PSD2 relevance for Swiss financial service providers

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I. Introduction

Since 13 January 2018, the second Payment Services Directive (PSD2)[1] has been in force in the EU. Its starting point is the European internal market as the cornerstone of the European Union: an area without internal frontiers, in which the free movement of goods, persons, services and capital is ensured.[2] The internal market goes beyond the borders of national territories; it implies the goal of a more intensive market and thus greater economic growth.

For the effective development of the free movement of goods and services, cash flow processes must be efficient. It therefore needs a functioning payment system.[3] The EU

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1 Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market […] (OJ L 337, 23.12.2015, pp. 35–127).

2 See art. 26 para. 2 of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, pp. 47–390).

3 See: Completing the Internal Market, White Paper from the Commission to the European Council (Milan, 28-29 June 1985) COM (85) 310, June 1985, marginal 125: "First, the completion of a large internal market inevitably involves a financial dimension. The free movement of goods, services and persons must also mean that firms and private individuals throughout the Community have access to efficient financial services. The effectiveness of the harmonisation of national provisions governing the activities of financial intermediaries and markets would be greatly reduced if the corresponding capital movements were to remain subject to restrictions." Also LINARDATOS, WM 2014, p. 300.

has taken various measures in this context. The most important of these are:[4]

- Comprehensive access to a payment account. The Payment Accounts Directive[5] achieves this goal. It aims to ensure that all consumers have access to a payment account with basic functions.[6] The Directive also aims to improve the transparency of payment account charges for consumers, in particular through information duties and comparison websites.[7] In order to promote competition, payment service providers will be obliged to provide a switching service to make it easier for consumers to change payment accounts.[8]
- The legal equivalence of cash and book money payments. Competition for goods and services throughout the internal market can only succeed if they are procurable at distance sales. This is achieved by largely exempting book money payments from interchange fees, which corresponds to the factual status quo for cash payments. The regulation on interchange fees for card-based payment transactions[9] and the SEPA Regulation[10] provide here for. Ultimately, however, the PSD2 also plays a role here, as it stipulates in Art. 62 para. 4 that the payee shall not request charges for the use of card payments or for credit transfers and direct debits.[11] The payee may therefore not pass on his own costs to the payer.
- The equal pricing of domestic and foreign payments. The Regulation on cross-border payments[12] is committed to this objective.

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4 See also the overview in BÖGER, Neue Rechtsregeln, p. 195 et seqq.; HESS, Euro-Zahlungen, p. 54 et seqq.

5 Directive 2014/92/EU of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (OJ L 257, 28.8.2014, pp. 214–246). Regarding the Directive, see LINARDATOS, WM 2015, p. 755 et seqq. For the implementation in Germany, see FINDEISEN, WM 2016, p. 1765 et seqq.

6 See art. 16 et seqq. and preliminary art. 36 et seqq. of the Payment Accounts Directive.

7 Art. 1 para. 1 and art. 3 et seqq. of the Payment Accounts Directive.

8 Art. 9 of the Payment Accounts Directive.

9 Regulation (EU) 2015/751 of 29 April 2015 on interchange fees for card-based payment transactions (OJ L 123, 19.5.2015, pp. 1-15). Regarding the Regulation, see OECHSLER, WM 2016, p. 540 et seqq.

10 Regulation (EU) No 260/2012 of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009 (OJ L 94, 30.3.2012, pp. 22–37).

11 Art. 62 para. 4 PSD2. This provision applies to payments in the area of Regulation (EU) 2015/751 (interchange fees) and Regulation (EU) No 260/2012 (SEPA Regulation). See OMLOR, ZIP 12/2016, p. 561, according to which this means positively that the creditor may no longer charge fees for card payments and for all credit transfers and direct debits. See also OMLOR, WM 2018, p. 941 et seq. on surcharging and German implementation in § 270a BGB.

12 Regulation (EC) No 924/2009 of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) No 2560/2001 (OJ L 266, 9.10.2009, pp. 11–18).

- The development of uniform standards and technical requirements for credit transfers and direct debits in euro. The SEPA Regulation[13] ensures this.

