REVISED PAYMENT SERVICES DIRECTIVE - ACCESS TO ACCOUNTS PRINCIPLE AS A MEANS OF PROMOTING COMPETITION

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ABSTRACT

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Digitalisation is quickly altering the ways in which people make payment transactions and manage their finances. This has led to the emergence of new types of financial services such as payment initiation and account information services that are provided by non-bank service providers, also known as third party providers. The providers of these new innovative payment services compete with the traditional banks in the European payment services market but at the same time the functionality of their services is dependent on the infrastructure and data possessed by the banks.

This thesis focuses on the so-called access to accounts principle that was introduced as a part of the EU's Revised Payment Services Directive (PSD2) that became applicable in January 2018. One of the main objectives of the access to accounts framework is to increase competition between incumbent banks and new market entrants by removing barriers to entry and creating a level playing field in the payment services market. Under the access to accounts rules banks are obliged to grant each authorised third party provider access to the payment account information of the customers of the bank, provided that the third party provider has obtained an explicit consent from each customer.

Since increasing competition is a crucial part of PSD2's objectives this study aims to assess the effectiveness of access to accounts rules in the light of competition. The first half of the thesis introduces the access to accounts framework and discusses the analogies between competition law's refusal to deal doctrine and the situation in the pre-PSD2 payment services market. It is concluded that payment account information has several characteristics of an essential facility and that anti-competitive refusals to deal have therefore been possible in the EU payment services market prior to PSD2. The primary methodology of the first half is the legal doctrinal method.

The second half of the thesis has a more future-oriented approach and the method utilised is closest to law and economics. This part of the thesis aims to evaluate how effective will the access to accounts framework be against potential anti-competitive practices of the banks. In this context potential gaps in the banks' duty to deal are highlighted and the overall levelness of the playing field in the payment services market is discussed. The assessment of the prevailing competition issues demonstrates that even though PSD2's access to accounts rules are an important leap forward the banks will maintain *de facto* control of payment account access in many ways. Therefore, a level playing field between all service providers in the EU payment services market is not yet a reality.

Keywords: EU law, competition law, PSD2, payment services, financial technology, essential facilities, refusal to deal, market access, sector-specific regulation

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Digitalisaatio muuttaa kiihtyvällä tahdilla ihmisten raha-asioiden hallintaa ja maksutapoja. Ilmiön seurauksena on syntynyt uudenlaisia pankkipalveluita, joita ovat esimerkiksi maksutoimeksianto- ja tilitietopalvelut. Näitä palveluita tarjoavat kolmannet palveluntarjoajat eivät tyypillisesti ole pankkeja. Vaikka tällaiset palveluntarjoajat kilpailevat perinteisten pankkien kanssa Euroopan maksupalvelumarkkinoilla, ovat ne myös riippuvaisia pankkien tarjoamasta infrastruktuurista ja datasta.

Tämä tutkielma keskittyy tarkastelemaan tammikuussa 2018 voimaan tulleen EU:n uuden maksupalveludirektiivin (PSD2) luomaa access to accounts -periaatetta. Yksi access to accounts -sääntöjen tärkeimmistä tavoitteista on lisätä kilpailua perinteisten pankkien ja uusien toimijoiden välillä markkinoille pääsyn esteitä poistamalla ja tasavertaisia kilpailuedellytyksiä luomalla. Access to accounts -sääntely velvoittaa pankkeja tarjoamaan kolmansille palveluntarjoajille pääsyn pankin asiakkaiden maksutilitietoihin sillä edellytyksellä, että kukin asiakas on antanut tähän nimenomaisen suostumuksensa.

Koska kilpailun lisääminen on keskeinen osa PSD2:n tavoitteita, keskittyy tämä tutkielma arvioimaan access to accounts -sääntöjen tehokkuutta kilpailun näkökulmasta. Tutkielman ensimmäisellä puoliskolla esitellään access to accounts -sääntelykehys sekä arvioidaan yhtäläisyyksiä kilpailuoikeuden refusal to deal -doktriinin ja maksupalvelumarkkinoilla ennen PSD2:n voimaantuloa vallinneiden olosuhteiden välillä. Havaintona on, että maksutilitiedolla on useita olennaisen toimintaedellytyksen (essential facility) piirteitä, minkä vuoksi kilpailulle haitalliset refusal to deal -tilanteet ovat olleet mahdollisia EU:n maksupalvelumarkkinoilla ennen PSD2:n voimaantuloa. Tutkielman ensimmäisen osuuden pääasiallinen tutkimusmetodi on oikeusdogmatiikka.

Tutkielman toisella puoliskolla tarkastelu suuntautuu tulevaisuuteen ja käytetty tutkimusmetodi onkin lähimpänä oikeustaloustiedettä. Tämä osio pyrkii arvioimaan, kuinka tehokkaasti access to accounts -säännöt pystyvät estämään pankkien kilpailunvastaisia käytäntöjä. Tässä yhteydessä tuodaan esille sääntelyssä esiintyviä aukkoja ja arvioidaan kilpailuedellytysten tasavertaisuutta uudistusten jälkeen. Tarkastelu osoittaa, että vaikka PSD2:n access to accounts -säännöt ovat selkä harppaus eteenpäin, voivat pankit silti vastaisuudessakin kontrolloida maksutileille pääsyä tosiasiallisesti monella tapaa. Tästä syystä pelikenttää EU:n maksupalvelumarkkinoilla ei vielä PSD2:n myötä voida pitää tasaisena.

Asiasanat: EU-oikeus, kilpailuoikeus, PSD2, maksupalvelut, finanssiteknologia, olennaiset toimintaedellytykset, refusal to deal -doktriini, markkinoille pääsy, sektorikohtainen sääntely

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ABBREVIATIONS

AISP	account information service provider
API	application programming interface
ASPSP	account servicing payment service provider
EBA	European Banking Authority
ECB	European Central Bank
EPC	European Payments Council
ERPB	Euro Retail Payments Board
EU	European Union
FCA	Financial Conduct Authority (the UK)
FSA	Financial Supervisory Authority (Finland)
NFC	near-field communication
PISP	payment initiation service provider
PSD1	Payment Services Directive
PSD2	Revised Payment Services Directive
RTS	regulatory technical standards
SCA	strong customer authentication
SEPA	Single Euro Payments Area
TEC	Treaty Establishing the European Community
TFEU	Treaty on the Functioning of the European Union

1 INTRODUCTION

1.1 Background

“Banking is necessary, banks are not.”

The above quotation originates from Bill Gates' interview in 1994. In the interview Gates famously criticised banks for their slow reactions to the development of information technology and Internet at the time.[1] Now, more than two decades later the banking industry is finally becoming truly digitalised and this quotation has become relevant again. It is widely used as a catchphrase by technology enthusiasts who believe that traditional banking has come to the end of the road.

Digitalisation[2] is changing our society at an ever-increasing pace and we hear news about disruptive innovations on various fields on a daily basis. From business to education and healthcare, this megatrend seems to be affecting nearly all aspects of our everyday lives at some level. Banking is no exception to this. During the last two decades banks and their services have definitely become increasingly digital, and the conventional image of banks as marble buildings with vaults filled with cash and gold bars is quickly fading away. People from the younger generations rarely visit the physical location of their bank when they need to manage their financial matters.

The same applies to one of the traditional core businesses of banks: payments. Payments have evolved from cash transactions at brick and mortar stores to lightning fast transfers of digital money between parties that are often connected to each other only through a computer network.[3] Instead of traditional payment instruments like cash and credit cards consumers are more and more often making payments by using their mobile phones or other devices. Attributes like the seamlessness, quickness and convenience of the payment transactions are becoming increasingly important for tech-savvy and demanding consumers.[4] Mobile payments

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[1] Cortese and Holland 1994.
[2] Digitalisation can be defined as creation of new products, services and business models through technology. See e.g. COM(2015) 630 final, p. 2.
[3] COM(2013) 547 final, p. 2.
[4] Cortet et al. 2016, p. 14.

have been enabled by new kind of applications and technologies, such as so-called mobile wallet applications connected to the Internet and Near-Field Communications (NFC) chips installed on mobile devices. These new technologies can be used to make purchases in either online or physical stores.[5] In the not too distant future, consumers may even be able to make payments by, for instance, taking selfies or using voice or gesture commands.[6]

Above-mentioned phenomena such as the growing volume of e-commerce and the rapidly increasing number of smartphones have radically changed people's banking and payment habits. This is why financial technology companies, better known as fintechs[7], are constantly developing new solutions that aim to revolutionise the way in which consumers make their payments and control their financial matters. Companies that are developing solutions that are primarily directed towards consumers and small businesses are commonly known as front-end service providers.[8] They are engaged in customer interaction and typically act as an intermediary between the bank, payer and payee. According to several reports by both EU officials and consultancy and research companies, it is this very segment of the financial services sector where most of the fintechs currently operate and where some of the most significant technological innovations take place. A large portion of fintech related investments also take place in this part of the market.[9] Therefore, it is natural that many fintechs are currently focusing on services that are somehow related to electronic retail payments.[10]

The significance of the current transformation of retail payment services to the financial services sector can be understood by looking at the figures illustrating the scale and expected growth of certain key segments of the European retail payments market. In its 2017 report the

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[5] COM(2011) 941 final, p. 5; COM(2015) 630 final, p. 11-12.
[6] See e.g. van der Beek 2017, p. 163.
[7] European Commission defines fintech as a term used to describe technology-enabled innovation in financial services that could result in new business models, applications, processes or products and could have an associated material effect on financial markets and institutions and how financial services are provided. See e.g. COM(2018) 109 final, p. 2. In some contexts only new financial technology companies, such as startups, are considered fintechs. See e.g. COM(2015) 630 final, p. 10. However, fintech can also refer to a broader range of businesses including 1) technology start-ups, 2) traditional financial institutions, and 3) large technology companies. See IP/A/ECON/2017-20 (2018), p. 18.
[8] BIS 2014, p. 1, 9.
[9] COM(2015) 630 final, p. 12; IP/A/ECON/2017-20, p. 37; BIS 2014, p. 1. See also The Boston Consulting Group and SWIFT 2017, p. 9; Geerling 2018, p. 65.
[10] Retail payments are payment transactions are payment transactions where at least one party of the transaction is not a bank or other financial institution. See. COM(2011) 941 final, p. 2.

European Central Bank (ECB) estimated that the number of executed non-cash transactions in the EU in 2016 was 122.0 billion.[11] Professional services company Deloitte UK estimated that European banks generated up to €128 billion of revenue from retail payments in 2015 which accounts for approximately 25 % of the total revenues from retail banking in Europe.[12] The European Central Bank had also reached a similar conclusion a couple of years earlier when it estimated that retail payments composed up to 25 % of the total revenues of the banks.[13] In its 2016 report consultancy firm Accenture estimated that banks in the UK could lose over 40 % of their revenue from retail payments by 2020 due to regulatory reforms and emerging innovative payment services.[14] Currently, fintechs that are classified as payment institutions form the largest individual segment of the fintech sector in EU.[15] These figures demonstrate why payment services are still a crucial part of the core business of most banks and why banks are facing serious competitive pressure from the direction of fintechs.

The emergence of new kinds of services to the electronic payment services market has been surprisingly rapid, and therefore some actors have so far operated in an unregulated market.[16] This issue, among several others, has been noted by the European Union and the Union seems to be willing to pave the way in the field of payment innovations by adopting new sector-specific regulation in order to facilitate entry into market and establish clear rules for new innovative service types.[17] As a result, the European Commission proposed revision of Directive 2007/64/EC, also known as the Payment Services Directive (PSD1), in July of 2013. Directive (EU) 2015/2366 on payment services in the internal market (hereinafter PSD2 or the Directive) became applicable on 13 January 2018.[18]

One of the key objectives of PSD2 is to "promote more competition, efficiency and innovation in the field of e-payments" by creating a level playing field for all kinds of payment service providers, including non-bank market entrants. PSD2 also aims to contribute to a better

[11] European Central Bank 2017, p. 1.
[12] Deloitte LLP 2015, p. 1.
[13] European Competition Network 2012, p. 2.
[14] Accenture 2016, p. 3. According to Accenture the UK exemplifies a typical European country where the payment services market is already mature.
[15] EBA/DP/2017/02, p. 20.
[16] SWD(2013) 288 final, Volume 1/2, p. 25-26.
[17] European Commission 2018.
[18] PSD2 and the Directive are used as synonyms in this thesis.

integrated and more efficient European payments market, enhanced security of payments and better protection of the consumers.[19] Among several other significant reforms, PSD2 extends the applicability of EU legislation to new categories of financial services which are known as payment initiation services and account information services. Service provides engaging in these activities are known as payment initiation service providers (PISPs) and account information service providers (AISPs).[20] These new service types are both categorised as payment services.[21] Actors providing either of these service types are collectively referred to as payment service providers or third party providers. Consumers or businesses that use either of these service types are called payment service users.[22]

Articles 66 and 67 of PSD2 establish the principle of access to accounts according to which Member States must ensure that credit institutions grant PISPs and AISPs access to their customers' payment account data. PSD2's requirements regarding access to accounts are entirely novel as such rules were not yet included in PSD1 which only covered payment service providers' access to payment systems. Practically these are the provisions that are intended to remove barriers to entry from the payment services market by opening the payment account data of banks' customers, naturally at their consent, to all payment service providers that are licensed or registered in accordance with the requirements of the Directive. These provisions will hence be of central importance for the purposes of this thesis. Since access to account data is an essential requirement for the provision of any innovative payment services, allowing third party providers to access this crucial input is expected to intensify competition in the payment services sector that has previously been dominated by a relatively small number of incumbent players.[23]

[19] COM(2013) 547 final, p. 2-3.
[20] See Chapters 2.4 and 2.5 below for detailed descriptions of these services. In addition to AISPs and PISPs, PSD2 also introduces access to account rules regarding a third group of service providers: card-based payment instruments issuers (CISP). Although allowing third party card issuers to access account information does create new business opportunities and is therefore a potential source of increased competition, CISPs are not examined in this thesis since the service they provide is very similar to that of traditional card issuers.
[21] See Annex I of PSD2. It is necessary to point out that account information services and payment initiation services can also be provided by traditional banks and not merely new non-bank service providers.
[22] See Article 4(10) PSD2.
[23] Vezzoso 2018, p. 3-4.

1.2 Objectives and Structure

The objectives of the Directive are undoubtedly valuable and have been acclaimed by most stakeholders. Promoting competition and innovation is, after all, beneficial for the whole payment services market and especially for the consumers. Aims of the legislation aside, reactions to the actual rules relating to access to accounts, however, have been more or less mixed among different interest groups: where most fintech startups and technology companies have been excited about the new possibilities, the actual contents of the legislation have been subject to consistent criticism among established financial institutions since the introduction of the first drafts. Nevertheless, both banks and third party providers have seemed to be dissatisfied with some of the compromises made in the final PSD2 text and in the supplementing regulatory technical standards.[24]

I argue that, due to the existing controversy and lack of previous research, there is demand for further interpretation and critical evaluation of several aspects of the adopted regulation, especially when it comes to enabling access to payment accounts. Since increasing competition by removing barriers to entry has been one of the key objectives of the Directive from the very beginning, it seems logical to assess the topic from the perspective of competition law.

The thesis will primarily seek answers to the following questions:

- What does access to accounts mean and what are the competition issues that the access to accounts rules of PSD2 aim to remedy?
- What kind of shortcomings, if any, does the access to accounts framework entail with regard to its objectives and how could they potentially be resolved?
- Are the rules regarding access to accounts likely to create a level playing field for all kinds of service providers in the market?

Chapter 1 of this thesis starts with an introduction to the topic and the reasons behind the revision of the Payment Services Directive. In addition, the objectives and method of this thesis will be discussed. In Chapter 2 I will briefly describe the history and structure of the PSD2 legislative package and then proceed to more detailed examination of the provisions of the

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[24] See e.g. Taylor and Basquill 2015 and Basquill 2018(a).

Directive that comprise the access to accounts framework. In order to evaluate whether PSD2 is successful in meeting its objectives regarding competition and innovation, it is essential to identify what are the competition concerns and issues that have occurred in the payment services market. Therefore, Chapter 3 focuses on assessing the competitive environment in the pre-PSD2 era electronic payment services market in the light of EU competition law, notably rules regarding refusal to deal and essential facilities. I aim to illustrate how and why the incumbent banks have been able to foreclose potential new competitors and assess whether incumbents' refusals to grant access to payment accounts could be regarded as anti-competitive refusals to deal in the light of the refusal to deal doctrine. In Chapter 4 I will discuss potential gaps in the access to accounts framework and evaluate whether refusals to deal are still likely to be an issue in the market after the entry into force of PSD2. In this context I will focus on those aspects of the access to accounts regime that have been subject to controversy and debate among the market participants or that have otherwise been considered problematic by experts. I will also briefly comment on how the remaining issues could potentially be remedied. In the final Chapter I will assess the levelness of the playing field in the payment services market after the regulatory reform and conclude the key findings of the thesis. I will also present my recommendations for potential further research topics in this field.

1.3 Delimitations

Since PSD2 influences numerous different aspects of the payment services sector it is necessary to narrow down the scope of this thesis to comprehend only a small portion of the reforms that it entails. Access to accounts is essentially the principle that extends the applicability of the sector-specific legislation to new types of actors, and hence allows new businesses to legally enter the market for payment and account information services. It can be regarded as the most significant individual reform of PSD2 when it comes to increasing competition between incumbent banks and new non-bank market entrants. This is why this thesis will mostly focus on topics that are directly related to access to accounts or that are in some way analogous.

Access to accounts rules are specifically addressed to front-end service providers, and although certain end-to-end service providers are engaged in somewhat similar activities, I will not be covering provisions that are solely addressed to them, such as Article 35 PSD2 concerning

access to payment systems.[25] Numerous other important aspects of the Directive also remain outside of the scope of this thesis due to their limited impact on competition between incumbents and market entrants in the payment services market. Nevertheless, certain crucial amendments included in PSD2 are briefly discussed in Section 2.2.1 below.

