

**FEDERICO DI SILVESTRE\***

## TOWARDS PSD3: THE DYNAMICS OF DIGITALIZED PAYMENT SERVICES MARKET

On 14 April 2021, the Roma Tre University, Law Department, hosted the international conference ‘Towards Psd3: The Dynamics of Digitalized Payment Services Market’. The conference was held under the auspices of the Centro Grandangolo – Research Centre Paolo Ferro-Luzzi for advanced studies of Banking and Finance Law in Europe (scientific committee: professor Concetta Brescia Morra and professor Maria Cecilia Paglietti).

The conference provided a critical analysis of the regulatory provisions governing the digitalized payment service market within the European Union (EU), in the framework of the current process of revision of the Payment Service Directive (PSD2).<sup>1</sup>

The first session of the conference, named ‘*The Macro level: Pluralism in the Multi-level Governance of Payment Services*’ and chaired by Vincenzo Zeno-Zencovich (Roma Tre University), opened with the speech of Olhao Cherednychenko (University of Groningen). Her presentation focused on the divide between public and private in EU financial regulation. In national legal systems, public law regulates the relationships between public parties and public authorities, in the pursuit of the public interest and distributive social justice. Moreover, public law is enforced by public authorities through public law means, in order to ensure *ex ante* compliance and deterrence. On the contrary, private law aims at administering the interaction between private parties pursuing private interests. Enforcement is achieved by aggrieved private parties through private law means which allow *ex post* compensation. Differently, EU financial

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<sup>1</sup> Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L 337.

regulation emphasizes mainly on three main issues: (i) the definition of the outcome to be achieved, (ii) the standard of conduct required from market participants and (iii) the enforcement techniques appropriate to ensure compliance. This approach can also be applied in the framework of EU payment regulation. The outcome to be achieved is the creation of a single payment market as well as the promotion of innovation, fair competition, and consumer protection. The standards of conduct required for market participants aim at defining issues such as the authorization to operate as a payment institution, the access to banks' payment systems and client databases, the allocation of damages in case of unauthorized payment transactions. Enforcement techniques include both public enforcement, private enforcement, and hybrid enforcement redress through regulatory agencies. In EU payment regulation, the distinction between public and private law is not recognised as such; indeed, public law and private law concepts are used as regulatory tools in novel combinations and the EU's experimentation with regulatory tools has led to the emergence of legal hybrids, which combine elements of public and private law.<sup>2</sup> The above analysis shows that EU financial regulation has blurred the divide between public and private law. However, the conceptual distinction between these two categories has not entirely lost its significance in EU and national law. In this regard, it is useful to evaluate the interplay between EU and national law in regulatory standard-setting and enforcement.<sup>3</sup>

Benjamin Geva (Osgoode Hall Law School of York University) was the second panellist of the conference and gave a speech about regulatory reforms and the evolution of banking, money and payments fields. PSD2 and the rise of digital currencies led the way to a new payment object. As a matter of facts, back in the Nineteenth century,

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<sup>2</sup> HW Micklitz, 'The Visible Hand of European Regulatory Private Law – The Transformation of European Private Law from Autonomy to Functionalism' in P Eeckhout and T Tridimas (eds), *Competition and Regulation* (2009) 28 Yearbook of European Law 3; OO Cherednychenko, 'Public Supervision over Private Relationships: Towards European Supervision Private Law?' (2014) 22 ERPL 37.

<sup>3</sup> OO Cherednychenko, 'Islands and the Ocean: Three Models of the Relationship between EU Market Regulation and National Private Law' (2021) 84 The Modern Law Review 1294; OO Cherednychenko, 'Regulatory Agencies and Private Damages in the EU: Bridging the Gap between Theory and Practice' (2021) 40 Yearbook of European Law 146; OO Cherednychenko and M Andenas, *Financial Regulation and Civil Liability in European Law* (Edward Elgar 2020).

