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Payment Services Directive: A New Legal Framework for Payments in the European Union

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Summary

Payment Services Directive (PSD) was designed with the objective of constituting a new legal framework in the field of payments in the European Union. The Directive not only introduces several new solutions, but also transforms those already existing – reshaping the legal background to a large extent.

It is clearly visible that the area of payments is a vastly complex part of the EU law. One should bear on mind that the PSD is interrelated with the Single Euro Payments Area (SEPA); while in some fields the PSD supplements the bank-led SEPA (f.i. enables the introduction of SEPA Direct Debits), at the same time has distinctly different scope. The legislator broadens the ambit to the whole EU/EEA (SEPA is limited to the Eurozone) and reshapes the SEPA project – a private sector initiative oriented on rationalization of costs – producing the PSD, a pro-consumer act of law.

To make it even more interesting, SEPA was born as a reaction of the banking sector to an earlier act of the EU law – *Regulation 2560/2001*, which implicated higher costs for the European banks and was the reason why the above mentioned search for savings even started. The Regulation has been recently revised, with an aim to update some of its provisions, in order to facilitate the development of the new European payment system.

The thesis presents what does the term “payments” actually mean, origins and categories of payments, the way in which they have been regulated before the PSD era (vide: *Directive 97/5*) and finally what are the novelties and modifications delivered by the PSD. The analysis of both those fundamental and those peculiar provisions was supplemented with the assessment of possible derogations (optional clauses) and potential incoherent national interpretations (vide: articles 73 and 86.3).

The way payments have been regulated in the EU could be described as an amalgamate of different acts of various types, the Directive has the potential to organize the European payment system and at the same time it delivers a wide range of pro-consumer provisions. While some provisions will not be in force until year 2012, many others have already started to influence the way relations between PSPs and their users are regulated.

Preface

”Money” is a word of multiple meanings. Economists define it as a *medium of exchange*, or a device by which prices of goods/services are determined. It is also called a *store of value*, a way in which one can hold hers/his wealth¹. For thousands of years, people have been using different objects as ”money” (replacing inefficient barter system). Basically, people turned to more and more durable things, shells were substituted by coins, then cheques were introduced and now we witness an assault of various ”cards”.

Modern payment systems have transformed the technology of banking and made possible numerous changes in the strategy and structure of financial services organizations, including central banks.

In *Theory of Economic Development*, Joseph Schumpeter observed that ”economic logic prevails over the technological and in consequence we see all around us in real life faulty ropes instead of steel hawsers, a clumsy money economy instead of a cheque circulation”. After half a century, his views remain valid in many banking systems where paper-based payment economies face substitution challenges by more efficient electronic payment methods (as to achieve faster and more secure payments). Schumpeter’s ideas on innovation were at the heart of the Lisbon Strategy², aimed to transform the European Union into the most competitive economic area in the world with innovation as the motor of the economic change³.

The process of modernization of payment systems is a major challenge for policy makers and for practitioners; involving formulation of strategic plans, drafting of new legislation, and development of common standards⁴. They operate as a ”plumbing system” for financial markets and help improve macroeconomic management, releasing funds from the clearing⁵ and settlement functions for more productive use, reducing float levels, and improving the control of monetary aggregates.

Principles of payment systems involve the discharge of financial obligations

¹ R. Litan, M. N. Baily, *Moving Money: the future of consumer payments*, The Brookings Institution, 2009, p. 1-3.

² During the meeting of the European Council in Lisbon (March 2000), the Heads of State/Government launched the ”Lisbon Strategy” aimed at making the EU, the most competitive economy and achieving full employment by 2010; <http://europa.eu/>.

³ T. Khiaonarong and J. Liebenau, *Banking on Innovation Modernisation of Payment Systems*, p. 2.

⁴ R. Listfield, F. Montes-Negret, *Modernizing payment systems in emerging economies*, World Bank Policy Research Working Paper Series, 1994 in: *Banking on Innovation...* op. cit., XV.

⁵ The process of transmitting, reconciling and, in some cases, confirming transfer orders prior to settlement, potentially including the netting of orders and the establishment of final positions for settlement; <http://www.ecb.int/>.

between two or more payment participants⁶. This mainly aims to provide financial markets promptness and certainty in the payment and settlement of borrowed and invested funds. In addition, it provides consumers the convenience of time and location, the choice of payment options, and the privacy and low cost of making payments.

It is difficult to trace the birth of the first payment system, but "surely (...) one of the earliest international payment systems was that of the Papacy during the Middle Ages". From year 1309 to 1417 (for security reasons) the Papacy transferred itself to Avignon, in the south of France. This coincided with a period of turbulence between 1378 and 1417, during which several popes and anti-popes ruled the Church until the Council of Konstanz ended the Great Western Schism. Substantial funds and new financial collection were required to recruit mercenaries to regain the Papal States.

Italian popes often came from merchant (banking) families and were fully aware of the existing financing techniques. The Church would maintain a network of tax collectors extending to the remote regions as – Poland or Scandinavia, so funds had to be repatriated to Rome (Avignon). As physical transportation was dangerous, the Papacy contracted with the Italian merchant and banking families (the Medici, the Bardi). Tax collectors transferred the taxes to the foreign branches of the bankers, who would make them available (minus commission) to the Papacy in Rome (Avignon) by using the funds deposited with them by the Church dignitaries. Afterwards, the funds collected locally were used to purchase goods, such as wool from England, which was then sold to the Florentine weavers for the exquisite cloths and robes. The bankers ensured the safe availability of funds collected remotely, the settlement and the foreign exchange⁷.

Nowadays, payment systems include private and corporate customers, financial intermediaries (banks), and central banks, linked by electronic networks transmitting information between computer systems. It is important to understand the roles and responsibilities of each, as to reach the balance between speed, efficiency, costs and economic safety. Each participant is driven by individual objectives, which are often contradictory. "Can speed be increased without impacting costs? Can costs be reduced without creating opportunities for fraud?" Every payment system reflects a compromise depending on the participants, the speed of execution and level of security required and, last but not least, the risk posed by the amounts involved. These will determine the most appropriate legal framework, level of security and technology. Payment systems operate in a competitive environment and technological innovation is one of the most important drivers in the evolution of payment⁸.

Payment systems are an important building block of the economic and

⁶ D. Humphrey, *Payment Systems. Principles, Practice and Improvements*, Papers 260, World Bank - Technical Papers, 1995 in: *Banking on Innovation...*, op. cit., XV.

⁷ D. Rambure, A. Nacamuli, *Payment Systems*, Palgrave Macmillian, 2008 UK, p. 22.

⁸ *Ibidem*, p. 3-4.

financial system. Every day, consumers, businesses and public administrations pay or receive money for the delivery of goods and services, for buying and selling shares, or for taxes and social benefits.

Suppliers of goods and services have more and more customers in various markets. People start spending more outside their home country, or rather without looking at the location of the seller. "Globalized economies and multiplied cross-border transactions impact the requirements for future payment systems." While facilitating trade and exchange, even higher demand for payment instruments is generated. What is crucial, costs of making payments could equal even 3% of GDP. Since e-payments have the potential to cost 60% less than paper-based transactions, significant benefits can be achieved by promoting the innovation in this field.⁹

In general, payment systems are indispensable to the proper functioning of the economy; they allow money to fulfil its role as the mean of exchange when purchasing goods: private persons receive salaries and pay their bills through payments; enterprises use the same payment systems to settle invoices within the terms of their contractual relationships. Interestingly, it turns out that how people pay for goods – influences what (and how much) they buy. People tend to buy more goods and are even ready to pay more for them when for instance, use credit cards instead of cash¹⁰.

⁹ D. Humphrey, M. Kim, and B. Vale, *Realizing the Gains from Electronic Payments: Costs, Pricing, and Payment Choice*, Journal of Money, Credit & Banking; May 2001 Part 1, Vol. 33, Issue 2, p. 231.

¹⁰ *Moving Money...*, op. cit., p. 3.

Abbreviations

ACH	Automated Clearing House
APS	Polish Act on Payment Services (proposal)
ATM	Automated Teller Machine
BIC	Bank Identifier Code
EBA	Euro Banking Association
ECB	European Central Bank
EEC	European Economic Community
ECJ	European Court of Justice
EEA	European Economic Area
ESCB	European System of Central Banks
EU	European Union
EUR	Euro
Europeans	Citizens of the EU
Eurozone	Euro Area
IBAN	International Bank Account Number
MICR	Magnetic Ink Character Recognition
OCR	Optical Character Recognition
PLN	Polish zloty
PSD	Payment Services Directive
PSP	Payment services provider
PSU	Payment services user
Q&A	Questions and Answers of the Commission
SCF	SEPA Card Framework
SCT	SEPA Credit Transfers
SDD	SEPA Direct Debit
SEK	Swedish crown
SEPA	Single Euro Payments Area
TEC	Treaty establishing the European Community
UK	United Kingdom
USA	Unites States of America

1 Introduction

Since the establishment of the European Economic Community (EEC), the road towards an integrated European financial market has been marked by several significant events, including the launch of the single currency in year 1999, and the cash changeover in the Eurozone countries in year 2002. Even though an unprecedented level of unification has been achieved, the European economy is unable to exploit fully all the benefits of the monetary union; Europeans still face difficulties when making payments in euro¹¹.

The launch of the euro made it clear that restructuring of the payment systems in the Eurozone was unavoidable. An integrated economic area with a single currency requires the same set of payment instruments that all consumers, businesses and public administrations could use to transfer euro within the Eurozone¹².

”Aligning Europe's national standards and networks is an important challenge in the quest for a common market”. Bank customers if want to transfer money domestically can do so through an Automated Clearing House (ACH)¹³. On the other hand, European consumers cannot reach parties abroad through their ACH, they are forced to make use of more expensive options such as the international correspondent banking system or payment clubs (EBA). A consumer in Germany cannot authorize a direct debit by, for example ”Italian electricity company unless he maintains an account in Italy”.¹⁴.

Such fragmentation affects both cross-border and national payments, as it prevents innovation and competition on the European level. The project of Single Euro Payments Area (SEPA)¹⁵ brings the solution, by creating an integrated and innovative retail payments market for all non-cash euro payments, which would basically mean – fast, secure and entirely electronic payments in euro. As such, the SEPA will benefit customers.

The SEPA, ”...next (...) step towards closer European integration should allow customers to make non-cash payments in euro (...) using a single bank account and a single set of payment instruments”. All retail payments in euro will become “domestic”, and there will no longer be any differentiation between national and cross-border payments.

¹¹ <http://ec.europa.eu/>.

¹² *Payment systems...*, XV.

¹³ Most countries have a single national ACH. Some countries (Germany) have several, but these are generally compatible: a customer can address – parties that are connected to another ACH without extra costs or hassle.

¹⁴ G. Leibbrandt, Establishing compatibility between Europe's payment systems, *International Journal of Industrial Organization* 28 (2010) 69–73.

¹⁵ Even though SEPA concerns payments made in the single currency (euro), the activity of the Commission reoriented this initiative to be of a wider (covering not only euro), European character (vide: PSD).

What is essential, the SEPA has been a classic example of unintended consequences. In 2000, the Lisbon Strategy set out a plan to create the internal market for financial services by year 2010. The first fruit of that plan was *Regulation 2560/2001*¹⁶, a measure that aimed to remove differences in costs of cross-border card payments, ATM¹⁷ withdrawals and credit transfers – thus increasing efficiency, lowering costs and improving competitiveness. The primary purpose of this Regulation was to prevent payment services providers (PSPs) from charging higher prices for cross-border payments than for comparable transactions made domestically¹⁸.

Banks in the Eurozone, realizing the impact of the Regulation, decided to “*up the stakes*”. The total of 42 banks, three banking associations and the EBA formed – the European Payments Council (EPC) with a goal of codifying standards, so that banks could be able to lower their costs (as they were forced to lower charges). Not only stakeholders in the Eurozone were involved, also in other countries of the EU/EEA, Switzerland and Monaco¹⁹.

Eventually, the idea of the SEPA has been “taken over” and developed by the European Commission and the European Central Bank (ECB). The result of this activity is *Directive 2007/64 on payment services in the internal market*²⁰ (Payment Services Directive), designed as the legal fundament of the whole concept. Whereas the SEPA initiative, driven by the banking sector, aims to remove technical and commercial barriers to integrating the fragmented European payments market – the PSD should remove any legal barriers and provide a harmonized legal framework²¹.

While the PSD is separate from the SEPA, the two are closely linked; implementation of the PSD is a prerequisite for the expansion of the SDD. The Directive was formally adopted in November 2007 and contains a number of provisions, fundamental to provide a sound legal basis across the EU for the processing of payments. As a rule it is a “full harmonization” directive, which means that States may neither implement nor retain legislation, which deviates from its provisions²².

An important difference should be underlined, the European authorities took the opportunity to address a number of issues not contained in the SEPA.

¹⁶ Regulation (EC) No 924/2009 of the European Parliament and of the Council of 16 September 2009 *on cross-border payments in the Community and repealing Regulation (EC) No 2560/2001*, OJ L 266, 9.10.2009.

¹⁷ ATM – automated teller machine: a machine outside a bank or in a public place that you use to take money out of your bank account.

¹⁸ The Regulation has just undergone a revision also to include SDD in euro.

¹⁹ L. Neville, *The SEPA revolution quietly creeps in*, Euromoney Vol. 39, Issue 466, February 2008, p. 138-142.

²⁰ Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, O J L 319.

²¹ E. van Winkel, *The Payment Services Directive: Where are the opportunities for new entrants in the European payments industry?*, Edgar, Dunn & Co, November 2008, p. 1-2;

²² M. Battistella, *Dealing with the SEPA direct debit*, Journal of Corporate Treasury Management, Vol. 2, No. 4, August 2009, p. 324-330.

The Directive covers not just payments made in euro but also those made in other currencies used in the EU and was designed as a consumer-friendly act, oriented specifically at consumers; at the same time, it lost some of the professional character of the SEPA²³.

The PSD replaces *Directive on cross-border payments 97/5*²⁴ and supplements the *Regulation 924/2009*²⁵ (amended *Regulation 2560/2001*²⁶). The presentation of the text of the PSD will include already existing regulations. When writing this thesis, most of the Member States have met the deadline for the implementation of the Directive (or encountered a small delay) – Estonia, Finland, Iceland, Sweden and Poland²⁷ being exceptions.

1.1 Methods and delimitation

Description method is often chosen as a research purpose when it occurs that basic information is missing from the literature²⁸. The author has discovered that regulation of payment systems at the European level could bring a wide package of benefits for European consumers, not to mention the crucial position of "payments" in the course of reaching an actual economical unification in the EU. The aim of this thesis is to characterize the European legal framework for payments in the EU.

There is not a wide choice of literature concerning these issues (as comes for the Directive there are some articles concerning specific matters but rather from a point of view of a bank or a corporate). If a more specific analysis was made – it was usually for the internal use of professionals. Neither any books have been written (except one monograph) nor concrete guidelines for clients delivered by the banks. Naturally there are numerous short articles and press notes, repeating the same slogans about pro-consumer development and the innovative nature of the PSD.

The primary sources used in this study were mainly: the EC Treaty, the text of the Payment Services Directive, acts more or less linked with the PSD – *Regulation 2560/2001 (924/2009)*, *Directive 97/5*, other linked directives and recommendations from the field of financial services in the EU.

²³ *The SEPA Revolution...*, op. cit., p. 140.

²⁴ Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers, OJ L 043.

²⁵ Regulation (EC) No 924/2009 of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) No 2560/2001 (Text with EEA relevance), OJ L 266, 9.10.2009.

²⁶ Regulation (EC) No 2560/2001 of the European Parliament and of the Council of 19 December 2001 on cross-border payments in euro.

²⁷ While the text of a national law has been fixed – it will be formally introduced not earlier than from November 2010.

²⁸ P. Shields and H. Tajalli, *Intermediate Theory: The Missing Link to Successful Student Scholarship*, Political Science, Department of Faculty Publications-Political Science Texas State University 2006, p. 325.

As to explain the above mentioned, the following secondary sources were used: materials published by the Commission and by the ECB (reports, press releases, information on the transposition), American monograph on the PSD, research articles, banking press, law reviews, and research based on the authors personal experience from an internship in one of the largest Scandinavian banks.

This thesis attempts to clarify the complex system of the law of payment services in the European Union. Not only there are several parallel legal acts but also bank-led initiative (SEPA) – this combination has the potential to implicate a significant confusion. The author will not focus on the national element – even though the way, financial services are regulated, leaves some crucial issues under authority of the States. For the sake of clarity, the analysis will cover "only" European legal framework for payment services.

Concrete provisions, considered by the author to be innovative or interesting because of other reasons, and also their possible limitations, were of specific interest under this research. The origins of the PSD and the entourage will be indicated, as to help to understand the position of this new, potentially very useful piece of law. The reason why the form of a directive (not a regulation) has been chosen, links of the PSD with already existing acts of law – all of that could influence the actual utility.

When writing this thesis, nearly all the Eurozone countries have already implemented the PSD. As comes to non-Eurozone States – Sweden is just to implement its national law in this field; Poland, even though a bill of an act has been already drafted, is expected to finish the process of implementation in the last decade of year 2010 (peculiar legislation and presidential elections being most probable reasons). On the other hand, the United Kingdom has finished the implementation more than a half a year before the deadline. While such differentiation occurred, the way in which these three countries have been implementing the optional clauses will be compared.

1.2 Outline

In the course of this research the author assesses the utility of the PSD. The Directive contains many provisions treating about the conditions and obligations of both clients (PSUs²⁹) and providers (PSPs³⁰). Provisions construing potential privileged position of clients being private persons (called by the PSD – consumers³¹) has been introduced. Already, the Preamble to the Directive motivates why such division is needed (consumers – other classes of clients). The provisions are generally very precise and do not leave much space for interpretation.

²⁹ PSU – payment services users.

³⁰ PSP – payment services providers.

³¹ The definition of consumer will be shortly illustrated in the fourth Chapter of this Thesis.

