AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Our position

Payment Services Regulation (PSR) and Payment Services Directive (PSD3)

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3.7 trillion in 2022, directly supports more than 4.9 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

American Chamber of Commerce to the European Union
Speaking for American business in Europe

Avenue des Arts/Kunstlaan 56, 1000 Brussels, Belgium • **T** +32 2 513 68 92
info@amchameu.eu • amchameu.eu • European Transparency Register: 5265780509-97

Executive summary

As the Payment Services Directive 2 (PSD2) brought some fundamental disruptions to the market, the proposals for a Payment Services Regulation (PSR) and Payment Services Directive 3 (PSD3) should now (re)prioritise a more outcome-based approach, creating space for the industry to innovate and enhance the consumer experience. Though Strong Customer Authentication (SCA) played a positive role in reducing certain types of fraud, the prescriptive nature of the current provisions can make it disproportionately difficult for customers to complete legitimate e-commerce transactions. Against this backdrop, priority should be given to the implementation of existing exemptions and policymakers should ensure that Regulatory Technical Standards (RTSs) remain fit for purpose in line with technological innovations. In case new RTSs are developed, given their complexity, the industry should be allowed 24 months for compliance.

The PSR also significantly revises the existing liability regime. While protecting consumers is obviously a shared objective, liability should always come with proportionality and reasonableness. In that context, measures aiming at facilitating fraud information sharing, monitoring and information campaigns are a more holistic approach to fighting fraud than a generalised refund possibility. Finally, the PSR and PSD3 should also foster the expansion of Open Banking by limiting the frictions for business users (eg allowing for optional application of SCA, re-establishing permission dashboard without permission, license grandfathering).

Introduction

Since the adoption and implementation of the PSD2, the pace of change in the payments sphere has quickened while the complexity and interdependence of the ecosystem increased. Driven by the digital revolution, new services and players are progressively shaping the market, bringing more choice, efficiency and inclusion to payments.

The PSD2 brought significant disruptions to the market and the regulatory framework, with a strong emphasis on fraud prevention. While safeguarding this acquis – including the existing level 2 and level 3 regulations – the PSR and PSD3 should emphasise an outcome-based approach, allowing the industry to innovate and improve the consumer experience.

Protecting consumers while enhancing consumer choice and innovation

Future-proof SCA

The industry shares the policy makers' objective of ensuring SCA effectiveness, while also taking into account the need to maintain comprehensive customer journeys. The implementation of SCA under PSD2 was challenging and resource-consuming for the payment industry, merchants and EU and national competent authorities. Though SCA played a positive role in reducing certain types of fraud, the prescriptive nature of the current provisions can make it disproportionately difficult for customers to complete legitimate e-commerce transactions.

Going forward, the industry needs a risk-based and outcome-based approach to foster the development of innovative payment services while maintaining a high level of protection and adjusting to increasingly elaborate fraud schemes. Therefore, the clarifications under PSR regarding SCA elements, which do not need to belong to different categories, are a positive development. A provision that will enable further innovation and increase legal certainty for service providers across the Union. We also see under a very positive light the recognition of environmental and behavioural characteristics as appropriate SCA elements.

Recommendations:

- Take into account aspects such as the seamlessness of the payment transaction, abandonment rates of transactions and the use of transaction risk analysis.
- Acknowledge in the level 1 text that, as technology evolves, there are increasing signs that non-physical biometrics can be equally accurate in their capacity to identify someone. Environmental and behavioural information should also be recognised as a valid authentication factor of 'inherence' (something the user is) if sufficiently precise to authenticate the cardholder.

Clearer and usable framework for exemptions

Not all the exemptions available under PSD2 have been widely adopted, for instance the Trusted Beneficiary exemption is still under used. 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. To remedy the current situations, both Level 1 and Level 2 regulations need to be adjusted.

Recommendations:

- Incentivise industry players across the board to jointly and proactively implement these exemptions by setting up specific targets (such as authorisation rates and abandonment rates) as well as specific timelines for the acceptance.
- Ensure that the Regulatory Technical Standards (RTSs) continue to remain fit for purpose, taking into consideration consumer behaviour and expectations as well as new innovation on the market:
    - Fostering ease of use for customers – raising the cumulative limit for the low-value contactless exemption under Article 11 RTS on SCA from €150 to €250 and extend the secure corporate payments exemption under Article 17 RTS on SCA to all forms of access to corporate accounts.
    - Adjusting to new innovations – extending the transport and parking exemption under Article 12 RTS on SCA to transactions for electric vehicle charging, alternative fuel filling, vending machines and donations up to EUR 50. Introducing a new exemption for airline in-flight transactions taking place in an offline environment.

Limited network exclusion and hybrid cards

Hybrid payment instruments are innovative products that already exist in the market and provide real consumer and merchant value.

