

EBA-Op-2019-03

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24 April 2019

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# Opinion of the European Banking Authority on the nature of passport notifications regarding agents and distributors under Directive (EU) 2015/2366 (PSD2), Directive 2009/110/EC (EMD2) and Directive (EU) 2015/849 (AMLD)

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## Background and legal basis

1. The European Banking Authority's (EBA's) competence to deliver an opinion is based on Articles 29(1)(a) and 34(1) of Regulation (EU) No 1093/2010 ('EBA Regulation'). Article 29(1)(a) mandates the EBA to play an active role in building a common Union supervisory culture and consistent supervisory practices and approaches throughout the Union including by providing opinions to competent authorities (CAs), while Article 34(1) empowers the EBA to provide opinions to the European Parliament, the Council and the Commission on all issues related to its area of competence, including on issues within the EBA's competence under Directive (EU) 2015/2366<sup>1</sup> (PSD2), Directive 2009/110/EC (EMD2)<sup>2</sup> and Directive (EU) 2015/849 (AMLD)<sup>3</sup>.
2. An analysis of approaches by CAs across Member States (MSs) to handling passport notifications of payment institutions (Pis) or electronic money institutions (EMIs) has revealed significant differences in the treatment of activities carried out by Pis and EMIs through agents or distributors in another MS. In particular, CAs have taken different approaches regarding the qualification of these activities as falling under the right of establishment or the free provision of services. The qualification of whether these activities fall under the right of establishment or the free provision of services is important because the existence of an 'establishment' in a host MS triggers some additional legal obligations for the principal PI/EMI, compared with the free provision of services, and has consequences for the allocation of competencies between the

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<sup>1</sup>Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market (PSD2).

<sup>2</sup>Directive 2009/110/EC of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions (EMD).

<sup>3</sup>Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (AMLD).

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CAs of the host and home MSs for supervising activities carried out in the host MS through such establishments, as further explained in the body of the opinion below.

3. In order to fulfil its objective of contributing to supervisory convergence in the EU/EEA, and to do so in the specific context of the EBA's competence under PSD2, EMD2 and the AMLD, the EBA has decided to issue this opinion in order to provide clarity regarding the criteria that, in the EBA's view, CAs should take into account when assessing whether or not an activity carried out by a PI or EMI using agents or distributors in a host MS amounts to an establishment of that PI/EMI in the host MS.
4. This opinion is addressed to CAs as defined in point (2), letter (i), of Article 4(2) of the EBA Regulation but, given the supervisory expectations it conveys, should also prove useful for PIs and EMIs providing services on a cross-border basis within the EU.
5. In accordance with Article 14(5) of the Rules of Procedure of the Board of Supervisors of the EBA<sup>4</sup>, the Board of Supervisors has adopted this opinion.

## Definitions

6. For the purpose of this opinion:
  - the term 'agent' has the meaning given in Article 4(38) of PSD2, namely any person acting on behalf of a PI or EMI in providing payment services; and
  - the term 'distributor' refers to any person acting on behalf of an EMI to distribute and/or redeem electronic money, as referred to in Article 3(4) of EMD2.

## General criteria under EU law for interpreting the concept of 'establishment'

7. In accordance with the Commission Delegated Regulation (EU) 2017/2055 (EBA Regulatory Technical Standards on passporting)<sup>5</sup>, in the case of PIs and EMIs using agents or distributors in a host MS, it is for the CA of the home MS to assess the nature of the passport application and communicate this information to the CA of the host MS<sup>6</sup>. Where the home CA considers that the use of an agent or distributor does not give rise to an establishment, it should provide the host CA with a description of the circumstances taken into account in its assessment.

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<sup>4</sup> Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors of 27 November 2014 (EBA/DC/2011/01 Rev4).

<sup>5</sup> Commission Delegated Regulation (EU) 2017/2055 of 23 June 2017 supplementing Directive (EU) 2015/2366 with regard to regulatory technical standards for the cooperation and exchange of information between competent authorities relating to the exercise of the right of establishment and the freedom to provide services of payment institutions (RTS on passporting).

<sup>6</sup> Article 10(1)(d) and Annexes III and IV of the RTS on passporting.

