

Position paper on the Payment Services Regulation

Ecommerce Europe welcome the European Commission's proposal for a Regulation on Payment Services (PSR). Ecommerce Europe strives for an innovative and competitive cross-border payment landscape that can spur the development of secure, consumer-centric, cost-efficient payment solutions across Europe. The Payment Service Regulation represents an opportunity to further the work already achieved under the framework of PSD2 and ensure that rules in place are future-proof and allow all players to pursue the highest level of consumer protection and convenience.

Retailers are not only directly impacted by the regulation of retail payments, but they also are in a prime position to understand and provide information on consumers' expectations and behaviour, evolving retail use-cases and the impact of existing legislations on the market. We have laid down in this paper our position for a PSR and secondary legislation which will bring about benefits to the whole ecosystem, including end-users.

Key Recommendations

1. **Update the SCA framework and standard to ensure the highest level of consumer protection and convenience through harmonised and future-proof rules and implementation;**
2. **Ensure that the whole ecosystem can take part in the fight against fraud;**
3. **Embrace the evolution of retail and consumer behaviour through proportional rules on Merchant Initiated Transactions and Limited Network Exemptions;**
4. **Maintain the ambition on Open Banking and ensure sufficient flexibility to allow for innovation.**

Strong Customer authentication

The current Regulatory Technical Standards on Strong Customer Authentication have had a positive impact on fraud reduction across the EU, but the roll-out of the new standards came at the expense of merchants and consumers. The priorities for the Payment Services Regulation should therefore be to:

- Build on the current SCA framework and secondary legislation to create a future-proof framework, which can ensure the development of (technology neutral) more secure, convenient and accessible solutions, adapted to the evolution of fraud.
- Ensure a harmonised and outcome-based implementation across the EU, that focuses both on fraud reduction and high performance of SCA solutions to secure a level-playing field and foreseeability.

As highlighted by the retail sector throughout the implementation process of the current RTS on SCA, the lack of preparedness and support, together with a fragmented implementation of the rules at national level has resulted in significant loss of revenues for merchants in the EU due to very high levels of false decline.

We therefore strongly encourage policymakers and regulators to address potential shortcoming in the implementation of the PSR, notably by ensuring a high level of harmonisation, and by designing clear metrics to assess success both from the angle of fraud reduction and share of successful authentication.

Above all, we strongly recommend the setting-up of a clear and structured consultation process coordinated by the European Banking Authority to gather feedback for the industry and civil society, to ensure the rules are still fit for purpose considering market, technological, and economic developments.

Exemptions

Exemptions to the application of SCA represent a clear opportunity to ensure both security and convenience for consumers. While the industry has gained maturity in the handling of SCA, which resulted overtime in a steady increase in acceptance rate, transaction efficiency has been significantly affected by inconsistent application and acceptance of exemptions across issuing banks. Merchants are still encountering important challenges, notably with exemptions based on Transaction Risk Analysis or Trusted Beneficiaries which are not consistently accepted throughout the EU or supported across issuers (e.g. the SCA exemption for trusted beneficiaries does not exist in France). Driving toward more consistent and homogenous implementation and adoption of exemptions across countries and payment actors can deliver clarity and certainty about the operating environment, helping businesses plan for implementation in an efficient manner, and allowing payment supply chains to focus on targeting fraudulent transactions while improving the customer experience for legitimate buyers.

Merchant initiated transactions (MITs) are considered low-risk to fraud as they are mostly recurring and pre-agreed. The Commission's efforts to provide clarity on provisions related to MITs, particularly the clarification that SCA only applies during the setup of the initial mandate and not for subsequent transactions (as stated in recital 108), contribute to increased legal certainty and are commendable.

When implementing **transactions risks analysis (TRA) exemption**, issuers have taken different approaches (or have different levels of sophistication) to monitoring and managing fraud for their customers. The result is an uneven application of TRA, often leading to an inferior customer experience. Ecommerce Europe advocates in favour of establishing a consistent approach across countries and issuers to applying exemptions. Performance on TRA exemptions adoption could for example be reported at issuer and country level, with action taken to ensure exemptions are honored consistently across all geographies. The precisions in article 89 (1) & (2) regarding the information to be included by the EBA in the regulatory technical standards on low-risk transactions are a step in the right direction. Furthermore, the PSR tasks the European Banking Authority (EBA) with developing draft Regulatory Technical Standards (RTS) on transaction risk analysis (TRA) to set the conditions which remote electronic payment transactions must meet to be considered low risk. This includes the methodologies, and models to implement TRA, and the criteria for calculating fraud rates. We would also encourage the EBA to consider potential sector-specific TRA threshold on the basis of average costs of purchase and overall fraud level in a given sector.

