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Reduced payer's liability for unauthorized payment transactions under the second Payment Services Directive (PSD2)

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ABSTRACT

In 2015, the European legislator enacted the second Payment Services Directive, which, among other things, determines the payer's liability for unauthorized payment transactions. This paper will show that PSD2 has widened its scope and further reduces the payer's liability for unauthorized transactions, for example by making it impossible to hold the payer liable in case no strong customer authentication has been applied, by requiring supporting evidence to prove the payer's fraud or gross negligence and by applying the same rules when unauthorized transactions are initiated through a payment initiation service.

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1. Introduction

Within the European Union, the first Directive dealing with the liability for unauthorized payment transactions was the Payments Services Directive of 2007 (PSD1).¹ In 2015, the European legislator enacted a second Payment Services Directive

(PSD2),² repealing the first one. A change of the legal framework was considered necessary because of the significant technical innovation, the rapid growth in the number of electronic and mobile payments and the emergence of new types of payment services (recital 3 PSD2). The objective of these new rules is to close regulatory gaps (among other things by adapting the scope of application), to provide for more le-

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¹ 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 [2007] OJ L 319/1. Before the Directive was enacted, there were only some non-binding rules, incorporated in European Recommendations. See in particular: Commission Recommendation of 30 July 1997 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder [1997] OJ L 2058/52. On the liability regime in PSD1 see for example: R. Steennot, "Allocation of liability in case of fraudulent use of an electronic payment instrument: the new directive on payment services in the internal market" (2008) 24 *Computer Law & Security Review*, 555.

² Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L 337/35. Not all Member States were able to implement the Directive in due time (e.g. Belgium).

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gal clarity and to ensure a high level of consumer protection (recital 6 PSD2). Particularly interesting in the context of this paper is the European legislator's objective to protect consumers adequately against the increasing security risks resulting from the growing technical complexity of electronic payments and the growing volumes of payment transactions (recital 7 PSD2).

This paper discusses the liability regime in case of unauthorized payment transactions under PSD2. The articles' main objectives are to find out whether this regime has been changed substantially under PSD2 and to determine whether consumers under PSD2 are better protected from the risks resulting from unauthorized payment transactions than under PSD1. In this context, attention will also be paid to the concept of (un)authorized payment transactions and the scope of the liability regime included in PSD2.

2. Unauthorized payment transactions

The concept of unauthorized payment transactions has basically remained the same in PSD2. A payment transaction is only authorized when the payment service user has given his consent to the transaction (art. 64.1 PSD2). Normally, consent is given prior to a payment transaction, but, if agreed by the payer and the payment service provider, transactions can also be ratified or approved afterwards. Consent must be given in the form and using the procedure agreed by the parties, usually in the framework contract (e.g. by providing login and password, communicating credit card details or scanning a QR-code and a PIN).

In general, it is quite easy – at least from a theoretical point of view – to make a distinction between authorized and unauthorized payment transactions. However, in some situations, it becomes more difficult to do so. For example, suppose that a payer originally authorizes a payment transaction but a third party acting fraudulently changes the beneficiary (and the amount) afterwards. For instance, reference can be made to a case where the payer initiated a payment transaction through a banking website, after sharing his computer via *TeamViewer* with a third person who contacted him by phone and pretended to be a Microsoft employee. Once the transaction (with the claimed objective of making a payment to Microsoft) was initiated, the fraud changed the beneficiary and the amount of the transfer. Can such a transaction be considered unauthorized? It can be argued that it can indeed be considered unauthorized, since the payer did not consent to that payment transaction.³

Although PSD2 did not change the concept of an (un)authorized payment transaction, PSD2 will have an important impact on the way payers will consent to payment transactions. However, this is due on the one hand to the requirement of strong customer authentication for electronic payment transactions (art. 97 PSD2) and on the other hand to the

new liability regime requiring strong customer authentication in order to be able to hold a payer liable for unauthorized payment transactions (art. 74.2 PSD2). We will come back to the issue of strong customer authentication and its impact on the payer's liability later in this paper.

Secondly, PSD2 does not only govern (the liability for) payment transactions, to which the payer has given his consent directly to his payment service provider via or through the payee (as was the case with PSD1), but also to payment transactions that are initiated through a *payment initiation service provider* (art. 64.2 PSD2). *Payment initiation services* are services that are used to initiate a payment order at the request of the payment service user with respect to a payment account held at another payment service provider (art. 4 (15) PSD2) (e.g. Sofort, iDEAL⁴).⁵ They establish a software bridge between the merchants' website or app and the online banking platform of the payer's account servicing payment service provider⁶ in order to initiate internet payments based on a credit transfer (recital 27 PSD2). Typically, the consumer using the payment initiation service when shopping online is automatically redirected from the online merchant's website to the payment initiation service provider's website, where he is required to provide his online bank login details. Once the service provider has authenticated the details, the payer is presented with a pre-filled payment form, containing the details of the payment transaction (such as the payee's account number and the amount of the transaction).⁷ When the payer confirms the details, the merchant is immediately informed that the transaction is initiated. Payment initiation services offer several advantages: they allow consumers to shop online, even if they do not have a credit card.⁸ In addition, they can provide comfort to the payee that a transfer has been initiated in order to provide an incentive to the payee to release the goods or to deliver the service without undue delay (recital 27 PSD2).

These kind of payment services did not fall under the scope of PSD1 and were therefore not regulated in the past,⁹ implying among other things that liabilities in the case of unauthorized payment transactions were unclear. In order to ensure consumer protection and the supervision of these players, regulation of payment initiation service providers was deemed necessary (recital 29 PSD2).¹⁰ What is interest-

⁴ J. Rogers, T. Carman & T. Wessing, "PSD2 and the payment services regime: what's changing, what's new and what you need to do" (2016) 5(6) *Compliance & Risk*, 3.

⁵ Contrary to payment service providers, payment initiation service providers do not at any stage of the payment chain hold the user's funds.

⁶ The account servicing payment service provider means a payment service provider providing and maintaining a payment account for a payer (art. 4 (17) PSD II).

⁷ M. Donnelly, "Payments in the digital market: Evaluating the contribution of Payment Services Directive II" (2016) 32 *Computer Law & Security Review*, 830; D. Mozdzynski, "The conceptions of new payment methods based on revised Payment Services Directive (PSD2)" (2017) 6 *Information systems in Management*, 52.

⁸ D. Mozdzynski, *ibidem*, 59.

⁹ C. Riefa, "New legislative package for payment services" (2013) 3 *Journal of European Consumer and Market Law*, 179.

¹⁰ See in particular article 66.3 PSD2 stating the requirements and business restrictions of payment initiation service providers. For example, payment service providers must ensure that personal-

³ The expert panel of the Belgian Ombudsman for financial services dealt with this case. The advice of the expert panel is available at <https://www.ombudsfm.be/nl/particulieren/publicaties/adviezen-college/paiements-et-comptes-de-paiements-%E2%80%93-op-%C3%A9rations-%C3%A0-distan-0/>.

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