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Spain's Implementation of PSD2*

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Informative abstract. This paper analyses the implementation in Spain of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market (best known as 'PSD2'). After introducing the background to payment services regulation in Spain, the paper addresses the specific transposition rules of PSD2 stated in Royal Decree-Law 19/2018 of 23 November on payment services and its regulatory development. The paper deals with national exceptions, while examining the technical nuances on legal framework for payment institutions and their transparency and information requirements, as well as on the rules applicable to the authorisation and execution of payment transactions. It also goes over the rules on data protection, risks management, authentication and case-law doctrine on liability of payment service providers, while considering the alternative dispute resolution procedures and the rules concerning penalties. The paper also reviews the rules applicable during the transition period and considers the regulatory development and the importance of Bank of Spain's criterion. Lastly, the paper provides some conclusions. Spain has opted to transcribe PSD2 without the necessary adaptation to domestic law. All that is added is a few nuances, except regarding two essential questions. On the one hand, the right to terminate the framework contract with an anti-competitive regulation that could constitute an incorrect transposition. On the other hand, there is no real alternative dispute resolution (ADR) system.

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I. INTRODUCTION

The transposition of PSD2 in Spain has been carried out by Royal Decree-Law 19/2018 of 23 November on payment services and other urgent financial measures (hereinafter, RDL 19/2018)[1] by Royal Decree 736/2019 of 20 December on the legal framework for payment services and payment institutions (hereinafter, RD 736/2019)[2] and by Order ECE/1263/2019 of 26 December on transparency of payment terms and conditions and information requirements for payment services (hereinafter, Order ECE/1263/2019).[3] The complete transposition thus took place after the 13 January 2018 deadline laid down in the directive.[4] **Spain was in the group of the last European countries to fully transpose PSD2**.[5] The fact that the directive was transposed mainly through a decree-law is relevant. This is approved by the Government and Parliament merely validates it. **There is no parliamentary processing or discussion of the contents**. The result is a copy and paste of the directive without effective transposition into national law.[6] Transposition is an act of accommodation, it is not a mere technical

[1] *Real Decreto-ley 19/2018, de 23 de noviembre, de servicios de pago y otras medidas urgentes en materia financiera*; validated by the Resolution of 13 December 2018. It partially transposes Directive (EU) 2015/2366 of 25 November and transposes another two directives. The transposition project was the subject of a close-up consultation on 3 May 2017 (available at: https://www.tesoro.es/sites/default/files/2017_04_07_sleg_8131_consulta_publica_psd2.pdf) and open to public comments until 16 January 2018 (available at: https://www.tesoro.es/sites/default/files/leyes/pdf/leyserviciospago_0.pdf).

[2] *Real Decreto 736/2019, de 20 de diciembre, de régimen jurídico de los servicios de pago y de las entidades de pago y por el que se modifican el Real Decreto 778/2012, de 4 de mayo, de régimen jurídico de las entidades de dinero electrónico*, and *Real Decreto 84/2015, de 13 de febrero, por el que se desarrolla la Ley 10/2014, de 26 de junio, de ordenación, supervisión y solvencia de entidades de crédito*.

[3] *Orden ECE/1263/2019, de 26 de diciembre, sobre transparencia de las condiciones y requisitos de información aplicables a los servicios de pago y por la que se modifica la Orden ECO/734/2004, de 11 de marzo, sobre los departamentos y servicios de atención al cliente y el defensor del cliente de las entidades financieras*, and *Orden EHA/2899/2011, de 28 de octubre, de transparencia y protección del cliente de servicios bancarios*. The national parliament did not perform its role as a mediator between the EU and its citizens.

[4] See https://eur-lex.europa.eu/legal-content/ES/NIM/?uri=CELEX:32015L2366

[5] With Malta and Romania, see National transposition measures at https://eur-lex.europa.eu/legal-content/ES/NIM/?uri=CELEX:32015L2366 and Payment services (PSD 2) - transposition status at https://ec.europa.eu/info/publications/payment-services-directive-transposition-status_en

[6] In the plenary session in which it was validated, it was presented as "a newly-established law on payment services" to complete the transposition, which was lagging far behind (Calviño). It was received as "very broad and very complicated" (Martínez Oblanca), to make up for "an unacceptable delay" (Bel Accesi), a rule that "transposes Directive 2016/2366 directly and almost literally" (Ramírez Freire). Having had a summary "would have spared me the additional torture of reading the royal decree" (Monero Soler) [See DS. Congreso de los Diputados No. 171 of 13/12/2018 pp. 5-16, available at: http://www.congreso.es/public_oficiales/L12/CONG/DS/PL/DSCD-12-PL-171.PDF#page=5]. It was decided to process it as a bill (BOCG. Congreso de los Diputados No. A-36-1 21/12/2018). There was a single amendment concerning the transposition of Article 42.1 PSD2 (BOCG. Congreso de los Diputados No. A-36-2 05/03/2019). This initiative was declared expired by the dissolution of parliament. (BOCG. Congreso de los Diputados No. D-519 27/03/2019).

formality.[7] In our case, such accommodation is lacking, which may create distortions and legal uncertainty, as the directive's provisions are not eligible for domestic law.

Under the Spanish Constitution, exercising of the right to private property and free enterprise within the framework of the market economy may only be regulated by law.[8] Within this framework, RDL 19/2018 transposes titles I and IV of PSD2 into domestic law and establishes the basis for transposing title II (which was completed by RD 736/2019) and title III (which was completed by Order ECE/1263/2019. However, RDL 19/2018 was issued **under the State's exclusive powers over commercial legislation, the bases for regulating credit, banking and insurance and the bases for and coordination of the general planning of economic activity**.[9] This plurality of titles shows that this Royal Decree-Law contains as many private-law rules as public-law rules.

Banking contracts are atypical in Spanish law; they do not have a specific legal framework. They are not dealt with in codes or in special laws, except those resulting from the transposition of EU directives, as in the case of the consumer credit and mortgage credit directives[10], which were transposed mainly as if they were administrative rules of conduct, without stipulating the contractual consequences of breach with due clarity. For example, the contractual consequences of the lender breaching the rules regarding assessing the customer's creditworthiness are not specified[11]. Now that the payment services framework has been enriched with the transposition of PSD2, **a banking contract has been regulated for the first time in Spanish law**, establishing the parties' rights and obligations and the contractual consequences of breaches. For this reason, we should carefully monitor how this legal framework is applied and interpreted by the Supreme Court, since determining the bank's civil liability in providing payment services may be used, by analogy, to determine the bank's liability in the provision of other financial services.

Although the legal framework for payment services goes back to the entry into force of the Spanish Payment Services Act 16/2009 of 13 November (*Ley 16/2009, de 13 de noviembre, de servicios de pago*), which transposed PSD1, as yet there is no doctrine concerning these kinds of contracts. **There is very little case law and the literature is descriptive**, focusing mainly on administrative law. Meanwhile, commercial law doctrine continues to treat payment services from the perspective of a "bank current

[7] See Wim Voermans, "Transposition of EU legislation into domestic law: Challenges faced by National Parliaments", ***Briefing Requested by the JURI committee, European Parliament***, November 2018, p. 8. Available at: http://www.epgencms.europarl.europa.eu/cmsdata/upload/7d46f259-9481-469c-922b-8172803a15d2/IPOL_Briefing_Transposition_of_EU_legislation_into_domestic_law.pdf

[8] Article 53.1 in relation to articles 33 and 38.