Considering the above-mentioned points, we recommend the European Commission and the EBA to consider the following:

- Mandate a consistent application of the exemptions laid down in the RTS – both in terms of support for these exemption by all actors, and in terms of consistent quality of services provided -

- Set clear transparency requirements for PSPs when applying or denying the application of SCA exemption to help merchant navigate their payment flows.
- Retailers are in a unique position to define the payment context, the transaction risks and whether an exemption can apply. We encourage regulator to consider the possibility for merchants and PISPs to suggest if an exemption should apply, as well as the type of exemptions possible – or request the application of SCA. Merchants and PISPs should also be able to send the corresponding data to the ASPSP to support the suggested exemption or the application of SCA;
- As a means to ensure both security and convenience, we would also suggest focusing on customer access and transaction efficiency by ensuring banks can offer intuitive and latency-free authentication customer experience, for example through the setting up of Authentication Success Rates (ASR) targets to monitor issuers' performance. Currently, the large variance in ASR is reflective of a sub-optimal customer experience and a lack of standardization in authentication approach, which can be observed across issuing banks/countries.
- Grant sufficient time to allow sectors with complex payment chains to move away from MOTO and develop alternatives.

SCA outsourcing and delegation

We are concerned that the approach in Article 87 requiring an outsourcing agreement for all SCA methods involving third parties could have an important impact on innovation and competition.

Opening the possibility for trusted third-parties to contribute to the development of new authentication solutions would improve greatly innovation, competition and consumer protection and convenience. For example, the involvement of third party could promote the development of new secure and convenient applications for SCA delegations, which crucially lacks on the EU market today. SCA delegation is a convenient way for consumers to seamlessly authenticate a payment into the merchant checkout, without being redirected to a banking app, and therefore avoiding needing to shuffle between different apps at checkout, which can prove cumbersome especially when shopping on a mobile. Another example would be the possibility to develop authentication solutions supported by a future EU Digital Identity Wallet. In the case of the upcoming EUDIW, these wallets would support the performance of SCA as certified entities that will be able to provide issuers with enough information to validate the transaction.

The approach chosen in Article 87 could jeopardise the development of new solutions, by creating new entry barriers for organisations wishing to develop authentication solutions but requiring outsourcing agreement for all SCA methods where other parties are involved. This would also have a disproportionate impact on new and smaller players, creating an unlevel-playing field for these solution providers.

Like the PSD2 opened the market for open banking, the PSR could create the conditions allowing reliable third parties to contribute to secure and convenient authentication solutions. We therefore strongly encourage policymakers to consider other model for cooperation with third-party, for example through certification process for third parties using secure SCA technologies.

MOTO and SCA Scope

The PSR clarifies the limitation in the use cases of MOTO to transactions where the initiation of a payment transaction is non-digital. Ecommerce Europe commends this inclusion in the primary legal text. It is positive that the Commission has provided clarification that MOTO may be applied where the payment orders are

placed using non-electronic means, while the execution of the transaction may be performed electronically. Further clarity regarding the status of email orders in the context of MOTO would be beneficial.

Fight against fraud

We strongly believe that the fight against fraud requires the involvement of the whole ecosystem. We welcome the provisions under Article 83, which enables the conclusion of fraud data sharing arrangements between PSPs. However, we strongly recommend to:

- Set-up up industry-wide standard for fraud data sharing arrangements, to ensure that participants in these arrangements can easily enter into multiple information sharing arrangements without having to adapt their systems to processes to each one.
- Extend the possibility to conclude data sharing arrangement to other actors of the payment supply chain, including merchants. Merchants could benefits from data to block fraudster upstream, and could contribute with data gathered with their own fraud monitoring tools.
- Keep the list of data that can be processed (Article 83.2) flexible in order to accommodate for future innovation in fraud monitoring and management;
- Extend the categories of data to be shared beyond the payee's unique identifier, as additional elements may be required to detect fraud (e.g. the reason why a transaction failed). Such data sharing could be overseen by national competent authorities and designed to respect the protection of personal data and bank secrecy.

Refunds for Merchant initiated transactions

We are concerned by the extension of unconditional refund rights to all payee-initiated transactions under Article 62.1(4). We believe that this provision would have a disproportionate effect on merchants, without providing any additional benefit to consumers considering the high level of consumer protection already enjoyed when using these solutions.