Recommendation:

- Allow for the existence of 'hybrid' payment instruments that accommodate an open-loop and a closed-loop functionality building upon existing reporting frameworks.

Merchant Initiated Transactions (MIT)

PSR creates a new unconditional refund right for merchant initiated transaction (MITs) under article 62(1), aligning it with existing provisions for direct debits (DD). DDs and card MITs have diverging set-up characteristics and widely different use cases. DDs are commonly used for essential services such as utilities. MITs, by contrast, are commonly used by online businesses, e-commerce and digital content, which are far more prone to abusive refund practices where the payer is the fraudster.

Moreover, unlike Direct Debits, 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. For the majority of MIT use cases, an unconditional refund right (ie 'no questions asked') would not be appropriate and is likely to have a severe negative impact on merchants especially on digital marketplaces and e-commerce, the majority of whom rely on for some of their use cases on MITs for payment (subscriptions, split shipment etc).

Recommendation:

- Maintain the existing framework as it stands currently, which balances consumers and payers interests, offering sufficient protection against the risk of potential misuse of MITs (eg via the refund right in article 76 PSD2).

Fair liability framework

The provisions for technical service providers (TSPs) and payment networks could have negative unintended consequences for the ability of technology providers - especially small players - to develop and provide SCA-supporting technologies. Imposing liability for 'any financial damage' is excessively onerous and unnecessarily interferes with how PSPs procure SCA-related services from third parties and allocate risk between themselves. It is likely to hamper expansion into new services (such as tokenisation) by domestic schemes, and impede innovation by fintechs, developers, device manufacturers and other services providers resulting in increased costs to consumers to reflect the increased risks of business, given the potentially unlimited liability that TSPs face towards PSPs, large merchants and consumers in Europe.

Recommendation:

- Give service providers flexibility to rely on contractually agreed liability. Any new liability imposed on service providers should be subject to proportionality and reasonableness - so that they are only liable for financial damage reasonably incurred or foreseen rather than 'any' damage, as currently drafted in article 58.

Effectively fighting fraud

To effectively address fraud through online scams and social engineering, it is important to ensure all parties in the chain, including governments, companies, and consumers, be part of the fight. Therefore, it is important to ensure proper fraud prevention and mitigation, while minimising potential incentives for fraudsters.

In that context, while measures aiming at facilitating fraud information sharing, fraud monitoring and information campaigns are a more holistic approach to fighting fraud, it is concerning that the unintended consequences of the mandatory refunds by PSPs, for instance for bank-employee impersonation fraud, may lead to an increase in fraud. Collaboration across all relevant parties to make it as difficult as possible for criminals and scammers, is a more suitable approach.

Recommendations:

- Ensure the liability and refunds policies provided in the legislation do not lead to the unintended consequences of 'supporting' criminal business models by incentivising fraudsters to use a generalised refund possibility to their advantage, therefore making EU customers and citizens more vulnerable.
- Ensure the regulation encourages cooperation between PSPs for fraud prevention, monitoring and mitigation by providing clearer grounds for cooperation amongst themselves.

Proportionate provisions for outsourcing

The lack of clarity provided in article 87 is concerning, particularly due to the lack of clear definition of Technical Service Provider, which may lead to PSPs having to enter outsourcing agreements with several additional companies where an entity is carrying out a regulated activity on its behalf.

For instance, under the current wording, it is unclear whether the payment terminals manufacturers, could be viewed as a TSP, therefore potentially leading to PSPs having to sign outsourcing agreements (which would include auditing requirements under the European Banking Authority (EBA) outsourcing guidelines) with these manufacturers. As this likely was not the intent of the legislation, the text should be amended to ensure proportionality of the provisions related to outsourcing.

Recommendations:

- Apply outsourcing requirements only where the TSP is carrying out the SCA on an outsourced basis for a PSP.
- Avoid duplication and complexity with outsourcing arrangements, notably by ensuring alignment with the existing EBA Guidelines on Outsourcing Arrangements.
- Define 'Technical Service Provider' to ensure a proportionate scope of the provisions related to TSPs.

Business continuity and resilience during outages

The EU PSR is silent on whether transactions requiring SCA can continue to be authorised through the authorisation network when the authentication infrastructure is down. The need to ensure business continuity during technical incidents should be addressed by the regulation.

Recommendation:

- Exceptionally and temporarily allow payments without SCA during technical incidents affecting the authentication infrastructure with appropriate safeguards to ensure the security of payments.

Implementation & enforcement: a stable and proportional framework

Legal stability and predictability for Level 2 & 3 rules

PSR foresees a significant number of RTSs to be develop by the EBA to supplement level 1 legislation. Policy makers should frame EBA work, ensuring mandates for RTSs are limited to strictly necessary measures and EBA endorses technology neutrality as a guiding principle when developing these.