Even though many of the provisions of PSD2 are to some extent overlapping with those of General Data Protection Regulation (GDPR)[26], and although PSD2 contains a great number of issues that could be examined from data protection perspective, it is inevitable for the purposes of this thesis, to delimit detailed examination of the links between PSD2 and GDPR outside of the primary scope of the study. This solution is also supported by the views expressed by the Article 29 Data Protection Working Party (WP29) in its guidelines regarding data portability. According to the WP29, in cases where the data request is related to account data and provision of services that are clearly subject to the PSD2 regime, the provisions of PSD2 should be primarily complied with when addressing the request.[27]

1.4 Methodology

In the first two main chapters of the thesis I will be applying traditional legal doctrinal method as the main research methodology.[28] The key function of the legal doctrinal method is to systematise and interpret currently effective legal norms in order to discover their meaning.[29] The purpose of Chapter 2 is to systematise the PSD2 legal framework and to clarify the meaning of those provisions that are currently open to interpretations, whereas in Chapter 3 the aim is to assess the applicability of an existing legal doctrine to an entirely new field by using analogical

[25] End-to-end service providers are normally involved in all stages of the payment chain and their customers do not have to be in contact with a bank at any point of the payment transaction. In a way their services form a closed system in which payers and payees can transact without any other intermediary parties. However, their operations typically require access to bank-to-bank clearing and settlement systems which can be obtained, for instance by holding business an account with a bank. Best known example of an end-to-end payment service provider is probably PayPal. See BIS 2014, p. 9, 13.
[26] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
[27] WP29 2017, p. 8.
[28] This method is often also referred to as legal-dogmatic method and there might be certain national nuances between these terms but the main principles of this type of research are normally the same. See e.g. Smits 2015, p. 5.
[29] Cryer et al. 2011, p. 38; Hirvonen 2011, p. 21-22.

reasoning which is one of the methods of interpretation that can be utilised in legal doctrinal research.[30]

The perspective in the first half of the thesis is more or less internal: the main focus is on current positive law and the text aims to serve the needs of the interpreters of the law. On the other hand, the last two chapters of the thesis require a different, at least partly external, and more future-oriented approach.[31] The approach chosen in Chapter 4 would be best characterised as law-and-economics since the focus is essentially on anticipating how well will the new legislation reach its objectives. Identifying shortcomings in regulation and making suggestions on how to improve it is an inherent part of the law-and-economics approach.[32] This type of assessment of regulatory policy falls within the scope of normative regulatory theory which belongs to one of the sub-categories of law-and-economics. In contrast to legal doctrinal method, the results of this type of research typically serve the legislator rather than an individual interpreter of the law.[33] Considering the novelty of the research topic, and the fact that relevant case law is at this point practically non-existent, it is inevitable to evaluate the potential competition issues in a speculative manner and at a rather hypothetical level.

[30] Hirvonen 2011, p. 39.
[31] Internal perspective has been regarded as characteristic to the legal doctrinal method whereas multidisclipnary methods, such as law-and-economics are typically characterised by external or at least partly external perspective. See e.g. Määttä 1999, p. 10 and McCrudden 2006, p. 634, 637.
[32] Määttä 1999, p. 13-14; Cryer et al. 2011, p. 84.
[33] Määttä 1999, p. 10; Paccess and Van den Bergh 2011, p. 2-3. Research that is oriented towards improving regulatory policy and making suggestions to the legislator is often also referred to as *de lege ferenda*. Even though *de lege ferenda* research forms a stand-alone methodology it is often closely connected to legal doctrinal research. See e.g. Kolehmainen 2015, p. 3.

2 REVISED PAYMENT SERVICES DIRECTIVE AND ITS KEY PROVISIONS WITH REGARD TO ACCESS TO ACCOUNTS

2.1 Demand for Revised Payment Services Directive

The creation of a functioning single market has always been one of the primary agendas of the EU. Union-wide single market requires integration of national markets and legislations. In many sectors this goal has been pursued through the harmonisation of national laws and one of the main tools of harmonisation has traditionally been EU directives.[34] Payment services sector is not an exception: PSD1 and its successor PSD2 have been perhaps the most remarkable recent regulatory projects in the European payment services market and they have both ultimately aimed at harmonisation.[35] Legal basis for these directives has been Article 114 TFEU[36] (ex Article 95 TEC) which has been widely used in similar harmonisation projects.[37] One of the overarching objectives in all payment services regulation, including PSD1 and PSD2, has been the establishment and promotion of the so-called Single Euro Payments Area (SEPA).[38]

Since efficient competition and high level of innovation are fundamental elements of a well-functioning single market, facilitating the access of new kinds of service providers to the payment services market was also a crucial part of the objectives of PSD1.[39] Among other important reforms, PSD1 introduced the notion of "payment institution" in an effort to extend the scope of legislation and thus enable more competition in a rather restricted market.[40] However, PSD1's positive impact to market entry was not perhaps as radical as was initially expected by the Union.[41] In addition, as technology in the field of electronic payments developed and new services emerged, many of the rules established by PSD1 quickly became outdated.

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[34] Craig and Búrca 2011, p. 581-582.
[35] PSD1 and PSD2 are both so-called maximum harmonisation directives which means that Member States are not allowed to independently expand the scope of the directives. See Article 86 PSD1, Article 107 PSD2 and Craig and Búrca 2011, p. 600.
[36] Consolidated version of the Treaty on the Functioning of the European Union 2012/C 326/01.
[37] See citations of PSD1 and PSD2 and Craig and Búrca 2011, p. 582, 590.
[38] See recitals 2-5 of PSD1 and recitals 1 and 17 of PSD2.
[39] See recital 16 of PSD1 and European Commission 2018.
[40] See recital 10 of PSD1.
[41] Impacts of PSD1 were studied externally by London Economics and iff in association with PaySys by request of the Commission in 2013. See London Economics et al. 2013, p, ix.

The shortcomings of PSD1 and the need for revised legislation were identified by the Union as the result of series of reports and consultations produced mainly by the Commission. The key documents that formed the basis for the revision by identifying problem areas in the European payment services market were the Commission's 2012 Green Paper "Towards an integrated European market for card, internet and mobile payments"[42], which also included a feedback statement collected from the relevant stakeholders[43], and the Commission's 2013 Impact Assessment[44]. In these documents the Commission brought forward several issues in the prevailing legislation. These issues included, for instance, fragmented application of PSD1 in different Member States, inconsistent rules regarding surcharges and levels of interchange fees for card payments, insufficient standardisation and interoperability between national payment systems, and legal vacuum for certain new payment service types, such as payment initiation services.[45] The legal vacuum was seen as particularly harmful to market entrants since it was one of the main sources of the existing barriers to entry.[46]

It was acknowledged by the Commission already in 2012 that banks serve a special "gateway function" as regards the customer account data that they possess. This means that banks have traditionally been able to control the access to account information by refusing the access of third party service providers even in situations where the bank's customer has given his or her consent for the processing of this information. The Commission stated that this behavior could form obstacles to the development of new payment innovations. Although the Commission admitted that banks may in many situations have legitimate reasons for such refusals, it also noted that banks could have incentives to deliberately prevent third parties from accessing account information.[47]

Similar issues were pointed out in the Commission Impact Assessment in 2013. The Commission found that the "legal vacuum" for the new services provided by third party providers raised competition concerns among several other issues.[48] The Commission also

[42] COM(2011) 941 final.
[43] COM(2011) 941 final: Feedback statement.
[44] SWD(2013) 288 final.
[45] See SWD(2013) 288 final, Volume 1/2, p. 15-16; COM(2011) 941 final, p. 3-6.
[46] COM(2011) 941 final, p. 63.
[47] COM(2011) 941 final, p. 11.
[48] SWD(2013) 288 final, Volume 1/2, p. 25-26.

expressed concerns over the tendency of banks to restrict new service providers' access to "crucial components of the payments infrastructure". The Commission estimated that the restrictive behaviour of incumbent banks could lead to distortion of the payment services market as banks control several resources that are vital for new service providers trying to enter the market. Posing restrictions to access has been possible because of the established position of the traditional banks in the market.[49] Therefore, new service providers have essentially been dependent on the banks' willingness to cooperate and provide information that is crucial for their services. In the case of PISPs, for instance, information about the availability of funds on a customer's payment account has been identified as such information.[50] The Commission concluded that restrictions regarding access to account information create barriers to entry and hinder the emergence of new innovative payment services.[51]

In the following Sections I will focus on examining the contents of those provisions of PSD2 that flesh out the Directive's objectives regarding payment account access. Many of the discussed provisions are rather technical and it may at first seem that they have little to do with promoting competition. Nevertheless, detailed description of the relevant provisions is necessary for forming an overall picture of the impact of the Directive to competitive environment in the electronic payment services market. The description of the access to accounts legal framework will also serve the purposes of Chapter 4 where some of its potential competition-related shortcomings are discussed.

2.2 The Legislative Framework

2.2.1 Revised Payment Services Directive

PSD2 aims to remedy above-mentioned problems by presenting several wide-ranging reforms. The most significant reform from the perspective of this thesis is obviously the access to accounts principle that will be discussed in detail in the Section 2.6. New requirements

[49] SWD(2013) 288 final, Volume 1/2, p. 16.
[50] SWD(2013) 288 final, Volume 1/2, p. 24.
[51] SWD(2013) 288 final, Volume 1/2, p. 63.

concerning secure authentication in connection with remote use of payment accounts have also been included in the Directive.[52]

Other important amendments have been made in relation to the positive scope of the legislation as the Directive now applies to situations in which a service provider that is a party to a payment transaction is located outside the Union, regardless of the used currency.[53] Also the negative scope of the Directive has been updated by limiting the scope of exemptions concerning providers of electronic communications networks, limited payment networks and commercial agents.[54] Additionally, the revised Directive introduces a ban on surcharges that will affect a great number of payment transactions. This ban practically means that merchants will no longer be allowed to request extra fee from the payer for a payment made by consumer credit or debit card.[55] Furthermore, the revision of the Directive contributes to enhancing consumer protection by adjusting the rules regarding liability for unauthorised payment transactions.[56]

2.2.2 Supplementary Regulation

Recital 107 of the Directive constitutes a duty for the European Banking Authority (EBA) to draft supplementary regulation in the form of regulatory technical standards (RTS) and guidelines. The purpose of these instruments is to complement and elaborate certain, mostly technical, aspects of the Directive. This is a typical procedure in the field of EU's financial services regulation and it derives from the so-called four-level Lamfalussy system.[57] The implementation process of the supplementary regulation is at the time of writing of this thesis

[52] See Article 97 PSD2. These requirements are touched upon in the Section 2.4.
[53] See paragraph 4 of Article 2 PSD2.
[54] See Article 3 PSD2.
[55] See Article 62 PSD2. The ban on surcharges applies to all payment instruments that fall within the scope of Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions.
[56] See Article 74 PSD2.
[57] In the Lamfalussy system the actual legislative act, such as directive or regulation, at the level 1 merely forms a framework for the new legislation which is then complemented at the levels 2 and 3 with supplementary legislation and soft law instruments and supervised and enforced at the level 4. The system is based on close cooperation with the Commission and relevant authorities like the EBA and the ECB. See e.g. van Rijsbergen 2014, p. 119-120 and ec.europa.eu.

still partly unfinished.[58] Nevertheless, the texts of the most essential regulatory technical standards have already been finalised and published in the Official Journal of the European Union.

Altogether five regulatory technical standards and six guidelines will be issued. The Regulatory technical standards will cover: 1) the electronic central register that contains information about payment institutions in each Member State, 2) cooperation between competent national authorities in cross-border situations, 3) national central contact points for the agents of foreign payment institutions, 4) exchange of information regarding passporting[59] between the national authorities, and 5) strong customer authentication and secure communication between third party providers and account servicing payment service providers (ASPSPs), i.e. banks.[60] Particularly the latter has relevance in the access to account regime and will be discussed below in the Section 2.6. Since the regulatory technical standards are adopted as delegated regulations, they will be binding in their entirety and directly applicable in the Member States.[61]

EBA guidelines are essentially a non-binding form of soft law addressed to the national competent authorities and sometimes directly to the financial services providers.[62] However, Article 16 of the Regulation establishing the EBA[63] imposes an obligation for the competent authorities and financial institutions to make every effort to comply with the EBA guidelines which means that they are not to be taken lightly. According to the Article 16, competent authorities and financial institutions that intend not to comply with certain guidelines must provide EBA with thorough reasoning for their non-compliance. The EBA will issue guidelines

[58] All pieces of PSD2 legislation should be fully in force and applicable by September 2019. See European Commission 2017.
[59] Passporting means conducting licensed or authorised business in multiple Member States with license or authorisation granted by the authorities of one Member State. See e.g. eba.europa.eu (b) for more information on passporting in the context of financial services.
[60] eba.europa.eu (a). For the sake of clarity, terms "bank" and "account servicing payment service provider" are used interchangeably in this thesis since account servicing payment service providers are, at least for the present, mostly banks. See e.g. IP/A/ECON/2017-20, p. 72.
[61] Delegated regulation is a form of delegated act. In accordance with Article 290 TFEU delegated acts are non-legislative acts of general application. Delegated acts supplement or amend legislative acts, such as directives and regulations. However, they shall not interfere with essential elements of the relevant legislative act.
[62] Chiti 2013, p. 95-96.
[63] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC.

regarding following aspects of the Directive: 1) reporting of fraudulent payment transactions, 2) minimum amounts of professional indemnity insurances or comparable guarantees for PISPs and AISPs, 3) payment service providers' appropriate security measures for operational and security risks, 4) handling of complaints for alleged infringements of the Directive, 5) identification and reporting of major operational or security incidents, and 6) documentation to be provided by the service providers applying for authorisation or registration.[64]

2.3 Payment Initiation Services

In order to understand the meaning and significance of the access to accounts principle, it is necessary to understand the basic features of the new payment service types that it covers. According to the Directive, payment initiation services are services that can be 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".[65] This seemingly simple definition, however, needs some further elaboration in order to be thoroughly understood. The functioning of payment initiation services is therefore explained in short below.

Payment initiation services are typically offered to the customers in the form of mobile or web browser based applications. The first prerequisite for the use of a payment initiation service is that the payer has a payment account in place in a credit institution, i.e. a bank. This bank is the account servicing payment service provider (ASPSP) of the payment service user. Secondly, in order for payment transaction via payment initiation service to be possible, the merchant, i.e. the payee involved in the transaction, needs to accept payment initiation service as a payment method. This typically requires some sort of a contractual relationship between the merchant and the PISP.

After the payment initiation service has been chosen as the payment method, the payer must give the PISP an explicit consent to access his or her payment account. After this, the payer is required to identify himself or herself by using the security credentials provided by his or her bank. If the identification takes place in the interface provided by the PISP, the PISP must

[64] eba.europa.eu (a).
[65] Paragraph 15 of Article 4 PSD2.

forward the identification details to the account servicing bank which then grants access to the account information. This is known as the "embedded" model. The identification can also take place in the interface provided by the bank. In this case the PISP redirects the payer to the bank's interface where he or she enters the identification details which enables the PISP then to gain access. This alternative is known as the "redirection" model.[66] Only after this identification procedure the PISP can access the payment account of the payer, either through the payer's personal online banking interface or a dedicated access interface provided by his or her bank, and initiate the payment by placing a payment order based on the details of the transaction. The payment is directly transferred to the account of the payee. The actual transfer takes place between the banks of the payer and the payee which are connected to each other through a clearing and settlement network.[67]

Both online and physical stores can offer payment initiation services as payment options, although recital 27 of the Directive indicates that payment initiation services would mainly be utilised in transactions related to e-commerce. For instance, German-based Sofort and Swedish Trustly both provide payment initiation services that are primarily designed for online shopping, whereas Dutch iDEAL can be used to make face-to-face payments by scanning receipts with the Quick Response (QR) code scanner of a mobile device.[68] Since the existing PISPs already use a variety of different technologies and the field is constantly evolving, it is important that the definitions adopted by the regulator do not hinder future developments in the market.[69] In addition to shopping, payment initiation services could also be used as an easy way of executing transfers between the different payment accounts of a payment service user. In this situation it would probably be offered as an additional service in connection with an account information service. Another potential application could be rapid non-cash money transfers from consumer to consumer with mobile devices using NFC technology.[70]

[66] See EBA-Op-2018-04, p. 10-11 and API EG 30-18, p. 6-7.
[67] BIS 2014, p. 8-10; London Economics et al. 2013, p. 106.
[68] See www.klarna.com/sofort, www.trustly.com and www.ideal.nl for more information about the functionalities of these services.
[69] The importance of neutrality towards different business models and technological solutions has been recognised in the Directive text as well. See e.g. recital 93 of PSD2.
[70] See e.g. European Banking Federation 2016, p. 24; BIS 2014, p. 1.

The cost-effectiveness and convenience of these services derive from the fact that instead of accessing customer accounts through an existing card network, the service provider will establish a direct connection to its customer's account held by a bank. In recital 27 of PSD2 the connection formed by the service provider is characterised as "a software bridge between the website of the merchant and the online banking platform of the payer's account servicing payment service provider". The lack of an intermediary party makes it possible to avoid additional fees related to the use of payments cards for instance.[71] Payment initiation services also enable quick online payments for those consumers who do not have a credit or debit card.[72] Since with payment initiation services merchants receive information about initiated payments practically instantly, it is possible that the new services will eventually enable shorter delivery times in e-commerce.[73]

2.4 Account Information Services

Article 4(16) PSD2 defines account information service as "an online service to provide consolidated information on one or more payment accounts held by the payment service user with either another payment service provider or with more than one payment service provider". Unlike payment initiation services that can actually replace banks in certain parts of payment transaction, account information services are often characterised as partly or completely "complementary services" which means that they can actually add new features to existing service portfolios without replacing any existing services.[74]

AISPs are sometimes called data aggregators since they compile account and transaction data from different sources in order to generate new useful data sets for their customers. If allowed by the payment service user, AISPs can collect payment account data from all his or her payment accounts even if they were maintained by different banks. The purpose of such services is to provide consumers with tools that facilitate the management of their personal

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[71] Accenture 2016, p. 8.
[72] The number of such consumers is relatively high as according to the Eurobarometer approximately 60 % of EU citizens do not own a credit card. However, nearly 80 % of them do possess a current account. See TNS Opinion & Social 2016, p. 4.
[73] See recital 29 of PSD2 and European Commission 2018..
[74] See recital 28 of PSD2 and IP/A/ECON/2017-20, p. 72.

financial matters. Compiled information can help the users to better understand their overall financial situation and therefore make better decisions.[75] It is also possible that AISPs could, with payment service user's consent, pass the information forward to other service providers. For instance, comparison websites could suggest better alternatives to the payment service user's current financial products.[76] This could eventually increase customers’ proneness to switch their service provider which would then lead to intensified competition between banks.[77] Account information could also be used to assess the payment service user's creditworthiness. Unlike PISPs, AISPs are not involved in actual payment transactions as their activities are primarily informative.[78]

The existing European account information services, such as British Money Dashboard and Moneyhub, are personal financial assistants designed primarily for mobile device use.[79] The basic functionality of account information service applications is rather similar to payment initiation services: designated payment accounts held by a bank or banks are accessed directly or indirectly by the AISP with the explicit consent of the payment service user. However, unlike payment initiation services which normally require some kind of active participation from the payment service user, account information services can also make individual information requests within certain limits set by the RTS.[80] This way an account information service can update contained information on the background even when the application is not being actively used which enables the provision of real time information quickly.

