

Quoted



PSD II: new rules for provision of payment services

PSD II was implemented in Dutch law on 19 February 2019. This edition of Quoted discusses a number of important changes brought about by PSD II and the experiences of it that meanwhile have been acquired. This Quoted concludes with a number of practical considerations.

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PSD II: new rules for provision of payment services

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1. Introduction

13 January 2018 was the date on which PSD II (Directive (EU) 2015/2366) should have been implemented in the Netherlands. This date has long since passed. The Act implementing PSD II (hereinafter: the PSD II (Implementation) Act) and the Decree implementing the revised Payment Services Directive (Hereinafter: the Decree implementing PSD II) were eventually published in the Government Gazette on 27 December 2018 and 18 February 2019 respectively¹ and entered into force on 19 February 2019.² There were several controversial issues that severely delayed the legislative process. The main issue was what administrative body would have regulatory powers over the payment service providers regarding access by payment service providers to the payment details of payment service users. These regulatory powers were first given to De Nederlandsche Bank (DNB), but now have rightly been passed to the Dutch Data Protection Authority (Dutch DPA).³

This edition of Quoted will first discuss the background to PSD II. It will then look at a number of important changes in the scope of PSD II, including the introduction of new payment services and the new explanation as to when payment services are provided in the conduct of a business. Quoted will go on to examine the amended licensing requirements for payment service providers, including the introduction of the obligation to provide a

certificate of no objection (*verklaring van geen bezwaar*, hereinafter 'VWGB'). This Quoted also discusses the new rules providing for the relationship between the payment service providers themselves and with the payment service users. It concludes with a number of practical considerations relating to the changes discussed here.⁴

2. Why PSD II?

PSD II replaces its predecessor, PSD I (Directive 2007/64/EC). In the Netherlands, PSD I was implemented with effect from 1 November 2009 in the new Financial Supervision Act (*Wet op het financieel toezicht*, hereinafter 'Wft') and Title 10 of Book 7 of the Dutch Civil Code (DCC). PSD harmonised the internal market for payment services. It provided for the coordination of national requirements on licensing, prudential requirements, market access of payment service providers, including the option to provide payment services in other countries of the European Economic Area (EEA) on the basis of a so-called 'European passport', information requirements and the rights and obligations of payment service users and providers.

In the summer of 2013 the European Commission published its proposal for a revised PSD I. This proposal was prompted in particular by the significant technical innovations that had occurred since 2009, such as a rapid rise in the number of electronic and mobile payments

¹ *Bulletin of Acts and Decrees* 2018, 503 and *Bulletin of Acts and Decrees* 2019, 59.

² *Bulletin of Acts and Decrees* 2019, 60, as amended by Decree of 5 March 2019 (*Bulletin of Acts and Decrees* 2019, 114), because it was erroneously laid down that a number of provisions concerning access to payment accounts by new payment service providers would not enter into force until 14 September 2019. The Decree of 5 March 2019 has amended this to 19 February 2019.

³ *Parliamentary Papers II*, 2017–2018, 34 813, no. 12. See also the recommendations of the Dutch DPA of 24 October 2017 (annex to *Parliamentary Papers II*, 2017–2018, 34 813, no. 3) and 20 December 2017 (on the Decree implementing the revised Payment Services Directive). The Dutch DPA also regularly publishes explanations on the processing of personal data under PSD on its website www.autoriteitpersoonsgegevens.nl. On 21 February 2019, DNB and the Dutch DPA signed a cooperation protocol in order to maintain effective and efficient supervision of compliance with PSD II (*Government Gazette* 2019, 10431).

⁴ For the record, we note that PSD II entails even more changes that we will not discuss in this Quoted. These include, for example, the requirements concerning the processing of personal data and access to payment systems. An overview of all changes can be found in *Parliamentary Papers II*, 2017–2018, 34 813, no. 3, p. 2-10.

and the emergence of new types of payment services. The framework for PSD I did not provide for this, resulting in legal uncertainty, potential security risks in the payment chain and a lack of consumer protection in some areas. It was proving difficult for payment service providers to promote innovative, secure and user-friendly digital payment services and to offer effective, convenient and secure payment methods to consumers and retailers in the EU.⁵

In summary, PSD II is based on and is structured in the same way as PSD I. Title I contains the general provisions and explanation of terms, Title II sets out the requirements regarding market access and supervision, Title III the conditions and information requirements for the provision of payment services, and Title IV the rights and obligations in relation to the use of payment services. Title V contains a number of options for delegated acts as well as the option for the European Banking Authority (EBA) to establish technical regulatory standards. Finally, Title VI contains the customary final provisions such as evaluation, transitional provisions and entry into force. Briefly, the changes compared to PSD I provide for broadening the scope of and restricting a number of exceptions to PSD II, the introduction of two new payment services, additional licensing requirements, rules on unauthorised and unintentional transfers, payment service agents, access to payment systems and payment accounts, charges for the use of payment instruments, strong customer authentication and protection of personal data.

