leave only 6-months for implementation once the draft RTS are published. Given the wide-ranging and complex nature of issues covered by the RTS, this is an extremely compressed implementation timeline and will leave very little time for market participants to understand the scope of their obligations, let alone enact any changes that may be required by the RTS. We would therefore strongly support 24 months for compliance with the PSR (i.e., at least 12 months after the draft RTS are published).

Access to payment systems that process credit transfers or direct debits and to accounts maintained with credit institutions

As mentioned, EPIF members welcome that the Regulation addresses strong concerns that we have been raising for many years: the **lack of access to payment systems** that process credit transfers or direct debits and **de-risking practices.**

Under Article 31 of the PSR, and by amending the Settlement Finality Directive (SFD), the Regulation now provides for **payment systems operators to grant access systems that process credit transfers or direct debits to payment institutions** in a *non-discriminatory, transparent and proportionate* manner. EPIF members support this inclusion and amendment which will strongly contribute to ensure a level playing field between bank and non-bank PSPs. In fact, EPIF has been calling for this change to the SFD to already be included as part of the Instant Payment proposal that is currently being discussed by co-legislators. The negotiations on the PSD3/PSR are expected to be lengthier than those for the instant credit transfers proposal, notably in light of the upcoming changes in the EU political cycle and Parliamentary elections.

Following the agreement on the file and publication in the EU Official Journal, the PSD3/PSR will still need to be implemented. At this stage, the industry does not expect an implementation before 2027, implying that PIs run the risk of being left out of the next wave of innovation on instant payments and digital euro payments. Thus, we would call on the European Parliament and Council to support the introduction of direct access to payment systems that process credit transfers or direct debits via the current Instant Payments Regulation negotiations to remove the legal blockers within the SFD and not to delay any further the benefits for consumers and businesses across the EU.

EPIF fully agrees that payment system operators must have specific rules and procedures for admission to participants and that such rules are to be made publicly available.

We also encourage the European Parliament and Council to maintain the envisaged **6-month transposition** for the adoption and publication of the amended SFD.

As noted in the EBA Opinion on de-risking, from 5 January 2022[2], *"de-risking, especially if it is unwarranted, has a detrimental impact on the achievement of the EU's objective, in particular in relation to fighting financial crime effectively, promoting financial inclusion and competition in the single market."* Against this backdrop, EPIF also fully supports the EBA's assessment and were happy to see a reinforcement of the **rules against unwarranted de-risking** (Article 32 of the PSR). The specification

[2] https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Opinions/2022/Opinion%20on%20de-risking%20%28EBA-Op-2022-01%29/1025705/EBA%20Opinion%20and%20annexed%20report%20on%20de-risking.pdf

of the circumstances under which credit institutions can refuse to open/close accounts is a crucial improvement in the current framework, as well as clear communication requirements for the motivations of a refused/closed account. The Regulation should also specify a time limit for exit periods (e.g., a minimum of 6 months) that banks would need to give to payment institutions in case of de-risking.

Notwithstanding, EPIF members noted that loopholes still persist in the draft proposal. For example, the PSR allows credit institutions to refuse access on the grounds of *excessive compliance costs* and *business risks*. The current wording in this regard is too broad and open to interpretation, preventing an appropriate assessment of the refusal. Additionally, we also note that credit institutions often generate revenues from the fees and charges in excess of their costs from payment institutions, passing costs as service charges. EPIF suggests that credit institutions should inform payment institutions of the assessed risks and recommend controls on that basis. De-risking or refusal to onboard a payment institution should only occur if the payment institutions then refuses to implement said recommended controls.

Importantly, EPIF welcomes that agents and distributors are also in scope of the de-risking provisions.

Surcharging

Our members welcome the clarification provided in the proposed PSR that the surcharge prohibition extends to all credit transfers and direct debits, in all currencies of the EU. Moreover, while we appreciate the evaluation of the surcharging rules in the review clause under Article 108 of the PSR, we **call for a total ban of surcharging practices**. We believe that surcharging is detrimental for consumer choice, consumer protection and for the efficient functioning of the payments sector. A total ban would also enhance the level playing field between card and non-card payments, while lowering the fees for digital payments as a whole.

