Volume 13 – Part 1 - 2024 ISSN 2050-9014

LAW AND ECONOMICS YEARLY REVIEW

ISSUES ON FINANCIAL MARKET REGULATION, BUSINESS DEVELOPMENT AND GOVERNMENT'S POLICIES ON GLOBALIZATION

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LAW AND ECONOMICS YEARLY REVIEW

www.laweconomicsyearlyreview.org.uk

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ISSN 2050-9014

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PRUDENTIAL REQUIREMENTS FOR PAYMENT INSTITUTIONS: A EUROPEAN UNION PERSPECTIVE IN VIEW OF PSD3

Ciro G. Corvese*

ABSTRACT: *This paper focuses the attention on a particular topic not much discuss in doctrine: the prudential requirements for payment institutions. Like all other intermediaries operating in the financial market, payment institutions are subject to strict prudential regulations concerning the request for a specific authorization. For supervisory authorities to release that authorization, payment institutions must comply with some requirements that primarily concern legal form, ownership of shares, capital and other funds. The existence of these requirements is a necessary condition for obtaining authorization, which is subject to stringent rules that concern not only the issue of said authorization but also its maintenance and possible revocation. The principal aim of this paper is to focus the attention on the rules providing important prudential requirements like ownership, own funds, the identity of directors and persons responsible for the management, internal control system, seeking to grasp differences and/or similarities with financial market regulations on other intermediaries (banks and insurance companies) considering, inter alia, the possible effect of the new proposal of PSD3.*

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Funds: Initial Capital and Safeguarding Requirements. – 4.1. Supervisory Capital: Amounts And Three Methods for Calculation. – 4.2. Safeguarding Requirements. – 5. Specific Provisions for PI Corporate Governance. – 5.1. Introduction – 5.2. The Identity of Directors and Persons Responsible for The Management. – 5.3. Internal Control Mechanism and its Importance for Anti-Money Laundering and Counter Terrorist Financing. – 6. The Authorization Procedure. **–** 7. *De Iure Condendo*: towards PSD3.

1. This paper focuses the attention on a particular topic not much discuss in doctrine: the prudential requirements of payment institutions (hereinafter PIs for the plural and PI for the singular). Like all other intermediaries operating in the financial market, PIs are subject to strict prudential regulations concerning the request for a specific authorization. For supervisory authorities to release that authorization, PIs must comply with some requirements that primarily concern legal form, ownership of shares, capital and other funds. The existence of these requirements is a necessary condition for obtaining authorization, which is subject to stringent rules that concern not only the issue of said authorization but also its maintenance and possible revocation.

The principal aim of this paper is to comment the articles of PSD2[1] regarding ownership, own funds, the identity of directors and persons responsible for the

[1] 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, OJ L 337, 23.12.2015, p. 35–127.
For a systematic comment of PSD2 see GIMIGLIANO and BOŽINA BEROŠ (eds), *The Payment Services Directive II. A Commentary*, (Elgar 2021). Regarding the implementation of PSD2 in the Italian legal system see, *ex* multis¸ RISPOLI, SANTORO, SCIARRONE ALIBRANDI, TROIANO (eds), *Armonizzazione europea dei servizi di pagamento e attuazione della direttiva 2007/64/CE*, Milano, 2009; CAPRIGLIONE (eds), Commentario al Testo unico delle leggi in materia bancaria e creditizia, T. 3, Padova, 2018, specially comments to Articles 126 bis-novies, p. 2243 ss.
In this research we do not consider other aspects of PSD2 like, open banking, consumer protection and so on. Regarding these aspects see CAPRIGLIONE, *Law and economics. The challenge of artificial intelligence*, Law and Economics Yearly Review, 10(2), 2021, p 189; RABITTI and SCIARRONE ALIBRANDI, *I servizi di pagamento tra PSD2 e GDPR: Open Banking e conseguenze per la clientela*, in CAPRIGLIONE, (ed.), *Liber Amicorum Guido Alpa*, CEDAM, Padova 2019, p. 711- 735. About the relation between PSD2 and GDPR see FERRETTI and PETKOFF, *Open finance and consumer protection: uneasy bedfellows*, Law and Economics Yearly Review, 11(2), 2022, p 261.

management, internal control system[2], seeking to grasp differences and/or similarities with financial market regulations on other intermediaries (banks and insurance companies) considering, inter alia, the possible effect of the new proposal of PSD3.[3]

This work establishes licensing requirements and prudential rules for PIs, i.e., financial institutions other than credit institutions authorised to professionally operate as payment service providers, according to Article 1 PSD2[4]. Detailing the PSD2 licensing rules, the EBA has issued guidelines (EBA/GL/2017/09, hereinafter EBA Guidelines) on the information to be provided for authorisation/registration of any type of PIs.[5]

It is made up of a further eight paragraphs: paragraph 2 focuses on the rationale for the authorization process and what appears new, drawing a comparison between PSD1[6] and PSD2; paragraphs 3 and 4 examine prudential

[2] There are no specific references concerning the profiles that will be dealt with in this research work. For all of them, refer to JANCZUK-GORYWODA, *Public-Private Hybrid Governance for Electronic Payments in the European Union*, German Law Journal, (2012) 13, pp. 1435-1455; JANCZUK-GORYWODA, *Evolution of EU Retail Payments Law*, European Law Review, (2015) 40, p. 858, p. 862 and JANCZUK-GORYWODA, *Enforcing Smart: Exploiting Complementarity of Public and Private Enforcement in the Payment Services Directive 2 (PSD2)*, in CHEREDNYCHENKO and ANDENAS (eds), *Financial Regulation and Civil Liability in European Law* (Elgar 2020).
Most important about the effectiveness of PSD2 is EUROPEAN COMMISSION, A *study on the application and impact of Directive (EU) 2015/2366 on Payment Services (PSD2) FISMA/2021/ OP/0002*, available at link https://www.ecri.eu/sites/default/files/a-study-on-the-application-and-impact-of-directive-ev0423061enn.pdf.

[3] We wish to refer to Proposal for a Directive on payment services and electronic money services in the Internal Market amending Directive 98/26/EC and repealing Directives 2015/2366/EU and 2009/110/EC, Brussels, 28.6.2023. COM (2023) 366 final, 2023/0209 (COD). At the same time European Commission presented a Proposal for a Regulation on payment services in the internal market and amending Regulation (EU) No 1093/2010. At the end of this work, we will focus the attention only on the first proposal because the second one does not affect the profiles that we will examine.

[4] From the outset, it is necessary to underline that the licensing requirements are to be met not only when the authorisation is released, but throughout the life of PIs.

[5] According to Articles 5 (4), 5 (5) and 6 of PSD2, EBA issued "*Final Report on Guidelines under Directive (EU) 2015/2366 (PSD2) on the information to be provided for the authorisation of PIs and e-money institutions and for the registration of account information service providers*" (see the link:https://extranet.eba.europa.eu/sites/default/documents/files/documents/10180/1904583/f0e94433-f59b-4c24-9cec-2d6a2277b62c/Final%20Guidelines%20on%20Authorisations%20of%20payment%20Institutions%20%28EBA-GL-2017-09%29.pdf?retry=1 accessed 20 January 2024).

[6] The PSD1 («Payment Services Directive») is «Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007, relating to payment services in the internal market, amending directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC, which repeals Directive

requirements, namely, rules concerning ownership structure, initial capital, own funds and, in general, risk management, which are largely the same as under PSD1; paragraph 5 looks into PIs corporate governance; paragraph 6 deals with the authorization procedure; concluding, paragraph 7 draws both a comparison between prudential requirements for PIs and for credit institutions, traditionally performing the monetary function and an analysis of possible effects deriving from the PSD3 proposal.

2. The provision of payment services, as listed in the PSD2 Annex I, is a regulated activity. Therefore, it may be carried out professionally if the business entities concerned are authorised as credit institutions, electronic money institutions, post office giro institutions, or PIs, in compliance with Article 1, paragraph 1, PSD2[7]. Indeed, Article 37 PSD2[8], on the "Prohibition of persons other than payment service providers from providing payment services and duty of notification", provides, at paragraph 1, that "*Member States shall prohibit natural or legal persons that are neither payment service providers nor explicitly excluded from the scope of this Directive from providing payment services*".

This is relevant for the PIs authorization process from two different points of view:

on one hand, only authorized PIs may carry out payment services as listed in Annex I of PSD2; payment services, covered by the authorisation released, may be carried out either by establishing a branch in another Member State (freedom of

97/5/EC". In doctrine, among the comments on PSD1, see CHEREDNYCHENKO, *Public and Private Enforcement of European Private Law in the Financial Services Sector* (2015) (23) ERPL p. 621, p. 628-629.

[7] For more details see GEVA, *Title I 'Subject matter, scope and definition' (Arts.1-4)*, in GIMIGLIANO and BOŽINA BEROŠ (eds), cit., p. 8 f.

