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# Understanding payment services

The provision of payment services is a licenced activity in the EU. Payment services providers are regulated by the European Directive (EU) 2015/2366, better known as PSD2. In Belgium PSD2 is transposed by the Belgian Act of 11 March 2018 on the legal status and supervision of payment institutions and electronic money institutions, access to the business of payment service providers and to the activity of issuing electronic money, and access to payment systems. In practice, it is not always easy to grasp (i) what type of activity these regulated payment services refer to and (ii) the scope of the related legal framework and licensing requirements. From basic principles such as possession of funds and payment accounts, to classic cash depositing services as well as the recently introduced account information services, this article aims at providing an updated overview and better understating of the scope of the payment services framework.

## 1. Introduction

1. Payment services are a regulated activity in Europe. At European level, the legal framework is primarily set out by Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (“PSD2”) and its implementing directives and regulation, as implemented into national law by each of the EU countries. In Belgium, the PSD2 framework was implemented by the Act of 11 March 2018 on the legal status and supervision of payment institutions and electronic money institutions, access to the business of payment service provider and to the activity of issuing electronic money, and access to payment systems (the “Act of 11 March 2018”) and by the Code of Economic Law (“CEL”).

Under the applicable legal framework, payment services can only be provided by certain licensed institutions or other public authorities and institutions specifically listed in Art. 1, 1. PSD2 or Art. 5, §1 of the Act of 11 March 2018. This includes credit institutions, electronic money institutions (“EMIs”), B-post, the National Bank

of Belgium (“NBB”) and the European Central Bank (“ECB”) as well as some Belgian federal, regional and local authorities and finally, licensed payment institutions (“PIs”). In addition, certain rules govern (i) the relationship between the payment service provider (“PSP”) and its customers and users (especially for consumers) and (ii) the way in which payment services must be provided.<sup>1</sup>

From reading the provisions of the legal texts, it is not always easy to understand (i) what type of activity these payment services actually refer to in practice and (ii) the scope of the payment services legal framework. For classic players, who have been active in the core of the payment service industry for years, this might seem more evident. However, as part of the FinTech industry, the payment service industry is booming and continuously further developing and welcoming new players. For those new innovative players, as well as for their legal advisors, it is important to obtain a better understanding of the scope of the payment services legal framework.

This article aims to provide a better understanding of some of the basic principles and concepts as well as of what is captured under each of the payment services. In a second article, we will discuss each of the exemptions listed under PSD2 in further

1. Book I, Chapter 5 and Book VII CEL and The Act of 11 March 2018.

detail. It goes without saying that a lot more is to be said about the PSD2 framework. For example, in this article we do not cover any issues about the territorial scope of PSD2. We also do not go into the details of the PSD2 inspired payment user and consumer protection rules, e.g. the rules imposing information obligations on PSPs, or setting out the payment user's rights and obligations related to the use of payment services.<sup>2</sup>

## 2. Basic principles and concepts proper to all payment service activities

### 2.1. Possession of funds as key element

2. Although not explicitly mentioned in the legal texts, a key element in determining the scope of application of the payment services legal framework has always been the possession of client funds by the PSP. This rationale certainly made sense under PSD1, which only regulated 6 types of payment services for which the PSP indeed, at one time or another, entered into the possession of client funds.<sup>3</sup>

Even though PSD1 failed to explicitly provide for such a criterion, it could be derived from the exemption for technical service providers, who were exempted if they did not enter into possession of the funds.<sup>4</sup> According to the study of London Economics on the application of PSD1, the decisive role of the funds' possession may be assumed in light of the PSD1's goals which include securing consumers against the provider's default. Where the provider does not enter into the possession of funds, the risk of default is not present".<sup>5</sup>

The question now arises as to whether this implicit criterion can still be used to determine the application of the PSD2 regime. PSD2 introduced two new types of payment services – payment initiation and account information – that are characterised by the fact that the PSP does not come into possession of the client funds.<sup>6</sup> For that reason, PSPs

offering only those services are subject to less burdensome regulatory requirements compared to PSPs offering services 1 to 6. For example, they have almost no or much less strict own fund requirements, as opposed to other PSPs.<sup>7</sup>

Although the possession of funds can no longer be used as the general key criterion for the application of PSD2, in our view it remains an important element or characteristic when assessing whether a service or an activity could fall within the scope of any of the payment services 1 to 6.

### 2.2. Payment service user

3. The payment service user ("PSU") is an important PSD concept, as the payment service legal framework aims at protecting the user in its relation towards a PSP.<sup>8</sup> A PSU is any natural or legal person making use of a payment service in the capacity of payer, payee, or both.<sup>9</sup> The payer can be any natural or legal person who holds a payment account and allows a payment order from that payment account. Where no use is made of a payment account, the payer can be any person who gives a payment order.<sup>10</sup> The payee is any natural or legal person who is the intended recipient of funds which have been the subject of a payment transaction, such as the beneficiary of a direct debit or an online merchant accepting card payments.<sup>11</sup>

As a rule, the payer is the person whose payment account is debited as a result of a payment transaction. The payee is the person whose payment account is credited.<sup>12</sup> However in some cases, such as money remittance, no payment account might be credited and/or debited as no payment account might be involved in the transaction (see paragraph 25 below).

It is interesting to note that the definition of PSU only refers to the notions of payer and payee. However, in case of account information services, no actual payer or payee can be identified, as this service does not entail the execution of a payment transaction or transfer of funds. For the purpose of account information services, the PSU is the

2. For more information on these topics we refer to for example J. SAD, "Les services de paiement", in *Traité pratique de droit commercial – Tome 5: droit bancaire et financier*, Waterloo, Kluwer, 2016, 229–338 (hereafter J. SAD, "Les services de paiement").
3. Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC ("PSD1").
4. Art. 3, (J) PSD1; Art. 4, 10° of the Act of 10 December 2009.
5. IFF, London Economics and PaySys, *Study on the impact of Directive 2007/64/EC on payment services in the Internal Market and on the application of Regulation (EC) No. 924/2009 on cross-border payments in the community*, February 2013, 107 (hereafter: IFF, London Economics and PaySys, *Study on the impact of PSD*).
6. Recital 35 PSD2.
7. Art. 17 & 33 of the Act of 11 March 2018; Art. 7 & 8 PSD2; PSPs only offering payment initiation services should have an initial capital of EUR 50,000 and their own funds shall not fall below the amount of the initial capital. PSPs offering account information services do not have any initial capital or own funds requirements to comply with. Nevertheless, they remain subject to important other organisational and financial requirements, such as the requirement to have an appropriate liability insurance in place.
8. R. STEENNOT, "Art. 1 – 81 Artikelsgewijze Commentaar Wet betalingsdiensten" in X, *Financieel recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Kluwer, 23.
9. Art. 4, (10) PSD2; Art. 2, 19° of the Act of 11 March 2018.
10. Art. 4, (8) PSD2; Art. 2, 20° of the Act of 11 March 2018.
11. Art. 4, (9) PSD2; Art. 2, 21° of the Act of 11 March 2018.
12. R. STEENNOT, "Art. 1 – 81 Artikelsgewijze Commentaar Wet betalingsdiensten" in X, *Financieel recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Kluwer, 24.



person who holds the payment account from which the information is being provided.

### 2.3. Regular occupation or business activity

#### 2.3.1. General

4. Another key principle that might not immediately be clear from reading PSD2 or the Act of 11 March 2018 is that the payment services legal framework is limited to service providers who provide payment services as a “regular” occupation or business activity.<sup>13</sup> This means that other types of market players may, in principle, offer payment services outside the legal framework as long as their payment services cannot be designated as being their regular occupation or business activity.

The payment services legislation does not provide any specific criteria to determine whether or not a payment service can be characterised as the “regular” occupation or business activity of a company. In practice, it is up to the NBB and the Belgian courts<sup>14</sup> to decide. However, a good test in this context is the application of two specific conditions (to be met simultaneously) developed by existing legal doctrine case law. For the application of the legal framework to be excluded:

- (i) the payment services may not be the main activity of the undertaking; and
- (ii) the payment services must be complementary to the other activities of the undertaking.<sup>15</sup>

#### 2.3.2. Main activity

5. First of all, the main or principal activity of the company should be taken into account. A company that produces goods or offers services and in addition offers

payment services<sup>16</sup> in connection with or in the context of this activity is unlikely to fall within the scope of application of the payment services framework. The payment services should constitute a substantial part of the activity and profit of the company.

#### 2.3.3. Complementary character

6. However, it is also necessary to consider the finality of the main activity of the company and the complementary nature of the payment services. If a payment service is offered separately and in addition to the main activity, the company will, in principle, be subject to a licence requirement as payment institution, regardless of the size of this activity. For instance, a company that mainly produces and sells goods and also offers money remittance services (see paragraph 25) will, in principle, have to obtain a licence for such services, as these services are in no way complementary and necessary to supplement the main activity, being the production of goods.<sup>17</sup> Needless to say, this is only so if no other exemptions apply.

#### 2.3.4. Other criteria

7. Other, quantitative, criteria that may be taken into account by regulators are: (i) the proportion (percentage) of the profit from payment services in the overall profit of the company, (ii) the fact that the payment services are advertised/marketed as such and/or (iii) the possible intervention/use of a third-party/licensed payment institution.<sup>18</sup>

#### 2.3.5. Impact

8. Without the notion and principle of regular occupation or business activity, the payment services legislation

13. Recital 24 PSD2; See also recital 6 PSD1 and confirmed by the European Commission (“EC”) in its questions and answers on PSD1 (“Q&A”) clarifying that this recital should be read in conjunction with Art. 1(2) PSD1 (Note that the same article still exists under PSD2); EC, *your questions on PSD*, question 125, [https://www.trivvy.nl/uploads/5/1/6/0/51608851/faq\\_en.pdf](https://www.trivvy.nl/uploads/5/1/6/0/51608851/faq_en.pdf).

It is also interesting to note that the Act of 11 March 2018 does not refer to the concept of regular occupation or business activity. Nevertheless, we take the view that the same principle applies in Belgium and that a licence is only required for service providers having payment services as one of their main activities. This was previously confirmed by the CBFA (Banking, Finance and Insurance Commission, now NBB) in its annual report of 2009–2010. (CBFA, *Verslag DC 2009–2010*, 45). In addition, as far as the application of the applicability of the rules on the contractual relationship between PSPs and the users as well as the consumer protection rules are concerned, the CEL contains provisions that indirectly confirm this principle: Art. I.9.1° CEL defines “payment service” as every service offered for sale in the course of a *business activity*. Art. I.9.2° CEL provides for a definition of PSP that is identical to the one previously used in the Act of 21 December 2009 on the legal status of payment institutions and electronic money institutions, access to the business of payment service provider and to the activity of issuing electronic money and access to payment systems (“Act of 21 December 2009”). In the preparatory works of this Act, it is explained that the definition of PSP should be limited to PSPs or contractual service providers whose principal activity is the provision of payment services; Parl. Doc. 2008–09, no. 2182/001, 13.