2.5 The Definition of Payment Account

The notion of payment account plays a particularly important role in PSD2: it is essentially the information contained within payment accounts that the third party service providers are being granted access to. Therefore, the definition of payment account is crucial when determining whether certain account should be accessible under the Directive. Considering the significance

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[75] Recital 28 of PSD2; IP/A/ECON/2017-20, p. 18; European Commission 2018.
[76] Vezzoso 2018, p. 3-4.
[77] This was named as one of the key advantages of so-called open banking, e.g. the practice of sharing information previously possessed by banks solely with customers and third parties, in the report of the British Competition & Markets Authority. Competition & Markets Authority 2016, p. 442-443.
[78] IP/A/ECON/2017-20, p. 71-72; Autoriteit Consument & Markt 2017, p. 19-20.
[79] See www.moneydashboard.com and www.moneyhub.com.
[80] See Article 36 of the RTS.

of this concept, its actual definition in Article 4 of the Directive appears to be somewhat indefinite. Pursuant to paragraph 12 of Article 4 "payment account means an account held in the name of one or more payment service users which is used for the execution of payment transactions". This definition is identical to the one adopted in paragraph Article 4(14) of PSD1.

The interpretation of payment account has raised questions among actors in the payment services sector and the CJEU was requested a preliminary ruling on the issue by the Supreme Court of Austria.[81] The key issue in the case *Bundeskammer für Arbeiter und Angestellte v ING-DiBa Direktbank Austria Niederlassung der ING-DiBa AG* was whether an online direct savings account with which the customer can independently make deposits and withdrawals via online bank through another account held in his/her name could be regarded as a payment account in accordance with Article 4 PSD1.[82] Although reference was made to the definition of payment account under PSD1 only, it is relevant for the application of PSD2 as well due to the identical definitions in the two directives.

On 19 June 2018 Advocate General Tanchev's opinion on the case was published. The opinion implicated that, as other means of interpretation do not provide sufficient answer to the question at hand, guidance has to be sought from other instruments of the legal framework for payment services, particularly Directive 2014/92[83] that is also known as the Payment Accounts Directive (PAD). According to Tanchev, the requirements of the PAD should be taken into consideration when assessing the nature of an account in the context of PSD1 or PSD2. Consequently, it needs to be examined whether the functionalities of an account enable placement of funds, withdrawal of cash, and execution and reception of payment transactions to and from third parties, including credit transfers. Accounts that do not meet all these requirements should be excluded from the scope of the notion of payment account. Tanchev concluded that online direct savings account in question did not appear to satisfy the conditions, since payment transactions to and from third

[81] *Bundeskammer für Arbeiter und Angestellte v ING-DiBa Direktbank Austria Niederlassung der ING-DiBa AG*, Case C-191/17.
[82] Case C-191/17, para. 1.
[83] Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features.

parties could only be executed and received through an intermediary account also known as a reference account.[84]

The CJEU is not officially bound by the opinions of Advocates General. Nevertheless, there is a consensus among scholars that the ultimate decision of the CJEU is often strongly affected by the relevant Advocate General's opinion.[85] Therefore, it is not surprising that the CJEU adopted a similar approach as Advocate General Tanchev in defining payment accounts in its judgement that was published on 4 October 2018. In its judgement the CJEU confirmed that the definition adopted in PSD1 does not make it possible to determine which account types fall within its scope which is why assistance has to be sought from PAD.[86] According to the CJEU, direct payment transactions from and to the relevant account have to be possible in order for the account to be regarded as a payment account.[87] The CJEU emphasises, however, that all savings accounts cannot be automatically excluded from the definition of payment account.[88] Practically this implicates that different accounts will have to be evaluated on a case-by-case basis for determining whether they meet the criteria.

Since the approaches to defining payment accounts and the scope of the Directive's access to accounts principle have varied greatly among the Member States, the judgement of the CJEU is of great importance. For instance, the British Financial Conduct Authority (FCA) has previously chosen a definition that highlights the underlying purpose and functionalities of an account. The FCA's approach bears a resemblance to Advocate General Tanchev's opinion and the ruling of the CJEU as it excludes certain types of savings accounts from the definition. Instead, for example credit card accounts and current account mortgages should according to the FCA be regarded as payment accounts.[89]

In France there seems to be some controversy regarding the scope of the notion of payment account: some officials insist that, for example, savings and investment accounts should always

[84] Opinion of Advocate General Tanchev, paras. 53-58.
[85] See e.g. Craig and de Búrca 2011, p. 62 and Arrebola et al. 2016, p. 83-84.
[86] Case C-191/17, paras. 23-25
[87] Case C-191/17, paras. 32-33.
[88] Case C-191/17, para. 29.
[89] Financial Conduct Authority 2016, p. 11-12.

be treated in a similar way as more conventional payment accounts for the purposes of the Directive's access to accounts rules whereas others argue that this would widen the scope of the Directive too much and risk creating an unlevel playing field with France and other EU countries. Wider scope has been regarded particularly important for the provision of AISPs by several French stakeholders that represent the interests of third party providers.[90]

The Finnish Financial Supervisory Authority (FSA), on the other hand, suggests that terms and conditions of the relevant account should always be the key when assessing its nature. If the terms and conditions of the account agreement enable the execution of payment transactions with the account it can normally be considered to be a payment account. According to the Finnish FSA, savings account is an account type that can typically be regarded as a payment account, and that would hence be included in the scope of PSD1 and PSD2.[91]

Curiously enough, the European Forum on the Security of Retail Payments (SecuRe Pay)[92] implicated in its recommendations regarding the security of payment account access that savings account should not be treated as payment accounts by excluding them from the scope of their recommendations. The view of the Forum was that payment accounts are accounts that are used "for the main purpose of initiating and receiving payments". Savings accounts are also presented as an example of other types of accounts which appears to set them clearly apart from payment accounts.[93]

[90] Basquill and Regoli 2018.
[91] Financial Supervisory Authority 2018, p. 25.
[92] SecuRe Pay is an organ consisting of national central banks and banking supervisors and governed by the EBA and the ECB. Its purpose is to ensure the safe functioning of electronic retail payment services. See European Central Bank 2014(a), p. 1-2.
[93] European Central Bank 2014(b), p. 23. Recommendations were primarily addressed to the EBA to support its drafting work.

2.6 Rules Regarding Access to Accounts

2.6.1 Challenges Relating to Account Access Prior to Revised Payment Services Directive

So far the only means for third party providers to access the account information maintained by banks has been through "screen scraping" also referred to as "direct access" by some stakeholders.[94] Screen scraping is a method by which a PISP or an AISP accesses the customer's bank accounts directly by logging into his or her personal online banking interface with his or her personal credentials.[95] Thus, screen scraping process always requires that the payment service user discloses the security credentials issued by the bank to the PISP or AISP at some point.

Identification by screen scraping has been opposed by banks from the beginning as it has been impossible for them to reliably identify a third party provider that is accessing their accounts with the personal credentials of the bank's customer. This is why some banks have expressly prohibited this access method on the grounds of security and liability concerns and several other issues.[96] Screen scraping has been considered to be a violation of the terms and conditions of the customer accounts by many banks, as they have typically insisted their customers not to disclose personal security credentials to any third parties. Integrity of the security credentials has traditionally been regarded as an essential requirement for payment security.[97]

For these reasons, third party providers have not in many situations been able to access customer account data without violating the terms and conditions of the account agreements between banks and their customers. In addition, in some Member States, including at least Finland and Poland, screen scraping has been prohibited by the national law or by the order of the national supervisory authority.[98] For these reasons, it appears that lack of legitimate and widely accepted means of accessing the data in the customer accounts held by banks has formed a serious barrier to entry for new payment service providers.

94 Future of European Fintech 2017, p. 1.
95 European Commission 2017(a).
96 London Economics et al. 2013, p. 108, 110; SWD(2013) 288 final, Volume 2/2, p. 137.
97 See e.g. European Banking Federation 2015.
98 FIN-FSA 2018; Warburton 2018.

2.6.2 Legal Basis for Access to Accounts in the Directive

The access to accounts principle is perhaps the single most remarkable contribution to enhancing competition and innovation in the payment services market in the entire Directive. Demand for account access reform was first publicly expressed by non-bank payment service providers in response to feedback survey regarding the European Commission Green Paper of 2012. The idea of granting access was also supported by retailers and consumers, both of whom are stakeholders that are expected to benefit from the reform in the long run.

Understandably the banking sector opposed granting third party providers access to account data and expressed concerns regarding payment security and liability issues in potential misuse situations. Banks also noted that enabling this kind of access would incur them significant costs.[99] In reality, these are unlikely to be the greatest concerns among banks. Most likely the biggest threat that the third party access poses to banks is the potential loss of direct everyday contact with the customers. Losing first-hand contact with the customer to non-bank front-end service providers could lead to a remarkable loss of cross-selling opportunities which in turn could reduce the volumes of high margin services provided by banks. The worst scenario for banks is that they would eventually become mere account providers while consumers would acquire other high value banking services from more innovative and flexible non-bank service providers.[100]

The importance of this reform has been widely acknowledged and most of the public debate around PSD2 has somehow related to this topic.[101] The obligation to provide third party payment service providers access to payment service users' payment accounts is essentially addressed to Account Servicing Payment Service Providers (ASPSPs) which are credit institutions, i.e. banks[102], that provide payment accounts to their customers. Nevertheless, it is up to each Member State to ensure that this obligation is complied with. The access to accounts rule consists of several pieces of legislation that will be examined in this and the following section. The foundation of the principle of access to accounts is laid down in Articles 66 and

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[99] COM(2011) 941 final, feedback statement, p. 12-13.
[100] Cortet et al. 2016, p. 14; Vezzoso 2018, p. 7; Autoriteit Consument & Markt 2017 , p. 12, 31.
[101] See e.g. Cortet et al. 2016, p. 20.
[102] Majority of credit institutions are banks and therefore bank is commonly used as a synonym for credit institution.

67 of PSD2 and further elaborated in the regulatory technical standards and guidelines of the EBA. Recitals of the Directive also give some guidance on questions relating to third party access. I will begin by explaining the contents of the relevant articles and recitals of PSD2.

The provision of payment services is allowed to entities that can be regarded as payment institutions under Article 4(4) of the Directive.[103] Article 11 provides that legal persons that meet the requirements listed in Article 5 may apply for payment institution authorisation from the competent national authority, such as a national financial supervisory authority. Authorised payment institutions will then be able to access the payment accounts maintained by banks on conditions listed below. However, according to Article 11(1), legal persons that provide exclusively account information services in accordance with point 8 of the Annex I of the Directive shall also be treated as payment institutions even though they are, based on Article 33, exempt from the authorisation requirement. As a result of these provisions, there are actually two separate groups of actors that can obtain access to payment accounts under the Directive. These two groups are ultimately subject to different sets of requirements and appear to be in somewhat unequal position: PISPs must meet the stricter requirements laid down in Article 5 in order to be granted authorisation, whereas AISPs are exempt from the authorisation procedure, and can obtain access to payment accounts after they have been entered to a national register in accordance with Article 14.

The principle of access to accounts does not provide that authorised PISPs or registered AISPs would receive an unconditional and unlimited access to all the account information of the payment service users. The specific rules and conditions of the access have been specified in Articles 66 and 67 which impose obligations to Member States, third party providers and banks in relation to the provision of payment initiation and account information services.

First of all, according to both Article 66 and 67, it is an essential prerequisite for the access that the relevant payment account is accessible online. This requirement naturally derives from the

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[103] It is necessary to point out that for instance credit institutions, i.e. banks, have typically also acquired a payment institution status which means that they can often engage in these activities as well. Provision of payment initiation and account information services is not hence an exclusive right of PISPs and AISPs.

fact that payment initiation and account information services are both by definition services that are, in one way or another, always connected to the Internet.[104]

The second mutual requirement is that both PISPs and AISPs must ensure the integrity of the payment service user's personalised security credentials that are classified as sensitive payment data in paragraph 32 of Article 4 PSD2. Paragraph 30 of Article 4 defines personalised security credentials as "personalised features provided by the payment service provider to a payment service user for the purposes of authentication". Personalised security credentials are typically issued by the account servicing bank and the payment service user primarily uses them to log in to his or her online banking portal.[105]

Thirdly, the third party payment service provider must always acquire explicit consent from the payment service user in order to initiate payments or provide account information services. The notion of explicit consent is elaborated in Article 64 which, however, leaves quite considerable room for interpretation. According to the European Data Protection Board's (EDPB) letter to the European Parliament, explicit consent under PSD2 should primarily be distinguished from the definition of explicit consent under General Data Protection Regulation (GDPR). In the context of payment services, the consent should derive from the terms and conditions of the contract between the payment service provider and the payment service user.[106] The European Banking Authority (EBA) has also adopted a similar view highlighting the relevance of contract between the payment service user and third party provider in its latest opinion regarding the implementation of the Regulatory Technical Standards (RTS) on authentication and communication.[107] Some stakeholders, including the European Consumer Organisation, have expressed their concerns regarding the actual form that consents will take and emphasised that, for instance, ticking a typical terms and conditions box would not be sufficiently explicit consent in the context of PSD2.[108]

[104] See Chapters 2.3 and 2.4.
[105] See recital 30 of PSD2.
[106] EDPB 2018, p. 3-4.
[107] EBA-Op-2018-04, p. 4
[108] API EG 045-18, p. 5.

Fourthly, PISPs and AISPs must communicate with banks and payment service users in a secure way, and identify themselves to the relevant bank in conformity with Article 98 PSD2 whenever they intend to initiate a new payment or make an information request. The requirement of secure communication applies to the other direction as well: banks shall also comply with Article 98 when they intend to communicate with third party providers. Identification requires the use of so-called strong customer authentication (SCA) in accordance with paragraph 4 of Article 97.[109] According to the definition of Article 4(30) PSD2 "strong customer authentication means an authentication based on the use of two or more elements categorised as knowledge (something only the user knows), possession (something only the user possesses) and inherence (something the user is) that are independent, in that the breach of one does not compromise the reliability of the others, and is designed in such a way as to protect the confidentiality of the authentication data".

In most cases the knowledge element of strong customer authentication is a password or a PIN code. The element that the user possesses can vary quite remarkably depending on the type of service that is being used. Typical examples include different kinds of mobile devices and digital tokens. The inherence element on the other hand, is something that is related to the payment service user's physical characteristics, such as fingerprints or irises, which can be verified by using biometric devices.[110] Article 98 makes reference to the EBA's RTS on authentication and communication which define the concrete requirements for identification and communication purposes.

Furthermore, both PISPs and AISPs must refrain from accessing, using and storing information for purposes other than those explicitly requested by the payment service user. Basically the only acceptable purpose is the provision of either payment initiation or account information services. For PISPs it is prohibited to request data that is not necessary for payment initiation, and even though AISPs could theoretically access all the available account data of the payment service user, they are also required to restrict their access to designated payment accounts.

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[109] However, Articles 10 to 18 of the RTS lay out certain exemptions to the obligation to apply SCA. These exemptions relate to, for instance, recurring or low-value transactions and transfers made by the payment service user to himself or herself.
[110] EBA-Op-2018-04, p. 7.

Articles 66 and 67 also both contain restrictions regarding sensitive payment data[111]: AISPs must refrain from requesting sensitive payment data linked to payment accounts from the payment service user, and PISPs should never store sensitive payment data of the payment service user.

Article 66 contains several requirements that are exclusive to payment initiation services. According to Article 66(3)(a) a PISP shall "not hold at any time the payer's funds in connection with the provision of the payment initiation service". This provision is of great importance as the whole concept of payment initiation is based on the idea that the actual transfer of funds takes place between banks which is why the PISP does not actually have to hold the funds in its possession at any point.[112] Due to this characteristic non-bank service providers can engage in payment initiation business without having to acquire a full banking license.[113] Article 66 also provides that PISPs must not make use of any additional information about the payment service user that they may obtain when accessing payment service users' accounts. Such information can, however, be provided to the payee if the payer gives his or her explicit consent to this. Finally, it is prohibited for the PISP to modify any features of a payment transaction, including the amount and the payee.