[8] For more details see DIVISSENKO and GIMIGLIANO, '*Title II – Payment service providers*, *Chapter 2 Common provisions*, in GIMIGLIANO and BOŽINA BEROŠ (eds), cit., p. 99.

establishment) or on a cross-border services basis without using an establishment in the host state (freedom of providing services)[9];

on the other hand, natural or legal persons may carry out payment services without authorization if they are included in the list of exemptions provided by Article 3 of PSD2. This means that if natural or legal persons wish to have exemptions in order to carry out certain payment services – precisely, services referred to in points (i) and (ii) of point (k) of Article 3, point (k) and in the same Article, point (l) – they must send a *notification* to competent authorities[10].

The competent authorities shall inform the EBA of the services notified pursuant to paragraphs 2 and 3, stating under which exclusion the activity is carried out. When the notification requirement is not complied with or, despite compliance, the competent authority considers that the conditions for exemption are not met, the entity is obliged to apply for authorisation.

However, neither PIs authorisation nor cases of exemption are completely new to PSD2. Indeed, Article 109 PSD2 is committed to dealing with those PIs authorised or exempted within the framework of PSD1 and still operating when PSD2 came into effect[11].

Drawing a comparison between PSD1 and PSD2, the main changes in Title II, Chapter 1, concern, firstly, enhanced levels of payment security: in fact, business entities that wish to be authorized as PIs must provide a security policy document together with their application, as well as a description of their security incident management procedure, contingency procedures and so on[12]. In addition, there are new elements concerning new payment services (n. 7 and 8, PSD2 Annex I), the

[9] "*Passporting is the exercise by a business of its right to carry on activities and services regulated under EU legislation in another EEA State on the basis of authorisation or registration in its home EEA State*"

[10] As regards competent authorities in Member States see Chapter 4. <https://ec.europa.eu/info/sites/info/files/authorisation-supervision-08082013_en.pdf>.

[11] Guidance PSD2 establishes transitional provisions for PIs already authorised to provide services under PSD1 (See European Banking Federation, 'Guidance for implementation of the revised Payment Services Directive' - PSD2 guidance – (2019) <www.ebf.eu/wp-content/uploads/2020/01/EBF-PSD2-Guidance-Final-v.120.pdf p. 80>). Concerning Article 109 of PSD2.

[12] See European Banking Federation, 'Guidance for implementation of the revised Payment Services Directive' - PSD2 guidance – (2019), footnote (10).

Payment Initiation Service (hereinafter PIS)[13] and the Account Information Service (hereinafter AIS)[14]:

(a) PIS works as an alternative to paying online using a credit card or debit card. The new rules bring PIS within the scope of regulation, which will ensure that payment initiation service providers (hereinafter PISPs) receive access to payment accounts, whilst also placing requirements on them to ensure security for users.

(b) AIS provides the payment service user with consolidated information on payment accounts held by a payment service user with different payment service providers. PSD2 brings them within the scope of regulation, and this will ensure that account information service providers (hereinafter AISPs[15]) can have access to payment accounts, whilst also placing requirements on them to ensure security for users.

PISPs must be authorized by the competent authority in their home Member State, setting out their business plan and operating model, demonstrating appropriate levels of initial and working capital, and specifying their risk management, financial controls, fraud and security monitoring, and business continuity arrangements[16]; in addition, they must hold a professional indemnity insurance or comparable guarantee to cover their liabilities in this respect.

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[13] The definition of PIs covers services to initiate a payment order at the request of the payer with regard to a payment account held at another PSP located in one of the EEA States. More precisely, the payer 'has the right to make use of a PISP to obtain the service referred to in point (7) of Annex I of PSD2" if the payment service is provided within the EEA according to Article 2 of PSD2'.

[14] As regards the role of these two services within the internal market for payments, see: Gabriella Gimigliano, 'The Lights and the Shadows of the EU Law on Payment Transactions', in Gabriella Gimigliano (ed.), *Money, Payment Systems and the European Union* (Cambridge Scholars Publishing 2016) p. 32.

[15] For a detailed analysis of the legal profiles of the new account information services see BURCHI, MEZZACAPO, MUSILE TANZI, TROIANO, *Financial Data Aggregation e Account Information Services, Questioni regolamentari e profili di business*, Quaderni FinTech, 4, marzo 2019, http://www.consob.it/documents/46180/46181/FinTech_4.pdf/2adb8707-41bf-48a4-ad4e-ce8ecce0ab13, p. 23.; CATENACCI and FORNASARO, *PSD2: i prestatori di servizi di informazione sui conti (AISPS)*, April 2018, 3-4, available on *www.diritto bancario.it*.

[16] All authorised credit institutions are entitled to provide the whole range of payment services, including AIS and PIS, and to do so without any need for additional authorisation, pursuant to Articles 33 and 34 of Directive (EU) 2013/36 on capital requirements, known as CRD IV, which sets forth that financial institutions and credit institutions can provide all payment services. Indeed, EBA confirmed that: 'all authorised credit institutions are entitled to provide the whole range of payment services, including AIS and PIS, and to do so without any need for additional

In this study we presume that applicants intend:

a) to provide only payment services referred to in points 1-7 of Annex I to PSD2 or service 8 referred to in the Annex I of PSD2 in combination with other service or services referred to in points 1-7 without providing e-money services. In this case, applicants should refer to the specific set of guidelines on the information required from them for authorisation as PIs set out in Section 4.1.

b) to provide only the payment service referred to in point 8 of Annex I to PSD2 without providing e-money services. In this case, applicants should refer to the guidelines on the information required from them for registration for the provision of only service 8 of Annex I PSD2 set out in Section 4.2.

Article 5 of PSD2 provides a number of items required of businesses requesting authorization by the competent authorities of their home Member State. The list of requirements is as follows (Article 5.1.):

(a) a programme of operations;

(b) a business plan;

(c) initial capital;

(d) a description of measures taken to safeguard payment service users' funds;

(e) a description of the applicant's governance arrangements and internal control mechanisms;

(f) a description of the procedure in place to monitor, handle and follow up on a security incident and security related customer complaints;

(g) a description of the process in place to file, monitor, track and restrict access to sensitive payment data;

(h) a description of business continuity arrangements;

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authorization'. See para. 26 of the *Final Report on Draft Regulatory Technical Standards setting technical requirements on development, operation and maintenance of the electronic central register and on access to the information contained therein, under Article 15(4) of Directive (EU) 2015/2366 (PSD2),and Draft Implementing Technical Standards on the details and structure of the information entered by competent authorities in their public registers and notified to the EBA under Article 15(5) of Directive (EU) 2015/2366 (PSD2) (EBA/RTS/2017/10 and EBA/ITS/2017/07).*

(i) a description of the principles and definitions applied for the collection of statistical data on performance, transactions and fraud;

(j) a security policy document;

(k) for PIs subject to obligations regarding money laundering and the financing of terrorists, a description of the internal control mechanisms which the applicant has established in order to comply with those obligations;

(l) a description of the applicant's structural organisation, including, where applicable, a description of the intended use of agents and branches;

(m) the identity of persons holding within the applicant company, directly or indirectly, qualifying holdings;

(n) the identity of directors and persons responsible for the management of the PIs and, where relevant, persons responsible for the management of the PI's payment services activities;

(o) the identity of statutory auditors and audit firms as defined in Directive 2006/43/EC of the European Parliament and of the Council;

(p) the applicant's legal status and Articles of association;

(q) the address of the applicant's head office.

Like other financial intermediaries set up in the EU, PIs are also required to fulfil a variety of qualitative and quantitative prudential requirements:

1) principal qualitative requirements include sound administrative, risk management and accounting procedures, proper internal control mechanisms, directors and managers who are of good repute and possess appropriate knowledge and experience, as well as suitable shareholders, taking into account the need to ensure the sound and prudent management of a PI;

2) quantitative capital requirements intended to ensure financial stability include initial and ongoing capital requirements appropriate to the low level of risk of PIs, own funds and safeguarding requirements.

In the following paragraphs, we shall focus attention on these prudential requirements regarding, in particular:

(a) the ownership structure and disclosure rules;[17]

(b) initial capital, own funds and separation of funds;[18]

(c) the identity of persons holding within the applicant company, directly or indirectly, qualifying holdings;

(d) the identity of directors and persons responsible for the management of the PIs and, where relevant, persons responsible for the management of the PI's payment services activities;

(e) internal control system; [19]

(f) registration.

Given this specific purpose, for all other requirements we shall limit the discussion to some profiles considered by the EBA in its Guidelines[20]. In particular, we wish to shed light on the main differences between:

(a) Section 4.1 of EBA Guidelines on information required from applicants for authorisation as PIs for the provision of *services 1-8 of Annex I to PSD2* and

(b) the Section 4.2 of EBA Guidelines on information required from applicants for registration for the provision of *only service 8 of Annex I to PSD2*

This second set of guidelines applies to applicants for registration as AISPs. This refers to applicants that intend to provide *only* AIS. Should the applicant intend to provide other services in addition to AIS, they should apply for authorisation and refer to the guidelines set out in Section 4.1 for PIs.

2.1. Before going into details, we should underline that Article 33 of PSD2, dedicated to AISPs, provides that natural or legal persons, providing only payment services as referred to in point (8) of Annex I, shall be exempt from application of

[17] See below in this paper, paragraph 3.
[18] See below in this paper, paragraph 4.
[19] See below in this paper, paragraph 5.3.
[20] See above in this paper, footnote 5.

the procedures set out, for the purposes of our research, in Section 2 with the exemption of point (a), (b), (e), (f), (g), (h), (j), (l), (n), (p) and (q) of Article 5.1., Article 5.3. and Articles 14 and 15. This rule confirms that there are no capital and safeguarding requirements for AISPs; indeed, it provides an exemption for the application of Article 5.1, points (c) and (d).