In addition, Art. I.9.2° CEL states that “A person who, as a regular occupation or business (activity), provides payment services to payment service users or electronic money to a holder of electronic money without the necessary licence or authorisation nevertheless remains subject to the mandatory provisions of this Act”. A *contrario*, it can be derived from the same text that a person who does not carry out such activities as a regular occupation or business activity is not subject to this legal framework; P. E. BERGER & S. LANDUYT, “Toepassingsgebied van de Wet Betalingsdiensten en de Wet betalingsinstellingen” in Instituut Financieel Recht (ed.), *Financiële regulering in de kering*, Antwerp–Cambridge, Intersentia, 2012, 138 (hereafter: P. E. BERGER & S. LANDUYT, “Toepassingsgebied van de Wet Betalingsdiensten en de Wet betalingsinstellingen”).

14. As far as the application of the rules included in the CEL is concerned.

15. In the preparatory works of the Act of 21 December 2009, it is also stated, when discussing the characteristics of the concept of payment service, that the payment service is the principal element of the service offered. Payment services that are ancillary to the supply of goods or services are, in principle, out of scope; Parl. Doc. 2008–09, no. 2182/001, 13; P. E. BERGER & S. LANDUYT, “Toepassingsgebied van de Wet Betalingsdiensten en de Wet betalingsinstellingen”, 139.

16. For example, a company that sells goods and maintains remunerated accounts for its customers in this context.

17. P. E. BERGER & S. LANDUYT, “Toepassingsgebied van de Wet Betalingsdiensten en de Wet betalingsinstellingen”, 137.

18. P. E. BERGER & S. LANDUYT, “Toepassingsgebied van de Wet Betalingsdiensten en de Wet betalingsinstellingen”, 138.

would capture activities and businesses that should clearly not be subject to such strict licensing and other obligations. Even though the payment services legislation already lists a number of activities that are specifically exempted from its scope<sup>19</sup>, there are many other possible scenarios or activities that are not included in this list. These latter activities could, under a broad interpretation of the law, fall within the scope of one or another payment service.

Let us take the example of funds received by lawyers, tax representatives, bailiffs or notaries. It seems evident and appropriate that a notary or lawyer should not be required to obtain a license as a payment institution simply because he receives funds in his third-party account on behalf of his clients and further transfers such funds to an account indicated by his client (i.e. an account held in the name of his client or another beneficiary). Under a strict interpretation, such a transaction could fall within the scope of service 3 (execution of payment transactions). However, in this case, the transfer of funds is clearly not the main service provided to the client. Moreover, in principle, no remuneration is paid specifically in relation to the transfer of the funds either. The purpose and main activity of the professions of lawyer or notary concern the provision of legal services, not payment services.<sup>20</sup>

The principle of regular occupation also helps to allow for the development of other innovative services both within the financial (FinTech) sector and in other sectors such as market players developing payment collection services.

An example could be a platform on which, or an intermediary via whom, invoices are sold. The platform facilitates the sale/purchase of the invoices but also offers debt collection services. It follows up on the payment of the invoices (and chases debtors where necessary), collects payments from debtors, and transfers the amounts to the buyer/owner of the invoice. Depending on the business model, clients of the platform (buyers and sellers) may pay a general membership fee, and/or also an amount per invoice sold. As this is not customary, we assume that no separate fee is charged for every payment of (part of) the invoice that is collected and transferred. In so far as such services cannot already make use of the general exemption for commercial agents under Annex I.B, 2° of the Act of 11 March 2018 (e.g. for the invoice sale/purchase services), it is generally accepted that debt collection service providers may benefit from a more general exemption for agents

or proxy holders (i.e. non-commercial agents or proxy holders that are not necessarily involved in soliciting the customer to purchase).<sup>21</sup>

In the example of the platform, two arguments could be given for them to be excluded from the PSD scope. First, the main service of the collector is not so much the receipt/transfer of the funds (even if he does this on a regular basis). The main service goes a lot further and entails the follow-up of invoices, and the actual receipt/transfer is ancillary to the main service. Moreover, remuneration is often not based on a transaction but on a contract, an invoice or a portfolio. Secondly, it could also be argued that such a service does not even constitute a payment service as there is no further request for an execution of a payment transaction once the debtor has paid the invoice to the collector. Indeed, in this model, the invoice issuer/owner provides the payer with the option of settling the invoice by payment to the collector. Such a payment extinguishes the debt by virtue of the agency relationship between the collector and the invoice issuer/owner, and is therefore equivalent to a payment made directly to the invoice issuer/owner. In the event of failure on the part of the collector, the risk lies with the invoice issuer/collector. The payer/debtor has no further exposure.<sup>22</sup>

Other examples of market players for which the same reasoning may apply and that generally do not fall under the scope of PSD2 are e.g.:

- letting agents or platforms (handling deposits or rent payments);
- individuals dealing with account information or initiation under a power of attorney; and
- operators of crowdfunding platforms transferring funds between participants.<sup>23</sup>

Nevertheless it is clear that this principle of “main activity” allows room for national regulators’ discretion on the interpretation of the applicability of PSD2. Regulators will take into account the business model and the risks associated for consumers/users when considering whether or not a PI license is required with respect to a certain business or service provider.

For example the German Federal Financial Supervisory Authority (“BaFin”) believes that one should look at the economic reality of the services offered. Factoring is usually seen as a financing solution, whereby the factoring company assumes the credit risk for invoices sold. However,

19. Annex I.B of the Act of 11 March 2018; Art. 3 PSD2.

20. P. E. BERGER & S. LANDUYT, “Toepassingsgebied van de Wet Betalingsdiensten en de Wet betalingsinstellingen”, 137.

21. IFF, London Economics and PaySys, *Study on the impact of PSD*, 134–135.

22. IFF, London Economics and PaySys, *Study on the impact of PSD*, 134–135; EC, *Your questions on PSD*, question 414; UK Financial Conduct Authority (“FCA”), *Perimeter Guidance (Payment Services Scope) Instrument 2009*, question 25, <https://www.handbook.fca.org.uk/handbook/PERG/15/?view=chapter>.

23. FCA, *Perimeter Guidance (Payment Services Scope) Instrument 2009*, question 9.



in case the factoring company only pays the seller once it has received payment from the seller's client, this could fall under the scope of payment service 6. According to the BaFin, in such case the service offered by the factoring company is not so much a financing solution, but more a payment service. For Bafin, the latter applies regardless of whether or not the factoring solution makes use of discharging payments (meaning the debt towards the seller is distinguished as soon as the debtor has paid the factoring company).<sup>24</sup> Also in Belgium some factoring platforms have obtained a PI license with the NBB, for example Edebex SA.

A similar approach has also been taken by some regulators for other types of market players, such as Airbnb which receives payments from travellers for bookings made on its platform and subsequently transfers those funds to the hotels.

## 2.4. Payment account

### 2.4.1. Importance

9. The notion of “payment account” is relevant for a number of reasons. First, with respect to the qualification of a service under PSD2, as some of the payment services (as listed in Annex I to PSD2 or Annex I.A. of the Act of 11 March 2018) relate only to payment accounts. Second, a number of consumer protection rules set out in the CEL only apply in relation to payment account services.<sup>25</sup> Third, the notion is relevant for market participants offering the new payment initiation and account information services. The latter's rights of access to accounts held with other PSPs under PSD2 will apply only in relation to payment accounts.<sup>26</sup>

### 2.4.2. Scope and definition

10. The Act of 11 March 2018 defines a payment account as “an account held in the name of one or more PSUs that is used for the execution of payment transactions”.<sup>27</sup>

The types of accounts that should be regarded as payment accounts has been uncertain since even before the introduction of PSD.<sup>28</sup> PSPs (such as credit institutions, PIs and EMIs) offer different types of accounts depending on their line of service.

In traditional banking services, for example, an account is a tool not used exclusively for payment transactions. It is a useful tool for purposes beyond the payment context, such as for savings, borrowing and escrow services. An account expresses the fundamental relationship between a banker or PSP and his client. Without considering the types of financial institutions involved, mainly two categories of accounts can be distinguished (i) the account as a medium to support assets and (ii) an account as a payment technique. Both types of accounts are the result of an agreement, expressed or implied, whereby the parties agree that their legal transactions will be settled by registering claims or debts onto the account, hence enabling them to know the debt or credit position of the parties at all times.<sup>29</sup>

The payment services legal framework only applies to *payment* accounts, i.e. those that can be used as a payment technique. The scope of application of the payment services legislation does not depend on the name or qualification that is given to the account by the parties, nor on the fact that the account is or is not exclusively used for the purpose of payment transactions. Indeed, the definition of payment account is broad so that it can refer to all types of accounts, including current accounts, electronic money accounts and savings accounts, as long as they can be used for the execution of payment transactions.

The preparatory works leading to the Act of 10 December 2009 provide more guidance on the scope of this notion.<sup>30</sup> According to the Belgian legislator, it would be stretching things too far if one included any account from which a payment transaction could occasionally be made. It is clarified that an account should, *a priori*, not be considered as a payment account in the case where making a few payments is only an accessory function of an account that is used mainly for other purposes, such as saving or investing.<sup>31</sup> For the Belgian legislator, important elements in determining whether an account should

24. See BaFin Merkblatt – Hinweise zum ZAG. [https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Merkblatt/mb\\_111222\\_zag.html](https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Merkblatt/mb_111222_zag.html).

25. This includes for example information obligations on fees and costs associated with a payment account and rules on the basic banking service; See Chapter 1.1, Chapter 8 and Chapter 9.1 Book VII CEL.

26. However, in case service providers provide access to other client accounts than strict payment accounts, the security rules set out in PSD2 should be respected; Parl. Doc. 2017–18, no. 2896/002, 5; G. HENNARD, “La loi du 19 juillet 2018 portant modification et insertion de dispositions en matière de services de paiement dans différents livres du Code de droit économique”, *BFR* 2019, no.1, 28 (hereafter: G. HENNARD, “La loi du 19 juillet 2018”).