[9] Final provision ten RDL 19/2018, which cites the powers conferred by article 149(1)(6), (11) and (13) of the Spanish Constitution.

[10] Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers, and Directive 2014/17/EU of 4 February 2014 on credit agreements for consumers relating to residential immovable property.

[11] See article 14 Ley 16/2011, de 24 de junio, de contratos de crédito al consumo, and article 11 Ley 5/2019, de 15 de marzo, reguladora de los contratos de crédito inmobiliario.

account", which is an atypical contract based on case law[12]. The courts of first instance are beginning to apply the legal framework for payment services with diverse interpretations while they wait for the Supreme Court to pronounce.[13]

Given the lack of doctrine, **the Bank of Spain's criteria have great practical relevance.** These were set out in the complaints report produced by the Market Conduct and Complaints Department.[14] These criteria define good banking practice that institutions must observe in providing banking and payment services to their customers. They are followed by institutions and the courts use them to settle disputes. In legal frameworks as complex and technical as that which governs payment services, unless court claims are accompanied by an expert report, there is a problem with identifying the factual circumstances and locating the applicable regulations. Judges do not have the necessary specialisation and sufficient interlude to conduct such an analysis. Their workload prevents them from doing so. They have to manage many different national and EU legal and regulatory sources, including the technical rules of authorities and other soft law. In this scenario, the good practice criteria published by the Bank of Spain are a source of interpretation of the legal framework that is very useful in guiding their decisions[15].

[12] *Lección 40, Los contratos bancarios (II), IV. La cuenta corriente bancaria*, in AA.VV., *Lecciones de Derecho mercantil*, Vol. II, A. Menéndez & A. Rojo (dirs.), 17th ed., 2019; J. Sánchez-Calero Guilarte, Chapter 56, *Los contratos bancarios (I), II. Las cuentas bancarias*, in *Instituciones de Derecho mercantil*, Vol. II, 37th ed., 2015.

[13] The CENDOJ case law catalogue contains 43 judgments that apply the Payment Services Act 16/2009 of 13 November. For example, one issue debated is the liability of the bank in executing a payment order using only the unique identifier of the payment account without checking whether the payee, identified by using additional information, is the holder of the account identified by the unique indicator. In principle, under the legal framework, when the payment order is executed in accordance with the unique identifier, it is considered correctly executed and the provider is not liable. According to article 59.3 RDL 19/2018, which transposes article 88.5 PSD2, in the same terms as article 44.3 Act 16/2009, which transposes article 74.3 PSD1: "When the payment service user provides additional information to that required by the provider for correct initiation or execution of payment orders, the payment service provider will only be liable, for the purposes of correct performance, for the execution of payment transactions in accordance with the unique identifier provided by the payment service user." However, in spite of the clarity of the legal framework, there are judgments that consider the bank liable when "it performed an action in addition to applying the payment order to the designated account, which revealed its lack of diligence, albeit minor, but sufficient in view of its classification as an "expert trader" (Judgment handed down by the First Chamber of the Supreme Court, of 16 December 2011)". For all of these, see the Judgment handed down by Zaragoza Provincial High Court, Fifth Chamber, 680/2019, of 17 April, which cites other previous judgments.

[14] See Bank of Spain, *Memoria de Reclamaciones 2018*, available at https://www.bde.es/f/webbde/Secciones/Publicaciones/PublicacionesAnuales/MemoriaServicioReclamaciones/18/00_Memoria_reclamaciones_completa.pdf

[15] Supreme Court Judgment 857/2020, of March 13, on the validity and legality of the overdraft fee on current account, using the Bank of Spain criteria as the main source of guidance; Judgment handed down by Madrid Provincial High Court (*Audiencia Provincial*), Twelfth Chamber, 418/2019, of 3 October, which ruled on the lawfulness of charges by Google to the appellant's account. These criteria are used by institutions as a safe haven on occasions; see the Judgment handed down by Oviedo Provincial High Court, Fifth Chamber, 434/2019, of 3 December 2019.

However, this does not prevent the Courts from stating that these criteria "are in any way binding for civil purposes"[16].

II. GENERAL PRINCIPLES AND PROVISIONS

1. Purpose

In accordance with PSD2, RDL 19/2018 **applies to payment services "provided professionally in Spanish territory"**.

PSD2 regulates the "the provision of payment services as a regular occupation or business activity". Paragraph 24 of its preamble limits the directive's application to "service providers who provide payment services as a regular occupation or business activity". These are the **characteristics of a professional activity**. RDL 19/2018 does not cover those who provide payment services on a non-professional basis, even if it is their regular occupation. However, this nuance does not appear to have practical effects. If it is their regular occupation, it will be associated with professionalism and the rules will apply. In the stock market, in a rule that may be applied analogously to payment service providers, "activities being performed for customers in general on a remunerated basis is a sign of professionalism"[17]. Professional fees tend to be associated with regularity. There is regularity when the activities are accompanied with commercial, advertising or other action to create customer relationships.

The transposed directive includes the payment services envisaged in annex I of PSD2 in article 1.2. There are no differences here. With regard to its territorial scope, RDL 19/2018 applies to "payment services provided within Spain". One must consider, by analogy with the stock market regulation, that **it applies to all payment services "whose issuance, trading or marketing takes place in national territory"**[18]. Moreover, RDL 19/2018 transposes the scope based on the currency of the payment transaction and the

[16] Judgment handed down by the Madrid Provincial High Court (*Audiencia Provincial*), Nineteenth Chamber, 352/2017, of 25 October, in proceedings concerning indemnity for the bank's liability due to breaching duties imposed by the Payment Services Act in relation to managing collection of bills of exchange. Judgment handed down by Madrid Provincial High Court, Ninth Chamber, 15/2017, of 19 January, which questions the Bank of Spain's criterion that considers it "recommendable" for institutions to immediately inform their customers of the seizure orders they receive so they can exercise their legal rights to object to an attachment within the time limit, since "this Court considers that it is not only recommendable but inexcusable, and that the bank has an obligation to notify the customer immediately when there is a seizure order concerning his/her account."

17 See article 8 of Royal Decree 217/2008 of 15 February on the legal regime for investment services companies and other entities that provide investment services which partially amends the Spanish *COLLECTIVE INVESTMENT INSTITUTIONS ACT* 35/2003 of 4 November *APPROVED BY ROYAL DECREE 1309/205 OF 4 NOVEMBER* (*Real Decreto 217/2008, de 15 de febrero, sobre el régimen jurídico de las empresas de servicios de inversión y de las demás entidades que prestan servicios de inversión y por el que se modifica parcialmente el Reglamento de la Ley 35/2003, de 4 de noviembre, de Instituciones de Inversión Colectiva, aprobado por el Real Decreto 1309/2005, de 4 de noviembre)*.