Moreover, Articles 66 and 67 contain certain requirements that are addressed solely to banks. Banks must always treat payment orders and information requests from PISPs and AISPs "without any discrimination other than for objective reasons". Article 66(4)(c) specifies that in the context of payment initiation services this concerns at least timing, priority and charges. This requirement is of great importance since it implies that banks are not allowed to place, for instance, any additional fees on payment orders submitted by PISPs if its customers can normally place payment orders directly free of charge.[114] Information on the initiation and

[111] Sensitive payment data is in the paragraph 32 of the Article 4 defined as "data, including personalised security credentials which can be used to carry out fraud". For PISPs and AISPs, "the name of the account owner and the account number do not constitute sensitive payment data".
[112] See e.g. London Economics et al. 2013, p. 107.
[113] See recital 31 of PSD2.
[114] This requirement does not necessarily explicitly prohibit banks from charging PISPs and AISPs for access. However, as account information requests and payment orders have not been sold by the banks as independent services it would be very challenging to price them separately. For this reason the consensus appears to be that banks will not be able to place additional charges for payment account access requests. Overall, the wording of the Directive is not very precise. See e.g. Autoriteit Consument & Markt 2017, p. 35.

execution of the payment transaction must be provided to the PISP "immediately after receipt of the payment order". These requirements clearly aim to ensure that banks could not favour their own services at third party services’ expense. What is more, a contractual relationship between the bank and the PISP or AISP shall not be a requirement for the access to payment accounts. The purpose of this provision is to prevent potential foreclosure of PISPs and AISPs by the banks. Otherwise banks could possibly impose unreasonable terms and conditions to third party providers willing to access accounts held with them which could have all sorts of anti-competitive effects.[115]

There are certain scenarios where it may be justified for the bank to deny the access of a PISP or an AISP to a payment account altogether. However, banks shall not deny PISPs’ or AISPs’ access unless there are some objectively justified reasons for this. Acceptable reasons are specified in Article 68(5) PSD2 and they include “unauthorised” or “fraudulent” access to the payment account. The list of objectively justified reasons appears to be exhaustive which means that third party providers’ access can only be blocked under very limited circumstances. Furthermore, the bank that denies payment account access must also be able to duly evidence the existence of reasons that gave rise to the denial.

Although the Directive imposes multiple requirements regarding third party providers’ access to payment accounts, it provides very little guidance about the concrete execution of the access. Recital 27 that describes payment initiation services explains that in payment initiation connection is established to bank's online banking platform. Recital 32 specifies that access to account can be either direct or indirect, and banks that provide interfaces that are based on indirect access should also enable direct access. In accordance with recital 28, AISPs can access accounts via banks' online interfaces. Recital 93 confirms that PISPs and AISPs should be able to choose between direct and indirect access methods. However, the actual meanings of terms like direct and indirect access or necessary features of the online interfaces are not clarified anywhere in the Directive text. Therefore, in order to fully understand the requirements concerning access to accounts, it is necessary to examine the provisions of the complementing regulatory technical standards as well.

[115]See e.g. SWD(2013) 288 final, Volume 1/2, p. 64.

2.6.3 Relevant Provisions in the Regulatory Technical Standards

Commission delegated regulation (EU) 2018/389[116] (the RTS) complements the Directive by fleshing out its requirements that relate to authentication and communication which are both crucial aspects of account access. For the most part the requirements established by the RTS are addressed to banks. In this context I will focus on the most important parts of the provisions that concern online interfaces that enable PISPs and AISPs access to payment accounts held by banks.

Article 30(1) of the RTS imposes a general obligation to all banks that offer online payment accounts to provide at least one access interface that enables secure communication with third party providers so that they can receive all the information that is necessary for the provision of their services. Such access interfaces are also know as application programming interfaces (APIs). However, pursuant to Article 31, banks can decide whether they want to develop a dedicated interface that is specifically designed for communication with third party providers, or whether they want to utilise their already existing customer interface for this purpose. This freedom of choice is crucial because technology and business-model neutrality is one of the primary objectives of the PSD2 legislation.[117] Regardless of the chosen approach, paragraphs 1 and 2 of Article 30 require that the interface makes it possible for third party providers to identify themselves to the bank. It also has to allow them to use the same authentication methods that are offered to the customers of the bank.

Since it was noted early on in the drafting process of PSD2 that the functionalities of the access interfaces affect the operations and services of all stakeholders in the payment chain the Commission made a proposal concerning the creation of a specialist group that would evaluate industry standards that relate to access interfaces.[118] The organisation called API Evaluation Group that was established as a result of this proposal comprised of representatives of all

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[116] Comission delegated regulation (EU) 2018/389 of 27 November 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for strong customer authentication and common and secure open standards of communication.
[117] See recital 20 of the RTS.
[118] The proposal of the Commission was approved by the Euro Retail Payments Board (ERPB) Working Group on Payment Initiation Services and communicated in the final report of the Group. See ERPB PIS 034-17, p. 3.

relevant stakeholder groups and it participated actively in the discussion around the legal and technical requirements for access interfaces.[119]

According to Article 30(3), the technical specification of the interface shall be disclosed to third party providers upon request in order to facilitate the development of new services. The technical specification of the interface should be in line with possible common standards developed by relevant international or European standardisation organisations. Paragraph 4 of Article 30 requires that third party providers are informed of all possible amendments to above-mentioned specification as soon as they occur. In accordance with Article 30(5), banks must also arrange well in advance a testing facility where third party providers can ensure the interoperability between their services and the interface. Paragraph 6 of Article 30 highlights that it is the duty of the national competent authorities to supervise banks' compliance with the RTS.

Article 32 of the RTS is crucial for ensuring the proper functioning of dedicated interfaces which is vital for the quality of the third party providers' services.[120] It imposes banks an obligation to ensure that the availability and performance of their dedicated interfaces is at the same level with the online banking interfaces offered to their customers. Banks shall adopt performance indicators and service level targets that are "at least as stringent as those set for the interface used by their payment service users", and these must be communicated to the public along with statistics on the availability and performance of the interface. The dedicated interfaces should not impose third party providers any requirements that could be regarded as obstacles for the provision of their services. Potential obstacles are listed in paragraph 3 of Article 32 but the wording illustrates that the list is not exhaustive.[121] For instance, forcing third party providers to always redirect payment service users to the bank's authentication page or requiring some additional authorisations or registrations from the third party providers could possibly form illegal obstacles. Article 32 also helps to understand the difference between direct access and indirect access: wording of the article implicates that when an account is accessed

[119] europeanpaymentscouncil.eu
[120] See recital 22 of the RTS.
[121] According to the wording of Article 32 "Such obstacles, may include, among others…".

through the customer interface the access can be considered direct. Access through a dedicated interface can hence be deemed indirect.

Article 33 of the RTS presents a set of contingency measures, also known as a fallback mechanism[122], which aim to ensure that third party providers have an alternative means of accessing the accounts of a certain bank in the event that its dedicated interface is not functioning properly. The fallback mechanism was added to the RTS partly due to the pressure from national competition authorities who suspected that banks could try to manipulate the flow of account information towards third party providers if the information was only accessible through their dedicated access interface. However, this was an issue that divided the views of the Commission and the EBA and the final result was a compromise between two conflicting opinions.[123] The fallback mechanism enables third party providers to temporarily access accounts directly through the customer interface of the payment service user even if the relevant bank would have a dedicated access interface in place. Such temporary direct access is subject to several conditions defined in the paragraph 5 of Article 33. According to these requirements 1) all accessing, storing and processing of data by third party providers must relate to the provision of their services, 2) all requirements of Articles 66 and 67 PSD2 must be strictly complied with, 3) all accessed data must be logged, 4) the bank must always be informed about the direct access, and 5) the third party provider must be able to justify direct access to the competent authorities if required. However, Article 33(6) provides that the national competent authority may, with EBA’s approval, exempt a bank from the obligation to provide such fallback mechanism if its dedicated interface meets all the requirements laid down in the previous Articles and if it has been "widely used" by third party providers for at least 3 months and if all its possible problems have been duly solved.

Article 36 of the RTS sets more specific requirements to the data that banks and third party providers are obliged to provide to each other in different situations. In order to enable the provision of account information services, banks shall make available to the AISPs the same information from "designated payment accounts and associated payment transactions" that they provide to their customers requesting the information directly. Nevertheless, AISPs need to

[122] Recital 24 of the RTS; European Commission 2017.
[123] See e.g. Vezzoso 2018, p. 8-9.

ensure that access is restricted to information that is covered by the payment service user's explicit consent. AISPs should be able to access this information whenever actively requested by the payment service user or up to four times a day when not actively requested by the payment service user. Similarly, PISPs must receive the same information "on the initiation and execution of the payment transaction" that is provided to customers that initiate payments directly. In addition, PISPs requesting information about the availability of adequate funds in the payer's payment account shall always be immediately informed with a "yes" or "no" answer. PISPs shall also provide the bank with the same information that their customers must provide when initiating payments directly. Moreover, Article 36 provides that banks must always duly communicate possible errors and malfunctions in their interfaces to third party providers. A dedicated interface shall also enable communication about detected errors between the payment service providers participating in the same communication session.

3 REFUSALS TO DEAL IN THE PAYMENT SERVICES MARKET – DEMAND FOR A DUTY TO DEAL?

3.1 The Relevance of Competition Law Considerations in the Field of Payment Services

3.1.1 The Key Provisions of EU Competition Law

In order to assess the applicability of competition rules to a certain field of economic activity it is necessary to understand what kind of provisions form the core of the competition policy of the Union. The two most important substantive competition provisions that regulate the economic activities of undertakings in the EU are Articles 101 and 102 TFEU. The concept of undertaking is wide and it entails all kinds of entities that are "engaged in an economic activity, regardless of the legal status of the entity".[124] Even though Articles 101 and 102 TFEU apply to different types of anti-competitive practices their ultimate goal is the same: to secure effective competition in the common market.[125]

The primary purpose of Article 101 TFEU is to prevent collusive practices between independent undertakings. Prohibited practices can be agreements, decisions or other concerted practices that can prevent, restrict or distort competition in the relevant market. The key requirement for invoking Article 101 is that the alleged practices are in some way collective since independent conduct of an individual undertaking does not fall within the scope of the Article 101.[126] In other words some form of cooperation between competing undertakings is always characteristic to practices that can lead to proceedings under Article 1011

Article 102 TFEU on the other hand, is the key provision regarding the anti-competitive behavior of individual dominant or monopolistic undertakings. The aim of Article 102 is to prevent dominant undertakings from abusing their position in situations where they can act independently of competitors.[127] The abuses of dominant market position have traditionally

[124] See Case C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH*, para. 21.
[125] Bishop and Walker 2010, p. 5-6; O'Donoghue and Padilla 2013, p. 34.
[126] See e.g. Jones and Sufrin 2011, p. 118-119, 141.
[127] See e.g. Jones and Sufrin 2011, p. 259-260.

been categorised into exploitative and exclusionary abuses. The exploitative conduct of a dominant undertaking typically occurs in the form of excessive prices or otherwise unfair contractual terms that would not be possible if there was enough competition. Exclusionary abuses, by contrast, are practices that reduce competition by preventing new players from entering a certain market which can limit production for the harm of consumers. Exclusionary practices can take numerous forms and they often eventually lead to reduced innovation and consumer choice. However, some abuses can contain elements from both categories which means that they do not always exclude each other. Sometimes an individual category of reprisal abuses is mentioned as well: for instance, dominant undertaking's punishment or disciplinary action targeted at another undertaking can constitute what is known as a reprisal abuse.[128]

3.1.2 Recent Developments in the Field of Electronic Payment Services

The remaining sections of Chapter 3 focus on assessing the competitive environment in the payment services market before PSD2 in the light of EU competition law, notably rules regarding refusals to deal and essential facilities. First, I argue that the preparatory materials of PSD2 and the recent activity of the Commission seem to implicate that the Union is treating payment account information as an essential facility even though such stance has not been explicitly expressed. Essential facility is a resource access to which is vital for undertakings that aim to compete in a certain market. Essential facilities are an important element of the refusal to deal doctrine.[129] I then proceed to introducing the relevant rules of competition law and assessing whether incumbent banks' refusals to grant access to payment account information, i.e. the alleged essential facility, could indeed be regarded as anti-competitive refusals to deal in the light of the existing refusal to deal doctrine.

Taking into consideration the seemingly important role that fair competition between existing and new payment service providers plays in the objectives of the Directive[130], it is surprising how little attention has been paid to assessment of this topic in the preparatory materials, namely

[128] See e.g. Jones and Sufrin 2011, p. 358-359, 364 and O'Donoghue and Padilla 2013, p. 237.
[129] See Section 3.2.1 below for detailed definition.
[130] See e.g. recitals 29 and 33 of PSD2 and COM(2013) 547 final, p.2.

the Commission Green Paper[131], Impact Assessment[132], and the Proposal for PSD2[133]. Competition considerations in the preparatory materials seem to focus primarily on interchange fees that relate to card-based payments. For instance, the barriers to entry that PISPs and AISPs face or potential discrimination practiced by the incumbent banks are not analysed in detail. As discussed in the beginning of Chapter 2, these documents do provide, however, few examples of the competition issues that demonstrated the need for access to accounts framework that would enable the new service providers to effectively compete with the incumbent banks.

Actions recently taken by competition authorities also illustrate that electronic payment services are currently an important focus area from a competition law perspective: at least the European Commission, the EFTA Surveillance Authority (ESA) and the German competition authority Bundeskartellamt have conducted investigations in the payment services market already before PSD2 became applicable.[134] These investigations have all related to situations where incumbent banks or associations formed by banks have been suspected of engaging in practices that could potentially exclude new competitors from the market.

The European Commission first paid attention to the actions of the incumbents in the online payments market in 2011 when it opened an investigation concerning the European Payments Council's (EPC) attempt to create standards for online payments. According to the Commission, the proceedings were based on Article 101 TFEU. The Commission's objective was to ensure that the EPC would not favour incumbent players by adopting standards that could exclude new non-bank service providers from the market. Exclusion of innovative new service providers could eventually cause harm to consumers in form of higher prices.[135] The investigation was, however, closed in 2013 since the EPC decided to cancel the standardisation project which resulted in complainant Sofort AG withdrawing its complaint.[136]

In 2016 Bundeskartellamt ruled that German Banking Industry Committee's (Deutsche Kreditwirtschaft) online banking rules that had prohibited banks' customers from sharing their

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[131] COM(2011) 941 final.
[132] SWD(2013) 288 final.
[133] COM(2013) 547 final.
[134] IP/11/1076 and MEMO/13/553; MEMO/17/3761; Case No 77452; Bundeskartellamt 2016.
[135] EPC is a body initally formed by the banking industry which is why non-bank service providers were not represented in its decision making. See IP/11/1076.
[136] MEMO/13/553.

security credentials with non-bank third party providers in order to use their services were to be considered illegal. Prohibition to share security credentials impeded third party providers' access to account information that is crucial for the provision of e.g. payment initiation services. These online banking rules were collectively adopted in German banking associations and applied by practically all active German banks. Since the online banking terms and conditions were jointly decided by the member banks the practice was judged by Bundeskartellamt in the light of Article 101 TFEU. Bundeskartellamt held that such rules prevent new payment services from emerging in the market which can have detrimental effects to consumers and retailers since innovative electronic payment services are typically cost-effective and fast compared to traditional payment methods.[137]

The ESA[138] initiated competition proceedings against several major banks operating in Norway based on the alleged infringement of Article 53 of the Agreement on the European Economic Area (EEA Agreement) which is essentially identical with Article 101 TFEU. ESA will investigate whether certain Norwegian banks have engaged in anti-competitive agreements or other collective practices in order to prevent Swedish Trustly from entering the electronic payment services market in Norway. In addition, the ESA will assess whether general terms and conditions related to electronic payment services in Norway could restrict competition in this market.[139]

At the end of 2017, right before PSD2 became applicable, the European Commission and national competition authorities jointly conducted unannounced inspections, i.e. dawn raids, in the premises of certain banks and banking associations “in a few Member States”. The organisations under investigation are suspected of denying third party providers’ access to banks’ customers account information in situations where the customer has consented to account access. Such behavior can exclude non-bank service providers from the payment services market and could therefore be regarded as “anti-competitive practice”. The

[137] Bundeskartellamt 2016; European Competition Network 2016.
[138] ESA is responsible for monitoring compliance with the EEA Agreement in the European Free Trade Association (EFTA) states and therefore it operates in close cooperation with the EU. Even though ESA is not an organ of the EU its decisions may provide useful guidelines for interpretation of EU competition law since EEA Agreement is compatible with the EC Treaty. See e.g. Craig and Búrca 2011, p. 16-17.
[139] Case No 77452, para. 3-5.

Commission specifies that the alleged practices may constitute a breach of rules regarding cartels and restrictive practices or rules regarding abuses of dominant market position or both. This means that these practices could fall within the scope of both Article 101 and Article 102 TFEU.[140] The Commission did not initially reveal the Member States in which inspections took place. Nevertheless, it was later announced by the media that the Member States in question were the Netherlands and Poland.[141]

The alleged objective of the collusive practices has in all above-mentioned cases been the same: the exclusion of new non-bank service providers from the market by denying access to account information that is essential for the functioning of their services. The majority of the above-mentioned proceedings have been primarily based on Article 101 TFEU. This, however, does not indicate that there would be no need for considerations under Article 102 TFEU as well. The anti-competitive effects of collective practices and unilateral refusals to deal are essentially similar and it is not always clear whether collective practices fall within the scope of Article 101 or 102 TFEU.[142] In fact, individual incumbent banks may have been able to foreclose non-bank competitors more discreetly without entering into any collusive agreements or making collective decisions with other banks.[143] Such foreclosure has been rather easy to justify with, for instance, the risk of fraud or other payment security concerns since there has not been a formal obligation for the banks to provide access to the account information.

Observations made by the Commission and national competition authorities seem to implicate that incumbent banks have been in a position where they have, at least to some extent, been able to foreclose competition by refusing to supply crucial inputs to new service providers. The lack of in depth assessment of the identified competition issues relating to third party providers' access to accounts in the Directive's preparatory materials and the recent activity of competition authorities in the payment services sector call for further examination of this topic.

In the preparatory materials of PSD2 the Commission used expressions like "gateway function" and "restricted access to crucial components of the payments infrastructure" when discussing

[140] MEMO/17/3761.
[141] See e.g. Khan and Shotter 2017 and Basquill 2018(b).
[142] See e.g. O'Donoghue and Padilla 2013, p. 572-573 and Graef 2016, p. 209-210.
[143] See e.g. Vezzoso 2018, p. 10.

the problems related to third party providers' limited access to payment account information. The Commission also indicated that "the viability" of certain business models in the payment services sector is dependent upon access to account information and that emergence of new payment solutions could be hindered due to the refusals of the banks to grant necessary access.[144] As explained in Section 3.2 below this kind of rhetoric has been characteristic to so-called essential facility cases. Although the Commission has clearly avoided making any direct references to essential facilities in PSD2-related material, the preparatory materials could be interpreted as to implicate that the Commission has considered payment account information to form an essential facility.