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society used to conceive money as ‘that which passes freely from hand to hand throughout the community in final discharge of debts [...] being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it’.<sup>4</sup> However, over the years, money has ended up not only been conceived as coins and banknotes, but also as bank money, e-money and digital currency. A banknote can be defined as an unconditional promise in writing signed by a banker who commits to pay a certain sum on demand to the bearer, being the holder in possession who presents it for payment. It is transferrable from one person to another by delivery. Digital currency, instead, is an entity that amounts to a string of bits. The string must have a numerical value and, in order to prevent double spending, it must have a unique identity.<sup>5</sup> Digital currency can be issued either privately or by a central bank. A particular type of digital currency is the stablecoin, which is denominated in, namely pegged to, or claimed at par with, either an official currency’s unit of account (as well as a basket of such currencies) or the value of a specified amount of a designated commodity, whether or not it is backed by a reserve of such currency or commodity. Stablecoin may be divided in: (i) algorithm-based stablecoins, which maintains a stable value via protocols that adjust quantity in response to change of demand and, not being adequately collateralized, are the most fragile, and (ii) asset-linked stablecoins, which maintain a stable value by referencing a commodity, digital asset, fiat currency or a basket of any of the above and are either off-chain<sup>6</sup> and or on-chain.<sup>7</sup> The main risks associated with stablecoins are issuer’s insolvency, exchange’s insolvency, systemic risk, and weak interoperability. Stablecoin issued by central banks for a specified number of the national monetary currency units is called Central Bank Digital Currency. Such a coin is an e-banknote, since like the stablecoin

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<sup>4</sup> *Moss v Hancock* [1899] 2QB 111, 116.

<sup>5</sup> G Samid, *Tethered Money: Managing Digital Currency Transactions* (Elsevier 2015).

<sup>6</sup> I.e., backed by fiat currency and/or high-quality liquid assets, and because transactions are validated and authenticated by an independent third-party outside of the main blockchain network before they are reintegrated back into the main blockchain).

<sup>7</sup> I.e., backed by digital assets which are riskier and thus tend to be overcollateralized and are carried out on a blockchain from start to finish where they are verified and recorded on a public distributed ledger that cannot be changed after they are validated.

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it is written electronically and is transferable by control, which is functionally equivalent to the transfer by physical delivery of a paper banknote.

The next panellist to intervene was Michelle Everson (Birkbeck University of London), who addressed the crisis of European agencies. In the EU, financial agencies are intergovernmental, transnational, or supranational in character and were primarily created to face financial crises and systemic risk. Traditionally, European doctrine has held that European regulation must be strengthened to improve an inadequate mix of regulatory and supervisory skills and to create a co-ordinated early-warning system to identify macro-systemic risks.<sup>8</sup> Unwieldy EU regulation and discrepancies in national implementation has been seen as regulatory failings because they led to differential treatment of financial instruments, both violating the pre-requisite of the neutrality of financial supervision in the EU market and delaying the adaption of European financial services to the pace of global financial market change.<sup>9</sup> Autonomous regulatory models gain normative legitimacy as postulation of a concept of *pareto*-efficiency mediates against concerns that executive power should never be endowed with too broad a mandate. Discretionary powers may be delegated to independent agencies where they have no redistributive consequences, or the subject-matter of regulation is value-neutral in terms of general welfare losses.<sup>10</sup> According to some scholars, European financial agencies might partially substitute the activity of the European Commission in financial matters, since the Commission might appear too bureaucratic, too politicised and composed only of generalists.<sup>11</sup> In addition, it has been argued that a 'central bank is not an appropriate institution for macro-prudential supervision because central bankers are not legitimate politically to make decisions that involve important trade-offs between political and economic objectives'; 'such decisions should be left with finance ministries

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<sup>8</sup> Opinion of the European Economic and Social Committee on the 'Report of the de Larosière Group' (Own-initiative opinion) [2009] C 318/11.

