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Opinion of the European Banking Authority on
the transition from PSD1 to PSD2

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On 19 December 2017, the European Banking Authority (“EBA”) issued an opinion on the transition from PSD1 to PSD2 which was addressed to the relevant supervisory authorities (the “Opinion”).

Either in accordance with PSD2 or because of a delay in adoption of the implementing regulations, not all the provisions of PSD2 or EBA technical standards and guidelines will be applicable on 13 January 2018, date on which Member States should implement PSD2.

This phased entry into force has led to a number of transitional issues regarding the implementation of PSD2 among market participants and the relevant authorities. To clarify matters, the Opinion clarifies the entry into force of the EBA technical standards and guidelines, and some aspects of PSD2.

The most notable aspects of the Opinion are summarised below:

ENTRY INTO FORCE OF THE TECHNICAL STANDARDS AND GUIDELINES IMPLEMENTING PSD2

PSD2 conferred on the EBA the authority to develop twelve technical standards and guidelines (the “RTS”). On the date of the Opinion, the EBA has completed ten RTS and expects the other two to be ready at the beginning of 2018.

On the PSD2 application date, the following RTS will also be also applicable:

- Commission Delegated Regulation (EU) 2017/2055 of 23 June supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for the cooperation and exchange of information between competent authorities relating to the exercise of the right of establishment and the freedom to provide services of payment institutions,
- Guidelines 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 under Article 5(5) of PSD2 (EBA/GL/2017/09), and
- 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 PSD2 (EBA/GL/2017/08).

The EBA has stated that another three RTS will become applicable in the first quarter of 2018:

- Guidelines on major incident reporting under PSD2 (EBA/GL/2017/10),
- Guidelines on procedures for complaints of alleged infringements of PSD2 (EBA/GL/2017/13), and
- Guidelines on the security measures for operational and security risks of payment services under PSD2 (EBA/GL/2017/17).

Likewise, the EBA is developing guidelines on fraud reporting requirements under Article 96(6) of PSD2 (EBA/CP/2017/13), which date of entry into force has not been set as at the date of the Opinion.

The remaining RTS are the following:

- Regulatory technical standards setting technical requirements on development, operation and maintenance of the electronic central register and on access to the information contained therein, under Article 15(4) of PSD2, as well as the implementing technical standards 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) of PSD2 (EBA/RTS/2017/10 and EBA/ITS/2017/07),
- Regulatory technical standards on central contact points under PSD2 (EBA/RTS/2017/09),
- 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 Article 29 (6) of PSD2 (EBA/CP/2017/16), and
- Regulatory technical standards on strong customer authentication and common and secure communication under Article 98 of PSD2 (EBA/RTS/2017/02).

The EBA does not know when the first four RTS will enter into force because they have to be implemented by the Commission and be published in the Official Journal of the European Union (OJEU), following the relevant legislative procedure. With regard to the RTS on strong customer authentication and common secure communication, it will enter into force within 18 months following its publication on the OJEU, in accordance with the provisions of PSD2. In this case, the EBA expects it to be applicable in the second half of 2019.

The difference between the dates on which PSD2 (or the relevant transposition regulation) and the RTS enter into force means that the payment service providers (PSPs) will only have to comply with the national transposition regulations of PSD2, even if the implementing RTS are not in force. In this scenario, the EBA advises the relevant supervisory authorities to take into account those RTS, even if they are not formally in force. Likewise, it advises the authorities to encourage the PSPs to assess

those RTS in order to understand what is required to comply with the PSD2, in particular regarding the strong customer authentication and common and secure communication, as further explained below.

SPECIFIC MATTERS

Authorisation requirement under PSD2

Payment institutions (PIs), electronic money institutions (EMIs), account information service providers (AISPs) and payment initiation service providers (PIPs) cannot operate from 13 January 2018 unless they benefit from transitional and exceptional periods established in PSD2 such as the following:

- those established for the PIs and EMIs, already authorised under PSD1, which may continue providing their services (except for account information and/or payment initiation services) until 13 July 2018 without being subject to the reauthorisation procedure, or
- those established for all entities that offered account information and/or payment initiation services before 12 January 2016, which may continue providing services without requiring immediate authorisation, although they may not benefit from the full set of rights set out in PSD2 such as the provision of services on a cross-border basis in other Member States.

Accessing payment account information during the transitional period

Between 13 January 2018 and the application of the RTS on strong customer authentication and common and secure communication, some provisions of PSD2 on security measures will not be applicable (in particular Articles 65 (2) (c), 66 (3) (d), 67 (2) (c), 67 (3) (a) and 97 (except 5)).

As a consequence, the AISPs and PISPs may access payment accounts held by account servicing payment service providers (ASPSPs) anonymously. Likewise, ASPSPs will not be obligated to “communicate securely” with AISPs and PISPs or provide interfaces that give them access to the customers’ data.

Furthermore, the EBA believes that Article 115 (6) of PSD2 allows the ASPSPs to block access to the account information and payment initiation services solely for justified and duly evidenced reasons, in particular if payments are suspected to have been unauthorised or fraudulent. Additionally, the AISPs and PISPs may access customer account information without being blocked using existing methods (such as “screen scraping”), unless national law states otherwise before PSD2 enters into force.

Notwithstanding the above, the EBA encourages the PSPs to comply with the RTS on the strong customer authentication and common and secure communication, as well as the relevant provisions of PSD2 in this regard, before its entry into force.

In any case, the existing guidelines on the security of internet payments (EBA/GL/2014/12) will continue to apply beyond the PSD2 application date and will gradually cease to apply when they are superseded by PS2-specific EBA instruments.

Provision of cross-border services if the transposition of PSD2 is delayed

PSPs that have already been authorised under PSD1 and have been providing services in other Member States in accordance with a valid passport notification, may continue providing payment services in those Member States, even if both home and host Member States have not transposed PSD2.

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