27. Art. 2, 18° of the Act of 11 March 2018.

28. T. BAES, “Wet 10 december 2009 betreffende de betalingsdiensten” in *Wet en Duiding (deel 5) Bank en Zekerheden*, Brussels, Larcier, 2014, 34 (hereafter: T. BAES, “Wet 10 december 2009”); P. E. BERGER & S. LANDUYT, “Toepassingsgebied van de Wet Betalingsdiensten en de Wet betalingsinstellingen”, 114; P. E. BERGER, S. LIEBAERT & C. FABRI, “Betaal-apps in het licht van PSD II” in Instituut Financieel Recht (ed.), *Financiële regulering: een diwersdoornede*, Antwerp-Cambridge, Intersentia, 2019, 138; G. HENNARD, “La loi du 19 juillet 2018”, 27; J. SAD, “Les services de paiement”, 238; J. A. VOERMAN, “Betaaldiensten 2.0 – Toezicht op innovatieve betaaldiensten” in *Financieel Juridische Reeks*, Zutphen, Uitgeverij Paris, 2019, 55 (hereafter: J. A. VOERMAN, “Betaaldiensten 2.0”).

29. J. SAD, “Les services de paiement”, 235; J. VAN RYN & J. HEENEN, *Principes de droit commerciale*, Brussels, t. 4, 1988, 307.

30. Parl. Doc. 2008–09, no. 2179/001, 14–15.

31. A similar approach is taken by the Dutch legislator: Kamerstukken II 2008/09, 31892, 3, 15; J. A. VOERMAN, “Betaaldiensten 2.0”, 57.

qualify as a payment account are the applicable legislative or contractual limitations. In case these limitations are of such a nature that it would *de facto* be impossible to use the accounts for the execution of payment transactions on a regular basis, the accounts should not be considered as payment accounts. The preparatory works mention the following examples:

- 1) fixed term deposits, as they do not allow additional deposits or withdrawals of funds to be made<sup>32</sup>;
- 2) savings accounts subject to the regime of withdrawals of savings deposits as defined in Art. 2 of the Royal decree of 27 August 1993 implementing the Income Tax Code 1992. According to the documents on the preliminary debates in Parliament, such savings accounts do not fall under the concept of ‘payment account’ because of the restrictions on withdrawals that apply to such accounts. It is further clarified that other savings accounts that do not fall under this regime and which may also be used to carry out payment transactions should be reclassified as payment accounts.<sup>33</sup>

Also, at a European level further guidance is provided on the qualification of payment accounts. In its Q&A on PSD the EC stated that a savings account in which the account holder can place funds whenever he wants, and from which he is also able to withdraw funds whenever he likes without any restrictions (e.g. penalties), qualifies as a payment account.<sup>34</sup> This statement should be read together with a more recent judgment of the Court of Justice of the EU dated 4 October 2018, bringing the interpretation on EU and Belgian level more closely together. In its judgement the Court of Justice clarifies that the determining criterion for the purpose of categorisation of payment accounts lies in the ability to perform daily payment transactions from such an account. The latter should be understood not only as the possibility to place funds in and withdraw cash from an account, but also as the possibility to execute and receive payment transactions to and from a third party. Hence, the possibility of making payment transactions to a third party from an account or of benefiting from such transactions carried out by a third party is a defining feature of the concept of

payment account. A savings account from which no direct payments to third parties can be made and in which no direct payment from third parties can be received should not be considered as a payment account.<sup>35</sup>

The interpretation of the concept of payment account by the Belgian legislator or at European level are not identical. Where the Belgian legislator focuses on the main purpose of the account, the European legislator focuses on the possibility to use the account to execute and receive payment transactions to and from a third party.<sup>36</sup> So far the Belgian law texts or guidance were not amended to bring them in line with the above mentioned EU case law. The preparatory works leading to the Act of 10 December 2009 are therefore still relevant. Nevertheless, it seems that both approaches are not necessarily contradictory. Indeed, also for Belgian law purposes it is clear that even if the main purpose of the account is different from a payment account, it will be considered as a payment account in case it can be used for the execution of payment transactions on a regular basis. For Belgian law purposes, one might therefore conclude that the following elements should be taken into account when assessing whether an account should be categorised as a payment account:

- What is the main purpose for which the account is designed and held?
- Is the account *de facto* fit to carry out payment transactions?
- Is it possible to place funds in or withdraw funds from the account without any restrictions, such as the need for intervention, penalties or the agreement of the PSP?
- To what extent can the users make direct payments to third parties from the account or receive direct payments from third parties in the account?

Applying the above reasonings of both the Belgian and EU legislator, most savings accounts, investment accounts, or accounts linked to credit cards (i.e. accounts used for the sole purpose of reimbursing amounts due because of the use of the credit card), or accounts specifically set up for reimbursements of loans such as a mortgage credit, do not fall under the category of a payment account unless they allow to make direct payments to third parties from the

32. Parl. Doc. 2008–09, no. 2179/001, 14–15; The EC supports the vision of the Belgian legislator in its Q&A on PSD and states that “... *fixed term deposits should fall out of this category as the funds are taken and paid back by the PSP, and the holder of the deposit does not keep any freedom to place additional funds or withdraw funds during the term of the deposit*”; EC, *Your questions on PSD*, question 25.

33. Parl. Doc. 2008–09, no. 2179/001, 14–15; P. E. BERGER & S. LANDUYT, “Toepassingsgebied van de Wet Betalingsdiensten en de Wet betalingsinstellingen”, 116.

34. EC, *Your questions on PSD*, question 150.

35. CJEU 4 October 2018, C-191/17; In a situation where funds should be transferred to another reference account held in the name of the account holder first (e.g. current account), before a payment from a savings account can be made to or received from a third party, such a savings account does not qualify as a payment account. This interpretation of the concept of payment account was inspired by the scope of application of the Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (“PAD”). Nevertheless, one could argue that the scope of the concept of payment account under PSD2 remains more broad when compared to the type of accounts that are in scope of the PAD. Where the PAD applies mainly to accounts with more or less unlimited payment features, PSD2 also applies to accounts with more limited payment features; J.A. VOERMAN, “Betaaldiensten 2.0”, 61.

36. G. HENNARD, “La loi du 19 juillet 2018”, 31.



account or receive direct payments from third parties on the account.<sup>37</sup>

### 2.4.3. Payment accounts versus deposit accounts and electronic money accounts

11. It is important to note that the concept of a payment account is not the same as the concept of a deposit account, such as savings or current accounts. In some cases, as explained above, deposit accounts offered by credit institutions may also qualify as payment accounts. In contrast to credit institutions, PIs (as well as EMIs) are not allowed to hold deposits or repayable funds within the meaning of Art. 1 of the Banking Act or Art. 23 of the Act of 11 July 2018.<sup>38</sup> PSPs that are not credit institutions may only hold “mere” payment accounts, meaning they may only hold clients’ funds in an account for the sole purpose of executing payment transactions.

The notions of deposit or repayable funds are not defined in Belgian or European law. However, in the context of PSD, the European legislator created a legal fiction that any funds received by payment institutions from PSUs with a view to executing payment transactions do not constitute a deposit or other repayable funds.<sup>39</sup> This was also implemented into Belgian law by Art. 44 of the Act of 11 March 2018.

The difference between a deposit account held with a bank and a mere payment account held with a PI nevertheless remains relevant in two ways. First, as far as the purpose for which the funds can be used is concerned, PIs can only receive funds from clients to execute payment transactions and must keep these clients’ funds separated from other funds at all times.<sup>40</sup> Second, this is relevant with respect to the period during which the PSP may hold the money in the account. The EC clarified that PIs can only accept a customer’s funds in a payment account with an order for executing a payment transaction or a series of payment transactions to be executed on a given date. (E.g. direct debits or standing orders where it is necessary to place funds in a payment account in advance of the execution of the payment transaction).<sup>41</sup> Whereas deposits can of course remain in the deposit account of a credit institution for an indefinite period of time, the funds in a payment

account should in principle not remain under the control of the PI for longer than is necessary for operational and technical reasons.<sup>42</sup>

This is also what differentiates classic payment accounts from electronic money (“e-money”) payment accounts. E-money accounts are used as payment accounts from which payments transactions can be performed. For both types of accounts, the funds in those accounts are not considered as deposits or repayable funds. However, whereas mere payment accounts work on the basis of classic payments, e-money accounts work on the basis of prepaid solutions. This means that, whereas funds can only be made available to a classic PI for a predefined transaction, EMIs can hold the funds in the account for undefined future transactions.<sup>43</sup>

## 2.5. Funds

12. The Belgian legal framework on payment services only applies where such services are performed in relation to “funds”. Funds include banknotes and coins, scriptural money or electronic money, in practice also often called “flat” currency or money.<sup>44</sup>

E-money is regulated by the second Electronic Money Directive (2009/100/EC) (“EMD2”), which was also transposed into the Belgian Act of 11 March 2018. It is defined as electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions as defined in point 5 of Art. 4 of PSD, and which is accepted by a natural or legal person other than the electronic money issuer. The purpose of this article is not to discuss in detail what can or cannot qualify as electronic money. However, it is important to note that e-money transactions are in scope of PSD2 as the concept of funds under PSD2 explicitly includes e-money. Hence, e-money payment services are covered by both EMD2 and PSD2.

Virtual currencies or cryptocurrencies, such as Bitcoin, do not fall under the definition of funds or e-money. Therefore ‘payment’ services in relation to virtual currencies are to date, not subject to PSD2 related licensing requirements.

37. G. HENNARD, “La loi du 19 juillet 2018”, 31.

38. Art. 45 of the Act of 11 March 2018.

39. P. E. BERGER & S. LANDUYT, “Toepassingsgebied van de Wet Betalingsdiensten en de Wet betalingsinstellingen”, 116.

40. In a situation where they hold client funds for more than one business day before transferring them to another PSP or beneficiary, they must deposit the funds on accounts held by a credit institution or invest the funds in a recognised money market fund or in certain low-risk liquid assets as listed by the NBB. Alternatively, the clients’ funds held by the payment institution must be covered by an insurance policy or guarantee that is considered sufficient by the NBB; Art. 42 of the Act of 11 March 2018; Art. 10 PSD2.

41. EC, *Your questions on PSD2*, question 155.

42. EC, *Your questions on PSD2*, question 155.

43. IFF, London Economics and PaySys, *Study on the impact of PSD*, 157.

44. Art. 2, 25° of the Act of 11 March 2018; Art. 4, (25) PSD2; Electronic money is defined in Art. 2, 77° of the Act of 11 March 2018.