The first requirement provided by point (a) of Article 5.1. concerns "a programme of operations setting out in particular the type of payment services envisaged" [(Article 5.1, point (a)]. The programme of operations is nothing more than a letter of intent in which the applicant promises to respect certain obligations linked to PIs activities. EBA Guidelines provide different information for applicants asking to operate carrying out all payment services[21] as opposed to those limited to AIS only[22]. The main differences between the two guidelines regard: 1) the requirement of funds and 2) the restricted aim for AIS.

The second requirement is "a business plan including a forecast budget calculation for the first 3 financial years which demonstrates that the applicant is able to employ the appropriate and proportionate systems, resources and procedures to operate soundly" [(Article 5.1, point (b)]. For this requirement as well, rules provided by the EBA differ depending on the payment services that the applicant declares it intends to carry out[23].; for instance:

(a) information on own funds, including the amount and detailed breakdown of the composition of initial capital as set out in Article 7 of PSD2,[24] is not required for AIS;

(b) information on, and calculation of, minimum own funds requirements in accordance with the method(s) referred to in Article 9 of PSD2[25] as determined by the competent authority, unless the applicant intends to provide PIS or AIS only.

[21] See EBA Guidelines, Section 4 (1), point (3).
[22] See EBA Guidelines, Section 4 (2), point (3).
[23] See EBA Guidelines, Section 4 (1), point (4) and Section 4 (2), point (4).
[24] See below in this paper, paragraph 4 (1).
[25] See below in this paper, paragraph 4 (2).

The third requirement is "*a description of the procedure in place to monitor, handle and follow up a security incident and security related customer complaints, including an incident reporting mechanism which takes account of the notification obligations of the PI laid down in Article 96"* [(Article 5.1, point (f)]. For this requirement, the EBA provides similar rules for all payment services[26].

The fourth requirement is "a description of the process in place to file, monitor, track and restrict access to sensitive payment data" [(Article 5.1, point (g)]. As regards this requirement, the EBA[27] has provided a uniform set of guidelines for PIs and AISPs, while if the applicant intends to provide PIS only, certain information is not required, e.g. a description of how the collected data are filed: f) unless the applicant intends to provide PIS only, the expected internal and/or external use of the collected data, including by counterparties.

The fifth requirement is "a description of business continuity arrangements including a clear identification of the critical operations, effective contingency plans and a procedure to regularly test and review the adequacy and efficiency of such plans" [(Article 5.1, let. h)]. For this requirement as well, the EBA[28] has issued almost the same rules for PIs, PISs and AISPs; for the latter it has not required a description of the mitigation measures to be adopted by the applicant, in cases of the termination of its payment services, ensuring the execution of pending payment transactions and the termination of existing contracts.

The sixth requirement is "a description of the principles and definitions applied for the collection of statistical data on performance, transactions and fraud" [(Article 5.1, point (i)] and for this requirement the EBA has issued guidelines applicable only if the applicant wishes to exercise all payment services[29], Section 4.1., point 12.

The seventh requirement is "a security policy document, including a detailed risk assessment in relation to its payment services and a description of

[26] See EBA Guidelines Section 4 (1), point (9) and Section 4 (2), point (7).
[27] See EBA Guidelines, Section 4 (1), point (10) and Section 4 (2) point (8).
[28] See EBA Guidelines, Section 4 (1), point (11) and Section 4 (2), point (9).
[29] See EBA Guidelines, Section 4 (1), point (12).

security control and mitigation measures taken to adequately protect payment service users against the risks identified, including fraud and illegal use of sensitive and personal data" [(Article 5.1, point (j)].

Regarding this requirement, the EBA[30] requires more detailed information from solely-AIS businesses concerning:1) a description of IT systems; c) the type of authorised external connections, such as with partners, service providers, entities of the group and employees working remotely, including the rationale for such connections; 2) the logical security measures and mechanisms that govern internal access to IT systems; 3) the security of payment processes.

Another requirement for authorisation is established by Articles 5.2 and 5.3 of PSD2, which states that applicants intending to provide PIS or AIS payment services as referred to in point (7) of Annex I[31] and in point (8) of Annex I[32] must hold professional indemnity insurance.

The EBA[33] has provided guidance on how to stipulate the minimum amount of professional indemnity insurance or other comparable guarantee. As evidence of a professional indemnity insurance or comparable guarantee that is compliant with EBA Guidelines on criteria for stipulating the minimum monetary amount of professional insurance or other comparable guarantee (EBA/GL/2017/08) and Article 5(2) and 5(3) of PSD2, the applicant intending to offer PIS or AIS should provide the following information: a) an insurance contract or other equivalent document confirming the existence of professional indemnity insurance or a comparable guarantee, with a cover amount that is compliant with the above-

[30] See EBA Guidelines, Section 4 (1), point (13) and Section 4 (2), point (10).
[31] "Member States shall require undertakings that apply for authorisation to provide payment services as referred to in point (7) of Annex I, as a condition of their authorisation, to hold a professional indemnity insurance, covering the territories in which they offer services, or some other comparable guarantee against liability to ensure that they can cover their liabilities as specified in Articles 73, 89, 90 and 92" (Article 5 (2) of PSD2).
[32] 'Member States shall require undertakings that apply for registration to provide payment services as referred to in point (8) of Annex I, as a condition of their registration, to hold a professional indemnity insurance covering the territories in which they offer services, or some other comparable guarantee against their liability vis-à-vis the account servicing payment service provider or the payment service user resulting from non-authorised or fraudulent access to or non-authorised or fraudulent use of payment account information' (Article 5 (3) of PSD2).
[33] See EBA Guidelines, Section 4 (1), point (12) and Section 4 (2), point (18).

mentioned EBA Guidelines, showing the coverage of relevant liabilities; b) documentation of how the applicant has calculated the minimum amount in a way that is compliant with the above-mentioned EBA Guidelines, including all applicable components of the formula specified therein.

3. As regards rules concerning ownership of PIs, following the same method used for other financial intermediaries, the European legislation considers two different profiles:

(a) first, PSD2 imposes specific requirements for natural or legal persons holding, directly or indirectly, qualifying participations in the PI's capital [Article 5.1., point (m)];

(b) second, Article 6 imposes control of shareholdings, and it is important to note that this article is new relative to PSD1.

3.1. Since, as regards the attainment and maintenance of healthy and prudent management, it is necessary that those in important positions in the organizational structure respect determined requirements of good repute and professional competence[34], holders of a qualifying holding in a PI must meet the transparency principle and the suitability rule.

The Article deals with the qualitative aspect of capital, which assumes particular relevance in the financial market due to the fiduciary nature of the activity of financial intermediaries and the importance of guaranteeing efficient allocation of resources in the economic system.

From one perspective, the suitability requirements for qualifying shareholders are intended to keep dangerous persons from gaining entry into PIs (sadly, the phenomenon of financial intermediaries being set up by criminal

[34] See below in this paper, paragraph 5.

organizations for money-laundering purposes must be acknowledged) that do not provide appropriate guarantees of correctness; while from another point of view, the obligation to communicate shareholder information not only provides a picture of the order and distribution of the stock capital or significant quotas of a given PI at a given moment, but also generates a record of all upward or downward variations and oscillations that occur thereafter.

Operating in this way, it would be difficult for qualifying shareholders holding a portion of capital considered significant enough to allow them to influence decisions concerning the PI to remain anonymous, and this is important to safeguard the existing fiduciary relationship between the public/savers and management.

Given that, as provided by Article 5 (1), point (m) of PSD2, information that must be provided with requests for authorization includes the identity of persons holding in the applicant, directly or indirectly, qualifying holdings within the meaning of point (36) of Article 4.1 of Regulation (EU) No 575/2013.

The quoted point (36) provides that 'qualifying holding' means a direct or indirect holding in an enterprise which represents 10 % or more of its capital or voting rights or which makes it possible to exercise a significant influence over the management of that enterprise; of such holdings, businesses must submit information on the size of their holdings and evidence of their suitability taking into account the need to ensure the sound and prudent management of a PI.

For the purposes of the identity and evidence of the suitability of persons with qualifying holdings in the applicant PI, without prejudice to the assessment in accordance with the criteria, as relevant, introduced with Directive 2007/44/EC and specified in the joint guidelines for the prudential assessment of acquisitions of qualifying holdings (JC/GL/2016/01), EBA Guidelines[35] provides that

the applicant should submit the following information: a) a description of the group to which the applicant belongs and an indication of the

[35] See EBA Guidelines, Section 4 (1), point (15).

parent undertaking, where applicable; b) a chart setting out the shareholder structure of the applicant[36]; c) a list of the names of all persons and other entities that have or, in the case of authorisation, will have qualifying holdings in the applicant's capital[37].

Following these general requirements, the EBA provides different instructions depending on whether the applicant is a natural person[38] or a legal person or entity[39].