Scope and Exclusions

Overall, EPIF agrees with the European Commission that the list of payment services under the PSD2, as well as the scope exclusions, remain fit-for-purpose.

We do take note of the incremental improvements put forward in the Regulation in relation to the application of the commercial agent exclusion. EPIF members agree with the European Commission that the divergent interpretation of the concept of a “commercial agent” has led to different applications of the exclusion at the national level. The clarification in recital 11 to align the definition of “commercial agents” at the EU level is therefore welcomed.

Strong Customer Authentication and Fraud Prevention

In general, EPIF members see great progress in the draft revisions to the rules concerning SCA. EPIF continues to call for a genuine **risk-based and outcome-oriented approach**. This should take into account not only fraud levels but also other aspects such as the seamlessness of the payment transaction, abandonment rates of transactions and the use of transaction risk analysis. While sceptical of too many new mandates to the EBA, EPIF welcomes the new mandate to the EBA to develop the draft RTSs to reflect technological developments and a business-model neutral approach, combined with the new recognition under Recital 101 of environmental and behavioural characteristics. We believe that this will allow PSPs to adapt their authentication processes as fraud behaviour also evolves.

Likewise, we welcome the clarification provided now under Article 85(12) of the PSR that the **SCA elements do not need to belong to different categories *if* their independence is fully preserved**;

this will help resolve some challenging use-cases, enable further innovation and increase legal certainty for PSPs across the Union. The draft Regulation also emphasis the accessibility of SCA by ensuring the deployment of SCA is no longer dependent on a single authentication method (e.g., smart phone), thereby incentivising the development of diverse means to cater for different situations. We believe this will lead to an improvement in customer experiences as long as it is accompanied by a commensurate enablement of data-driven approaches to SCA, such as device recognition of behavioural biometrics. In this sense, we call on co-legislators to maintain and encourage innovation on SCA.

In addition, not all the exemptions made available in the PSD2 have been widely adopted, namely the Trusted Beneficiary exemption. Others, such as the Acquirer TRA (Transactional Risk Analysis) exemption, based on fraud rate and risk analysis, have faced delays or have been met with resistance, thus generating unnecessary friction for consumers and additional costs for merchants due to transaction abandonment. In relation to acquirer TRA, we use this opportunity to also advocate for particular changes regarding the calculation of fraud rates. Specifically, we recommend the European Economic Area (EEA) to adopt the same liability approach as the UK. The current EEA calculation method does not consider liability - meaning that every issuers and PSP's fraud rate is impacted by all unauthorized/fraudulent remote transactions (vs counting only those transactions towards their fraud rate for which they are liable, e.g. as issuer or acquirer). This limits the incentive of issuers to accept the TRA exemptions put forward by acquirers given the potential impact on their fraud rates. Issuers are instead currently incentivised to follow a maximum 3DS/SCA approach and not honour any acquirer TRA exemptions. As such, it undermines effective acquirer fraud risk management in the EEA. It also means that fraud rates across the EEA and UK are not comparable. A shift in calculation approach would re-incentivise the use of acquirer TRA for all PSPs.

Industry players should be further incentivized to jointly and proactively implement these exemptions. To do so and, while maintaining a general outcome-based approach, payment institutions should be given specific targets (such as authorisation rates and abandonment rates) as well as specific timelines for the acceptance of the exemptions. This would incentivize the uptake of exemptions, the improvement of user experience and minimise the impact to consumers. Aiming for a more consistent and homogenous implementation and adoption of exemptions across countries and payment actors can deliver clarity and certainty about the operating environment, helping businesses plan for implementation in an efficient manner, and allowing payment supply chains to focus on targeting fraudulent transactions while improving the customer experience for legitimate buyers.

We also consider that for cases where the payer is acting in a corporate capacity and not as an individual consumer, the application of SCA should be revised. Corporate authentication is subject to significantly lower fraud risks and much higher implementation challenges. EPIF therefore calls for the EBA to issue further guidance and clarifications that ensure a proportionate application of SCA in this context. When revising the RTS, the EBA should take into account that the risk of corporate fraud is to be managed and mitigated at the corporate-level.

