

## eu travel tech position paper – Payment services legislative proposals

### **Introduction**

The EU's payment services legislation has been an important driver of change in how travel technology businesses handle payment transactions. eu travel tech broadly views the revised Payment Services Directive (PSD2) as a piece of legislation that has enabled the development of innovative payment services, increasing competition in the relevant markets and making payments more efficient, swift and secure for consumers. At the same time, there have been implementation challenges and uncertainties, which makes the new proposal on the Payment Services Regulation (PSR) and Payment Services Directive (PSD3) all the more relevant.

eu travel tech broadly supports the decision to transfer relevant elements of the revised Payment Services Directive into the newly proposed Payment Services Regulation. The adoption of a Regulation will serve the interest of ensuring a uniform application of rules across the EU, thereby avoiding competitive distortions due to varying transpositions into national law and diverging enforcement practices across Member States.

We call on EU policymakers to adopt a revised framework which is fit for purpose and closely considers the relevant specificities of the travel sector, in its low-fraud and complex nature.

### **Commercial Agent Exclusion**

The Commercial Agent exclusion (CAE) of the PSR is an important element for travel platforms and can be a core part of their business model. This applies to large platforms, 'multi property management companies' that manage a group of properties, and smaller travel agencies. The CAE affects all these parties in the travel industry. As such, we welcome the fact that the PSR proposal tackles the issue of varying interpretations of the CAE, which may increase legal certainty for many businesses operating in the EU. However, we request that its scope and application be clarified. Online Travel Agencies (OTAs) of all sizes heavily rely on the CAE and will face challenges if they are not able to process transactions under the CAE.

In general, travel intermediaries should not be required to take on the full burden of being an authorized payment institution only because they are fulfilling a limited intermediary role in the payment transaction, and in some cases they are not in the possession of funds when acting on behalf of either the payer or payee in the course of the payment transactions from the payer to the payee. The OTA landscape is very diverse; any legislative change will impact a broad range of business models.

The PSR brings a novel approach to the CAE by referring to the Commercial Agents Directive regarding the definition of commercial agents (PSR Art. 2 (2) (b)), which we generally hold to be flawed. When applied to the travel tech sector, this approach raises a pressing need for clarification:

- The exact definition of “negotiate” and “conclude” remain unclear. We believe that the distinction between negotiation and conclusion is key as it can be decisive for the application of the exclusion. In the PSD2 context, eu travel tech members have encountered regulators issuing guidance indicating that the agent must have power to negotiate material sales parameters such as the price, as though the exclusion wording read “and conclude”. In fact, some authorities take the view that commercial agents just provide a technical means of messaging between vendors and purchasers - mainly on the basis that the actual conclusion of each contract is largely automated. This approach is not technology-neutral and disregards the role of agents who will genuinely take control of the contract-conclusion process. The absorption of “conclusion” into the “negotiation” can also have the unintended adverse effect of blocking the availability of the exclusion to platforms who only negotiate or only conclude the sale or purchase of goods or services.
- The definition of “real margin to negotiate” similarly requires clarification, as its interpretation is currently unclear.
- The CAE provision of the PSR refers to the Commercial Agents Directive to define the concept of “agent”. This Directive stipulates that only self-employed intermediaries involved in the sale or purchase of **goods** on behalf of another person qualify as commercial agents. Building on this definition, Art. 2 (2) (b) of the PSR then refers to agents involved in the sale or purchase of **goods or services**. The CAE would benefit from a clarification that the Commercial Agent Directive’s restrictive focus on intermediaries of **goods** only is not followed.
- Commercial agents involved in the travel sector often have multiple principals for a single transaction, however, this circumstance is not reflected in the provisions of the Commercial Agents Directive. Requirements to meet the exclusion seem to extend to negotiating a sale with the seller and the buyer. As such, the proposal would benefit from clarification to ensure that this ambiguity is revised.
- Furthermore, a clear distinction should be made between commercial agents who negotiate or conclude the sale or purchase of a product or service while holding funds, and commercial agents who act on behalf of the payer or payee but do not possess the funds. This distinction was made in Recital 11 of the PSD2 and was decisive for the application of the exclusion to OTAs.
- We welcome the fact that the EBA will issue guidelines to further clarify the provisions relating the CAE. However, it is very important to clearly describe

the boundaries in which the EBA should operate to avoid undesired consequences.