<sup>9</sup> Ibid.

<sup>10</sup> G Majone, 'The Rise of the Regulatory State in Europe' (1994) 17(3) West European Politics 77.

<sup>11</sup> M Busuioc and M Groenleer, 'The Theory and Practice of EU Agency Autonomy and Accountability: Early Day Expectations, Today's Realities and Future Perspectives' in M Everson, C Monda and E Vos (eds.), *European Agencies in Between Institutions and Member States* (Kluwer Law International 2013).

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and other elected officials'.<sup>12</sup> Another important issue to take into account is the non-accountable commodity of reputation. Indeed, 'damage to an institution's reputation (and the resulting loss of consumer trust and confidence) can have very tangible consequences – a stock price decline, a run on the bank, a spike in policy surrenders, an outflow of assets under management, a drop in new sales, a ratings downgrade, an evaporation of available credit, regulatory investigations, shareholder litigation, etc'.<sup>13</sup> Against this scenario it would be useful to find a way of institutionalising and constitutionalising market, epistemic and deliberative knowledge within a system that is simple enough for people to understand the rationale of the regulatory steps taken at European financial level.

The contribution of Daniel Sarmiento (Universidad Complutense of Madrid) addressed the concept of a level playing field in the context of payment services within the EU. Level playing field is a principle based on the notion of equality among the European Member States and among consumers operating in the common European market. A market having these characteristics requires specific obligations and rights on market operators, Member States and consumers. The creation of a level playing field in the payment system is a complex project, as it necessitates to impose stringent obligations on the operators in the sector and to create a coherent, consistent, and functional payment system for the benefit of consumers and market operators. To realise this goal, it would be necessary to face the issues of: (i) regulatory fragmentation, (ii) creation of appropriate standards of equality and (iii) definition antitrust and competition standards. In relation to regulatory fragmentation, it is first of all necessary to consider that the EU is working at the creation of an internal market for payment systems. The choice of the legal instruments (namely directives or regulations) to be used in this process is crucial in defining how and to what extent a level playing field can be guaranteed in the market. Moreover, further complexity is added by the fact that

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<sup>12</sup> E Ferran and K Alexander, 'Can Soft Law Bodies be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of the European Systemic Risk Board' (2010) University of Cambridge Faculty of Law Research Paper No. 36/2011, 1.

<sup>13</sup> G Stansfield, 'Some Thoughts on Reputation and Challenges for Global Financial Institutions' (2006) 31 The Geneva Papers on Risk and Insurance – Issues and Practice 470.

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lately, especially in the field of banking law, regulations are assuming more and more the characteristics of directives, as on certain occasions Member States are left partially free to choose how to comply with the regulation's provisions. This approach may lead to a fragmentation of the rules applicable to payment systems. The second issue under analysis is the definition of appropriate equality standards. This point is central because market operators are not subject to the same compliance duties and because some operators conduct business in domestic markets only and other also in transborder markets. Therefore, it would be necessary to define what is the standard of equality that is required from the EU legislator. A useful guide in this sense is the Arcelor case of 2008,<sup>14</sup> where the European Court of Justice coded its case law on equality, stating that a discrimination arises in case of different treatment of comparable situations in lack of an objective justification. The concept of equality stemming from the Arcelor case can be applied also to the PSD2 framework, leaving a rather broad level of discretion to the legislator in defining equality standards. The third and last point is linked to the concept of essential facilities, ie, assets or infrastructures necessary to a third party to offer its own product or service on a given market. In the payment market, the essential facilities doctrine is particularly relevant because payment infrastructures are essential facilities. In EU case law, the essential facilities doctrine has been addressed in the Bronner case,<sup>15</sup> where the European Court of Justice ruled that if a dominant player, that has control over resources being indispensable to operate in the market, refuses to other players the access to such resources, a breach of Article 102 of the Treaty on the Functioning of the European Union may occur. However, in Slovak Telekom case, the Court also stated that implicit rejections are not covered by Article 102. Applying Slovak Telekom case's implicit rejection regime to payment services may collide with the application of a level playing field in that specific sector.