18 Applying that stipulated in article 4.1 of the Stock Market Act by analogy.

provider's situation without altering the scope of the directive[19]. Its application to the Official Credit Institute or any of the bodies referred to in article 2.5 PSD2 is not excluded. It considers the Bank of Spain, the General Government Administration, Autonomous Communities and Local Bodies to be payment service providers when they are not acting in their position as public authorities[20]. Moreover, Sociedad Estatal de Correos y Telégrafos, S.A. (the postal service) may provide payment services, as it is authorised to do by its specific regulations[21].

RDL 19/2018 adds an **express prohibition of discrimination** in access to payment accounts in accordance with article 21 of the Charter of Fundamental Rights of the European Union[22]. This article prohibits any discrimination, in particular on grounds of nationality. This is a mere reminder of a general prohibition.

2. Exclusions

The exclusions are transposed literally, except for a reference to the activities of **"Pension Funds and Plans and their Managers"**[23]. Due to their volume, it was made clear that the legal framework for payment services does not apply to these activities[24].

In relation to **services based on payment instruments that can be used only in a limited way**, conditions have been developed to prevent possible abuses[25]. Firstly, the objective scope of the exclusion of these instruments is defined. The exclusion applies to "luncheon vouchers, restaurant cards or any other similar payment instrument that an employer provides to an employee in order to make a payment in kind"[26]. Secondly, the form and contents of the contractual relationship between the issuer and the suppliers that are members of the network is regulated[27]. Suppliers must sign a contract with the issuer. This contract must state the obligation to accept the instrument and the users' rights. It is

[19] Article 2.1 RDL 19/2018. See Tapia Hermida, A.J., "La regulación de los servicios de pago por el Real Decreto-ley 19/2018, de 23 de noviembre. Una visión panorámica", ***Revista de derecho bancario y bursátil***, 155, 2019, p. 18.

[20] Article 5.2 RDL 19/2018.

[21] Article 5.1.d) RDL 19/2018.

[22] Article 2.2 RDL 19/2018. PSD2 mentions the Charter of Fundamental Rights of the European Union in paragraphs 46 and 90 but concerning matters other than access to accounts. In paragraph 46 it does so to prevent abuse or arbitrariness in the competent authorities exercising their powers, and in paragraph 90 it does so to safeguard recognised rights, in particular "respect for private and family life, the right to protection of personal data, the freedom to conduct a business, the right to an effective remedy and the right not to be tried or punished twice in criminal proceedings for the same offence".

[23] Article 4(i) RDL 19/2018.

[24] According to INVERCO data, in Spain, in April 2020, pension funds managed 74,563 million euros with 7.49 million investor accounts. The statistics are available at http://www.inverco.es//documentos/pension_mensual/2004_Abril%202020/PSIabril20.zip

[25] The crisis affecting the Younique Money card limited network in 2015 was a lesson in how to avoid situations of this kind happening again. See the Bank of Spain Decision of 3 February 2015, publishing the penalties involving revocation and a fine for very serious infringements and the penalty of a public reprimand for a serious infringement, imposed on Younique Money E.D.E., S.A.

[26] Article 25.4 RD 736/2019.

[27] Article 25.3 RD 736/2019.

made clear that the instrument must be exclusively used within the network. General use would suspend the exception and the regulations governing payment services would apply. In that case, the issuer must notify the users of the conversion, requesting prior authorisation and adapting the framework contract. This framework protects users as it gives continuity to the provision of the payment service. However, instead of obliging them to cease the activity when they no longer meet the requirements for the activity being excluded, the breach is considered as if it were a contingency. That "contingency" must thus be managed by the issuer, which must request the relevant authorisation, apply the payment service regulations, and adapt the framework contract between the issuer and the providers as necessary. It is a "conversion" that gives continuity to the activity without the fact of expanding payment services beyond a single network constituting an infringement of the rules regulating and disciplining payment services. However, breach of the conversion framework, by maintaining the payment service provision, would be an infringement of the legal reservation of payment services[28].

The **exclusion of payment transactions by a provider of networks or electronic communication services** within the framework of a charitable activity or for the ordering, acquisition or validation of tickets or passes includes payments for "tickets or passes for transport services, entertainment, parking, events"[29], as well as "urban mobility, including shared use, as well as tickets for cultural services such as museums, exhibitions and others similar to those mentioned, in the judgement of the Bank of Spain"[30]. The notification duties are literally transposed. The Bank of Spain, as the competent authority, is the recipient of the notifications[31]. This authority must assess whether the applicant for an exemption for payment services based on payment instruments that only can be used in a limited way meets the regulatory requirements and, if it does not meet them, the person concerned will be notified with the reasons stated[32].

It is such an exhaustive exemption system that it has given rise to initial lack of interest in it. In fact, no exempt payment service institution has registered[33].

3. Definitions

The definitions, orderly alphabetically, are transposed without changes except for the following nuances.

The first nuance affects the definition of "payment initiation service provider", which is replaced by the definition of **"institutions providing the account information service"**. These institutions are limited to a "payment initiation service provider" that, by only providing the service after which it is named, enjoys a partial exemption from the regulations and is treated as a "payment institution"[34]. In this way, the exclusive and

[28] Reservation stipulated in Article 5 RDL 19/2018.

[29] Article 4(k)(2) RDL 19/2018.

[30] Article 26.1 RD 736/2019.

[31] Article 6.1 initial and 6.2 RDL 19/2018.

[32] Article 6.2 final RDL 19/2018.

[33] Retrieved on 9 May 2020.

[34] See article 33 PSD2, which was partially transcribed in article 15 RDL 19/2018.

excluding activity of these kinds of institutions is demarcated. This is confirmed by article 3 RD 736/2019, which only authorises "institutions providing the account information service" to perform business activities other than payment services, and operational services or services auxiliary to their main activity. In other words, it is clear that "institutions providing the account information service" cannot provide other payment services[35].

In turn, the term "scriptural money" used in the definition of funds is transposed as **"banking money"**, which is more imprecise but more usual in domestic trade[36]. This terminological choice does not have implications in practice apart from highlighting the origin of this type of money[37].

Moreover, the definition of "strong customer authentication", described in the directive as "designed in such a way as to protect the confidentiality of the authentication data", is transposed as "designed in such a way as to protect the confidentiality of the identification data". **This is an incorrect transposition that creates legal uncertainty since "authentication data" are not the same as "identification data"**. Article 98 PSD2 differentiates between "identification" and "authentication". Authentication uses electronic means of identification[38]. It is a process for identification and communication with users. In this process, payment service providers must ensure secure identification in communications between the payer's device and the payee's acceptance devices[39]. In short, "authentication data" comprise "identification data" but also others such as personalised security credentials conveyed to the user.

With regard to the **"business day"**, the transposition specifies that in "payment accounts contracted electronically, the calendar followed shall be that for the location of the corporate headquarters of the payment service provider with which they have been contracted".