The first chapter of this thesis was designed as to explain the term: "payment", including short historical background and characteristics of their different types. This is designed as to show the importance of this topic and to help to understand some terms used in the PSD, which otherwise could sound too technical and not comprehensible enough. Multiple definitions should not obscure the fact that payment instruments are all around us, every day and during dozens of activities.

Afterwards the author sketches the origins of the Directive, links with the SEPA project and the relation with the revised *Regulation 924/2009*. Furthermore, the links with former *Directive 97/5* and other legislation will be mentioned and compared if necessary. The SEPA was initially designed as to help the banks to fit with the new circumstances. Naturally, it is not a consumer who is in the centre of interest of these entities. The PSD on the other hand has transformed the whole process into an initiative oriented towards the latter; introduced solutions bring significant modifications to the European legal framework in the sphere of payments, still are no longer aimed at helping to rationalize efficiency of the banks.

While analyzing the text of the Directive, including explanation of the basic terms used in the PSD – the author will characterize rights and obligations of the consumers (PSUs) and scrutinize concrete provisions. Furthermore, the difference between "individual" and "single" payments is underlined and explained. Finally, of special interest is the fourth Title of the PSD, especially – authorization and execution of the payments, including the liability of providers (PSPs) with respect to PSUs.

Even though the PSD was designed as a fully harmonizing act, there are more than twenty optional clauses. As an implication, acts of national laws, implementing the provisions of the Directive could differ to some extent, which will most probably hinder the homogeneity. Because of that, a short comparative analysis of transposed options by Poland, United Kingdom and Sweden will be presented, as to sketch potential inconsistencies.

2 Payments

While researching the current position of payments within the EU law, one should not lose sight of the basics of what payment is about. For the legal understanding it is convenient to recall Roy Goode's definition, according to which: "payment in the legal sense means a gift or loan of money or any act offered and accepted in performance of a money obligation"³².

The field of payments is concerned with how the wealth can be moved around from place to place and from person to person. To narrow, payment systems deal with shifting of the wealth, when the transfer is made in terms of cash (money). The area of payment systems deals exclusively with promises to pay or payments, which are actually made by one party to another of an amount of money³³.

An example of such symbolic money is European currency – euro (holding a symbolic value). Currency is the most basic, simplest payment system, which means a way of paying debts. Payment means satisfying a debt in way that the obligor has no further legal liability for the debt, once the payment is made no further interest in the currency, credit or other money used to effect the payment³⁴.

It has already been noted that whilst being a legal notion payment has significant economic implications. This applies both to situations of normal functioning of payment systems and to those where things go wrong. Lawyers will of course tend to concentrate on the latter. Indeed, where things do go wrong (insolvency), costs to those involved may be very serious. Moreover, in broader economic sense serious "accidents" may implicate a loss of faith in the functioning of the system as such: the so-called "systemic risk". Such risk is indeed a costly affair, both in terms of curing and of prevention.

Lawyers should also realize that even where the payment system functions "normally" this involves the handling of money in its various possible forms, which thereby incur transaction costs. Moreover, it may be noted that different people may hold different views as to what is "normal" in this regard. This starts with the choice between payments by legal tender (notes) or rather a cheque or again a credit transfer or making use of "plastic". It is crucial to understand that any payment operation involves costs and that technical developments are mostly driven by cost considerations³⁵.

³² M. van Empel, *Financial Services in the EU. Retail Payments in the EU*, Kluwer Law International, 2008, p. 215-216.

³³ J. Brook, *Payment Systems Examples & Explanations*, Aspen Publishers; Ed 3, March 1, 2007, p. 3.

³⁴ S. Nickles and M. B. Matthews, *Payments Law in a Nutshell*, Thomson West, p. 3.

³⁵ *Retail Payments...*, op. cit., p. 2.

As for technical developments, these relate essentially to the impact of electronic data storage and processing. It should be stressed that whilst those developments have the potential of bringing down costs, they rely on common infrastructure and on agreed standards for that infrastructure, which enable processing of “products” (payment instructions, fee calculations, other information). This requires substantial investment before the new system even starts.

2.1 Wholesale vs. Retail

One should distinguish between wholesale and retail payments; the difference depends on the user of the payment instruments³⁶. Retail payments involve transactions between: consumers, consumers and businesses and two businesses; wholesale payments are typically made between businesses. Although there is no definitive division between these categories, retail payment systems are generally characterized by higher transaction volumes and lower average values than the latter³⁷. Nevertheless it is the client, who decides how to be treated.

On the other hand, the “retail” option is mostly chosen by “man in the street”, not giving a thought on the actual costs of payment operations. The distinction between “wholesale” and “retail” is vital in that the legal and technical organization of payment systems have been set up to it. This difference of perspective reflects upon both legal and technical aspects. Thus, for instance in a “wholesale” setting “real time” processing of payments may be both important in terms of risk management and realistic in terms of actual organization³⁸.

In a retail payment system with multiple relatively low value payments, technical processing through settling and clearing between the banks is a mass operation where “real time” processing tends to be an unrealistic proposition. With “netting”³⁹ being postponed till a certain hour of the day, the legal position is of course different. Electronic processing has of course become crucial here, but resulted in electronic processing of orders in such way that it has become unrealistic to build legal argument on the basis of an individual order that can be identified at any time. The “mass” character of retail payments calls for an infrastructure and standardization of procedures supported by a majority of players; again this would implicate “heavy barriers to exit in place, and thus tends to promote a “conservative” attitude as regards the switch to another system”. On the other hand, within the

³⁶ D. Mavromati, *The law of payment services in the EU. The EC Directive on Payments Services in the Internal Market*, Kluwer Law International, 2008, p. 4.

³⁷ <http://www.ffiec.gov/>.

³⁸ *Financial Services...*, op. cit., p. 2.

³⁹ In the context of clearing or settlement systems, the agreed offsetting of mutual obligations by participants in a system. This process involves the calculation of net settlement positions and their legal reduction to a (bilateral or multilateral) net amount; <http://www.ecb.int/>.

existing system there is continuous pressure to save costs on what is not unlike a supermarket position: high volume – small margins⁴⁰.

2.2 Payment instruments

Firstly, a buyer and a seller must agree on a payment instrument, will it be cash, cheque or card. These various instruments are the "raw materials" of payment systems and have evolved in response to demands for ease of use, cost reduction, security, as well as technological progress⁴¹.

The choice of a payment instrument represents a compromise between the various features and benefits like: ease of use and convenience, execution time, ease of automation, costs and security. Retail customers mainly base their choice on convenience and execution times, the date at which their account will be debited (less when the beneficiary will be credited). Corporate customers are generally concerned with fees and execution times; they are interested in optimizing their cash flow: accelerated availability of funds. "Fees and execution times are keenly negotiated between large corporations and financial institutions"⁴².

Banks and other providers will be mainly concerned with processing costs and security. They are keen to reduce the processing costs of generic payment services to a minimum so as to devote funds and resources to value-added services and customer relations. This is achieved by automating the entire chain of processes; any manual intervention is to be avoided as it increases costs⁴³.

2.2.1 Legal tender

Notes and coins ("cash") are the oldest payment instrument after mankind progressed beyond barter. It is probably the first "instrument" that one thinks of when making payment in ordinary life. Even though "cards" entered widely into the usage, it is still probably "cash" that we use for buying parking tickets or a cup of tea⁴⁴.

Cash has the advantage of providing instant finality and discharge of debt, but is bulky and expensive to handle in terms of transport, storage, security and counting. For this reason several countries have introduced legislation to ensure that salaries, pensions and social benefits are paid by cheque or electronic credit transfers⁴⁵.

⁴⁰ D. Rambure, A. Nacamuli, *Payment Systems. From the Salt Mines to the Board Room*, Palgrave Macmillan, UK 2008, p. 2.

⁴¹ *Payment Systems*, op. cit., p. 23.

⁴² *Ibidem*, p. 23.

⁴³ *Ibidem*, p. 25.

⁴⁴ *Ibidem*, p. 25.

⁴⁵ *Ibidem*, p. 25-26.

Cash handling costs are estimated at 45–70 billion in the EU, or 0,4–0,6% of GDP. No direct charge is made to retail customers for cash handling, but banks attempt to recover transport and handling costs from large retail outlets such as supermarket chains⁴⁶, not to mention other charges to customers being set on adequately higher level.

2.2.2 Cheques

A cheque (check in the USA) is a signed written payment instrument drawn by the debtor (payer) on hers/his bank and presented, either face-to-face or by mail, to the creditor (payee). The theoretical sequence of events⁴⁷: creditor presents the cheque to his/her bank (collecting bank) that verifies that amounts in figures and in letters match. Next, creditor's bank sends cheque to debtor's bank (paying bank), either directly or via a clearinghouse, which sorts the cheques received from the collecting banks and sends them to the paying banks. In the next step, payer's bank verifies debtor's signature and balance (credit line) on the account. Finally, payer's bank notifies creditor's bank that the cheque will be honoured and that the funds can be credited to his/her account, or that the cheque is refused for insufficient funds ("bounced") or suspected fraud, in which case the dishonoured cheque is returned (payer's bank returns the cheque to the drawer with the statement of hers/his account).

In cases where immediate acceptance is required, banks issue a banker's cheque (or draft) after debiting the debtor, therefore guaranteeing good funds; such drafts can become negotiable instruments, from this their name *assegni circolari* (circulating cheques) in Italy⁴⁸.

This is a long, inconvenient and expensive process, also difficult to automate. Still, the MICR (magnetic ink recognition) or OCR (optical recognition) encoding or pre-printing of the drawer's account identifiers (number accompanied by a code) and cheque number, allied with progress in optical recognition of the handwritten amount in figures (but not the amount in letters) have significantly facilitated automation.

The next step in certain countries was "cheque truncation", whereby the data is captured by the creditor's bank (who stores the cheque or its image and charges the debtor's bank for his efforts) and transmitted electronically to the debtor's bank or the clearing house – thereby omitting signature verification. Under customer pressure, banks have recently credited the beneficiary immediately, but reserve the right to recover the funds. The system is therefore wide-open to fraud and counterfeiting, the burden resting simply on the debtor to verify his bank statement regularly and report any debit that appears suspect⁴⁹.

⁴⁶ <http://www.europeanpaymentscouncil.eu/>.

⁴⁷ Ibidem, p. 26-27.

⁴⁸ Ibidem, p. 26.

⁴⁹ Ibidem, p. 27.

Corporations dislike cheques as they require manual handling and reconciliation is difficult. Many leading retailers and petrol chains in the refuse to accept cheques. In some countries, cheques remain however popular with retail customers and small businesses on account of convenience (particularly for remote occasional payments), force of habit and the float... France and the US remain the largest cheque users, while some other (for instance Sweden, the Netherlands for retail customers) have withdrawn cheques. Several countries however have taken measures to reduce the usage of cheques by differential pricing to encourage the use of more efficient instruments⁵⁰.

2.2.3 Payment cards

History of credit cards started in the US in the 1920's when hotel chains and oil companies began issuing cards to their customers (such cards were accepted only at the business that issued the card and in limited locations). The invention of the bank credit card is attributed to John Biggins of the Flatbush National Bank of Brooklyn who invented the "charge-it" scheme between the bank's customers and local merchants in 1946⁵¹.

The Diners Club Card was the next step in credit cards, in 1949 when a man named Frank McNamara had a business dinner in New York's Major's Cabin Grill. When the bill arrived, Frank realized he'd forgotten his wallet. He managed to find his way out of the pickle, but he decided there should be an alternative to cash... By 1951, there were 20,000 Diners Club cardholders. Technically, purchases with such a card were made on credit, but it was technically a charge card, meaning the bill had to be paid in full at the end of each month⁵².

Cards as "payment products" come in many guises. The constantly increasing use of plastic money leads to the further elaboration of payment cards, a single card can be nowadays both an ATM card and debit card. The legal consequence of the use of a concrete card depends on the contract between the parties. In case of cash cards such contract is concluded between the cardholder and the card issuer; while debit or credit card are regulated with a contract between the supplier of goods and hers/his bank. The two most popular types of cards are: credit cards, and debit cards⁵³.

2.2.3.1 Credit cards

Where credit cards are organized by banks four parties will usually be involved: the issuing bank, the cardholder, the acquiring bank (concludes the contract with) the acceptor (shop, restaurant). What differentiates the credit card from other "plastic" is *nomen omen* the credit aspect The cardholder can purchase goods and services on the faith of the guaranteed payment to the acceptor by the acquiring bank who will be reimbursed by

⁵⁰ Ibidem, p. 27.

⁵¹ Ibidem, p. 32.

⁵² <http://www.creditcards.com/>.

⁵³ *Financial services...*, op. cit., p. 3.

the issuing bank who in turn does so on the basis of an agreed credit arrangement with the cardholder.

In terms of actual organization the former “paper and telephone call by the acceptor” has by now been replaced almost universally by an online check against the credit available to the cardholder. Needless to say that this is no more than a very simplified summary of a complex arrangement where, if things go wrong, different parties may hold very different views as to what they have agreed to. What is essential, credit cards are only eligible for those who have credit and therefore cannot function as a generalized payment instrument for everyone⁵⁴.

2.2.3.2 Debit cards

The most commonly used card is the debit card which is linked to a bank account, allowing the holder to withdraw cash at ATMs and pay for goods and services at retail outlets, petrol stations, restaurants, etc. The amount of the purchase or withdrawal is debited almost instantly from the holder’s account. Whilst the payer may in certain systems rely on credit to some extent, this is not the rule; some debit cards are only intended for withdrawals at ATMs and therefore called “cash cards”⁵⁵.

As a matter of fact, the debit card is currently used in two different ways. On the one hand, in combination with an ATM it can be used to draw cash independently from banking hours and personal services. On the other hand, the card can be used for payment at points of sale (POS)⁵⁶.

Conceptually, the former use could be very simple in that it might involve nobody but the cardholder and his bank. In practice, however, banks have come to develop patterns of cooperation between them, which allow holders to draw cash from ATMs installed by another banks. Still, this is relatively simple in that such cooperation involves a limited number of players largely on the basis of reciprocity. POS use, on the other hand, requires the involvement of acceptors (f.i. shops) and consequently brings with it a complex pattern of organization, both contractual and technical (with on-line connection being essential)⁵⁷.

2.2.4 Direct debits

As to avoid any possible confusion it should be underlined that the direct debit has nothing to do with debit cards; no cards are involved here at all.

Direct debits are payments initiated by the creditor through hers/his bank, which collects the funds from the debtor’s account at hers/his bank, based on a legally binding mandate agreed by the debtor. “Direct debits generally rely upon a guarantee to the debtor that he will be able to recover the funds

⁵⁴ Ibidem, p. 3.

⁵⁵ *Payment Systems...*, op. cit., p. 33-34.

⁵⁶ Ibidem, p. 4.

⁵⁷ Ibidem, p. 4.

collected in case of error or dispute within a specified time limit". Such instrument may be used for individual or regular payments. In certain countries the creditor's bank charges an interchange fee, also known as a Multilateral Interchange Fee (MIF), to the debtor's bank⁵⁸.

The above-mentioned mandate must be signed (by hand or electronically) by the debtor and the ACH and both banks hold a file of mandates. It will contain the names, addresses and account identifiers of the debtor and the creditor as well as the payment reference such as a customer reference identifier. Two possible mandate flows exist:

1. Creditor mandate flow, whereby the creditor – for instance an energy utility – will obtain the customer's signature on the mandate and send it to the creditor's bank for onward transmission to the ACH and/or the debtor's bank;
2. Debtor mandate flow whereby the debtor will sign the mandate and forward it to hers/his bank for onward transmission to the ACH and/or to the creditor's bank that notifies the creditor.

Direct debits have become favourite instrument for enterprises issuing a large number of invoices (financial institutions for mortgage repayments, telecoms), as enable them to automatically collect variable amounts on a predetermined date, optimizing the treasury management (most telecoms nowadays accept only direct debits for subscription customers). Reconciliation is also automatic as the creditor sets the remittance information. Furthermore, discounts are offered if paying by direct debit (to encourage customers to change). In general, direct debits reduce time and costs for debtors; not to mention the peace of mind that the bill will be paid, if one misses the deadline⁵⁹.

2.2.5 Credit transfers

From the legal point of view, a credit transfer can be seen as a single transaction or a series of successive bilateral transactions. In general, legislation without a specific law on payments follows the former view, while, for example USA opted for the latter⁶⁰. The agency relationship arises implicitly from the payee's account. According to the recent theory, the credit transfer is viewed as the transfer of "bank credit money", cashless money, not classified under *Code Civil*. In such a case, "there is a double account transaction under which credit to the payer's account extinguishes and is substituted by credit to the account of the payee"⁶¹.

It seems worth to follow a comparison between French and German legislation⁶². Under the French law, the payer's payment order initiating the

⁵⁸ *Payment Systems...*, op. cit., p. 30.

⁵⁹ *Ibidem*, p. 32.

⁶⁰ *The law of payment...*, op. cit., p. 158.

⁶¹ *Ibidem*, p. 159.

⁶² *Ibidem*, p. 158.

credit transfer is seen as mandate ("mandate") to hers/his bank, an act where a payer gives to payee's bank, the power to something for the principal and in his name⁶³. The German law is an amalgam of general and special legislation, where the national law implementing *Directive 97/5*, went even further than EU legislator and covered also national transfers. "On the other hand, the general provisions of BGB⁶⁴ on the law of contract have continued to apply. According to article 611 of the BGB, the contract underlying the credit transfer has been viewed as a contract for service", under which the bank is bound to carry out the instructions embodied in the order, and the customer is bound to pay what was agreed (a fee or by making deposited funds available for use). There were different special rules for three various types of contracts introduced (between the payer and hers/his bank, between payer's bank and the intermediary's bank and for giro contracts), applicable to the account, from/to which payments are directed⁶⁵.

Credit transfers are initiated by the debtor (originator) who instructs hers/his bank to debit hers/his account; the bank verifies the instruction and availability of funds prior to transferring the information to a clearing house or directly to the beneficiary's bank which credits the latter's account⁶⁶.

