What Role for Supervisors? A Comment on the PSD2 Supervisory Framework

European Legal Strategies for Payment Systems in the Open Banking Age - €LSOBA

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Introduction

- the EU payment market is experiencing far-reaching transformations:

✓ technological progress (i.e. digitization),

✓ market competitiveness.

- the market in payments is "opening up" thanks to regulatory changes → PSD2 implementation
- these transformations are slowly revealing prudential challenges → uncertainties of opening the business of banking to "third party providers", for instance
- it is critical to ensure consistent and uniform implementation of PSD2 provisions to guarantee continuity and integrity of the EU market in payment services
- **the PSD2 supervisory framework**: Title II, Section 3, Art. 22-30

The contours of the PSD2 supervisory framework

- essentially, the contours are delineated by the following principle:

  "payment institutions are subject to licensing and must comply with a plethora of prudential requirements relating to institutions' capital soundness, conduct toward other payment entities and consumers, as well as to competition and protection of personal data"

- moreover, the contours of the PSD2 supervisory set-up abide the principles of:

✓ decentralization,

✓ proportionality

- this is congruent to PSD2 legislative predecessor, and, to the Directive 2013/36/EU (2013 Banking Directive)
- from an institutional/organizational aspect → **Art. 22, 23 and 26**

The PSD2 supervisory framework: COMPETENT AUTHORITIES

- main trait of PSD2 supervision → **decentralization** or **home country control**

  authorisation and monitoring of payment institutions as well as the enforcement of supervisory measures falls under the competence of *national* authorities

- a **multi-level supervisory framework**
- home country control is to be expected, because:

1. cornerstone of all supervisory frameworks within the internal market for financial services,
2. reflects the hybridity of supervisory governances in the field of payments.

- hybridity in turn, implies a certain degree of vertical hierarchy, i.e. involvement of EU authority(ies)
- the European Banking Authority (EBA): coordinator and facilitator

The PSD2 supervisory framework: EXCHANGE OF INFORMATION

- the PSD2 accentuates the prerequisite of information exchange (meaningful, purposeful, complete) between:

✓ competent authorities at EU/MS level (following Art. 22),

✓ competent authorities and other stakeholders at EU/MS level (e.g. ECB, financial industry actors).

- it is worth noting that:

1. information must be exchanged with **all competent authorities** at MS level → where multiple authorities are involved, attention should be placed on potential "supervisory blind spots",
2. information exchange should **encourage** authorities' quality of supervision at MS level (as sharply evidenced by the Wirecard debacle)

The passporting system and cross-border supervision

- the PSD2 is a **pro-competitive regulatory instrument**:

✓ introduces new market actors, market activities,

✓ incentivizes cross-border provision of payment services.

- two modes of cross-border operativeness: **i)** the right of establishment, **ii)** freedom to provide services, by virtue of **the PSD2 passporting system**
- the underlying premise of passporting system and effective cross-border supervision → exchange of information
- to this end, the PSD :

1. establishes **central contact points** (CCPs),
2. specifies & standardizes information to be exchanged

details spelled out by the EBA

A few words on non-compliance & emergency situations

- what happens if **irregularities** arise in cross-border service provision?
- Art. 30 of the PSD2 grants competent authorities the right to employ “appropriate measures” in case of irregularities or outright non-compliance
- yet, remedial action is prerogative of home competent authorities → host competent authorities' competencies are limited to notification
- what happens in **emergency situations**?
- the PSD2 awards to host authorities the power to employ “precautionary measures” that are interventionist in nature
- limited to addressing “serious threats to the collective interest of payment service users in the host MS”

Continued …

- how to determine the “seriousness” of a threath? through the lens of the proportionality principle – yes and no
- the open texture of this qualification opens the way to legal uncertainties
- to this end precautionary measures are:

✓ temporarily limited,

✓ subject to prior “notification and justification for the host competent authority toward competent authorities of the home Member State” as well as the “Commission and EBA”

- is this feasible in practice?

In conclusion

- overall, the PSD2 supervisory framework is comprehensive and “to the point”:

1. it rightly identifies and addresses main technological, market, regulatory challenges,
2. as a multilevel framework it rightly gives due attention to the exchange of information at the horizontal level (i.e. between NCAs),
3. considering new market participants and incumbents, it rightly extends its monitoring parameter,
4. it fits well with the supervisory regime established for credit institutions → a holistic approach to the prudential framework for the internal market for financial services in the EU

Comments and questions welcomed!

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