The notion of **"group"** adds a reference to article 42 of the Commercial Code and so the concept is integrated.

Moreover, the definitions of **"payment brand"** and "co-badging" are not transposed. These definitions are only used in paragraph 13 PSD2 to demarcate the payment activities of a limited network excluded from its scope. These payment brands are also not mentioned in the text in the transposing regulation. Therefore, their lack of transposition is justified.

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[35] There was only one institution registered with the Bank of Spain as an "institution providing the account information service" on 28 April 2020.

[36] Used in the definition of "funds".

[37] "Scriptural money" is a legally undefined term understood as equivalent to "bank money", according to M.ª Ángeles Nieto Giménez-Montesinos and Joaquín Hernáez Molera, "Monedas virtuales y locales: las paramonedas, ¿nuevas formas de dinero?", ***Financial Stability Review***, Issue 35, Bank of Spain, 2018, p. 108.

[38] See Regulation (EU) no. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market.

[39] See article 28.1 Commission Delegated Regulation (EU) 2018/389 of 27 November 2017.

4. Reservation of activity and professional name

The prohibition on payment services being provided by someone who is not a payment service provider or who enjoys an exclusion is instrumented through a **legal reservation of the activity**[40]**.** This is the usual way of framing the regulation of financial activities in domestic law[41].

In turn, the **generic name** "payment institution" is reserved for authorised payment institutions. There is no obligation to include it in the name used in trade. They may do so, and have the exclusive right to do so, but they are not obliged to include it in their name[42]. The same framework applies to the generic name of "institution providing the account information service"[43]. However, there is no legal reservation of the generic name of "institutions providing the account information service".

It is a very serious infringement of the rules regulating and disciplining lending to repeatedly and professionally provide a payment service without having the status of a payment service provider, as well as to use any of the reserved names without having been authorised or registered[44].

III. LEGAL FRAMEWORK APPLICABLE TO PAYMENT INSTITUTIONS

In accordance with the bases stated in 11 RDL 19/2018, the government has regulated the payment institution authorisation framework[45]. In accordance with the regulatory provision, the Bank of Spain has published a **guide for authorisation applicants**[46]. It is an exhaustive guide that aids market access.

Article 12 RDL 19/2018 details the **grounds on which the authorisation application may be rejected**[47]**.** Among other reasons, the application will be rejected due to lacking procedures that ensure healthy and prudent management of the institution, due to shareholders who are not fit and proper persons having a significant holding, senior managers who are not of good repute, obstacles to the supervisory function or lack of minimum share capital. The list of grounds ends with an open clause that gives the Bank

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[40] Article 31 RDL 19/2018.

[41] For all of these, see article 3 on reservation of activity and name in the Credit Institutions Creditworthiness, Supervision and Regulation Act 10/2014 of 26 June (*Ley 10/2014, de 26 de junio, de ordenación, supervisión y solvencia de entidades de crédito*).

[42] Compare this with banks and other credit institutions, which "must use generic names of their own" (article 3.2 Credit Institutions Creditworthiness, Supervision and Regulation Act 10/2014 of 26 June).

[43] Article 8.5 RD 736/2019.

[44] Article 92(aa) Act 10/2014.

[45] See article 2 RD 736/2019, complying with the Final Guidelines on Authorisations of Payment Institutions (EBA-GL-2017-09).

[46] Informative guide for applicants for authorisation of payment institutions or e-money institutions, as well as registration of natural or legal persons providing the account information service or exempt persons referred to in article 14 of Royal Decree-Law 19/2018, available at https://sedeelectronica.bde.es/f/websede/INF/Comun/Relcionados/Guia_Informativa_para_Solicitantes.pdf

[47] Article 12 RDL 19/2018.

of Spain a broad degree of discretion. It may reject the application when: "The information and evidence accompanying the application are not favourably viewed with regard to compliance with all of the stipulated requirements"[48].

The transposition regulations include the **exemption system** of article 14 PSD2, provided the other requirements stipulated in that article are also met and the average total value of payment transactions executed in the preceding 12 months by the institution does not exceed 3,000,000 euros per month[49].

Institutions providing the account information service may be **hybrid institutions** that perform business activities other than payment service provision[50]. In any case, they are authorised to provide operational services or auxiliary services closely related to provision of the account information service[51]. It is expressly stipulated that the registration of institutions providing the account information service is aimed at maintaining the highest possible level of competition in payment service provision[52].

In accordance with the provisions in PSD2, **registration** of the different types of payment institutions is the responsibility of the Bank of Spain. It is a public register that is updated and accessible through the internet[53]. There is also a register of senior managers of payment institutions, which is confidential. The Bank of Spain assesses whether the senior managers who are registered are fit and proper persons.

The provisions concerning **professional indemnity insurance or an equivalent guarantee** to provide account information or payment initiation services are in accordance with the provisions in PSD2. Although the Bank of Spain is authorised and it may determine the criteria to be used to stipulate the minimum amount covered by professional indemnity insurance or other equivalent guarantee, the Informative Guide for Applicants for Authorisation stipulates that it "must cover at least the monetary amount calculated in accordance with the EBA GL/2017/08 Guidelines".

In addition to their specific framework, the framework concerning **qualifying holdings**, and the corresponding intervention and substitution, which applies to credit institutions, also applies to payment institutions[54].

[48] See article 12(g) RDL 19/2018. This open clause is not included in the regulation of authorisation applications by credit institutions (see article 7 of the Credit Institutions Regulation, Supervision and Creditworthiness Act 10/2014 of 26 June and article 6 of Royal Decree 84/2015 of 13 February, developing the Credit Institutions Regulation, Supervision and Creditworthiness Act 10/2014 of 26 June).

[49] Article 14 RDL 19/2018, developed by article 4 RD 736/2019.

[50] Article 3.3(b) RD 736/2019.

[51] Article 3.3(a) RD 736/2019.

[52] Article 51.3 RDL 19/2018.

[53] There are 44 payment institutions registered, none of which is exempt, and one institution providing the account information service. Retrieved on 11 May 2020.

[54] Articles 17.5 and 17.6 RDL 19/2018.

Revocation may refer exclusively to any of the payment services being authorised[55]. In addition to the grounds stated in PSD2, the Bank of Spain may revoke authorisation as a penalty[56].

Funds associated with the provision of payment services deposited in a separate account in a credit institution are specially protected. In the event of the payment institution becoming insolvent, payment service users enjoy an absolute right of separation[57].

Payment institutions are liable for the **actions of their employees, agents** or people to whom they have outsourced their activities[58].

While article 21 PSD2 stipulates a minimum of five years, payment institutions must **keep documents** concerning their regulatory compliance for at least six years[59].

The **Bank of Spain is the designated authority** for control and intervention of payment service providers[60]. It can gather any information that may be necessary to verify regulatory compliance. It can issue recommendations or guidelines. The auditors of payment institutions must notify the Bank of Spain of any fact or decision that may imply an infringement of the regulations or give rise to a qualified opinion[61].