New players that offer services in relation to funds or ‘fiat’ money as well as virtual currencies are however required to obtain a license, and, in Belgium, must obtain the NBB’s prior approval to develop other non-PSD2 activities.<sup>45</sup> From experience we know that our Belgian regulators are not opposed to these types of innovative services. However, when normal payment services are combined with more risky cryptocurrency activities, it is very likely that our regulator will carefully assess the PSP’s business model, and where necessary require additional measures to secure clients’ interests and funds or limit “contamination” of the regulated activity of the PSP.

### 3. *Payment Services already covered under PSD1 (payment services 1 to 6)*

#### 3.1. *Services enabling cash to be deposited into a payment account, as well as services required for operating a payment account*

13. The first payment service is a cash-related service. It entails the possibility for customers to deposit cash into a payment account held and operated by the PSP, regardless of the methods or procedures that are used.<sup>46</sup> It also includes the services required to allow clients to operate such payment accounts, for example remote access to check account balances or receive financial account statements.<sup>47</sup>

In practice, this service is offered by credit institutions or PIs that accept cash over the counter or via an automated teller machine (“ATM”), after which the money is deposited into a payment account.<sup>48</sup> The service can also be offered by EMIs that allow depositing cash to convert it into electronic money and place it in an electronic money account.<sup>49</sup>

Although not explicitly mentioned or required by PSD2 or the Act of 11 March 2018, it makes sense that service 1 only relates to cash deposits in a payment account of the PSU and operated by that PSP.<sup>50</sup> The definition provided in the legal texts might not be that clear for that matter since they only refer to “cash deposits into a payment account”.

Furthermore, service 1 does not include cash deposits in a payment account of a payee-third party, as this

kind of service would fall within the scope of service 3: the execution of payment transactions including the transfer of funds. Also, the fact that the management of payment accounts is added as a second, independent part of the definition could create confusion. It may not always be clear whether or not a PSP is also “managing or servicing” payment accounts and therefore whether it is offering service 1. This question is nevertheless very relevant for PIs. First to ensure the correct services are covered in the PSP’s license; cash services without payment accounts are covered by service 6, not service 1. Secondly, because capital requirements are different for PIs offering service 1 or service 6 (initial capital requirements of EUR 125.000 versus EUR 20.000).<sup>51</sup>

Finally, it should be noted that, when offered by a PI (hence not a credit institution or EMI), this service can in fact only be offered together with payment service 3 (the execution of payment transactions). This is because, as explained above, PIs can only hold funds in a payment account for the execution of a payment transaction. In practice, the cash can only be deposited into the account for the purpose of an envisaged payment transaction.

#### 3.2. *Services enabling cash withdrawals from a payment account as well as all the services required for operating a payment account*

14. Service 2 is also a cash-related service that allows withdrawals to be made from a payment account. As is the case for service 1, it also includes the services required to operate the payment account.

The cash pay-out can be made by the PSP with whom the account is held, or, by a person acting on its behalf. This service is typically offered by card issuers, which have larger framework agreements with the PSU. In Belgium most banks offer this service to their clients. Withdrawals can be made either with the client’s bank or in an ATM or a bank office of another bank that will in such case be acting on the former’s behalf.

It should be noted however, that not all ATM operators fall within the scope of this service.<sup>52</sup> Independent ATM operators that are not part of a larger framework agreement with the client but which act on behalf of one or more card issuers are not considered as PSPs. Typical examples

45. Art. 44 of the Act of 11 March 2018.

46. T. BAES, “Wet 10 december 2009”, 28; P. E. BERGER & S. LANDUYT, “Toepassingsgebied van de Wet Betalingsdiensten en de Wet betalingsinstellingen”, 100.

47. Parl. Doc. 2008–09, no. 2179/001, 9.

48. Parl. Doc. 2017–18, no. 2896/001, 14.

49. E. PIETERS & V. BROEKAERT, “Les services de paiement: l’autorégulation, la directive et la loi. Vue d’ensemble”, in X. *Betalingsdiensten. De nieuwe regelgeving onder de loep genomen*, Brussels, Anthemis, 2011, 18.

50. See also J.A. VOERMAN, “Betaaldiensten 2.0”, 64.

51. See also J.A. VOERMAN, “Betaaldiensten 2.0”, 64.

52. Reference is made to exemption 13° of Annex I.B of the Act of 11 March 2018.



of these unregulated service providers or activities include ATMs in supermarkets, nightclubs etc.<sup>53</sup>

### 3.3. Execution of payment transactions, including transfer of funds to a payment account with a user's payment service provider or with another payment service provider

15. A “payment transaction” is defined as an act initiated by or on behalf of the payer or by the payee, whereby funds are deposited, transferred or withdrawn, irrespective of any underlying obligations between the payer and the payee.<sup>54</sup> This is a broad definition, which means that service 3 could include all services whereby the PSP transfers funds from or to its clients, enabling them to make or receive payments.

The approval to initiate and execute such a transaction can be given by either the payer, the payee or the PSP that provides payment initiation services (service 7).<sup>55</sup> In practice, service 3 almost always implies the existence of a payment account at either the payer's or the payee's side or both, which is relevant to differentiate it from other services such as services 5 and 6, as further discussed below.

The following 3 types of payment execution services are explicitly provided for in PSD2 and the Act of 11 March 2018.<sup>56</sup>

#### 3.3.1. Direct debits, including one-off direct debits

16. This is a payment service for debiting the payer's payment account, where a payment transaction is initiated by the payee on the basis of the payer's consent to the payee, to the payee's PSP or to the payer's PSP. In the case of a direct debit, the payee initiates the payment to debit the payment account of the payer.

It is a service offered by a PSP to its clients to facilitate their payments. The client does no longer need to worry about the payment. The PSP executes the funds transfer on the initiative of the payee. An example is a direct debit by a telecom provider for a monthly subscription.

Strictly speaking, the definition of a direct debit only requires a payment account at the payer's side of the transaction. However, in practice, most direct debits will take place between payment accounts at both ends of the transaction. A payee could, however, debit the account of the payer to have the funds directly transferred to one of his accounts that is not a payment account (e.g. a savings account).

#### 3.3.2. The execution of payment transactions by means of “a payment card or similar instrument”

17. This service should be understood to include all payment transactions initiated by means of a debit card, credit card, prepaid card, electronic money cards,<sup>57</sup> or by means of the mobile or software applications that allow such card-based payment transactions.<sup>58</sup>

Neither the Act of 11 March 2018 nor PSD2 define the notion of payment card or explain what should be understood as “similar instrument”. In our view, reference should be made to the concepts of *card-based payment instrument* and *card-based payment transaction*, which are not defined by PSD2 or the Act of 11 March 2018. A card-based payment instrument is any payment instrument including a card, mobile phone, computer or any other technological device containing the appropriate payment application<sup>59</sup> to enable the payer to initiate a card-based payment transaction<sup>60</sup> that is not a credit transfer or direct debit.<sup>61</sup>

In summary, category b) thus concerns all payment transactions that are executed by using payment card schemes, such as Visa, Mastercard or Bancontact. This also allows the latter payment transactions to be easily distinguished from the execution of credit transfers and direct debits, as these are payment transactions that typically do not use a payment card scheme. Instead, these payment transactions use other payment schemes such as SEPA direct debit or SEPA credit transfer. Those payment transactions can thus also be referred to as *non-card-based payment transactions*.

53. Annex I.B, 15° of the Act of 11 March 2018; Art. 3, (o) PSD2; Parl. Doc. 2017–18, no. 2896/001, 23.

54. Art. 2, 22° of the Act of 11 March 2018; Art. 4, (12) PSD2.

55. See payment initiation services below; Parl. Doc. 2017–18, no. 2896/001, 15.

56. Parl. Doc. 2017–18, no. 2896/001, 14.

57. Parl. Doc. 2017–18, no. 2896/001, 15.

58. T. BAES, “Wet 10 december 2009”, 29; Y. LAUWERS & Y. VANWEDDINGEN, “Toepassingsgebied Richtlijn betreffende betalingsdiensten in de interne markt”, *Bank Fin.R.* 2008, 381; The definition of ‘payment instrument’ is further discussed under service 5 below.

59. “Payment application” means computer software or equivalent loaded on a device enabling card-based payment transactions to be initiated and allowing the payer to issue payment orders; Art. 2, 20) of Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (hereafter: Regulation 2015/751).

60. A card-based payment transaction is defined as a service based on a payment card scheme's infrastructure and business rules to make a payment transaction by means of any card, telecommunication, digital or IT device or software if this results in a debit or a credit card transaction; Art. 2, 7) of Regulation 2015/751; For a definition of payment card scheme, see service 5.

61. This is not defined in PSD2 or the Act of 11 March 2018. However, the preparatory works leading to the Act of 11 March 2018 refer to the definition in Art. 2, 20) of Regulation 2015/751; Parl. Doc. 2017–18, no. 2896/001, 80.

The PSP issuing the payment instrument is in most cases also the one executing the payment transaction (hence combining services 3 and 5) (see paragraph 22 below). Moreover, the execution of such transactions is often also linked to a payment account in the name of the cardholder, but not necessarily. A debit card offered by a credit institution, for example, is usually linked to a current account. A transaction initiated with that card will imply a nearly immediate debit of the current account to transfer the funds to a beneficiary (or acquirer).

### 3.3.3. The execution of credit transfers, including standing orders

18. The credit transfer is one of the classic examples of a payment transaction. It is the classic bank transfer that can be made via an online banking system.

More generally, it concerns a payment service for crediting a payee's payment account with a payment transaction or a series of payment transactions from a payer's payment account by the PSP that holds the payer's payment account, based on an instruction given by the payer. The definition of credit transfer therefore explicitly requires a payment account at both ends of the transaction.<sup>62</sup>

The latter service also includes the execution of standing orders, which is a service offered by a PSP to make a recurring periodic transfer on a predetermined date. A standing order should be distinguished from the direct debit as it is the payer, not the payee, that initiates the payment, for example, a monthly transfer for the rental of an apartment.<sup>63</sup>

### 3.3.4. The transfer of funds to a payment account with the user's PSP or with another PSP

19. In addition to the three types of payment transactions above, the Act of 11 March 2018 clarifies that the execution of payment transactions also includes the transfer of funds to a payment account with the user's PSP or with another PSP.<sup>64</sup> This type of transfer could be considered as a separate, more residual category that includes any payment transaction whereby money is transferred, in cash or electronically, to a payment account of the payee (in so far as it is not already captured by the other 3 categories).