8. The RTS on passporting does not, however, define the criteria for assessing when an activity falls under the right of establishment or the free provision of services.
9. In the EBA's view, in the absence of specific guidance in the sectorial legislation, the criteria for determining the nature of the passport application of PIs and EMIs using agents or distributors can be extrapolated from the EU Treaty provisions on the right of establishment<sup>7</sup> and the free provision of services<sup>8</sup> and the case-law of the Court of Justice of the European Union (CJEU) on the interpretation of these provisions, taking into account the specific nature of the economic activities and the provision of services concerned in this particular case.
10. In relevant CJEU case-law, it was affirmed that an undertaking providing services on a cross-border basis in a host MS falls within the scope of the Treaty provisions on the right of establishment if it has an 'infrastructure' or 'physical presence' in that host MS, that allows it to participate in the economic life of the host MS on a 'stable and continuous basis' and to profit therefrom<sup>9</sup>.
11. Following the Court's case-law, an undertaking that maintains a 'permanent presence' in a host MS is operating under the right of establishment, 'even if that presence does not take the form of a branch or agency, but consists merely of an office managed by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency'<sup>10</sup>.
12. In a more recent judgment, the CJEU held that a 'commercial relationship entered into by an operator established in a Member State with operators or intermediaries established in the host Member State' may lead to an establishment within the meaning of the Treaty if that relationship 'make[s] it possible for the operator to participate, on a stable and continuous basis, in the economic life of the host Member State, and **must thus be such as to enable customers to take advantage of the services offered through a permanent presence in the host Member State** [...] which may be done by means merely of an office managed by a person who is independent but authorized to act on a permanent basis for the operator, as would be the case with an agency' (emphasis added)<sup>11</sup>.
13. By contrast, according to the Court's case-law, a service or activity carried out on a 'temporary' or 'occasional basis' would fall under the freedom to provide services. Following this case-law, 'the temporary nature of the activities [...] has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity. The

<sup>7</sup> Article 49 et seq. of the Treaty on the Functioning of the European Union (TFEU); ex-Article 43 et seq. of the Treaty establishing the European Community (TEC).

<sup>8</sup> Article 56 et seq. TFEU; ex-Article 49 et seq. TEC.

<sup>9</sup> For example, C-55/94, *Gebhard* [1995], C-205/84, *Commission v Germany* [1986], C-131/01, *Commission v Italy* [2003], C-97/09, *Schmelz* [2010].

<sup>10</sup> C-243/01, *Gambelli* [2003]; Joined cases C 338/04, C 359/04 and C 360/04 *Placanica and others* [2007]; Joined cases C-316/07, C-358/07 to C- 360/07, C-409/07 and C-410/07, *Markus Stob and others* [2010] and C- 409/06, *Winner Wetten* [2010].

<sup>11</sup> C-347/09, *Jochen Dickinger and Franz Ömer* [2011], paragraph 35.

fact that the provision of services is temporary does not mean that the provider of services [...] may not equip himself with some form of infrastructure in the host Member State<sup>12</sup>.

14. In the Court's view, in order to establish whether or not there is an establishment, 'both the degree of stability of the arrangements and the effective exercise of activities in [the host] Member State must be interpreted in the light of the specific nature of the economic activities and the provision of services concerned. This is particularly true for undertakings offering services exclusively over the Internet'<sup>13</sup>.
15. This assessment has to be carried out on a case-by-case basis, because, as the Court has repeatedly held, 'no provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service in another Member State can no longer be regarded as the provision of services within the meaning of the Treaty but as coming under the chapter relating to the right of establishment'<sup>14</sup>.
16. Some Union legislation has incorporated the principles deriving from the CJEU case-law regarding the delineation of the concept of 'establishment' from the free provision of services. For example, the Services Directive (Directive 2006/123/EC<sup>15</sup> defines 'establishment', for the purpose of that directive, as 'the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out'.
17. Recital 37 of that directive also refers to the case-law of the CJEU stating that 'an establishment [...] may consist of an office managed by a provider's own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency'. While the Services Directive does not apply to e-money or payment services that are subject to specific EU sectorial legislation, the general principles that it enshrines are helpful in a more holistic interpretation of the concept of 'establishment'.
18. A similar interpretation of the concept 'establishment' has also been included in the General Data Protection Regulation (Regulation (EU) 2016/679, GDPR). Recital 22 of the GDPR provides that an '[e]stablishment implies the effective and real exercise of activities through stable arrangements'. The wording is identical to that in Recital 19 of the former Data Protection Directive (Directive 95/46/EC), which is referred to in several CJEU rulings. Referring to this directive, the CJEU held that:

'[I]n the light of the objective pursued by that directive, consisting in ensuring effective and complete protection of the right to privacy and in avoiding any circumvention of national rules, [...] the presence of only one representative can, in some circumstances, suffice to constitute a stable arrangement if that representative acts with a sufficient degree of

<sup>12</sup> C-55/94, *Gebhard* [1995], paragraph 27; C-215/01, *Schnitzer* [2003], paragraph 28.

<sup>13</sup> C- 230/14, *Weltimmo* [2015], paragraph 29.