Exceptions are defined as: rejects (transfer rejected by the originator's bank before interbank settlement for incorrect formatting, invalid account numbers or insufficient funds; the originator will be notified), and returns (transfer rejected after interbank settlement if the beneficiary cannot be credited, for example if the account has been closed; the creditor's bank will advise the originator's bank which will notify and refund).

The majority of credit transfers (corporate payments, pensions and social benefits) are initiated electronically from internet banking portals, accounting software packages or enterprise resource planning systems (SAP, Oracle). Paper forms, optimized for optical reading are used for transfers initiated manually; banks issue to each customer, pre-printed forms with their name, address and account identifier, either as initiator or beneficiary. Inversely, enterprises send a computer-generated pre-printed form with data, amount and invoice reference, and a customer needs only to enter hers/his name, account details, sign the form, and send it to the bank⁶⁷.

Credits transfer offer major advantages in terms of automated processing; reconciliation is good if the creditor (less reliable if entered by the debtor) provides the reference. Processing costs are low as even paper forms achieve a very high (over 98%) STP rate thanks to progress in OCR⁶⁸.

⁶³ Article 1984 of *Code Civil*.

⁶⁴ The Bürgerliches Gesetzbuch (BGB) – German Civil Code.

⁶⁵ *Ibidem*, p 158-159.

⁶⁶ *Payment System...*, op. cit., p. 28.

⁶⁷ *Ibidem*, p. 30.

⁶⁸ *Ibidem*, p. 29.

3 Single Euro Payments Area (SEPA)

In January 2008, the Single Euro Payments Area became a reality. "No flags were waved, no confetti was thrown and no Euro-anthems were played"⁶⁹. This effort to harmonize national payment systems – seen by some as the culmination of the introduction of the euro and the final stage in the creation of the single market – debuted without anyone except specialists noticing.

"Why the deafening silence on such a momentous occasion?" The SEPA has nothing like the popular impact or appeal of the introduction of the euro, which might have contributed to its "popularity". Perhaps more important, the SEPA – although a bank-led initiative – has been "...modified in the EU inertia, as a result losing its clarity". The banks have reflected soberly and decided that SEPA should be treated as "a marathon – not a sprint"⁷⁰.

The SEPA comprises of 31 countries: the 27 EU Member States, Norway, Iceland, Liechtenstein and Switzerland, as well as territories that are deemed to be a part of the EU (Martinique, Guadeloupe, French Guiana, Reunion, Gibraltar, the Azores, Madeira, Canary Islands, Ceuta, Melilla, and the Aland Islands).

To coordinate its efforts, the banking industry has set up a self-regulatory body to manage the SEPA project. The European Payments Council (EPC) consists of 65 European banks, three European credit associations and the Euro Banking Association (EBA). The EPC has developed general principles and criteria for countries wishing to become part of SEPA⁷¹.

3.1 Regulation (EC) 2560/2001

Payment systems in the EU are going through a process of integration, with the objective of creating the SEPA; the source of this project was the adoption of *Regulation 2560/2001*, which established that the charges levied on payments in euro between bank accounts in different Member States must not be higher than those levied on payments in euro within a Member State. With the launch of the single currency, the Commission saw a need for a modern and efficient payment infrastructure to assist cross-border electronic payments, and to support the single monetary policy for the Eurozone. Member States' payment systems have historically been designed to meet the needs of domestic markets. Following introduction of the euro,

⁶⁹ L. Neville, *The SEPA revolution quietly creeps in*, Euromoney Magazine, February 2008, p. 138-142.

⁷⁰ Ch. Skinner, *What happens to SEPA if Europe fails?*, October 2008, <http://www.swiftcommunity.net/>.

⁷¹ <http://europa.eu/>.

the Commission sought to encourage a re-modelling of such payment systems to address the higher cost of cross-border payments⁷².

The main objectives of the Regulation were to:

1. Reduce the level of charges levied on cross-border electronic payments in euro, seen by the Commission as too high;
2. Encourage the payments industry to make improvements to the existing cross-border payment infrastructure, in terms of cost, speed and quality, as to support the Internal Market.

Regulation 2560/2001 introduced the rule that cross-border payments in euro should cost the same as corresponding national payments in euro within the State; has been applied to ATM cash withdrawals and purchases by payment card since July 2002 and to credit transfers since July 2003.⁷³

The Regulation obliged banks to make available to their customers in a readily comprehensible form, in writing (where appropriate, by electronic means), prior information on the charges levied in respect of: cross-border payments, payments transacted within the State in which it is located and the exchange rates. Any change in the charges had to be notified in advance.

Another obligation was to notify customers on request of their International Bank Account Number (IBAN) and the institution's Bank Identifier Code (BIC). In order to pay only the charges that apply to domestic transfers, customers are required to indicate the IBAN of the beneficiary and the BIC of the beneficiary's institution.

IBAN is an international bank account number of the payment beneficiary. Existing bank account numbering systems were strictly national and did not include any characters indicating the country in which an account was located. The IBAN standard is based simply on preceding each account number by a group of four characters: two letters identifying the country and two figures enabling the IBAN to be checked in order to avoid transcription errors. It comprises a maximum of 34 characters but has a fixed length per country (16 characters in Belgium or 27 in France)⁷⁴.

The Regulation also applied to cross-border payments made in the currency of another State, once the latter has notified the Commission that it has decided to extend the Regulation's application to its currency. Only the Swedish authorities have asked for such extension (Swedish krona – SEK)⁷⁵. This means that cross-border payments within the EU in Swedish crowns are covered by the Regulation in the same way as payments in euro.

⁷² Study of the impact of Regulation 2560/2001 *on bank charges for national payments*, Final Report, prepared for the European Commission Internal Market and Services Directorate General, Retail Banking Research Ltd London, September 2005, p. 1.

⁷³ *Ibidem*, p. 1.

⁷⁴ <http://europa.eu/>.

⁷⁵ *Extension of Regulation 2560/2001 to Swedish Kronor*, OJ C 165.

Furthermore, the Regulation covered cross-border transfers to accounts in euro, even if they have been opened in a State outside the Eurozone, such as the UK. The British authorities – in contrast to those in Sweden – have not decided to extend the Regulation to the British pound (GBP)⁷⁶.

Private customers in Sweden are (typically) not charged for national credit transfers in SEK, while national euro-denominated transfers typically incur a fee of around EUR 0,33. Neither has changed since the implementation of the Regulation. There is no evidence suggesting that the Regulation has impacted customer charges in the other non-Eurozone countries. In the UK, private customers can make non-urgent credit transfers in GBP free of charge, while euro transfers incur a charge of GBP 18-23 (EUR 26-36)⁷⁷.

The obligation to apply the same charges to national and cross-border payments has created the need for the banking industry to deploy EU-wide infrastructures in order to cut the costs for cross-border payments. As a result of this process the EPC was established and a pan-European Clearing House (STEP 2) started operations in April 2003. Any credit transfer to any bank in the EU was to be sent via STEP 2 and executed in three days, according to the *Credeuro Convention*⁷⁸.

While being adopted, the Regulation raised vigorous opposition from the banking sector, because of its “price-fixing” nature. The main argument was that the number of cross-border payments was small comparing to national ones, and that the consequence of the Regulation would be an increase of national prices. Whilst banks were unsuccessful with these arguments during the legislative process, concerns were raised in some States, which resulted in the introduction of a review clause to the Regulation.

Such a review clause was added in article 8 of the Regulation, requiring the Commission to present a report on the application of the Regulation in year 2004. A parallel process was also initiated by the private sector – European banks started working on the new project, called... SEPA.

The impact assessment accompanying the Commission’s proposed revision of the Regulation noted that – at the time the Regulation was introduced – the necessary infrastructures to efficiently process cross-border payments within the EU was not in place, with widely differing national rules, performance levels and prices. In October 2008 the Commission published proposal for revising the *Regulation 2560/2001*. The Commission proposal considered the Regulation as a success (the charges for cross-border electronic payments in euro were brought down to the level of national

⁷⁶ *Study of the impact...*, op. cit., p. 7.

⁷⁷ *Ibidem*, p. 53.

⁷⁸ The *Credeuro Convention* established a standard for the execution of a “basic” bank-to-bank pan-European credit transfer, which allowed participating banks to give guarantees to their customers as regards information requirements, execution time and remittance information transmitted.

ones). It was also noted that the Regulation provided the impetus to the banking industry to undertake the SEPA⁷⁹.

The PSD, when implemented into Member States national legislation by November 2009, was to introduce a number of conduct of business requirements for PSPs, which apply to all electronic payment services, including cross-border credit transfers, ATM withdrawals and card payments, which were in scope of the Regulation (the PSD also applies to cross-border direct debit payments, which were not in the scope of the Regulation). The Commission's proposal therefore sought to align the Regulation with the incoming PSD requirements⁸⁰.

The main changes to the Regulation set out in the Commission proposal concerned the following:

1. Extension of the scope as to include direct debits (art. 2);
2. Alignment with the PSD transparency requirements, concerning provision of information on IBAN and BIC (art. 4);
3. Phasing out settlement-based Balance of Payments (BOP) reporting requirements by 2012 (art. 5);
4. Obliging States to appoint a competent authority and out-of-court redress mechanism for the purposes of the Regulation, along with a complaints procedure, penalties and cross-border cooperation with other States' authorities (art. 6-10).

It should be underlined that the implementation of the Regulation was the reason why the SEPA project even started (note: a private sector initiative). Afterwards, the SEPA influenced the introduction of the PSD (note: a public response), which afterwards implicated the revision and substitution of the old Regulation with the new *Regulation 924/2009*.

3.2 SEPA – scope

The European Payments Council (EPC) has designed rulebooks for two payment schemes, and one framework in which banks can develop SEPA payment products: Credit Transfers (SCT), Direct Debits (SDD) and Card Framework (SCF)⁸¹.

With regard to the SCT and the SDD a “replacement” strategy has been chosen, with new common schemes designed for euro payments in each case. These schemes are recorded in rulebooks covering the rules, practices and standards applicable to euro payments. For the SCF on the other hand, an “adaptation” strategy has been chosen to allow existing schemes and their operators to adjust to a new set of business and technical standards. “A

⁷⁹ *Study of the impact...*, op. cit., p.13, p. 36.

⁸⁰ *Study of the impact...*, op. cit., p. 54.

⁸¹ <http://europa.eu/>.

core feature of both approaches is the clear separation of the schemes from infrastructure”⁸².

Once these building blocks for SEPA are in place, the next step will be to develop value-added services, which could stimulate a paperless payments area, with end-to-end STP⁸³ of all SEPA-compliant payments. Naturally, the current national instruments will gradually be replaced.

3.2.1 SEPA Credit Transfers

It seems worthy to remind that a credit transfer is a payment initiated by the payer, where a payment instruction is sent by the payer to the payer’s bank (the sender’s bank), which moves the funds to the payee’s bank (the receiver’s bank), possibly via several intermediaries⁸⁴.

The SEPA Credit Transfer enables European banks to offer customers a central payment product in euro; customers and banks can make transfers in euro throughout the Eurozone as easily and efficiently as on their local markets. The SCT defines a common set of interbank rules and processes for credit transfers in euro. The scheme was launched on 28 January 2008, and had a successful start, with more than 4000 banks adhering. By the end of August 2008, 4350 banks had adhered, according to the EPC, nearly all banks that are active in the payments business⁸⁵.

During the start-up phase, some problems did occur, f. i. with regard to the use of incorrect BICs or the inaccurate application of the scheme rules when making a SCT return transaction. Nevertheless, the use of the SCT has grown steadily since its launch, in September 2008, 7 million transactions were processed, accounting for 1,5 % of the total transfer volume⁸⁶.

The pace of updating procedures at the bank-level – influences the uptake of the SCT; the same comes to promotion. The ECB conducted a Corporate Survey in 2007 and 2008, to which over 300 companies responded (of different sizes)⁸⁷. In year 2008, awareness of SEPA increased significantly to 80% (from 53% in 2007)⁸⁸.

During the first eight months, the use of the SCT seems to have been mainly restricted to cross-border transactions in euro, which are commonly estimated to account for around 2% of credit transfers in Europe. Still, the

⁸² <http://www.europeanpaymentscouncil.eu/>.

⁸³ The SEPA payment instruments ensure that euro payments between any two payment accounts within SEPA are processed smoothly and without manual intervention. This is commonly referred to as straight-through- processing (STP); <http://www.ebc.int/>.

⁸⁴ Ibidem, p. 20.

⁸⁵ European Central Bank, *Single Euro Payments Area (SEPA). Sixth Progress Report*, November 2008, p. 15.

⁸⁶ Ibidem, p. 13-14.

⁸⁷ The ECB Corporate Survey makes use of the European Commission’s “European Business Test Panel”.

⁸⁸ Ibidem, p. 13.

positive news is that the SEPA migration has started; it is expected that the migration to SCT transactions will have reached a critical mass by the end of 2010⁸⁹.

It should be mentioned that the Eurosystem⁹⁰ has identified some remaining obstacles to the take-up of the SCT; for example, it is not always possible to make: payments with a scheduled execution date, periodic payments or some online banking applications. In the medium term, further improvements will be needed to make the SCT a lasting success, and in the long term, the payment industry needs to develop a more user-friendly account identifier than the IBAN⁹¹.

3.2.2 SEPA Direct Debits

SEPA Direct Debit, a pan-European direct debit product in euro. If one rents a holiday home on a long-term basis or has regular bills to pay in another country, (s)he will be able to pay such bills from the home country by the direct debit. Erasmus students know very well that opening a bank account in the country of their new residence is often the first point on the “to-do list”. Thanks to the SEPA, one will simply carry on using hers/his existing euro account in homecountry.

In general, a direct debit is a transfer initiated by the payee (the receiver) via the payee’s bank after agreement between the payee and payer (the sender). The new SDD scheme will consist of two different models. In the first model, the debtor gives the mandate directly to the creditor. The second model differs in that the debtor gives the mandate directly to its bank⁹².

The new framework offers full SEPA-wide reach; direct debits can be made to any receiver. This model covers both recurrent and one-off payments in euro and the maximum settlement time is five business days for the first payment, and two business days for recurring payments. Furthermore, IBAN and BIC are to be used as account identifiers.

”The SDD is an entirely new product in many markets”. For example, while it is broadly similar to existing direct debits in the Netherlands, it is completely different to direct debits in France and Belgium⁹³. In the Netherlands, the account holder may authorize a company to collect direct debit payments, without notifying the bank (such practice is very common, with approximately 45% of all banking transactions conducted via direct debit)⁹⁴. On the other hand, in France initiators of direct debits require approval from the bank. They must also obtain a signed authorization from

⁸⁹ Ibidem, p. 15.

⁹⁰ Eurosystem comprises the ECB and the NCBs of those States that have adopted the euro.

⁹¹ Ibidem, p. 15.

⁹² <http://www.ecb.int/>.

⁹³ J. Germeys, head of product development, supply chain & cash management and responsible for SEPA for merchant banking within Fortis; <http://info.euromoney.com>

⁹⁴ http://www.mkb.nl/index.php?pageID=40/Artikelen/359_476.293/.

the payer, which is then sent to the payer's bank. Before transmitting the order to its bank for collection, the initiator must notify the payer of the amount and date of the debit (f.i. by sending an invoice) to enable the latter to make sure there are sufficient funds on its account (or to contest it)⁹⁵.

The PSD facilitates the operational implementation of the SDD. The harmonization of the European legal framework is the key for the SDD and it is the PSD that contains a number of provisions, which provide a sound legal basis across the EU for the processing of direct debits. Additionally, the PSD has been designed as to increase competition in the payment market by introducing the concept of "payment institutions", which can provide certain payment services under a "lighter" supervision framework, thus increasing competition in the European market⁹⁶.

Another European legislative process of major consequences for the SDD has been the review of *Regulation 2560/2001*. Firstly, it is widely recognized that the adoption of the Regulation was the trigger for the banking industry to start developing SEPA in 2002. Secondly, "updating" the Regulation to the current payments, means that the prices for SDD products may not exceed those for the similar national direct debit products.

3.2.3 SEPA Card Payments

The SEPA Cards Framework establishes rules for banks, card systems (MasterCard, VISA) and other stakeholders. When travelling abroad, people will be able to pay with their debit card just as at home. This is especially useful, if one does not have a credit card, or in the case of making low-value purchases (where a credit card is often not accepted).

As it was already mentioned in the first chapter of this thesis – from the numerous types of payment cards that are available to cardholders, two main types of card payments could be identified:

1. Debit cards, which allow the cardholder to charge purchases directly and individually to an account.
2. Credit cards, allowing the cardholder to make purchases within a certain credit limit. The balance is settled in full by the end of a specified period, or in part, with the remaining balance taken as extended credit on which the cardholder is charged interest⁹⁷.

Cardholders should pay with one card all over the Eurozone (limited only by brand acceptance by merchants). Payment card processors will be able to compete with each other and offer their services throughout the Eurozone,

⁹⁵ The Bank for International Settlements (BIS), Committee on Payment and Settlement Systems (CPSS) – Red Book – 2003, *Payment systems in France*, p. 119.

⁹⁶ *SEPA. Sixth Progress Report*, op. cit., p 16.

⁹⁷ *Ibidem*, p. 22.

making the processing payment card market more competitive and cost-efficient⁹⁸.

3.3 Value-added services

Financial institutions are responsible for the quality of their SEPA products, and are free to offer to their customers' improved SEPA products as long as they are in line with the schemes defined in the rulebooks and frameworks.

An example of such product improvement is the possibility for the fast settlement of credit transfers (priority payments), whereby the banking community could allow customers to settle urgent transfers within one banking day. Another product improvement is the possibility for customers to provide only the IBAN without the additional BIC when making payments; the service provider would then map the BIC from the IBAN⁹⁹.