It should be noted that, following the definition of funds, the last category of service 3 could even relate to cash transfers. "Funds" after all include banknotes and coins, scriptural money or electronic money.<sup>65</sup> This could for example be the case where a client/payer deposits funds directly into the account of a third party at that third party's bank without using his own payment account. In practice, however, this is very rare. At least in Belgium, we understand that very few or even no PIs offer such type of cash service. Also, credit institutions cannot, or have become reluctant to, offer such services because of anti-money laundering obligations. In practice, funds would most likely first be deposited into a payment account in the name of the payer (even if it would only be a temporary one) to be further transferred to the account of the payee.

Notwithstanding the above, service 3 should clearly be distinguished from service 6 (money remittance). In principle, service 3 is only offered to clients in the context of a larger framework agreement with the client, whereby most often a payment account is opened in the name of the client. Service 6, however, relates to a specific type of client service whereby funds are transferred in the context of single payments without opening a payment account in the name of the payer or the payee.<sup>66</sup>

### 3.4. Execution of payment transactions covered by a credit line

20. The 4<sup>th</sup> category of payment services includes the same kind of services as the third category, but, in this case, the funds of the payment transaction will be covered by a "credit line" offered to the PSU.<sup>67</sup> This service refers to the situation where payment transactions are executed with funds that are advanced by the PSP.<sup>68</sup>

The Act of 11 March 2018 does not provide a specific definition of the notion of "credit line". The previous Act of 10 December 2009 and its preparatory works referred to the concept of "credit agreement" as provided in the legislation on consumer credit.<sup>69</sup> It should be well-understood, however, that service 4 can be offered to both consumers and non-consumers.<sup>70</sup> Hence, it applies to any agreement whereby a PSP grants, or promises to grant, credit to a PSU in the form of a deferred payment, a loan or any other similar payment facility.

62. Art. 2, 2° of the Act of 11 March 2018; Art. 4, (24) PSD2.

63. Parl. Doc. 2008–09, no. 2179/001, 9.

64. Annex I.A, 3, §1 of the Act of 11 March 2018; Annex I, 3 §1 PSD2; The payment account of the payee can be held at the same PSP as the one of the payer, or at another PSP.

65. Art. 2, 25° of the Act of 11 March 2018; Art. 4, (25) PSD2; Electronic money is defined in Art. 2, 77° of the Act of 11 March 2018.

66. See below for more information on money remittance.

67. Parl. Doc. 2017–18, no. 2896/001, 15.

68. Parl. Doc. 2017–18, no. 2896/001, 15.

69. Art. 1, 4° of the Act of 12 June 1991 on consumer credit; current Art. I.9, 39° CEL.

70. Parl. Doc. 2008–09, no. 2179/001, 21–22.



Examples of this kind of service are card payments by means of a credit card or deferred debit card and credit transfers where the payer makes use of overdraft facilities, which allow the payer to exceed the current balance in its payment account.<sup>71</sup> When the PSP offers such credit agreements it shall be subject to additional legislation such as the rules relating to consumer credit, as set out in Book VII of the Economic Code.

The execution of such transactions is often but not necessarily linked to a payment account in the name of the cardholder. In case of a credit card, the issuer could decide not to open a payment account in the name of the payer. Often, the issuer pays the amount into the payment account of the beneficiary<sup>72</sup> (i.e. on behalf of the payer) and only receives the money from the payer at a later date by way of a direct debit on the payer's current account held with either the same PSP/bank or another bank. In some cases, the issuer of the credit card provides the client with an account into which funds are usually paid for the sole purpose of repaying the credit card debt. Such accounts should not be considered as payment accounts.<sup>73</sup>

### 3.5. Issuing of a payment instrument and/or acquiring of payment transactions

21. Service 5 covers two separate payment services:

- (i) the issuing of a payment instrument;
- (ii) the acquiring (or acceptance) of payment transactions.

These are two very different services that are not necessarily directly linked and are often not provided by the same PSPs in practice.

#### 3.5.1. Issuing of a payment instrument

22. The issuing of a payment instrument is defined as a payment service provided by a PSP that concludes an agreement to provide a payment instrument to a payer for initiating and processing<sup>74</sup> the payer's payment transactions.<sup>75</sup>

A "payment instrument" should be understood as a personalised device and/or set of procedures agreed between the PSU and the PSP and used in order to initiate a payment order.<sup>76</sup> In its Q&A the EC clarified that the definition covers (i) physical devices such as cards or mobile phones and (ii) sets of procedures (such as PIN codes, TAN codes, Digipass, /passwords), that a payer can use to give instructions to his PSP in order to execute a payment transaction.<sup>77</sup> "Procedures" should be understood as verification or authentication procedures.<sup>78</sup> Examples are debit and credit cards, prepaid cards, pc banking and mobile phone applications. This definition is broad and technologically neutral so it is suited to the rapidly changing technologies. It should also be noted that even a "paper" transfer order with the handwritten signature of the payer can constitute a payment instrument.<sup>79</sup>

In practice, most PSPs issuing the payment instruments also execute the payment transactions initiated with such an instrument.<sup>80</sup> Therefore, services 3 and/or 4 and 5 are often combined.<sup>81</sup>

The issuing of a payment instrument requires a framework agreement between the PSP and the PSU.<sup>82</sup> Under this framework agreement, the PSP will, in most cases, provide a payment account linked to the payment instrument.<sup>83</sup> This is no requirement, however: it could also be a payment account provided by another PSP or the payment instrument could even not (directly) be linked to any payment account at all.<sup>84</sup>

Interesting to note is that PSD2 facilitated the linking of new card-based payment instruments to payment accounts of other PSPs. Before PSD2, mostly only credit cards were issued by a PSP without also providing its own payment account linked to the instrument.

As explained above, credit cards often operate without any payment account. The card is only indirectly linked to a current or payment account of the user held with a bank because the issuing/executing PSP is able to execute a direct debit on the current account, to settle amounts at the end of a certain period. For this type of activity, the issuer knows it risks not being able to retrieve the funds

71. Parl. Doc. 2008–09, no. 2179/001, 9; P. E. BERGER & S. LANDUYT, "Toepassingsgebied van de Wet Betalingsdiensten en de Wet betalingsinstellingen", 108.

72. Or maybe not directly to the beneficiary but to an acquirer, depending on the type of payment scheme that is used.

73. Recital 12 of Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features.

74. Neither PSD2 nor the Act of 11 March 2018 provide a definition of "processing of the payer's payment transaction". Processing of the payment transaction should clearly be distinguished from *execution* of the payment transaction that is initiated using the payment instrument, which constitutes a different payment service.

75. Art. 2, 7° of the Act of 11 March 2018.

76. Art. 2, 26° of the Act of 11 March 2018.

77. EC, *Your questions on PSD*, question 34.

78. J. SAD, "Les services de paiement", 241.

79. J. SAD, "Les services de paiement", 242.

80. The execution of payment transactions by means of "a payment card or similar instrument" with or without a credit line.

81. See below for a more detailed overview of the role of the issuer in a classic four-party card scheme.

82. J. SAD, "Les services de paiement", 242.

83. However, as mentioned under service 3, not all payment instruments are linked to a payment account. Debit cards are usually linked, credit cards not necessarily.

84. See paragraph 17 & 21.

it advanced when executing the transaction by paying the beneficiary. In such cases, the PSP often only tracks the total amount of money spent with the credit card. It does not check the funds available in the current account for each and every transaction.

For other solutions such as debit cards, however, it was more difficult or even impossible for PSPs to issue such instruments and execute payment transactions in connection with accounts not serviced by them. Under a debit card model, the idea is not that the PSP advances the funds for a certain period. Instead, the amounts are both transferred to the beneficiary and debited from the account at (nearly) the same time. Providing a debit card that was linked to a payment account held by another PSP was, prior to PSD2, impossible in cases where the issuer did not have access to the account and hence had no direct feedback information on the availability of funds. PSD2 removed this obstacle by allowing PSPs to (i) issue card-based payment instruments linked to payment accounts held by another PSP<sup>85</sup> and (ii) execute transactions from those payment accounts.<sup>86</sup> Such “third-party” PSPs, subject to the user’s consent, now have the right to receive a direct confirmation (“yes”/“no”) as to whether there are sufficient funds in the account for the payment to be made from the PSP where the account is held. There is no requirement for an agreement between the issuing PSP and the account-servicing PSP provided that the requirements in Art. 58 of the Act of 11 March 2018 are met.<sup>87</sup>

This new possibility is available only for PSPs that issue “card-based payment instruments”.<sup>88</sup> The European legislator mainly had debit cards in mind. According to recital 67 of PSD2, the EC should give particular consideration to the developments in the market and whether the scope of the provision on the confirmation as to the availability of funds needs to be revised and further broadened.

Interesting to note is that Art. 55 of the Act of 11 March 2018 sets down specific obligations for *issuers* of card-based payment instruments, in order to receive the confirmation as to the availability of funds.<sup>89</sup> The notion of “issuer of card-based payment instruments” in principle only refers to the issuer of the payment card of which

the data is used for the execution of the payment transaction. In other words, if a smartphone or a tablet can be considered to be “card-based payment instruments”, the obligations imposed by PSD2 and the Act of 11 March 2018 on the “issuer of card-based payment instruments” only apply to the card issuer and not to the issuer/manufacture of the smartphone or tablet. Only the issuer of the payment card is therefore considered a PSP.<sup>90</sup> Although not explicitly provided for by the preparatory works, the same reasoning could be applied to providers of *digital wallets*, such as Apple Pay or Google Pay. Digital wallets are a type of application that offer users an overview of their various payment cards and allows the execution of payment transactions with those payment cards. Such a digital wallet could be considered a card-based payment instrument. However, applying the reasoning of the preparatory works, the provider of such a digital wallet should not be considered an issuing PSP that requires a PI licence under service 5.<sup>91</sup> Nevertheless, it should be assessed on a case-by-case basis whether a provider of a digital wallet is not offering other payment services, such as payment initiation.