Important elements of PSD II are elaborated further in the Commission Delegated Regulation (EU) 2018/389 (hereinafter: the DR). To summarise, the DR lays down the requirements relating to the application of the procedure for strong customer authentication, the protection of confidentiality and integrity of personal security data of the payment service users, and the standards for communication between account servicing payment service providers (such as banks) and the new payment service providers and payment service users. The DR will enter into force on 14 September 2019.

An important role in the development of PSD II is reserved for the EBA. The EBA publishes guidelines on matters such as licensing and the European passport, complaints

handling and fraud reporting. An important subject in practice, namely the option for account servicing payment service providers to make payment details of their payment service users accessible via a dedicated interface, is also elaborated in guidelines.⁶ This subject is dealt with in paragraph 5.1. The EBA's guidelines have been adopted by DNB since the entry into force of the PSD II Implementation Act (i.e. since 19 February 2019). However, the guidelines relating to the reporting of fraud, entered into force on 1 July 2019.

Finally, Regulation (EU) 2015/751 on interchange fees for card-based payment transactions is important within the context of PSD II. The Regulation lays down rules relating to card-based transactions, including interchange fees that may be charged for carrying out card-based payment transactions and accepting card-based transactions. This Regulation has been fully in force in all EEA Member States since 9 June 2016.

3. Changes in scope

As a result of the implementation of PSD II, a number of changes in scope have been made compared to PSD I. These changes concern the definition of payment services, the explanation regarding the provision of payment services 'in the conduct of a business', the exemption from the licensing obligation, the exceptions to PSD II and the geographical scope of PSD II.

3.1 Changes in the definition of payment services

PSD II regulates providers of payment services.

The previous directive (PSD I) distinguished seven payment services, described briefly below:

1. Services enabling cash to be placed on a payment account, as well as all the operations required for operating a payment account;
2. Services enabling cash withdrawals from a payment account, as well as all the operations required for operating a payment account;
3. Execution of payment transactions, including transfers of funds on a payment account with the user's payment service provider or with another payment service provider;

4. Execution of payment transactions where the funds are covered by a credit line for a payment service user;
5. Issuing and/or acquiring of payment instruments;
6. Money remittance; and
7. Execution of payment transactions where the consent of the payer to execute a payment transaction is given by means of any telecommunication, digital or IT device and the payment is made to the telecommunication, IT system or network operator, acting only as an intermediary between the payment service user and the supplier of the goods and services.

PSD II makes a number of changes to the payment services described above.⁷

Payment initiation and the account information service

PSD II adds payment initiation services and account information services to the above list:⁸

- The payment initiation service is a service to initiate a payment order at the request of the payment service user, in connection with a payment account that is held with another payment service provider. In short, the payment service provider initiates the payment for the payment service user (a consumer or a business), such as an online purchase from a web shop.
- The account information service is an online service providing aggregated information on one or more payment accounts that a payment service user holds with another payment service provider or more than one payment service provider. The account information service enables the user to keep a record of his transactions, which can be useful if a payment service user has several payment accounts with one or more banks or if the payment service user does not want to be dependent on his own bank's app. An online transaction record gives the payment service user a summary of his payments per category, such as housing costs, food, clothing, transport, subscriptions, insurance policies etc. A summary can also be made of income, expenditure and savings. This can be useful if the payment service user needs a financial product such as a mortgage or consumer credit.

Providers of these new payment services may not hold any funds of payment services users.

Acquiring payment instruments

Regarding service 5, PSD II has changed 'issuing and/or acquiring of *payment instruments*' to 'issuing payment instruments and/or acquiring of *payment transactions*'. Pursuant to preamble 10 of PSD II, PSD II introduces a neutral definition of the acquisition of payment transactions, and includes not only the traditional acquiring models structured around the use of payment cards, but also other business models, such as those involving more than one acquiring party. This should ensure, where the activity is the same as the acquiring of card-based transactions, that merchants receive the same protection, regardless of the payment instrument used. Technical services provided to payment service providers, such as the mere processing and storage of data or the operation of terminals, should not be considered to constitute acquiring. Moreover, some acquiring models do not provide for an actual transfer of funds by the acquirer to the payee because the parties may agree upon other forms of settlement.