The existence of a resource that is considered to be an essential facility would definitely explain the urge of the Union to introduce access regulation. PSD2's access to accounts rules that were discussed in Chapter 2 practically constitute banks a duty to deal with third party providers: banks are obliged to enable competitors' access to their infrastructure and inputs, notably payment account data, on a non-discriminatory basis. Therefore, it is necessary to understand when restrictions to third parties' access to a certain input or facility controlled by an incumbent can be considered so harmful to competition that imposing the incumbent an obligation to provide access is seen as a more viable option. In general, undertakings operating in liberal market economy have no obligation to deal with their competitors but the possession of an essential facility may under certain rare conditions make imposing such obligation justified.[145] Section 3.3 sheds light on these conditions whereas Section 3.4 focuses on assessing whether such conditions have potentially been present in the payment services market in the EU.

The adoption of *ex ante* regulation that obliges the owners of essential facilities to share them with market entrants has been typical in utility sectors, such as telecommunications, energy and postal services. The third energy package of the EU[146] and the EU's regulatory framework for

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[144]COM(2011) 941 final, p. 11; SWD(2013) 288 final, Volume 1/2, p. 16.

[145] Whish 2009, p. 687-688.

[146] Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC and Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC.

electronic communications[147] are examples of regulation that has aimed to secure market entrants' access to essential facilities on a non-discriminatory basis. It has been a means of creating competition in previously non-competitive markets that rely heavily on physical infrastructure. These markets have been primarily controlled by state-owned or natural monopolies and for structural reasons general competition law, i.e. Articles 101 and 102 TFEU, has been considered to be an inadequate means of promoting competition.[148] In this light, the payment services market that is not dependent on any specific physical infrastructure and has been primarily controlled by privately owned banks appears to be an atypical target for this type of regulatory intervention. Nevertheless, payment services do serve a crucial function in the modern society and everyday life would be extremely challenging without the existing payment infrastructure. Today, various digital network-based innovations, such as the Internet and software platforms that it enables, have become so vital to the functioning of the society that their importance is comparable to that of physical infrastructure.[149] This may apply to payment services as well.

The essential facilities doctrine originally derives from general competition law and is typically used *ex post* and on a case-by-case basis. Nevertheless, I do not see obstacles to applying it in this context as the concept has sometimes also played major role in sector-specific regulation. After all, the objectives of sector-specific regulation and competition law are often very similar and these instruments can also be parallelly applied.[150] In the following sections I will introduce the refusal to deal doctrine and assess its applicability to the situation in the pre-PSD2 payment services market. This will hopefully help to identify and better understand those competition-related issues that PSD2 is destined to remedy.

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[147] Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), as amended by Directive 2009/140/EC.
[148] See e.g. Whish 2009, p. 970 and Colomo 2010, p. 270.
[149] See e.g. Waller and Tasch 2010, p. 764.
[150] Colomo 2010, p. 263; Jones and Sufrin 2011, p. 495.

3.2 Refusal to Deal as an Anti-competitive Practice

3.2.1 The Key Elements of the Refusal to Deal Doctrine

Dominant undertaking's refusal to deal, also referred to as refusal to supply, is a practice that can under specific conditions be considered anti-competitive. In the EU the definition of anti-competitive refusal to deal has been developed primarily by the CJEU through its case law.[151] It is a form of exclusionary abuse that can constitute a breach of Article 102 TFEU.[152]

The criteria for anti-competitive refusals to deal are strict which is why refusal to deal cases are rather rare. Strict criteria are necessary and justifiable as the idea of forcing an undertaking to supply inputs to its competitors is against the principle of freedom of contract which is one of the core values of free market economies such as the EU.[153] It is possible that dominant undertakings become less keen to innovate and invest if they are obliged to grant market entrants access to their resources.[154] In addition, there lies a risk that undertakings get punished for being merely more efficient than their competitors if refusals to deal are considered to be anti-competitive too lightly.[155] Since the concept is problematic for several reasons, the Commission has attempted to clarify some of the questions deriving from the application of the refusal to deal doctrine in its Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty (Article 102 TFEU) to abusive exclusionary conduct by dominant undertakings.[156]

Refusal to deal doctrine can become relevant in scenarios where an undertaking, or a group of undertakings, that operates on both the upper and the lower level of a specific supply chain, controls an input on the upper level and that input is necessary for undertakings that aim to compete with it on the lower level. These two different levels of the supply chain are known as the upstream market and the downstream market and an undertaking that operates on both levels

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[151] Some of the leading cases are discussed below in Section 3.2.2.
[152] Jones and Sufrin 2011, p. 479-480; O'Donoghue and Padilla 2013, p. 510.
[153] Whish 2009, p. 687-688; O'Donoghue and Padilla 2013, p. 509.
[154] Bishop and Walker 2010, p. 322; Marsden 2010, p. 68-69.
[155] Bishop and Walker 2010, p. 324.
[156] 2009/C 45/02.

is called vertically integrated. In these scenarios the end product, i.e. the product that is sold to customers in the downstream market, cannot be produced without obtaining the crucial input from the upstream market.[157]

If the dominant undertaking is able to make it effectively impossible for other undertakings to compete on the downstream market by refusing to supply a necessary product or service, and this is likely to be harmful to consumers, the refusal may be considered to form anti-competitive foreclosure. Anti-competitive refusal to deal can be found even though all effective competition would not have yet been eliminated; it may suffice that this is likely to happen in the future. It is necessary to also emphasise that it has to be practically impossible for downstream actors to duplicate the essential input controlled by the dominant undertaking in the upstream market.[158]

It is noteworthy that according to the discussion paper of the Directorate-General for Competition, dominant undertaking's refusal to deal may be considered anti-competitive even though it would not eliminate, or be likely to eliminate, all competition on the downstream market. It suffices that significant harm is caused to competition.[159] In addition to concrete and absolute refusals, other kinds of practices may also fall within the scope of the refusal to deal doctrine. Refusal to deal doctrine may be applied to situations where the dominant undertaking makes it difficult, although theoretically possible, for its competitors on the downstream market to obtain access to the necessary input. In its Article 82 Guidance Paper the Commission explains that this can be the case if the dominant undertaking places unreasonable terms and conditions in supply agreements, or if it unduly delays or otherwise hinders the supply of the essential input.[160]

In the context of IP rights, an additional requirement is typically applied to refusals to deal. Refusal to license an IP right to competitors requesting it does not hence automatically constitute an abuse of dominant position even if all the above-mentioned conditions were met. In order for a refusal to license an IP right to be abusive, it is also required that the refusal can

[157] Bishop and Walker 2010, p. 323; O'Donoghue and Padilla 2013, p. 541.
[158] O'Donoghue and Padilla 2013, p. 511, 553-554; 2009/C 45/02, para. 81.
[159] DG Competition 2005, p. 63-64.
[160] 2009/C 45/02, para. 79.

potentially limit technical development or prevent the emergence of a new product for which there is likely to be consumer demand. In the long term the prevention of emergence of such products could be harmful to consumers which can make a duty to license justified.[161]

In those situations where the dominant undertaking can objectively justify its refusal, it might be able to refrain from granting access to the input that it controls notwithstanding that all the above-mentioned conditions are met. Acceptable justifications may include, for instance, limitations in the capacity of certain physical facility, supply shortages that are caused by circumstances beyond the dominant undertaking's control and issues with creditworthiness of the undertaking that requests access.[162] According to the Commission, also remarkable research and development investments made by the dominant undertaking to create the relevant input could potentially justify a refusal to share it with other undertakings.[163]

Refusal to deal doctrine is closely intertwined with the concept of essential facility that originates from the case law of certain courts in the United States. However, the relevance of the essential facilities doctrine has been greatly undermined in the United States after the *Trinko*[164] case of 2004.[165] Although the CJEU has avoided using the term essential facility in its rulings, there appears to be a consistent line of case law formed around this issue and it is commonly referred to as essential facilities doctrine in legal literature.[166] The CJEU has neither officially confirmed the existence of the essential facilities doctrine nor denied it.[167] In legal literature there does not appear to be any clear division between refusal to deal and essential facilities doctrine as these terms are used interchangeably. The Commission also states in the Article 82 Guidance Paper that "refusal to grant access to an essential facility or a network" is

[161] O'Donoghue and Padilla 2013, p. 554-555.
[162] O,Donoghue and Padilla 2013, p. 563-566.
[163] 2009/C 45/02, para. 89.
[164] *Verizon Communications Inc v Law Offices of Curtis V. Trinko, LLP*, 540 US 398.
[165] Waller and Tasch 2010, p. 744. According to the Supreme Court the essential facilities doctrine was developed by lower courts, and therefore, there was "no need either to recognize it or to repudiate it". In addition, the Supreme Court stated that it was not justified to expand the scope of "exceptions from the proposition that there is no duty to aid competitors". See *Trinko*, para 411.
[166] See e.g. Craig and de Búrca 2011, p. 1031; O'Donoghue and Padilla 2013, p. 509; and Graef 2016, p. 155. For instance, cases like *Commercial Solvents, Magill, Oscar Bronner* and *Microsoft* that are discussed below have been classified as essential facilities cases in several sources even though there are no explicit references to essential facilities in the actual texts of the rulings.
[167] Garzaniti and O'Reagan 2010, p. 486.

a practice that can be regarded as a form of refusal to supply.[168] This indicates that the line of essential facilities case law could actually be regarded as an integral part of the refusal to deal doctrine rather than a separate stand-alone doctrine. Cases that relate to essential facilities have played important role in the development of the refusal to deal doctrine, and according to some sources, essential facilities are perhaps the most significant area of its application.[169] In both the United States and Europe the essential facilities doctrine has been traditionally often applied to sectors where certain physical infrastructures, such as distribution networks, controlled by incumbents form bottlenecks for market entry.[170]

Refusal to deal situations are typically resolved by imposing the dominant undertaking a "duty to deal" with its downstream competitors or customers. Obligation to provide access to an input as such, however, is likely to be insufficient if the dominant undertaking can independently define the conditions of access. Hence, duty to deal is often necessary to supplement with some sort of price regulation. Dominant undertakings can be, for instance, required to provide access to the essential input at a reasonable price and on non-discriminatory terms. Calculating a reasonable price can be an extremely challenging task and it is one of the recognised problem areas of duty to deal.[171]

Refusal to deal doctrine has been applied to various scenarios ranging from refusals to deal with new customers to discontinuances of supply to existing ones, and from refusals to grant access to a physical essential facility to refusals to license IP rights.[172] Below I will discuss some of the landmark cases that have had a significant impact on the development of the refusal to deal doctrine. Focus will mostly be on cases in which refusal to deal has been targeted at actual competitors of the dominant undertaking. In addition, I will introduce a refusal to deal case from the financial services sector since it is likely to have particular relevance in the context of payment services. Lastly, I will discuss recent development that could result in the extension of the essential facilities doctrine to various types of data in the future.

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[168] 2009/C 45/02, para. 78.
[169] Dunne 2016, p. 130.
[170] See e.g. Viscusi et al. 2005, p. 324 and Colomo 2010, p. 269-270.
[171] Bishop and Walker 2010, p. 322-323, 329-330.
[172] See 2009/C 45/02, para. 78.

3.2.2 The Development of the Refusal to Deal Doctrine in the EU

The concept of anti-competitive refusal to deal was introduced by the CJEU in its judgement in the *Commercial Solvents*[173] case of 1974. Commercial Solvents Corporation was one of the main global manufacturers of a chemical that was used as a raw material for the production of several derivative chemical products. When the company decided to start manufacturing a derivative chemical itself it discontinued its supply to main downstream producer Zoja. The Court stated that dominant undertaking's refusal to continue supplying raw material to a customer that manufactured derivative products out of the raw material in the same way as the dominant undertaking, could risk "all competition on the part of this customer". Therefore, such refusal should be deemed abuse of the dominant position in accordance with Article 86 of the EC Treaty (Article 102 TFEU).[174] One of the key contributions of this judgement to the refusal to deal doctrine was the identification of distinct upstream market for the raw material and downstream market for the derivative products.[175] *Commercial Solvents* judgement has in some sources been criticised for focusing on the mere protection of competitors instead of assessing the actual effects of the dominant undertaking's behaviour to consumers.[176]

The first significant essential facility case in the EU in which a final decision was issued by the Commission was *Sea Containers v. Stena Sealink*[177]. Stena Sealink was a vertically integrated company that controlled a port and also used it to provide ferry services in a downstream market. Sea Containers Ltd was a ferry service provider that was planning to expand its services to new routes for which it needed access to a port operated by Stena Sealink. Stena Sealink's control over the port of Holyhead gave it a dominant position in the market for ferry services on a key route between the UK and Ireland. The Commission held that the port could be regarded as an essential facility "without access to which competitors cannot provide services to their customers". Failure to provide competitors access to such facility on reasonable terms

[173] Joined Cases 6-7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission*.
[174] *Commercial Solvents*, para. 25.
[175] Ezrachi 2012, p. 233.
[176] Jones and Sufrin 2011, p. 483.
[177] Case IV/34.689, *Sea Containers v Stena Sealink* (Interim measures). The Commission had used the expression "essential facility" already in 1992 in Case IV/34.174 *Sealink/B&I – Holyhead* (Interim measures) but this case was settled and hence final decision was never given.

could constitute an abuse of the dominant position under Article 86 of the EC Treaty (Article 102 TFEU).[178] Although Stena Sealink did not explicitly refuse to grant Sea Containers Ltd access, it was found that it had *de facto* discriminated the access requests of Sea Containers Ltd by delaying negotiations and raising other difficulties.[179] The decision in *Sea Containers v. Stena Sealink* officially confirmed that dominant undertaking's obligation to grant access to an essential facility extended to both existing and new customers.[180]

In *Magill*[181] case refusal to deal doctrine was applied to IP rights. In this case the refusal of major television stations RTE and ITP to grant Magill TV Guide Ltd license to their weekly programme listings that were protected by copyright was regarded as an abusive practice under Article 86 of the EC Treaty (Article 102 TFEU). The dominant position of these TV stations was based on the fact that as broadcasters they were the sole producers of information about the schedules of their programmes and this information would have been impossible to duplicate.[182] The key argument for finding an abuse was that the refusal to provide information "prevented the appearance of a new product". The comprehensive weekly television guide that Magill TV Guide LTD was developing was a product that did not previously exist even though there was potential consumer demand for such guide. Due to the exceptional circumstances of the case, the refusal to license was able to constitute an abuse.[183]

The CJEU's ruling in *Oscar Bronner*[184] was remarkable in many ways as it restricted the scope of refusal to deal doctrine and laid down more concrete and explicit conditions for imposing dominant undertakings a duty to deal. It is often referred to as the leading case in the refusal to deal doctrine and it has undoubtedly strongly defined the development of the subsequent case

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[178] *Sea Containers. v Stena Sealink*, para. 66.
[179] *Sea Containers. v Stena Sealink*, para. 70.
[180] Jones and Sufrin 2011, p. 489.
[181] Joined Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission*.
[182] *Magill*, para. 47.
[183] *Magill*, paras. 50, 54.
[184] Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*.

law.[185] The case dealt with Mediaprint group's refusal to grant Oscar Bronner GmbH & Co KG, an Austrian newspaper publisher, access to its national distribution network. In its judgement the CJEU held that Mediaprint group's practice was not abusive as there were several alternatives to the distribution scheme. It was not relevant that other existing distribution methods were likely to be "less advantageous".[186] According to the Court, it was necessary to assess whether access to this specific distribution network was an indispensable requirement for the distribution of the newspaper. In order for a distribution network or any other facility to be indispensable, it would have had to be demonstrated that there was "no actual or potential substitute" to the facility. Furthermore, it was required that are either technical or legal obstacles, or that it would not be "economically viable" to create a similar network even if the volumes of that competing network were as high as the volumes of the network controlled by the dominant undertaking.[187] This requirement of indispensability has later on become a vital element of the refusal to deal doctrine and is definitely among the key contributions of *Oscar Bronner* judgement.[188]

The judgement was preceded by the opinion of Advocate General Jacobs[189] which has also become renowned. In the opinion Jacobs expressed concerns regarding the negative impacts that duty to deal may have on dominant undertakings' incentives to invest in efficient facilities. Furthermore, Jacobs stated that whenever an obligation to grant access is imposed the dominant undertaking should be "fully compensated". Jacobs also emphasised that the primary function of Article 86 of the EC Treaty (Article 102 TFEU) is not to protect competitors but consumers instead.[190] Jacobs' opinion has been regarded as an initiative to limit the applicability of the somewhat problematic essential facilities doctrine in the EU.[191]

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[185] See e.g. Jones and Sufrin 2011, p. 491 and O'Donoghue and Padilla 2013, p. 529. For instance, the judgement in Case C-418/01, *IMS Health GmbH & Co v NDC Health GmbH & Co KG* which was an IP rights case in the health care sector, was largely built upon the foundation laid by *Oscar Bronner* case. See *IMS Health*, paras. 28, 37.
[186] *Oscar Bronner*, paras. 42-43.
[187] *Oscar Bronner*, paras. 41, 44-46.
[188] O'Donoghue and Padilla 2013, p. 545-546.
[189] Opinion of Advocate General Jacobs in Case C-7/97.
[190] Opinion of Advocate General Jacobs in Case C-7/97, paras. 57-58, 64.
[191] Bishop and Walker 2010, p. 333; Jones and Sufrin 2011, p. 492.