Additionally, the draft RTSs must be published by the EBA within 1 year of PSR entering into force. Given that the majority of PSR obligations applies within 18 months, this would leave only a 6-month implementation window once the draft RTSs are published. Given the wide-ranging and complex nature of issues covered by the RTSs, 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 uplift that may be required by the RTSs.

Recommendations:

- Avoid adding further layers of legislation and complexity with secondary legislation and supervisory guidance at Level 2 and 3, by ensuring that the Regulation sets out clear outcomes and objectives for PSPs to meet. It is then up to each payment provider, in close coordination with their supervisory authorities, to determine the means in which to achieve these objectives.
- Carefully consider the need to develop new level 2 legislations, instead leverage the existing provisions and regulatory technical standards, which were developed by the relevant competent authorities, in consultation with industry participants.
- Allow 24 months for compliance with the PSR (ie at least 12 months after the draft RTS are published).

Consultation right vis-a-vis EBA

EBA's new product intervention powers do not contain an explicit right for the relevant PSP or TSP to be consulted before the EBA imposes a temporary prohibition or restriction on a payment or e-money service or instrument in the EU.

Recommendation:

- Set up an explicit right for the relevant PSP or TSP to be consulted before the EBA imposes a temporary prohibition or restriction on a payment or e-money service or instrument in the EU. A prohibition or ban by the EBA should constitute a last recourse.

Proportionate penalties

Under PSR, national authorities have been given extensive investigation powers and the ability to impose fines up to 10% of annual turnover (including on both PSPs and TSPs) for specified breaches which given the small size of most PSPs and TSPs seem quite disproportionate.

Recommendation:

- Limit penalties to proportionate and adequate measures.

Licensing provisions under PSD3

It is unclear whether the repeal and merge of the PSD2 and the Electronic Money Directive (EMD) under PSD3 will entail the re-authorisation of existing license owners and how the EU Commission and the Member States will ensure a frictionless adaptation thereof. Member States can provide mechanisms to automatically grant this new authorisation to existing payment institutions (PIs) and electronic money institutions (EMIs). This is important to ensure business continuity of existing Pis and EMIs and avoid regulatory arbitrage.

Recommendations:

- Allow existing PIs and EMIs to continue to provide their services under their current PSD2/EMD2 licenses without the need to seek a new PSD3 license.
- Maintain a 24-months transition period while streamlining of the re-authorisation process to minimise bureaucratic procedures.

Open Banking: further streamlining the framework

Optional application of SCA

Creating the right processes and implementing the developments to perform SCA might be challenging and costly for many small fintechs, and if it was explicitly required by law, it might deter some from entering the market.

Recommendation:

- Allow the application of SCA to be optional for AISPs and fall back on Account Servicing Payment Service Providers (ASPSPs), if not provided by AISPs.

No permission re-establishing requirement for dashboards

Re-establishing already withdrawn permissions in the permission dashboards might lead to technical and contractual (legal) difficulties if the terms & conditions and other aspects of the services change during between the time the permission was withdrawn and then re-established by the consumer in the dashboard.

Recommendation:

- Remove the requirement for dashboards (operated by ASPSPs) to enable PSUs to re-establish permissions, which they have previously withdrawn, or designate an appropriate and maximum time limit within which the re-establishing of the permission should happen.

Grandfathering of licenses

Requiring the PIs and EMIs to apply for a new license under PSD3 does not bring value with regards to services they already have existing licenses for under PSD2, but it creates legal uncertainty and raises their costs.

Recommendation:

- Allow grandfathering of existing licenses, and only require new license under PSD3 for additional requirements that PSD3 introduces on top of PSD2.

Interplay between level 1 and 2

The PSR has enhanced provisions on Open Banking compared with PSD2, and we welcome the changes to incorporate certain provisions currently contained in a Regulatory Technical Standard within the PSR text. This provides ASPSPs with certainty of regulatory expectation and eliminates the risk of RTS change or of technical standards which are inconsistent with intended regulatory outcomes. However, it is proposed that supplementary provisions on secure open standards of communication using dedicated interfaces will be developed separately in the RTS. For example, detailed criteria for granting different types of exemption decisions on setting up a dedicated interface.

Recommendation:

- Where possible, provide additional clarity directly within the PSR rather than in regulatory technical standards. For example, article 39 could clarify that an ASPSP is exempt from having in place a dedicated interface where they do not provide payment services to retail clients.

Conclusion

The payment services market has changed significantly in recent years and it is crucial that the proposed PSR and PSD3 respond to these changes to improve consumer protection and competition. To fulfil users' expectations on an innovative and secure payments ecosystem, policymakers should prioritise a more outcome-based approach in order to create room for industry to innovate while enhancing the consumer experience and focus on ensuring a stable and future-proof framework.