Telecom providers

Payment service 7 has been deleted under PSD II. This does not mean, however, that telecom providers no longer fall under PSD II. A telecom provider may still provide payment services if it offers a service where billing is carried out via the telecom provider or if purchases are paid for directly through the telephone bill. This concerns for instance services in the entertainment category, such as paid chats, video, music, games, weather information, news, sports reports, stock market prices, telephone information services and participation in TV and radio programmes (such as voting, participation in competitions and direct feedback). However, a payment service is not involved if the subscriber pays the provider and as a result thereof is discharged from its payment obligation towards the service provider. If, however, this is not the case, it may be considered a payment order of the subscriber (payer) to the provider and the provider executes this by performing a payment service. Payment transactions relating to donations to charitable organisations and for the purchase of digital content and voice-controlled services

⁵ Preambles 3 and 4 PSD II.

⁶ EBA, Guidelines on the conditions to benefit from an exemption from contingency mechanism under Article 33(6) of Regulation (EU) 2018/389 (RTS on SCA & CSC), 4 December 2018, EBA/GL/2018/07.

⁷ Art 1:1 of the Wft defines payment services by referring to the annex to PSD II.

⁸ See also: DNB, Factsheet – *Betaaldiensten waarvoor een vergunning nodig is* (Payment services for which a licence is required), 19 February 2019, www.toezicht.dnb.nl, most recently consulted on 28 March 2019.

are exempted, provided that certain threshold amounts are not exceeded.

3.2 Further explanation on 'in the conduct of a business'

PSD I and PSD II contain a licensing obligation if the payment service provider is 'in the conduct of its business'. Under PSD I, services were provided in the context of a business or profession if the provision of payment services was the principal activity of the service provider. This ensued from the explanatory notes from the Dutch legislator to the implementation of PSD I⁹ and the factsheet posted on DNB's website.¹⁰ In order to qualify as the principal activity, a service had to be an 'independently identifiable service, which furthermore does not serve solely to support main activities, not being payment services'.

It can be concluded from the explanatory notes from the Dutch legislator to the PSD II implementation Act that when interpreting the concept of "in the conduct of a business" it is not, or no longer, relevant whether or not the provision of payment services is the principal activity of the undertaking.¹¹ This means that undertakings providing payment services to support their principal activities, other than the provision of payment services, may need to obtain a licence as a payment institution from DNB. This may apply to e-commerce platforms that themselves provide payment services (by facilitating payments from the buyers to the sellers).¹²

On 11 February 2019, DNB gave further guidance on when the provision of a payment service in the conduct of a business applies.¹³ According to DNB, 'making the business of providing payment services' is when payment services are provided and charged, as an independently identifiable activity, to a payer or payee. In other words: an independent activity, not inextricably bound to another activity that is not connected to the carrying out of payment services.

According to DNB, the following do not involve the provision of payment services in the course of one's business as an independently identifiable activity:

- *civil-law notaries* – civil-law notaries as referred to in Art. 1(1) preamble and part (a) of the Civil-Law Notaries Act (*Wet op het notarisambt*), in so far as they hold funds in an account as referred to in Art. 25 of that Act;
- *bailiffs* – bailiffs as referred to in Art. 1, preamble and part (d) of the Bailiffs Act (*gerechtsdeurwaarderswet*), in so far as they hold funds in an account as referred to in Art. 19 of that Act;
- *lawyers* – '*stichtingen derdengelden*', i.e. accounts held by a foundation used by a law firm whereby the sole activity of the foundation is the temporary management of funds for beneficiaries and which foundation only act for lawyers who themselves are not entitled to the funds, as apparent from a written agreement between the foundation concerned and the lawyers involved;
- *certain crowdfunding platforms* – crowdfunding platforms, in so far as they temporarily manage funds of those to whom loans are given through the platform, or those who offer or have provided funds through the platforms and that management is not a stand-alone activity; and
- *tax representatives* – tax representatives to whom a general or limited licence has been granted as referred to in Art. 24c (4) and (5) of the Turnover Tax (Implementation) Decree 1968 (*Uitvoeringsbesluit omzetbelasting 1968*), to the extent that they hold funds in their capacity as tax agent.

In addition, it can be concluded from DNB's explanation to the application form for a licence for a payment service provider that offering services to different customers is an indication that those services are being offered on a commercial basis. In any case, a payment service subject to a licensing obligation exists if the service is actively offered, through advertising for example. From this explanation, it could be derived that if it concerns a one-off

or only very occasional offering of payment services, a business does not qualify as a payment service provider.¹⁴

3.3 Changes to exemption

Anyone wishing to conduct a business as a payment service provider (i.e. providing payment services) in the Netherlands must obtain a licence from DNB, unless a licence has been obtained as a bank or electronic money institution and this licence permits the holder to provide payment services, or payment services are provided under a so-called 'EU passport'.¹⁵