However, SEPA is more than just a regulation. SEPA stands for Single Euro Payments Area. SEPA intends to eliminate the differences between national and cross-border cashless euro payments.[14] These payments shall be triggered and received according to the same standards and as securely and efficiently as in the domestic area from anywhere in the SEPA area.[15]

The PSD2 plays a central role in the SEPA project.[16] It creates a uniform supervisory regime for payment service providers. It also creates uniform rights and obligations in the payment service agreement between the payment service provider (simplified: the bank) and the users of payment services (simplified: the bank customer).[17] The agreement in the PSD2 is a consumer protection contract, as was the case in the previous directive of 2007.[18] This also reflects the fact that the risks for bank customers have been further reduced by the liability regulations that allocate the majority of the risks for unauthorized payments to the banks.

A revision of the PSD1 became necessary because digitalisation has transformed payment transactions fundamentally in recent years. Today, we essentially pay electronically; new security standards are therefore necessary. However, digitalisation has also produced many new providers who, unlike banks, are not regulated as traditional payment service providers. The PSD2 regulates these providers, the so-called third party providers (TPP).

II. Relevance of the PSD2 for Swiss financial service providers

Why is there a reason to be interested in the PSD2 in Switzerland? Switzerland is not a member of the EU; the aforementioned regulations are therefore not applicable law in Switzerland and there is no obligation to implement them. Moreover, in its position

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13 Cf. fn. 10.

14 Regarding the history of SEPA, see the (very worthwhile reading) book of WANDHÖFER, EU Payments Integration, passim. See further WERNER, WM 2014, p. 243 et seqq.

15 More about SEPA, HESS, Euro-Zahlungen, p. 60 et. seqq.

16 The same already applied to the PSD1, see WANDHÖFER, EU Payments Integration, p. 33 et seqq.

17 For other PSD2 motifs, see OMLOR, ZIP 12/2016, p. 559 et seq.: Promoting the internal market and the completion of an integrated market for non-cash payments; legal equivalence of cash and book money; digital payments; improved consumer protection.

18 Directive 2007/64/EC of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ L 319, 5.12.2007, pp. 1–36).

paper of September 2017, the Swiss Bankers Association (SBA) spoke out against introducing PSD2-equivalent regulation.[19] Its position paper focuses on one - albeit central - point of the PSD2, namely the obligations for banks to open access rights to TPP. First, the SBA argues that regulation analogous to PSD2 is unnecessary because there is no action required in this area. Competition is functioning effectively and the banks already (irrespective of the PSD2) offer a large number of innovative solutions. A regulatory obligation to open interfaces would be an unnecessary intervention in what is a functioning market and would result in competitive distortion to the disadvantage of the banks. Secondly, a forced opening would be dangerous because it could lead to security gaps. Thirdly, the bank would incur additional efforts and costs in the areas of security infrastructure and compliance, which in the end the customer would have to pay.[20]

However, there are a number of reasons for taking a closer look at the PSD2:

1. Competition, technical standards and European customers

Firstly, the PSD2 is relevant for Swiss banks for competitive reasons. Switzerland is a leading financial centre, geographically located in the heart of Europe. The Swiss banks therefore have good reasons to keep up with their competitors in the EU when it comes to the framework conditions for payment transactions.

Secondly, the PSD2 plays a role for Swiss banks from both a regulatory and a private law perspective because it sets technical standards. If the EU sets security standards for online banking and for banks' interfaces to external service providers within the framework of the PSD2, then this is a regulation on the bank's operational risks. FINMA will take account of such standards. If the wheel already exists, there is no need to reinvent it. It can be equipped with fewer spokes; its size reduced or enlarged. However, the wheel itself is already there and it defines the starting-point for the further regulatory considerations that a Swiss supervisory authority will make - at the latest after the next high-profile hacker attack on customer accounts. The same applies to private law: New security standards for online banking narrow down the due

19 SBA, position paper (PSD2), September 2017.

20 SBA's conclusion regarding PSD2: "A one-sided opening of access rights for third parties as required within the EU under PSD2 is an experiment at the expense of bank customers that creates dangerous confusion and undermines the customer's data security." See: <https://www.swissbanking.org/en/topics/digitisation/open-banking-and-standardised-interfaces-apis/payment-services-directive-psd2?set_language=en>.

diligence of the bank - and of a Swiss bank as well. It determines the standard that applies in the European financial centres, which includes Switzerland.

