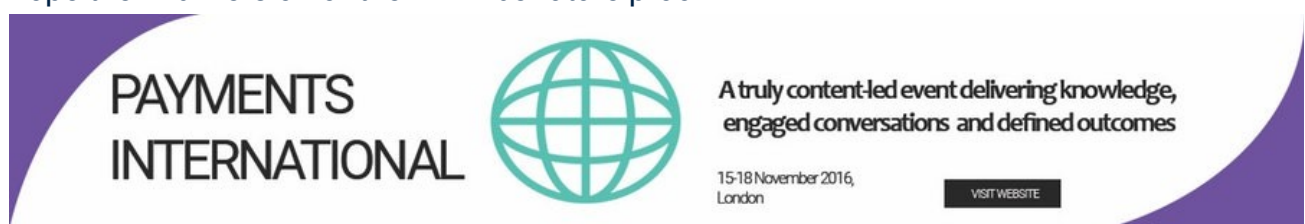


Payments regulation: Is the forthcoming European regulatory landscape encouraging cross border activity?

This autumn, I am following the PSD2 implementation at Member State level across all European countries, while having spent summer looking at how the Interchange Fee regulation various options –weighted average, consumer choice at Point of Sale, three parties systems derogation, commercial cards definition... – were interpreted and dealt with at national level in the EU. The PSD2 is a very clear piece of law, and its Article 2 explains that Title III – on transparency of conditions and information requirements for payment services- and Title IV – on rights and obligations in relation to the provision and use of payment services - both apply to payment transactions in the currency of an EU Member State where both the payer’s payment service provider and the payee’s payment service provider are located within the Union, or the sole payment service provider in the payment transaction is. So the PSD2 includes the cross border payments activity logic in its scope and sets clear rules on “what” is “cross border feasible” and “how” it is “cross border feasible”, allowing industry to adapt and foresee how to operate in the near future.

Where the PSD2 gets less workable as a legal framework is, in my view, when “Level 2” regulation kicks in; the PSD2 gives the European Banking Authority (EBA) the mandate to develop six different Regulatory Technical Standards, five sets of guidelines and a register. Recently, reading the EBA draft Regulatory Technical Standards (RTS) on strong customer authentication, I found the text unclear and very difficult to work with for the industry. First of all the liability shift provision in Article 74.2 of the PSD2 is not taken into account in the RTS, but neither is there any space left for risk-based analysis outside of the very specific exemptions proposed by the EBA, which indicate very low maximum amounts both for remote and contactless payments. Level 1 regulation –i.e. the PSD2- allowed for risk analysis criteria to be put in place under Article 98 of the PSD2 which explicitly refers to “the level of risk involved in the service provided”. But these are only draft RTS, and I really hope the final version of them will be future proof.



A less pro international payments approach than that of the PSD2 can be found in the draft 5th Anti Money Laundering Directive (5th AMLD), which was published by the European

Commission on the 5th of July and is currently being discussed in the European Council. An amendment to Article 12 of the 4th AMLD proposes that credit institutions and financial institutions acting as acquirers in Europe should only accept payments made with prepaid cards issued in third countries where such cards meet requirements equivalent to those set out in the Directive. Would this provision potentially allow the use of non-EU issued prepaid cards in Europe? And how would EU acquirers eventually check if these non-EU prepaid cards meet such requirements? Which payment service provider will be liable for such checks? I share the anti-money laundering aim of the draft Directive, but I struggle to understand how this will in practice be feasible.

Finally, a European Commission Communication on a European system complementing the existing EU-US Terrorist Financing Tracking Programme (TFTP) is to be published in December 2016. The TFTP allows Member States to request a search of financial data when there is a suspicion of a nexus to terrorism or its financing. In the Action Plan against terrorism financing of 2 February 2016, the European Commission announced its intention "...to analyse the possible need for complementary mechanisms to the TFTP to fill possible gaps, i.e. transactions which are excluded from the EU-US TFTP agreement – notably intra-EU payments in euro – and may not be possible to track otherwise." An EU system would require the collection, processing and analysis of a large amount of personal data which is privately held. I look forward to reading the Communication in December- the aim of the Communication is very important. But how the balance between combatting terrorism and protecting data is to be found, appears for the moment unclear.

Monica Monaco will be presenting at the upcoming Payments International event to address "Payments Innovations Strategy Roundtable: From Bitcoin to Apply Pay – What will the new Payments World Look Like? How Will It Be Regulated?" and "The Payments Regulation Trouble Shooting Panel".