In *Microsoft*[192] case of 2007 the CJEU seemed to loosen the criteria for duty to deal laid down in *Oscar Bronner* and *Magill*.[193] The case concerned the issue of whether Microsoft, as the dominant player in the PC operating systems market, was liable to provide interoperability information about its systems to competitors that were developing server operating systems that had to be integrated with Microsoft's products. Microsoft's refusal to continue providing interoperability was found to be an abuse of Article 82 of the EC Treaty (Article 102 TFEU) but this required some extension of the conditions established by the preceding case law. Firstly, the standard of indispensability was lowered from that of *Oscar Bronner* judgement. In *Microsoft* the Court held that it did not suffice that interoperability with Microsoft's systems was technically possible: competitors' systems had to be able to interoperate with Microsoft's products "on an equal footing" or otherwise they could not be considered to be economically viable.[194] Secondly, the Court abandoned the requirement according to which an anti-competitive refusal to deal would have to eliminate all competition on the market and replaced with a new standard which required that the refusal "is likely to eliminate all effective competition on the market".[195] Furthermore, the Court stated that the prevention of "the appearance of a new product" cannot be the only exceptional circumstance under which refusal to license an essential IP right should be regarded as abusive. Instead, limitation of "technical development" that the refusal could cause can also constitute an exceptional circumstance.[196] In addition, some commentators have pointed out that the judgement could be interpreted as to suggest that the significant market share of Microsoft in itself could constitute an abuse.[197]

In *Clearstream*[198] the Court upheld the decision of the Commission whose purpose was, above all, to make clear that "competition rules are being applied in the financial industry".[199] Clearstream Banking AG and Clearstream Banking SA, dominant central securities depositories in the EU, had postponed Euroclear Bank SA's access to their cross-border clearing

[192] Case T-201/04, *Microsoft Corp. v Commission*.
[193] See e.g. Ezrachi 2012, p. 245 and Graef 2016, p. 171.
[194] *Microsoft*, paras. 374, 421.
[195] *Microsoft*, para. 563.
[196] *Microsoft*, para. 647.
[197] See e.g. Jones and Sufrin 2011, p. 518 and O'Donoghue and Padilla 2013, p. 536 for comments on para. 664 of *Microsoft*.
[198] Case T-301/04, *Clearstream Banking v Commission*.
[199] IP/04/705.

and settlement services for nearly two years.[200] Although access was eventually granted, the Court held that two years was such a long period of time that it could be regarded as "abusive refusal to provide the service in question".[201] Since the Court mostly applied the criteria established by the previous case law, notably *Oscar Bronner* and *Microsoft*, the judgement did not bring any major changes in the refusal to deal doctrine.

The latest development that could have relevance for the essential facilities doctrine relates to the Commission's decision in *Google Search (Shopping)*.[202] The case concerned the appearance of price comparison services provided by competitors in the search results of Google search engine. According to the Commission, the fact that Google positioned and displayed its own comparison shopping services more favourably than the services of competitors in Google's general search results constituted an abuse of dominant position and hence a breach of Article 102 TFEU.[203] The remedies imposed by the Commission required Google to treat the comparison shopping services of its competitors "no less favourably than its own comparison shopping service within its general search results pages".[204]

Many commentators have considered this to be an access remedy which is a form of remedy typically applied to refusal to deal cases.[205] However, it is necessary to point out that several academic papers published prior to the final decision of the Commission concluded that the facts of the case made it very difficult to fit under any category of abuse established by previous case law.[206] Hence, it is logical that the Commission also strictly refused to categorise the abuse and label the imposed remedy as a duty to deal.[207] What the case could potentially implicate is that the Commission has an intention to extend the applicability of its competition policy, and notably its rules regarding access to crucial inputs, to the new sectors of the digital society where the tools of competition law have previously been regarded as inapplicable. Competition issues related to Google's extraordinary position have also aroused academic interest and there

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[200] *Clearstream*, para. 102.
[201] *Clearstream*, para. 151.
[202] Case AT.39740, *Google Search (Shopping)*. After the decision Google appealed to the General Court where Case T-612/17, *Google and Alphabet v Commission* is currently pending.
[203] *Google Search (Shopping)*, Section 7.2.
[204] *Google Search (Shopping)*, para. 699.
[205] Vesterdorf and Fountoukakos 2018, p. 3-4.
[206] See e.g. Akman 2017, p. 355 and Kokkoris 2017, p. 329.
[207] *Google Search (Shopping)*, para. 651.

are varying views on whether Google has actually become essential route for effective advertising in the Internet or even for accessing the Internet.[208]

In recent years discussions about data as a potential source of market power have become more and more common in the field of competition law. Access to data has become a relevant topic among not just policy makers but also competition law experts.[209] One of the key questions from a competition law perspective is whether data can constitute an indispensable resource and whether it would be justified to force dominant players in the data market to grant competitors access to their data.[210] Regardless of the interest around this issue the Commission and the CJEU have so far refrained from labelling dominant position with regard to data or limited access to data as competition issues even in cases where this could have potentially been possible. For instance, in merger cases *Google/DoubleClick* and *Facebook/Whatsapp*, which both concerned companies possessing and utilising significant amounts of data, the Commission did not consider the concentration of data to be a threat to competition in the relevant markets. The Commission's view appears to be that the possession of data as such does not enable dominant players to foreclose competition.[211]

3.3 Analogies Between Refusal to Deal Cases and the Situation in the Pre-PSD2 Payment Services Market

3.3.1 Definition of Relevant Market and Assessment of Dominance

Since refusal to deal is an abuse of dominant market position the doctrine can only be applied after the relevant market has been defined and undertaking's dominant position in that market demonstrated. As explained above in Section 3.2.1, in refusal to deal cases dominance occurs in the so-called upstream market which then affects competition in the downstream market where the dominant undertaking is also active. Problems related to market definition in the field of payment or other retail banking services could be the topic of an entire thesis. However,

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[208] Lao 2016, p. 298.
[209] See e.g. SWD(2017) 2 final, p. 11 and Martens 2016, p. 41.
[210] Martens 2016, p. 44.
[211] Case COMP/M.4731, *Google/DoubleClick*, paras. 364-365; Case COMP/M.7217, *Facebook/Whatsapp*, paras. 121, 191.

taking into account the objectives and limited scope of this study, it is necessary to apply a more straightforward, simplified approach.

In the definition of the relevant market two key aspects have to be considered: the substitutability of the product, i.e. the product market, and the geographic scope of the product market, i.e. the geographic market.[212] One of the leading cases with regard to market definition has been *United Brands*[213] in which the CJEU stated that in order for there to be a distinguished product market the interchangeability of the product with other products has to be very limited. In addition, the Court held that a "clearly defined geographic area" where the product is marketed and where "conditions of competition are sufficiently homogeneous" must be identified.[214] The Commission has also clarified the process of market definition in its Notice on the definition of relevant market for purposes of Community competition law.[215] According to the Commission Notice, all products that can be considered to be "interchangeable or substitutable by the consumer" belong to the same product market. The geographic market is the geographic area where the relevant undertaking offers its products. It must be possible to distinguish it from the surrounding areas based on its peculiar competition conditions that are "sufficiently homogenous" within the area.[216]

The primary test for determining dominance was developed by the CJEU in the *United Brands* ruling. The key condition for identifying dominance is that the allegedly dominant undertaking is able to "prevent effective competition" in the relevant market because it can behave "to an appreciable extent independently of its competitors, customers and ultimately of its consumers".[217] In *Hoffmann-La Roche*[218] the Court elaborated the test by stating that there may still be "some competition" regardless of the dominant position but the dominant undertaking must have "an appreciable influence" on the development of the conditions for competition.[219]

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[212] Craig and Bürca 2011, p. 1012-1016; O'Donoghue and Padilla 2013, p. 95. Temporal factors may also need to be considered in the case of seasonal products but this is unlikely to be relevant in this context. See Craig and Bürca 2011, p. 1017.
[213] Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission*.
[214] *United Brands*, paras. 11, 22.
[215] 97/C 372 /03.
[216] 97/C 372 /03, paras. 7-8.
[217] *United Brands*, para. 65.
[218] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission.*
[219] *Hoffmann-La Roche,* para. 39.

In practice, the demonstration of such position requires thorough analysis of market share of the undertaking and potential barriers to entry to the relevant market.[220]

For the purposes of this thesis, I hypothesise that the relevant upstream product market in the field of payment services, such as payment initiation and account information services, is actually the market for the payment account information of the customers of each individual bank. The downstream market, on the other hand, is the market for different payment services that are offered to the customers of each bank. The downstream market is where the competition between banks and front-end third party providers like PISPs and AISPs takes place. It can be considered to be either the market for all payment services or the market for payment initiation and account information services and it is possible to present arguments for and against both viewpoints.[221] The bank where a specific customer holds his or her payment account has so far had an exclusive right to utilise the information related to the account. Therefore, it is justifiable to argue that each bank has had a monopolistic, or at least dominant, position with regard to information about its customers' payment accounts in the market for payment account information.[222] This kind of approach was adopted by the Autoriteit Consument & Markt (Authority for Consumers & Markets) of the Netherlands in its 2017 report discussing the risks of foreclosure that fintechs face.[223]

The geographic scope of the market for payment account information has not been analysed in the Autoriteit Consument & Markt's report. However, payment services form an important segment of retail banking and retail banking markets in general have commonly been considered to be mostly national regardless of the efforts that have so far been made in order to integrate markets in the EU.[224] The decisions of the Commission also support this view as the Commision has in its merger decisions consistently held that retail banking markets are

[220] See e.g. Craig and Bürca 2011, p. 1019-1020.
[221] At least recital 3 of PSD2 suggests that new payment services belong to the same market with traditional payment solutions and hence challenge them. This viewpoint seems logical since essentially for example payment initiation services are an alternative to credit cards and they can be seen as substitutes.
[222] As discussed in Section 2.4.1, highly controversial screen scraping has enabled some third party providers to access the accounts of certain banks but the scale of this practice has been rather limited and it has been formally prohibited.
[223] Autoriteit Consument & Markt 2017, p. 26, 29.
[224] See e.g. COM(2015) 630 final, p. 2.

national.[225] Retail banking sector is in many Member States highly concentrated which means that few major players control a great share of the market.[226] Therefore, if a third party provider is not able to access the payment account information of the customers of one of the Member State's major banks it will have a significant negative impact on its chances to compete effectively on the downstream market.

3.3.2 Assessment of the Characteristics of Payment Account Information and the Situation in the Payment Services Market

Now that the relevant upstream and downstream markets have been defined and crucial input for downstream service providers identified, it is possible to evaluate analogies between refusal to deal cases and the situation in the pre-PSD2 payment services market. The objective is to assess whether payment account information should be regarded as an essential facility access to which is critical for downstream competitors like the preparatory materials of PSD2 seem to suggest. If the conditions established by case law discussed in Section 3.2 are present banks' refusals to grant third parties access may actually have constituted anti-competitive refusals to deal. Making this determination requires considerations regarding indispensability of the input, the risk of elimination of effective competition in the downstream market and the potential prevention of emergence of new products or technological developments. Provided that these three conditions are met, imposing banks a duty to provide access to payment account information could be considered to be justified in the light of competition law unless it is possible to prove that banks have objective justifications for refusals.

In accordance with the indispensability requirement developed in *Oscar Bronner* payment account information needs to be essential for PISPs and AISPs that aim to compete in the downstream market for payment service provision. The common conception seems to be that this has been the case.[227] Without access to payment account information on the upstream market it has been practically impossible for third party providers to provide any useful payment

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[225] Case COMP/M.2567, Nordbanken/Postgirot, para. 37; Case COMP/M.3894, Unicredito/HVB, para. 41; Case M.8553, Banco Santander/Banco Popular Group, para. 16.
[226] See e.g. COM(2015) 630 final, p. 5.
[227] See e.g. IP/A/ECON/2017-20, p. 60.

services to the customers of that bank in the downstream market since the functioning of these services primarily depends on the information about the availability of funds in the customers' accounts.[228] It is extremely difficult to come up with actual or potential substitutes to such account specific information as the information only exists within each account servicing bank and payment account information is not available through other channels because it is not made public anywhere.[229] It would be impossible to forecast, for instance, the availability of funds on a specific payment account of a specific individual by aggregating information about his or her shopping behavior from Google's or Facebook's datasets even if such data was made publicly available.

However, this alone is not adequate: it is necessary to assess the technical, legal and economic obstacles that have prevented third party providers from replicating or otherwise replacing payment account information. Provided that screen scraping is not regarded as a viable option due to several legal obstacles, the only remaining alternatives for third party providers have been purchasing access from the bank or creating similar information independently. Neither of these seems like a very realistic option.

Since the product of the third party provider competes with the payment solutions offered by the bank there lies a great risk that the bank would demand unreasonably high price for the access which would then constitute an economic obstacle. This risk was detected by the Commission in the preparatory materials.[230] An unreasonably high price could eventually have the same effect as an outright refusal to grant access.[231] Creating payment account information independently appears to be even more unrealistic scenario and it would be against the whole idea of non-bank payment service provision.[232] Replicating or replacing the payment account information held by incumbent banks would only be possible if the third party provider started issuing payment accounts itself. This would not be legally possible without a banking license

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[228] See Section 2.1 where the gateway function of banks is discussed.
[229] Autoriteit Consument & Markt 2017, p. 29.
[230] SWD(2013) 288 final, Volume 1/2, p. 64.
[231] This has been emphasised by the Commission in *Google Search (Shopping)*, para. 700. Such practice would, nevertheless, mostly likely be considered exploitative rather than exclusionary. See 2009/C 45/02, para 7.
[232] The objective of PSD1's provisions regarding payment institutions was to enable participation to payment services business without the need to meet the heavy requirements related to credit institution authorisation. See PSD1 recitals 10-11.

and in order to obtain a license the third party provider would have to make significant investments which form a barrier to entry.[233] These are admittedly significant economic and legal obstacles. Even if banking license was obtained there would be no guarantee that the current customers of the incumbent banks would move their payment accounts to the third party provider. In the light of these considerations it is justified to argue that access to payment account information can be regarded as a unique form of data that is indispensable for PISPs and AISPs.

The condition regarding the risk of elimination of all effective competition in the payment services market appears to be more problematic. It is evident that on a general level there is competition in the downstream market where payment services are offered since in almost every geographic market there are at least a few banks providing these services to customers, and nothing stops the customers from switching between banks.[234] The fact that banks have not granted access to their payment account information has not eliminated all effective competition in this sense and this is unlikely to happen in the future either. Nevertheless, if the scope is narrowed down to payment initiation or account information services specifically the situation is different since these are services that have not been offered by traditional banks. It could be justified to assess the risk of elimination of effective competition in this narrower market since the new services provided by PISPs and AISPs are in many ways differentiated but it is undeniable that at least payment initiation services are substitutes to traditional payment methods.

Overall it is very difficult to demonstrate that effective competition in the downstream market would be likely to be eliminated even if third party providers were not granted access to essential payment account information. It is justified, however, to claim that competition in the downstream market would be a lot more inefficient without any competitive pressure from the direction of new payment service providers as weak competition has been characteristic to the whole payment services sector where incumbent banks have been uninterested to innovate.[235]

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[233] Mariotto and Verdier 2015, p. 131-132.
[234] Studies have shown that in reality switching between account servicing banks does not in reality occur very often even if there were not any actual obstacles to switching. See e.g. Competition & Markets Authority 2016, p. xii-xiii and London Economics et al. 2013, p. 188-189.
[235] Vezzoso 2018, p. 6-7.

The prevention of the emergence of new products or technological development is a condition that has been traditionally considered to be relevant in the context of IP rights cases such as *Magill, IMS Health* and *Microsoft*. Nonetheless, the prevention of the emergence of new innovations is an acknowledged source of consumer harm and for example the Commission does not appear to limit its relevance to mere IP rights.[236] In the context of fintech-based services, such as payment initiation and account information services, this condition appears to be particularly relevant because fintech is built around the idea of finding new innovative ways to utilise information already possessed by banks.[237] Since without access to essential information possessed by account servicing banks payment initiation and aggregation of account data would not be possible, the inevitable consequence is that the emergence of new innovative services would also be prevented or at least significantly hindered. This would in the long term certainly have a negative impact on consumers who would not be able to choose faster and cheaper payment methods or enhance the management of their personal financial matters. Account information services, for instance, form an entirely new category of financial services which has no existing substitutes: some banks may have offered services that aggregate account information from all the customer's accounts within that specific bank to a single application but these services have not previously been able to collect information from all the banks where the customer has accounts.

As mentioned in Section 3.2.1 the duty to deal is not absolute. Even if the conditions for duty to deal were fulfilled dominant undertakings may be able to avoid granting competitors access to an essential input provided that they have objectively justified reasons for their refusal.[238] However, it is hard to see how any of the typical objectively justified reasons would apply to payment account information that is not, for example, a limited material resource or a resource whose production requires substantial research and development inputs from the banks. It is plausible that justifications that have been considered to be acceptable in some of the previous refusal to deal cases will not play any role with regard to payment accounts in the future due to the fact that Article 68(5) PSD2 explicitly states that refusal to grant access may only be

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[236] 2009/C 45/02, para. 87. Negative effects to innovation were also considered in *Google Search (Shopping)* although it was not related to IP rights. See *Google Search (Shopping)*, paras. 593, 595.
[237] Vezzoso 2018, p. 4.
[238] See Section 3.2.1 for examples of acceptable justifications.

justified with reasons relating to unauthorised or fraudulent payment account access of a third party provider.

In the light of the above considerations it would seem reasonable to regard payment account information as an essential facility. Access to payment account information is a crucial requirement for the provision of payment initiation and account information services in the downstream market, and therefore, banks have been able to foreclose competition from the direction of third party providers. The practice of foreclosing third party providers by refusing payment account access has potentially amounted to anti-competitive refusal to deal in certain situations. This is most likely why the EU has considered it justified to impose banks a general obligation to grant access to the payment account information that they possess. This view, however, is not entirely trouble-free as it remains questionable whether all the conditions for duty to deal established in the case law have actually been present in the payment services market.

4 PREVAILING COMPETITION CONCERNS IN THE ACCESS TO ACCOUNTS FRAMEWORK

4.1 The Positive Effects of the Access to Accounts Rules on Market Entry

Even though this Chapter focuses on the remaining competition issues in the access to accounts regime it does not mean that PSD2 would not have any positive impact on competition. When it comes to increasing competition between incumbents and market entrants, the access to accounts rules are obviously a significant leap forward from PSD1 which did not entail any provisions concerning third party access to payment account information.[239] The PSD2 legislative package addresses some of the key issues that have hindered effective competition in the payment services market in the era before the Directive.