The possibility to assess the request for refunds is crucial, especially in cases where there is adequate proof that the intended goods or services have been delivered or if the all conditions were fulfilled during the setting-up of the mandate. In these cases, an unconditional right for refund should not apply. Under the European Commission's proposal, a company that could in most cases clearly assess that a consumer used a service every day for close to 8 weeks, benefitting from its full extent and beyond what is necessary to assess whether the service fits their expectations or not, would still have to refund that consumers for the whole time that they have used this service.

MITs and SEPA Direct Debits tend to be used for different use-cases, with Direct Debits being a popular payment method for utilities, while MITs tend to be used for online businesses, e-commerce and digital content. Therefore, the risks of abuse of this unconditional refund rights would be much high than for Direct Debit. This would have a disproportionate effect on merchants and impact the entire ecosystem.

Limited Network Exclusion

We welcome the Commission's attempt to harmonise the conditions for the exclusion of limited networks, considering the divergent interpretation among Member States on that issue. The European Commission excludes from the scope of the Regulation, under Article 2.2(j), services based on specific payment instruments allowing the holder to acquire goods or services only in the premises of the issuer or within a single limited network of service providers under direct commercial agreement with a professional issuer, and instruments which can be used only to acquire a very limited range of goods or services.

We are however concerned by the assessment detailed in Recital 13 on whether a limited network should be excluded from scope or not. The recital specifies that "*specific-purpose instruments should allow the holder to acquire goods or services only in the physical premises of the issuer, whereas usage in an online store environment should not be covered by the notion of premises of the issuer.*"

We believe that this does not reflect consumers' habits and the fading distinction between physical and online shops. More and more retailers offer today the possibility to buy online and pick-up orders at physical stores, or order items from the store to be delivered at home. Stores are increasingly integrating all channels in their business models, with points of sales designed to showcase a limited number of items and offering wider collections online.

We therefore strongly encourage the EBA to consider the evolution of retail and consumer behavior when drafting Regulatory Technical Standards to specify the conditions of the exclusions referred to in paragraph 2, point (j).

Commercial Agent Exclusion

The Commercial Agent Exclusion (CAE) is an essential provision within the PSD2. Ecommerce Europe welcomes the creation of a Regulation which will help address the fragmented application of the CAE by different Member State regulators. However, there are certain elements of the Commercial Agent Exclusion that would benefit from clarification and amendment:

- Ecommerce Europe believes the text would benefit from clarification on the requirement that the agreement between the principal and the commercial agent should give the third party "a real margin to negotiate with the commercial agent or conclude the sale or purchase of goods and services". Specifically, clarification would be useful on what is meant by 'a real margin', and how the European Commission views an agent's autonomy to 'negotiate or conclude'.
- Furthermore, a clear distinction should be made between commercial agents who negotiate or conclude the sale or purchase of a product or service while holding funds, and commercial agents who act on behalf of the payer or payee but do not possess the funds. This distinction was made in Recital 11 of the PSD2 and represented an important clarification for the industry, but has not maintained in the PSR.
- Finally, the PSR applies the Commercial Agent Directive's definition of a 'commercial agent' to the exclusion. In doing so, large questions remain over the application of the exclusion due to the interpretation of the definition. Ecommerce Europe believes that the reference to the Commercial Agent's Directive should be removed and replaced by the definition of an agent as defined under the guidelines on vertical restraints. This definition identifies an agent as a legal or natural person entrusted

with the power to negotiate and/or conclude contracts on behalf of another person ('the principal'), either in the agent's own name or in the name of the principal, for the purchase of goods or services by the principal, or the sale of goods or services supplied by the principal, thereby avoiding the limitations of the Commercial Agent Directive's restrictive wording. Further to this point, the Commercial Agents Directive stipulates that only self-employed intermediaries involved in the sale or purchase of **goods** on behalf of another person qualify as commercial agents. Building on this definition, Article 2.2.b of the PSR then refers to agents involved in the sale or purchase of **goods or services**. Given this inconsistency, the definition of a commercial agent in the PSR is not fit for purpose and should be replaced by the definition of an agent in the guidelines on vertical restraints.

Open Banking

We welcome the PSR's focus on improving Application Programming Interfaces in the EU, to address some of the challenges created by the fragmented regulatory landscape across the EU and the varying interpretation and implementation across the market.

Potential obstacles to data access can evolve over time, and new barriers can be identified, especially in implementation phases. We would therefore strongly suggest amending Article 44 to ensure that the list of obstacles to the provision of payment initiation and account information services remains non-exhaustive and that the appropriate authority can identify and add new obstacles.