3.1.1. In the first case, the principal requirement regards the reputation of the qualifying shareholder. The EBA states that "Where a person who has or, in the case of authorisation, will have a qualifying holding in the applicant's capital is a natural person, the application should set out all of the following information relating to the identity and suitability of that person:

a) the person's name and name at birth, date and place of birth, citizenship (current and previous), identification number (where available) or passport number, address and a copy of an official identity document;

b) a detailed curriculum vitae stating the education and training, previous professional experience and any professional activities or other functions currently performed;

c) a statement, accompanied by supporting some documents;

d) a list of undertakings that the person directs or controls and of which the applicant is aware of after due and careful enquiry; the percentage of control either direct or indirect in these companies; their status (whether or not they are active, dissolved, etc.); and a description of insolvency or similar procedures;

[36] Structure means: 'i) the name and the percentage holding (capital/voting right) of each person that has or will have a direct holding in the share capital of the applicant, identifying those that are considered as qualifying holders and the reason for such qualifications; ii) the name and the percentage holding (capital/voting rights) of each person that has or will have an indirect holding in the share capital of the applicant, identifying those that are considered as indirect qualifying holders and the reason for such qualification'.

[37] It is necessary to indicate for each such person or entity 'i. the number and type of shares or other holdings subscribed or to be subscribed; ii. the nominal value of such shares or other holdings'.

[38] See EBA Guidelines, Section 4 (1), point (15)(2).

[39] See EBA Guidelines, Section 4 (1), point (15)(3).

e) where an assessment of reputation of the person has already been conducted by a competent authority in the financial services sector, the identity of that authority and the outcome of the assessment;

f) the current financial position of the person, including details concerning sources of revenues, assets and liabilities, security interests and guarantees, whether granted or received;

g) a description of any links to politically exposed persons, as defined in Article 3(9) of Directive (EU) 2015/849[40]".

3.1.2. Where a person or entity who has or, in the case of authorisation, will have a qualifying holding in the applicant's capital (including entities that are not a legal person and which hold or should hold the participation in their own name), the application should contain the following information relating to the identity and suitability of that legal person or entity:

(a) name;

(b) where the legal person or entity is registered in a central register, commercial register, companies register or similar register that has the same purposes of those aforementioned, a copy of the good standing, if possible, or otherwise a registration certificate;

(c) the addresses of its registered office and, where different, of its head office, and principal place of business;

(d) contact details;

(e) corporate documents or, where the person or entity is registered in another Member State, a summary explaining the main legal features of the legal form or the entity;

(f) whether or not the legal person or entity has ever been or is regulated by a competent authority in the financial services sector or other government body;

[40] Council Directive 2015/849/EU of 20 May 2015 laying down the prevention of the use of the financial system for the purposes of money laundering or terrorist financing [2015] OJ L141/73.

(g) where such documents can be obtained, an official certificate or any other equivalent document evidencing the information set out in paragraphs (a) to (e) issued by the relevant competent authority;

(h) the information referred to in EBA Guidelines 15(2)(c), 15(2)(d), 15(2)(e), 15(2)(f), and 15(2)(g) in relation to the legal person or entity;

(i) a list containing details of each person who effectively directs the business of the legal person or entity, including their name, date and place of birth, address, their national identification number, where available, and a detailed curriculum vitae (stating relevant education and training, previous professional experience, any professional activities or other relevant functions currently performed), together with the information referred to in Guideline 15(2)(c) and 15(2)(d) in respect of each such person;

(j) the shareholding structure of the legal person, including at least their name, date and place of birth, address and, where available, personal identification number or registration number, and the respective share of capital and voting rights of direct or indirect shareholders or members and beneficial owners, as defined in Article 3 (6) of Directive (EU) 2015/849;

(k) a description of the regulated financial group of which the applicant is a part, or may become a part, indicating the parent undertaking and the credit, insurance and security entities within the group; the name of their competent authorities (on an individual or consolidated basis);

and (l) annual financial statements, at the individual and, where applicable, the consolidated and sub-consolidated group levels, for the last three financial years, where the legal person or entity has been in operation for that period (or, if less than three years, the period for which the legal person or entity has been in operation and for which financial statements have been prepared), approved by the statutory auditor or audit firm within the meaning of Directive 2006/43/EC4 , where applicable, including each of the following items: i. the balance sheet; ii. the profit-and-loss accounts or income statement; iii. the annual reports and financial

annexes and any other documents registered with the relevant registry or competent authority of the legal person;

(m) where the legal person has not been operating for a sufficient period to be required to prepare financial statements for the three financial years immediately prior to the date of the application, the application shall set out the existing financial statements (if any);

(n) where the legal person or entity has its head office in a third country, general information on the regulatory regime of that third country as applicable to the legal person or entity, including information on the extent to which the third country's anti-money laundering and counter-terrorist financing regime is consistent with the Financial Action Task Force Recommendations;

(o) for entities that do not have legal personality such as a collective investment undertaking, a sovereign wealth fund or a trust, the application shall set out some information[41].

3.1.3. In addition, the EBA also sets forth common rules regarding the reputation requirement[42]. The principal aim of said requirement is the stability of PIs, not only financial but corporate as well.

As regards corporate stability, the application shall set out all of the following information for each natural or legal person or entity who has or, in the case of authorisation, will have a qualifying holding in the capital of the applicant:

(a) details of that person's or entity's financial or business reasons for owning that holding and the person's or the entity's strategy regarding the holding, including the period for which the person or the entity intends to hold the

[41] Specifically: the identity of the persons who manage assets and of the persons who are beneficiaries or subscribers; ii. a copy of the document establishing and governing the entity including the investment policy and any restrictions on investment applicable to the entity. 4 Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC.

[42] See EBA Guidelines, Section 4 (1), points (15)(4) and (15)(5).

holding and any intention to increase, reduce or maintain the level of the holding in the foreseeable future;

(b) details of the person's or the entity's intentions with respect to the applicant and the influence the person or the entity intends to exercise over the applicant, including with respect to the dividend policy, the strategic development and the allocation of resources of the applicant, whether or not it intends to act as an active minority shareholder, and the rationale for such intention;

(c) information on the person's or the entity's willingness to support the applicant with additional own funds if needed for the development of its activities or in the case of financial difficulties;

(d) the content of any intended shareholder's or member's agreements with other shareholders or members in relation to the applicant;

(e) an analysis as to whether or not the qualifying holding will impact in any way, including as a result of the person's close links to the applicant, on the ability of the applicant to provide timely and accurate information to the competent authorities;

(f) the identity of each member of the management body or of senior management who will direct the business of the applicant and will have been appointed by, or following a nomination from, such shareholders or members, together with, to the extent not already provided, the information set out in EBA Guidelines point (16).

As concerns financial stability, the application should set out a detailed explanation of the specific sources of funding for the participation of each person or entity having a qualifying holding in the applicant's capital, which should include:

(a) details on the use of private financial resources, including their availability and (so as to ensure that the competent authority is satisfied that the activity that generated the funds is legitimate) source;

(b) details on access to financial markets, including details of financial instruments to be issued;

(c) information on the use of borrowed funds, including the name of the lenders and details of the facilities granted, such as maturities, terms, security interests and guarantees, as well as information on the source of revenue to be used to repay such borrowings; where the lender is not a credit institution or a financial institution authorised to grant credit, the applicant should provide to the competent authorities information on the origin of the borrowed funds;

(d) information on any financial arrangement with other persons who are shareholders or members of the applicant.

3.2. In addition to the reputation requirement, Article 6 of PSD2 provides for a specific discipline for the control of qualifying shareholdings. This rule is not present in PSD1 and it can be supposed that this rule has been introduced in the interest of homogeneity with rules regarding other financial intermediaries. In fact, the rule substantially reproduces the same rule found in European directives regarding banks, insurance undertakings and investment firms.

According to Article 6 (1) of PSD2, "*Any natural or legal person who has taken a decision to acquire or to further increase, directly or indirectly, a qualifying holding within the meaning of point (36) of Article 4(1)of Regulation (EU) No 575/2013 in a PI, as a result of which the proportion of the capital or of the voting rights held would reach or exceed 20 %, 30 % or 50 %, or so that the PI would become its subsidiary, shall inform the competent authorities of that PI in writing of their intention in advance*".

First, we must consider the use of the generic term "any natural or legal person". It is intended to mean that the precept applies to any subject able to acquire shares in the capital of PIs, therefore both natural persons and legal persons.

Second, regarding the moment at which the obligation arises, the rule focusing on the intention to acquire or surrender shares prescribes that the obligation must be fulfilled before the passage of ownership has happened and that, in any case, the intention has gone beyond the phase of simple negotiations and has irreversibly acquired juridical consequence binding one or both parties. For the purposes of the regulation, the effectiveness of the contracts for the acquisition of qualifying holdings is subordinate to the condition that the competent authority does not forbid the operation.

It should be noted that the transfer or acquisition of qualifying holdings may be subject to obligatory communication regardless of the underlying instrument and whatever the circumstance may be (acquisition, signature, etc).

