

Legislator must issue Clarification to provide Certainty for non-financial Companies

Centralized Cash Management Systems of
non-financial Groups are not in the Scope of PSD 2

Introduction

Deutsches Aktieninstitut represents non-financial companies that have centralized payment transactions across the group. We very much welcome the progress recently achieved in integrating EU-wide payments. Nevertheless, we see a risk in terms of level playing field due to eventual uncertainties among national supervisory authorities regarding the treatment of centralized cash-management systems within non-financial groups. This particularly applies to the regulatory classification of incoming and/or outgoing payments of a group company which are processed centrally via another group company (e.g. payment factories). In this regard, the interpretation of Recital 17 and the related application of Article 3 lit. (n) of Directive (EU) 2015/2366 (“**PSD 2**” or “**Directive**”) has a key role. The respective uncertainties will need to be clarified such that the full range of centralized cash-management systems (and related services) that are duly operated by non-financial groups are without doubt exempted from the scope of PSD 2. In more detail:

1 Background: Relevance of centralized cash-management systems in non-financial groups

Centralisation of domestic and cross-border payment transactions is widespread and well established in non-financial groups across Europe (and the world). Such cash management systems are, in particular, characterized by a centralized group-wide processing of incoming and outgoing payments (so-called “payment factories” / “shared service centers”). In practice, there is a broad variety of set ups (e.g. by implementing specific group entities for these purposes or by way of integrating a central cash-management unit into a parent or other group company).

Apart from that, centralized group cash-management systems frequently appear in other forms, e.g. in the context of “one-face-to-the-customer”-situations (such as in leasing structures or with respect to a group-wide distribution of products). In this case, a group company may centrally receive payments by customers for services and/or products provided by other companies of the same group for intra-group onward transmission to such other involved group companies.

The central processing of payment transactions within non-financial groups as described above does not only have organizational advantages (such as efficient execution of payments). Duly operated centralized cash-management systems also facilitate compliance with the legal requirements regarding payment transactions and the prevention of money laundering. Thus, they contribute significantly to the prevention of misuses of payment transactions. In addition, such centralisation provides transparency of a group's payment transactions as well as centralized control / monitoring of the processing of payment transactions within a non-financial group. In summary, depending on their size and the nature, scope and complexity of their business activities, the relevant non-financial groups therefore usually not only ensure compliance with the legal requirements at a central point. They also comply with various voluntary requirements in order to ensure the integrity of the respective non-financial group. This is a main differentiation criterion to abusive / criminal participants in the relevant markets.

2 PSD 2 – Legal uncertainties and purpose

The PSD 2 acknowledges the importance and particularities of payment systems in non-financial groups. Recital 17 PSD 2 explicitly refers to “payment factories” and “collection factories” and the fact that SEPA facilitated their EU-wide creation. According to Recital 17 PSD 2 *“transactions between a parent undertaking and its subsidiary or between subsidiaries of the same parent undertaking provided by a payment service provider belonging to the same group should be excluded from the scope of this Directive”*. The same applies with respect to Article 3 lit. (n) PSD 2 which exempts *“payment transactions and related services between a parent undertaking and its subsidiary or between subsidiaries of the same parent undertaking”* from the scope of the Directive.

By explicitly mentioning “payment factories” or “collection factories” in Recital 17 PSD 2, which are by definition non-licensed group entities providing payment services for the group in the sense of a “processing platform”, the EU-legislator acknowledged their ongoing existence and, accordingly, the purpose of the exemption seems clear. However, this holds not entirely true for the second sentence of Recital 17 PSD 2 and the actual wording in Article 3 lit. (n) PSD 2, both of which also refer to a *“payment service provider [other than an undertaking]¹ belonging to the same group”*. The PSD 2 defines a “payment service provider” as a licensed entity like a credit institution, an electronic money institution etc. (see Article 1(1) PSD 2).

¹ Wording in Article 3 lit. (n) PSD 2 only.

Against this background it is, in particular, not entirely clear if and to what extent (and/or under which circumstances) a non-licensed group company shall be permitted to centrally process for and on behalf of other group companies incoming and/or outgoing payments from or to third parties.