Finally, as noted in Recital 116, the security measures enforced should be proportional to the level of risk involved. This includes contactless transactions. As stated in our response to the targeted consultation on the PSD2 review[3], EPIF would favour removing the cumulative amount and cumulative transactions requirements, with PSPs being able to apply a requirement for SCA that is appropriate to the particular payment service user. This flexibility on the cumulative thresholds would favour a more customer-centric approach, with individual customers setting their own limits.

Treatment of MIT

While we acknowledge that direct debits (DDs) and Merchant Initiated Payments (MITs) are both transactions initiated by the payee, it is important to recognise that DDs and MITs (especially card MITs) have diverging set-up characteristics and widely different use cases. DDs are typically used for essential services (e.g., utilities), while MITs are more commonly used for online businesses, e-commerce and

[3] https://paymentinstitutions.eu/wp-content/uploads/2022/07/EPIF-response-to-the-PSD2-Consultation.pdf

digital content, which are far more susceptible to fraudulent and abusive refund practices where the payer is the fraudster. Moreover, MITs already benefit from high levels of consumer protection, including by benefiting from a right for refund when the amount of the executed transaction exceeds what would be reasonably expected.

Article 62(1) of the PSR seeks to extend an unconditional refund right to all MIT transactions, aligning it with existing provisions for direct debits. This means payers would be able to request a “no questions asked" refund from PSPs within eight (8) weeks of any MIT transaction. The proposal leaves no possibility for merchants to dispute any chargeback on MITs (in the case of abusive refund requests from payers) or to recover any physical goods or digital services received by the payer.

If implemented, the proposal is likely to create new avenues for fraud. It is highly likely that fraudsters will systematically use payment chargebacks to avoid paying for physical or digital goods and services. Additionally, genuine customers may increasingly rely on chargebacks as an exclusive means of dealing with disputes over goods and services rather than approaching merchants directly. This will be highly detrimental to the merchant ecosystem and particularly smaller merchants who will bear a heavy operational and financial burden as a result of increased chargebacks.

The existing framework of consumer protection under PSD2 (and card scheme rules) is already extremely protective of consumers and gives payers the possibility to easily dispute MIT transactions within eight weeks (e.g., via the refund right in Article 76 PSD2). The existing framework balances the rights of consumers and merchants, by giving merchants the possibility of disputing a refund request.

IBAN check and verification services

EPIF welcomes the principle of having name verification services, especially for instant credit transfers as proposed in the Instant Payments Regulation, especially given the irrevocable nature of these transfers. However, we **fail to see the goal of enlarging the scope of use of IBAN check and verification services to all credit transfers and in any EU currency as proposed in the PSR**.

It is widely accepted by the industry and by the Member States that have implemented such services, that these are not bullet-proof services. They can often provide a failed sense of security to consumers. Extending these services to all types of credit transfers and for any EU currency will require a financial effort that we believe to be disproportionate compared to the results such services can deliver. To effectively fight fraud, legislators must instead focus on equipping PSPs with outcome-oriented laws that allow them to deploy the best tools to successfully stop fraudsters.

Moreover, it is essential to reflect in the Regulation that there can be other types of data elements, other than IBANs, that can identify the payee, **such as a mobile proxy, an email address, a European unique identifier or an LEI, as well as other payment account identifiers.** This is rightly already reflected in the positions of the European Parliament and the Council on the Instant Payments proposal.

Liability

High level observations

EPIF believes that **the suggested shift in liability for authorized push fraud is not the way to efficiently fight this type of growing fraud** associated with social engineering, such as spoofing.

Instead, legislators should focus on equipping PSPs with a variety of instruments that they can use to effectively fight this type of fraud, namely (i) the rules regarding telecommunication operators, internet platforms and other key players in the payment chain **need to be strengthen and a concrete mandate put in place for them to act** to keep their customers safe when using their services and preventing

scams and fraudulent behaviour (e.g., an obligation to block IP/phone number/emails/websites or take down messages/content, as appropriate); and (ii) the possibility to have **arrangements to share data fraud elements is welcomed but it needs to be more robust** as it is important to clarify with whom the liability rests, if any, for making the wrong call regarding an IP address or a phone number or any other element that could considered as fraudulent. It is also important that members can use shared information to tackle fraud. Currently, Article 83(6) of the PSR prevents PSPs from using shared data in risk decisions such as onboarding. Without this, the purpose of sharing fraud information is unclear.