In order to address the above-mentioned lack of legal clarity, we recommend to define an agent as a legal or natural person entrusted with the power to negotiate and/or conclude contracts on behalf of another person ('the principal'), either in the agent's own name or in the name of the principal, for the purchase of goods or services by the principal, or the sale of goods or services supplied by the principal. as defined under the guidelines on vertical restraints, thereby avoiding the limitations of the Commercial Agent Directive's restrictive wording.

### **Strong Customer Authentication**

Strong Customer Authentication requirements are a key achievement of the EU's legislation framework on payment services, as they serve to protect consumers and prevent fraud. Nonetheless, the obligations must remain proportionate and implementable, which is why several adjustments to the provisions, focusing on the SCA exemptions, are necessary.

Regarding the SCA-exemption for **Merchant-Initiated Transactions (MIT)**, eu travel tech welcomes that fact that it has been included directly within the PSR legal text. This marks a step forward from the previous approach of including the MIT exemption only in EBA guidance.

On the substance of the MIT exemption, it should be noted that several travel tech companies are confronted with a unique problem: no-shows, cancellations and late cancellations by the traveler. In such cases, travel intermediaries could theoretically rely on an existing MIT mandate (with SCA) to transact the charge. However, many travelers are not inclined to conduct a further SCA to enable a no-show cancellation charge. This leaves several travel intermediaries in a difficult situation where they may be unable to receive the necessary MIT mandate, but are also unable to motivate the traveler to validate the additional charge through SCA. The reviewed MIT regime does not take into account the circumstances as described above which is why an exemption for those instances should be introduced for a limited period of time until the entire travel industry has built an alternative solution. Actors within the industry should increase their efforts and coordinate to work toward common solutions to ensure that SCA procedures are compliant and fit for purpose.

Concerning the **Mail Order, Telephone Order (MOTO)** exemption, we similarly commend its inclusion in the primary legal text. It is positive that the Commission has provided clarification that MOTO may be applied where the payment orders are placed using non-electronic means, while the execution of the transaction

may be performed electronically. Further clarity regarding the status of email orders in the context of MOTO would be beneficial.

Furthermore, we would request additional time for the travel ecosystem to further implement alternatives to MOTO. Much work has already been carried out by the travel industry to develop and build alternative solutions. Again, actors within the industry should increase their efforts and coordinate to work toward common solutions to ensure that SCA procedures are compliant and fit for purpose. The EC and EBA should grant sufficient time to permit for such sector-based solutions to be rolled out.

On the topic of **Transaction Risk Analysis (TRA)**; based on the higher transaction amount for travel services such as flights and the low fraud risk of the travel sector, eu travel tech supports Regulatory Technical Standards (RTS) which would allow for SCA-exempt transaction amounts higher than €500.

Lastly, we highlight that the additional **accessibility obligations** introduced under Art. 88 require further clarification. The criteria for defining “persons with disabilities, older persons, with low digital skills and those who do not have access to digital channels or payment instruments” and associated SCA-related obligations should be as clear as possible.

### **PSR and Package Travel Directive (PTD)**

The PSR proposal foresees a focus on single payment transactions, potentially even in cases where various services of travel providers (e.g. hotels and airlines) are concerned. For travel intermediaries, such an approach may lead to a classification of their activities as “package organizers” under the existing Package Travel Directive, resulting in additional legal obligations such as insolvency protection. The PSR and PTD should be aligned in this context, avoiding a de facto reclassification of travel intermediaries.

### **Technical service providers**

Article 58 of the PSR proposal refers to technical service providers and their liability. From the perspective of the tourism industry, it would be very important to ensure that providers of tourism booking and reservation systems (for example, Global Distribution Systems) as well as internal systems for customer and booking management are not classified as technical service providers within the meaning of the PSR. We expressly point out that, particularly in the case of booking systems, but also other industry systems, providers are often used whose registered office is in a non-EU territory and therefore have no obligation to implement the PSR.