We note, however, that the EU-legislator was aware that centralized cash management systems as described in para. 1 above tend to stabilise the system and prevent misuses of payment transactions and therefore should be exempted from the scope of PSD 2. This intention of the EU-legislator is unmistakably referred to in Recital 17 PSD 2. In particular, sentence 3 of Recital 17 PSD 2 refers to the permission to operate a “collection factory” without the need for a licence. It states that *“the collection of payment orders on behalf of a group by a parent undertaking or its subsidiary for onward transmission to a payment service provider should not be considered to be a payment service for the purposes of this Directive”*. Due to the wide range of centralized cash management systems (cf. para. 1 above), such reference to a “collection factory” can only serve as an example and Recital 17 PSD 2 cannot be regarded as an exhaustive list of privileged transactions.

In conclusion, the whole range of centralized cash management systems (such as the execution of payment orders for and on behalf of other group companies to third parties which is characteristic for a “payment factory”) should not be regarded as a payment service within the meaning of PSD 2.

The following considerations support this interpretation:

- Either Recital 17 PSD 2 as well as Article 3 lit. (n) PSD 2 expressly refer to *“payment transactions and related services”* which we understand to be a strong indicator that the recipient of the payment services (and not the recipient of the individual payment transaction which could be a third party) needs to be a group company. Any other understanding would contradict the general objective of PSD 2 to (only) cover service providers that do offer payment services to external third parties (rather than to companies of the same group only).
- If the reference to a “payment service provider” in a sense of a licensed entity is narrow interpreted, the exemption would lack its own use case: A licence would be required for entities which are aimed to be exempted from the licence requirement.
- Harmonisation achieved by the Single Euro Payments Area is a prerequisite for companies to centralise their payment services group-wide. This is to be considered a material contribution to the completion of the European single market.

- Non-financial groups, in contrast to vehicles intentionally created for abusive behaviour, are verifiably compliant with the legislative requirements regarding their cash transactions.
- It is a generally acknowledged principle in the area of banking supervisory law to privilege the processing of group internal payments / services.

Provided that the relevant non-financial groups ensure compliance with the legal requirements relating to the (centralized) processing of payments we do not see any reasonable grounds that would require a different interpretation of Recital 17 / Article 3 lit. (n) PSD 2. Moreover, in our view, this interpretation / application of PSD 2 would still allow for a differentiation between different participants in the market. In other words, we do not see any objection to apply PSD 2 – in accordance with its purpose – to those market participants (only) that are subject to a risk that should specifically be covered by PSD 2 (in particular with respect to prevention of misuses of payment transactions).

In summary, we conclude in accordance with current practice and applicable requirements that centralized cash-management systems duly operated by non-financial groups (cf. para. 1 above) should be exempted from PSD 2. For the avoidance of doubt, this shall include the processing / receiving of payments to/from third parties for and on behalf of other group companies.

3 Outlook – EU-wide clarification / harmonization

In the interest of all market participants (including, for the avoidance of doubt, national legislators as well as national supervisory authorities), any future uncertainties / misunderstandings with respect to the applicability of PSD 2 to centralized cash-management systems should be avoided.

- In the short-run, as a matter of precaution, the EU-legislator is being asked to confirm our above understanding relating to the scope of PSD 2 (see para. 2).
- In the mid-/long-run, the Regulation will need to be modified / renewed accordingly. For example, the wording of Recital 17 and Article 3 lit. (n) PSD 2 should be clarified in accordance with the actual purpose outlined under para. 2 above. The text should clearly exempt the full range of centralized cash-management systems (and related services) that are duly

operated by non-financial groups (as described above). Any reference to a “payment service provider” that could be interpreted in a sense that a respective license would be required for the operation of centralized cash-management systems will need to be avoided. Unlike now, the regulation would then be clearer and could not be (mis)understood in a manner that non-financial companies may require a license although such companies are actually aimed to be exempted from the license requirement (cf. para. 2 above).

In conclusion, the requested clarifications would prepare the grounds for a harmonised interpretation and application of the regulation. This would not only reflect the importance of centralized cash-management systems (and related services) for the European single market, but also facilitate the national implementation of the underlying EU-legislation as well as the respective interpretation by the national supervisory authorities and its application in practice.

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