We would highlight that in Recital 80 of the PSR proposal, the Commission acknowledges that payment service providers are also victims of this kind of fraud. Therefore, the solution should not be to make PSPs liable **and possibly give room for fraudsters to further explore this type of fraud.** Instead, the market as a whole should work on strengthening the tools to fight this type of fraud.

***Liability for* unauthorized transactions**

The current rules within Article 56 of the PSR mandate that PSPs refund unauthorized payment transactions immediately or by the end of the next business day or within 10 days where payer fraud is suspected. However, this strict timeframe poses certain challenges. False claimers can exploit the system as PSPs lack sufficient time for a thorough investigation. As a result, PSPs may rush their decisions, leading to a decline in response quality and the possibility of overlooking legitimate customer claims. **To improve the process, we suggest extending the refund timeframe to five business days** and the time to investigate suspected payer fraud to 20 days. This extra time would enable PSPs to conduct a more informed assessment of each case, determining whether there are reasonable grounds to suspect fraud or gross negligence by the customer. This would also reduce the burden on the national authorities, as the extended timeframe will reduce invalid reports to authorities and ensure that valid customer claims are not unduly reported. The proposed extension would strike a balance between providing timely refunds to genuine claimants and allowing PSPs the opportunity to review transactions more thoroughly, reducing the risk of false positives and deterring false claimers from abusing the system.

We also take note of the wording in Article 55(1) of the PSR, which requires PSPs to prove that transactions were *authorized* in case payment service users claim they have not authorized a transaction or that a transaction was incorrectly executed. This is a **significant change from the equivalent Article 72 of the PSD2**, which obliged PSPs to prove *authentication*. Proving *authorization* of a transaction is not feasible for PSPs, which would have to presume the state of mind and/or intent of the payment service user at the time of authorization. Combined with shortened deadlines for reimbursement of transactions under Article 56 of the PSR, this new wording risks incentivising fraud and placing PSPs in a situation of *de facto* reimbursement of transactions on demand of payment service users. EPIF therefore calls on the co-legislators to adopt the wording of the PSD2 in this context.

Liability of technical service providers and of operators of payment schemes for failure to support the application of SCA

EPIF members are concerned that Article 58 of the draft regulation will introduce a new liability framework for technical services providers (TSPs) and operators of payment schemes with significant unintended consequences. Article 58 unnecessarily interferes with how PSPs procure services from third parties and how parties allocate risk and liability under such contracts based on the services being provided. If this new framework is implemented, third parties (including small Fintechs providing services to PSPs) will be exposed to unlimited liability to PSPs, large merchants, and consumers in Europe. This will result in changes to business models, increased costs which will invariably be passed on to consumers or rendering certain services commercially unviable.

Moreover, the complexity of payment systems implies that not all participant parties have contractual relationships between each other. The possible liability of the TSP and operators of payment schemes is based on the existence of a contractual relationship, or the existence of a specific clauses in a contract, to address a possible liability scenario of the TSP derived from deficiencies in the SCA, attributable to such parties. This extra layer of complexity imposed by the Regulation does not address any market problem or failure, whilst adding complexity and potentially increasing costs to the consumers.

Gross Negligence

Under Article 56 of the PSR, if the PSP has reasonable grounds for suspecting fraud in an unauthorised transaction, the PSP will have ten days to verify the possible case of fraud. However, the provision does not include the same scenario if it has reasonable grounds to suspect gross negligence.

This possibility is established for consumers (excluding non-consumer clients) under Article 59 of the PSR, but only for impersonation fraud. It excludes other types of fraud or unauthorised transactions regulated under Article 56 of the PSR. At the same time, Recital 82 of the PSR establishes the possibility of gross negligence where a consumer introduces a second claim for impersonation fraud, after receiving a refund from the PSP.

Gross negligence is usually established under the parameters of national laws. Hence, it could be beneficial to clarify the parameters for specific gross negligence cases and verify if there will be specific criteria to assess the level of carelessness in relation to payments process. In general, the scenarios related to gross negligence in unauthorised transactions should be further clarified in the interest of legal certainty.

