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# BUSINESS LAW COURSE

## EUMOL LECTURE 3

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# Mid-Term 1

## 5° November 2021

Written test based on all study materials uploaded on moodle until 5° November

Open book

2 hours (12.00 – 2 p.m.). Remotely

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# BUSINESS LAW COURSE

## EUMOL LECTURE 3

### PSD2 structure and scope



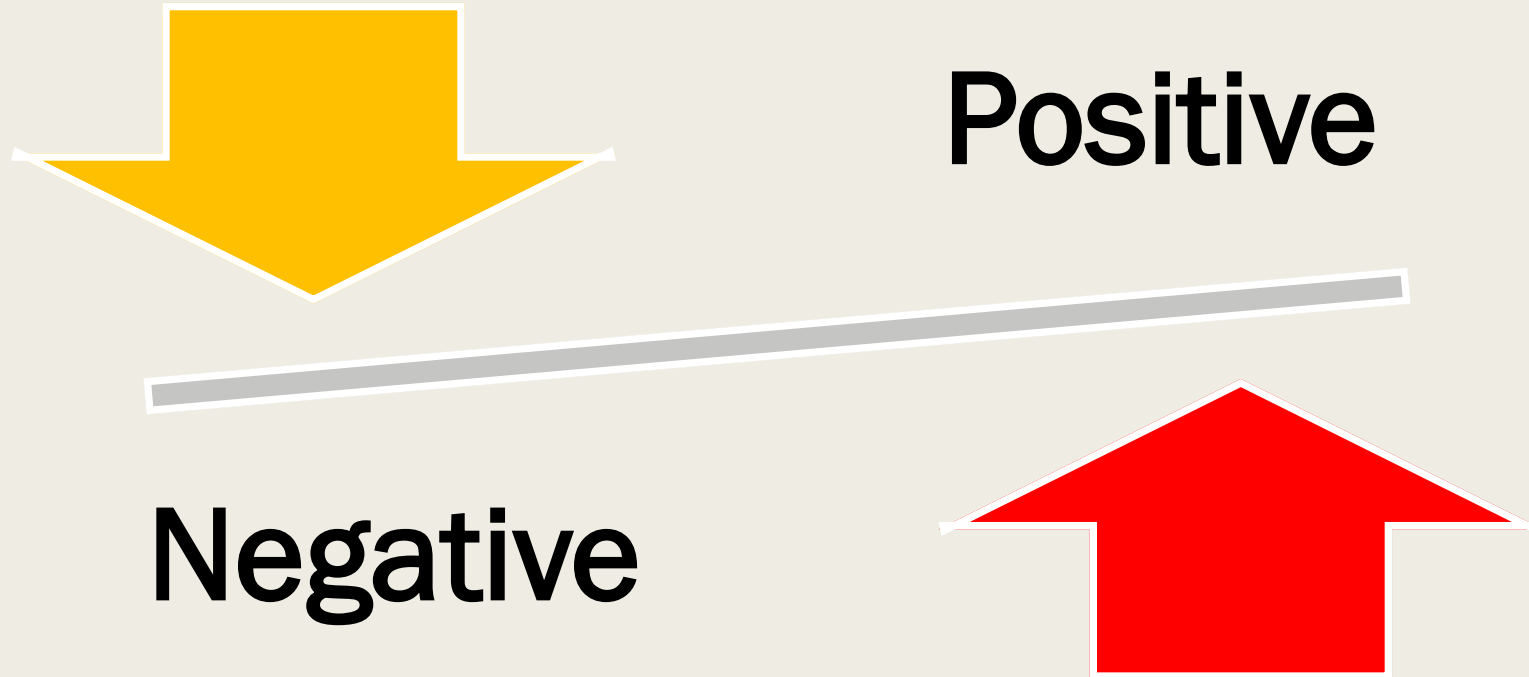
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# PSD2

## Structure.

- Title I: scope, definitions, and exceptions
- Title II: Payment Institutions
- Title III: Information Requirements
- Title IV: Duties and obligations for the provision of payment services
- Title V: Delegated and Regulatory Technical Standards
- Title VI: Final Provisions

# PSD2. SCOPE



# PSD2 (Art. 1). POSITIVE SCOPE.

## When the PSD2 is applied to

When Does Title I apply? (Title I on the authorisation of and supervision on the PSPs): legal seat and head office in the Union

**When do Title III and Title IV apply? Depends on the following factors...**

- when both PSPs are located in the Union and it is concerned the currency of a MS
- When both PSPs are located in the Union, but it is concerned a third-country currency\_ Title III and Title IV
- When only one PSP is located in the Union and it is concerned a third-country currency \_ Title III and Title IV