Above all, access obligations imposed by Articles 66 and 67 PSD2 will most likely render banks' outright refusals to grant third party providers access to payment accounts practically impossible. Moreover, the wording of Article 68(5) that concerns objectively justified reasons for denying access is very precise and leaves very little room for any unfounded or obscurely justified refusals. Due to these reforms defensive banks can no longer legally adopt such terms and conditions for their payment accounts that would explicitly block third party providers' access requests that are based on the consent of the customer.[240] Furthermore, since Article 30 of the RTS requires banks to have at least one access interface in place for all online payment accounts, scenarios where third party providers' only way to gain access to payment accounts is via screen scraping should not occur anymore. This means that access to accounts rules are likely to be effective against all obvious and strict refusals to deal that have previously been common in the market.

Nonetheless, I argue that certain gaps persist in the access to accounts framework and some parts of PSD2 could even ultimately turn out to have negative implications for the business models of the new market entrants. Although the access to accounts rules appear to be efficient against the most obvious forms of refusal to deal their effectiveness against more discreet forms

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[239] COM(2013) 547 final, p. 12.

[240] As stated in recital 69 of PSD2 banks should not draft terms and conditions "in relation to keeping personalised security credentials safe" in a way that prevents their customers from using the services offered by other payment service providers.

of foreclosure seems somewhat questionable. Despite the fact that the ultimate impacts of PSD2 will not be revealed anywhere in the near future, identifying potential problem areas in advance can certainly prove useful. As explained in Section 1.4 this type of analysis is characteristic to law and economics research which is part of the methodology of this thesis. The remainder of this Chapter will focus on highlighting certain regulatory issues that could potentially undermine the effectiveness of the access to accounts principle, and hence hinder the development of healthy competition in the market. First, however, I will discuss the relevance of competition law in a regulated market since the relationship between *ex ante* sector-specific regulation and *ex post* competition law is not always entirely straightforward.[241]

4.2 Relationship Between General Competition Law and Sector-specific Regulation

Regardless of the fact that the objectives and expected implications of PSD2 are in many ways related to promoting effective competition, it is somewhat unclear whether general competition law will play significant role in the field after the sector-specific regulation has become applicable. Competition law is often considered to be an instrument that is used to address market failures when there are gaps in the regulation of a certain market, or when there is no regulation at all. In other words, competition law can be regarded as a substitute for regulation.[242] This can particularly be the case in sectors where there is detailed sector-specific legislation that can be considered *lex specialis* that would be applied primarily when there is overlap between the regulation and general competition law.[243] PSD2 with its somewhat detailed supplementing RTS and guidelines will probably fit this category and it would seem rational for any plaintiff to primarily invoke the provisions of PSD2 in a situation that falls within the scope of the Directive even if there would also be a potential infringement of Article 102 TFEU at hand.

[241] Regulation is typically characterised as a means of *ex ante* competition policy since it aims to prevent competition issues from occurring whereas competition law is referred to as *ex post* since it can only be applied after a competition issue has already been identified. See e.g. Dunne 2015, p. 43.
[242] Dunne 2016, p. 71-72.
[243] Diathesopoulos 2012, p. 96, 100.

Despite the above considerations, the fact that sector-specific regulation was chosen by the Union as the primary legislative approach instead of general competition law does not automatically undermine the relevance of competition law in this field. According to some views, regulation and competition law are essentially complementary instruments and the mere existence of sector specific regulation, such as PSD2, does not in itself imply that general EU competition rules would not be relevant as well.[244] On the contrary, it may sometimes be even necessary to apply regulatory principles and general competition law simultaneously.[245] Need for the parallel application of sector-specific regulation and competition law in the field of payment services was already recognized by the Commission in its proposal for PSD2.[246] Subsequently, the representatives of the competition division of the Commission have emphasised the complementary role of general competition law in this sector in less official contexts as well.[247] It is hence reasonable to expect that general competition law and regulation will supplement each other to some extent even after all pieces of PSD2 legislation have become applicable.

Nevertheless, the relevance of general competition law is likely to be mostly restricted to areas that fall outside of the scope of the sector-specific regulation. This has been the case in the telecommunications sector which was subject to similar regulatory reform at the beginning of the millennium when the Regulatory Framework for Electronic Communications was adopted.[248] In the field of electronic communications general competition law, including the essential facilities doctrine, can be applied to certain areas that remain outside of the scope of the regulatory framework. In those areas that fall within the scope of access rules of the regulatory framework the room for application of general competition law is somewhat limited.[249] Hence, it is possible and even likely, that in the case of payment services general competition law will continue to be relevant in those situations where third party providers seek access to such accounts that are excluded from the definition of payment account. This issue is

[244] Dunne 2016, p. 54.
[245] See e.g. IP/A/ECON/2017-20, p. 104; O'Donoghue and Padilla 2013, p. 45.
[246] COM(2013) 547 final, p. 3.
[247] Leader of the financial institutions team within the competition division of the Commission emphasised in his speech in a competition law conference that the Commision does not intend to rely solely on the regulation in fixing potential competition issues. See Basquill 2018(b).
[248] Garzaniti and O'Regan 2010, p. 4.
[249] Garzaniti and O'Regan 2010, p. 483, 488-489.

addressed in Section 4.2 below because it is closely related to the narrow definition of payment account.

4.3 The Narrow Interpretation of the Notion of Payment Account

As discussed in Section 2.3, the definition of payment account laid down by Article 4(12) PSD2 is not very helpful in determining what are the actual account types that should be regarded as payment accounts. Therefore, it was expected that the definition would have to be sooner or later elaborated. In its judgement in case C-191/17 the CJEU adopted a narrow definition of payment account. Although this is a seemingly technical issue the consequences of this judgement are rather far-reaching: the definition of payment account essentially determines what kinds of services PISPs and AISPs can provide in compliance with PSD2 as the scope of the access to accounts provisions of PSD2 and the RTS is dependent on this definition. As a result of the CJEU's judgement, banks' duty to deal with third party providers now only extends to those accounts that are used for daily payment transactions and there remains a possibility for the banks to refuse to grant access to information on any other account types.

The fact that a great number of savings accounts, mortgage accounts and potentially also credit card accounts that lack this functionality will in the future remain outside of the PSD2's access regime is likely to have negative implications for the quality and scope of services provided by third party providers. As the recent developments in certain Member States such as France demonstrate[250] this might be against national interests and could even lead to a situation where Member States have incentives to implement national payment services legislation that has wider scope than the Directive. This could prove to be highly problematic considering that PSD2 is a maximum harmonisation directive.

It is also questionable whether the CJEU's narrow interpretation is in line with some of the core objectives of the Directive: according to recital 6 of PSD2 the new rules should aim to close existing regulatory gaps, increase legal certainty and reduce inconsistent application of the provisions among all Member States. In addition, the rules of PSD2 should enable new service providers to "reach a broader market". Since Case C-191/17 mainly dealt with the interpretation

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[250] See Section 2.3.

of PSD1 it is, however, unclear whether the objectives of PSD2 were taken into account in the judgement. Nevertheless, there are similarities with the objectives of these two directives as one of the most important aims of PSD1 was creating more coherence to the legislative framework for payment services.[251] At the moment it seems that the definition of payment account could become a potential breeding ground for a variety of inconsistencies regarding the scope of the access to accounts rules. The market that new players will be able to access under PSD2 also appears to be more limited than what was perhaps envisaged.

Particularly the viability of the business models of AISPs will be greatly affected since the main purpose of account information services is to provide a comprehensive image on customer's financial situation.[252] In this respect, there appears to be a slight inconsistency between the objectives of the Directive and the ruling of the CJEU. One of the main objectives of the Directive is to enable all kinds of service providers "to offer their services with a clear and harmonised regulatory framework" regardless of their business models.[253] Access to accounts provisions of Articles 66 and 67 PSD2 also reflect this objective. When payment account access is restricted to a relatively small number of accounts it becomes difficult for the payment service providers to provide meaningful and valuable account information services that truly provide the customer an overall view of his or her financial situation. Creating a comprehensive image of one's financial situation will almost certainly require a lot more than information about the balances and transaction histories of the customer's current accounts.

The narrow definition could lead to a situation where AISPs continue to resort to screen scraping as it enables them to access non-payment accounts. It is likely that many AISPs consider non-payment account information to be essential for the viability of their service. Security concerns that relate to screen scraping make this is an undesirable scenario from the perspective of the regulator and the banks and it would inevitably undermine the relevance of the RTS that aimed to ensure that third party providers are always identified when they access payment accounts.[254] This requirement can obviously not be extended to cover non-payment accounts that now fall outside of the Directive's scope.

[251] Recital 4 of PSD1.
[252] Recital 28 of PSD2 supports this view by stating that the purpose of account information is to allow the payment service user "to have an overall view of its financial situation immediately at any given moment".
[253] Recital 33 of PSD2.
[254] See recital 20, Article 30(1)(a) and Article 33(5) of the RTS.

For those banks whose intention is to limit third party access to the bare legal minimum, the narrow definition confirmed by the CJEU could offer certain new opportunities. One could even argue that there is a gap in the duty to deal established by the access to accounts principle. Banks could potentially start amending the terms and conditions or functionalities of certain account types in ways that would exclude them from the scope of PSD2. For instance, the basic functionalities of some account types could be altered so that they do not allow direct transfers anymore. Such accounts would not have to be accessible through the dedicated access interface of the bank. This kind of practice could ultimately have similar effects as an outright refusal to deal but it would be rather challenging to detect. It would most likely be difficult for third party providers to demonstrate that such practice constitutes an anti-competitive refusal to deal even though the case law and the Commission's Article 82 Guidance Paper illustrate that refusals to deal can take various forms that are not necessarily straightforward.[255]

In addition to refusals to grant access, banks could also develop strategies where they grant access to non-payment account information against compensation which could then potentially entail other kinds of competition issues. Some representatives of third party providers have already expressed their concerns over such potential developments.[256]

4.4 Threats Posed by the Limited Functionalities of Dedicated Access Interfaces

Since the access to accounts rule can practically be regarded as a form of duty to deal that forces the banks to share some of their most valuable assets, i.e. customer account data, with their new competitors it is foreseeable that banks' incentives to invest in this activity and to cooperate with third party providers are low. After all they are giving away a significant share of their market power and will apparently be obliged to give it away for free. This kind of duty to deal

[255] See Section 3.2.2 for the review of case law and 2009/C 45/02, para. 79. So-called constructive refusal could have relevance in this context as such refusals associated with, for instance, undue delays and degradations in the supply of the relevant input.
[256] Basquill 2018(c).

has not been a typical remedy in the context of essential facilities.[257] Some commentators have expressed concerns that dissatisfied banks are unlikely to invest enough time and money to actually develop well-functioning and seamless access interfaces. Instead, it would seem like a logical defensive strategy for the banks to come up with an interface that meets the bare minimum requirements introduced by the legislation at the lowest possible cost and effort.[258] In fact, the defensive stances expressed by certain banks in the process of developing recommendations for dedicated access interface standards were among the main reasons that made the ECB leave the API Evaluation Group prematurely.[259]

There is also a risk that some banks decide to choose even more radical approaches and subtly develop interfaces that actually hinder the access of third party providers in some way. Interfaces could, for instance, create artificial technological barriers or impose limits to the extent or quality of account information available to third party providers. This threat is likely to be greater in the context of dedicated access interfaces that are developed by the banks for third party access only: from a commercial perspective banks do not have any obvious incentive to offer the same level of usability and functionality as the customer facing interfaces of the banks offer.

What is more, developing a dedicated access interface allows the bank to maintain stricter control over the scope of third party access. These issues were obviously acknowledged by the legislator and one of the key functions of access to accounts rules introduced by the RTS is to prevent these kinds of negative phenomena.[260] Articles 30 to 33 of the RTS covered in Section 2.6.3. are designed as safeguards against such threats and one of the main tools is the fallback mechanism. The purpose of these provisions is to ensure that access interfaces meet all the requirements of Articles 66 and 67 PSD2 and that dedicated interfaces provided to PISPs and

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[257] It was already emphasised by Advocate General Jacobs in his opinion on *Oscar Bronner* that dominant undertakings should be fully compensated for granting access. See Opinion of Advocate General Jacobs in Case C-7/97, para. 64. The Commission also referred to "fair remuneration" for access in its Article 82 Guidance Paper which indicates that the normal expectation should not be an uncompensated access to the essential facility. 2009/C 45/02, para. 75. Granting uncompensated access has not been the case in liberalised network industries either: the prices that dominant firms are allowed to charge for access to their network have been regulated so that they are not able to extract monopoly profits. See Hellwig 2008, p. 2.
[258] IP/A/ECON/2017-20, p. 89.
[259] API EG 052-18, p. 2-3.
[260] Vezzoso 2018, p. 6-7.

AISPs are not less advantageous than interfaces offered by the banks to their own customers. A bank may only be exempted from providing a fallback solution if its dedicated access interface meets the strict criteria laid down in Article 33 of the RTS.[261] Regardless of these safeguards certain concerns remain.

Currently there appears to be controversy regarding the extent of information that a PISP should be able to access through a dedicated interface in order to provide payment initiation services in accordance with Article 66 PSD2. As discussed in Section 2.6.2, Article 66(3)(f) PSD2 provides that PISPs shall only request information that is "necessary to provide the payment initiation service". Article 66(4)(b) PSD2 obliges the bank to provide the PISP "all information on the initiation of the payment transaction" immediately after it has received a payment order submitted by the PISP. In addition, the bank is required to make information "regarding the execution of the payment transaction" available to the PISP.

Article 36(1)(b) of the RTS that was covered in Section 2.6.3 elaborates that PISP should be provided with "the same information on the initiation and execution of the payment transaction" that the bank provides to its customers when they are initiating payments directly through the bank's interface. According to Article 36(1)(c) of the RTS the adequacy of funds in the payer's account shall be confirmed by the bank in the form of a "yes" or "no" answer to the PISP when it requests this information. Different interpretations on the meaning of these provisions can lead to very different conclusions regarding the scope of PISPs' access to payment account information. Views expressed by the representatives of banks and third party providers illustrate that the former would prefer a lot more limited scope than the latter.

According to third party providers the necessary information regarding the execution of the payment transaction should be interpreted as to include information about whether a payment will actually be executed. This would enable the PISP to immediately confirm to the payee that the payer has sufficient funds on the designated account and payment will hence be executed.

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[261] The EBA did, however, make some alleviations to the original criteria in the Guidelines. For instance, actual wide usage of the dedicated interface by third party providers is no longer required: according to Guideline 7 it suffices that the bank can evidence that it has made "all reasonable efforts to ensure wide usage of the dedicated interface". See EBA/GL/2018/07, p. 23.

It would require those banks that do not have real-time booking systems, i.e. constantly updated information on account balances, to make an additional check and confirmation concerning the adequacy of funds to the PISP whenever a payment is initiated.[262] The representatives of banks have argued that this would be outside of the scope of Article 66 PSD2 and could be regarded as an additional payment guarantee that should only be provided against compensation. Only a minority of the ongoing API initiatives supports the functionality suggested by third party providers which could indicate that a more limited interpretation is currently prevailing.[263]

Although the EBA discussed this issue in its opinion it did not clearly support either of these views but instead merely repeated the contents of the relevant provisions. The EBA did suggest that in situations where the system of the bank does not provide all necessary information there should be a possibility for the third party provider to access it by itself.[264] However, this does not seem like a viable option for third party providers that provide solely payment initiation services since such solution would most likely require AISP status that allows the third party provider to access a wider range of data.

In the light of above considerations, there is a chance that the uncertainty about the correct interpretation of Article 66 PSD2 and Article 36 of the RTS allows banks to adopt defensive strategies and introduce dedicated access interfaces that do not provide PISPs with any information on whether the funds on a designated account are actually adequate for the execution of each payment. In the context of e-commerce this would be highly problematic for the payees since they typically need this information in order to proceed with the delivery.[265] The refusals of the banks to provide such information that is clearly essential for the proper functioning of payment initiation services could definitively have a negative impact on the competitive position of PISPs. Therefore, it could undermine the effectiveness of the duty to deal imposed on banks. A very limited interpretation of the requirements laid down by Article 66 PSD2 and Article 36 of the RTS would seem to be against the key objectives and spirit of the access to accounts principle. As long as there is uncertainty about the specific meaning of

[262] EBA-Op-2018-04, p. 4-5.
[263] API EG 045-18, p. 3.
[264] EBA-Op-2018-04, p. 6.
[265] This concern was expressed by the retailer representatives engaged in the API Evaluation Group's work. See API EG 045-18, p. 3.

these provisions banks with defensive strategies may be able to exclude this information from their dedicated interfaces or potentially charge a price for it.

4.5 Complication of Customer Journey by Forced Redirection

One of the most obvious reasons behind the increased interest towards third party providers' payment service applications has been the convenience and intuitiveness that they have been able to offer to their users: user interfaces of online banking and payment applications provided by traditional banks have often been more complex and time-consuming to use as they have required more input from the payment service users. The process through which the payment service user initiates a payment or makes an account information request typically consists of several steps and together these steps form the so-called customer journey. Uncomplicated and swift customer journey that consists of as few steps as possible makes a payment service typically convenient to use. It is therefore one of the key factors determining the success of any payment initiation or account information service these days. It is evident that a frictionless customer journey is essential for third party providers that wish to differentiate their services from the solutions offered by traditional banks. For these reasons, third party providers have taken a negative stand towards all regulatory solutions that would complicate the customer journey.[266]

It was recognised during the drafting process of the RTS that access interfaces introduced by banks should support a variety of different authentication methods in order to fulfill the objective of technology and business model neutrality laid down in Article 98(2) PSD2. For instance, the ERPB Working Group stated in its 2017 report that access interfaces should be designed in a way that would enable the payment service user to authenticate without having to access the authentication interface of his or her bank. The Working Group was of the view that third party providers should not be obliged to use redirection in the authentication process. This way PISPs and AISPs would be able to freely design an innovative and coherent customer journey that could not be interrupted by the bank except if redirection is part of the design of the payment service.[267]

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[266] See e.g. the commentary of third party providers in API EG 045-18, p. 10.
[267] ERPB PIS 034-17, p. 4.