The rules on **access to payment systems** are transposed unchanged, although the prohibition on discriminatory rules or restrictions to closed systems in which a single provider acts as a provider of the payer and payee, and is exclusively responsible for management of the system, is excluded[62].

Payment institutions are recognised as having **access to accounts open in credit institutions** in the terms stipulated in PDS2[63]. However, it is specified that the reasons must be stated in refusal notifications which must be based on an analysis of the specific risks or not being in accordance with the published criteria[64].

In turn, the **prohibition on payment institutions taking deposits** is also transposed in the terms stipulated in PSD2[65].

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[55] Article 18. 1 final RDL 19/2018.

[56] Article 18.1(h) RDL 19/2018, just as in the case for credit institutions (article 8.1(e) Act 10/2014).

[57] Article 21.1(a) final RDL 19/2018. See Tapia Hermida, A.J., "La regulación de los servicios de pago por el Real Decreto-ley 19/2018, de 23 de noviembre. Una visión panorámica", ***Revista de derecho bancario y bursátil***, 155, 2019, p. 22.

[58] Article 23.5 RDL 19/2018.

[59] Article 24 RDL 19/2018.

[60] See article 26 RDL 19/2018.

[61] Article 25.3 RDL 19/2018.

[62] Article 8.3 RDL 19/2018.

[63] Article 9 initial RDL 19/2018.

[64] Article 9 final RDL 19/2018.

[65] Article 10.2 RDL 19/2018.

IV. INFORMATION REQUIREMENTS AND TRANSPARENCY

The transposition **extends consumer protection to micro-enterprises** in relation to transparency and contractual rights and obligations in payment services[66].

As is permitted under PSD2, the **limits set for considering low value payment instruments** for the purpose of defining information requirements are doubled[67].

While information and conditions may be provided through the payment order or framework contract, payment service providers must provide users with a **leaflet containing the information and regulated conditions** for single payment transactions or those performed under a framework contract[68]. A leaflet is the usual way of making pre-contractual information available to customers in domestic law[69].

Information provided to the user concerning "safeguards and corrective measures" is identified as **measures concerning "responsibilities and necessary requirements for return"** without that change in title affecting its contents[70].

The payment service user may **terminate the framework contract** at any time, without prior notice[71]. This is more favourable than that stipulated in article 55.1 PSD2, which allows a one-month notice period to be agreed. After receiving the request, the provider must comply with the termination order within 24 hours. The user must be provided with the credit balance in the account and, in turn, the user must provide the supplier with the cards or payment instruments associated with the payment account so that it may cancel them. The reason for this provision is not understood, since cancelling the instrument does not depend on the user handing it over. The card, as a material object, loses its usage value once it has been cancelled.

However, this right of termination of the framework contract **is conditional upon not having contracted other financial products or services associated** with the account[72]. In that case, the user will not be able to terminate the contract and the provider may raise the cost of the account when the user uses it as a support for other financial products or services contracted with the institution. This limitation on terminating the framework contract also applies to cases in which the customer could otherwise terminate it due to not accepting a modification to the framework contract notified by the provider[73].

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[66] Article 34.1 RDL 19/2018. However, micro-enterprises are exempted from application of the right to order the return of direct debits, as it is considered that granting that right would distort the direct debit management system, causing micro-enterprises harm arising from the credit risk that payment service providers would have to bear during that period (Preamble RDL 19/2018).

[67] Article 5.3 Order ECE/1263/2019, as allowed by article 42.2 PSD2.

[68] Articles 8.1 and 13.1 Order ECE/1263/2019, which develop the disqualification in article 29.3 RDL 19/2018.

[69] See Chapter II, Bank of Spain Circular 5/2012 of 27 June to credit institutions and payment service providers concerning the transparency of banking services and responsibility in granting loans.

[70] See article 13(e) Order ECE/1263/2019.

[71] Article 32.1 RDL 19/2018.

[72] Article 32.2 II and III RDL 19/2018.

[73] Article 33.1 final paragraph RDL 19/2018.

This special framework, which limits the user's right to terminate the framework contract, has special importance in trade. In Spain, there is a high percentage of owner-occupied homes with long-term mortgages[74], and it is common to pay the mortgage instalments by direct debit from the payment account. Moreover, there is a special framework that makes it possible to link the mortgage to various insurance contracts and other financial products and services[75]. With particular relevance here, the lender bank may link the mortgage to a payment account contracted by the borrower, his/her spouse, civil partner or a relative up to the second degree of consanguinity or affinity, provided the sole purpose of that account is to accumulate capital to make loan repayments, pay interest on the loan or pool funds to obtain the loan or provide additional security for the lender in the event of default[76]. These linked products condition the right to terminate the framework contract. **The customer bound by such links loses the right to terminate the framework contract and has an obligation to maintain the payment account**, while the banking institution can unilaterally change the cost if the customer uses the account for other uses, as is commonplace. **This is an anti-competitive situation and could constitute an incorrect transposition** of PSD2. Article 55.6 allows member states to provide, in relation to termination of the framework contract, "more favourable provisions for payment service users". However, the provisions in article 32.2 RDL 19/2018 are unfavourable for users. They make the right of termination conditional upon not having contracted other financial products or services with the bank. In practice, this excludes the right of termination for the majority of users bound by other products or services.

This limitation extends to cases in which the bank notifies that it wishes to unilaterally modify the conditions of the framework contract. The customer forfeits their right if they do not accept the modification within the notice period by choosing to terminate the framework contract. Under this **ius variandi** framework, the user that has contracted other products or services with the bank, as is commonplace, is tied to the bank and cannot terminate the framework contract and must also put up with conditions being changed in the bank's favour.

The system for termination of the framework contract applies "notwithstanding that stipulated in the Civil Code concerning the parties' rights to request that the framework

[74] In December 2019, the outstanding balance of mortgage credit was 643,585 million euros, which is approximately 57% of the total credit granted to the private sector and around 52% of GDP (Asociación Hipotecaria Española, *Boletín Trimestral - Cuarto Trimestre 2019*, April 2020, page 13).

[75] Although, in accordance with that stipulated in the MCD, article 17.1 of the Property Loan Contracts Regulation Act 5/2019 of 15 March (*Ley 5/2019, de 15 de marzo, reguladora de los contratos de crédito inmobiliario*), sales practices linked to mortgage loans are prohibited, the system of exceptions is so broad that they are very common. The competent authority may authorise linked sales when the lender can demonstrate that the linked products or categories of products offered provide a clear benefit to the borrowers, taking into account the availability and prices of the pertinent products offered in the market. This authorisation of linked sales has been classified as a veritable "mess" [Karolina Lyczkowska "Chapter X.- Contratos vinculados", in *Comentario a la ley de contratos de crédito inmobiliario*, Ángel Carrasco Perera (Director), 2019]. The bank may require that an insurance policy be taken out to guarantee compliance with the obligations under the loan agreement, as well as indemnity insurance.

