1

INTRODUCTION TO *THE PAYMENT SERVICES DIRECTIVE II: A COMMENTARY*

Gabriella Gimigliano and Marta Božina Beroš

1.001 Few legislative instruments encourage such radical transformations to the EU payment services market as the 2015 Payment Services Directive (hereafter PSD2), and it is safe to state that the PSD2 is one of the leading pieces of legislation in the European framework for financial services overall. However, it is far from being the first one. Indeed, the construction of the internal market for payment is a continuous process that over the years has undergone important changes in terms of searching for the appropriate regulatory approach – but, interestingly, it is a process that has not been burdened by regulatory fatigue.

1.002 Initially based on soft rules, that is, the mid-1980s European Commission communications and recommendations on electronic payments, the process of constructing a single market for payment services turned to binding rules in the mid-1990s, when the European Parliament and the Council enacted the directive on cross-border credit transfers. Since then the harmonisation process has taken several steps forward – an advancement that has been sustained by the common legal basis, namely Article 114 Treaty on the Functioning of European Union (hereafter TFEU), concerning the construction of the internal market (for payments).

1.003 In this process of regulatory development, the enactment of the 2007 Payment Service Directive (hereafter PSD1) may be considered as a turning point for the harmonisation process concerning payments. Aiming to remove existing legal obstacles to market access, as well as to level the playing field and hence improve consumers' protection, the PSD1 has for the first time addressed the professional provision of payment services as a regulated business and, to this end, set a closed list of payment services and payment service providers. This groundbreaking Directive is made up of 96 provisions, grouped in six comprehensive titles, covering respectively: the subject matter, scope and definition (Title I); the payment service provider (Title II); transparency of conditions and information duties (Title III); rights and obligations in the payment service contract (Title IV); implementing measures and payment committee (Title V); and final provisions covering the full harmonisation approach, the review clause, the transitional provisions and the amendments to the existing rules and regulations.

1.004 When the PSD2 replaced the PSD1 in 2015, the number of directive provisions increased substantially: indeed, the recast Directive is now made up of 117 provisions, introduced by

a remarkable 113 recitals.[1] At the same time, no change is made to the directive structure: the same number of titles, and title headings, remain. The PSD1 and the PSD2 share more than pure nomotechnics – what the two directives have in common is a definite pro-competitive approach, as well as regulatory objectives, the principle of (technical) neutrality and, lastly, a legislative preference for the electronification of funds' transfers. The PSD2 enjoys a broader functional and territorial scope, based on the single-leg principle, and pushes forward stronger digitisation of payments, embedding the 'open banking' objective with stronger customer authentication processes.

1.005 It is worth noting that – regardless of payment services' central place in financial markets, and irrespective of the EU's encouraging regulatory advancements in this field – the scholarship on the two key PSDs is more than modest; the available literature written by legal scholars expounds PSDs as a very technical subject matter. Therefore, as editors our aim was to deliver a Commentary that fills an obvious lacunae in the existing scholarship, unravelling both the origins and the effects of the 2015 Payment Services Directive.

1.006 In terms of book structure, the Commentary is divided into two parts. Part I analyses the legislative provisions, while Part II turns to the PSD2 implementation experience in selected EU Member States, namely Austria, Croatia, Czech Republic, Estonia, Finland, France, Germany, Italy and Spain, as well as the United Kingdom. Since there is a close link between the PSD1 and the PSD2 we agreed that the Part I contributors would clarify in their own chapters what has changed – if anything – in the process of regulatory transition from PSD1 to PSD2.

1.007 However, PSD2, like PSD1, concerns different legal aspects that in turn make reference to further pieces of European legislation: contract law, banking law, data protection, antitrust issues, Alternative Dispute Resolution (hereafter ADR) mechanisms, European Banking Authority (hereafter EBA) technical regulatory standards, just to mention some leading examples. These legislative frameworks are all intertwined. For this reason we, as editors, decided to depart from the 'article-by-article' commentary which would have been a more traditional approach in normative analysis, opting instead for a systematic analysis. More concretely, this means for instance that in Part I, the book chapters analyse either single PSD2 titles or single PSD2 title chapters. At the end we list a final comprehensive bibliography.

1.008 Furthermore, like the PSD1, the PSD2 has applied a full harmonisation approach, despite some degree of leeway left to Member States. It was therefore interesting to compare the different issues raised in the transposition process at national level. We would like to stress that this Commentary does not cover all Member States (perhaps this leaves us the possibility to think about future editions!) but rather a selection of nine countries, in addition to the United Kingdom which, during this Commentary's publication process, finalised the Brexit process.

1.009 In concluding these initial remarks, we would like to acknowledge the kind support for this research given by the Jean Monnet Chair in 'EU Money Law' (EUMOL) held by Dr Gabriella Gimigliano at the Department of Business and Law of the University of Siena. Editing a book is always a collaborative endeavour – one that critically depends not only on the academic rigour of those contributing to the work but also on their diligence. In this respect we are infinitely

1 In this book the term 'preambles' is sometimes used, rather than 'recitals'.

grateful to have had the opportunity to collaborate with exceptionally knowledgeable and earnest contributors, whom we would like to thank for their enthusiasm, patience and hard work. We are also indebted to Elgar's editorial team – their valuable observations and suggestions helped us deliver a curated selection of manuscripts sharply defined by the style of Elgar's Commentaries. We hope this book will appeal to a wide and varied readership; in particular, we hope it will be useful guidance for young and less young scholars, authority officers and legal practitioners.

Gabriella Gimigliano, Siena, Italy
Marta Božina Beroš, Pula, Croatia