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John Berrigan
Director General
Directorate-General for Financial Stability,
Financial Services and Capital Markets Union
European Commission
Rue de Spa 2
1049 Brussels
Belgium

Date: 5th July 2022

Reference: European Commission Call for input on review of the Payments Services Directive (EU) 2015/2366 (PSD2)

Dear Mr. Berrigan,

I am writing to you in response to the European Commission Call for input to the review of the PSD2 from May 2022, and specifically on the impact and application of the Directive.
The European Commission invited responses on this matter by 5 July 2022.

We have engaged our members at MRC – the large eCommerce merchants operating in the EU – and provide you today with the collective opinion on several points.

The MRC is a non-profit membership organisation for eCommerce merchants, solution providers, acquirers, payment gateways, card issuers, card schemes, law enforcement agencies and payments consultants. We have a global reach of decision makers within this organisation (85% of the biggest eCommerce global retail brands). We bring a wealth of knowledge on activities on the ground in payments, as well as details of increased challenges as a result of several items we wish to bring to your attention, as follows:

1. Consistency – we and our members would be supportive of parts of the directive being regulated to ensure consistency across National Conduct Authorities. For large merchants operating across the EU, they are experiencing a different view from various NCAs, which brings a challenge in meeting requirements that have not been defined across the board. Reporting can't be consistent, based on the variety across the ask from NCAs.

   For example:

   TRA Exemptions - Strong Customer Authentication and TRA exemptions could be simplified and made consistent to help reduce implementation costs. For example, SCA TRA exemptions are applied at legal entity level which is extremely inflexible for acquirers that have a wide spectrum of merchants with different levels of fraud. Essentially proactive merchants who are minimizing their fraud rates may not be rewarded with a higher exemption given the general fraud rate level across the legal entity.

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As a further example of this, the current fraud rate/ SCA exemption levels are defined as 0.13% between €0 and €100, 0.06% between €100 and €250 and 0.1% between €250 and €500. MRC acquiring members currently avail of the 0.13% rate for Legal entity 1 and the 0.1% rate at legal Entity 2. However, a third legal entity would be required for the 0.06% fraud rate level and the management of the exemption/ fraud rate levels for both entities is an onerous exercise.

A better option would be to apply fraud rates to the Merchant ID.

TRA Exemptions – it appears there is a general lack of consistency in the application of the ruleset and in particular the application of fraud thresholds. Greater regulatory oversight is required to ensure a level playing field across the industry.

2. Lack of consistency in issuer acceptance/ declines on Merchant Initiated Transaction (MIT) Rules. Currently MIT transactions (recurring transactions like subscriptions) are exempt from SCA provided they have been proceeded with an original authenticated transaction at setup. This allows the issuer to verify the cardholder for the initial and subsequent transactions.

   MRC members found that the implementation across multiple jurisdictions was complicated by NCAs applying gold-plating and unique definitions to requirements. A consistent and prescriptive approach to implementation would be beneficial for future changes.

3. Friendly Fraud/ First Party Misuse. There is growing evidence that a weakness in the directive allowed for a massive increase in the number of cases of first party misuse (formerly known as friendly fraud), where the bona fide cardholder purchases goods or services, then claims fraud on their account in order to get their money back and retain the goods and services. The growing trends in this space are as a result of the regulatory pressure on card issuers to dispute *all* cases of fraud put to them by consumers.

   Under **article 71** of the PSD2 (Payment Services Directive 2 > TITLE IV > CHAPTER 2 > Article 71), payment providers are required to refund immediately, any fraud claims from consumers. There needs to be wording in the article which allows providers time to investigate claims and confirm fraud before refunding the consumer. Not all fraud claims are fraud. Increasingly so.

   MRC has collected evidence to show the increase in this activity to the extent that for some merchants, e.g. Microsoft and Sony, the disputes received account for up to 80% of the disputes against them, where they know the consumer to be the bona fide cardholder and the transactions to be valid and not fraud – for several reasons.

   While working with the industry players to detect, prevent and mitigate against this growing issue, MRC has spent time with the Card Schemes, Visa and Mastercard, working to change their rules around the issue of first party misuse (friendly fraud). As a result of our work, Visa updated their scheme rule, with a public announcement on 16 June regarding their rule change effective from April 2023 on merchants' ability to dispute false fraud claims under first party misuse. The issue has become that big. Mastercard is quickly following suit.

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We can provide figures and scorecards from our members to show the size of the issue.

In addition, law enforcement agencies are advising that fraudsters have also seen this weakness in the regulation and an increasing number of organised crime gangs (OCGs) are now gathering mules (genuine cardholders), getting them to purchase high value goods for a fee, then telling them to charge the purchases back as fraud knowing the issuer will concede. The mule gets their fee from the fraudster, the fraudster gets the goods which they can sell on for cash, and the merchant bears the brunt of the fraud claim, with a dispute raised by the issuer who is under that regulatory pressure to dispute on their customer's behalf.

This is a costly problem, that is also affecting consumers negatively as merchants aim to recoup their losses by ramping up the fees for goods and services.

It is an issue that is growing exponentially but that can be stopped, by a change in article 71.

We welcome this review of the PSD2. For my own part, I participate in the Payment Systems Market Expert Group and I am due to present to that group on our findings around first party misuse, to show the size of the problem.

We look forward to further discussion, to help stop this fraud, and the inconsistency issues mentioned above.

I remain at your disposal for any follow up questions on the above.

Yours Sincerely,

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Úna Dillon
Managing Director MRC EU