[76] Article 17.4 of Act 5/2019, developed by article 32 sexies of Order EHA/2899/2011 of 28 October on transparency and protection of the banking service customers, added by Order ECE/482/2019 of 26 April.

contract be declared null and void. The provisions in the Civil Code concerning the termination of contractual obligations also apply"[77]. As mentioned above, there is no codified framework for banking contracts in Spanish domestic law. They are atypical contracts with the exception of the provisions in title III of RDL 19/2018 on "rights and obligations in relation to the provision and use of payment services". The rules concerning the termination and modification of the framework contract in title II of RDL 19/2018 are also of this nature[78]. But these regulations are applied notwithstanding the framework for nullity and contractual termination in the Civil Code[79]. From this perspective, **limiting the right of termination and the bank's power to raise the cost of the service unilaterally** is not only an incorrect transposition of PSD2, contrary to the principle of effectiveness, **but may also be contrary to article 1256 of the Civil Code,** which prohibits leaving performance of the contract to the discretion of one of the contracting parties.

In addition to the foregoing, it is permitted, and will be commonplace, for **modifications to the framework contract to be provided on a "durable medium"**, i.e. through a digital storage instrument, with the problems of dematerialised "data volatility" and a "high risk of "*(ab)ius variandi tecnologia causa*": based on technology, the supplier may alter the terms of the contractual relationship with the user on a whim, giving the contract a degree of indeterminacy that is not tolerable in the law of obligations and contract"[80]. The payment service provider's *ius variandi* must be exercised in accordance with the guidelines harmonised by PSD2, which "we must apply effectively if we want to maintain the value of autonomy of will"[81].

V. PAYMENT SERVICE CONTRACT RIGHTS AND OBLIGATIONS

1. Authorisation and execution of payment transactions

Payees in payment transactions may not require the payer to pay **additional expenses or charges** for the use of any payment instruments. This is a measure that article 63.5 PSD2 allows "taking into account the need to encourage competition and promote the use of efficient payment instruments".

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[77] Article 32.6 RDL 19/2018.

[78] In fact, the rules concerning termination and modification of the framework contract are transposed in RDL 19/2018, which transposes the rules in PSD2 that require a regulation with legislative status, since they affect contracts, instead of leaving these points to RD 736/2019, which deals with transparency rules of an administrative nature.

[79] See arts. 1300 and 1124 Civil Code.

[80] Pedro José Bueso Guillén, "Chapter 6. Cumplimiento telemático de la obligación de información previa a la modificación del contrato marco de servicios de pago: A propósito de la sentencia del Tribunal de Justicia de la UE de 25 de enero de 2017 en el asunto C-375/15 "BAWAG vs. Vfk"" in *Problemas actuales y recurrentes en los mercados financieros: Financiación alternativa, gestión de la información y protección del cliente*, Rafael Marimón Durá & Jaume Martí Miravalls (editors), 2018. He considers that the *ius variandi* by the payment service provider must be exercised in accordance with the guidelines harmonised by PSD2.

[81] *Ibid*.

Users are recognised as having a **right to make use of account information services** in the terms stipulated in PSD2.[82]

Replacement of a card after unblocking requested by the user "must be performed at no cost to the user"[83]. Replacement may "be motivated by the inclusion of new functionalities in the payment instrument, which were not expressly requested by the user, provided the framework contract envisages that possibility and the replacement is performed free of charge for the customer"[84].

Payment service providers must **keep documentation and records** allowing them to prove compliance with the obligations for at least six years, and the user has a right to request said documentation[85]. However, they must keep documentation concerning the commencement, modification and termination of payment services **for a period that, in view of the lapsing rules, may be appropriate** in order to exercise their contractual rights or while they may be required to comply with their contractual obligations[86]. This rule arises from the experience built up in numerous disputes filed in the courts after the financial crisis. With some frequency, the defendant bank, which has the burden of proof of compliance with its professional obligations, has not kept all of the contractual documentation during that period. This failure to keep documentation places it in a weak position in response to claims by its customers. A case law criterion that had been accepted by the Bank of Spain's Market Conduct and Complaints Department has thus acquired legal rank[87].

Maximum execution terms shorter than those stated in PSD2 have not been stipulated[88].

2. Data protection

With regard to data protection, article 65 RDL 19/2018 merely confirms that the processing and assignment of data concerning payment services is subject to the GDPR[89]. It does not mention the processing of personal data by payment systems and payment service providers when it is necessary in order to guarantee the prevention, investigation and discovery of payment fraud[90]. It also does not mention that payment service providers

[82] Articles 7 and 38 RDL 19/2018.

[83] Article 40.4 RDL 19/2018.

[84] Article 41.1.b) final RDL 19/2018.

[85] Article 44.4 first paragraph RDL 19/2018.

[86] Article 44.4 final paragraph RDL 19/2018.

[87] Bank of Spain, *Memoria de Reclamaciones 2018*, pp. 279 and 280.

[88] As permitted by article 86 PSD2.

[89] 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.

[90] Article 94.1 initial PSD2.

may only obtain, process and keep the personal data necessary for the provision of their payment services with the express consent of the payment service user[91].

This article 65 of RDL 19/2018 contains a single paragraph. However, it is numbered as paragraph one, as if it should be followed by others that have been omitted. The payment services bill contained an article with three consecutively numbered paragraphs on data protection[92]. When the bill was published as a decree-law, the Government kept the first paragraph with its numbering but removed the following two paragraphs. The second paragraph that was removed transposed the same paragraph from article 94 PSD2. In turn, paragraph three transposed the initial paragraph of article 94.1 PSD2. Perhaps the Government considered these two paragraphs to be superfluous or irrelevant in relation to the GDPR. However, **the transposition of PSD2 in relation to data protection is partial**, which creates a legal risk in a very delicate field.

3. Risks management and authentication

According to the Bank of Spain's Informative Guide, payment institutions must "take account of that stipulated in the EBA/GL/2019/04 Guidelines on ICT and security risk management of 28 November, which is applicable from 30 June 2020 and, up to that date, that stipulated regarding the matter in the EBA/GL/2017/17 Guidelines"[93]. Payment institutions must have an **incidents reporting mechanism** that "takes into account both that stipulated in the EBA/GL/2017/10 Guidelines of 18 December on major incident reporting, and the procedure for referring such incidents to the Bank of Spain, available at the Virtual Office of the Bank of Spain[94]." The Bank of Spain must collaborate with the National Cybersecurity Institute to enhance digital trust and with that objective must "pass on to it the most frequent and significant security incidents reported by payment service providers[95]".

Payment service providers must apply **strong customer authentication** in the manner, with the contents and with the exceptions stipulated in the Delegated Regulation with regard to regulatory technical standards for strong customer authentication[96]. The entry into force of these regulations, which was set to take place on 14 September 2019, has been the subject of an EBA opinion, which allows the possibility of the national

[91] Article 94.2 PSD2.

[92] Bill Sleg8419 11/07/2018 CdE, available at this link https://www.tesoro.es/sites/default/files/leyes/pdf/20180711_sleg8419_apl_transposicion_psd2_cde.pdf

[93] Informative Guide, page 14.