The conference continued with the keynote speech of Piero Cipollone (Deputy

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<sup>14</sup> Case C-127/07 *Société Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de l'Écologie et du Développement durable and Ministre de l'Économie, des Finances et de l'Industrie* [2008] ECR I-09895.

<sup>15</sup> 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* [1998] ECR I-07791.

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Governor of the Bank of Italy). The payment sector is a key component of the European single market and because of its fragmentation among national borders, it has been the target of several technical and regulatory interventions. In this scenario, PSD2 has been a landmark, as it has brought about greater harmonisation and competition in payment services. However, two more milestones need to be achieved. First, we need to allow innovation to be as disruptive as it was meant to be in the PSD2. Second, we ought to embed into the new regulation the dramatic changes in the technological landscape that occurred since PSD2 came into force. As for the first issue, there are at least three hurdles that must be overcome. First, the lack of full administration and complete application of the rules across Member States. As a matter of fact, the payment services framework still needs to be fully aligned with other European policies and regulations. Second, it would still be necessary to foster a strong competition within and across Member States and to better clarify the role of technological providers in the payments sector. In relation to the second issue, it is worth noting that PSD2 entered into force in Italy in 2018. The new technological landscape that has emerged in the last few years has offered many opportunities to develop new payment solutions which can improve general wealth. Whether this potential will be realised or not it depends on the way PSD3 will be designed and implemented. Before PSD2 came into existence, the main actors in the field of payment services were traditional payment service providers such as banks, electronic money institution and payment institution. PSD2 has contributed to bring the exclusivity of bank-customer relationship to an end, as it allows other players, such as third-party providers, to offer new services to their customers, like the so-called open banking services. This scenario may lead from open banking towards open finance, where technological interdependencies will be equally stronger for payment solution and financial services developed on a blockchain platform. It is now necessary to ponder the consequences of this new technological paradigms on the existing regulatory framework. One way forward is to think about the product-oriented approach, whereby all entities involved in the supply chain of a payment services need to comply with the core principle underlying the other side of the payment system, regardless the existence of a contractor relation among themselves. Moreover, it is also crucial to constantly bear in mind that the ecosystem to be dealing with is very dynamic,

and therefore it would be appropriate to monitor how this ecosystem will evolve overtime. Finally, the regulators should ask themselves whether a closer interaction with the payment industry might be useful to better direct their interventions in the field of payment services.

The first session closed with the presentation of Maria Cecilia Paglietti (Roma Tre University), analysing whether the rules governing the allocation of legal responsibility in the event of unauthorized payment transactions need regulatory changes, in order to better ensure consumer protection and consistency. Continuing market developments have led to new payment methods, new security risks for electronic payments and new political trends. Any attempt to create consistency in application and enforcement of relevant provisions should take into account the risks of forum shopping, regulatory uncertainty, and alteration of the level playing field. It would be possible to ensure an appropriate level of consumer protection and consistency in the application of relevant rules not only by regulatory means, but also resorting to interpretative instruments, namely: (i) a proper reconstruction of the relationship between special supranational rules and general domestic private law and (ii) an open texture nature of PSD2. In relation to the first point above, a fundamental rule under PSD2 to be considered is the one stating that financial institutions shall bear payment losses unless such losses are caused by consumers' gross negligence or fraud. In this regard, the European Court of Justice recently took the chance to clarify that the subject matter of payment losses is regulated exhaustively by the PSD2, rejecting the continued application of domestic regulatory additions of general private law.<sup>16</sup> Such ruling of the European Court of Justice guarantees a high degree of harmonisation. In relation to the open texture nature of PSD2 (ie, the co-presence of general clauses and specific rules), it would be fair to say that, on the one hand, this approach makes it possible to regulate a large number of cases, gives the legal framework flexibility, allows the prevention of obsolescence and grants the setting of different levels of protection and liability based on the user's particular degree of vulnerability; but on the other hand, it

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<sup>16</sup>C-337/20 *DM and LR v Caisse régionale de Crédit agricole mutuel (CRCAM) – Alpes-Provence* [2021] Court reports – general.