Value-added services are defined as forward-looking services often linked to SEPA payment instruments. Such services include: e-invoicing, e-reconciliation, payment solutions for internet banking and can be offered by banks as well as non-banks. Work has already started on e-invoicing, which is a service offered to customers before payment, where bills are sent directly to the payer's internet banking application and, after the payer accepts the bill, an automatic payment instruction is created containing the relevant information on the payer and payee (Denmark's public sector has saved more than EUR 100 million a year by switching to e-invoicing). All the providers will be attempting to make up revenues from value-added services, which will become the weapons for competitive differentiation¹⁰⁰.

3.4 Timeline

The EPC has planned the timeline for the SEPA project around three main phases: the design phase, the implementation phase and the migration phase.

The first stage (design phase) began in January 2004 and involved the design of the new credit transfer and direct debit schemes and the frameworks for cards and clearing and settlement infrastructures. The necessary standards and specification of security requirements have also been developed.

⁹⁸ Ibidem, p. 29-30.

⁹⁹ As an established standard, one could be forgiven for assuming IBANs required little additional consideration. Unfortunately, while the IBAN is a standard requirement for SEPA payments, the way in which it is actually being implemented varies from country to country. While originally envisaged as being mandatory for cross-border payments, some countries (Luxembourg, Italy and Belgium) have now also mandated its use for domestic payments, while others countries specifically preclude this.

¹⁰⁰ *Payment Systems...*, op. cit., p. 204.

The second phase (implementation), started in June 2006 and concentrated on preparation for the rollout of the new SEPA instruments, standards and infrastructures (including testing exercises). During this phase, the Commission created the legal basis for the SEPA – the PSD.

In the final phase (migration period) national payment schemes coexist with the new SEPA schemes (from January 2008 onwards). Customers will be offered both “old” national and new SEPA instruments, and the clearing and settlement infrastructures will be able to process payments made using both types of instruments. The goal is to achieve a gradual market-driven migration to SEPA, so that by end-2010, a critical mass of transactions has migrated¹⁰¹.

¹⁰¹ European Central Bank, *The Single Euro Payments Area: an integrated payments market*, p. 14.

4 Payment Services Directive (PSD)

“The opening up of the Internal Market has brought about increased Community legislation for the financial services sector”¹⁰². The initial Recommendation *on transparent banking conditions* had been transformed into a binding act in shape of Directive 97/5 *on cross-border credit transfers*, which afterwards has been replaced by the PSD. Whereas the SEPA initiative, driven by the banking sector aims to remove the technical and commercial barriers to integrating the fragmented European payments market, the Directive establishes the necessary legal framework for SEPA payments, providing a clear set of harmonized information requirements that all PSP¹⁰³s must fulfil, whether they are offering SEPA payment products or already existing national ones¹⁰⁴.

The PSD is an example of legal basis dichotomy, which arises “from the bifurcated structure of the text” of the Directive. The first part concerns the authorization requirements for “payment institutions” (analogous to the banking and e-money institutions¹⁰⁵) and was structured on the legal basis of freedom of establishment. As for the second part – regulating rights and obligations of the parties – it is in accordance with the legislative measures in the area of “consumer contract law” and uses the legal basis of former article 95 of TEC (art. 114 after the Lisbon Treaty¹⁰⁶). Despite the fact that the PSD is officially following the path of “full harmonization”, explicitly allows the States to regulate above minimum standards in some cases, providing for mutual recognition. “Clearly the PSD tries to find the right balance” between: minimum and maximum harmonization rules”¹⁰⁷.

The issue of maximum harmonization is worth of a separate research, but for the goals of this thesis it is sufficient to mention that the decision on the form of harmonization could be crucial and has been lively commented topic in the EU. Should directives aim for this type of harmonization? Is it optimal for the consumers? Just to mention recent – *The Netherlands vs.*

¹⁰² J. A. Usher, *The Law of Money and Financial Services in the EC*, Oxford 2000, p. 150 in: *The law of payment services...*, op. cit., p. 65.

¹⁰³ An umbrella term that includes banks, building societies, e-money issuers, non-bank credit issuers and non-bank merchant acquirers.

¹⁰⁴ As to improve transparency for customers, and to fully harmonize the national rules, which varied to a great extent.

¹⁰⁵ See: Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 *on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC*.

¹⁰⁶ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 83 of 30.3.2010; Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306 of 17 December 2007.

¹⁰⁷ *The law of payment...*, op. cit., p. 96.

*Antroposana Case*¹⁰⁸ or the proposed Consumer Rights Directive and the raised opposition because of the alleged reduction of UK consumers' rights to reject goods¹⁰⁹.

For the sake of consistency, it is also worth to mention that the method how the notion of "consumer" has been regulated in the EU is not fully coherent. To shortly illustrate the situation, the author presents different ways of defining "consumers" in various European directives (table below)¹¹⁰. In addition, the way national authorities implemented the definition of "consumer" into their legal orders (since directives leave some doze of discretion to the States) implicated that the legal framework across the EU is far from being consistent. Certainly, this is an important matter – still even though present also in the text of the Directive (especially while the PSD includes different rules for "consumers" and other classes of clients) – it is not a role of the PSD to decide on how to interpret the term "consumer".

¹⁰⁸ Case C-84/06, Judgment of the Court (First Chamber) of 20 September 2007, Staat der Nederlanden vs. Antroposana, Patiëntenvereniging voor Antroposofische Gezondheidszorg and Others; "maximum harmonization does not imply that a standard is being fixed from which no divergence is possible".

¹⁰⁹ See: Proposal for a Directive of the European Parliament and of the Council *on consumer rights*, COM (2008) 614 final; merges directives on: sale of consumer goods and guarantees (99/44), Unfair contract terms (93/13), distance selling (97/7), doorstep selling (85/577) and also modernizes existing consumer rights, bringing them in line with technological change; see also: V. Reding Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship An ambitious Consumer Rights Directive: boosting consumers' protection and helping businesses European Consumer Day 2010 Madrid, 15 March 2010, SPEECH/10/91.

¹¹⁰ H. Schulte-No, Ch. Twigg-Flesner and M. Ebers, *EC Consumer Law Compendium – Comparative Analysis*, Universitat Bielefeld 2007, p. 671-673.

Table 1.

Legal act	Definition
Directive 85/577 ¹¹¹	Art. 2: “consumer” means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession;
Directive 90/314 ¹¹²	Art. 2.4: “consumer” means the person who takes or agrees to take the package (“the principal contractor”), or any person on whose behalf the principal contractor agrees to purchase the package (“the other beneficiaries”) or any person to whom the principal contractor or any of the other beneficiaries transfers the package (“the transferee”);
Directive 94/47 ¹¹³	Art. 2: “purchaser” shall mean any natural person who, acting in transactions covered by this Directive, for purposes which may be regarded as being outwit his professional capacity, has the right which is the subject of the contract transferred to him or for whom the right which is the subject of the contract is established
Directive 97/7 ¹¹⁴	Art. 2.2: “consumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;
Directive 2005/29 ¹¹⁵	Art. 2.a: “consumer” means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession.

4.1 SEPA and PSD

As it was already mentioned, the SEPA is a classic example of unintended consequences. In year 2000, the Lisbon Strategy set out a plan to create the internal market for financial services by year 2010; the first fruit of that plan

¹¹¹ Council Directive 85/577/EEC of 20 December 1985 *to protect the consumer in respect of contracts negotiated away from business premises*; OJ L 372 of 31 December 1985;

¹¹² Directive 90/314/EEC *on package travel, package holidays and package tours*; 1990 OJ L 158/61.

¹¹³ Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 *on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis*; OJ L 280 of 29 October 1994.

¹¹⁴ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 *on the protection of consumers in respect of distance contracts*; OJ L 144 of 4 June 1997.

¹¹⁵ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council; OJ L 149 of 11 June 2005.

was the *Regulation 2560* in year 2001, the measure that aimed to remove differences in costs of cross-border card payments, ATM withdrawals and credit transfers throughout the region.

European banks, realizing the impact that the Regulation would have, decided – like a "reckless poker player" – to raise the stakes without thinking of how the other players (the Commission) would react. In short, the SEPA was planned to help the banks to lower their costs as they were forced (by the Regulation) to lower charges¹¹⁶.

Unsurprisingly, the Commission "decided that SEPA needed assistance and that it was up to the (...) bodies of the EU to provide it". Although it was accurate to state that the SDD or the SCF required a legal basis in order to take place – the PSD proposal, adopted in December 2005 took the opportunity to address a number of issues not contained in the SEPA.

Peter Jameson, SEPA market manager in EMEA cash management at *Citi*: "the PSD is the 80-point behemoth created by (...) the Commission when the industry asked for a few key barriers to SEPA to be resolved. It is a different project to SEPA with a huge impact". The PSD should reinforce the rights and protection of all users of payment services – retailers, companies, public authorities and most determinedly... consumers. The Parliament approved the PSD in April 2007, but the transposition is still pending (it was to be implemented till November 2009)¹¹⁷.

Nearly 80% of respondents to *Sibos Daily News* and *BT* survey believe the PSD is a major change for their institutions. However, only just over half (53%) have read the PSD document. When asked, on which initiative they were spending more time – the SEPA or the PSD, 79.4% of respondents said: the SEPA. This shows a paradox: "SEPA is (...) getting the majority of attention, but the respondents feel the PSD represents a major change. The SEPA is a banking initiative and has no legal standing. There are no mandated deadlines for SEPA, unlike the PSD"¹¹⁸.

The table below presents and helps to understand the main characteristics of the SEPA and of the PSD. The differences are clearly visible, surely the PSD is not just a legal "arm" of the SEPA, and one could say it looks like an autonomous initiative; both scope and the goals to be achieved, differ.

¹¹⁶ L. Neville, *The SEPA Revolution...*, op. cit., p. 141.

¹¹⁷ *Ibidem*, p. 142.

¹¹⁸ <http://www.sibosdailynews/> (Banking Technology).

Table 2.

	SEPA	PSD
Currency	Euro	EU/EEA currencies
Legal nature	Self-regulatory	Directive
Geographical scope	EU, EEA, Switzerland	EU and EEA
Scope	SCT, SDD, card transactions in EUR	Payment services listed in the Annex to the PSD
Timing	Beginning in January 2008 with the launch of SCT and the initial SCF deliverables.	1 November 2009
Focus	SCT/SDD schemes have primary focus on the PSP-to-PSP space	Primary focus on the PSU-to-PSP space

4.2 Directive 97/5/EC

The PSD is – to large extent – based on *Directive 97/5*. Numerous provisions of the latter were transferred to the Directive (with bigger or smaller modifications). It seems worthy to mention and sketch the background and the origins of the PSD.

For many years credit transfers were organized as the "correspondent bank system", with four parties required in a "traditional" credit transfer: the debtor (payer), that orders hers/his bank to withhold from hers/his bank account a certain amount as to transfer it to the creditor's (payee's) bank. The wholesale cross-border sector has been regulated by the ESCB through the TARGET¹¹⁹ system and by the EBA, using the EURO1¹²⁰ system – till recently, the retail sector has not achieved an integrated electronic multilateral payment system¹²¹. *Directive 97/5* was the first act (with a binding force) regulating this sphere.

The implementation of *Directive 97/5* into national legal orders lasted 30 months. The Directive covered retail credit transfers up to EUR 50.000, defined as transactions carried out on the initiative of an originator via an institution (or its branch) in one State, with a view to make an amount available to a beneficiary at an institution (or its branch) in another State¹²².

Article 12 of this Directive foresaw that a Commission's report should be submitted to the Parliament and to the Council. In November 2002, the Commission produced such report, describing the way in which provisions

¹¹⁹ Trans-European Automated Real-time Gross settlement Express Transfer (TARGET);

¹²⁰ EURO1 is a large value payment system for credit and debit transfers denominated in euro (started operations on 4 January 1999).

¹²¹ R. Hooley and J. Taylor, *Payment by Funds Transfer in Law of Bank Payments*, M. Brindle and R. Cox, London 2004 in: *The Law of Payment...*, op. cit., p. 66.

¹²² Article 2.f ; definitions introduced in this article are not transposed by all the States – *The Law of Payment*, op. cit., p. 68.

of this Directive had been implemented.¹²³ "In general, even if the transposing law was proved to be in line with the principles of this Directive, problems arose by the lack of correct application of national laws by the institutions executing" such transfers¹²⁴. Moreover, the *Directive 97/5* was criticized for not providing instruments for solving conflicts of law.

The report included a few proposals for the revision of this Directive, just to mention – shortening of the maximum execution time (from 6 days) or raising of a EUR 12.500 level of a refund ceiling to EUR 50.000. The authors of the Report noticed the need for a "coherent and comprehensive" legal framework, if the SEPA was to be accomplished within the EU¹²⁵.

Eventually, the Payment Services Directive was called to replace the *Directive 97/5*.

4.3 Definitions

For the sake of clarity – before analyzing the text of the Directive and its concrete provisions – one should be accustomed with the terms and definitions used by the PSD. Firstly, the author would like to underline a difference between views of lawyers and economists on the issue of what does term "payments" mean¹²⁶. "As a rule, the economist's view that everything is money that functions as money is unacceptable to lawyers"¹²⁷. While practically every payments instrument has its own legal status, it is not legally feasible to merge all instruments in one legal qualification¹²⁸. The PSD resolves this terminological dichotomy by qualifying different definitions in one term: "payment services".

The PSD describes – "payment order", as "any instruction by a payer or payee to his PSP, requesting the execution of a payment transaction". "The UNCITRAL Model Law and *Directive 97/5* had defined payment order in a narrower way", the definition was limited to bank credit transfers¹²⁹. It appears worthy to present and analyze concepts such as: "payment services user" or "payment instruments", within the context of the PSD.

¹²³ Report to the European Parliament and to the Council *on the application of Directive 97/5 of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers*, COM (2002) 663 final, 29 November 2002.

¹²⁴ *Ibidem*, p. 71.

¹²⁵ *Ibidem*, p. 72.

¹²⁶ See: R. Goode, *Commercial law*, Penguin, 3rd Ed., 2004.

¹²⁷ Ch. Proctor, *Mann on the Legal Aspect of Money*, OUP Oxford, 6th revised ed., 2005; in: *The law of payments...*, op. cit., p. 146.

¹²⁸ M. C. Malaguti, *The payments system in the European Union: Law and practice*, London 1997 in: *Ibidem*, p. 146.

¹²⁹ *The law of payment...*, op. cit., p. 146.

European Communities even before introducing euro as a single currency – had its own unit of account – ECU¹³⁰. However ECU was defined by reference to fixed sums of national currencies, and even if possible to hold a bank account in ECU, the sum of money had practically to be converted into a national currency in case of withdrawal of tangible money¹³¹. It should be underlined that from the point of view of the PSD, money are understood not only as euro but also as all other national currencies of the States¹³².

The Directive in its article 4.15 describes the term "funds", indicating that this definition comprises: banknotes, coins, scriptural money and e-money¹³³. One can therefore infer that the term *funds* was used instead of the term *money*, since the latter also covers (in its broader sense), the three above mentioned elements. "Such deduction finds same footing on the text of the United Nations Commission on International Trade Law, Model Law for International Credit Transfers, in which both terms are used likewise"¹³⁴.

Another matter worth explaining is the interpretation of terms: "payer" and "payee". These terms have replaced – "originator" and "beneficiary" employed by the *Directive 97/5*. Interestingly, in the "old" Directive, an "originator" meant a natural/legal person ordering a cross-border credit transfer to the beneficiary, being the final recipient of the transfer (articles 2.h and 2.i); on the other hand in the PSD – a "payer" is a natural/legal person, with or without a payment account, with the right of disposal and transfer of funds to the payee; the latter is the intended recipient of the funds of the transaction (articles 4.7 and 4.8). "It is noticeable that the terms "payer" and "payee" are wider, not limited only to credit transfers"¹³⁵.

Furthermore, the PSD introduces a new term – "payment services user" (PSU), which was not present in the *Directive 97/5* (instead a term: "customer" was used). This term has a broader sense than "payer" or "payee" since it can mean either the former or the latter.

The author would also like to point at the difference between "retail" and "gross" payments. This differentiation even though present in the *Directive 97/5* and retained in the initial PSD proposal – was not introduced in the final text of the Directive. The scope of the PSD is extended to all payment services irrespective of amount.

¹³⁰ The central element of the EMS (European Monetary System) – a composite currency (basket of currencies); made up of specific amounts of each of the participating currencies, calculated by multiplying the weight assigned to each currency by that currency's exchange rate vis-à-vis the ECU; <http://www.europarl.europa.eu/>.

¹³¹ J. A. Usher, *The law of money and financial services in the EC*, Oxford 2000, p. 4.

¹³² Vide art. 2.2; *The law of payments...*, op. cit., p. 142.

¹³³ E-money Directive defines e-money as a monetary value as represented by a claim on the issuer stored on an electronic device and issued on receipt on equal funds with the monetary value issued.

¹³⁴ *Ibidem*, p. 143.

¹³⁵ *Ibidem*, p. 148.

4.3.1 Payment services

There are different methods as to categorize "payment services", while those define more or less the same issues, the author will not investigate this matter¹³⁶. The Directive lists the payment services in the *Annex* (such form is an innovation in this field).

For many years, legal scholars "racked their brains about the question if payment services are a banking activity", which would implicate the necessity to apply high standards of banking supervision. A significant step towards the "liberalization" of payment services was made with the adoption of E-money Directive in year 2000¹³⁷, payment services found their legal autonomy and were partly separated from the banking activity *sense stricto*¹³⁸.

If assume that all the listed payment services are at the same time banking services, one could think that these activities should be implemented by banks. One explanation could be that payment services have been traditionally connected to the work of accepting deposits, since the settlement comes in the second stage of payment transaction. As netting and transmission of information do not require any viability of deposits, such services could be safely carried out by "non-deposit-taking (non-banking) institutions". Another point of view is that – since payment services "comprise the whole process of issuing, collecting and transmitting the instruments of payment, including the netting and final settlement of payments", the service of transmitting payment data is not strictly a payment service but more of an auxiliary form thereof¹³⁹. The method introduced by the Directive is a single licensing regime for all PSPs not linked with taking deposits or issuing e-money, by the competent authority in the home country.