[94] Informative Guide, page 13.

[95] Article 67.5 RDL 19/2018.

[96] See article 68.1 RDL 19/2018, which refers to Commission 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.

authorities applying a 15-month moratorium[97]. Making use of this authority, the Bank of Spain, within the "framework of supervisory flexibility", has accepted that **payment service providers' migration plans must be completed prior to 31 December 2020**[98]. This flexibility is conditional upon the Bank of Spain approving the relevant migration plan in accordance with that stipulated in the EBA opinion. This measure is adopted to avoid possible negative effects for users, offering a period for payment instrument issuers and transaction acquirers to migrate to solutions that comply with the requirements for strong authentication. It is a **regulatory compliance contingency plan**. In view of the non-compliant situation, while the requirement for strong authentication has not been suspended, on the basis of the EBA opinion, the Bank of Spain is providing a safe haven for institutions that present a migration plan that meets the requirements of the EBA opinion, once it has been approved by the Bank of Spain itself. This is a transitional situation that creates legal uncertainty. It has a practical purpose, namely to force the adaptation of market practices to the new security requirements. This is not something that is exclusive to Spain[99]. The aim is to achieve, after that transitional period, security in the provision of payment services, guaranteeing that strong authentication is not used as an anti-competitive measure, which is one of the most controversial issues in the new legal framework[100].

Strong authentication is a security measure, but it **may be used to restrict competition** by account servicing institutions, i.e. the banks. For this reason, these kinds of abuses by account servicing payment service providers are prohibited. During the period prior to the date of compliance with the Delegated Regulation with regard to regulatory technical standards for strong customer authentication, no account servicing payment service provider "may abuse the situation of non-compliance to prevent or hinder the use of payment initiation services and account information services in relation to the accounts it has been entrusted to manage"[101].

[97] See *Opinion of the European Banking Authority on the elements of strong customer authentication under PSD2*, EBA-Op-2019-06, 21 June 2019; completed by *Opinion of the European Banking Authority on the deadline for the migration to SCA for e-commerce card-based payment transactions*, EBA-Op-2019-11, 16 October 2019.

[98] See the Bank of Spain's informative report of 18 October 2019, which updates that of 11 September 2019.

[99] The national competent authorities (NCAs) of at least 21 member states have applied the moratorium and, after COVID-19, an extension to the moratorium is not ruled out. See "Will PSD2 / SCA be delayed" at https://support.adyen.com/hc/en-us/articles/360008764900-Will-PSD2-SCA-be-delayed-.

[100] According to the EBA: "The proposed Regulatory Technical Standards on strong customer authentication and secure communication are key to achieving the objective of the PSD2 of enhancing consumer protection, promoting innovation and improving the security of payment services across the European Union", at https://eba.europa.eu/regulation-and-policy/payment-services-and-electronic-money/regulatory-technical-standards-on-strong-customer-authentication-and-secure-communication-under-psd2, which sets out some of the background to the debate at the European Commission.

[101] Temporary provision eight RDL 19/2018.

4. Liability

Indemnity for the expenses caused by the supplier in the case of non-execution or defective or delayed execution is extended to cases of transactions initiated by the payer through a payment initiation service[102].

In an initial pronouncement on the **liability of a payment service provider** within the framework of RDL 19/2018, the Spanish Supreme Court considers that it creates a system of liability for the service provider that is only removed "in the case of fraudulent action or infringement, whether deliberate or a result of gross negligence; which applies only in the case of fraudulent action, when the provider has not established the strong authentication system[103]." It places civil liability on the bank "based on the objective duty of care that the specific regulations impose on banking institutions as payment service providers". In this way, it consolidates a "quasi-objectification" of the bank's liability "based on the theory of risk or benefiting from the activity that generates it (*cuius commoda eius incommoda*)[104]".

In its judgment of 16 December 2009, the Supreme Court had already pronounced on the possibly **abusive character of certain general terms and conditions included in payment service contracts**, in particular those involving cards[105]. This judgment considers the contractual provision requiring that loss or theft be reported "without undue delay, as soon as becoming aware of it" to be an adequate formula for contractual balance. This is the formula stipulated in article 41 of the payment service act now in force. The same judgment also pronounced on who must bear the loss arising from improper use prior to the loss or theft. The Supreme Court considers that clauses that indiscriminately exempt the banking institution from any liability, without any qualifying or modulation, are abusive "because they contradict objective good faith with an imbalance in contractual reciprocity to the detriment of the consumer". This doctrine is maintained with PSD2. It also pronounces on the party with whom the burden of proof of improper use of the PIN lies. According to this judgment, it is the cardholder "because otherwise the institution would be placed in a situation of "*probatio diabólica*", whereby it is responsible for the consequences of failure to prove a negative, which is practically impossible to prove". Regarding this point, the strong authentication requirements in PSD2, in accordance with the relevant Delegated Regulation, reduce the possibility of fraud and are a novel aspect with regard to the burden of proof. The payment service provider must prove that the payment service user committed fraud or gross negligence[106]. When the user denies having authorised an executed payment transaction or claims that the payment transaction was not correctly executed, "it is for the payment service provider to prove that the payment transaction was authenticated, accurately recorded, entered in the accounts and

[102] Article 62 RDL 19/2018, excluded from the rules of discipline and regulation for penalty purposes, according to article 71.3(a) RDL 19/2018.

[103] Supreme Court Judgment 332/2020, Criminal Division, of 12 February, ruling in a joined case on the bank's subsidiary civil liability.

[104] In the same way, the Judgment handed down by Madrid Provincial High Court, Twelfth Chamber, 418/2019, of 3 October, considers that Act 16/2009 "establishes a quasi-objective system of liability for the payment service provider".

[105] Supreme Court Judgment, Civil Division, 792/2009, of 16 December.

[106] Article 44.3 RDL 19/2018.

not affected by a technical breakdown or some other deficiency of the service provided by the payment service provider"[107]. These rules, based on strong authentication, completely reverse the burden of proof. Therefore, we must consider that the **case-law doctrine that regarded requiring payment service providers to prove undue use of the payment instrument as "*probatio diabólica*" is no longer applicable** as it is contrary to the current legal framework.

VI. ALTERNATIVE DISPUTE RESOLUTION (ADR) PROCEDURES

1. Complaints services

Payment service providers must have a **customer service** to deal with complaints submitted by users in relation to rights and obligations in the provision of such services, including the transparency rules[108]. The deadline for receiving the final reply to complaints "shall not exceed one month", compared with the "thirty-five business days" stipulated in article 101.2 PSD2. On customer service procedures, the principle of proportionality prevails and the Bank of Spain may modulate the institutions' obligations in relation to its complaints service "in view of the size and structure of institutions, as well as the nature, size and complexity of the activities they perform"[109].

The Bank of Spain has adopted as its own the **EBA and ESMA guidelines on complaints-handling** for the securities and banking sectors, the scope of which has been extended to payment services[110].