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broadens the margins of discretion of the judge and therefore the risk of arbitrary choices. In this framework, the definition of gross negligence is decisive, since if the customer is grossly negligent, the financial loss is shifted from the financial institution. Under Recital 72 of PSD2, gross negligence is defined as a ‘conduct exhibiting a significant degree of carelessness’ (like, for example, ‘keeping the credentials used to authorise a payment transaction beside the payment instrument in a format that is open and easily detectable by third parties’). In addition, Recital 72 also states that in assessing gross negligence on the part of the payment service user, account should be taken of all of the relevant circumstances. The concept of gross negligent adopted by Member States does not really differ, as it is commonly intended to be ‘a higher standard than the standard of negligence, so more than just carelessness’.<sup>17</sup> Moreover, gross negligence is generally excluded in cases of sophisticated frauds.<sup>18</sup> In conclusion, instead of changing completely the relevant legal framework, it would be advisable to maintain level 1 legislation<sup>19</sup> as it is, while level 2 legislation<sup>20</sup> might be used to clarify the concept of gross negligence, explicitly mentioning examples of behaviour that constitute gross negligence.

The second session of the conference was chaired by Concetta Brescia Morra (Roma Tre University) and was named ‘*The Micro level: The Impact of Financial and Digital Asymmetries*’. Dirk Haubrich (European Banking Authority) opened the session with a speech about the contribution of the EBA to a consistent interpretation of PSD2 and to an improved PSD3. The panellist argued that on the one hand PSD2 has created a positive ground-breaking effect in the payment services sector, but on the other hand it also generated competing demands, requiring the EBA to make difficult trade-offs. PSD2 brought about an enhancement in competition, since hundreds of electronic money institutions, payment institutions and banks are now authorised to provide payment initiation services and account information service in the EU. Enhanced

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<sup>17</sup> Cour de Cassation 1st July 2020, 18-21487; Cass. civ., 19 November 2001, n. 14456; ABE, n. 540/2023.

<sup>18</sup> Gross negligence cannot be attributed to the customer due to the insidiousness of the means of attack.

<sup>19</sup> Ie, the directive and the relevant national transposing legislation.

<sup>20</sup> Ie, regulatory acts of the regulatory agencies.

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payment security and consumer protection were also further benefits of the directive. As a matter of facts, a study of 2020 data demonstrates a high reduction of fraud related to card payments, and 2021 and 2022 data are supposed to result in similar, if not better, figures. The directive is also believed to have facilitated innovation and promoted customer convenience, providing a wider and increasingly consumer-friendly choice of different payment options. Against this background, the European Banking Authority secured the transparency of electronic money institutions and payment institutions activities and improved the level-playing field across different types of payment service providers. In addition, EBA made efforts ensuring technological neutrality and contributing to a single payment market in the European Union. Bearing in mind the pros and cons of PSD2's experience, in June 2022, the EBA submitted to the European Commission its recommendations on what ought to be improved under PSD3. In this regard, EBA remarked that less tech-savvy groups of the society have been excluded from electronic transactions due to banks imposing smartphone-based authentication solutions on their customers; therefore, the EBA suggested that PSD3 imposes a requirement for banks to duly consider the needs of all their customers when designing their authentication solutions, in order to allow consumers to execute electronic payment transactions without having to rely on smartphones or similar technological devices, and at no additional cost for the consumer. Finally, the EBA suggested giving specific bodies the powers to get the industry to comply with PSD3's legal requirements.