On the grounds of Art. 1a of the Exemption Regulations under the Wft (*Vrijstellingsregeling Wft*), it is possible to benefit from an exemption from the obligation to hold a licence, if the conditions as referred to in that article are met. These conditions have been changed as a result of PSD II.¹⁶ Due to the deletion of payment service 7 under PSD II, the exemption is no longer needed for payment service 7. In addition, the exemption is applicable if payment services are 'offered' instead of 'provided' in the Netherlands. Due to the explanation of the amendment to the exemption, this is related to the amendment to Art. 1:5a of the Wft, in which, as a result of PSD II, the term 'offering' instead of 'carrying out' is used. See also paragraph 3.6 on the changes in the geographical scope of PSD II. The second paragraph of Art. 1a of the Exemption Regulations under the Wft has also been amended, as a result of which the standards with which an exempted payment service provider must comply have been extended. No exemption can be granted for the provision of the two new payment services.

3.4 Changes to statutory exceptions

Art. 3 of PSD II, implemented in Art 1:5a (2) of the Wft, contains a number of exceptions to the scope of PSD II.¹⁷ In those cases referred to in Art. 3 PSD II, PSD II does not apply, even though in such cases payment services are indeed provided in the conduct of a business. A number of important changes to the exceptions under PSD II are discussed below.¹⁸

Closed loop exception is restricted

The exception for payment services that are carried out within a restricted network (closed loop), such as within a particular business building, is defined more strictly under PSD II. Under the regime set forth in PSD I there were often still significant payment volumes and amounts involved within closed loops. This is contrary to the aim of the exception. Therefore, under PSD II the exception can only be used if it concerns the purchase of a very limited range of goods or services by a specific retailer or chain of retailers.¹⁹

The text new of the exception in Art. 1:5a (2) (k) of the Wft reads as follows:

"The provision of payment services within the meaning of [the Wft] does not include the provision of services that are based on specific payment instruments:

1°. with which the holder can buy goods or services exclusively in the business buildings of the issuer or within a limited network of service providers which have a direct trading agreement with an issuer;

2°. that can be used exclusively to buy a very limited range of goods or services; or

3°. that are offered exclusively in the Netherlands with the aim of achieving specific objectives that are laid down in social or tax regulations and with which specific goods or services can be bought from suppliers that have a trading agreement with the issuer."

The exception for limited networks is coupled with an obligation to notify DNB of the use of this exception if the total value of the payment transactions carried out exceeds a sum of EUR 1 million in the preceding twelve months.²⁰

⁹ *Parliamentary Papers II*, 2008-2009, 31 892, no. 3, p. 18.

¹⁰ DNB, Factsheet – *Reikwijdte betaaldienstverlening* (Scope of payment service provision), 29 May 2012, www.toezicht.dnb.nl, most recently consulted on 9 January 2019.

¹¹ *Parliamentary Papers II*, 2017-2018, 34 813, no. 3, p. 4.

¹² DNB, Q&A – *Elektronische handelsplatformen* (e-commerce platforms) PSD2, 26 October 2017, www.toezicht.dnb.nl, most recently consulted on 28 March 2019.

¹³ DNB, Q&A – *Reikwijdte betaaldienstverlening - niet op zichzelf staande betaaltransacties* (Scope of payment services – not stand-alone payment transactions), 11 February 2019, www.toezicht.dnb.nl, most recently consulted on 28 March 2019.

¹⁴ DNB, *Uitvoeren van het bedrijf van betaaldienstverlener* (Conducting a business as payment service provider), 12 December 2018, p. 7.

¹⁵ Art. 2:3e Wft.

¹⁶ *Government Gazette* 2019, 7963.

¹⁷ Art. 3 of PSD I also contained exceptions to the scope.

¹⁸ See also: DNB – Factsheet – *Diensten waarvoor geen vergunning nodig is* (Services for which no licence is required), 18 February 2019, www.toezicht.dnb.nl, most recently consulted on 28 March 2019.

¹⁹ Art. 1:5a (2) (k) of the Wft.

²⁰ Art. 1a, (1) of the Market Access for Financial Undertakings (Financial Supervision Act) Decree.

Commercial agent exception to be modified

It follows from the exception²¹ and the explanation thereto in PSD II that this exception applies only when the following three conditions are met:

- the commercial agent acts only for the account of the payer, or only for the payee;
- it is clear from an agreement that the commercial agent has been authorised by the payer or the payee, and that it acts only for the payer or only for the payee; and
- the commercial agent is authorised to bring about or conclude the sale or purchase of the goods or services concerned between the payer and the payee through negotiations.