The PSD proposal had attempted to offer a general definition of "payment services", stating that the Directive "shall apply only to business activities, listed in the *Annex*, consisting in the execution of payment transactions on behalf of a natural or legal person, hereinafter payment services, where at least one of the PSPs is located in the Community". This attempt to qualify the activity as that of intermediation in the execution of payment transactions was not retained in the final text¹⁴⁰.

The PSD does not deliver a literal definition of "payment services", which are only mentioned as "business activities" enumerated in the Annex. There are seven types of payment services enumerated, with a wide range of

¹³⁶ See: ECB Blue Book, August 2005; *Payment system in th European...*, op. cit.

¹³⁷ Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions, OJ L 275, 27.10.2000.

¹³⁸ *Ibidem*, p. 150.

¹³⁹ *Ibidem*, p. 151.

¹⁴⁰ M. C. Malaguti, *The Payment Services...*, op. cit., p. 6.

transactions, the delimitation of which is not always very clear (in the initial proposal there were even more categories). Alongside the classic operations of placing cash on (withdrawing cash from) a payment account, there are the three categories of SEPA instruments: "credit transfers, payment cards, and direct debits." As for the currency, whilst the "E" in the SEPA acronym refers to "euro" rather than "European", the scope of the PSD is defined in its article 2 and relates to the latter¹⁴¹.

In the first chapter of this thesis, the popular categories of payment instruments have been mentioned and shortly presented. The Directive explicitly excludes from its scope: cash-payment transactions and cheques. What was the reason of such exclusion?

In case of "cash", it is not a new view of the European authorities that cash is losing its dominance and the new methods of payments are taking its place¹⁴². Additionally, according to Recital 19 of the PSD: "Single Payment Market for cash already exists". Generally, it is widely agreed that in the modern economy "cash" has serious drawbacks¹⁴³. It is the same reason why cheques (traveller's cheques, eurocheques, banker's drafts) have not been included. "The high handling costs, especially for the cross-border cheques, do not argue for the cross-border blossoming of this payment instrument in the future"¹⁴⁴. It is noteworthy that already *Regulation 2560/2001* excluded cheques from its scope.

Basing on the Directive we can distinguish following types of payment services (with examples):

¹⁴¹ Ch. Kohler, *Banks in Europe must turn attention to PSD*, Bank Systems and Technology, Americas Head of Financial Institutions, Global Transaction Banking, Deutsche Bank, January 05, 2009.

¹⁴² COM (1990) 447 final, 26 September 1990, p. 9.

¹⁴³ *Retail Payments...*, op. cit., p. 2.

¹⁴⁴ X. Favre-Bulle, *Les Paiements Transfrontières dans un Espace Financier Européen*, Helbing & Lichtenhahn, Basle 1998 in: *The law of payment...*, op. cit., p. 155.

Table 3¹⁴⁵.

Payment service	Examples
Services enabling cash to be placed on a payment account and all operations required for operating such account.	Payments of cash into a payment account over the counter and through an ATM.
Services enabling cash withdrawals from a payment account and all of the operations required for operating a payment account.	Withdrawals of cash from payment accounts, for example through an ATM or over the counter.
Execution of: direct debits (including one-off); payment transactions executed through a payment card or a similar device; credit transfers.	Transfers of funds with the user's PSP or with another PSP. Transferring e-money; credit transfers, such as standing orders.
Execution of transactions where the funds are covered by a credit line for a PSU: direct debits, (including one-off); transactions through a payment card or a similar device; credit transfers.	Direct debits using overdraft facilities; card payments; credit transfers using overdraft facilities.
Issuing payment instruments or acquiring payment transactions.	Card issuing (other than technical providers who do not come into possession of transferred funds) and card merchant acquiring services.
Money remittance	Money transfer/remittances that do not involve payment accounts.
Execution of transactions where the consent of the payer is given by means of any digital or IT device and the payment is made to operator of such, acting only as an intermediary between the PSU and the supplier of the goods/services.	Mobile or fixed phone payments; payments made from handheld devices (BlackBerry).

4.3.2 Payment services providers

The Directive regulates "payment services", which are provided to users (called: "payment services users") by "payment services providers" (PSPs). In the meaning of the PSD, the category of providers covers a wide range of entities (e-money institutions, credit institutions, the ECB, national authorities or payment institutions). It's worth mentioning that according to the PSD proposal, there were only four main categories of providers. The ECB or national authorities have not been mentioned initially, eventually they are considered as payment institutions as long as they are acting as private entities, not in their capacity of public authorities¹⁴⁶.

The Directive introduces a new category: "payment institutions", "other natural or legal persons who have been granted authorization to provide and

¹⁴⁵ Financial Services Authority, *The FSA's role under the Payment Services Regulations 2009*, p. 13.

¹⁴⁶ *Ibidem*, p. 152.

execute payment services throughout the Community”, for which the provisions of first part of the PSD apply. This term appeared for the first time in the text of the *Regulation 2560/2001*, but had not been explained¹⁴⁷.

For all other categories of PSPs it will be the third and the fourth Title (transparency and rights) of the PSD that are applicable, instead of the second Title (authorization requirements). There are two categories of PSPs, which are currently regulated under European law and benefit from mutual recognition in the EU. These are: credit institutions under the *New Banking Directive 2006/48*, and e-money institutions, regulated in *E-money Directive 2000/46*. As authorization requirements should be carried under the existing legal standards – only the transparency requirements and rights/obligations of the parties would apply in this case.

The payment institutions have the status of a special form of PSPs, which are neither e-money institutions nor credit institutions. This differentiation could be explained by the fact that – in general – a lower level of risk characterizes activities undertaken by payment institutions¹⁴⁸.

The Directive mentions also ”post office giro institutions” as a category of PSPs. Such entities are covered only by the third and the fourth Title of the PSD; these are also out of scope of the *New Banking Directive*¹⁴⁹. Beyond a doubt a clarification – how to define this category would be welcomed.

Member States are also empowered to waive the application of some provisions of the PSD in relation to institutions listed in article 2 of the *New Banking Directive* (except two first intends). Those entities are excluded from the scope of that Directive; still the States have the option to allow them to offer payment services.

4.3.3 Payment instruments

”Payment instrument” is understood as ”any personalized device and/or set of procedures agreed between the PSU and the PSP and used by the PSU in order to initiate a payment” (art. 4.23). It is important to clarify which devices and procedures fall under this definition. As part of the ongoing dialogue between the PSD EG and the EU Commission, the Commission provided the explanation¹⁵⁰:

”This definition in the original Commission proposal was meant to include only *payment (verification) instruments*, which would cover physical devices (such as cards or SIM cards) and/or set of procedures (such as PIN codes, (...), digipass, login/password...) which a PSU can use to give

¹⁴⁷ Ibidem, p. 153.

¹⁴⁸ Ibidem, p. 151.

¹⁴⁹ Capital Requirements Directive, comprising Directive 2006/48, OJ L 177, 30 June 2006 (The New Banking Directive) and Directive 2006/49, OJ L 177, 30 June 2006 (New Capital Adequacy Directive).

¹⁵⁰ A letter of 28.03.2008.

instructions to his PSP in order to execute a payment transaction. This definition should be read together with definitions 19 (“authentication”) and 21 (“unique identifier”). So, a payment instrument is used to initiate a (...) transaction whose execution is part of a payment service (a direct debit, a card payment, a credit transfer). If the (...) transaction is initiated by paper, the paper slip itself is not considered as a payment instrument”¹⁵¹.

Article 55.2 of the PSD, gives the PSP the right to block the use of a payment instrument for objectively justified reasons, if such right has been agreed in the framework contract. In case the PSP uses this right – has to inform the PSU in accordance with article 55.3¹⁵². *Nota bene*, locking an account by a PSU herself/himself is not covered by this provision.

4.3.4 Payment account and money remittance

The PSD defines the category of “payment account” with the aim to avoid connecting the activity of providing payment services to already existing concepts as f.i. ”savings account”. With the new definition, the PSD seems to indicate that even assuming that an account is needed as to execute a transfer, it does not implicate that it has to be an account of the kind that qualifies banks or other existing financial institutions providing deposit and lending services¹⁵³.

Article 4.14 describes the “payment account” as “an account held in the name of one or more PSUs which is used for the execution of payment transactions”. ”Even so, a payment transaction under the PSD is no more than a money transmission, since it is irrespective of any underlying obligations between the payer and the payee” and it includes deposits and withdrawals (Art. 4.5). It could be concluded that the legislator’s attempt was to reflect the fact that fiduciary money, being scriptural in essence, need an account in order ”to exist”¹⁵⁴.

The Commission attempted to clarify this matter with an answer in its Q&A publication, where the question was whether a mortgage account that included payment facilities to reduce the overall mortgage balance could be seen as a “payment account”. The answer of the Commission distinguished between early repayments (where the lender is in fact the payee, excluding the account from the definition) and use of payment facilities to reduce the overall mortgage balance, which would be considered a payment account “as far as it is used for making payment transactions”¹⁵⁵.

This issue is further complicated by the fact that no explicit definitions of “deposit” or “repayable funds” exist in the Community’s legislation.

¹⁵¹ Ibidem, p. 153.

¹⁵² Q&A, article 55.2, 20.10.2009, Question no. 324.

¹⁵³ M. C. Malaguti, *The Payment Services Directive. Pitfalls between the Acquis Communautaire and National Implementation*, Brussels 2009, p. 6.

¹⁵⁴ Ibidem, p. 6.

¹⁵⁵ Q&A, 22.5.2008, article 4.14; Question no. 11.

The Commission is aware that there are operators in the market, which provide the transmission of money without a need for an account. Such operators simply offer the service of transferring cash. Among themselves, they may use fiduciary money to execute the order. The fact that they might not require any account favours the use of such services by for example – immigrants intending to send money home. If this sphere was left unregulated, competition could be distorted. "Over-regulation, however, may lead a number of them to go underground to conduct business"¹⁵⁶.

Money remittance providers do intermediate in payment transactions by providing a service that has the same business characteristics as those of PSPs holding also payment accounts, confirming that there is no need for an account to provide such services.

Money remittance services were already included in the *Directive 2006/48*¹⁵⁷ as one of the services that credit (or other financial) institutions could provide. The PSD proposal kept the same approach, by including money remittance services within the services listed in the *Annex*, but presented these as a kind of service deriving from typical banking activities (cash deposits/withdrawals and execution of payment transactions by way of traditional payment instruments, such as credit/debit transfers or cards). Money remittance services were indeed offered by the same kinds of institutions providing such other services; a lack of a payment account was not mentioned¹⁵⁸.

A different approach has been taken in the final text of the PSD, which delivers a specific definition of "money remittance" with a clear reference to the lack of a payment account and includes in this category non-financial institutions, such as merchants, supermarkets and retailers (art. 4.13)¹⁵⁹.

4.4 Possibilities for new entrants

The range of payment services and of PSPs covered by the PSD excludes a number of important categories of players and services. As a result, it will be much easier for new entrants to provide such services; neither a formal authorization is required nor compliance with any specific capital requirements (or conduct of business rules). Some of the most relevant categories are:

1. Closed-loop systems with a limited acceptance network; it would include retailer private-label cards that could only be used at that retailer's outlets; the definition of limited network in the PSD is not very clear, still: a petrol card of a single petrol brand should be

¹⁵⁶ Ibidem, p. 8.

¹⁵⁷ Capital Requirements Directive, op. cit.

¹⁵⁸ Ibidem, p. 8.

¹⁵⁹ Ibidem, p. 9.

covered, as well as a card that could only be used for buying petrol at multiple brands' stations.

2. ATM cash provision; companies that provide cash withdrawal services at ATMs without providing any other value-added payment services (as mobile top-up, money transfer, pre-paid card loading) do not have to be authorized, nor will the business rules apply to them (except for a few transparency requirements). A cash withdrawal transaction does fall within scope of the PSD, but will be covered by the card issuer (will have a framework contract with customer).
3. Payment systems by which telecoms provide mobile-phone-based services to purchase goods/services and where a telecom does more than just acting as an intermediary (again not a clear definition).

A number of payment services – limited in scope – have a privileged position owing to their exemption from compliance with the PSD. "New entrants can therefore be expected to focus on this type of activity to avoid the compliance/authorization process and to be able to have a shorter go-to-market timeframe. This could potentially have negative consequences for consumers, if resulted in a multitude of new PSPs that do not have to observe the same rules regarding transparency and consumer protection". Consumers could be faced with lower service levels (and higher risk) in the market for some areas of activity¹⁶⁰.

Furthermore, because of the limited scope of the payment services, consumers could end up with many different payment instruments, each covering only a small part of their payment needs. This could not be beneficial in terms of convenience/efficiency or to achieve a single payments market in Europe.

The final set of implications is related to non-EU players and activities partially involving non-EU-based providers or end-users. The PSD primarily covers payments taking place within the EU and EEA countries. The so-called *one-leg-out* transactions (one leg of a transaction is happening outside the EU) are – in principle – out of scope.

An issue to be clarified in this area is the situation of non-EU-based banks with only a branch presence within the EU (without separate legal entity). "These branches could potentially not provide payment services without obtaining the authorization unless the bank established itself legally as a credit institution in an EU country", basing on the interpretation of a credit institution according to the *Directive 2006/48*, which seems to imply that an organization needs to have a legal entity with its head office in a Member State, in order to be granted the authorization of a credit institution¹⁶¹.

A good practical example, illustrating potential implications for non-EU players would be a case of cross-border merchant acquiring for card payments. International merchants may choose an acquirer for their global

¹⁶⁰ *The Payment Services...*, op. cit., p. 107-108.

¹⁶¹ *Ibidem*, p. 109.

card activity; such an acquirer may well be an organization not established within the EU/EEA as a credit institution (using a global license obtained from an international card scheme). Such an acquirer, even though a bank in a non-EU country would then presumably have to become a payment institution under the PSD. This could not be economically justified in some cases (f.i. only small part of business conducted in the UE)¹⁶².

4.5 Implementation of the PSD

EU directives lay down certain end-results that must be achieved in every Member State. National authorities have to adapt their laws to meet these goals, but are free to decide on the method. Each directive specifies the date by which national laws should be adopted – giving national authorities a room for manoeuvre within deadlines necessary to take account of differing national situations¹⁶³. This has implicated that cross-border retail credit transfers became costly and time-consuming (one could argue that a lack of competition was the problem here). The first time that such transfers were regulated (with a binding act) was the *Directive 97/5*¹⁶⁴.

Developing and implementing Europe-wide legislation is a complex process, fraught with difficulties. National interests come to the fore and political agenda takes precedence. Little wonder that the process of implementation of the PSD is pending. In addition – in the PSD – the Member States have received some doze of additional autonomy, in shape of 23 opt-outs, which will be enumerated and analyzed in a separate chapter.

Even though the deadline for the implementation of the Directive has already passed, some countries have yet to transpose the directive into national law¹⁶⁵. According to Simon Bailey, director of payments at *Logica*¹⁶⁶: ”the implementation of the PSD has taken longer than the industry would have liked, but as long as people still feel it is of value, the differences will be ironed out and the situation will be improved”¹⁶⁷.

Even though the delays in transposition could implicate some perturbations. According to Ruth Wandhofer, vice-president, cash management EMEA at *Citi Global Transaction Services*: ”individual banks within the countries that will be transposing late can follow the best practice principles that have been issued in industry guidelines, which include, for example, no float and no deductions. However some banks may be hiding behind the fact that the laws will not be in force to continue business as usual – this will be an issue for cross-border payments because it will create inconsistency”¹⁶⁸.

¹⁶² Ibidem, p. 110.

¹⁶³ <http://europa.eu/>.

¹⁶⁴ Ibidem, p. 67.

¹⁶⁵ H. McKenzie, *Feature: PSD – Lack of harmony*, November 2009, p. 1.

¹⁶⁶ Logica is a business and technology service company, delivering business consulting, systems integration and outsourcing across all industries and business functions.

¹⁶⁷ Ibidem, p. 2.

¹⁶⁸ H. McKenzie, *Counting down to PSD*, Business Finance, March 2009, p. 2.

The PSD is a compulsory initiative, which means that delays, understandable given the challenging financial climate – cannot be an excuse for failure to comply. ”Although the consequences for those who miss the deadline are not set in stone, those who do not comply in time may be subjected to regulator-imposed fines and investigations, as well as exposed to reputational risk...”¹⁶⁹.

For instance, the UK has been one of the trailblazers – its legislation entering into force in March 2009 (8 months before the deadline). The British Government stated that it had committed to the early implementation in order to ”help firms consider the incoming requirements and prepare for compliance”. The Financial Services Secretary to the Treasury, Lord Myners said: ”this legislation will drive competition in the market for payment services, leading to greater efficiency, transparency and more innovation, bringing further benefits and certainty to UK consumers and businesses making everyday payments. It will also enhance consumer protection, with the new rules for PSPs”¹⁷⁰.

”The real problem with this Directive would (...) be the fact that on a number of issues it has not proved possible to come to a hilly binding harmonization. Whilst the declared principle is that of *complete harmonization*, on about two dozens issues (...) States are allowed to opt out the provisions agreed upon... Those escape clauses are (...) politically inspired and contradict the function (...) of providing legal uniformity”¹⁷¹.

Perhaps of even more practical importance will prove the differences between national laws of the Member States, which the Directive has chosen to ignore; these relates to issues such as the detailed elaboration of liability, the burden of proof and civil procedures¹⁷².

”As for possible remedies to this, it is submitted that whatever its ambitions, it would not be a proper role for the Commission to seek to solve these problems by *interpretative notes* or the like, as the Community legislature has apparently chosen to leave those issues to national law. On the same ground, the scope for guidance by the ECJ by way of preliminary rulings seems to be rather narrow”¹⁷³.

According to Luigi Brescia, special adviser at Italy-based payment processor *SIA-SSB*¹⁷⁴: there are different levels of harmonization in different

¹⁶⁹ M. Burkie, *Comment: PSD: are you prepared?*, BNY Mellon, p. 1.