### **Electronic Money Institutions (EMIs)**

The proposal to revise the Payment Services Directive (PSD3) merges elements of the PSD2 and revised Electronic Money Directive (EMD2), harmonizing them together in one single piece of legislation. The EMD2 states that EMIs shall be authorized to provide all the payment services outlined in Annex I of the PSD2. This is an interpretation that is followed by some, but not all, Member State Competent Authorities. However, this element was not included in the PSD3 proposal. Therefore, the question remains whether a Payment Institution authorized only to provide e-money services under Annex II PSD3 will automatically be authorized to provide all the payment services listed in Annex I PSD3. Clarification is needed as to whether a Payment Institution is authorized only to provide e-money services under Annex II PSD3 will automatically be authorized to provide all the payment services listed in Annex I PSD3.

### **Entities to which activities are outsourced**

The PSD3 proposal stipulates that payment institutions must not outsource operational functions that are important where a defect or failure in its performance would materially impair the continuing compliance of a payment institution with the requirements of its authorization, its other obligations under PSD3, its financial performance, or the soundness or the continuity of its payment or electronic money services. The text also states that a Payment Institution should remain fully liable for any acts of their employees, or any agent, distributor, or outsourced entity. It would be useful to have clarification on whether the liability protection is meant to extend to merchants as well as consumers. This would be relevant to OTAs as both a service provider and as a merchant.

### **Surcharges and discounts**

As in relation to other areas discussed above, eu travel tech members appreciate the PSD2's purpose and implementation in effecting a broad elimination of surcharges on common consumer payment methods at the point of payment processing but have also observed several challenges to the existing travel services payment ecosystem being able to manage and give full effect to the relevant provisions of the Directive.

Members have observed that the PSD2's focus on payment processing institutions as the determinant of surcharging practices on any transaction has given rise to a number of potential consistency challenges that may be unique to the travel payments ecosystem, and possibly in particular Air travel payments, though aspects of these apply in Accommodation and other travel services payments as well.

Illustrative examples include:

1. A practice among some airlines to surcharge certain PSD2-regulated forms of payment on the basis of extended logic linked, for example, to the point

of origin of a specific, or to assumptions as to the blanket nature of payment cards and methods from any system (for example, the incorrect assumption that all American Express cards are PSD2 exempt in all Member States). Of note here is that, whether working on an agency or a form of merchant model per transaction in any case, eu travel tech members have very limited scope within the online payment ecosystem to identify, suppress or otherwise control surcharges passed through on any basis or logic by a primary travel service provider, including through an industry standard Global Distribution System (GDS) of fares / ticketing. Where members do operate, or extend operation of, a merchant position, this can create significant additional cost, as well as disproportionate direct risk with respect to the financial position of the airline (or other travel service provider).

2. Selective single payment method discounting in some channels and markets, whereby a business offering airfare options for booking leads in online search results, on 'metasearch' sites or on its own site with a reduced headline price, that is not available via any PSD2-regulated common credit cards / payment methods, but only via a single, uncommon form of payment, sometimes also requiring joining fees to use.

Travel tech companies have been compelled to generate and attempt to influence all sector participants toward following common, unified policy approaches as to specific payment method, booking portal, and traveller combinations making up any 'EU' transaction. There remains a degree of uncertainty and friction in the marketplace for travel transactions emerging from this situation.

We would support clarification that renders more complete for the consumer the application and a common understanding among Member States and industry participants of the broad surcharge ban, to ensure it is experienced fairly and consistently for all intended use cases i.e., substantively all consumer travel from, to or in the EU and supports the due application of Member State national laws for the review of unfair consumer practices.

### **Concluding remarks**

We firmly believe that the proposals to revise the PSD3 and introduce the PSR are a positive step and provide a strong foundation for the co-legislators to build on. It will be particularly important to introduce further legal clarity regarding the Commercial Agent Exclusion and SCA exemptions, in the interest of facilitating compliance and reducing any unneeded administrative burden for payment service providers and merchants. The Commission has taken the right approach by aiming for more harmonization of rules and enforcement across the EU.

eu travel tech stands ready to support legislators in their efforts to finetune the proposals and calls on policymakers to take the travel (tech) sector's specificities into account wherever possible.