The second panellist of the second session was Marta Bozina (Juraj Dobrila University of Pula), who carried out a comparative analysis of PSD2 and the Market in Crypto-assets Regulation (MiCAR).<sup>21</sup> Technological advancements add value to payment products and services, but they also increase their riskiness. Such riskiness arises from new types of asymmetries in digitalized payments. The term 'asymmetry' can describe various security risks connected with the ascent of disruptive technologies in payments, as well as related conceptual ambiguities or regulatory gaps. Legislation should identify new asymmetries and provide appropriate solutions. PSD2 harness

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<sup>21</sup> Proposal for a Regulation of The European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, COM/2020/593 final.

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asymmetries arising from the increasing use of third parties in payments execution. Indeed, the directive contributed to the creation of a level playing field for payment services providers in the digital age, fostered security of digital payments and prevented the misuse of consumer data. However, market and technology continued to develop alongside PSD2 implementation and new asymmetries emerged. A crucial example is the rise of crypto assets, which are backed by cryptography and distributed ledger technologies, not issued or guaranteed by a public authority and exploitable in various economic functions. In the EU, crypto assets are mainly regulated by MiCAR.<sup>22</sup> PSD2 and MiCAR promote similar goals, as they both aim at establishing a bespoke legal basis for new players in the market,<sup>23</sup> setting up a pro-competitive approach<sup>24</sup> and boosting consumer confidence and market integrity.<sup>25</sup> However, PSD2 and MiCAR overlap marginally (i) when considering ‘funds’ and (ii) when addressing the legislative treatment of new players in the market, specifically crypto assets service providers (CASPs). In relation to the first point above, it is worth noting that the EBA warned about new formats of crypto assets which broadly correspond with the definition of e-money provided by the Second Electronic Money Directive (EMD2).<sup>26</sup> If a company executed ‘payment services’ with a crypto asset that qualifies as e-money using distributed ledgers technology, such activity would fall within the scope of the PSD2 by virtue of being ‘funds’. Such a situation would bring about an incoherent definition of crypto assets as funds,<sup>27</sup> which would result problematic especially in respect of asset-referenced tokens (ARTs) and e-money tokens (EMTs). Payment appeal of ARTs and

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<sup>22</sup> MiCAR is one of the operational pillars of the Digital Finance Package and provides a far-reaching legislative framework for crypto assets, crypto asset issuers and crypto asset service providers (CASPs) operating within the EU.

<sup>23</sup> PSD2, Recitals, p. 6; MiCAR, Recitals, p. 1.

<sup>24</sup> PSD2, Recitals, p. 67; MiCAR, Recitals, p. 5.

<sup>25</sup> PSD2, Recitals, pp. 4-6; MiCAR, Recitals, p. 5.

<sup>26</sup> Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC [2009] OJ L 267.

<sup>27</sup> T van der Linden and T Shirazi, ‘Markets in Crypto-Assets Regulation: Does It Provide Legal Certainty and Increase Adoption of Crypto-Assets?’ (2023) 9 Financial Innovation 11.

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EMTs will depend on stabilization mechanisms;<sup>28</sup> but still, a better coordination between PSD2 and MiCAR in the definition of ‘funds’ would be necessary. Furthermore, moving to the analysis of the asymmetries stemming from CASPs’ legislative treatment, if a CASP contracts with a payee to accept crypto assets (other than EMTs), it should abide with the same rules on consumer protection as those envisaged under the PSD2 for payment service providers. However, PSD2 and MiCAR provisions on consumer protection are not superimposable. Therefore, it would be necessary either to authorize the CASP under the PSD2 regime, or to designate a PSD2-authorized payment service provider. In addition, a clarification regarding the nature of CASPs’ business would also be required.<sup>29</sup> In light of the above, it would be fair to say that a closer coordination between PSD2 and the MiCAR would be convenient.