¹⁷⁰ Counting down..., op. cit., p. 2.

¹⁷¹ M. van Empel, *Retail Payments and the Arduous Road to SEPA*, Common Market Law Review 46, 2009, p. 930.

¹⁷² *Ibidem*, p. 931.

¹⁷³ *Ibidem*, p. 931.

¹⁷⁴ SIA-SSB provides services and solutions to international financial community in the areas of payment card processing, payments systems, capital markets and network services for connectivity and messaging; SIA-SSB Group currently operates in over 30 countries.

countries. "In reality, what we have today is not really harmonization between different countries"¹⁷⁵.

4.6 Optional clauses

It is evident that the text of the PSD is far much more liberal than the text of the PSD proposal, while it enables the States to introduce more stringent measures in several areas¹⁷⁶. While there were only three exceptions in the text of the PSD proposal, eventually there are twenty-three provisions left to the discretion of the States.

The first exception concerns the field of application of transparency conditions and information requirements to consumers; while according to article 30.1, parties may agree that these provisions apply only to consumers, the States have an option to provide by virtue of article 30.2 that consumers and micro-enterprises are to be treated in the same way. Similar exception applies *mutatis mutandis* (art. 51.3) to the rights and obligations of the parties in relation to the provision and use of payment services¹⁷⁷.

Another exception is relevant to the burden of proof on information and is foreseen in article 33 of the PSD. This provision directly allocates the burden of proof to the PSP. Nevertheless it is left for the discretion of the Member States to choose, if they want to introduce this provision, or decide on their domestic contract law¹⁷⁸.

Articles 34.2 and 53.2 also depart from the principle of full harmonization; in case of purely national low value payments, the States have the option to set a specific amount that constitutes "low value", up to threshold of EUR 500 (may set such tier, basing on a demanded level of consumer protection).

Furthermore, article 45.6 (termination of the framework contract) empowers the Member States to introduce more favourable provisions for PSUs, by increasing the period notice for the termination of framework contract for the PSPs. An analogous exception to the maximum harmonization rule can be found in article 48 (information to be provided to the payee).

The pro-consumer spirit of the PSD is noticeable also in article 47, which sets forth the information to be provided to the PSU (on individual payment transaction). According to its last paragraph, the States are empowered to oblige PSPs to deliver information on paper, once a month and free of charge. The relevant provision of article 52.3 has been introduced after the proposal and concerns the option to prohibit/limit charges raised from the payee to the payer for the use of specific instruments¹⁷⁹.

¹⁷⁵ PSD – lack..., p. 3.

¹⁷⁶ *The Law of Payment...*, op. cit., p. 120.

¹⁷⁷ Ibidem, p. 120.

¹⁷⁸ Ibidem, p. 121.

¹⁷⁹ Ibidem, p. 121.

Article 61.3 introduces a significant exception from the maximum harmonization rule; this provision regulates the PSU's liability for losses in respect of unauthorized transactions and raises the limit of EUR 150 before the notification to the PSP. "Lies in the discretionary power of the national legislator to go beyond the harmonizing line of the EC legislature and curtail the payer's liability by minimizing the limit of the amount that the payer has to pay"¹⁸⁰.

Finally, there is an optional clause (article 72) giving the States the freedom to shorten the maximum execution time for national payments. It should be underlined that this provision covers only "pure" national transactions. Such limitation has been designed as to protect the competition among PSPs across the EU, while the provision of shorter execution times for national PSPs could implicate a discrimination against the national providers and impair the competition thereof.

4.6.1 Comparative analysis (Poland, Sweden, UK)

Table 4¹⁸¹.

Republic of Poland	United Kingdom	Kingdom of Sweden
Art. 33	Art. 30.2	Art. 9.3
Art. 45	Art. 34.2	Art. 47.3 (on request)
Art. 53.3	Art. 53.2	Art. 48.3 (on request)

Basing on the table, only Poland plans to stipulate that the burden of proof shall lie with the PSP, as to prove that it has complied with the information requirements (art. 33).

Article 45 of the PSD regulates the termination of the framework contract; Poland is again, the only State from this poll to opt for and to provide more favourable provisions for the PSU.

The last situation where only Poland decided to use an optional clause is art. 53.3, according to which the State has the right to limit the derogation to payment accounts or payment instruments of a certain value – articles 60 and 61 apply also to e-money, except where the payer's PSP does not have the ability to freeze the payment account or block the payment instruments.

On the other hand, only in the UK – microenterprises will be treated according to the same rules as consumers (art. 30.2). The other two Member States did not decide to opt for this solution.

Article 34 (derogation from information requirements for low-value payment instruments and e-money) introduces two optional solutions for the States. First of them is to either reduce or double the amounts eligible for reduction according to the first paragraph. Additionally there is a possibility

¹⁸⁰ Ibidem, p. 121-122.

¹⁸¹ The table presents derogations, unique to each Member State from this poll.

to increase amounts for prepaid instruments up to EUR 500. The UK has decided to raise the limits in both cases (the maximum level for the former).

There is one another provision, transposed only in the UK, also connected with optional heightening of limits for the derogation (art. 53 – derogation for low value payment instruments and electronic money).

Furthermore, in case of Sweden, there are also three provisions, which have not been opted for by the other two States. First of them concerns, possible additional safeguarding measures for payments institutions (art. 9), Sweden decided to set them as a standard.

Finally, Swedish consumers will be provided with the information on individual transactions on paper once a month free of charge (on request). That is not the case for clients in the other two Member States. It will cover both, information for the payer and for the payee (articles 47 and 48).

As we can see from the above, at first sight the differences are not of the size that could hinder the general success of the PSD. Nevertheless, even in this short comparison, one can notice that totally unilateral conditions across the EU will not be the case – some differences will prevail. It should be noted that if compared all the States (including EEA countries), the final result of the implementation could not be a coherent system; some solutions are introduced by a certain group of States while another by completely different States, which obviously implicates significant unclarity for a potential consumer. We could imagine a European citizen using payment instruments in three different States and having to remember national differences in case of any single transaction (even if of a smaller calibre).

Additionally, if we compare a two States with each other, for example the UK and Poland – we will see that there are seven optional clauses implemented in UK (articles: 2.3, 10.2 34.2, 51.2, 51.3, 53.2 and 61.3) that are not planned in Poland. Inversely, there are five options that are to be introduced in Poland (articles: 26.4, 33, 45.6, 52.3 and 53.3) but were not introduced by UK.

There is a similar situation between Poland (articles: 7.3, 9.2, 26.4, 33, 45.6 and 53.3) and Sweden (articles: 9.4, 47.3, 48.3, 51.2, 51.3 and 61.3) – we will find six options in each State that have not been opted for in another.

Poland decided not to apply the liability provisions for unauthorized transactions when the payer's PSP does not have the ability to freeze the account or block the payment instrument limited to accounts or instruments of a certain value (art. 53.3). The English legislator had not transposed this option; nevertheless another provision from the same article (53.2) was applied (increase of the amounts for prepaid instruments up to EUR 500 plus, doubling of the amounts for national transactions). One article, delivering two provisions – two different decisions on the implementation.

On the other hand, Austria decided to opt for both derogations. That surely is not the ultimate unification that we would dream about.

In case of, another possible derogation (art. 51.3), interdiction or limitation of surcharging practices – both Poland and Sweden are to implement this option, while UK did not. The implication is that – we have a general rule – the PSP will not prevent the payee from requesting from the payer a charge or from offering him a reduction for the use of a given payment instrument. However, Poland and Sweden are expected to forbid the right to request charges; there are also a few States that decided to limit this optional provision and in effect – there could be three different positions of the same consumer dependent on the location – Austria (interdiction), Finland (limitation) or Czech Republic (did not apply).

According to article 33, the States "may stipulate that the burden of proof shall lie with the PSP to prove that it has complied with the information requirements". Beyond a doubt this was designed as a pro-consumer provision, however from the analyzed poll, only Poland plans to transpose this solution. If one compared the choices of all the States – incidence of each option is similar; also in this case a consumer will have to check, if the provision exists in the concrete national law.

Articles 47.3 and 48.3 deliver an option for the States to enact provision of information to the payer/payee on paper once a month, free of charge. From the three analyzed States only Sweden decided to introduce this clause, but it is not a rule – the PSU has to request this solution from hers/his PSP. It is worth mentioning that none of the States has decided to transpose this provision in full.

Last but not least, article 61 describes the liability of the payer for unauthorized transactions; there is another optional clause introduced in the third paragraph: "reduction of payer's liability (...) taking into account the nature of personalized security features of the payment instrument". There is no such State that has implemented all the possible pro-consumer solutions. For instance, Poland does not plan to transpose in this case, but Sweden does and UK has already transposed this provision. Furthermore, we have additional differentiation between the States that have opted for this solution, for example: the UK introduced a limitation up to GBP 50, in the Netherlands competences judge under certain circumstances and in Slovakia the limit is EUR 100 (in Ireland it is only EUR 75). This differentiation not only limits consumers' rights in many States but also implicates inconsistent framework and could hinder the aims of the Directive.

5 Analysis of the provisions of the PSD

Ultimately, it is the text of the Directive that constitutes its character and directs the actual impact. In this particular situation, the PSD is an act with a unique set of optional clauses, which could significantly influence its efficiency. That issue has been already mentioned in the previous chapter and could be a very interesting field of analysis itself.

”The PSD is a solid mass of 96 articles. It has a twofold structure and constitutes a prototype mixture of private and public rules of law”. The second Title (art. 5-29) covers authorization requirements for payment institutions; the third and the fourth Title (art. 30-83) regulate information and transparency matters as well as ”comprise provisions on contract law”¹⁸². It is noteworthy that the provisions on information requirements are binding and that the States cannot adopt information provisions other than those introduced by the PSD. This maximum harmonization clause was designed as to guarantee a homogenous implementation and application of the provisions.

The Directive consolidates the existing European legislation in the field of transparency requirements of payment services, by replacing the *Directive 97/5*, *Recommendation 97/489*¹⁸³ and two earlier recommendations (87/598¹⁸⁴ and 88/590¹⁸⁵, which had been replaced by the *Recommendation 97/489*). The PSD integrates the existing binding and non-binding legislation into one single act with a binding force.

5.1 Framework contracts

The distinction between single payment transactions and transactions covered by framework contracts is a novelty in this field of EU law, while such differentiation was not present in the earlier legislation.

The rationale for the distinction between single payment transactions covered by an agreement and individual, isolated payment transactions is that the former are substantially more important. Furthermore, since they incorporate an initial service agreement followed by a series of successive

¹⁸² *The law of payment...*, op. cit., p. 119.

¹⁸³ Recommendation 97/489 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder, OJ L 208, 2 August 1997.

¹⁸⁴ Recommendation 87/598 on European Code of Conduct relating to electronic payment, OJ L 365, 24 December 1987.

¹⁸⁵ Recommendation 88/590 concerning payment systems and in particular the relationship between cardholder and card issuer, OJ L 317, 24 November 1988.

transactions, some doze of the information needs to be communicated only to the initial agreement and not to the deriving transactions¹⁸⁶.

Framework contracts are defined in article 4.12 of the PSD – as payment service contracts for the future successive or individual payments transactions. A framework agreement “may incorporate the contractual conditions for the payment account, not being the only one, is therefore the key element within a framework contract”. Within the context of this agreement the PSU makes deposits/withdrawals of funds, which form the “successive payment transactions”. The contract “governing the account relationship endows (...) services with (...) operational legal framework”¹⁸⁷.

The relationship between a payment institution and its customer involves different types of payment services, but in their vast majority these are operated within the broad framework of a payment account, which in most of cases forms the centre and the basis of those services. The European legislator did not qualify the legal nature of such contract; national authorities, while implementing the PSD, should apply existing national laws applicable to payment contracts or opening of accounts¹⁸⁸.

In general, the framework contract is “composed of express and implied terms, with the latter being customary or usage-based and the former being usually standard form contracts”, mostly in favour of the bank. This is the reason why – in case of doubts – such terms are typically strictly interpreted against the bank¹⁸⁹.

5.1.1 Information provided before the contract

In a “good time” (it was not specified when exactly) before the conclusion of any framework contract, the PSP is bound to communicate the conditions cited in article 42 of the PSD (art. 41.1). Either on paper or on other durable medium, the information must be comprehensible for the PSU; in the official language of the State in which the service is offered (or in any other language upon parties’ agreement). It is worth mentioning that the PSD proposal provided also that such information should be “accessible” to the PSU. Such condition was introduced by the *Directive 93/13* – the final text did not copy this solution, instead repeated the “comprehensible form” from article 3 of the *Directive 97/5*. However, the accessibility clause can be found separately in article 43, the PSU can (upon request) receive contractual terms of the framework contract¹⁹⁰.

¹⁸⁶ *The law of payment...*, op. cit., p. 202.

¹⁸⁷ *Ibidem*, p. 203.

¹⁸⁸ *Ibidem*, p. 203.

¹⁸⁹ B. Geva, *Bank Collections and Payment Transactions, Comparative Study of Legal Aspects*, Oxford 2001, p. 29-30.

¹⁹⁰ *The law of payment...*, op. cit., p. 205.

As comes to pre-contractual information, the PSP is discharged from hers/his obligations according to the PSD, "upon supply of a copy of the framework contract, containing the necessary information" (art. 41.3).

The conditions that the PSP has to communicate before the conclusion of the framework contract (ex ante) are described in far much more details than in the previous directives (and recommendations). The reason is that PSPs as contracting partners, have the advantage of knowledge, which has to be balanced by information, so as to give the PSUs "the possibility to decide *en co naissance de cause*, before thy place their order"¹⁹¹.

Article 42 encloses the information that has to be communicated to the PSU. Interestingly, many of the provisions of this article have been added after the PSD proposal. "Along with article 30.1, the PSD opts for an essentially higher level of protection for PSUs than the previous legal acts for payments"¹⁹². It is divided into seven main parts – information on the: identity of the PSP, use of payment service; the charges; corrective measures; termination; redress and the way of communicating information.

Obligations and liabilities of the PSP constitute a major part of the information requirements; among others the PSD enforces the PSP to communicate the main characteristics of the service and to specify the unique identifier and the maximum execution time for the provision of payment services (42.2.e). The PSP is further obliged to inform PSUs of their right to terminate an initial payment service contract (art. 42.7).

The order of information requirements comprises equally a spending limit for certain services, a reference to the point in time of receipt of a payment order, charges and interest that the PSU has to pay to the PSP, as well as interest and exchange rates applied to payment transactions (art. 42.3; all these elements were also included in article 3 of the *Directive 97/5*).

5.1.2 Changes in conditions and termination

The PSD does not contain any specific rules on the formation of the framework contract. As a result, it is left under the authority of the Member States. Although, the Directive encloses rules in case of changes in contractual conditions (art. 44) that are substantially shorter and less detailed than the information requirements under article 42. Any changes in the conditions have to be communicated at least two months before their application (there was one month period in the PSD proposal). There is a possibility to assume that the PSU accepts the changes in a situation where (s)he does not object to them before their entry into force (art. 44.1)¹⁹³.

The two-month notice period applies to "any changes in the framework contract", whether they are related to a payment account or to individual

¹⁹¹ Ibidem, p. 205.

¹⁹² Ibidem, p. 205.

¹⁹³ Ibidem, p. 207.

transactions. The PSP has to inform the PSU "in the same way as provided for in article 41.1", the PSP has to provide the information on paper or another durable medium. According to Recital 27, "provide" means "actively communicate by the PSP at the appropriate time (...) without further prompting by the PSU". For instance, press announcement or a statement, which has not been sent to the PSU would not be sufficient¹⁹⁴.

The second paragraph of article 44 introduces an exemption for PSPs in case of change in the interest rates when "such a right is agreed upon in the framework contract". In any case neither the two months' notice nor the conditions of article 44.2 apply, if changes are more favourable to the PSU.

"The aim of this provision is to protect the PSU from a unilateral change (...) imposed by the PSP. For example, a change in the address of the PSP could have a negative impact on the PSU, if the PSP suddenly decides to move its branch to a remote area far from the place of the PSU"¹⁹⁵.

Article 45 of the PSD covers the termination of the framework contract with a view to enhance mobility of customers. In this respect, it establishes the free of charge and immediate, or within a maximum one month period of notice, if there was an explicit agreement between the parties (art. 45.2), termination of such contract, as well as the proportional payment of charges and the respective reimbursement in case of payment in advance (45.4). Upon agreement the PSP may terminate a framework contract concluded for an indefinite period by giving at least two months' notice (art. 45.3). There is also a minimum harmonization clause introduced in the last paragraph – allowing the States to adopt more favourable provisions for PSUs. Beyond a doubt, the aim of this provision is to facilitate and liberate the PSU from a non-desired contract, and also to promote user's mobility¹⁹⁶.

Article 45.3 allows PSPs to terminate a framework contract only when it is agreed in the framework contract itself and when the contract is concluded for an indefinite period. In such cases, PSPs have to respect at least two months' notice. Whatever the reasons for which PSPs want to terminate the framework contract, this period has to be respected.¹⁹⁷

This article should be seen in connection with the *Directive 93/13 on unfair terms in consumer contracts* – although, as listed in the *Annex* to the Directive, "a clause enabling the supplier to terminate a contract to indeterminate duration without reasonable notice and without serious grounds must be regarded as unfair", the second paragraph of the *Annex* explicitly allows the supplier of financial services to reserve the right to unilaterally terminate such contract, when there is a valid reason, on the conditions that the supplier informs the other contracting party without undue delay. In the absence of such provision within the PSD, "we can

¹⁹⁴ Q&A, article 44, 5.6.2009, Question no. 248.

¹⁹⁵ Q&A, article 42.1.a, 18.6.2008, Question no. 47.

¹⁹⁶ *Ibidem*, p. 208.

¹⁹⁷ Q&A, article 45.3, 28.5.2009, Question no. 237.

deduce that the *Directive 93/13* will be applicable for PSPs in such cases”, where a “valid reason” exists¹⁹⁸.