Thirdly, the PSD2 is relevant for Swiss banks because in a dispute between an EU customer and the Swiss bank, the PSD2 is regularly applied.[21] In the retail sector, contracts between the Swiss bank and its EU customers are consumer contracts within the meaning of the Lugano Convention.[22] Due to the mandatory consumer jurisdiction, EU customers can sue the Swiss bank at their domicile in the EU,[23] if the bank has oriented its activities towards this state - whereby the courts and the European Court of Justice (ECJ) set the bar extraordinarily low. If the court in an EU member state is dealing with the case, the national law of the involved member state applies due to the principle of favourable treatment in the Rome I Regulation[24] – an thus the (nationally implemented) PSD2 is applied. The principle of favourable treatment is also mandatory; any other choice of law clauses in the general terms and conditions of the Swiss banks are irrelevant.[25] The dispute between the drugstore king and multimillionaire Erwin Müller and the bank Safra Sarasin has provided plenty of unpleasant visual material for the banks.[26]

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21 See EMMENEGGER/FRITSCHI, Schweizer Banken: EU-Recht für EU-Kunden, p. 75 et seqq.

22 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 147, 10.6.2009, pp. 5–43).

23 Art. 17 in connection with Art. 23 para. 5 of the Lugano Convention.

24 Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (OJ L 177, 4.7.2008, pp. 6–16).

25 According to the principle of favourable treatment (or in German "Günstigkeitsprinzip"; art. 6 para. 2 of the Rome I Regulation), the choice of law is excluded if provisions apply in the country of the consumer's habitual residence which offer a higher level of protection than the chosen law. In view of the high level of consumer protection for financial services in the EU, the applicability of Swiss law is thus de facto excluded.

26 See EMMENEGGER/FRITSCHI, Schweizer Banken: EU-Recht für EU-Kunden, p. 76 et seqq. In a nutshell: In connection with the scandalous cum-ex transactions, Müller suffered a (total) loss of EUR 50 million, whereupon he sued the bank at his residence in Ulm/Germany. The German federal court of justice had already affirmed the jurisdiction. The district court Ulm decided meanwhile, the choice of law clause in favour of Switzerland is invalid. In application of German law, it obliged the bank to reverse the entire transaction and thus to repay the investment, because the bank had not sufficiently informed Erwin Müller about the receipt of retrocessions. For previous decisions, see German federal court of justice (BGH), XI ZR 223/15 of 26 July 2016, summarised in EMMENEGGER/THÉVENOZ, SZW 2017, p. 242, r36. Preliminary ruling of the Higher Regional Court (OLG) Stuttgart summarised in EMMENEGGER/THÉVENOZ, SZW 2015, p. 242, r39. Decision: district court (LG) Ulm, 4 O 66/13 of 22 May 2017 (operative part of the judgment). Summary of the decision in EMMENEGGER/THÉVENOZ, SZW 2018, p. 207, r31. Decision confirmed by: Higher Regional Court (OLG) Stuttgart, 5 U 98/17 of 14 September 2018 (operative part of the judgment).

2. Single Euro Payments Area (SEPA)

SEPA plays a special role for Switzerland in connection with the PSD2.[27] The Swiss banks have been participating on the technical side of SEPA since 2007 and carry out euro payments according to the SEPA standards. Participation in a technically uniform payment system for the euro is central for Swiss banks because it can reduce the expenses for euro transfers. Participation in SEPA is also a de facto prerequisite for the use of EBA clearing, i.e. the clearing services of the European Banking Association. EBA clearing is cheaper and faster and requires less liquidity - this is another advantage for the participating banks.

However, the technical side of SEPA is not a legal leeway: In the course of their accession to SEPA, the Swiss banks committed themselves to observe the provisions of the PSD2 (and previously the PSD1) in the bank/customer relationship.

a) The players

For the SEPA implementation, an adequate legal framework is required. However, it also necessitates the technical development of a payment system that functions according to uniform standards; it therefore depends on processes, data formats and software solutions - in other words, SEPA products. Three players are involved in providing these framework conditions: First, the EU Commission, which creates the legal framework. Secondly, the European Payments Council (EPC), i.e. the organisation of credit institutions and industry associations. They are to implement SEPA on the technical side. Finally, the Eurosystem, i.e. the merger of the euro central banks with the European Central Bank (ECB). In close cooperation with the EU Commission, the Eurosystem sets out its expectations for the EPC with regard to the implementation of the SEPA process. The efforts of these three players are closely interlinked.

aa) The EU commission and the Eurosystem

The EU Commission signalled the actual launch of SEPA with the publication of the Regulation on cross-border payments[28] in December 2001, which required equal price treatment for domestic and internal market payments and forced the switch to the

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27 In detail: WANDHÖFER, EU Payments Integration, p. 33 et seqq.; HESS/KEISER, SZW 2009, p. 153 et seqq.; HESS, Euro-Zahlungen, p. 60 et seqq.