The speech of Alberto Pozzolo (Roma Tre University) centered on the concept of open banking, which can be defined as a special kind of financial ecosystem governed by certain security profiles, application interfaces, and guidelines with the objective of improving customer choices and experiences.<sup>30</sup> Traditionally, most of financial transactions and underlying payments are intermediated by banks. Such banking transactions produce information which is: (i) valuable to the intermediary bank and (ii) owned only by the bank that records it, not by the customer that produces it. Open banking, on the contrary, is based on opening the access to information otherwise captive in a bilateral relationship between a bank and a customer and aims at creating a market for customers’ data obtained from payment information. This scenario would be feasible if all the payment operators, through software rules and programs that facilitate the interaction between different computer systems, have access to the information that the payer agreed to share. In the EU, the starting point for open banking was the approval in 2015 of PSD2, requiring that financial institutions open up they data to account service information providers, payment initiation service

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<sup>28</sup> G Gimigliano, ‘Payment Tokens and the Path Toward MiCA’ (2022) 8(1) *The Italian Law Journal* 367.

<sup>29</sup> European Commission, ‘A Study on the Application and Impact of Directive (EU) 2015/2366 on Payment Services (PSD2)’ (2021) FISMA/2021/OP/0002 181.

<sup>30</sup> Further information on the subject is accessible online at ‘European Economy – Banks, Regulation, and the Real Sector’ <<https://european-economy.eu/>> accessed 16 June 2023.

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providers and card-based payment instrument issuers. The rationale was to enhance competition, favor financial inclusion, and foster innovation. The impact of open banking will depend on how information will be spread and used. On the supply side, customers are likely to open information to a small number of counterparts of their choice. Instead, on the demand side, third parties will join open banking mainly if they have some way of preserving at least part of the value of the information they own. The long-run effects of open banking are challenging to predict, but regulation must play a key role, as proactive regulation will be crucial to avoid a scenario of late interventions.

Gabriella Gimigliano (University of Siena) gave an effective overview of provisional payment service from consumers' perspective. The three guidelines of the analysis were the concepts of (i) consumer, (ii) payment service and (iii) vulnerable consumer. A consumer is an individual acting for purposes which are outside his trade, business and profession. A systemic interpretation of PSD2 allows to define payment services as any transfer of funds and transaction data. The concept of vulnerable consumers, instead, can be inferred by the combined interpretation of the Unfair Commercial Practices Directive (UCPD)<sup>31</sup> and the Payment Account Directive (PAD).<sup>32</sup> Under the UCPD, an unfair commercial practice is any conduct that materially distorts the economic behaviour and is contrary to professional diligence. Traders are required to avoid carrying out such practices against consumers. In addition, the PAD provides that: all consumers are entitled to hold a payment account, no discrimination against consumer is permitted and only credit institutions are allowed to provide such service to consumers. The combined interpretation of UCPD and PAD reveals that EU policymakers are familiar with the concept of consumers' vulnerability. Therefore, not mentioning vulnerability in the PSD2 appears as a clear policy-making choice. However, according to the speaker, not mentioning consumer's vulnerability in PSD3 would not

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<sup>31</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149.

<sup>32</sup> 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 [2014] OJ L 257.

be the best approach. Firstly, because money cannot be seen as a passive technical instrument of the market, but it is instead an active institution in human societies that is socially and historically constructed, which can establish comparative values in a range of circumstances – social, political and economic.<sup>33</sup> Moreover, the concept of ‘monetary policy’ is not limited to its operational implementation, but it also entails a regulatory dimension, intended to guarantee the status of the euro as the single currency.<sup>34</sup> Therefore, clear and comprehensible information on the right to open and use a payment account with basic features should be provided by Member States and credit institutions to consumers. Member States should ensure that communication measures are well-targeted and capable of reaching out to unbanked, vulnerable and mobile consumers. Credit institutions should actively make available to consumers accessible information and adequate assistance about the specific features of the payment account with basic features on offer, their associated fees and their conditions of use.

