



## **Rights of EU Passport under PSD2**

This note aims to address some of the market confusion in relation to the rights of firms to move between EU jurisdictions when performing operations related to the second EU Payment Services Directive (PSD2).

In addition to seeking to establish the facts, some of the competition issues that may arise will be highlighted.

It must also be pointed out that the interaction between EU directives and member state transposition to law is not always straightforward and there is not always a clear answer or common interpretation.

### **Intent of the Directive**

Traditionally the banking industry controlled the rails of payments and access to transactional data sources that underpin the requirements of digital financial distribution and money management. New entrants (Fintech firms sometimes referred to as Third Party Providers (TPPs)) wanted to access these assets to perform their business models. Access for these Fintech firms has been with the permission of the customer and not often with the permission of the bank. In providing such services firms have not performed regulated financial services activity. These firms have been described as operating in the Live Market. PSD2 brings this form of access into regulation in the EU for the first time.

However, firms that have been in the Live Market since before January 13th, 2016, have been granted an extended period of grace that enables them to continue operating without the requirement to be immediately regulated in some markets. Whilst firms have incentives to become regulated earlier (both by the promise of access to certain APIs and to benefit from the greater certainty of access and liability model protections) there continues to be the opportunity for firms to delay becoming regulated until the Regulatory Technical Standards (RTS) come in to force on the 14th September 2019.

### **Current Situation in Transposition**

PSD2 came into force on the 13th January 2018. As an ordinary process, the rules of PSD2 get transposed into the national laws of EU member states.

As of March 2018, most of the EU members have not transposed this 'Maximum Harmonisation' directive into their national laws.

### **No transposition measures communicated:**

- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Greece
- Latvia
- Lithuania
- Luxembourg
- Netherlands
- Poland
- Portugal
- Romania
- Spain
- Sweden

### **Partial transposition measures communicated:**

- Malta

### **Full transposition measures communicated:**

- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Hungary
- Ireland
- Italy
- Slovakia
- Slovenia
- United Kingdom

### **Passport Rights**

If all EU member states **had** transposed at the same time, the situation would be straight forward.

- ASPSPs could continue to operate in the ordinary retail bank or credit card issuer role across member states, by simply having their main regulator notify the host regulator of their intention to trade
- ASPSPs could also seek to operate in the TPP role, by updating their license (if the ASPSP is not a bank) and following the notification process as set out in the first bullet
- TPPs could apply to their local regulator in their initial market to become regulated and then easily use this permission to open equivalent services in other EU markets after following the notification process set out in the first bullet.

### **Consequences for firms of markets not transposing at the same time**

It appears that the consequences of the failure to transpose at the same time do not fall evenly amongst market actors and across member states.

An ASPSP in a country which has transposed:

- Cannot demand the identity of the TPP until RTS applies
- Has had to change terms and conditions to avoid passing the risk of credential sharing back to the customer

- Is subject to the requirement to make the customer whole if a payment from a PISP relating to one of the PISPs customers (who is also the ASPSP customer) goes awry – this only applies to unauthorised, non-executed or defectively executed payments
- Must allow access to authorised or registered payment initiation and account information providers who operate both from within the transposed country and from another transposed country, unless they have reasonably justified and duly evidenced reasons to suspect fraudulent or unauthorised access by a TPP.

ASPSP in country which has not transposed:

- Is subject to access by firms that are both unregulated (in their own country) plus both regulated and unregulated firms from member states that have transposed. These ASPSPs are not subject to the obligation to grant access to TPPs until PSD2 is transposed into national law
- Don't have to change their risk position in their terms with their customer until they transpose PSD2.

ASPSP operating as a TPP in country which has transposed:

- Can operate in home jurisdiction as a TPP with no material application process to extend their permission to the TPP role if they are a bank; if the ASPSP is not a bank, they will need to apply for the new permissions
- Can operate as a TPP in any other jurisdiction which has transposed, using the relevant passporting right (provided they are a bank or have received the new permissions)
- Would have to notify their home state regulator if they choose to operate as a TPP in any member state that has yet to transpose.

ASPSP operating as a TPP in country which has not transposed:

- If an ASPSP is a bank, they are subject to PSD2 and therefore already regulated to supply services under the updated directive from 13th January 2018. Such an ASPSP can launch a TPP service in any Member State after undergoing the passporting notification process
- An ASPSP that is not a bank cannot launch as a TPP as they wouldn't be able to get the necessary authorisation or registration from their home member state. This means they also cannot offer these services in other member states unless they become authorised there.

Newly regulated TPP operating in a country which has transposed:

- Can operate TPP services in their regulated country
- Can offer services in other transposed and not transposed member states after undergoing the passporting notification process; however, in member states that have not transposed PSD2, ASPSPs might not yet be under an obligation under national law do not have the obligation to grant access to TPPs.

Newly regulated TPP operating in a country which has not transposed:

- This situation is not possible, as firms cannot apply to be regulated until the member state has transposed. This means that firms can offer AIS and PIS, but these services are provided in an unregulated space.

Pre-2016 TPP which has not become regulated operating in a country which has transposed:

- Can operate locally without any protections or regulations until RTS applies
- Can offer the same unregulated TPP services in member states which have not transposed but may have to cease trading in that domain when the member state transposes (depending on how that member state interprets the PSD2 transitional provision for the Live Market).

Pre-2016 TPP which has not become regulated operating in a country which has not transposed:

- In the UK, can continue to operate locally but cannot expand to a country where they have transposed, without becoming directly regulated in the other transposed member state (member states may differ in their interpretation of the PSD2 transitional provision for the Live Market, so it is possible that in some member states pre-2016 firms have to become regulated once relevant law is transposed)
- Can commence trading in other member states where they have yet to transpose but would have to cease trading if the member transposed, if they were not immediately regulated, as the extension framework is not transferable to states they have not operated in before 12th January 2016.

## **Key Issues**

### **Fair Competition**

1. The fintech market is again disadvantaged as the playing field is skewed by enabling banks to operate as regulated TPP actors selling the TPP services in markets where it is not even possible for the fintech to apply to be regulated (or to passport in as a regulated actor from another state). TPPs can offer these services in an unregulated space.
2. This is particularly vexing for the Fintech TPP market, as they have been slowed from expanding by practises in the ASPSP market in relation to access, terms and conditions and customer communications, until a legal framework is established which gives the ASPSP a structural advantage once more.
3. New fintech firms can launch and grow TPP type services in member states that have not transposed without any regulatory requirement. Presumably if member states transpose to coincide with RTS applying, these firms will suffer zero impediment, as the risks and rules switch simultaneously.

### **Liability and Security Concerns**

The purpose of this paper is not to exhaustively trawl through the gaps in the liability model during the period until RTS applies. That has been covered in earlier FDATA papers. The ecosystem has too much complexity in how it is delivering TPP services to be safe and competent. The proposal of voluntary communication between market actors as suggested by the FDATA 'Live Market Solution' should be pushed hard across the EU in the interests of not spoiling the market in its nascent state.

## **Customers**

It appears relatively difficult to follow this pattern for market participants. It must be difficult for customers to reasonably assess the risks, opportunities, protections and customer journeys now on offer from across the EU, where the transposition issues have further exacerbated the complexity and confusion.