

GSMA Feedback to the European Commission's Proposal on Payment Services in the Internal Market

This document presents the inputs from the GSMA to the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on payment services in the internal market and amending Regulation (EU) No 1093/2010 open [feedback period](#).

The European Commission presented a Payments Package to bring payments and the wider financial sector into the digital age, including a proposal for a Payment Services Regulation (PSR), introducing changes to the regulatory framework of the PSD2 Directive.

Among other issues, the proposal addresses fraud by impersonation ("Spoofing"), making the payment services provider liable unless it is able to prove gross negligence by the end user, and introducing a new obligation on providers of Electronic Communications Services (ECS) to cooperate with payment service providers to prevent that type of fraud. It also establishes that potential claims by payment services providers against ECS providers for financial damage caused in the context of impersonation fraud should be made in accordance with national law.

As providers of ECS, we welcome the aim and goals of the proposed Regulation. Notwithstanding, we would like to raise concerns concerning the specific inclusion of ECS providers in a financial proposal for Regulation targeted to credit institutions.

Impersonation Fraud

- As a general remark, we highlight that consumer law and protection is not absolute but it is also based on the principle of an average consumer due diligence. In this respect, payment services cannot be an exception, or grounded on a sort of consumer unaccountability obliging credit institutions to make reimbursements in any circumstances when a fraud takes place.
- Directive 2002/58/EC (e-privacy directive, amended in 2009) already sets obligations for ECS providers regarding the security of communications. Additional responsibilities deriving from claims by payment services providers to ECS providers on the basis of this new proposed obligation, could potentially amount to roughly eight billion euros per year across the EU¹. To put that figure in perspective, the telco industry invests per year approximately 50 billion EUR in the EU. A risk of this magnitude can be severely disruptive for telecom operators and negatively impact connectivity across the EU. The E-privacy directive already established obligations on ECS providers concerning security of communications, targeting specifically the ECS sector. We consider

¹ Payments fraud figures available for the UK reach 1,3 Bn GBP (730 million GBP for unauthorised payments; 583.2 million GBP for authorized payments). [Annual Fraud Report 2022_FINAL_.pdf \(ukfinance.org.uk\)](#). Extrapolating by GDP, payments fraud losses in the EU27 could be estimated at roughly 8 Bn EUR per year.

therefore that imposing new or similar obligations in a sectorial regulation is disproportionate and not justified.

- Directive 2002/58/EC sets obligations on providers of ECS that sufficiently address the issue of fraudulent identification of the caller/sender in electronic communications services, including voice calls, SMS, or electronic mail. Based on these obligations, and in the pursuit of our customers' interests, GSMA members already cooperate with payment services providers to minimize payments fraud. In GSMA view, an abstract obligation to cooperate that opens the door to claims but leaves open the extent of the potential liabilities for ECS providers would not add much to the fight against fraud. On the contrary, it would create an unsound foundation for future improvements.
- The distribution of value along the payment services supply chain is currently overwhelmingly dominated by payment service providers. Payment services are provided through agreements between end users and merchants on the one hand, and payment institutions on the other. What end users and merchants pay to be able to use a payment platform essentially goes to the payment service providers. In contrast, ECS providers only have a very secondary and indirect role, as service providers that enable the parties to communicate with each other. Holding ECS providers responsible for payment fraud would be disproportionate, given their extremely limited involvement in the distribution of value among the various layers of the payment supply chain.
- Considering the abovementioned reasons, Article 59(5) and recital 81 of the proposed Regulation should be removed.
- Without prejudice to what has been previously indicated, if it is decided not to repeal Article 59(5) and recital 81, it would be appropriate to introduce in the Regulation mitigating factors to nuance the extent to which ECS providers would be liable when there is a case of fraud and to clarify the extent and scope of cooperation obligation that Regulation imposes to ECS providers. The imposition of obligations of result² on ECS providers creates legal uncertainty because fraud can take place despite ECS providers complying with their obligations in directive 2002/58/EC and making all reasonable efforts to cooperate with providers of payment services. Moreover, the responsibility to compensate end users cannot be transferred to the ECS providers, and much less entirely, even when they fail to meet their obligations. We note in this respect that failure on the side of ECS providers to meet their obligations under directive 2002/58/EC is not necessary, nor sufficient, for the fraud to take place.
- Incentives can be created for ECS providers to actively participate in fraud prevention through commercial arrangements with payment service providers, in which payment providers can buy a fraud prevention or mitigation service from ECS suppliers, and as

² In obligations of result, one is liable if the intended result (e.g., absence of payments fraud) is not obtained. In obligations of means, which in GSMA are more appropriate in this case, one is obliged to act with the prudence and diligence of a reasonable person of the same quality placed in the same situation, even if the result sought is not obtained.

part of the agreement eventually also establish risk sharing in case of fraud. These commercial arrangements could be encouraged through a clearer legal framework regarding the use of fraud prevention tools involving ECS providers, as explained below.

- As part of ongoing initiatives to mitigate payments fraud, GSMA members have identified several monitoring and intervention tools that could have a substantial positive impact but face legal uncertainties. In this respect, this Regulation presents an opportunity to clarify the legal framework. Firstly, allowing ECS providers to swiftly discontinue communications originated in IDs used by fraudsters. Secondly, legal uncertainties regarding monitoring tools should be removed. Existing technologies could already support the fight against fraud but carry the legal risk of being eventually deemed in breach of privacy-related rights. For the fight against fraud to be successful, we need a clear legal framework, avoiding fragmented rules within the EU, that protects end users but also makes privacy compatible with the availability of effective anti-fraud mechanisms.

Telecommunications exemption

- The monetary limits of the telecommunications exemption in Art. 2 (2) (k) (ii) are intended to ensure that payment services provided without a licence do not expand into general payment intermediation services. In the meantime, neither the PSD2/PSD3 nor the PSRs require a case-by-case approach when considering the threshold values, but also allow a general, cross-cutting approach. Accordingly, the legal requirements can also be sufficiently taken into account by a statistical approach based on validly determined historical billing data, whereby - also in order to ensure the applicability of the provision in practice - the determination of the cumulative threshold of EUR 300 can be based on the subscriber number and the respective service.
- From the perspective of telecommunications companies, it is essential that this remains valid even after the PSR enters into force. Since the PSR is an EU Regulation, there is a great deal of uncertainty among the member companies concerned. In this respect, we propose the inclusion of a clarifying provision in the PSR, i.e. "per telephone number" instead of "per subscriber" in Art. 2 (2) (k) (ii) of the PSR and that the procedure developed by BaFin for determining the threshold may continue to be applied. Furthermore, we reiterate that the limits of EUR 50 and EUR 300 should be adjusted against the background of the development of the market for digital goods and rising inflation.

New audit obligation

- In Art. 39 (2) PSD 3, the additional obligation to "provide competent authorities with an annual audit opinion" has been standardised for the first time in addition to the previously obligatory annual notification of compliance with the thresholds standardized in Art. 2 (2) (k). Since the existing annual notification procedure has proven

itself, there is no need to introduce such an additional obligation, especially since this would entail higher costs for the obligated parties. Should this additional unnecessary obligation be retained, we would at least ask for a clarification that an audit by the internal audit is sufficient.