28 Regulation (EC) No 2560/2001 of 19 December 2001 on cross-border payments in euro (OJ L 344, 28.12.2001, pp. 13–16). No longer in force. Before: Communication from the Commission to the Council and the European Parliament - Retail payments in the internal market, COM (2000) 36 final.

International Bank Account Number (IBAN) and the institution's Bank Identifier Code (BIC).[29] As a result, the SEPA Implementation had reached two milestones. The first Payment Services Directive of November 2007 was the following milestone.[30]

The EU Commission kept the roadmap for SEPA on course by means of additional legal regulations. SEPA instruments should have replaced the national instruments by 2010. When it became clear that this was not the case, it published the SEPA Migration Regulation[31] in March 2012. It obliges payment service providers to implement the cornerstones of SEPA, namely the SEPA standards (IBAN) for credit transfers and direct debits.

The Eurosystem publishes annual progress reports on SEPA. The progress reports are closely coordinated with the EU Commission.[32] The reports acknowledge the implementation of SEPA to date, but at the same time formulate the expectations of payment service providers and in particular of the EPC with regard to further efforts.[33]

bb) The European Payments Council

SEPA does not work without the banks. Ultimately, they must provide the SEPA products. The main coordinating decision-making body for the banking industry in relation to SEPA is the European Payments Council, established in 2002.[34] Its members are banks or industry organisations in the EU, the EEA and Switzerland.[35] The number of seats in each country depends on the number of payment transactions in euros in that country and its population, as well as the appropriate representation of all banking sectors.[36]

The EPC represents the industry in discussions with the EU institutions, but also develops the various technical standards and instruments for processing cross-border

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29 See cons. 11 and art. 5, Regulation (EC) No 2560/2001.

30 The PSD1 is not a pure SEPA directive from the conception, but the PSD1 is a comprehensive regulation of payment transactions. However, the PSD1 is relevant for SEPA among others because it has pushed the direct debit procedure.

31 See cons. 5 of the SEPA Regulation: "Self-regulatory efforts of the European banking sector through the SEPA initiative have not proven sufficient […]."

32 Namely the ECB's 4th progress report, Towards a single euro payments area, from 12. February 2006, p. 11: "In this report, which has been discussed with the European Commission, the Eurosystem endeavours to make this guidance more explicit and comprehensive."

33 Namely the ECB's 4th progress report, Towards a single euro payments area, from 12. February 2006, p. 17: "The Eurosystem expects that by 1 January 2008: [following is a list of implementation projects]".

34 Regarding EPC, see HESS MARTIN, Euro-Zahlungen, p. 62 et seq.

35 Swiss member of the EPC is UBS, see EPC website, list of EPC members.

36 HESS/KEISER, SZW 2009, p. 158.

payments.[37] From a basic conception, the credit industry was to develop the tools for a pan-European payment system, which, because of its technical advantages, would replace national payment systems. The EPC was to assume overall responsibility for the implementation of the migration process. It is in the EPC's responsibility to establish criteria to assess SEPA compliance.[38]

In other words, they relied on competition. However, given the importance of SEPA, the European Commission has reserved the right to propose or introduce the necessary legislation for its realization.[39] That is what it ultimately did with the SEPA Migration Regulation.

The EPC subsequently developed the procedures for the main payment instruments: The SEPA Credit Transfer, the SEPA Direct Debit and the SEPA Cards Framework. In addition, there are the procedures for SEPA Instant Credit Transfer and SEPA Direct Debit Business-to-Business. The SEPA data formats are standardized so that fully automated processing is possible. The EPC has defined the functionality of the various payment instruments (SEPA schemes) in documents. The so-called rulebooks are central to this. Financial service providers are contractually obliged to comply with the rules.[40] Membership of the schemes takes place via private law contracts, the so-called SEPA Adherence Agreements. They contain the SEPA rulebooks and the obligation to comply with them. By signing the SEPA Adherence Agreements, the participating financial institutions conclude multilateral agreements with the EPC and the other financial institutions participating in SEPA.[41] The contracting parties are not states, but the signatory financial institutions.