<sup>14</sup> C-215/01, *Schnitzer* [2003], paragraph 31.

<sup>15</sup> Directive 2006/123/EC of 12 December 2006 on services in the internal market.

stability through the presence of the necessary equipment for provision of the specific services concerned in the Member State in question. [...] [I]n order to attain that objective, it should be considered that **the concept of ‘establishment’**, within the meaning of Directive 95/46, **extends to any real and effective activity — even a minimal one — exercised through stable arrangements’**(emphasis added)<sup>16</sup>.

19. To date, beyond the general criteria and principles deriving from the Court’s case-law, there is no specific CJEU case-law that has looked at the interpretation of the concept of ‘establishment’ within the meaning of the sectorial legislation applicable to agents and distributors of PIs and EMIs (PSD2 and EMD2) or the AMLD.
20. In the banking sector, the European Commission issued, in 1997, a non-binding interpretative communication which provided some indicative criteria to help determine the nature of the passport application for credit institutions operating cross-border under the Second Banking Directive (Directive 89/646/EEC)<sup>17</sup>. However, this interpretation was limited to the banking sector and issued at a time when PIs, EMIs as well as agents and distributors of PIs and EMIs were not yet regulated at Union level, meaning that the activities envisaged by that communication, at the time of its issuance, were likely different from the activities carried out today by agents and distributors of PIs and EMIs.
21. The European Commission communication from 1997 could also not have feasibly taken into account case-law of the CJEU that was issued after 1997, such as the *Gambelli* case of 2003 (referred to in paragraph 12 above), which was referenced in a more recent Commission staff working paper from 2011<sup>18</sup>. Referring to this case-law, the working paper concluded that, ‘if [a] PI maintains a permanent presence in another Member State, even if that presence consists merely of an office managed by an agent who is independent but authorized to act on a permanent basis for the undertaking, it has to be considered as having, through its agents, a form of establishment in the host country’.

## Application of the concept of ‘establishment’ to agents and distributors

22. This section provides some general considerations regarding the legal regime of agents and distributors under the EU sectorial legislation before addressing in more detail the criteria which, in the EBA’s view, CAs should take into account when assessing whether or not the engagement of an agent or distributor in a host MS amounts to an ‘establishment’ of the appointing PI/EMI in that MS.

<sup>16</sup> C- 230/14, *Weltimmo* [2015], paragraphs 30-31.

<sup>17</sup> Commission Interpretative Communication ‘Freedom to provide services and the interests of the general good in the Second Banking Directive’ (SEC(97) 1193 final), available at: <https://publications.europa.eu/en/publication-detail/-/publication/4a6f984b-dabb-4ea2-96f5-8dc61379a883>.

<sup>18</sup> Commission Staff Working Paper on Anti-money laundering supervision of and reporting by payment institutions in various cross-border situations (SEC(2011) 1178 final), available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015288%202011%20INIT>.

## Preliminary considerations on the legal regime applicable to agents and distributors

23. An agent under PSD2 is, by definition, a person who acts on behalf of a PI or EMI in providing one or more of the payment services set out in Annex I to PSD2 (Article 4(38) of PSD2). An agent must comply with the requirements in Article 19 of PSD2 and be registered in the register kept by the CA of the home MS.
24. Distributors, on the other hand, are not explicitly defined in EMD2, which also does not define what ‘distribution’ of e-money is. Article 3(4) of EMD2 provides, however, an indirect definition of distributors<sup>19</sup>. In line with this article, the term ‘distributor’ refers to any person entitled to carry out distribution and/or redemption of e-money on behalf of an authorised EMI<sup>20</sup>. Recital 10 of EMD2 also briefly refers to distributors and states that:
- ‘It is recognised that electronic money institutions distribute electronic money, including by selling or reselling electronic money products to the public, providing a means of distributing electronic money to customers or of redeeming electronic money on the request of customers or of topping up customers’ electronic money, through natural or legal persons on their behalf, according to the requirements of their respective business models’.
25. Distributors are not entitled to issue e-money or carry out payment services. Unlike for agents, there is also no requirement under EMD2 for PIs/EMIs to register distributors with the home NCA.
26. E-money can be issued only at par value (i.e. for the same amount as the funds received), upon receipt of funds and ‘without delay’ (Articles 6(3) and 11 of EMD2). In the EBA’s view, if a distributor receives the funds from the end-customer in exchange for e-money, the funds are considered to have been received by the issuer itself, considering that the distributor is acting on behalf of the issuer. The safeguarding obligation of the issuer starts as soon as the distributor receives the funds from the customers, and remains with the issuer/EMI (not with the distributor), so that the customer does not bear any consequence of the funds not being transferred from the distributor to the issuer, including in the event of the distributor’s insolvency.
27. In all cases, the PI/EMI retains full responsibility for the acts performed by any of its agents or distributors on its behalf.