2. Alternative dispute resolution

Alternative dispute resolution will apply "when [the institution envisaged in additional provision one of Act 7/2017] is created[111]". The said provision envisages the creation of a single alternative dispute resolution institution for consumer disputes in the financial sector within eight months. This provision has not been complied with to date. There is a bill for the creation of the **Independent Administrative Authority for the Protection of Financial Customers**, which was submitted on 7 March 2019 as a regulatory solution to the "current situation of legal disputes in the financial sector, together with disputes

[107] Article 44.1 initial RDL 19/2018, which matches the repealed article 30.1 of the Payment Services Act 16/2009 of 13 November. Furthermore, it is somewhat incoherently referred to in the legal grounds of Supreme Court Judgment 792/2009.

[108] In accordance with article 69 RDL 19/2018, and secondarily in accordance with that stipulated in article 29 of the Financial System Reform Measures Act 44/2002 of 22 November [*Ley 44/2002, de 22 de noviembre, de Medidas de Reforma del Sistema Financiero*], and Order ECO/734/2004 of 11 March on customer service departments and services and the ombudsman of financial institutions, amended by final provision 2.1 of Order ECE/1263/2019.

[109] Additional provision three of Order ECO/734/2004, added by final provision 2.2 of Order ECE/1263/2019.

[110] See EBA, *Final report on the application of the existing Joint Committee Guidelines on complaints-handling to authorities competent for supervising the new institutions under PSD2 and/or the MCD*, JC 2018 35, 31 July 2018; adopted by the Decision of the Executive Committee of the Bank of Spain of 19 March 2020.

[111] Article 70.1 RDL 19/2018.

between customer and financial institutions being brought before the courts, sometimes en masse".

The Bank of Spain's Complaints Service has transitionally undertaken the financial ADR responsibility, in particular concerning payment services. This service is part of the "**Market Conduct and Complaints Department**"[112], which has had to adapt its operations and procedures to guarantee its organisational and functional independence[113]. However, it is a supervisory department that **lacks the independence and impartiality required to function as an ADR service**[114]**.**

When the new authority is created, in its work as a financial ADR system, it must settle the complaints and claims submitted by payment service users arising from regulatory infringements, as well as non-compliance with standards or good financial practices and customs. Article 102.1 PSD2 restricts the scope of ADR to "the settlement of disputes between payment service users and payment service providers concerning the rights and obligations arising under Titles III and IV of this Directive", which may include the EBA's standards or rules. There is no reference to **"good financial practices and customs"**. This expansion of the applicable framework may call the effectiveness of the mechanism into question. As the Supreme Court says, "banking abuses must be avoided, even when they are widespread practice"[115]. Contractual obscurity cannot be justified by "banking custom"[116].

VII. SUPERVISORY ENFORCEMENT

Article 71 RDL 19/2018 **refers to the penalty framework for credit institutions** to establish the penalty framework for payment institutions, designating the Bank of Spain as the competent authority. This framework applies to both institutions authorised in Spain and agents and branches of providers authorised in another member state. As a new feature, the Bank of Spain has established a procedure for users and their associations to

[112] Since June 2013, the department has centralised the Bank of Spain's conflict resolution responsibilities, not only "with the aim of providing individual conflict resolution, but it is also a source of crucial information to implement preventive regulatory and supervisory actions with a view to promoting the correct conduct of institutions towards their customers" (Bank of Spain, Complaints Report 2013, page 18; available at https://www.bde.es/f/webbde/Secciones/Publicaciones/PublicacionesAnuales/MemoriaServicioReclamaciones/13/1.INTRODUCCION.PDF).

[113] See temporary provision seven of RDL 19/2018, according to which this service must adjust "its procedures for settling complaints and claims submitted by payment service users to the principles of professionalism, adequacy, impartiality, effectiveness and organisational and functional independence".

[114] See article 102.1 PSD2 and article 1 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes.

[115] Supreme Court Judgment of 8 April 1994.

[116] Supreme Court Judgment of 28 June 2001. In Italy, reference cannot be made to customs to determine the consideration required of the customer (article 23.2 *Testo unico in materia di intermediazione finanziaria*, according to which "*E' nulla ogni pattuizione di rinvio agli usi per la determinazione del corrispettivo dovuto dal cliente e di ogni altro onere a suo carico*").

report alleged infringements117. Payment service providers must notify the Bank of Spain of the information it deems necessary to exercise control functions118.

Another relevant new feature is the **special framework for infringements that may be committed by the Bank of Spain**, which is handled by an *ad hoc* body within its structure. The decisions issued by this body must be reported to the **Spanish Ombudsman** as the supervisor of the public authorities' activity119. It is an extravagant provision which may create conflict between two independent administrations that will have to be resolved by Parliament, to which both institutions are accountable.

VIII. CONCLUSIONS

Spain has opted to transcribe the contents of PSD2 without the necessary adaptation to domestic law. All that is added is a few nuances, except regarding two essential questions. On the one hand, the right to terminate the framework contract and the *ius variandi* regarding fees to be received from the customer. This framework is contrary to that stipulated in PSD2 and article 1256 of the Civil Code, which prohibits leaving performance of the contract to the discretion of one of the contracting parties. On the other hand, there is no alternative dispute resolution (ADR) system. A Bank of Spain department has taken on the dispute resolution responsibilities but lacks the necessary independence and impartiality to function as an ADR service. With these two exceptions, the transposition is literal, by simply transcribing the text of PSD2, without adapting the text of the directive to internal law. This lack of adaptation to internal law has two readings. First, it creates the appearance of a fully harmonized domestic law. In fact, there are no substantial differences between the PSD2 text and the one collected in internal law. But this harmonization is somewhat apparent, since the text of the directive has not been adapted to internal law, doubts arise for legal operators on the interpretation of the rules and procedures. In good measure, the Bank of Spain is the one who is serving as a guide to locate the norm applicable to the factual assumption and its true scope. Its criteria, published each year in the Claims Report, guide the application of the regulations. There is a problem of legitimacy, since the criteria of the Bank of Spain is not source of the Law. Furthermore, there is a prudential bias in their solutions, favouring the protection of solvency over the proper conduct of institutions. In fact, the International Monetary Fund has asked the Bank of Spain to be more proactive in applying the rules of conduct[120].

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[117] In accordance with that stipulated in article 71. 5 RDL 19/2018. Procedure ES_BDE_C797_P234 of the Virtual Office of the Bank of Spain, which can also be used to report undue refusal of their right to access payment accounts in credit institutions in order to allow them to provide their services; procedure available at https://sedeelectronica.bde.es/sede/es/menu/institucionesfin/sistemas-de-pago/denuncia-de-presuntas.html

[118] Additional provision three RDL 19/2018.

[119] Article 1 Ley Orgánica 3/1981, de 6 de abril, del Defensor del Pueblo.

[120] IMF (2017), IMF, Spain: Financial Sector Assessment Program-Technical Note-Supervision of Spanish Banks, November 2017, paragraph 177, p. 54. Available at: http://www.imf.org/~/media/Files/Publications/CR/2017/cr17345.ashx.

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