### 3.5.2. Acceptance of payment transactions

23. The acceptance of payment transactions, which is also referred to as “acquiring” payment transactions, is a payment service provided by a PSP that concludes an agreement with a payee for the acceptance and processing<sup>92</sup> of payment transactions, thereby creating a transfer of funds to the payee.<sup>93</sup>

Whereas the service of issuing a payment instrument is a service offered to the payer, the acquiring service is offered to the payee of the transaction. The acquirer concludes a contract with the payee, for example a merchant, to accept and process payment transactions with the aim of transferring the funds from the payer to the merchant. He ensures the payment of the funds to the merchant.

The definition of acquiring is designed to be technologically neutral and broad to cover both traditional card-based models and other models where another payment

85. This PSP is referred to as the account-servicing PSP or ASPSP.

86. [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_15\\_5793](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5793); recital 68 PSD2; Parl. Doc. 2017–18, no. 2896/001, 15 & 80 *et seq.*

87. Art. 65 PSD2; Art. 55 & 58 of the Act of 11 March 2018.

88. Art. 65 PSD2; Art. 55 & 58 of the Act of 11 March 2018.

89. Art. 65 PSD2; Art. 55 & 58 of the Act of 11 March 2018; The issuing PSP must ensure that the following conditions are met: (i) the payer has given explicit consent to the PSP to request the confirmation, (ii) the payer has initiated the card-based payment transaction for the amount in question using a card-based payment instrument issued by the PSP and (iii) the PSP authenticates itself towards the account-servicing PSP before each confirmation request, and securely communicates with the account-servicing PSP in accordance with Art. 49 of the Act of 11 March 2018.

90. Parl. Doc. 2017–18, no. 2896/001, 80.

91. In most cases, those digital wallets moreover limit their services to mere technical services such as authentication of the PSU. These services are considered as technical services that are exempted according to Art. 3, (j) PSD2 and Annex I.B, 10° of the Act of 11 March 2018.

92. PSD2 and the Act of 11 March 2018 do not provide for a definition of “processing”. In our view, this should be clearly distinguished from the execution of the payment transaction itself.

93. Art. 2, 3° of the Act of 11 March 2018.



instrument is used or where various acquirers are involved. This should ensure that merchants, or users, receive the same protection regardless of the payment model. Nevertheless, mere technical services provided to PSPs, such as the processing and storage of data or the operation of terminals, do not fall within the scope of the acquiring service or any other payment service for that matter.<sup>94</sup>

24. Card-based transactions always imply the use of a payment card scheme.<sup>95</sup> Depending on whether or not the issuing and acquiring are carried out by the same service provider, a distinction can be made between three party card schemes (e.g. American Express) or four party card schemes (e.g. Bancontact, Mastercard and Visa). In the case of a classic four-party scheme, four main parties are involved, plus an intermediate party (i.e. the supplier of the payment scheme).<sup>96</sup> The four main parties involved are: the payer/customer, the payee-merchant, the issuer who provides the payment card to the customer, and the acquirer who has a contract with the merchant to accept and process its payment transactions.

To understand how acquiring works in practice, let us take the example of a purchase made via a debit card using a card terminal in a shop.<sup>97</sup> Such card payments are still the most common payment transactions in which an acquirer is involved. The initiation takes place when the payer uses his payment card and gives consent by entering the PIN and pressing “ok” on the card terminal.<sup>98</sup> After the initiation of the payment, the acquirer receives from the merchant a payment order for the execution of a payment transaction that was initiated by the payer via the merchant-payee (the “POS” or “point of sale”). The acquirer will then ask the issuer via the payment scheme for a confirmation of the transaction (in other words, are there enough funds in the payment account?).<sup>99</sup> Once he has received this confirmation, he will have the obligation to transfer the amount to the merchant/payee (in practice, actual pay-outs are accumulated and settled only once or

a few times per day, depending on the underlying settlement system). In turn, the acquirer will subsequently have a claim on the issuer of the card.<sup>100</sup> So, in terms of payments, the issuer will transfer the funds from the payment account of the payer to the acquirer (or a funds collector acting on behalf of the acquirer)<sup>101</sup>, who will then transfer the funds to the payment account of the merchant.<sup>102</sup> If the issuer is not the account-servicing PSP, an additional payment transaction will take place, which is usually a direct debit between the issuer and the account-servicing PSP.<sup>103</sup> In practice, the order of these payment transactions may differ and, depending on the underlying clearing and settlement mechanism, there might be no direct payments between the different parties in the payment scheme. In case of a sale in an online webshop, the acquirer will redirect the buyer to a separate web page where the transaction will be initiated and processed in a similar way but through an online application.<sup>104</sup>

Since the acquirer will most often also transfer the amounts to the merchants to execute the payment transaction, PIs specialised in acquiring services will in most cases need a licence to render both services 3 and 5.<sup>105</sup>

A very well-known acquirer licensed in Belgium is Worldline. Worldline offers merchants both online as well as terminal/card-based solutions.

### 3.6. Money remittance

25. Service 6, money transfer or money remittance, is defined as “a payment service where funds are received from a payer, without opening payment accounts in the name of the payer or of the payee, for the sole purpose of transferring the corresponding amount to a payee or to another PSP acting on behalf of the payee, and/or where the funds are received on behalf of the payee and made available to the payee”.

As the definition suggests, money remittance includes two types of services:

94. Parl. Doc. 2017–18, no. 2896/001, 16; Recital 10 PSD2.

95. In general, a payment scheme is a set of rules, practices, standards and/or guidelines for the execution of payment transactions that is agreed between PSPs and which is separate from any infrastructure or payment system that supports its operation; Art. 3, 12° of the Act of 24 March 2017 on the supervision of processors of payment transactions.

96. To be able to “use” and process payment transactions or issue payment instruments on the payment scheme, the parties will need to obtain a licence from the operator. Such a licence is granted against payment and subject to certain conditions/rules set by the operator. Operators of payment schemes in Europe are subject to the prudential oversight of the relevant European central banks. In Belgium, market players use Bancontact and Mastercard, which are subject to supervision by the NBB.

97. <https://economie.fgov.be/nl/publicaties/de-werking-van-de-markt-van-de>.

98. Parl. Doc. 2008–09, no. 2179/001, 10.

99. In a situation where the issuer of the payment card is not the account-servicing PSP, an additional step will take place. The issuer will ask the account-servicing PSP whether there are sufficient funds in the payment account and will receive a simple “yes” or “no” from this service provider.

100. Parl. Doc. 2017–18, no. 2896/001, 16; The use of a card-based payment instrument for making a payment thus triggers the generation of a message confirming the availability of funds and 2 or more resulting payment transactions.

101. Parl. Doc. 2017–18, no. 2896/001, 17.

102. The acquirer will transfer the funds to the bank of the merchant. Once the bank has received the funds, it will make them available in the merchant’s payment account.

103. Recital 68 PSD2.

104. P. E. BERGER & S. LANDUYT, “Toepassingsgebied van de Wet Betalingsdiensten en de Wet betalingsinstellingen”, 110.

105. Some acquirers, depending on the business model, do not provide the service consisting in an actual transfer of funds to the payee because the parties agree upon other forms of settlement whereby the acquirer does not come into possession of the funds; Recital 10 PSD2.

- 1) from the payer's side: the service where funds are received from the payer for the sole purpose of transferring the corresponding amount, by means of, for example, a communication network, to the payee or to another PSP acting on behalf of the payee;
- 2) from the payee's side: the service where funds are received by the PSP on behalf of, and made available to, the payee.

It should be kept in mind that also for the purpose of service 6, "funds" should be interpreted as including banknotes and coins, scriptural money or electronic money.<sup>106</sup>

Although money remittance is traditionally considered a cash-based service, it may also apply to business models under which funds are received and transferred electronically. However, it is a prerequisite that the provider does not operate a payment account for the payer or the payee for this service. This service is typically offered to customers in the form of single payment transactions, therefore not specifically requiring a larger framework agreement with the customer.<sup>107</sup> When PSPs open an account on behalf of the customer, a framework agreement is in principle required.<sup>108</sup>

The key example of money remittance is the service offered by large agency network providers such as Western Union, where the payer gives cash to a PSP's agent to make it available to the payee through another agent. Belgian examples of PSPs licensed in Belgium that offer the typical money remittance services are Transferwise Europe, Money International and Moneygram International. It was mostly with the view to providing a regulatory framework for this type of activity, that the service of money remittance was included originally in PSD. It mostly concerns payments of a cross-border (even cross-continent) nature, which makes that these services are often accompanied by complementary currency exchange services.<sup>109</sup>

The definition of money remittance does, however, not exclude the possibility for the money remitter to accept a payment order to transfer funds from a user's payment account operated by another PSP or to a payee's account operated by another PSP.<sup>110</sup> In other words, it is not a pure cash service only. The money remitter could also receive the money from a payer in the PSP's account electronically or by way of transfer to make it available (e.g. in cash) to a beneficiary without opening any payment accounts. Furthermore, the definition is so broad that also a PI that

receives funds in its own account (not opening accounts in the name of the payer or payee) to further transfer it to another PI could fall within the scope of this service. It is, however, required that the money remitter does not itself maintain any payment accounts, in the name of either the payer or the payee.

Given its broad scope of application, sometimes more unusual or unexpected market players require a license for payment service 6. A good example is Airbnb (licensed in Luxembourg under the entity Airbnb Payments Luxembourg S.A.). Although we have no view on the details of the business model of Airbnb, it is clear that Airbnb receives payments from travelers for bookings made on its platform, which it further transfers to the hotels. In the Airbnb case it concerns not so much a cash service. The requirement for a license for service 6 derives from the fact that Airbnb receives funds, without opening accounts in the name of the payer or the payee.

Another example given in PSD2 is the service where supermarkets, merchants and other retailers provide to the public a service enabling them to pay utilities and other regular household bills. They accept/receive cash payments from customers to subsequently transfer the amount to the payment account of the beneficiary.<sup>111</sup> This type of service is not so common in Belgium.

26. The above two examples are very close or similar to the services offered by PIs under service 3. Therefore, the boundaries between services 3 and 6 are not always that clear in cases where a payment account is involved in a "service 6" payment transaction. It seems that a money remitter can also, in a more limited way, often exercise some of the services that fall within the scope of service 3, the execution of payment transactions (e.g. the transfer of funds into a payment account of another PSP). However,
- 1) in practice, service 3 almost always implies the opening and use of a payment account in the name of the payer and/or payee (except for example in the case of payment card initiated transactions, e.g. credit cards);
  - 2) as opposed to PIs providing service 3, the money remitter typically offers its services only as single payment transactions, without the existence of a broader framework agreement.