From an objective point of view, the disclosure obligation is required when any natural or legal person who has taken a decision to acquire or to further increase, directly or indirectly, a qualifying holding, that is to say 10 % or more of the capital or of the voting rights or one that allows the holder to exercise a significant influence over the management of the enterprise [See point (36) of Article 4 (1) of Regulation (EU) No 575/2013] in a PI, as a result of which the proportion of the capital or of the voting rights held would reach or exceed 20 %, 30 % or 50 %, or the PI would become its subsidiary.

The proposed acquirer of a qualifying holding shall supply to the competent authority information indicating the size of the intended holding and relevant information referred to in Article 23.4 of Directive 2013/36/EU [Article 6 (2) of PSD2].

It is also important to consider the powers of Member States.

Member States shall require that where the influence exercised by a proposed acquirer, as referred to in paragraph 2 is likely to operate to the detriment of the prudent and sound management of the PI, the competent authorities shall express their opposition or take other appropriate measures to bring that situation to an end. Such measures may include injunctions, penalties

against directors or the persons responsible for the management, or the suspension of the exercise of the voting rights attached to the shares held by the shareholders or members of the PI in question. Similar measures shall apply to natural or legal persons who fail to comply with the obligation to provide prior information, as laid down in this article [Article 6 (3) of PSD2].

If a holding is acquired despite the opposition of the competent authorities, Member States shall, regardless of any other penalty to be adopted, provide for the exercise of the corresponding voting rights to be suspended, the nullity of votes cast or the possibility of annulling those votes [Article 6 (4) of PSD2].

For this second power, we may suppose that the Italian legislature will not provide a different solution than that envisaged for the other financial intermediaries.

Even if the requirements of reputation of the qualified shareholders are one of the conditions for the issuance of authorization, the sanction should they fail to respect the requirement consists exclusively of the suspension of the voting right. The qualifying shareholder, therefore, is not deprived of any faculty to hold a juridical position, but only the possibility to exercise some rights inherent to it, and this is more consistent with the aim of the rules, which is to keep disreputable persons from influencing management.

It might be possible to distinguish between constitutive quorums and deliberative quorums, provided that the actions for which the voting right is suspended are for the purpose of the regular constitution of the meeting. It is up to the president of the shareholder meeting, in relation to his tasks of verifying of the regular constitution of the meeting and the legitimation of shareholders, to admit or not to admit the shareholders to the vote for which, on the base of the available information, they are required to prove they meet the suitability requirements.

If shareholders exercise the voting right despite the prohibition, the decision may be annulled, in accordance with the general rules provided by company law,

by the directors, by control bodies and by absent, dissentient and abstaining shareholders within a determined period from the date of the resolution or of registration in the register of companies, presuming that the resolution was adopted with the controlling vote of the shareholder who should have abstained (i.e., the resolution does not pass the test of resistance).

4. The PSD2 imposes several requirements on PIs which aim to make these institutions safe.

These requirements relate to:

(a) *initial capital* required at the time authorisation is issued by the competent authority (Article 7 of PSD2);

(b) *own funds* to be held at all times by PIs (Article 8 of PSD2). Under Article 9 of PSD2, PIs must hold at all times own funds that can be calculated in accordance with one of three methods (A, B or C), as determined by national legislation;

(c) *safeguarding requirements* that require funds (which have been received from payment service users or through another payment service provider for the execution of payment transactions) to be safeguarded by either: a) holding such funds in an account separate from the operational account(s) of the payment service provider and insulating such funds from claims of the other creditors in case of bankruptcy, or b) having an insurance policy or a guarantee in place (Article 10 of PSD2).

The rules concerning initial capital and other own funds have the direct aim of ensuring the stability of PIs, and only indirectly serve to protect payment service users, who are mainly protected by safeguarding requirements.

4.1. According to Article 5.1, point (c) of PSD2, the applicant shall demonstrate evidence that the PI holds initial capital as provided for in Article 7 of PSD2.

The latter article provides different minimum levels of initial capital to be held at the time of authorisation depending on the payment services the PI wishes to offer.

Article 7 of PSD2 provides that Member States shall require PIs to hold, at the time of authorisation, initial capital, comprised of one or more of the items referred to in Article 26(1)(a) to (e) of Regulation (EU) No 575/2013[43] as follows:

(a) where the PI provides only the payment service as referred to in point (6) of Annex I, its capital shall at no time be less than EUR 20,000;

(b) where the PI provides the payment service as referred to in point (7) of Annex I, its capital shall at no time be less than EUR 50,000;

(c) where the PI provides any of the payment services as referred to in points (1) to (5) of Annex I, its capital shall at no time be less than EUR 125,000.

As noted in the introduction, there is no minimum capital requirement for AISPs (service as referred to in point 8 of Annex I).

According to EBA Guidelines point (6), the applicant should submit the following documents:

(a) for existing enterprises, an audited account statement or public register certifying the amount of capital of the applicant;

(b) for enterprises in the process of being incorporated, a bank statement issued by a bank certifying that the funds are deposited in the applicant's bank account.

(c) for the PIs referred to in Article 10.1, a description of the measures taken for safeguarding payment service users' funds in accordance with Article 10[44].

[43] Council Regulation (EU) 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) 648/2012 [2013] OJ L176/1.
[44] See below in this paper, paragraph 4 (2).

For own funds, the definition and calculation is provided in Articles 8 and 9 of PSD2.

In addition to the initial capital requirement, Article 8 of PSD2 provides for some specific rules regarding own funds. The PI's own funds shall not fall below the amount of initial capital as referred to in Article 7 or the amount of own funds as calculated in accordance with Article 9 of PSD2, whichever is the higher.

Member States shall take the necessary measures to prevent the multiple use of elements eligible for own funds (so-called double gearing) where the PI belongs to the same group as another PI, credit institution, investment firm, asset management company or insurance undertaking. This paragraph shall also apply where a PI has a hybrid character and carries out activities other than providing payment services [Article 8 (2) of PSD2].

The PSD2 sets out some exemptions. If the conditions laid down in Article 7 of Regulation (EU) No 575/2013 are met, Member States or their competent authorities may choose not to apply Article 9 of PSD2 to PIs which are included in the consolidated supervision of the parent credit institution pursuant to Directive 2013/36/EU [Article 8 (3) of PSD2].

Concerning the calculation of own funds, article 9 provides that, notwithstanding the initial capital requirements set out in Article 7, Member States shall require PIs, except those offering only services as referred to in point (7) or (8), or both, of Annex I, to hold, at all times, own funds calculated in accordance with one of the following three methods, as determined by the competent authorities in accordance with national legislation:

In method A, the PI's own funds shall amount to at least 10 % of its fixed overheads of the preceding year. The competent authorities may adjust that requirement in the event of a material change in a PI's business since the preceding year. Where a PI has not completed a full year's business at the date of the calculation, the requirement shall be that its own funds amount to at least 10

% of the corresponding fixed overheads as projected in its business plan, unless an adjustment to that plan is required by the competent authorities.

Turning to method B, the PI's own funds shall amount to at least the sum of the following elements multiplied by the scaling factor k defined in paragraph 2, where payment volume (PV) represents one twelfth of the total amount of payment transactions executed by the PI in the preceding year:

(a) 4.0 % of the slice of PV up to EUR 5 million;

plus (b) 2.5 % of the slice of PV above EUR 5 million up to EUR 10 million;

plus (c) 1 % of the slice of PV above EUR 10 million up to EUR 100 million;

plus (d) 0.5 % of the slice of PV above EUR 100 million up to EUR 250 million;

plus (e) 0.25 % of the slice of PV above EUR 250 million.

Finally, method C, where the PI's own funds shall amount to at least the relevant indicator defined in point (a), multiplied by the multiplication factor defined in point (b)[45] and by the scaling factor k defined in paragraph 2. 1.068. (a) The relevant indicator is the sum of the following: (i) interest income; (ii) interest expenses; (iii) commissions and fees received; and (iv) other operating income. Each element shall be included in the sum with its positive or negative sign. Income from extraordinary or irregular items shall not be used in the calculation of the relevant indicator. Expenditure on the outsourcing of services rendered by third parties may reduce the relevant indicator if the expenditure is incurred from an undertaking subject to supervision under PSD2. The relevant indicator is calculated on the basis of the 12-monthly observation at the end of the previous financial year. The relevant indicator shall be calculated over the previous financial year. Nevertheless, own funds calculated according to Method C shall not fall

[45] The multiplication factor shall be:
(i) 10 % of the slice of the relevant indicator up to EUR 2.5 million;
(ii) 8 % of the slice of the relevant indicator from EUR 2.5 million up to EUR 5 million;
(iii) 6 % of the slice of the relevant indicator from EUR 5 million up to EUR 25 million;
(iv) 3 % of the slice of the relevant indicator from EUR 25 million up to 50 million;
(v) 1.5 % above EUR 50 million.

below 80 % of the average of the previous 3 financial years for the relevant indicator. When audited figures are not available, business estimates may be used.

Article 9 (2) provides that the scaling factor k to be used in Methods B and C shall be:

(a) 0.5 where the PI provides only the payment service as referred to in point (6) of Annex I;

(b) 1 where the PI provides any of the payment services as referred to in any of points (1) to (5) of Annex I.