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37 For example, the uniform data format for the transmission of payment messages (ISO 20022) constitutes the basis for the interoperability of payment traffic infrastructures in SEPA and is designed to enable fully automated processing of payments. The data format was developed by the European banking industry, see HESS/KEISER, SZW 2009, p. 156. For the data format see SEPA Data Model, Version 2.2., European Payments Council approved on 13 December 2006 (EPC029-06).

38 ECB's 4th progress report, Towards a single euro payments area, from 12. February 2006, p. 13.

39 ECB's press release, Single Euro Payments Area, from 4. May 2006, p. 2.

40 For details on the contents, see HESS, Euro-Zahlungen, p. 69 et seqq.

41 See BAUMBACH/HOPT HGB-HOPT, Bankgeschäfte, marginal C/18: The accession agreement is subject to Belgian law, the individual contractual relationships are governed by International Private Law (IPR) and the customer relationship is governed by national law (general terms and conditions). See also HESS MARTIN, Euro-Zahlungen, p. 73.

b) Participation of the Swiss financial institutes within the SEPA schemes

Switzerland became a member of the SEPA member states in 2006.[42] Membership entitles Swiss institutions to sign the relevant SEPA Adherence Agreements.[43] They thus commit themselves towards the EPC and the other participating financial institutions to comply with the SEPA rulebooks.

In fact, the list of participating institutions shows that virtually all Swiss banks have joined the SEPA Credit Transfer Scheme.[44] There are only thirteen of them for the direct debit procedure. Ten institutions participate in the b2b Direct Debit Scheme.[45] The SEPA Instant Credit Transfer scheme shows no Swiss participation. The observations therefore concentrate on the SEPA Credit Transfer Scheme.

c) Conditions for participation: PSD equivalence

aa) PSD equivalence of the general framework

Regulation and self-regulation are closely interlinked in the SEPA project. The SEPA regulatory framework bases on the common legal framework. Accordingly, the Credit Transfer Scheme Rule Book (CTSR) clarifies in its introductory articles that participation requires the implementation of the PSD (the version in force).[46] Hence, a solution was necessary for financial institutions outside the EU. They opted for the concept of equivalence affecting only the civil parts of the PSD and not the supervisory parts. Equivalence is therefore required with regard to Titles III and IV of the PSD:

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42 Cf. information on the website <www.sepa.ch>: Switzerland as part of the SEPA zone.

43 In November 2007, the first banks signed the SEPA Adherence Agreement (including UBS), and from January 2008 the first SEPA-compliant payments were executed. See JURI, ClearIT, p. 7. For the conditions for participation, see c) Conditions for participation.

44 The participating banks are consultable on the EPC website (Register of Participants). <https://www.europeanpaymentscouncil.eu/what-we-do/participating-schemes/register-participants/registers-participants-sepa-payment-schemes>. The comparison between the banks approved by FINMA and the banks participating in the Credit Transfer Scheme (179) reveals that the foreign-controlled banks have not signed the adherence agreement or that in these cases the foreign parent bank is (probably) the participant.

45 Particularly noteworthy is the wide range of participating institutes. In addition to the large institutions such as Credit Suisse, UBS, Postfinance, Raiffeisen and the large foreign banks JP Morgan Chase and BNP Paribas, three medium-sized banks are represented: Luzerner Kantonalbank, Neue Aargauer Bank and Bank CIC. The tenth bank is the Banca Popolare di Sondrio, a small bank.

46 In order to participate in the Credit Transfer Scheme, you must also comply with Regulation (EC) No 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfers of funds (OJ L 345, 8.12.2006, pp. 1–9). See also HESS/KEISER, SZW 2009, p. 150.