## Criteria for assessing the nature of the passport notification for agents and distributors

28. In the EBA’s view, CAs should take into account, at a minimum, the criteria listed below when assessing whether the activities carried out by PIs and EMIs through agents or distributors

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<sup>19</sup> Article 3(4) of EMD2 provides that: ‘Member States shall allow electronic money institutions to distribute and redeem electronic money through natural or legal persons which act on their behalf [...]’.

<sup>20</sup> The sale of instruments that fall under the limited network exemption under Article 3(k) of PSD2, and are excluded from the scope of EMD2 (Article 1(4) of EMD2), is not considered as distribution of e-money under EMD2, and is therefore outside the scope of the Opinion.

located in a host MS fall under the right of establishment or the free provision of services. These criteria refer only to the case of agents or distributors that are physically located in the host MS, and do not cover the case of activities performed solely online (e.g. through the internet), without a physical presence in the host MS.

- (a) Whether the agent/ distributor has been empowered to carry out a specific task on behalf of the PI/EMI performed on an occasional basis (which may be an indication that those services fall under free provision of services) or, on the contrary, it has been mandated to provide the services on behalf of the PI/EMI on a regular or continuous basis (which may be an indication that those services fall under the right of establishment).
  - (b) The overall duration of the contractual relationship or arrangements between the PI/EMI and the agents/distributors.
  - (c) Whether or not the activities carried out through agents or distributors enable customers in the host MS to take advantage of the services offered by the PI/EMI in the host MS.
29. In relation to the first criterion, under (a), in the EBA's view this should be dependent not on whether or not the customers actually use the services of the agent/distributor, but rather on the limitations (if any) of the mandate given to the agent/distributor.
30. In relation to (b), CAs may also take into account in their assessment whether the relationship appears to be an ongoing one or merely of a temporary nature, considering for example the PI's/EMI's intention as reflected in its business plan, the information provided to the CA on changes to the contractual relationship with the respective agents/distributors under Articles 28(4) and 19(8) of PSD2 (to the extent applicable), or other information available to the CA that may be relevant.
31. CAs should take into account all of the above criteria in their assessment, meaning that a single criterion may not by itself be determinative. The above criteria are also not exhaustive, and CAs may take into account other criteria in their assessment of the nature of the passport notification in line with EU law. For example, in the case of a PI/EMI having an extensive network of agents/distributors in a host MS under the free provision of services, CAs should consider if this gives rise to a stable or 'permanent presence' of that PI/EMI in the host MS, even if each individual agent/distributor does not itself meet the criteria to be considered an establishment.
32. In all cases, under the current legal framework, PIs/EMIs, when submitting their passport applications to their home CA, as well as the home CA when submitting the passport notification to the host CA, will need to make a case-by-case assessment to determine whether the engagement of an agent or distributor in a host MS amounts to an 'establishment' of the PI/EMI in that MS or is conducted under the free provision of services, taking into account the specific facts of the case.

33. The EBA would also like to recall that, while the information under (a)-(c) may not be available to the host CA at the moment it receives the passport notification for an agent or distributor, the home CA should have access to such information. As explained above, the assessment of the nature of the passport application in accordance with the RTS on passporting lies primarily with the home CA, and not with the host CA. The host CA can, however, convey any concerns it may have to the home CA, within the passport notification procedure in Article 28(2) of PSD2, or within the framework for cooperation under the PSD2 and the delegated act under Article 29(6) of PSD2<sup>21</sup>.
34. In the EBA's view, the fact that an agent or distributor does not operate exclusively for only one PI/EMI, but instead acts on behalf of several principals, does not preclude the possibility of that agent or distributor being an establishment for the purposes of PSD2, EMD2 or AMLD, meaning that it is conceivable for an agent or distributor to be an 'establishment' of more than one PI/EMI.
35. Given the nature of the activities performed by an agent of a PI/EMI, the engagement of an agent located in the host MS is likely to trigger, in most cases, an establishment of that PI/EMI in the host MS, if the mandate given to that agent involves a sufficient degree of stability. However, this may not always be the case, and, as explained above, a case-by-case assessment is needed in all cases to determine the nature of the passport application, based on the criteria set out at the beginning of this chapter.
36. In the EBA's view, the distribution of e-money through distributors located in a host MS may come under the scope of the right of establishment under the same conditions as those applicable to agents. This means that the engagement of one or more distributors located in a host MS may trigger an establishment of the appointing EMI in the host MS if the arrangements in place with those distributors present a certain degree of stability, and if the use of those distributors enables customers to take advantage of the e-money services offered by the EMI in the host MS.