The competent authorities may - based on an evaluation of the risk-management processes, risk loss data base and internal control mechanisms of the PI- require the PI to hold an amount of own funds which is up to 20 % higher than the amount which would result from the application of the method chosen in accordance with paragraph 1, or permit the PI to hold an amount of own funds which is up to 20 % lower than the amount which would result from the application of the method chosen in accordance with paragraph 1.

4.2. The segregation of funds or, if it prefers, the safeguarding requirements, has the main object to protect payment services users' and specifically costumers' funds. According to Article 10 (1) of PSD2, the Member States or competent authorities shall require a PI which provides payment services as referred to in points (1) to (6) of Annex I[46] to safeguard all funds which have been received from the payment service users or through another payment service provider for the execution of payment transactions. In this case there is no rule concerning safeguarding requirements not only for AISPs but also for PIS.

The Article provides two ways to safeguard funds.

According to Article 10 (1), lett (a), where the abovementioned funds are still held by the PI and not yet delivered to the payee or transferred to another

[46] Points 1-6 of Annex I, and not points (7) and (8) of the same Annex.

payment service provider by the end of the business day following the day when the funds have been received, they shall be deposited in a separate account in a credit institution *or* invested in secure, liquid low-risk assets as defined by the competent authorities of the home Member State.

In these cases, the rule provides for two important effect related to safeguarding: (a) funds shall not be commingled at any time with the funds of any natural or legal person other than payment service users on whose behalf the funds are held and (b) they shall be insulated in accordance with national law in the interest of the payment service users against the claims of other creditors of the PI, in particular in the event of insolvency [Article 10 (1), point (a)].

For this profile, EBA[47] provides that where the applicant safeguards the payment service users' funds through depositing funds in a separate account in a credit institution or through an investment in secure, liquid, low risk assets, the description of the safeguarding measures should contain:

(a) a description of the investment policy to ensure the assets chosen are liquid, secure and low risk, if applicable;

(b) the number of persons that have access to the safeguarding account and their functions;

(c) a description of the administration and reconciliation process to ensure that payment service users' funds are insulated in the interest of payment service users against the claims of other creditors of the PI, in particular in the event of insolvency;

(d) a copy of the draft contract with the credit institution;

(e) an explicit declaration by the PI of compliance with Article 10 of PSD2[48].

Neither the law nor EBA Guidelines solve some questions arising from the obligation to deposit funds which have been received from the payment service users or through another payment service provider for the execution of payment transactions in a separate account in a credit institution.

[47] See EBA Guidelines, Section 4 (1), point (17)(1).
[48] See also Article 36 of PSD2 and DIVISSENKO and GIMIGLIANO, *op. cit.*, p. 97 f.

The questions are: first, what is the legal nature of this deposit? Second, is it possible to receive interests? Third, are these deposits subject to the rules for deposits' protection? In this place it is not possible to solve this question but just to put in light them.

In addition, Article 10 (1), lett (b) provides that such funds may be covered by an insurance policy or some other comparable guarantee from an insurance company or a credit institution as far as the following requirements are met: (a) the insurance company or the credit institutions do not belong to the same group as the PI itself and (b) the insurance policy is made for an amount equivalent to that which would have been segregated in the absence of the insurance policy or other comparable guarantee, payable in the event that the PI is unable to meet its financial obligations [(Article 10 (1), point (b)].

As regards this second way, EBA[49] provides that where the applicant safeguards the funds of the payment service user through an insurance policy or comparable guarantee from an insurance company or a credit institution, the description of the safeguarding measures should contain the following:

(a) a confirmation that the insurance policy or comparable guarantee from an insurance company or a credit institution is from an entity that is not part of the same group of firms as the applicant;

(b) details of the reconciliation process in place to ensure that the insurance policy or comparable guarantee is sufficient to meet the applicant's safeguarding obligations at all times;

(c) duration and renewal of the coverage;

(d) a copy of the (draft) insurance agreement or the (draft) comparable guarantee.

Where a PI is required to safeguard funds under the above commented rules and a portion of those funds is to be used for future payment transactions with the remaining amount to be used for non-payment services, that portion of

[49] See EBA Guidelines, Section 4 (1), point (17)(2).

the funds to be used for future payment transactions shall also be subject to the quoted requirements [Article 10 (2) of PSD2].

Where that portion is variable or not known in advance, Member States shall allow PIs to apply this paragraph on the basis of a representative portion assumed to be used for payment services provided such a representative portion can be reasonably estimated on the basis of historical data to the satisfaction of the competent authorities [Article 10 (2) of PSD2].

5.

5.1. In terms of prudential rules, it is important to consider that the applicant must also respect some requirements regarding corporate governance, which generally means the system by which companies are directed and controlled. This is not the place to discuss the corporate governance of PIs in depth, but simply to mention some Articles of PSD2 regarding corporate governance among the authorization requirements. We wish to refer to the identity of directors and persons responsible for the management of the PI [(Article 5 (1), point (n)], and to the internal control mechanism [Article 5 (1), points (e) and (k)].

5.2. According to Article 5 (1), point (n) of PSD2, applicants must provide the identity of directors and persons responsible for the management of the PIs and, where relevant, persons responsible for the management of the payment services activities of the PIs, as well as evidence that they are of good repute and possess appropriate knowledge and experience to perform payment services as determined by the home Member State of the PI.

This rule introduces one new principle: directors and persons responsible for the management of the PI and persons responsible for the management of the payment services activities of the PIs must meet two different requirements: a) good reputation and b) possession of appropriate knowledge and experience.

To specify the content of these requirements, the EBA issued the same rules for PIs and AISPs[50]. For the purposes of the identity and suitability assessment of directors and persons responsible for the management of the PI, the applicant should provide information regarding possession of knowledge and experience and good reputation.

As regards the possession of appropriate knowledge and experience, the specific information requested is as follows:

(a) personal details;

(b) where applicable, information on the suitability assessment carried out by the applicant, which should include details of the result of any assessment of the suitability of the individual performed by the institution, such as relevant board minutes or suitability assessment reports or other documents;

(c) evidence of knowledge, skills and experience, which should include a curriculum vitae containing details of education and professional experience, including academic qualifications, other relevant training, the name and nature of all organisations for which the individual works or has worked, and the nature and duration of the functions performed, in particular highlighting any activities within the scope of the position sought.

The suitability assessment is based on a broad range of information sources.

Indeed, EBA rules and regulations consider among the others,

(a) criminal records and relevant information on criminal investigations and proceedings, relevant civil and administrative cases, and disciplinary actions, including disqualification as a company director, bankruptcy, insolvency and similar procedures, notably through an official certificate or any objectively reliable

[50] See EBA Guidelines, Section 4 (1), point (16) and Section 4 (2), point (11).

source of information concerning the absence of criminal conviction, investigations and proceedings, such as third-party investigations and testimonies made by a lawyer or a notary established in the European Union;

(b) a statement as to whether criminal proceedings are pending or the person or any organisation managed by him or her has been involved as a debtor in insolvency proceedings or comparable proceedings;

(c) investigations, enforcement proceedings or sanctions by a supervisory authority that the individual has been directly or indirectly involved in;

(d) refusal of registration, authorisation, membership or licence to carry out a trade, business or profession; the withdrawal, revocation or termination of registration, authorisation, membership or licence; or expulsion by a regulatory or government body or by a professional body or association;

(e) dismissal from employment or a position of trust, fiduciary relationship or similar situation, or having been asked to resign from employment in such a position, excluding redundancies;

(f) previous inquiries carried on by other authorities, not necessarily financial authorities. To this end, the exchange of information among competent national authorities seems extremely important.

Both PSD2 and EBA Guidelines avoid addressing some important questions, leaving this task to Member States.

For instance, we know that the original lack of the above-cited requirements is a cause of ineligibility, in addition to other requirements provided by Member States legal systems regarding management. But what if the requirements are breached after authorisation has been issued?

To answer to this question, we need to take a step-by-step approach, keeping in mind, first of all, that the possession of appropriate knowledge and experience and good repute represent among the conditions on the basis of which authorization shall be granted by the competent Authorities. As such, we would

expect the lack of those requirements to produce effects on the PIs (for instance, the revocation of authorization).

However, we may presume that answer to this question will be the same as for other financial intermediaries, i.e., the removal of the persons responsible for management from their positions[51].

5.3. Another profile of corporate governance relevant for granting authorization concerns the internal control system of PIs.

The internal control system or mechanism means a set of rules, policies, and procedures an organization implements to provide direction, increase efficiency and strengthen adherence to policies. These are important for achieving the business objective. The components of an internal control system are closely linked to the company organization. Regarding PIs, the PSD2 provides for two different structures.

First, according to Article 5 (1), point (e) of PSD2, the applicant must present "a description of the applicant's governance arrangements and internal control mechanisms, including administrative, risk management and accounting procedures, which demonstrates that those governance arrangements, control mechanisms and procedures are proportionate, appropriate, sound and adequate". As regards this profile, the EBA issued the same rules for PIs[52] and for AISPs[53].

