

LEGAL UPDATE

Savings accounts and PSD/PSD2

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A case is currently pending before the European Court of Justice ("**ECJ**") concerning the definition of a *payment account* within the meaning of the Payment Services Directive ("**PSD**"). On 19 June 2018, the [Advocate General](#) gave his opinion on the case. In this Legal Update we briefly discuss the findings of the Advocate General.

A *payment account* is defined in PSD (and also in the revised Payment Services Directive ("**PSD2**")) as "an account held in the name of one or more payment service users which is used for the execution of payment transactions". In the market, there has long been a lack of clarity about what constitutes a *payment account* under PSD/PSD2. This is because the question can be asked to what extent savings accounts are covered by the above definition. That is relevant when assessing, for example, to what extent a bank must provide data to a payment services provider in relation to a savings account.

Although the present case is an older case that concerns PSD and not PSD2, which should have entered into force on 13 January 2018 (the Netherlands is running behind with the implementation of PSD2), the judgment is very relevant to the practice. This is because the definition of a *payment account* in PSD2 has remained unchanged. The case before the ECJ concerns a savings account where the customer can withdraw and deposit money independently. This must always be done through another account held in the name of the customer, which is referred to as a reference account.

The Advocate General has concluded that, when interpreting a provision of European Union law, consideration should be given not only to its (i) wording, but also to its (ii) context and (iii) the objectives of the regulations of which it forms part. The Advocate General has therefore approached the case based on this interpretation.

The Advocate General states that the definition is based on terms which in turn are defined in PSD/PSD2. Therefore, the definition of a *payment account* should be read in the light of other definitions and the scope of the Directive. After analysing various definitions and the scope of PSD, the Advocate General concludes that the wording of PSD/PSD2 does provide an unequivocal answer to the question as to whether the savings account at issue can be considered a *payment account*.

In the context of interpreting the wording, the Advocate General has also looked at the origins of PSD. In short, his conclusion is that the provision referring to savings accounts was deleted from the final version of the text on the grounds that – according to the legislator – savings accounts do not qualify as payment accounts, meaning that there was no need for regulation.

In addition, in the context of the 'wording', the Advocate General has assessed to what extent the guidance documents of the Commission and the expert group provide an answer to the question. He holds that it may be assumed that the guidance documents support the view that each type of account should be assessed based on its own specific characteristics. The guidance documents indicate that a *savings account* where the holder can place and withdraw funds without any restriction should qualify as a *payment account*.

In addition, the guidance documents indicate that a fixed-term deposit should not qualify as a *savings account*, because the holder cannot make any withdrawals from the account without incurring a loss of interest or penalties. The guidance documents make not mention, however, of the aforementioned structure using a reference account.

Next, the Advocate General considered the context of the provision. In this respect, he looked at both the related provisions in PSD and related measures that are part of the European Union's legislative framework concerning payment services. The principal finding in this respect is the comparison with Recital 12 and Article 1 paragraph 6 of Directive 2014/92/EU (on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features). This Recital states that the Directive applies to payment accounts through which consumers are able to at least: (i) place funds in a payment account, (ii) withdraw cash from a payment account and (iii) execute and receive payment transactions to and from third parties, including the execution of credit transfers. In addition, Recital 14 of this Directive states that the definitions in the Directive should be aligned as much as possible with those in other legislation of the European Union, and in particular with those in PSD.

Based on the context outlined above, the Advocate General concludes that the concept of a *payment account* in Directive 2014/92/EU should be taken into consideration when determining the meaning of the concept of a *payment account* in PSD/PSD2. In light of this, the Advocate General takes the view that the online savings account does not fall within the scope of PSD/PSD2 in view of its more limited functions, as it does not allow the account holder to execute and receive payment transactions to and from third parties.

Lastly, the Advocate General focused on the objectives of PSD/PSD2: establishing a single market in payment services and protecting consumers as recipients of payment services. Against this background, the Advocate General takes the view that the concept of a *payment account* does not cover the online savings account to which the present issue relates. Furthermore, the Advocate General observes that because a reference account would necessarily qualify as a payment account, there is no need for 'double protection' for consumers.

Based on the wording, context and intentions of PSD, the Advocate General takes the views that savings accounts where a reference account is used do not fall within the scope of the concept of a *payment account*. We will not have to wait for the judgment of the ECJ to find out whether this reasoning is indeed correct.

This is a Legal Update from the Banking & Finance team.

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