Transparency

Termination of framework contract

We would also seek clarification of Article 23, relating to termination of the framework contract, in particular on the application of the proposals. Article 23 outlines that where payment services are offered jointly with technical services, such technical services should be subject to requirements on termination fees (i.e., no termination fees can be charged for cancellation of the contract by the PSU after 6 months).

It is unclear, pursuant to the commentary in Recital 49, as to whether such technical services would also be subject to the requirements on the termination notice period i.e., PSU can terminate a terminal hire contract with up to 1 months' notice. Equally, whilst it is clear that no termination fees can be applied after 6 months, it is unclear whether PSPs would still be able to bill PSUs for the remaining period of their terminal hire contract, should the PSU terminate it before the end of the contract term. For example, if a PSU has a 12-month contract for technical services with a PSP and cancels after 6 months, is the PSP permitted to charge the PSU for the remaining 6 months for which they were contracted? We would welcome clarity from the Commission on these points.

In addition, we seek clarity over the scope of the proposals. Article 4 states that Title 2 (under which Article 23 falls) should be applied to microenterprises in the same way as to consumers. Therefore, we would like confirmation as to whether Article 23 applies to all PSU's or specifically microenterprises.

We understand that the proposals aim to provide PSUs with greater mobility and choice, and thereby increase competition amongst PSPs in the market. However, we wish to understand if the Commission has carried out, or intends to carry out, an impact assessment (there is no reference to it in the Impact Assessment Report) and whether it has considered the potential unintended consequences.

Competent Authorities powers

EPIF members question the need for the **EBA's new product intervention powers.** These powers are already enshrined in the EBA Regulation. We therefore believe that including them in the Regulation would lead to duplication. Moreover, we believe that there should be an explicit right for the relevant PSP or technical third-party provider to be consulted before the EBA imposes a temporary prohibition or restriction on a payment or e-money service or instrument in the EU. Our suggestion would be to acknowledge this and reference it in the PSR the Regulation establishing the EBA (Regulation 1093/2010/EU). This would avoid creating duplication and legal uncertainty over which legal text would apply, while maintaining the product intervention powers of the EBA as already in place.

Turning to the powers of national competent authorities (NCAs), EPIF welcomes the efforts to reinforce enforcement powers to ensure a correct application of the new rules. However, our members note that the degree of discretionary powers given to NCAs is not always followed by the expected safeguards. We are also concerned that the different provisions covering the powers of NCAs are not always coherent and thus create legal uncertainty and leave scope for divergences in the application of the rules. This is the case in Article 48 of the PSR regarding the procedures of NCAs in case of non-compliance by ASPSP in the Open Banking provisions, risking creating an unlevel playing field amongst Member States. We also consider it to be excessive the investigation powers introduced in Article 91(3) of the PSR, particularly when it comes to Technical Service Providers given that they are mostly out of scope of the PSR. Our members also have concerns over Article 38(3) of the PSR, which seems to suggest that where an API is not functioning, it is for the TPP to request the NCA of its *home* Member State to access an interface of the payment service user in the *host* Member State.

Open Banking

The introduction of Open Banking in the EU, through the PSD2, brought greater connectivity to enhance competition and innovation in payment services, benefiting both consumers and businesses. PSPs have however faced challenges in the implementation and full realization of Open Banking as a result of the **fragmentation and quality of APIs** across the EU Single Market, which has led to a divergence in user experiences.

Against this background, EPIF members fully welcome the provisions in the draft Regulation ensuring the alignment of dedicated interfaces with **international standards** of communication as well as **minimum requirements** for the interfaces. EPIF has long been calling for the setting of benchmarks for API performance in order to ensure quality and reliability of APIs for innovation to flourish. This will also be supported by the **listing of prohibited practices for data access**, as laid down in Article 44 of the PSR.

On **compensation**, we note that the draft Regulation, under its Recitals 55 and 56, clarifies that access to APIs would still establish access without compensation. The same Recitals specify that compensation could be envisaged if there is an optional contractual relation for premium APIs between the relevant parties, including multilateral (e.g., Scheme) relationships. This is supported by our members. Nevertheless, we would call for these provisions to also be incorporated into an article in order to bring further legal clarity and certainty around the sensitive topic of compensation for API access.