For banks, this question of a service falling within the scope of service 3 or 6 is of less relevance as they are

106. Art. 2, 25° of the Act of 11 March 2018; Art. 4, (25) PSD2.

107. Parl. Doc. 2008–09, no. 2179/001, 34.

108. Recital 57 PSD2.

109. Parl. Doc. 2008–09, no. 2179/001, 17.

110. [https://ec.europa.eu/info/system/files/study-impact-psd-24072013\\_en.pdf](https://ec.europa.eu/info/system/files/study-impact-psd-24072013_en.pdf).

111. Recital 9 PSD2; Parl. Doc. 2008–09, no. 2179/001, 17.



allowed to perform all payment services. For PIs (or EMIs providing payment services) this is relevant, as they need to obtain the licence for the right type of services. Moreover, this can have an impact on the applicable capital requirements.<sup>112</sup> However, in practice, a licence for service 6 will only be requested by a PI if it carries out the classic types of money remittance, i.e. making money available without the use of a payment account at both sides of the transaction (in practice mostly cash solutions). In other cases, most PIs need a licence for service 3.

#### 4. *Innovative services introduced by PSD2: services 7 and 8*

##### 4.1. *General and background*

27. Service 7, payment initiation, is newly introduced by PSD2, together with service 8, account information services. These two services were previously unregulated. By bringing them within the scope of PSD2, the EU legislator intended to open the EU payment market to companies offering more consumer or business-oriented payment services based on access to third-party payment accounts, while at the same time increasing security.<sup>113</sup>

##### 4.1.1. Access to an (online accessible) account

28. The possibility for these new types of service providers to access third-party accounts, is one of the PSD2 topics that triggered many debates. In fact, this possibility is not a right of the PSP, but concerns the right of the PSU to make use of payment initiation or account information services by means of third-party PSPs (“TPPs”).<sup>114</sup> A TPP takes its place in between the PSU and the PSP servicing the account (the “ASPSP”). When using services 7 and 8, the PSU usually only communicates with the TPP and, in its turn, the TPP communicates with the ASPSP.<sup>115</sup>

This right for a PSU to make use of a TPP, and hence to grant a TPP access to an ASPSP’s account, only applies where the payment account is accessible online. But what is meant by an online accessible account? Neither PSD2, nor the Act of 11 March 2018 provide for more information

as to when an account should be considered as “online accessible”.

The preparatory works leading to the Act of 11 March 2018 clarify that an account is accessible online within the meaning of Art. 48 (on payment initiation services), when it offers the user an online interface. The preparatory works further add that the meaning of online accessibility within the meaning of Art. 48 is different from the meaning of that same notion under Art. 55 and 58 (on the ASPSP’s obligations regarding account access for TPPs issuing new card-based payment instruments).<sup>116</sup> For the purpose of the latter, an account should be considered online accessible as soon as the ASPSP’s IT system allows for the checking of account balances.<sup>117</sup>

In addition to the very limited guidance provided by the Belgian legislator, some information is available in Dutch legal doctrine, based on the guidelines provided by the FCA and the German and Dutch legislators. Based on the said sources, VOERMAN concludes that an account is accessible online if the accounts are accessible via web interfaces or (mobile) applications in the context of internet banking, where PSUs can access their payment accounts and issue payment orders on the basis of their personalised security data.<sup>118</sup> Whether a particular customer has not chosen to use or activate online banking services with the ASPSP should not be taken into account.<sup>119</sup>

Regardless of the above, to determine whether or not a TPP has access to an account, or the type of access it could acquire, one should also consider the purpose or functionality for which that specific account is accessible online. Indeed, the functionalities of a specific payment account may limit the use of an account by a TPP. For example, the FCA states that an online accessible payment account that offers “view only” services to the user, without providing the possibility to issue any payment orders, will not be “accessible online” for the purpose of payment initiation services. However, such an account would be considered “accessible online” for the purpose of account information services and confirmation of availability of funds to issuers of a card-based payment instrument.<sup>120</sup> In other words, the possibility for TPPs to access accounts under PSD2, does not imply that the ASPSPs are required to suddenly extend the functionalities of their product or to extend the functionalities of a certain PSU’s existing account.

112. Lower initial capital requirements where a PI offers service 6 only (Art. 17, 1° of the Act of 11 March 2018).

113. [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_15\\_5793](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5793).

114. Art. 66 and 67 of PSD2; Art. 57 of the Act of 11 March 2018.

115. J.A. VOERMAN, “Betaaldiensten 2.0”, 115.

116. Parl. Doc. 2017–18, no. 2896/001, 77.

117. Parl. Doc. 2017–18, no. 2896/001, 86.

118. J.A. VOERMAN, “Betaaldiensten 2.0”, 117.

119. J.A. VOERMAN, “Betaaldiensten 2.0”, 116 – 117.

120. J.A. VOERMAN, “Betaaldiensten 2.0”, 117; FCA, *Payment services and Electronic Money, Our approach*, December 2018 (Version 3), 17–45.

#### 4.1.2. What type of access?

29. ASPSPs must ensure that TPPs have access to their accounts via at least one communication interface. They are free to grant such access either (i) by allowing the TPP to use the channels for authentication and communication also used between the account holders and the ASPSP; or (ii) by providing for an interface dedicated to TPPs. This communication interface must furthermore meet certain basic requirements set out by the European Banking Authority (“EBA”).<sup>121</sup>

Interesting to note is that in each of the two options the TPP must identify itself as TPP with the ASPSP. Prior to the entry into force of PSD2, some market players such as lenders, financial management apps and accounting products already offered similar initiation and information services by means of screen scraping. Without going into detail, screen scraping was a service whereby a service provider obtained access to the online banking environment of its clients by using the personal security details of the latter. In that model the ASPSP could not know whether it was a TPP or the actual PSU that was accessing the account.<sup>122</sup> Following the entry into force of PSD2, this type of service offering is no longer allowed.<sup>123</sup>

#### 4.1.3. Contracts for access by TPPs?

30. ASPSPs may not require TPPs to enter into specific contractual agreements to obtain access to the online accounts in the context of payment initiation or account information services. This principle has been explicitly included in Art. 66 and 67 of PSD2 in order to avoid any market entry barriers for these new players. The decision to grant access to an account therefore lies with the clients, not the ASPSP.

Nevertheless, nothing prevents TPPs and ASPSPs from entering into such contracts. On the contrary, a contract between the TPP and the ASPSP will be required in case the TPP would like to obtain access beyond the specific access rights provided for in PSD2. This is for example the case when a TPP would like to use its own client authentication methods instead of using those agreed between the ASPSP and the PSU.<sup>124</sup>

Interesting to note is that, at least as far as Dutch law is concerned, VOERMAN questions whether TPPs that have access to accounts solely on the basis of their agreements with ASPSPs are even subject to PSD2 licensing requirements.<sup>125</sup> We cannot find explicit elements in the Belgian legal guidance to support such interpretation. However, it is true that both from a legal as well as technical perspective, it is not always clear where the boundaries lie between the activities of (i) PSPs or service providers providing payment solutions on the basis of a contract (and under the responsibility of the ASPSP) on the one hand and (ii), the mere technical service providers that are exempted from PSD2, on the other.<sup>126</sup>

In practice, the services offered by a TPP can seem more or less identical to the services that are offered by certain mobile wallets or applications, especially from a customer point of view. As mentioned above, the latter service providers can often benefit from the exemption for technical service providers. However, in case those apps do not merely transfer instructions to the ASPSP and/or provide more than mere authentication services or use different authentication procedures as the ASPSP, their services could fall under the scope of service 7 (and/or service 8).<sup>127</sup> The payment initiation and technical service provider activity is another point where our regulators have room for interpretation on the scope of PSD2. Again, our regulators can be expected to make their decision on a case-by-case basis considering the concerned business case, players and risks involved.

#### 4.1.4. Less regulatory burdens

31. As mentioned in paragraph 2, these new services are more or less atypical payment services, in the sense that these PSPs never obtain possession or control over client funds. For that reason, they are subject to different regulatory requirements in terms of licensing and organisation compared to other PSPs.

Belgian PSPs that only offer service 8, account information services, are technically speaking not subject to a license requirement, but only have to obtain a prior registration with the NBB. Therefore, account information PSPs are subject to less strict regulatory requirements. This includes the fact that they do not have the obligation to

121. EBA, *Final report on draft RTS on SCA and CSC*, 46.

122. J.A. VOERMAN, “Betaaldiensten 2.0”, 132.

123. EBA, *Final report on draft RTS on SCA and CSC*, 46; See also Art. 55 and following of the Act of 11 March 2018.

124. EBA, *Consultation paper on the draft technical standards on strong customer authentication and secure communication under PSD2*, 12 August 2016; Parl. Doc. 2017–18, no. 2896/001, 19 – 20 & 75.

125. J.A. VOERMAN, “Betaaldiensten 2.0”, 147; On this point, J.A. Voerman is also inspired by the text of the EBA *Consultation paper on the draft technical standards on strong customer authentication and secure communication under PSD2*, 9.

126. Exemption 10° of Annex I.B of the Act of 11 March 2018; This is a topic that will be further discussed in our second article.

127. J.A. VOERMAN, “Betaaldiensten 2.0”, 103; At present most mobile wallet solutions offered in Belgium only include card-based payment methods. Hence, such mobile wallet service providers can already benefit from the exemption as set out in paragraph 22 above.



follow the full licensing procedure but only need to lodge a less burdensome registration file with the NBB.<sup>128</sup> In practice the application procedure is however rather similar.

Although they are subject to lower minimum capital requirements, these players offering services 7 and 8 need to put in place a professional liability insurance. This insurance must cover the PSP's liability towards the users or ASPSPs for non-authorised or fraudulent payment transactions or access to payment account information.<sup>129</sup>

#### 4.2. Service 7: Payment initiation services

32. Payment initiation is a service for initiating a payment order, at the request of the PSU, to debit a payment account held by that user with another PSP, and to credit another account.<sup>130</sup> The PSP initiates the payment on behalf of the PSU.