According to the Report on the implementation of the *Directive 93/13*¹⁹⁹, the financial services field appeared second in the list of “problematic” sectors, with 1200 unfair terms overall. The most common concerned: obligations of the consumer, the conclusion of contracts and the termination. That could explain why the European legislator decided to regulate “positively” the field of financial services, by establishing concrete information requirements for PSPs. *Nota bene*, to all unfair practices – not regulated by the PSD – the *Directive 93/13* is applicable²⁰⁰.

5.2 Single payment transactions

Article 35 of the PSD delimits the application field of the chapter dealing with single payment transactions, not covered by a framework contract. Although the PSD does not offer an exact and comprehensive definition of “single payment transactions”, it can be deduced from the formulation of article 35 that every payment transaction not covered by a framework contract falls under this category. These are consequently solitary operations of PSUs, not attached to the specific PSP through a “framework contract”.

Moreover, there is the possibility of a single payment transaction whose order is transmitted by a payment instrument covered by a framework contract. This is a *sui generis* category which falls between individual transactions and transactions covered by a framework contract and the PSP does not have to provide to the PSU information already given on the basis of the framework contract (art. 35.2)²⁰¹.

Beyond the innovative distinction between single payment transactions and transaction falling under the broader framework of payment agreement, the European legislator treats both in similar way. Individual, single payments have to fulfil the criteria set in articles 36-39, which are analogous to the obligations set in articles 41-47.

“Articles 37.2 and 42.7.a of the PSD recognize the ability of the parties to agree on the law applicable respectively to the single payment transaction or to the framework contracts... These provisions have to be read together with Recital 51 which refers to article 5.2 of the *Rome Convention*²⁰² whose text is almost identical to that of article 6.1 of the *Rome I Regulation*

¹⁹⁸ Ibidem, p. 208.

¹⁹⁹ Report on the Implementation of Directive 93/13 on Unfair Terms in Consumer Contracts, COM (2000) 248 final, 27 April 2000.

²⁰⁰ *The Law of Payment...*, op. cit., p. 210.

²⁰¹ Ibidem, p. 213.

²⁰² 1980 Rome Convention on the law applicable to contractual obligations, OJ C 027.

593/2008”²⁰³ (according to article 24.2 of the *Rome I*, all the references to the *Convention* are to be interpreted as references to the new Regulation).

In comparison with the previous text, the new does not refer to ”conclusion of contract preceded by publicity or a specific proposal” but to the activity carried out by the professional in the State where the consumer has hers/his habitual residence. As for the definition of consumer under the Regulation, it is in line with the definition under article 4 of the PSD; only in the absence of an agreement, article 4.1.b of the Regulation contains rules to determine the applicable law (the law of the habitual residence of the PSP would be applicable)²⁰⁴.

As for obligations and liability of parties involved, these comprise a series of elements which aim at facilitating the specific transaction; in this respect the PSP must specify *inter alia* the information or unique identifier for the proper execution of the payment order, the maximum execution time for the PSP, the charges and possible exchange rates (article 37.1).

Article 38 regulates the issue of information to be provided after the acceptance of the payment; it is the same structure and content, notwithstanding a slightly different formulation, as for transactions covered by framework contracts (art. 48). Accordingly the PSP must communicate to the PSU a reference for the identification of the payment transaction in question, together with the full amount of the transaction in the currency used, the fees and charges payable by the payee, the date of receipt of the order and, possibly, the exchange rate used in the payment²⁰⁵.

The information to the payee after receipt of the funds is almost identical to the information of the payee laid down in article 48 (for transactions covered by a framework contract). This is not surprising, while the information of the payee is not affected by the existence (or non) of the framework contract. Again, the principle of transparency in the form of supplied information (clear, readable etc.) is identical to the one applicable to the framework contracts²⁰⁶.

5.3 Rights and obligations of the parties

The fourth Title of the PSD concerns provisions on the ”rights and obligations in relation to the provision and use of payment services”; firstly presents provisions of general nature, afterwards regulates the matters linked with the authorization of payments and execution issues, lastly it delimits the application of the *Directive 95/46* (Data Protection Directive)²⁰⁷.

²⁰³ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 *on the law applicable to contractual obligations* (Rome I).

²⁰⁴ Q&A, article 42.7.a, 3.7.2009, Question no. 272.

²⁰⁵ *Ibidem*, p. 212.

²⁰⁶ *Ibidem*, p. 213.

²⁰⁷ *Ibidem*, p. 215.

The liability of the PSP can be divided into two main categories: liability for losses from unauthorized transactions and the strict liability for non-execution or defective execution of payment transactions. Additionally, the Directive obliges the PSP to refund the PSU, if the amount of the payment order was not specified.

Not all of the provisions are completely new, in the sense that they had already existed under former legislation. However they are important, while updating and consolidating the earlier regulation, they also extend their scope and introduce some new solutions²⁰⁸.

Article 53 enables for derogation in case of low value payments (not exceeding EUR 30, with a spending limit of EUR 150 or storing funds which do not exceed EUR 150) and e-money. The PSP would have an option to agree with PSUs not to apply some of the provisions of the fourth Title to payments not exceeding a certain amount²⁰⁹. Paragraph 3 of this article contains a *lex specialis*, which applies to e-money irrespective of any threshold. By law, articles 60 and 61 do not apply when the payer's PSP is not able "to freeze the payment account or block the payment instrument". The States have the option to fine-tune this mandatory rule by setting a threshold for its application. Therefore, when the payer's PSP can freeze the payment account or block the payment instrument, parties cannot agree on the disapplication of articles 60 and 61.

A different situation is governed by article 53.1.b. (applies to low-value instruments) which are used anonymously or when authorization cannot be proved. In such cases, parties may agree on the disapplication of article 60 and, partly article 61 (Paragraphs 1 and 2)²¹⁰.

5.3.1 Liability for losses from unauthorized transactions

The concept of liability of PSPs for unauthorized transactions had already been introduced by the *Recommendation 97/489*, still the difference brought by the PSD is fundamental – directives have a binding force²¹¹.

5.3.1.1 Consent

According to Article 54.1, the consent of the PSU addressed to the PSP is the sole and absolute condition for the authorization; the Directive delivers an indirect definition of such consent, namely an explicit authorization for the PSP to effect a payment (or series), before or upon agreement between the parties, after the execution of the payment (art. 54.2 and 41).

²⁰⁸ Ibidem, p. 215.

²⁰⁹ Ibidem, p. 217.

²¹⁰ Q&A, article 53.3, 18.6.2008, Question no. 67.

²¹¹ *The law of payment...*, op. cit., p. 218.

Article 54.4 states that the parties to a payment transaction agree on the exact procedure for transmitting consent. The final PSD text refers to "payment instruments, that is any personalized device(s) or set of procedures agreed between PSU and the PSP and used by the PSU as to initiate an order"²¹².

Payment instruments within the meaning of the PSD may be used for the transmission of consent – in such case and upon agreement between parties there may be a spending ceiling for payment services. Always upon agreement PSPs have the right to block the use of the payment instrument in case of suspicion of fraudulent use (or other justified reasons; art. 55). In any case the PSP informs users without undue delay.

The consent to authorize the payment transaction may be communicated in different ways (not stated expressly) either directly (by the payer) or indirectly (through the payee). The difference depends on the character of the payment, if it is a credit transfer it is the payer who transmits hers/his consent to the bank, while in case of debit transfers or direct debits, it is mainly the payer who transmits the consent of the PSU to hers/his bank²¹³.

The Directive sets the latest point in time for the withdrawal of consent, in general up to the reception of the payment order by the PSP (art. 54.3). The provision of withdrawal of consent must be viewed in connection to article 66 – the withdrawal of consent in case of series of payment transactions renders all subsequent transactions "unauthorized", but the withdrawal should occur, before the payer's PSP has received the order. If it is a direct debit, the payer may revoke the order until the end of the business day before the day of debiting the funds (art. 66.3). "This is a clear effort of the legislator to combine the right of withdrawal of the PSU with the legal certainty and stability through fixed irrevocability limits"²¹⁴.

5.3.1.2 Burden of proof

Article 56.1.b states that loss, theft, misappropriation of the payment instrument or an unauthorized use thereof must be communicated to the PSP "without undue delay". Although during the consultations there had been requests to further specify this term – that did not happen. There was a proposal to define "delay" as – 30 days after the issuance of the associated statement for the payment instrument, an issue that had already been covered by the card scheme rules²¹⁵. Such approach was not uptaken, as an implication the States are empowered to decide on the exact timeframe²¹⁶.

²¹² Article 4.23 of the PSD.

²¹³ *Ibidem*, p. 220.

²¹⁴ *Ibidem*, p. 221.

²¹⁵ The contribution of Irish Payment Services Organization (IPSO) to the New Legal Framework for Payments, 10 February 2004.

²¹⁶ *The Law of Payment...*, op. cit., p. 221.

According to article 56, the PSU bears the obligation to use the instrument under the terms provided (56.1.a), to notify without delay cases of loss, theft or misappropriation and keep personalized security features (f.i. PIN) safe.

As for PSPs and their obligations, these are provided in article 57. The PSP is obliged *inter alia*, to provide personalized security features only to the PSU, not to send the unsolicited payment instrument except for the replacement of the old one, to guarantee an easy access to the notification procedure in case of loss, theft or unauthorized transaction and to prevent any further use of the instrument after notification. The risk of sending any information and the security features of the instrument lies in the PSP²¹⁷.

Article 58 was newly inserted after the PSD proposal and introduces the prescription, after 13 months, of any claims of the PSU for unauthorized transactions or non-execution according to article 75. The PSU has to notify the PSP without undue delay and no later than 13 months after the debit date; this prescription date is not valid in cases where the PSP has not provided information on the particular transaction according to hers/his obligations (third Title), and thus the PSP could not have been informed²¹⁸.

Cases of disputed authorization are of a major concern for PSPs. Article 59 attained to resolve this issue, the PSP bears a burden of proof that the transaction was authorized and correctly executed. Undoubtedly, the burden of proof is limited to submitting evidence of elements, which are under its own control (infrastructure). In such case, the PSP has to "provide evidence of authentication, the accurate record (...), as well as the absence of technical breakdown" or other problems (art. 59.1). "Logically (...) a payment transaction is deemed unauthorized, if the PSP fails to provide the minimum evidence required" by article 59 (*Recommendation 97/489* contained a similar provision on the burden of proof)²¹⁹.

If the PSP wishes to refuse the presumption of the PSU that (s)he could not have authorized the transaction in question, (s)he should apply additional evidence. According to the Directive, the mere evidence that the PSU made use of the payment instrument and that the use was recorded by the PSP, will not be sufficient to prove that the PSU acted fraudulently or failed with intent or gross negligence as regards hers/his obligations (art. 56)²²⁰.

It is noteworthy that if the PSU denies having authorized a transaction, "the use of a PIN is not a sufficient proof: the PIN might have been caught at the same time as the card data in the case of a fraud". The parties cannot agree to exclude PIN based transactions from the scope of this provision²²¹.

²¹⁷ *Ibidem*, p. 221.

²¹⁸ *Ibidem*, p. 221.

²¹⁹ *Ibidem*, p. 222.

²²⁰ *Ibidem*, p. 222.

²²¹ Q&A, article 59.2, 11.7.2008, Question no. 112.

5.3.1.3 Liability of the parties

Articles 60 and 61 introduce solutions in the field of PSPs/PSUs liability in case of unauthorized payment transactions. It is worth mentioning that liability of the PSP was not regulated in the previous *Directive 97/5* (article 8 of the *Recommendation 97/489*).

According to article 60.1, in case of unauthorized payment transactions, the PSPs has to refund immediately the amount of the unauthorized payment transaction or restore the account to the previous state (which would have existed without the unauthorized transaction). Such obligation applies as long as the 13-month deadline and other obligations of article 58 have been respected. As comes to further financial compensation, legislator refers to the law applicable to the contract upon agreement of the parties²²².

In case of payers, the liability is limited up to maximum EUR 150, where the States have optional clause to reduce this upper threshold (still only for PSPs authorized in the State). Such limited liability applies in case of non-compliance with the payer's obligations under article 56; the Commission tried to provide an incentive for PSUs, as to notify their providers for any theft or loss of the payment verification instruments, and in such way to avoid further unauthorized transactions... with an upper limit fixed only to EUR 150, or even less, according to the national provisions, it is very dubious whether these objectives will be attained²²³.

The PSU is always liable in case of fraudulent act (or gross negligence), with the fraudulent use being principal criterion for the application of the liability and without the upper ceiling of EUR 150 in such case. However, the Directive provides a higher level of consumer protection by requiring not only mere negligence but also gross negligence or fraudulent use. This issue was widely disputed during consultations; the industry required withdrawal of the upper limit for negligence of the PSU²²⁴.

The term "gross negligence" is a criterion that needs a further explanation, while it has a different meaning among the States. The Directive left it unclarified and "prone to diverging jurisdictional interpretations across EU". An example of potential confusion could be a situation where the PSU fails to report loss or theft – it is not clear is it already "gross negligence", probably will have to be judged case-by-case at national level²²⁵.

Another matter worth mentioning – concerns unauthorized transactions without theft or loss of the verification instrument, but through the failure of the payer to keep the security features for the instrument safe: this could be the use of a digit number of a credit card when buying at a distance. In such

²²² Ibidem, p. 222.

²²³ Ibidem, p. 223.

²²⁴ *COM (718) final* at <http://ec.europa.eu/>.

²²⁵ *The Law of Payment...*, op. cit., p. 224.

case, the PSU would be liable for the unauthorized or misappropriate use, and subsequently the EUR 150 upper limit should apply (art. 61)²²⁶.

5.3.2 Liability for non-execution/defective execution of a payment transaction

In general, the PSP executes the order according to the mandate given by the PSU, and is responsible for non-fulfilment of its obligations towards the latter. Prior to the PSD – *Directive 97/5* included a provision on strict liability to refund cross-border credit transfers up to EUR 12.500, (*Recommendation 97/489* enclosed similar rule for transactions in e-money).

The Directive extends the scope of the strict liability of PSPs to all payment services specified in the *Annex*. The basis for such strict liability is that PSUs cannot influence possible third party contractual relationships of the PSP with other parties. In fact, through strict liability the PSU is not obliged to search into the chain of the parties involved in the payment process, as to discover the party responsible for the non-execution of defective execution²²⁷. On the other hand, the PSP is able to measure the risks involved in the accepted payment transaction.

It should be underlined that the strict liability is not absolute and is restricted to the "correct execution of the payment transaction in accordance with the payment order of the PSP". Naturally exceptions as *force majeure* or the suspicion of money laundering clause, apply. Additionally, if the PSP of the payee is located outside the EU only limited liability will be applied.

5.3.3 Receipt, execution time and value date

5.3.3.1 Receipt of the payment order

Instead of the date of "receipt" (of the payment order), the PSD proposal used a term "acceptance of a payment order"; *Directive 97/5* delivered a similar definition.

Again, otherwise than in the proposal, the Directive does not touch the issue of "authentication" of the order, which allows the PSP to prove that the user has the authorization to proceed to the order.

The date of receipt of the payment order is a crucial element here; it is the point in time employed in order to define the execution time, but it is also the moment – marking irrevocability of the order. Moreover, the Directive sets the date of receipt as the enacting point of the liability of the PSU for non-execution (defective execution) of the order.

²²⁶ *The Law of Payment...*, op. cit., p. 223.

²²⁷ Communication COM (2003) 718 final, 2 December 2003.

According to article 64, the PSP should receive the transmitted order. If the moment of receipt is not a business day, the receipt should take place on the next business day. Additionally, parties may agree that execution of the payment order will start on a specific day, the point in time of receipt is deemed to be the agreed business day²²⁸.

As stated in Recital 37, the point in time of order of the payment is the moment "when the PSP receives the order, including when he has had the opportunity to receive it through the means of communication agreed in the (...) contract, notwithstanding any prior involvement in the process leading up to the creation and transmission of the (...) order... Therefore, the point in time of receipt is the moment when the (...) order is simply received (...) and not the moment when it has been accepted by the PSP"²²⁹.

The legislator differentiated between payments initiated by the payer and those initiated by the payee. For the payer, the irrevocability limit is the reception of the payment order by the payer's PSP. For the payee, the order becomes irrevocable after its transmission to the payee; if it is a direct debit, revocation could occur until the last business day before the agreed debiting of the funds. Revocation after the limits set by the Directive is possible after agreement between the PSP and the payer (or the payee); Additionally, the framework contract may foresee a "revocation fee" (art. 66.5).

5.3.3.2 Execution time and value date

Articles 64 and 69 (the point of receipt for transactions to a payment account) should be seen in conjunction. The execution times provided in the Directive apply to transactions made in euro, national transactions in the currency of the State in question or transactions involving only one currency conversion (art. 68). The PSD covers transactions with only one currency conversion between euro and the currency of a non-euro State or if the cross-border transfer is in euro. It is noteworthy that many provisions on the execution time are *ius dispositivum* and the parties may agree otherwise²³⁰.

The Directive sets the limit of one business day for the crediting, of the amount agreed to the payee's account. Upon agreement of the parties and until January 2012, this period may be lengthened up to three business days. In accordance with article 69.1: "the PSP of the payer has to ensure that, after the point in time of receipt, the amount of the payment transaction is credited to the account of the PSP of the payee at the latest by the end of the next business day." A local bank holiday on the side of the PSP of the payee should have no influence in the calculation of the execution time. The PSP of the payer should thus process payments within the timelimit, irrespective of any local bank holidays on the side of the PSP of the payee²³¹.

²²⁸ *The Law of Payment...*, op. cit., p. 227.

²²⁹ Q&A, article 64.1, 18.12.2009, Question no. 340.

²³⁰ *Ibidem*, p. 227.

²³¹ Q&A, article 68, Question no. 298.