If agents act for the account of both the payer and the payee (as on certain e-commerce platforms), it will be excluded from the scope of PSD II only if it will not hold and has no control over funds of the customers.²²

Payment factory

Art. 1:5a (2) (n) of the Wft clarifies that carrying out payment transactions and associated services between a parent company and its subsidiary, or between subsidiaries of the same parent company, without the intervention of a payment service provider other than one belonging to the same group under the Directive, is not regarded as the performance of payment services. Preamble 17 of PSD II explains this as follows: “*The Single Euro Payments Area (SEPA) has facilitated the creation of Union-wide ‘payment factories’ and ‘collection factories’, allowing for the centralisation of payment transactions of the same group. In that respect payment transactions between a parent undertaking and its subsidiary or between subsidiaries of the same parent undertaking provided by a payment service provider belonging to the same group should be excluded from the scope of this Directive. The collection of payment orders on behalf of a group by a parent undertaking or its subsidiary for onward transmission to a payment service provider should not be considered to be a payment service for the purposes of this Directive.*”

21 Art. 1:5a (2) (b) Wft.

22 *Parliamentary Papers II*, 2017–2018, 34 813, no. 3, p. 4. See also: DNB – Factsheet – *Diensten waarvoor geen vergunning nodig is* (Services for which no licence is required), 18 February 2019, www.toezicht.dnb.nl, most recently consulted on 28 March 2019.

23 See, for example, Art. 7:515 DCC, Art. 26h Prudential Regulations (Financial Supervision Act) Decree. Art. 59ac and 69 Market Conduct Supervision (Financial Institutions) Decree.

24 Art. 1:5a (1) Wft. *Parliamentary Papers II*, 2008-2009, 31 892, no. 3, p. 3.

25 A definition of an account servicing payment service provider is contained in Art. 7:514 (x) DCC.

26 *Parliamentary Papers II*, 2017–2018, 34 813, no. 12, p. 6-7.

3.5 Change to geographical scope

Due to the introduction of PSD II, also transactions where only one of the payment service providers concerned is based in the EU, partly fall within the scope of PSD II, namely in so far as the transaction takes place within the EU. Also, PSD II is applicable to payment transactions in currencies of non-member states. However, not all the rules under PSD II apply to such transactions. In that case, PSD II is applicable only in so far as the transaction takes place within the EU.²³ Finally, it is explained that PSD II is applicable if a service is actually offered in the EU and the service is not merely accessible from within the EU.²⁴

4. Requirements for payment service providers

4.1 Distinction between payment service providers

Under PSD II, the licensing requirements for payment service providers have been extended, making a distinction between (i) account servicing payment service providers (APSPs), (ii) the new payment service providers (third party providers, TTPs) and (iii) the other payment service providers (PSPs).

APSPs are payment service providers offering and operating a payment account on behalf of a payer.²⁵

The PSD II (Implementation) Act provides for the following (amended) definition of a payment account in Article 1:1 of the Wft: an ‘account in the name of one or more payment service users which is used to carry out payment transactions as referred to in Art. 4 of the Payment Services Directive’. Previously a payment account was viewed as an account held for the main purpose of making payments. This interpretation too limited for a proper functioning of PSD II according to a legislative note of the Dutch legislator to PSD II.²⁶ Advocate-general Tanchev of the European Court of Justice (hereinafter: the CJEU) discussed in his conclusion of 19 June 2018 the term ‘payment account’ in response to a request from the

Austrian *Oberste Gerichtshof* for a preliminary ruling.²⁷

This case concerned the question whether a savings account where funds can only be deposited or withdrawn by a payment service user via another account held in his name (a suspense account) qualifies as a payment account. The A-G judged that this is not the case. In his view, the decisive factor is whether an account implies direct involvement in payment transactions with third parties. The CJEU also ruled that the savings account with a permanent contra account in the case presented to it should not be viewed as a payment account.²⁸ The relevance of the ruling is underlined above all by the obligation for APSPs to give access to TTPs. This obligation only applies with regard to payment accounts that can be accessed online.²⁹ APSPs are often banks, but may also be other account servicing parties.³⁰ It should be noted though, that the ruling was given on the grounds of the PSD I. There is still some uncertainty as to how the term ‘payment account’ should be interpreted under PSD II.

TTPs are payment service providers which deliver payment initiation and/or account information services. TTPs in particular can be newcomers to the financial markets, such as FinTechs. Existing players on the financial markets can also act as TTPs, of course.

Besides APSPs and TTPs there are other parties that provide payment services: the other PSPs. These parties can provide a wide range of payment services, from money transfers and offering solutions by which online and mobile payments can be accepted, to the provision of point-of-sale terminals.

4.2 Extension of licensing requirements

More licensing conditions are being imposed than before in order to ensure secure payment transactions.