> "It is a prerequisite for the use of the Scheme that the Payment Services Directive (or provisions or binding practice substantially equivalent to those set out in Titles III and IV of the Payment Services Directive) is implemented or otherwise in force in the national law of SEPA countries."[47]

As a prerequisite for their accession, Swiss credit institutions had to prove that in Switzerland, in the area of euro payments, the law or court practice governing the legal relationship between banks and each other and between banks and their customers provides a legal framework that is equivalent to the rules in the PSD. In September 2007, the EPC affirmed equivalence and, based on this, decided that Swiss financial institutions could participate.[48]

bb) PSD equivalence in the bank-customer relationship

However, the abstract equivalence of the legal framework is not enough for Swiss credit institutions. Furthermore, the SEPA Rulebook contains a special provision for banks from non-EU countries entitled "Application of EU legislation between Participants". Under this provision, banks from non-EU states undertake to provide their customers with a service equivalent to that required by the PSD:

> "Each Participant that is not subject to the Payment Services directive under its national law shall vis-à-vis other Participants and vis-à-vis its Customers and to the extent permitted by the national law applicable to such participant, comply with and perform obligations that are substantially equivalent to those provisions in Title III and IV of the Payment Services Directive which are relevant for SEPA Credit Transfers."[49]

According to the Rule Book, all participating service providers are also obliged to waive the exercise of nationally anchored rights if these could effectively or potentially conflict with the provisions in Titles III and IV of the PSD.[50] In other words, legal positions arising from national law should only be exploited to the extent that they are within the SEPA framework.

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47 CTSR 2017, version 1.3, section 1.8.

48 HESS, Euro-Zahlungen, p. 75, discussion of the relevant aspects on p. 76 et seqq.; HESS/KEISER, SZW 2009, p. 160.

49 CTSR 2017, version 1.3, section 5.14, first paragraph.

50 CTSR 2017, version 1.3, section 5.14, second paragraph: "Further, each Participant (whether or not subject to the Payment Services Directive) shall refrain, to the extent reasonably possible, from exercising any rights accorded to it under its national law vis-à-vis other Participants and vis-à-vis its Customers that either conflict or that could potentially conflict with the provisions in Title III and IV of the Payment Services Directive."

In conclusion, the Swiss banks have committed themselves vis-à-vis the EPC and the other SEPA participating banks to comply with the relevant requirements of the PSD2 for euro credit transfers vis-à-vis their customers.

cc) PSD equivalence in the bank-TPP relationship

An exception to the equivalence requirement applies with regard to those provisions in the PSD2, which deal with TPP. These providers need direct access to the accounts of their users for their service, without managing these accounts themselves. Specifically, these are third party issuers of payment cards, account information and payment initiation services.[51] The PSD2 obliges the banks to co-operate with TPP and gives the bank customer a corresponding claim. In return, the TPP are integrated into the PSD2 specifications and are supervised.

Swiss SEPA financial institutions, however, are not required by EPC regulations to open their programming interfaces since the introduction of the PSD2. The CTSR expressly states that compliance with the PSD2 equivalent rules or obligations does not imply compliance with the rules for access to payment initiation services in the case of art. 66 PSD2 and related articles.[52] The reason for this is that the required opening of programming interfaces in the PSD2 is linked to the licensing requirements for payment institutions, which in turn only apply to payment service providers in the EEA. This implies that Swiss SEPA financial institutions are not obliged by virtue of the reference in the EPC regulations to open their programming interfaces in the sense of the PSD2.[53]

This means that every Swiss bank - regardless of whether it is a SEPA financial service provider or not - is free to decide whether and how it wishes to make its program interfaces accessible to TPP after the customer has given his consent, as long as there are no analogous regulations in Switzerland to the PSD2. However, if a Swiss financial services provider intends to open its program interfaces, it must ensure compliance with adequate security requirements. This already results from Swiss financial market

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51 In detail, see EMMENEGGER, Dritten Zahlungsdienstleistern, p. 88 et seqq.

52 Cf. CTSR 2017, version 1.3, section 5.14, third paragraph; "[…] For the avoidance of doubt and notwithstanding the above paragraphs of this section, it is recognised that the compliance obligations for a Participant that is not subject to the Payment Services Directive under its national law and is operating outside the EEA shall not include the obligations resulting from Article 66 and related Articles of the Payment Services Directive as these Articles should only apply in combination with the authorisation framework within the EEA in accordance with Titles I and II of the Payment Services Directive.[…]."

53 ESSEBIER/BOURGEOIS, EuZ 2018, p. 124.

regulation.[54] If the financial services provider itself cannot technically ensure compliance with these requirements from the outset, it is advisable to agree the most important requirements with the TPP contractually.[55]

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54 Cf. e.g. FINMA-Circular 2008/21 "Operational Risks Banks", passim.

55 ESSEBIER/BOURGEOIS, EuZ 2018, p. 124.

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