Additionally, in case of a paper-initiated transaction, one more day is allowed. "Paper-initiated payment transactions are (...) credit transfers for which the payment order has been established using a paper slip which is either directly handed over by the payer to his PSP during opening hours or put in a box provided by the payer's PSP (could also be outside opening hours). They could also include payment orders transmitted via email or fax when they require a paper handling action on the side of the PSP..."²³².

The Directive introduced the term "value date". The Member States "identified the concept (...) in different ways or even through their case law". For example, in Germany it is a result of a decision of the Federal High Court from year 1997. In most countries "value dates" are regulated to correspond to the transaction or booking date; the situation is the same in market practice of banks²³³.

The execution time for payments initiated by the payee (debit transfers) is provided in article 69.3 – the PSP has to credit the amount to the payee's account within the time limit agreed between the payee and hers/his PSP. For cash deposits placed on a payment account with that PSP and in the currency of the account, amount has to be made available and value dated directly after the receipt of the funds (art. 71).

Article 73 imposes – simultaneous to the crediting of the account – availability of funds for the payee and the prohibition of any fees for making funds available. Differently, the funds are not available to the payer after the debiting of hers/his account. There is the credit and the debit value date, with the former being the point in time of crediting the payment account and the latter being the point in time of debiting the account (art. 83)²³⁴. It should be noted that the parties cannot decide not to apply this provision.

In relation to some advanced banking "products" (as f.i. pooling) the PSD seems to ignore the business needs. The characteristic of the Directive is that in respect of some core issues (value dating) there is no space to decide otherwise, even if requested by the customer. Article 86.3 could be used as a "tool" to derogate from the single mandatory provisions of PSD (at least to some extent), nevertheless the legal risk that either the customer or a third party could demand compensation will still exist (f.i. in Sweden the courts are obliged to consider automatically if a certain condition is against mandatory provisions of the PSD; it is irrelevant if the user appealed for it).

The Directive introduces new (shorter) execution times; these periods were subject to negotiations between the Commission and the banking industry (the PSD proposal contained 2010 deadline). Eventually, the legislator introduced a "transitional" period till year 2012 for credit transfers, "acknowledging that the short execution time of one (...) day would

²³² Q&A, article 69.1, Question no. 227.

²³³ Ibidem, p. 228.

²³⁴ Ibidem, p. 228.

necessitate a very high level of infrastructure and standardization (...) not yet in place”²³⁵.

According to the newly introduced system – payment executions from Poland will look like this:

1. If a currency conversion takes place in a non-EUR country and cross-border transaction takes place in EUR. For example from Poland to Italy, payment order from PLN account in Poland to EUR account in Italy with conversion taking place in Poland – a ”D+1” rule (takes place in the non-EUR country and involves a conversion between the EUR and the local currency)²³⁶. For paper-initiated transactions one extra day is allowed²³⁷, which brings the maximum execution time to ”D+4” until 2012 and to ”D+2” afterwards. There is an exception rule until 1 January 2012, if agreed between payer and payer’s PSP up to ”D+3” (art. 69.1).
2. Cross-border transaction not in EUR but in other EU/EEA currency: Poland to Finland (PLN to EUR). Payment order from PLN account in Poland to EUR account in Finland with cross-border transfer in PLN and PLN to EUR currency conversion taking place in Finland. A ”D+1” rule, unless otherwise agreed (maximum ”D+4”)²³⁸. One extra day is allowed (the maximum execution time of ”D+4” must not be exceeded). No transitional exception rule applicable.

5.3.3.3 Strict liability under article 75 of the PSD

A non-execution of a payment order may occur for a number of reasons, as malfunctioning of a system or error of an intermediary to the transaction, for these the PSP will be held liable. ”According to the principle of strict liability (without fault or objective liability), the PSU has to claim only that the order has not been accurately executed, in line with article 75. There is no significance for the compensation of the PSU, whether the error (that led to the non-execution) was made by a third party or by the PSP itself²³⁹.

Defective execution occurs in cases where either the full amount has not reached the destination (partial execution) or the payment has arrived later than agreed/obliged to.

It seems worthy to mention some other acts that were designed to tackle the issue of strict liability: *Directive 85/374*²⁴⁰ concerning liability of defective products imposed a strict liability on manufacturers or *Directive 90/314*²⁴¹ on package travel providing for liability of a tour operator, by establishing a strict liability with some exceptions.

²³⁵ Ibidem, p. 229.

²³⁶ Relevant PSD articles Art. 68.1.c and 69.1.

²³⁷ Art. 69.1.

²³⁸ Art. 68.2 and 69.1.

²³⁹ Ibidem, p. 234.

²⁴⁰ Directive 85/374, OJ L 210, 7 August 1985.

²⁴¹ Directive 90/314, OJ L 158, 23 June 1990.

Already in the year 1994, a study had showed that the most commonly used unfair terms in the banking sector were those restricting or totally waiving the bank's liability, with 43 cases out of a total of 88 employing such practices²⁴². The strict or "no-fault" liability of PSPs was firstly introduced by *Directive 97/5*²⁴³, and then repeated in *Recommendation 97/489*. The Directive introduces a solution wider in scope (lengthy art. 75), including the division for orders initiated by the payer and by the payee (did not exist in the PSD proposal).

In case of payment orders initiated by the payer, the PSP is strictly liable to the PSU in case of non-execution (defective execution) of the order. The liability is enacted by the sole failure of a credit transfer for each its destination; consequently, the payer does not have to prove error or negligence of the PSP as to establish hers/his right. Moreover, the PSP is strictly liable for any charges (and interest) charged to the PSU as a consequence of the non-execution (75.3). If the PSU disputes the accurate execution of the order, the provider has to prove that the payee's PSP received the amount of the transaction in the time provided in article 69.

If the payer's PSP is responsible, then refunds to the payer the amount of non-executed payment transaction. If the payee's PSP is responsible, then places the amount of the payment transaction at the payee's disposal.

The liability of the payee's PSP is not so strict, the PSP is bound to transmit correctly the payment order to the PSP of the payer. If liable under second paragraph of article 75 – re-transmits the order to the PSP of the payer. After this and immediately after the crediting of the PSP's account, the latter has to ensure that the amount in question is at the payee's disposal²⁴⁴.

In situation when the PSP of the payee is not responsible under article 75, the payer's PSP is liable to the payer and refunds the amount of non-executed transaction and restores the account to the previous situation (without undue delay).

The final text of the PSD includes a provision, which was not put in the PSD proposal. It is titled "right of recourse" and regulates the liability attributable to intermediaries and other PSPs. They are obliged to compensate the initial PSP for any losses incurred under article 75. For further losses the Directive leaves the parties to agree according to the national legislation applicable (art. 77)²⁴⁵.

Finally, the consequential damage is not regulated by the Directive, which creates the space for national contract law principles. This solution could implicate quite serious differences among the Member States.

²⁴² *Study on Unfair terms in Financial Services*, Confederation Syndicale du cadre de Vie, 1994 France.

²⁴³ Article 8.

²⁴⁴ *The Law of Payment...*, op. cit., p. 231.

²⁴⁵ *Ibidem*, p. 232.

It should not be a surprise that PSPs may evoke *force majeure*, suspicion of money laundering or of terrorist financing as to be discharged from their obligations (art. 78). The liability introduced by article 75 is not an "absolute" liability of the PSP. Opposite, the PSP may invoke f.i. "incorrect unique identifiers" clause (art. 74) or mentioned *force majeure*; the "strict" liability is in fact a "flexible" liability, where the interests of both PSPs and users have been balanced.

A significant incoherence should be also noted. If the payment was defective in the way that the transfer was delayed – should the PSP return the amount to the PSU, even though it was eventually transferred? Literally, it does look like that. A peculiar provision; the PSP should without undue delay return the amount of the payment to the PSU. How should that function? A right of recourse? What kind of liability would it be? (art. 75.1 and 75.2) In the Polish APS there were attempts to solve this matter, but without larger success (art. 141)²⁴⁶.

5.3.4 Refunds for transactions initiated by the payee

According to the Directive – "refunds" constitute a specific obligation of the PSP and at the same time a right of the PSU. *Directive 97/5* did not deliver special provisions on the rights of a payer to a refund from hers/his PSP for unauthorized payment transaction initiated by (or through) the payee. The PSD is somewhat pioneering in this field.

Article 62 of the Directive enumerates situations in which the PSU is entitled to a refund, in case of an already authorized and executed transaction. *Nota bene* the PSD proposal required a "good faith" of the payer; interestingly this was not introduced by the PSD.

Refunds should be granted on request of the payer, at least 8 weeks from the date of the debit of funds. The Directive imposes a deadline of 10 business days on the PSP to provide an answer and either refund or justified refusal (with an indication of redress procedures).

The Directive foresees two situations with regard to the right of the payer for refunds. For direct debit, the parties may agree differently and the framework contract may provide that the payer is entitled to a refund even without the fulfilment of the conditions set by article 62. "This is a pro-consumer provision that lets industry adopt more favourable conditions for payers. The second situation refers to a contractual condition mentioned in the framework contract, according to which the payer is not entitled to a refund after the transmission of consent to a payment order directly to hers/his PSP. This provision aims to achieve a balance between payers, payees and PSPs..."²⁴⁷.

²⁴⁶ <http://mf.gov.pl/>.

²⁴⁷ *Ibidem*, p. 242-243.

5.3.5 Additional remarks

Another noteworthy issue is the dual legal basis employed for the adoption of the Directive; "the ECJ has only exceptionally accepted a twofold legal basis for the adoption of a directive"²⁴⁸. Such situation is only allowed if the act pursues objectives inextricably connected to each other and none of them may be regarded as the main or predominant²⁴⁹. Similar situation is with the PSD, where the dual structure is reflected not only in legal basis but also in material provisions.

The text of the Directive is a combination of private and public law provisions, which was planned as to provide a horizontal framework for payments in the EU. From the point of view of novelty, this would probably be the most innovative element of the PSD, while its text regulates both issues as supervision and the list of rules of contractual nature²⁵⁰.

There is a serious doubt about the structure of the text of the Directive, while the second Title regulates the authorization requirements for newly introduced "payment institutions", the other Titles cover also other classes of PSPs, such as credit institutions or e-money institutions. Certainly this structure does not constitute a clear, organized whole²⁵¹.

One could ask, if the form of a regulation would have not been a better choice, especially after the success of *Regulation 2560/2001*, compared with the results of *Directive 97/5* (which achieved some goals but not all of them). There were probably two reasons why this form of legislation was chosen. Firstly, the rules on the authorization, according to article 47.2 of the EC Treaty, explicitly provided for directives as the tool for the achieving of its goals. Secondly an attempt to regulate the issues of contract law – most certainly would meet a hard opposition of the Member States.

Interestingly, some definitions of the PSD are visibly inconsistent with other European texts (f.i. "framework contracts" or "refund"). Naturally if different acts of European law use a similar terminology, one could expect such to be consistent with each other as to achieve a coherent terminology.

The third Title attempted to resolve most of the problems deriving from the diverging European and national legislation by establishing the common framework for all payment services, within one document with a binding force. The rights and relations between a PSU and a PSP are determined by a particular "payment service". The problem is that this term is "rather diverse and the result is somewhat confusing"²⁵².

²⁴⁸ Ibidem, p. 255.

²⁴⁹ *British American Tobacco Case*, C-491/01 [2002] ECR I-11453; Opinion of AG Geelhoed from 10 September 2002 in the *BAT Case*.

²⁵⁰ Ibidem, p. 255.

²⁵¹ Ibidem, p. 256.

²⁵² Ibidem, p. 262;

Finally, PSPs are held liable for PSUs losses caused by unauthorized transactions, whereas the PSU bears only a limited liability of up to EUR 150 till the moment of notification. The Directive introduces heavy liability of the PSP in relation to the PSU, which is especially evident when compared to the limited liability of the PSU. While such provisions should not implicate larger problems for bigger institutions, they could be more problematic for smaller payment institutions. Incidentally, the EUR 150 limit is not a new threshold, it was already introduced in the *Directive 97/5*, and the author agrees with Despina Mavromati that it could have been set on a higher level, at least to count in the inflation²⁵³.

²⁵³ Ibidem, p. 263;

6 Conclusions

During the ages, we have witnessed a permanent development of how people transfer their welfare. Fundamentally, the basic barter system has been replaced by "money" of various shapes, then cheques were invented, and now it is the era of "plastic cards". One could ask – for how long?

While national payments are – from the point of view of a consumer – fast and simple, it is not the case when one wants to push a transfer to another country, even in the EU. Although monetary union has been introduced, a transfer from Strasbourg to Cologne is still a completely different matter than a transfer "between" Berlin and Munich. Even though in the first case the distance is shorter, the national borders still exist... The European integration influenced the evolution of the European trade and that implicates the necessity to establish a new universal payment system.

The main aim of this thesis was to research and describe the legal framework for payments in the EU, in order to examine the utility of the PSD, designed as an act organizing the existing legal background in a pro-consumer spirit. Beyond a doubt, the Directive was designed as a consumer-friendly act of law; the question was if attitude of the Commission was really achieved; especially having on mind that the Directive originated from the SEPA, bank-led initiative, clearly not oriented on consumers.

An in-depth analysis of pioneering provisions of the Directive determines the character of this paper. Every provision was profoundly studied, including possible derogations; additionally in a few cases official indications from the Commission were cited (as to help to understand the real intentions of the legislators).

Another investigated matter was to analyze and compare the optional clauses, left in the autonomy of the Member States; which have the capability to implicate that national solutions could not be unilateral enough. These options do not constitute a radical breach, but have the potential to mislead users to a large extent.

The author draws also the reader's attention to the fact that different interpretations of the same provisions in different Member States could hinder results expected by the Commission. One should not forget about diverse national rules of civil law in the Member States (vide: article 75 and the potential complications in the field of liability).

The very broad and ambitious scope of the PSD makes it the most significant piece of the EU law (in relation to the payments) that market has ever seen. It should affect all current and future providers, and users of

payment services within the EU, as well as infrastructures, card schemes, software vendors, and other ancillary services providers²⁵⁴.

The new framework has the potential to deliver some concrete benefits for European consumers. Firstly, it permits cross-border direct debits; furthermore allows the use of debit cards anywhere in the Eurozone, which should be particularly useful for Europeans who do not own a credit card. Another innovation – a single bank account for the whole Eurozone; people working or studying abroad who had to open a new account will be able to manage their finances from a euro account in their home country. Finally, a set of new provisions regulating payments has been delivered; transfers will be faster thanks to the "D+1" execution rule (from 2012), and when a payment is credited to an account, the recipient will be able to use it immediately. Additionally, the full amount will be credited without any deduction to the beneficiary.

It should be underlined that not all of the provisions are entirely pro-consumer; while analyzing the text of the PSD – the author came across a few provisions of rather balanced character (vide art. 66 and 74). Sometimes the need of efficacy or requirement to guarantee a proper execution has to be taken into account. One could say that it limits the rights of consumers, but objectively speaking there is probably not much more space for further concession; for instance allowing PSUs to put additional data together with the bank account number should not obstruct transferability. It seems that it does not constitute a "pro-PSP" provision, it could be seen as a pro-consumer provision with a consideration for the merit – resultful execution.

It may be asserted that the fourth Title of the Directive proposes heavy liabilities on PSPs towards PSUs; the provisions of the PSD visibly shift the responsibilities – almost entirely on PSPs. Most likely that would have a larger impact on the smaller institutions. The rule of liability of the PSP for non-executed transactions (defective execution) is also significant, still seems to be a rational solution; it is evident that the Commission wanted to secure the interest of users by this regulation²⁵⁵.

The Directive moves regulation of payments services to a completely new level, what is crucial it covers not only the Eurozone, but the whole territory of the EU. Since not all the Member States have introduced euro as the currency, the universal character is not evident – but that does not negate the potential of this act.

The time will show if the optional clauses left in the autonomy of the States, as well as different ways of interpreting its text – could hinder the general very clear keynote: regulation and safeguarding the rights of Europeans. Although, there are already many provisions (f.i. rules on information) that

²⁵⁴ Guidance for the implementation of the Payment Services Directive, Version 1.0 – August 2009, PSD Expert Group, European Banking Industry, p.1.

²⁵⁵ *The Law of Payment...*, op. cit., p. 244.

are influencing changes in framework contracts offered by European banks and delivering a practical change²⁵⁶.

At the first sight, the PSD could appear as hard to follow. Nevertheless, it contains very specific provisions, which after “translating” some technical definitions – indicate rights of the parties in a quite clear manner. It should not surprise that the banking sector is not keen on educating people about their new rights, especially having on ones mind that instead of an act facilitating their professional activity – the Directive is a pro-consumer act, and also causes serious confusion as comes to functioning of some more advanced banking products (pooling). From European clients’ perspective even a short guidance, would most probably make a huge difference; either national authorities or the Commission could have to enter the stage and deliver some “advertising”²⁵⁷.

Overlapping perypeteia of *Regulation 2560/2001*, the SEPA and the PSD – illustrate considerable interaction that occurs between the private sector and public regulatory activities. On one hand, there was an attempt to lower costs of a service, initiated by the public side, clearly a pro-consumer solution (the Regulation); on other hand, there was the banking sector, oriented on its earnings, trying to cut on costs and because of that developing a new system (the SEPA). Finally, the Commission does not rest on laurels – on the opposite, decides to push the vision further, takes over the private initiative (originated as a reaction to the act of public law) and delivers a new quality – an innovative infrastructure in shape of the PSD.

In November 2012, the Commission should publish a report reviewing the functioning of the PSD and measuring the progress towards establishing the European payments market. This review would focus on whether the scope of the Directive should be expanded with regard to non-EU/EEA currencies and to transactions where only one of the PSPs involved is located in the EU/EEA. The PSD should be seen as a further step (rather than as the final one) in Europe’s drive for harmonization²⁵⁸. The actual impact of the Directive is most probably yet to come.

²⁵⁶ Source: professional research work.

²⁵⁷ The Commission has already started publishing short information brochures.

²⁵⁸ B. Flismark, *The Payment Services Directive: A Crucial Step Toward Payment Harmonization Across the EU*, <http://www.qfinance.com/>.

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