# PSD2 (Art. 3). NEGATIVE SCOPE.

## When the PSD2 is not applied to

- Paper-based payment instruments
- Clearing and Settlement relationships between payment institutions
- Provision of technical activities supporting the operation of payment services
- Transport of cash (banknotes and coins)
- Limited network exception
- Payment transactions provided by a provider of electronic communications networks

*And so on...*

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## EUMOL LECTURE 2

Negative Scope: Rasool Case. 22  
March 2018

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# Rasool Case

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Who Public Prosecutor

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Mr Rasool - Re

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Telecash

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# Rasool Case

## Preliminary question n. 1

Should the art. 3, lett. o) of PSD1 (it is the same in the PSD2 directive) must be interpreted as meaning that the possibility of withdrawing cash from a cash terminal, in a gaming arcade, holding concession from the State, by means of a bank card and a PIN, is an activity within the exception of art. 3 lett. o), when

- the technical processing relating to the bank and the account is carried out by an external service provider (namely, the network operator) and the cash is dispensed only when the network operator has checked whether the account has enough funds and (the network operator) sends an authorisation code to the terminal,
- the arcade operator loads the multifunctional machine with cash and receives from the bank holding the account of the customer withdrawing funds a credit corresponding in the amount withdrawn.

# Rasool Case

## Art. 3, lett. o), of PSD1 (PSD2)

(o) cash withdrawal services offered by means of ATM by providers, acting on behalf of one or more card issuers, which are not a party to the framework contract with the customer withdrawing money from a payment account, on condition that those providers do not conduct other payment services as referred to in Annex I.

# Rasool Case

## Preliminary question n. 2

As far as the art. 3, lett. e) does not cover the activity mentioned above, the referring court asked whether the art. 3, lett. e) PSD1 (but it is the same in the PSD2) must be interpreted as covering the withdrawing cash with a PIN as far as it is issued a voucher worth of 20 euro (to be exchanged for cash), when this voucher is issued by the supervisor of the gaming arcades (namely, Mr Rasool and RE) because he has fed cash into a slot machine.

# Rasool Case

## Art. 3, lett. e), of PSD1 (PSD2)

(e) services where cash is provided by the payee to the payer as part of a payment transaction following an explicit request by the payment service user just before the execution of the payment transaction through a payment for the purchase of goods or services;

# Rasool Case

## Preliminary question n. 3

If the exceptions under art. 3 , lett. o) and e), do not cover the activity above mentioned, the referring court asked the ECJ whether the point n. 2 of the PSD1 annex (it is the same in the PSD2 Annex) may be interpreted as meaning that the activity of a gaming arcade operator, as described above, is a payment service when the gaming arcade operator (namely, Mr Rasool and RE) does not operate any account of the customer withdrawing funds and does not enjoy any service fee for the cash withdrawing.

*2. Services enabling cash withdrawals from a payment account as well as all the operations required for operating a payment account. (n. 2 of the PSD1 annex)*

# Rasool Case.

## Legal Analysis

What does Re do as main business?

Does Re access users' payment accounts?

Does its activity raise regulatory concerns for payment services users?

# Rasool Case.

## Legal Analysis. Conclusions.

*(39) ... the answer to Question 3 is that Article 4(3) of Directive 2007/64, read in conjunction with point 2 of the annex to the directive, must be interpreted as meaning that a cash withdrawal service offered by a gaming arcade operator to his customers by means of multifunctional terminals in those arcades is not a 'payment service' within the meaning of that directive, where the operator does not carry out any operation on those customers' payment accounts and the activities he performs on that occasion are confined to making the terminals available and loading them with cash.*



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## EUMOL LECTURE 2

CONTRACTING PARTIES:  
PAYMENT SERVICE USER

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# CONTRACTING PARTIES.

## Payment Service User

- *Payment service user: natural or legal person making use of a payment service in the capacity of payer, payee, or both*
- *(payment service) consumer: a natural person who, in payment service contracts covered by this Directive, is acting for purposes other than his or her trade, business or profession*
- *Micro-enterprises: a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.*

# CONTRACTING PARTIES.

## Payment Service User

- When the payment service user is a payment service consumer, the PSD2 are binding for the contracting parties.
- The PSP and the Consumer cannot derogate to the PSD2 rules on information rules and rights and obligations for the provision of payment services
- The Member States may include in the concept of (payment services) consumers also the micro-enterprises

# BUSINESS LAW COURSE

## EUMOL LECTURE 2

CONTRACTING PARTIES:  
PAYMENT SERVICE PROVIDERS (PSPs)

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# CONTRACTING PARTIES.