27 Conclusion of advocate-general, 19 June 2018, C-191/17, ECLI:EU:C:2018:466.

28 CJEU, 4 October 2018, C-191/17, ECLI:EU:C:2018:809.

29 Art. 66 and 67 PSD II.

30 Account must be taken here of the prohibition on attracting claimable funds (art. 3:5 Wft). However, see also Art. 3:29c Wft.

31 Art. 3a (4) Market Access for Financial Undertakings (Financial Supervision Act) Decree. For a further explanation of the licensing requirements, see: DNB, *Uitoefenen van het bedrijf van betaaldienstverlener* (Carrying out the business of a payment service provider), 12 December 2018.

32 Art. 2:3b (4) and (5) Wft. Art. 3a, lid 6 Market Access for Financial Undertakings (Financial Supervision Act) Decree.

33 Art. 2:3b (2) Wft.

34 Art. 40a (5) Prudential Rules (Financial Supervision Act) Decree. Among account information service providers, this arises from the nature of the service. See also preamble 35 of PSD II.

35 Art. 24 Prudential Rules (Financial Supervision) Act.

36 Art. 26i and 26j Prudential Rules (Financial Supervision) Decree. Incidentally, specific obligations for APSPs apply on the grounds of Art. 26k Prudential Rules (Financial Supervision) Decree.

37 For the definition of qualifying holding, see Art. 1:1 Wft.

Amongst other things, payment institutions must be able to show how they deal with security incidents and complaints, store, monitor, trace and restrict access to sensitive payment data, business continuity, the way in which statistics are kept of transactions and fraud, the security policy including risk analysis and how agents and branches are supervised.³¹ The licensing conditions are not as strict for the account information service provider and payment initiation service provider as for providers of other payment services.³²

PSD II imposes the requirement that at least some of the work of a payment institution must take place in the Member State of its establishment in order to prevent an abuse of the right of establishment.³³

4.3 Special conditions for TTPs

Providers of payment initiation services and account information services must comply with a number of special conditions. Providers of both these types of payment services may not hold any funds of payment service users.³⁴ They must have professional liability insurance or another equivalent safeguard against liability.³⁵ Conditions are also laid down for business activities, in particular concerning data processing, security and consumer protection.³⁶

4.4 Introduction of the VWGB obligation

PSD II introduces the obligation for shareholders in payment institutions with a ‘qualifying holding’ to obtain a certificate of no objection (*verklaring van geen bezwaar*, hereinafter VWGB) from DNB. Briefly, a qualifying holding is a shareholding of 10% or more, the ability to exercise 10% or more of the voting rights or a comparable say in the payment institution.³⁷ The obligation to obtain a VWGB does not apply for obtaining or having a qualifying holding

in a payment institution that offers only account information services.³⁸

The obligation for shareholders in payment institutions with a qualifying holding to obtain a VVGB also plays a role in the licensing process. DNB will only issue a licence if the relevant shareholders have obtained the necessary VVGB.³⁹ This is not a licensing requirement for payment institutions that offer only account information services.

4.5 Use of a payment service agent

The rules regarding agents of payment institutions have become more strict in PSD II. For example, material changes in the agent's policy regarding money laundering and terrorism financing must be reported immediately to the competent authority in the home country. As regards directors and managers of agents who are not a payment service provider, it must be demonstrated that they are reliable and competent. Similarly, the competent authorities must also be informed as to what payment services the agent is authorised to perform.⁴⁰ Competent authorities of receiving Member States can ask for a report on the work carried out in the territory of the Member State. They can also require payment institutions active via agents in their territory to designate a central contact point.⁴¹

5. Relationship between payment service providers themselves and with payment service users

PSD II contains new rules that provide for the relationship between TTPs and the payment service user, and between TTPs and APSPs (a bank, for example). The rules on the legal relationship between payment service providers and payment service users are implemented in the DCC, while the rules concerning the legal relationship between

payment service providers are contained in the Wft in particular and in secondary legislation.

5.1 Access to the payment account

A payment service user only has the right to make use of a TTP if the payment service user's payment account can be consulted, i.e. accessed, online.⁴² If a payment service user gives explicit consent for a payment via a payment initiation service provider or for an account information service provider to retrieve account information, the APSP must cooperate in order to safeguard the payment service user's right to be able to make use of a TTP. The APSP may only deny access if there is an objective suspicion of an unauthorised payment transaction or of fraud.⁴³ This was different under PSD I.⁴⁴

Furthermore, the APSP may not treat a TTP differently to the payment service user. This means, for example, that an APSP may not charge higher costs for a TTP's request for information, if that cannot be objectively justified, or delay further the processing of a payment order. The service provided by a TTP may also not depend on a contractual relationship with the APSP.⁴⁵