Wording of Article 32(3) of the RTS also suggests that forcing third party providers to use redirection to bank's website during the authentication process could be considered as an obstacle to free provision of payment initiation or account information services. The purpose of the provision is clearly to ensure that those banks that opt to provide a dedicated access interface for third party providers would not be able to hinder or complicate third party access by incorporating artificial barriers into the interface with the aim of weakening the functionality of payment initiation or account information services. It is necessary to point out that recital 69 of PSD2 also states that banks should not be allowed to draft terms and conditions or other obligations that could "make it more difficult, in any way, to use the payment services of other payment service providers". This recital supports the view that transmission of the personal security credentials of the payment service user through the third party provider, i.e. the embedded authentication method, should not be prevented by banks.

What first seemed like a safeguard against unnecessary redirection imposed by the banks has, however, after the publication of the RTS been undermined by the EBA in its opinion and in its final Guidelines on the conditions to benefit from an exemption from the contingency mechanism under Article 33(6) of Regulation (EU) 2018/389 (the Guidelines).[268] In its opinion on the implementation of the RTS the EBA elaborated its understanding of the meaning of Article 32(3) of the RTS. The EBA stated that redirection as such should not be regarded as an obstacle to the provision of payment initiation or account information services. If redirection is the only method of authentication provided by the bank to its customers, i.e. payment service users, there is no obligation for the bank to provide other methods to third party providers either. According to the EBA redirection may only form an obstacle if the bank uses it "in a manner which is restrictive or obstructive for AISPs or PISPs".[269]

Regardless of the negative reactions of several third party provider organisations[270] in the consultation process the EBA retained the same interpretation in the final Guidelines and

[268] EBA/GL/2018/07.
[269] EBA-Op-2018-04, p. 11.
[270] See eba.europa.eu (c) for the responses of European Payment Institutions Federation (EPIF) and European Third Party Providers Association (ETPPA).

confirmed that forced redirection itself is not an illegal obstacle.[271] Nevertheless, it has not been elaborated by the EBA what kind of redirection could be considered restrictive or obstructive. Wording of Guideline 5 concerning obstacles indicates that it is the responsibility of the national competent authorities to assess whether the dedicated interface causes "unnecessary delay or friction" to the customer journey.[272]

As a result of the EBA's solution there is now a risk that development of many innovative payment services by third party providers becomes nearly impossible: PISPs may no longer be able to provide payment solutions that are based on, for instance, voice commands if the payment process always requires a redirection to the browser or mobile application-based interface of the bank. Some market participants have even gone so far as stating that obligatory redirection would render third party payment services completely meaningless as they would have no clear advantages compared to traditional solutions.[273]

The approach chosen by the EBA is likely to undermine the scope of access to accounts from what was originally anticipated by many market participants. However, even when taking into account the concept of "constructive refusal" introduced by the Commission[274] it would be rather radical to state that forcing third party providers to use redirection would amount to an anti-competitive refusal to deal. As stated by the Court in *Oscar Bronner* case discussed in Section 3.2.2. the fact that other available alternatives are less beneficial for the market entrant does not automatically mean that they should be granted access to a certain essential resource possessed by a dominant player. Analogy from this reasoning can be drawn to the context of redirection: access to accounts provisions do not explicitly provide that third party providers should be able to access payment accounts by using the authentication method that is most beneficial and convenient to them. In the light of the EBA's guidelines it will suffice that third party providers can utilise all the same authentication methods as the customers of the bank. It is, nevertheless, easy to understand the frustration of third party providers because redirection is likely to have a remarkable negative impact on their intended business models and on their ability to provide more innovative payment services.

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[271] EBA/GL/2018/07, p. 33.
[272] EBA/GL/2018/07, p. 21.
[273] API EG 045-18, p. 9-10.
[274] 2009/C 45/02, para. 79.

4.6 Possible Solutions to Detected Issues

The issues covered in Sections 4.3 to 4.5 are all in one way or another related to competition between the incumbent banks and new market entrants. These issues could, in my opinion, potentially even amount to refusals to deal. Hence, there is a chance that third parties requesting access would be able to demonstrate existence of an infringement of Article 102 TFEU. Nevertheless, as previously discussed the thresholds for anti-competitive refusals to deal have traditionally been very high which makes it challenging for a plaintiff requesting access to succeed, especially when the infringement is not necessarily evident. Considering that the Commission has already initiated investigations regarding incumbents' alleged attempts to foreclose market entrants and that the preparatory materials of PSD2 emphasised the complementary role of competition law in the sector it seems probable that some competition cases will arise in the field of payment services in the future.[275] Nonetheless, I consider it unlikely that general competition law would become the main instrument when it comes to securing access to payment accounts.

Since the Union initially decided to tackle concerns related to third party access to payment accounts by introducing detailed sector-specific regulation it would seem like a rational solution to try to solve the remaining problems with legislation in so far as possible. Therefore, in this Section I will try to make some brief legislative suggestions regarding the ways in which PSD2 could be amended in the future. These suggestions all address competition concerns that in my opinion still remain in the sphere of access to payment accounts.

The current definition of payment account is definitely among the most significant deficiencies in the access to accounts framework. By basing its judgement largely on definitions adopted in PAD the CJEU essentially paralleled it with PSD1 and PSD2. This is problematic since at least based on the objectives of these directives the scope of PAD is in principle more limited than the scope of PSD1 or PSD2.[276] Taking into account the purpose of account information services it seems plausible that the original intention of the legislator was not to limit the scope of PSD2

[275] See Sections 3.1.2 and 4.1.

[276] One of the key objectives of PAD is to ensure consumers' access to "payment accounts with basic features" which is clearly a rather limited category of payment accounts. It seems that PSD1 and PSD2 on the other hand were designed to apply to payment accounts in a more general sense. See e.g. recital 12 of PAD.

to mere current accounts. I believe that the definition of payment account in PSD2 was left open-ended so that it would not form an obstacle for innovation in the future when different payment services evolve further. However, now it appears that the brief and open-ended definition has turned against its original purpose as it has the capability of significantly reducing the number of accounts that third party providers will be able to access in accordance with requirements of PSD2.

Because PSD2 is the highest tier of legislation regarding access to payment accounts amending or revising the Directive text would presumably be the most viable way of correcting the issue in the light of legal certainty and consistent application between the Member States. Furthermore, the definition of payment account is such a crucial component of PSD2 that it would be outside of the mandate of the EBA to make binding amendments to it.[277] One opportunity would be to elaborate Article 4(12) PSD2 by, for instance, stating that payment transactions can be executed either directly or indirectly. On the other hand, the negative scope of the Directive could also be specified by listing account types that do not under any circumstances fall within its scope. This could potentially limit the room for future innovation but it would certainly make access rules clearer for all parties. PSD3, however, will probably not be drafted anytime soon as according to Article 108 PSD2 the impacts of the Directive shall be assessed by 13 January 2021.

In the meanwhile third party providers will need to resort to screen scraping or commercial agreements with the banks in order to gain access in the likely scenario that banks do not grant access to non-payment accounts voluntarily. However, it could also be possible to get around the issue by invoking data subject's right of access under Article 15 GDPR. This would obviously require that the payment service user that wishes to grant third party providers wider access would actively request access to non-payment account data from his or her bank.

Concerns expressed in Sections 4.4 and 4.5 are both essentially linked to requirements set to access interfaces provided by banks: the extent of information available to third party providers and the selection of authentication procedures supported are both matters that can be affected

[277] According to recital 107 of PSD2 the role of the EBA is of elaborating and technical nature and amending Article 4(12) PSD2 would affect the very essence of the Directive.

by making changes to the functionalities of the access interfaces. Since the minimum requirements for access interfaces are laid down in the RTS and elaborated in guidelines that are drafted by the EBA these both seem like problems that should primarily be addressed by the EBA. This means that the issues could potentially be solved without having to amend or revise the actual text of the Directive or the RTS. Therefore, I argue that the EBA should first try to clarify the situation by using non-binding instruments such as guidelines or opinions. If no actions are taken by the EBA the conflict between the views of third party providers and banks may eventually lead to legal disputes: a decision by the Commission or a ruling of the CJEU would also confirm the correct interpretation of PSD2 but such *ex post* measures take a lot of time which can be critical for new market entrants.

I believe that the wordings of Article 66(3)(f) and 66(4)(b) PSD2 and Article 36(1)(b) and 36(1) of the RTS purposely leave some room for interpretation because otherwise they could end up limiting the development of new payment services in the future. In my opinion there is no need to make these provisions more specific since they already appear to be perfectly adequate for securing third party providers' access to necessary payment information when interpreted in correct manner. The purpose of payment initiation services is to enable faster and more cost-effective payment transactions for the benefit of customers. The confirmation of the adequacy of funds on the payer's account is a crucial part of a fast and smooth transaction as it enables the payee to quickly proceed with the delivery of goods or services.

In the light of these considerations, the EBA could begin solving the issue related to the extent of information available through a dedicated interface by issuing an opinion. In the opinion it should clearly confirm whether the information regarding the adequacy of funds on a payment account for a specific payment transaction is a functionality that should be available in all dedicated access interfaces. Although the EBA touched on the topic in its previous opinion it did not take a clear and definitive stance. The current situation may enable banks with defensive strategies to interpret relevant provisions in a limited way which could undermine the effectiveness of their duty to deal.

When it comes to redirection as the only authentication method the EBA has already confirmed its definitive stand in the Guidelines concerning exemption from the fallback mechanism. Hence, if the fears of third party providers materialise and authentication by redirection

undermines their chances to differentiate their services and to effectively compete with banks, the EBA cannot solve occurring problems merely by issuing an opinion. Instead, the EBA will be forced to make amendments to its Guidelines. The EBA has luckily acknowledged that due to the characteristics of the payment services market it may have to review these Guidelines sooner than normally.[278] Therefore, quick reactions to developments that have negative impact on competition between third party providers and banks should be possible in this respect.

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[278] EBA/GL/2018/07, p. 35.

5 CONCLUSIONS

5.1 The Levelness of the Playing Field

It goes without saying that all the assessments of the levelness of the playing field in the payment services market are at this point merely speculative as the transition period of PSD2 is still in progress. However, the relevant provisions and elaborating guidelines with regard to access to accounts have now taken their final form and market participants have already expressed their concerns regarding certain competition issues. Thus, it seems justified to make some projections about whether PSD2's access to accounts framework in its current form actually has the potential to establish a level playing field between the incumbent banks and third party provider market entrants.

The objectives of PSD2's access to accounts rules are without a doubt ambitious and groundbreaking: access to accounts essentially challenges the long lasting monopolistic position of banks in the upstream market for customer account data. The exclusive ownership of the banks' over the account information of their customers has previously been regarded as a self-evident fact but PSD2 has managed to bring the prevailing mindset into question by creating important discussion about the ownership of customers' account data. This will likely force the banks to critically examine the effectiveness of their operations and business models in the future which will eventually benefit their customers.

The competition of traditional banks against each other will probably also intensify as a result of PSD2 since access to accounts principle enables them to gather information on their customers' finances from competing banks as well. This legislation is also the first of its kind globally and it will probably lead the way for more significant and radical future reforms in the Union. PSD2 demonstrates that the EU is determined to increase competition in the field of retail banking where major players have so far been able to adopt passive strategies due to their uncontested position. In addition, PSD2 aims to develop the whole banking industry to a more open direction by increasing transparency for the benefit of customers.

However, at this point it already appears that the scope of access to accounts framework will clearly be more limited than initially expected. At least in the beginning, the reforms that will

actually be undertaken are likely to be somewhat incremental. As Chapter 4 illustrated several gaps still exist in the access to accounts framework which is problematic due to the gateway position of the banks. Existing gaps may enable refusals to deal and thus undermine the objective of the level playing field. The levelness of the playing field depends heavily on the non-discriminatory access of the third party providers to the essential payment account data and there are reasons to believe that completely non-discriminatory access might not be reality yet.

The existing problems do not seem to stem from the actual text of the Directive or the RTS but rather from the compromises that have so far been made in the interpretation of certain relevant provisions. Access to accounts principle that initially seemed like a radical improvement to the position of third party providers has recently been watered down due to interpretations of the Court and the EBA. To me it seems very unlikely that the Directive will disrupt the field of retail payments substantially in the near future.

In fact, it is even possible that the access that third party providers will have when PSD2 has fully entered into force is in some respects much more limited than the access that they had before the Directive via screen scraping. This can have severe negative impacts on their capability to compete with incumbent banks that have broad customer bases and established positions. This kind of threat may materialise if dedicated access interfaces approved by competent national authorities have more restricted functionalities than customer facing interfaces regardless of the safeguards of the RTS. There is also a chance that differences between jurisdictions continue to increase when different Member States interpret the RTS and the Guidelines in different ways. Such development would be extremely detrimental to the levelness of the playing field as it would hinder the integration of the Union-wide payment services market.

The most logical explanations for above-mentioned developments would probably be strong criticism and active lobbying from the direction of incumbent players. It was stated in recital 108 of PSD2 that when developing regulatory technical standards and guidelines the EBA should take the views of all relevant stakeholders into account. However, it should "make a particular effort to obtain the views of relevant non-bank actors" in order to balance the views of different interest groups. This could be interpreted as suggesting that the EBA should put special emphasis on the interests of third party providers that have at least in principle less

influence in the payment services market than for instance well established major banks. The current situation implies that this may not have always been the case since. For instance, the consultation on the Guidelines conducted by the EBA showed that third party providers were seriously concerned about some of the proposed guidelines.

In the light of these observations it would be over-optimistic to believe that the payment services market will suddenly become a level playing field for all kinds of service providers when the RTS becomes applicable in September 2019. It seems that the market is not yet ready for the major disruption that PSD2 was initially intended to be. Currently the prevailing interpretations of the Directive demonstrate that banks will in many ways maintain *de facto* control of the access to payment accounts which implies that the chance of anti-competitive refusals to deal cannot be completely ruled out even though access to accounts provisions establish banks a duty to deal.

The prevailing strong position of banks in the payment services market is unlikely to be challenged anytime soon, at least by fintech startups. Traditional banks have in a way first mover advantage as they have been able to study the business models of AISPs and PISPs during the transition period of the Directive without having to actually provide access to new service providers. The long transition period has therefore potentially benefitted banks at the cost of fintechs. Globally influental technology companies such as Google, Amazon, Facebook and Apple on the other hand, could potentially change the balance on the playing field. These companies will now be able to expand their already extensive data supply to a new field from which they have so far been precluded from. Due to their significant market power and aggressive behaviour in other markets there is reason to believe that their impact on payment services market would also be considerable.

Even though the Directive may not succeed in creating a level playing field yet it is undoubtedly the first significant step towards the direction of even competition between banks and third party providers. PSD2 also shows that the Union is ambitious about accelerating innovation through regulation in immature fields of business: Union-wide regulative reforms such as PSD2 have great potential for revolutionising entire industries if their potential is properly harnessed and not suffocated by political compromises.

5.2 Concluding Remarks

PSD2 is essentially the response of the EU to rapid technological development in the field of retail payments that has made the original PSD1 in many ways outdated. The Directive also aims to take the integration of the European payment services market even further. Digitalisation has quickly altered the ways in which people make payment transactions and manage their finances and this has led to the emergence of new types of financial services such as payment initiation and account information services. However, in order to function these new services require information about the accounts of the payment service users and this information is possessed solely by account servicing banks.

Banks have naturally been reluctant to grant third party providers access to this information because it is against their commercial interests and could lead to loss of market power. As described in Chapter 3 each bank has a unique bottleneck position with regard to the account data of its own customers. This has allowed banks to foreclose new competitors by refusing to grant access to their accounts. Based on the analysis of the criteria established by the refusal to deal doctrine and the characteristics of payment account information it is reasonable to argue that payment account information can be regarded as an essential facility which means that it is indispensable for third party providers that aim to compete with banks in the downstream market for front-end payment services.

The preparatory materials of PSD2 illustrate that this issue has been noted by the legislator and the access to accounts framework introduced by the Directive essentially forms a duty to deal. PSD2 obliges the banks to grant third party providers non-discriminatory access to necessary information from designated payment accounts with the explicit consent of the payment service user, i.e. the customer of the bank and the third party provider. The key provisions of PSD2 with regard to access to accounts are Articles 66 and 67. The requirements laid down by these Articles are fleshed out and elaborated in the RTS that forms and integral part of the Directive. One of the key functions of these provisions is to ensure that third party providers are able to access the same information that is accessed by the customers of the bank when they initiate payments or make account information requests directly. Articles 66 and 67 PSD2 and the RTS together form the minimum requirements that aim to secure effective and fair competition between third party providers and banks.

As discussed in Chapter 4 the current form of access to accounts framework appears to contain certain shortcomings that could undermine its effectiveness from competition perspective. One of the most significant issues relates to the narrow interpretation of the notion of payment account which limits the scope of access remarkably. Furthermore, controversies regarding the extent of payment information available to third party providers through dedicated access interfaces could enable banks to refuse PISPs' access to certain necessary types of data. Finally, the possibility of the banks to offer redirection as the only method of authentication forms a threat to the viability of services provided by third party providers as it may have serious ramifications to the usability and convenience of their services. These are all issues that could have potential anti-competitive effects and that could even amount to constructive refusals to deal. Only time will show whether any of these risks will actually materialise but due to the fragile state of the evolving new market competition authorities must remain vigilant so that arising competition issues can be detected in time.

In this thesis I have focused on assessing the potential impacts of the access to accounts rules of PSD2 on competition between banks and third party payment service providers. This, however, is only one of many potential research topics that I identified during the research process: PSD2 is still in its infancy and case law and legal literature around the Directive are almost non-existent which means that numerous relevant legal questions still remain unanswered.

For instance, issues relating to data protection and privacy have great importance in the context of payment services. The overlap between PSD2 and GDPR could be a potential source for various interesting research topics that would inevitably have relevance in the not too distant future. Especially the concept of explicit consent plays a crucial role in both PSD2 and GDPR, and yet, there appears to be uncertainty about when and how the requirements of GDPR should be taken into account in the context of payment services that fall within the scope of PSD2. It could also be intriguing to assess the relationship between GDPR's data subject's right of access and PSD2's access to accounts. Both of these topics would serve the purposes of all stakeholders in the payment services market.