First, the applicant should provide a description of the governance arrangement and the internal control mechanisms consisting of:

a) a mapping of the risks identified by the applicant, including the type of risks and the procedures the applicant will put in place to assess and prevent such risks;

[51] See below the comment to Article 13 of PSD2 at paragraph 6.
[52] See EBA Guidelines, Section 4 (1), point (8).
[53] See EBA Guidelines, Section 4 (2), point (6).

b) the different procedures to carry out periodical and permanent controls including the frequency and the human resources allocated;

c) the accounting procedures by which the applicant will record and report its financial information;

d) the identity of the person(s) responsible for the internal control functions, including for periodic, permanent and compliance control, as well as an up-to-date curriculum vitae;

e) the identity of any auditor that is not a statutory auditor pursuant to Directive 2006/43/EC;

f) the composition of the management body and, if applicable, of any other oversight body or committee;

g) a description of the way outsourced functions are monitored and controlled so as to avoid an impairment in the quality of the PI's internal controls;

h) a description of the way any agents and branches are monitored and controlled within the framework of the applicant's internal controls;

i) where the applicant is the subsidiary of a regulated entity in another EU Member State, a description of the group governance.

Second, regarding solely PIs, according to Article 5 (1), point (k) of PSD2, for PIs subject to the obligations in relation to money laundering and terrorist financing under Directive (EU) 2015/849 of the European Parliament and of the Council (1) and Regulation (EU) 2015/847 of the European Parliament and of the Council (2), the applicant must present a description of the internal control mechanisms which the applicant has established in order to comply with those obligations".

The EBA[54] states that the description of the internal control mechanisms that the applicant has established to comply, where applicable, with those obligations should contain the following information:

[54] See EBA Guidelines, Section 4 (1), point (14): Internal control mechanisms to comply with obligations in relation to money laundering and terrorist financing (AML/CFT obligations).

(a) the applicant's assessment of the money laundering and terrorist financing risks associated with its business, including the risks associated with the applicant's customer base, the products and services provided, the distribution channels used and the geographical areas of operation;

(b) the measures the applicant has or will put in place to mitigate the risks and comply with applicable anti-money laundering and counter terrorist financing obligations, including the applicant's risk assessment process, the policies and procedures to comply with customer due diligence requirements, and the policies and procedures to detect and report suspicious transactions or activities;

(c) the systems and controls the applicant has or will put in place to ensure that its branches and agents comply with applicable anti-money laundering and counter terrorist financing requirements, including in cases where the agent or branch is located in another Member State;

(d) arrangements the applicant has or will put in place to ensure that staff and agents are appropriately trained in anti-money laundering and counter terrorist financing matters;

(e) the identity of the person in charge of ensuring the applicant's compliance with anti-money laundering and counter-terrorism obligations, and evidence that their anti-money laundering and counter-terrorism expertise is sufficient to enable them to fulfil this role effectively;

(f) the systems and controls the applicant has or will put in place to ensure that its anti-money laundering and counter terrorist financing policies and procedures remain up to date, effective and relevant;

(g) the systems and controls the applicant has or will put in place to ensure that the agents do not expose the applicant to increased money laundering and terrorist financing risk;

(h) the anti-money laundering and counter terrorism manual for the staff of the applicant.

6. Prudential requirements are relevant for all parts of the authorization procedure that it is regulated by Articles 11, 12, 13 and 16 of PSD2 and it is divided into four different legal parts:

(a) granting of authorisation,

(b) communication of the decision,

(c) withdrawal of authorization and

(d) maintenance of authorization.

The authorisation process is regulated by Article 11 of PSD2. According to Article 11 (1), Member States shall require undertakings other than those referred to in points (a), (b), (c), (e) and (f) of Article 1 (1) and other than natural or legal persons benefiting from an exemption pursuant to Article 32 or 33[55], who intend to provide payment services, to obtain authorisation as a PI before commencing the provision of payment services. An authorisation shall only be granted to a legal person established in a Member State.

According to Article 11 (2), competent authorities shall grant an authorisation if the information and evidence accompanying the application complies with all of the requirements laid down in Article 5 of PSD2, already analysed in this chapter, and if the competent authorities' overall assessment, having scrutinised the application, is favourable. Before granting an authorisation, the competent authorities may, where relevant, consult the national central bank or other relevant public authorities. However, the Article 11 introduces other two requirements; one shall be applied to all PIs, the other one to apply only to PI provides any of the payment services as referred to in points (1) to (7) of Annex I and, at the same time, is engaged in other business activities.

Article 11 (3) introduces an important requirement for authorization: a PI which, under the national law of its home Member State, is required to have a

[55] For a comment of these two articles see and BOŽINA BEROŠ, *Chapter 4: Title II 'payment service providers', Chapter 1 'Payment Institutions', Section 4 'Exemptions' (arts 32-34)*, in GIMIGLIANO and BOŽINA BEROŠ (eds), p. 82.

registered office, shall have its head office in the same Member State as its registered office and shall carry out at least part of its payment service business there. This requirement, provided for all financial intermediaries, was introduced by Article 3 of Directive 95/26/EC of 29 June 1995 to preclude financial intermediaries from benefiting from regulatory arbitrage. It is particularly strange that this requirement is indicated in the rule regarding the granting of authorization and not in Article 5 which contains all the other requirements; but it can be readily supposed that the Italian legislature will adopt the same solution used for all other financial intermediaries and will maintain the cited requirement among the other requirements.

Article 11 (5) states that where a PI provides any of the payment services as referred to in points (1) to (7) of Annex I and, at the same time, is engaged in other business activities, the competent authorities may require the establishment of a separate entity for the payment services business, where the non-payment services activities of the PI impair or are likely to impair either the financial soundness of the PI or the ability of the competent authorities to monitor the PI's compliance with all obligations laid down by PSD2.

Despite the objective authorisation requirements, the competent authorities still enjoy some degree of leeway. Indeed, the competent authorities shall grant an authorisation only if, taking into account the need to ensure the sound and prudent management of a PI[56],

(a) the PI has robust governance arrangements for its payment services business, which include a clear organisational structure with well-defined, transparent and consistent lines of responsibility, effective procedures to identify, manage, monitor and report the risks to which it is or might be exposed, and adequate internal control mechanisms, including sound administrative and accounting procedures [Article 11 (4)];

[56] For example, *sub* point (a) and the rule of Article 11 (6), it is not possible to find an objective definition of "sound and prudent management".

(b) where close links[57]exist between the PI and other natural or legal persons, those links do not prevent the effective exercise of their supervisory functions [Article 11 (7)];

(c) the laws, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the PI has close links, or difficulties involved in the enforcement of those laws, regulations or administrative provisions, do not prevent the effective exercise of their supervisory functions [Article 11 (8)].

Moreover, the competent authorities shall refuse to grant an authorisation if, taking into account the need to ensure the sound and prudent management of a PI, they are not satisfied as to the suitability of the shareholders or members that have qualifying holdings [Article 11 (6)].

Concluding, Article 11 (9) provides the principle of passporting; indeed, an authorisation shall be valid in all Member States and shall allow the PI concerned to provide the payment services that are covered by the authorisation throughout the Union, pursuant to the freedom to provide services or the freedom of establishment.

About the communication of the decision, withdrawal and maintenance of authorisation, Article 12 states that within 3 months of receipt of an application or, if the application is incomplete, of all those information required for the decision, the competent authorities shall inform the applicant whether the authorisation is granted or refused. The competent authority shall give reasons where it refuses an authorisation.

Conversely, according to Article 13, the competent authorities may withdraw an authorisation issued to a PI only if the institution:

[57] "Close links" are defined in Article 4 (1), point (38) of Council Regulation (EU) 575/2013, cit., 'close links' means a situation in which two or more natural or legal persons are linked in any of the following ways: (a) participation in the form of ownership, direct or by way of control, of 20 % or more of the voting rights or capital of an undertaking; (b) control; (c) a permanent link of both or all of them to the same third person by a control relationship.

(a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has ceased to engage in business for more than 6 months, if the Member State concerned has made no provision for the authorisation to lapse in such cases;

(b) has obtained the authorisation through false statements or any other irregular means;

(c) no longer meets the conditions for granting the authorisation or fails to inform the competent authority on major developments in this respect;

(d) would constitute a threat to the stability of or the trust in the payment system by continuing its payment services business; or

(e) falls within one of the other cases where national law provides for withdrawal of an authorisation.

The competent authority shall give reasons for any withdrawal of an authorisation and shall inform those concerned accordingly, and make public the withdrawal of an authorisation, including in the registers referred to in Articles 14 and 15.

Finally, according to Article 16, where any change affects the accuracy of information and evidence provided in accordance with Article 5, the PI shall, without undue delay, inform the competent authorities of its home Member State accordingly.

7. The Commission's 2020 Communication on a Retail Payments Strategy (RPS) for the EU[58] laid down the Commission's priorities regarding the retail payments sector for the term of office of the current College of Commissioners (2019-2024). It was accompanied by a Digital Finance Strategy, which set out priorities for the digital agenda in the finance sector other than payments. The RPS

[58] COM (2020) 592 final, of 24 September 2020.

announced that "*at the end of 2021, the Commission will launch a comprehensive review of the application and impact of PSD2*".

This review was duly undertaken, essentially in 2022, and led to a decision by the Commission to propose legislative amendments to PSD2, to improve its functioning. These amendments are set out in two proposals:

a) the proposal for a Directive on payment services and electronic money services, focussing on licensing and supervision of PIs and amending certain other Directives (hereinafter PSD3[59]) and

b) a proposal for a Regulation on payment services in the EU[60].