## PSPs.

Anti-Money Laundering Directives

PSD1

PSD2

# CONTRACTING PARTIES.

## PSPs.

Credit institutions, electronic money institutions, payment institutions

Post office giro institutions

ECB, NCBs, MSs, local and regional authorities

# CONTRACTING PARTIES.

## PSPs (CIs, PIs, EMIs)

Regulated business activities

Single License

Home country control

# CONTRACTING PARTIES.

## PSPs (CIs, PIs, EMIs)

- *«an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account»* (Banking Business and CIs)
- *Provision of payment services and ancillary activities* (PIs)
- *«electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions as defined in point 5 of Article 4 of Directive 2007/64/EC, and which is accepted by a natural or legal person other than the electronic money issuer»* (EMIs and e-money issuance and reimbursement)



# CONTRACTING PARTIES.

## PSPs OTHER THAN BANKS (PIs, EMIs)

Same risk, same rules. Lighter financial requirements

Broader Scope - Hybrid PIs and EMIs

Extension of credit with their own funds

# Payment Institutions.

## AUTHORISATION REQUIREMENTS

- (a) a programme of operations;
- (b) a business plan;
- (c) initial capital;
- (d) a description of measures taken to safeguard payment service users' funds;
- (e) a description of the applicant's governance arrangements and internal control mechanisms;
- (f) a description of the procedure in place to monitor, handle and follow up on a security incident and security related customer complaints;

# Payment Institutions.

## AUTHORISATION REQUIREMENTS

- (g) a description of the process in place to file, monitor, track and restrict access to sensitive payment data;
- (h) a description of business continuity arrangements;
- (i) a description of the principles and definitions applied for the collection of statistical data on performance, transactions and fraud;
- (j) a security policy document;
- (k) for PIs subject to obligations regarding money laundering and the financing of terrorists, a description of the internal control mechanisms which the applicant has established in order to comply with those obligations;
- (l) a description of the applicant's structural organisation, including, where applicable, a description of the intended use of agents and branches;

# Payment Institutions.

## AUTHORISATION REQUIREMENTS

- (m) the identity of persons holding within the applicant company, directly or indirectly, qualifying holdings;
- (n) the identity of directors and persons responsible for the management of the PI and, where relevant, persons responsible for the management of the PI's payment services activities (skills and reputation);
- (o) the identity of statutory auditors and audit firms as defined in Directive 2006/43/EC of the European Parliament and of the Council;
- (p) the applicant's legal status and Articles of association;
- (q) the address of the applicant's head office.

# Payment Institutions.

## AUTHORISATION REQUIREMENTS.

- **Sounds and Prudent management:** Directors and persons in charge of the IP management: good reputation and possession of appropriate knowledge and experience
- **Suitability of Shareholders** - 'qualifying holding' means a direct or indirect holding in an enterprise which represents 10 % or more of its capital or voting rights or which makes it possible to exercise a significant influence over the management of that enterprise
- *Any natural or legal person who has taken a decision to acquire or to further increase, directly or indirectly, a qualifying holding (...) in a PI, as a result of which the proportion of the capital or of the voting rights held would reach or exceed 20 %, 30 % or 50 %, or so that the PI would become its subsidiary, shall inform the competent authorities of that PI in writing of their intention in advance.*

# Payment Institutions.

## AUTHORISATION PROCEDURE.

(a) granting of authorisation,

(b) communication of the decision,

(c) withdrawal of authorization and

(d) maintenance of authorization

# Payment Institutions. AUTHORISATION PROCEDURE. REFUSAL.

## Sound and prudent management of the PI.

*where close links [a situation in which two or more natural or legal persons are linked in any of the following ways:*

- (a) participation in the form of ownership, direct or by way of control, of 20 % or more of the voting rights or capital of an undertaking;*
- (b) control;*
- (c) a permanent link of both or all of them to the same third person by a control relationship] exist between the PI and other natural or legal persons, those links do not prevent the effective exercise of their supervisory functions [Article 11 (7)];*

**ELECTRONIC MONEY INSTITUTIONS (EMIs)**  
**AUTHORISATION REQUIREMENTS AND**  
**PROCEDURE.**

Member State Register

EBA Register



# Payment Institutions.

## USE OF AGENTS, BRANCHES AND OTHER ENTITIES

- Description of the structural organization set and the internal control mechanisms, identity of the directors and persons in charge of the management of the agents/branch
- Outsourcing without delegation of management responsibility
- IP full liability when it rely on third parties for the performance of operational functions

# ELECTRONIC MONEY INSTITUTIONS (EMIs).

## Authorisation Requirements and Procedure

- EMI = electronic money institution= non-banking payment service providers
- Core business = issuance and redemption of e-money
- PURE AND HYBRID EMIs
- 2009 EMI DIRECTIVE sets capital ratios and own funds requirements tailor-made to e-money issuance and reimbursement business as well as the payment transactions linked to both of them
- While the PSD2 own funds requirements for the operation of payment transactions are applied when the payment transaction operated by EMIs are not linked to issuance and reimbursement activities. When? Paysera case.