Stefaan Voet (University of Leuven) closed the second session with a speech dealing with the remedies available to achieve enforcement of the PSD2 provisions, namely: court enforcement, alternative dispute resolution (ADR) and public enforcement. Consumers’ right to seek for court enforcement is contained in many provisions of the PSD 2 and specifically: Recital 98,<sup>35</sup> Recital 100,<sup>36</sup> Art. 25,<sup>37</sup> Art. 52<sup>38</sup> and Art. 99.<sup>39</sup> Moreover, in relation of court enforcement, relevant provisions are enclosed also

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<sup>33</sup> M Mellor, ‘Democratizing Finance or Democratizing Money?’ (2019) 47 *Politics & Society* 635.

<sup>34</sup> Cases C-422/19 and C-423/19, *Johannes Dietrich and Norbert Häring v Hessischer Rundfunk* [2021] Court reports – general.

<sup>35</sup> ‘Without prejudice to the right of customers to bring action in the courts [...]’.

<sup>36</sup> ‘Without prejudice to the right to bring action in the courts to ensure compliance with this Directive [...]’.

<sup>37</sup> ‘Member States shall ensure that decisions taken by the competent authorities in respect of a payment institution pursuant to the laws, regulations and administrative provisions adopted in accordance with this Directive may be contested before the courts’.

<sup>38</sup> ‘Member States shall ensure that the following information and conditions are provided to the payment service user: [...] 7. on redress: (a) any contractual clause on the law applicable to the framework contract and/or the competent courts’.

<sup>39</sup> ‘Where appropriate and without prejudice to the right to bring proceedings before a court in accordance with national procedural law, [...]’.

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within Directive 2020/1828 on representative actions for the protection of the collective interests of consumers. According to this directive, in case of a violation of PSD2 provisions, consumers will have right to a collective action. The entities designated by law to pursue collective actions on behalf of consumers are specific qualified entities, ie any organisation or public body representing consumers' interests which has been designated by a Member State as qualified to file collective actions. Representative actions may be both domestic – if the representative action is brought by a qualified entity in the Member State in which the qualified entity is designated – and cross border – if the representative action is brought by a qualified entity in a Member State other than the one where the qualified entity is designated. An alternative to court enforcement is ADR, which is specifically envisaged by Chapter 6 'ADR procedures for the settlement of disputes', Recital 98<sup>40</sup> and Art. 102<sup>41</sup> of the PDS2.<sup>42</sup> Finally, consumers may resort to public enforcement. In this scenario, it is necessary to analyse the concept of regulatory redress, ie, the outcome of redress being paid as a result of the intervention of a public authority. According to the speaker, it would be necessary to introduce fair procedural rules, predictable and transparent process, ministerial and stakeholder oversight, possibility for courts to impose more serious sanctions, and a mechanism for appeals.

The concluding remarks of the conference were entrusted to Mads Andenas (University of Oslo), who reviewed and analyzed the main issues that emerged during the two sessions of the conference. First, the speaker stressed out the fact that, in the digital payment system, financial data collected by payment operators are becoming an asset of particular interest, which the European legislator ought to regulate appropriately. Furthermore, taking due account of the typically transnational nature of the payments sector and the need to effectively protect consumers operating in the single European market, it would be advisable to avoid an excessively fragmented regulatory regime and

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<sup>40</sup> '[...] Member States should ensure effective ADR procedure [...]'].

<sup>41</sup> Which makes explicit reference to the Directive 2013/11/EU on alternative dispute resolution for consumer disputes.

<sup>42</sup> For further information on the matter, see S Voet and others, 'Recommendation from the academic research regarding future needs of the EU framework of the consumer Alternative Dispute Resolution' (ADR) (JUST/2020/CONS/FW/CO03/0196).

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an ineffective enforcement mechanism. The speaker also underlined the importance of correctly addressing the new systemic risks stemming from recent technological developments that have affected the digital payments sector, such as, the growing importance of the role played by digital currencies in recent years.