The proposal for a Directive on licensing and supervision of PIs is largely based on Title II of PSD2, regarding "Payment Service Providers", which only applies to PIs. It updates and clarifies the provisions relating to PIs and integrates former EMIs as a sub-category of PIs (and consequently repeals the second Electronic Money Directive, 2009/110/EC)[61]. Furthermore, it includes provisions

[59] COM (2023) 366 final, of 28 June 2023. The second Electronic Money Directive (Directive 2009/110/EC) and the second Payment Services Directive (Directive 2015/2366/EC) will be repealed with effect from the date of application of PSD3.

[60] COM (2023) 367 final, of 28 June 2023.

[61] See also EBA, *Opinion of the European Banking Authority on its technical advice on the review of Directive (EU) 2015/2366 on payment services in the internal market (PSD2)* EBA/Op/2022/06 of 23 June 2022 at the link https://www.eba.europa.eu/sites/default/files/document_library/Publications/Opinions/2022/Opinion%20od%20PSD2%20review%20%28EBA-Op-2022-06%29/1036016/EBA%27s%20response%20to%20the%20Call%20for%20advice%20on%20the%20review%20of%20PSD2.pdf.
In particular it is important to indicate the point 19 (p. 15) where EBA proposes for the Directive to: a) align the initial capital requirements for all PIs with the exception of payment initiation service providers (PISPs) and account information service providers (AISPs), with CAs having discretion to decide, depending on the business model of money remitters whether to apply the threshold for initial capital or the one for own funds; b) apply Method B under Article 9 of PSD2 as a default method for the calculation of own funds requirements since it reflects in the best way the applicable risks arising from the activities. However, to address specific cases, the EBA also proposes CAs to have discretion to decide whether another method should be used based on uniform conditions and criteria, which should be set out in the Directive or by the EBA in a mandate; c) introduce additional own funds requirements for granting of credit related to the provision of payment services; and d) clarify the application of the professional indemnity insurance (PII), including its characteristics, risks to be covered, possibility of use of excess, deductibles and thresholds, and what could be considered as a comparable guarantee. The EBA also proposes to introduce initial capital requirements for AISPs as an alternative to PII during the process of authorisation. See also Section 2 of the EBA, *Opinion - Licensing of PIs and supervision of PSPs under PSD2 - Question 6 - Does the EBA see a need to change the prudential requirements under PSD2, such as the calculation of own funds for particular types of payment services or the application of the requirements on professional indemnity insurance?* (p. 34-44)

concerning cash withdrawal services provided by retailers (without a purchase) or independent ATM deployers and amends the Settlement Finality Directive (Directive 98/26/EC)[62].

As regards the main object of this research, licensing and supervision of PIs, we may resume that the procedures for application for authorisation and control of shareholding are mostly unchanged from PSD2, with the exception of a new requirement for a winding-up plan to be submitted with an application but made fully consistent for institutions providing payment services and electronic money services[63].

Amongst other changes, it is acknowledged that PISPs and AISPs may hold initial capital instead of a professional indemnity insurance, considering that the requirement to hold a professional indemnity insurance at the licensing stage may be difficult to fulfil, considering previous experience. Requirements for initial capital are updated for inflation since the adoption of PSD2, except for PISPs as this is considered not appropriate given the relatively short time, they have been in operation[64].

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[62] To understand better the reasons of changes we can put the attention to Recital (18) of PSD3 where the Commission underlines the results of The EBA Peer Review on authorisation under Directive (EU) 2015/2366 published in January 2023 (European Banking Authority, EBA/REP/2023/01, Peer Review Report on authorisation under PSD2). In this Report EBA *"concluded that deficiencies in the authorisation process have led to a situation where applicants are subject to different supervisory expectations as regards the requirements for authorisation as a payment institution or electronic money institution across the Union, and that sometimes the process of granting an authorisation may take an exceedingly long time. To ensure a level playing field and a harmonised process for the granting of an authorisation to undertakings applying for a payment institution license, it is appropriate to impose to competent authorities a time limit of 3 months for the authorisation process to be concluded, after the receipt of all the information required for the decision"*.

[63] See Article 3, paragraph 3, lett. s), PSD3.

[64] The new Article 5, *Initial capital*, of PSD3 states that "*Member States shall require payment institutions to hold, at the time of authorisation, initial capital, comprised of one or more of the items referred to in Article 26, points (1)(a) to (e), of Regulation (EU) No 575/2013 as follows:* ***(a)*** *where the payment institution provides only the payment service referred to in Annex I, point (5), its capital shall at no time be less than EUR* ***25 000; (b)*** *where the payment institution provides the payment service referred to in Annex I, point (6), its capital shall at no time be less than EUR 50 000;* ***(c)*** *where the payment institution provides any of the payment services referred to in Annex I, points (1) to (4), its capital shall at no time be less than EUR 150 000; (d) where the payment institution provides electronic money services, its capital shall at no time be less than EUR 400 000*".

If we focus attention on capital requirements, we may note the substantial difference between the minimum initial capital required for PIs and for banks: for PIs, at this moment the amount varies from EUR 20,000 to 125,000[65] whereas banks are required to have EUR 10,000,000[66]. We may presume that this sizeable difference is owing to the different activities carried out by banks. The latter hold deposits, which they use for a variety of risk-taking activities, including providing credit, and can pose a systemic risk to the wider financial system. On the other hand, PIs cannot take deposits and cannot use monies in a payment account to finance their own payment activities, including possible credit granting. PIs are therefore subject to an extremely low level of risk that does not pose a systemic risk to the financial system.

The possibility given to PIs to grant credit would not have justified the extension to them of the same minimum capital requirements provided for banks because, unlike the credit granting exercised by banks, that carried out by PIs is not connected to the business of taking deposits or repayable funds.

As regards this topic it is important to remember the recital 20 of the PSD3 proposal where it is stated that "*the prudential framework applicable to payment institutions should continue to rest on the premise that those institutions are prohibited from accepting deposits from payment service users and are only permitted to use funds received from payment service users for rendering payment services. Consequently, it is appropriate that prudential requirements applicable to payment institutions reflect the fact that payment institutions engage in more specialised and limited activities than credit institutions, thus generating risks that are narrower and easier to monitor and control than those that arise across the broader spectrum of activities of credit institutions*".

Continuing the brief considerations of PSD3, we may note that the possible methods for calculation of own funds are not changed, either for PIs covered by

[65] Specifically, EUR 20,000 money remitters; EUR 50,000 mobile payments and EUR 125,000 full-range payment service providers including any credit.
[66] See also, European Commission, 'Payment Services Directive: Frequently Asked Questions' <https://ec.europa.eu/commission/presscorner/detail/en/memo_15_5793> accessed 15 February 2024.

PSD2 or for former electronic money institutions; it is provided that one of the three possible methods of calculation of own funds should be considered the default option to enhance the level playing field – but exceptions are allowed for particular business models[67].

Safeguarding rules for PIs are unchanged except that the possibility of safeguarding in an account of a Central Bank (at the discretion of the latter) is introduced in order to extend the options for PSPs in this regard and that PIs must endeavour to avoid concentration risk in safeguarded funds; EBA regulatory technical standards on risk management of safeguarded funds are to be adopted in this respect. For PIs providing electronic money services, the safeguarding rules are fully aligned with those applying to PIs only providing payment services. More detailed provisions on internal governance of PIs, including EBA guidelines, are introduced.

Member States and the European Banking Authority shall continue to maintain a register of authorised PIs and in addition develop a list of machine-readable payment initiation services providers and account information service providers.

As in PSD2 and the Electronic Money Directive, competent authorities, with adequate powers, must be designated by Member States for licensing and supervision. Provisions for cooperation between national competent authorities are laid down, clarifying the rules in this regard, and adding the possibility for NCAs

[67] The new Article 7 of PSD3, named "Calculation of own funds for payment institutions not offering electronic money services", will replace the Article 5 of PSD2 and states that "*1. Notwithstanding the initial capital requirements set out in Article 5, Member States shall require payment institutions, other than payment institutions that either only offer payment initiation services as referred to in Annex I, point (6), or only offer account information services as referred to in Annex I, point (7), or both, and other than payment institutions offering electronic money services, to hold own funds calculated in accordance with paragraph 2 at all times. 2. Competent authorities shall require payment institutions to apply, by default, method B as laid down in point b) below. Competent authorities may however decide that, in light of their specific business model, in particular where they only execute a small number of transactions but of a high individual value, payment institutions shall rather apply method A or C. For the purposes of methods A, B and C, the preceding year is to be understood as the full 12-month period prior to the moment of calculation*". See also the Article 8 of PSD3 that introduces a new rule regarding the *Calculation of own funds for payment institutions offering electronic money services.*

to request assistance of the EBA in solving possible disagreements between other NCAs.

As in PSD2, PIs which only carry out account information services are subjected to a requirement of registration not authorisation. The proposal specifies the documentation that must accompany the registration application. Account information service providers remain supervised by competent authorities. The optional exemptions from certain provisions which Member States may grant to small PIs are unchanged.