Consent from the payer for payment via a payment initiation service provider or for an account information service provider to retrieve account information always determines the scope of access and the information that may be obtained. If certain information is not requested by the payment service user, a TTP may not obtain access to this information. The explicit consent is given between the payment service user and the TTP. The APSP is not involved in this and can therefore not impose any restrictions on the form or content of the consent given.⁴⁶

If a payment service user makes use of a payment initiation service provider, explicit consent is given by issuing the strong customer authentication (as discussed further

in par. 5.2). This consent is once-only and applies only for one specific transaction. Similarly, for the account information service provider to provide the service, access is given by issuing a strong customer authentication. Consent to access the payment account can be given for a maximum of 90 days.⁴⁷

APSPs which offer a payer a payment account that can be accessed online must possess at least one interface that enable TTPs⁴⁸, in brief, to identify themselves and communicate securely. In addition, the interface must enable the TTP to instruct the APSP to start the authentication on the basis of the payment service user's consent, to facilitate communication sessions via the authentication and to safeguard the integrity and confidentiality of the personal security details and the authentication codes sent. APSPs must make a test facility available, in which TTPs can test their software and applications for providing payment services.

An APSP can offer the required interface in two ways: either via a dedicated interface or by permitting TTPs to make use of the customer interface (the interface that is used by the payment service users themselves). If a dedicated interface is made available, this must offer the same level of availability and performance, including support, as the customer interface. In addition, if a dedicated interface is used, the APSP should include a strategy and contingency plans in case the interface does not perform as intended or is unavailable (unplanned). As part of this, TTPs may use the customer interfaces until the dedicated interface is restored. Under certain circumstances, as explained further in the DR, DNB may waive the latter requirement.⁴⁹

5.2 Strong customer authentication

PSD II requires payment service providers to use strong customer authentication in a number of cases. This is an authentication procedure that guarantees a high level of security by combining at least two different factors. The payment service provider can choose between knowledge (e.g. a password or PIN), possession (such as a debit card) and an inherent feature (such as a fingerprint

or voice of the user). Situations where strong customer authentication must be used include when a payment service user accesses his payment account online, initiates an electronic payment transaction, uses a remote communication tool, initiates a remote electronic payment transaction or uses a TTP.⁵⁰

Payment service providers are exempt in a number of cases from the obligation to use strong customer authentication. These could be, for example, initiating contactless payments at points of sale or using unattended point-of-sale terminals to pay for travel tickets or parking fees.⁵¹

5.3 Rules on unauthorised and unintentional transfers

In the case of unauthorised transfers, PSD II provides that the payment service provider must reimburse the payer immediately, and in any event no later than by the end of the following business day, unless the payer's payment service provider has reasonable grounds to suspect fraud.⁵²

In the event of an unauthorised transfer initiated by a payment initiation service provider, the payment service provider holding the relevant payment account will refund that amount. In that case the burden of proof lies with the payment initiation service provider to show that the initiation was correct and to provide such proof to the account servicing payment service provider. If the payment initiation service provider is liable for the unauthorised payment transaction, it must immediately compensate the account servicing payment service provider at its request for the losses incurred.⁵³

In addition, PSD II contains an obligation for the payer's payment service provider to do its utmost to reverse an incorrect transaction as far as possible, even if the payer has accidentally entered an incorrect account number. The payer's payment service provider must therefore make reasonable efforts to recover the funds. The payment service provider of the payee should also cooperate, also by communicating all relevant information to the payer's

38 *Parliamentary Papers II*, 2017–2018, 34 813, no. 12, p. 9.

39 Art. 2:3b (3) Wft.

40 Art. 2:3c, 2:3e, 2:106a and 3:111b Wft, Art. 3b and 42a (c) Market Access for Financial Undertakings (Financial Supervision Act) Decree, Art. 140a Prudential Rules (Financial Supervision Act) Decree.

41 *Parliamentary Papers II*, 2017–2018, 34 813, no. 3, p. 7.

42 Art. 7:522b and 7:522c DCC, Art. 7:522a DCC deals with the relationship between an APSP and a payment service provider which issues card-based payment instruments.

43 Art. 7:523 BW. *Parliamentary Papers II*, 2017–2018, 34 813, no. 3, p. 5.

44 See District Court of Midden-Nederland, 30 July 2014, ECLI:NL:RBMNE:2014:3250, in which the court held that the online financial information (*huishoudboekje*) of software developer AFAS may not contain an automatic link to ING internet banking, in view of the prohibition contained in ING's general terms and conditions from entering personal security details on websites other than those of the banks.

45 Art. 26k Prudential Rules (Financial Supervision Act) Decree

46 *Government Gazette* 2019, 59, p. 19-20.

47 *Government Gazette* 2019, 59, p. 20.