Although the definition is wider in scope, this service was introduced in PSD2 more particularly to regulate a specific type of service that had been developed in the market. It concerns a service for e-commerce payments by establishing a software bridge between the website of the merchant and the online banking platform of the payer's ASPSP in order to initiate internet payment on the basis of a credit transfer.<sup>131</sup> On the one hand, the payment initiator helps consumers to make a simple online credit transfer. On the other hand, the payment initiator provides comfort to the payee-merchant by informing the merchant that the payment has been initiated, allowing for the immediate dispatch of goods or immediate access to services purchased online (as opposed to the merchant having to wait until he has received the funds in its account).<sup>132</sup>

In practice, this most often works as follows: the online merchant offers its clients the possibility to pay for its goods or services using a payment initiator, next to a range of other methods such as a credit card payment or PayPal<sup>133</sup> etc. In the case of payment initiation, the payer will be redirected from the online website to the payment

initiation service provider's website and is asked to provide personalised security credentials that allow the payer to be authenticated by the ASPSP. Once this information has been received, the payment initiator will identify himself with the customer's ASPSP to initiate the payment. The payment transaction will then be executed by the ASPSP. Once the payment has been initiated, the payment initiator shall inform the merchant allowing the latter to finalise the purchase.<sup>134</sup> An example of such a service provider is the German payment institution SOFORT GmbH.

Another widely known example is the Payconiq by Bancontact app. The app allows the user/payer to scan a QR-code with its mobile phone to make a credit transfer from his payment account linked to the payment initiation app to the payment account of the payee.

It is a true alternative for card payments and card-based payment transactions. For these payments, no use is made of a payment card scheme, as the payment initiator initiates a credit transfer. As discussed above, a credit transfer is typically a non-card-based payment transaction. The consumer only needs to have an online payment account. The payment initiator will have direct or indirect access to the payer's payment account to initiate the credit transfer.<sup>135</sup>

The difference between issuing a payment instrument and performing payment initiation services lies in the fact that: (1) the first most often relates to card-based payment transactions, whereas the second initiates a credit transfer, (2) in the latter case, it is not the payer but the PSP that initiates the payment and (3) in the case of payment initiation services, the PSP never obtains control over the funds and never executes the payment transaction.<sup>136</sup>

The above shows that, although payment initiation services require the approval of the PSU/payer, it is, or was initially, often a service developed for the benefit of the beneficiary or payee, such as a merchant. New market players are however also developing services on the payer's side. This is for example the case with the Belgian players Cake and Let's Didid. Both players offer both services 7

128. Art. 95, §1–2 of the Act of 11 March 2018; Art. 5 & 33 PSD2; P.E. BERGER, S. LIEBAERT & C. FABRI, "Betaal-apps in het licht van PSD II", in Instituut Financieel Recht (ed.), *Financiële regulering: een dwarsdoorsnede*, Antwerp-Cambridge, Intersentia, 2019, 132.

129. Art. 13, 89 & 92 PSD2; Art. 18 & 95 of the Act of 11 March 2018.

130. Art. 2, 5° of the Act of 11 March 2018; Payment initiation services should also be explicitly distinguished from electronic billing services. Such service providers pre-fill the credit transfer forms for businesses so that invoices and credit notes can be easily processed. The mere completion and filling-in of payment orders does not constitute payment initiation, as the initiation of the payment transaction is done by the payer himself; Parl. Doc. 2017–18, no. 2896/001, 19.

131. Recital 27 PSD2.

132. Some e-commerce websites offer their customers the possibility to pay the amount of their online purchase by credit transfer. This can be a difficult and time-consuming process: on the one hand, the customer has to initiate the transfer himself (either by physically going to his bank's counter or by using PC or mobile banking) and, on the other hand, the merchant only ensures the delivery of the purchased good after having received the funds in its bank account. This system allows a time gap to exist between order, payment and delivery.

133. Paypal has a credit institution license and offers, among others, online payment solutions including electronic money wallets (prepaid), payment apps and acquiring services. Although some of its payment solutions may seem very similar to payment initiation services from a customer experience point of view, the difference is that Paypal does (often) enter into the possession of funds.

134. Parl. Doc. 2017–18, no. 2896/001, 18.

135. Recital 31 PSD2.

136. Recital 35 PSD2; This as opposed to payment card issuers, which in practice often both issue the instrument and execute the payment. Execution can take place directly from the payer's account (credit transfer). Alternatively, execution can also take place by means of an advanced transfer to the beneficiary's/acquirer's account followed by a subsequent settlement by the PSP with the payer via a direct debit on the latter's current account.

and 8 by means of an online banking app. Customers can create a profile and link their current, payment and/or savings accounts to the app. Customers can get a better overview on their income and spending. Moreover, they can set their own savings targets. The app also allows clients to make payments or transfer amounts between accounts (for example to a savings account).

A very well-known and innovative player on the market offering these services, as well as services 1 to 6, with respect to both scriptural as electronic money is Revolut. Revolut has different entities in its group which have different types of licenses. Revolut Ltd is licensed by the FCA as an electronic money institution and is also active in Belgium. Its payment solutions and apps allow linking of accounts and cards offered by other PSPs. Customers can use their Revolut accounts/app to initiate payments from different accounts or can get information on spendings. This is an interesting player that does not only offer innovative payment services but also links the fiat money payment industry to the world of trading in virtual and cryptocurrencies.

#### 4.3. Service 8: Account information services

33. The second new payment service under PSD2 is the account information service. This is defined as an online service concerning the provision of consolidated information on one or more payment accounts held by the PSU with another PSP or with more than one PSP.<sup>137</sup>

These service providers, also called “account aggregators”, provide the user with an online interface that generates a global overview of the user’s financial situation. For instance, it enables consumers to consolidate the different payment accounts they may have with one or more banks to check the balance of the various accounts and to categorise their spending according to different typologies (food, energy, rent, etc.), thus helping them with budgeting and financial planning.<sup>138</sup>

To help increase the development of such services, PSD2 granted the account aggregators access to the payment account data of accounts held at other PSPs. They are no longer dependent on the existence of a contractual relationship with the ASPSP.<sup>139</sup> Nevertheless, the account aggregator will only be able to access the designated

accounts and only the type of information as explicitly agreed by the PSU.<sup>140</sup>

As the account information services are “read-only” services, no payment transactions can be executed in the designated accounts by the account aggregator. Similarly as for payment initiators, the account aggregators will not come in the possession of the funds.<sup>141</sup>

34. It is interesting to note that neither PSD2 nor the Act of 11 March 2018 require that the account information PSP (“AIPSP”) provides the consolidated information to the PSU that owns the payment account(s) concerned. Reading the definition of account information services, the consolidated account information could, in principle, be provided to the account holder, the TPP itself or to third parties. In the past, some have questioned whether account information services to third parties or the AIPSP itself, would even fall within the scope of PSD2.<sup>142</sup> The answer to this question is nevertheless important as it determines whether the TPP offering such services is allowed to access the ASPSP’s accounts on the basis of the PSD2 principles (and hence based on his agreement with the PSU), or whether he will also need to reach an agreement with the ASPSP.<sup>143</sup>

In 2019, EBA shed more light on this uncertainty in its Single Rulebook Q&A.<sup>144</sup> The Central Bank of Ireland had submitted the question whether the particular business model set out below fell under the scope of the PSD2 account information services.

In the case at hand a service provider was offering a service to audit firms, which allowed the latter to request instant account balance information and transaction data regarding the payment accounts of their audit clients, via an online platform. The PSU, in this case the audit client, signed up to the AIPSP’s terms of service via an email. By signing up to the service, the PSU provided explicit consent to the AIPSP to access its payment accounts via the platform. Also the permission levels were set at this point, indicating the type of information the AIPSP gained access to. Next, the PSU had to sign off on each access request made on the auditor’s behalf. The AIPSP retrieved the payment account balance and transaction information via the bank’s application program interface or API and converted the information into a PDF document and made this information available for the auditors on its online platform.

137. Art. 2, 6° of the Act of 11 March 2018.

138. [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_15\\_5793](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5793).

139. Art. 67, 4 PSD2.

140. Art. 67, 2, (a) & (d) PSD2; Art. 98, §2, 3° & 6° of the Act of 11 March 2018.

141. Parl. Doc. 2017–18, no. 2896/001, 20.

142. We refer to J.A. VOERMAN, “Betaaldiensten 2.0”, 124–126, for an overview of the different standpoints on this matter.

143. J.A. VOERMAN, “Betaaldiensten 2.0”, 125.

144. EBA, Single Rulebook, [https://eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/2018\\_4098](https://eba.europa.eu/single-rule-book-qa/-/qna/view/publicId/2018_4098).



The PSU itself did not have access to the information. The only information the PSU had access to related to tasks and information the auditor requested and a summary of the access levels the PSU had consented to.

The Central Bank of Ireland commented that *“The proposed account information service provider’s business model is not the typical business model we had anticipated as a result of the new payment service of account information service being introduced. Our original expectation, based on our participation at various EU fora, was that AIS services would typically entail providing consolidated account information directly to a payment service user to enable them to view their account balances/information across multiple banks in one place. PSD2 defines Account Information Service as ‘an online service to provide consolidated information on one or more payment accounts held by the payment service user with either another payment service provider or with more than one payment service provider’. Whilst PSD2 does not appear to explicitly state that, when providing AIS payment account information has to be provided to the PSU, we are aware that at least one other Member State has taken the interpretation that unless the information is provided to the PSU, it is not AIS.”*

In its response EBA clarified that for the purposes of PSD2 it is not required that the AIPSP offers the consolidated information to the PSU. The AIPSP may therefore transmit the consolidated information to a third party subject to the PSU’s explicit agreement. The explicit consent that is required by Art. 67(2), a)<sup>145</sup> of PSD2 hence entails both the access by the PSP to the PSUs payment account(s), as well as the provision of the consolidated information to other parties involved, where applicable.

Finally, regarding the use made by any third party of the transmitted consolidated information, EBA added that other provisions of EU law may apply, for instance the General Data Protection Regulation (EU) 2016/679 (GDPR).

## 5. Conclusion

35. Payment services are a very particular and technical business that is not always that easy to grasp. Unlike for other financial players, it can be more difficult to understand what it is that these payment institutions actually do on a day-to-day basis. This has to do with the fact that there are many different (technical) ways in which payment services can be offered, and that new solutions or techniques are developed almost on a daily basis. It also partially explains why the legal texts regulating this business are worded very broadly and theoretically. Legislators aim to be technologically neutral as much as possible, so that existing and new services fall within the scope of the legal framework without a constant need for amending the applicable texts. Nevertheless, it is to be expected that the legal framework will have to be amended on a regular basis, considering the pace at which new technologies are developed for this booming business. It will be a challenge for legislators and regulators to keep up with new technologies and further improve the legal framework. They will have to keep balancing between protecting consumers and maintaining financial stability, stimulating innovation and providing clear legislation.

145. Art. 98, §2, 6° of the Act of 11 March 2018.