In general, we continue to support the work of the European Payments Council on the SEPA Payments Account Access Scheme (SPAA Scheme) and the importance of introducing greater functionalities into Open Banking payments, such as recurring payments, to allow for a wide variety of use cases.

Moreover, the role of supervisory authorities is also enhanced under the PSR. EPIF members believe that the additional powers granted to these authorities, to ensure the quality and availability of APIs and

necessary dashboards, will greatly contribute to the improvement and consistency of Open Banking services across the EU. We would however caution the European Parliament and Council to ensure that the additional powers granted to NCAs do not lead to **great divergences and an unlevel playing field** between Member States. To avoid these divergences NCAs should not be given discretionary powers.

EPIF members also welcome the proposal on Financial Data Access (FiDA) and stress that coherence needs to be ensured between FiDA and the Open Banking framework under the PSR.

IBAN Discrimination

EPIF notes that IBAN discrimination continues to occur in the Single Market and therefore suggests to **align the wording under the SEPA Regulation with the PSR**, as well as enhance the requirements and penalties for non-compliance in case of IBAN discrimination. While discrimination between domestic and cross-border IBANs is already illegal, country specific interpretations and practices vary greatly, specially in the field of salary and utility payments, leading to a *de facto* IBAN discrimination.

Expanding the ban on IBAN discrimination to non-euro currencies to all EU currencies would also help remove persisting frictions and enhance access to the EU Single Market. To this end, the EBA could also be mandated to draft regulatory technical standards to ensure a consistent application and interpretation of the IBAN non-discrimination obligation across the EU. In the medium-term, EPIF members also see value in a revision by the European Commission of the **structure of IBANs** notably by removing the country delineation.

Data Protection

The PSR draft proposal also envisaged a clear **"public interest" exemption** for the processing of special categories of person data as defined under the EU General Data Protection Regulation (GDPR). This clarification in the Level 1 text is very much welcomed by PSPs and provides legal certainty for their compliance with both the GDPR and fraud prevention requirements under the PSR. The processing of personal data needs to be accompanied by the necessary safeguards envisaged under Article 80 of the PSR, which EPIF fully supports.

EU Digital Identity Wallets

The draft Regulation recognizes the role of the **EU Digital Identity Wallets,** implemented through the eIDAS Regulation, for the facilitation of identification and authentication in payment services. This is particularly relevant for the facilitation of payment services cross-border.

Our members support this link between the eIDAS Regulation and the PSR, as well as the reference in the AML/CTF Package and the Digital Euro.

Specifically, EPIF would welcome the inclusion of a specific article in the PSR making clear that eID solutions can be used by PSPs for their compliance with the PSR in areas such as SCA implementation, customer onboarding and other relevant use cases.

Digital euro

It is important to ensure that the rules on SCA, liability and AML that are considered for the digital euro proposal are in line with the rules agreed for PSR and PSD3 to ensure a level playing field for all the actors in the payments market.

ABOUT EPIF (EUROPEAN PAYMENT INSTITUTIONS FEDERATION)

EPIF, founded in 2011, represents the interests of the non-bank payment sector at the European level. We currently have over 190 authorised payment institutions and other non-bank payment providers as our members offering services in every part of Europe. **EPIF** thus represents roughly one third of all authorized Payment Institutions ("PI") in Europe. All of our members operate online. Our diverse membership includes a broad range of business models, including:

- Three-party Card Network Schemes
- E-Money Providers
- E-Payment Service Providers and Gateways
- Money Transfer Operators
- Acquirers
- Digital Wallets
- FX Payment Providers and Operators
- Payment Processing Services
- Card Issuers
- Independent Card Processors
- Third Party Providers
- Payment Collectors

EPIF seeks to represent the voice of the PI industry and the non-bank payment sector with EU institutions, policy-makers and stakeholders. We aim to play a constructive role in shaping and developing market conditions for payments in a modern and constantly evolving environment. It is our desire to promote a single EU payments market via the removal of excessive regulatory obstacles.

We wish to be seen as a provider for efficient payments in that single market and it is our aim to increase payment product diversification and innovation tailored to the needs of payment users (e.g. via mobile and internet).