48 And, for that matter, also payment service providers who issue card-based payment instruments.

49 Art. 33(6) DR

50 Art. 26h Prudential Rules (Financial Supervision Act) Decree.

51 See Art. 10-18 DR.

52 Art. 7:528 (1) and (3) DCC.

53 Art. 7:528 (4) and (5) in conjunction with Art. 7:527 (2) DCC.

payment service provider. If it is not possible to recover the funds, the payer's payment service provider should provide the payer on request with all available information relevant for taking legal action to recover the amount of money.⁵⁴ The explanatory notes of the Dutch legislator to the PSD II Implementation Act takes the following example to illustrate this: a consumer transfers an amount via internet banking and accidentally enters a wrong account number. He contacts his own bank and asks for the amount paid to be refunded. This bank contacts the payee's bank and asks it to persuade the unintended payee to repay the amount received to the payer. If the payee refuses to cooperate, the consumer requests information from his own bank. The payee's bank will provide the consumer with the information necessary for the consumer to write to him or, if necessary, take him to court.⁵⁵

5.4 Charges for the use of payment instruments

With regard to the charging of fees (in the form of surcharges) for the use of a certain type of payment instrument (also referred to as 'surcharging'), PSD II stipulates that a fee only has to be paid if the payment service user has been informed of this prior to the payment. PSD II further obliges Member States to prohibit the payee from charging for the use of payment instruments whose interchange fees fall under Chapter II of the Interbank Fees Regulation and for the use of payment services to which Regulation (EU) No 260/2012 (SEPA Regulation) apply. In short, these are payment transactions carried out within the EU (where both the payer's payment service provider and the payee's payment service provider are located within the EU) by means of payment cards, both debit cards and credit cards, based on four-party payment card schemes or European credit transfers and European direct debits.⁵⁶

PSD II gives the option to Member States to further extend this ban, taking into account the importance of increased competition and the use of efficient payment instruments. In the Netherlands, this Member State option has not been used. If there would have been a complete ban on charging, retailers could pass on the cost of expensive payment instruments in the price of their products or services or choose to stop offering certain expensive or

innovative payment instruments. This could limit innovation and consumer choice.⁵⁷

The ban on passing on charges for certain payment instruments exists alongside Art. 6:230k DCC. Art. 6:230k DCC lays down that for payment instruments that do not fall under Art. 7:520 DCC, the actual costs of the use of a payment instrument as part of an agreement concluded between a trader and consumer may be charged.

5.5 Payment transactions where the transaction amount is not known in advance

With regard to payment transactions where the transaction amount is not known in advance (for example, when filling up with fuel at an unattended filling station), PSD II provides that the payer's payment service provider can block the funds in the payer's payment account, provided the payer has agreed to the exact amount to be blocked. The payment service provider releases the funds blocked on the payer's payment account without delay after receipt of the information on the exact amount of the payment transaction, and at the latest immediately after receipt of the payment order.⁵⁸

6. Practical considerations

This edition of Quoted discusses a number of changes brought about by PSD II for payment service providers and payment service users. These changes give rise to a number of practical considerations:

- Anyone who wants to provide a new payment service (the payment initiation service or the account information service) should apply for a new licence or extend the existing licence as a payment institution;
- Existing payment institutions that already possess a licence should comply with the new licensing requirements. They must provide DNB with information showing that they comply with these new requirements in order to retain their licence;

- Anyone who already provides payment services while making use of the conduct of business exemption under PSD I should reconsider whether a licence as payment institution must be obtained under PSD II;
- E-commerce platforms should check whether PSD II means that they are considered as providers of payment services;
- Anyone making use of the 'closed loop' exception should notify DNB of the use of this exception if the total value of the payment transactions carried out in the preceding twelve months exceeds EUR 1 million;
- APSPs that offer online payment accounts should set up an interface that enable TTPs and payment service providers that issue card-based payment instruments to provide their payment services, and also to structure their procedures in line with TTPs' payment service provision;
- Anyone who has or obtains a qualifying holding in a payment institution (other than an account information service provider) should obtain a WVGB from DNB.
- The conditions providing for the relationship between payment service providers and payment service users have been amended under PSD II. This may mean that the general terms and conditions of framework contracts should be amended.

⁵⁴ Art. 7:542 (4) DCC

⁵⁵ *Parliamentary Papers II*, 2017–2018, 34 813, no. 3, p. 6-7.

⁵⁶ Art. 7:520 DCC.

⁵⁷ *Parliamentary Papers II*, 2017–2018, 34 813, no. 3, p. 8.

⁵⁸ Art. 7:529a DCC. *Parliamentary Papers II*, 2017–2018, 34 813, no. 3, p. 8.

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