## Implications of the existence of an 'establishment' under the sectorial legislation and the AMLD

### Implications under PSD2 and EMD2

37. The engagement of an agent in a host MS that is an establishment of the appointing PI/EMI may trigger some additional obligations for that PI/EMI. This may include in particular:

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<sup>21</sup> The draft RTS on cooperation between the competent authorities of the home and host Member States in the supervision of payment institutions operating on a cross-border basis under Article 29(6) of PSD2 (EBA/RTS/2018/03), as submitted by the EBA to the European Commission, is available at: <https://eba.europa.eu/regulation-and-policy/payment-services-and-electronic-money/rts-on-home-host-cooperation-under-psd2>.

- additional obligations for the appointing PI/EMI to report to the CA of the host MS, where the CA has taken up the option in Article 29(2) of PSD2 to require such reporting, as set out in the delegated act under Article 29(6) of PSD2<sup>22</sup>;
- an obligation to appoint a central contact point in the host MS, where the host MS has transposed in its national legislation the option in Article 29(4) of PSD2 to require such a contact point, and subject to the conditions in the delegated act under Article 29(5) of PSD2<sup>23</sup> being met. This requirement is applicable only to agents, and not to distributors<sup>24</sup>.

38. The CA of the host MS shall be responsible for supervising compliance of the activities carried out in the host MS through agents that are establishments with the host MS national law implementing Titles III and IV of PSD2 (Article 100(4) of PSD2).

39. However, it is important to recall that some obligations under PSD2 and EMD2 apply to all PIs/EMIs operating on a cross-border basis in another MS, whether or not they have an establishment in the host MS. These include:

- the passport notification requirements under PSD2 and the RTS on passporting; and
- the reporting requirements under Article 29(2) of PSD2 for statistical purposes, which may apply to all passporting PIs/EMIs using agents or distributors in the host MS, irrespective of the nature of the passport, if the CA of the host MS has taken up the option in Article 29(2) of PSD2 to require such reporting<sup>25</sup>.

### Implications under the AMLD

40. Articles 45(2) and 48(4) of the AMLD provide that, where a credit or financial institution operates an establishment in another MS, that establishment has to comply with the AML/CFT rules of the host MS. The compliance of such establishments with the AML/CFT rules of the host MS will be supervised by the CAs of the host MS.

41. Since Article 2 of AMLD does not list distributors and agents as obliged entities, distributors and agents are not themselves required under the AMLD to comply with the AML/CFT rules in the host MS in which they operate.

42. This means that where:

- a) a PI/EMI uses an agent or distributor in another MS and

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<sup>22</sup> See the draft RTS on cooperation between the competent authorities of the home and host Member States referred to in footnote 21 above.

<sup>23</sup> The draft RTS on central contact points under PSD2, as submitted by the EBA to the EU Commission (EBA/RTS/2017/09), is available at: <https://eba.europa.eu/regulation-and-policy/payment-services-and-electronic-money/rts-on-central-contact-points-under-psd2>.

<sup>24</sup> Article 3(4) of EMD2, as amended by Article 111(1) of PSD2.

<sup>25</sup> See the draft RTS on central contact points under PSD2 referred to in footnote 23 above.

b) that agent or distributor is an establishment,

the PI/EMI itself has to comply with the AML/CFT requirements of that MS in respect of all regulated activities that they carry out through that establishment on that MS's territory. In other words, when a PI/EMI has an establishment on another MS's territory, the appointing PI/EMI has the obligation to comply with the AML/CFT requirements of that MS<sup>26</sup>.

43. The AMLD does not prescribe how PIs or EMIs must meet their AML/CFT obligations when using agents or distributors in the territories of other MSs. It is the national law transposing the AMLD in each MS that can lay down rules in this regard. Given this, PIs and EMIs may therefore be required to discharge their functions in a certain manner, for example by centralizing the AML/CFT compliance function or by outsourcing aspects of their AML/CFT compliance to the distributor, the agent or another third party. In any case, as mentioned above, the PI or EMI retains full responsibility for any of the acts performed by its established agents or distributors on its behalf.
44. Where this is required by national law, PIs and EMIs that operate establishments in another MS's territory may have to appoint a central contact point under Delegated Regulation (EU) 2018/1108<sup>27</sup> to ensure compliance, on the PI's/EMI's behalf, with the AML/CFT requirements of the host MS, and to facilitate AML/CFT supervision by the CA of the host MS.
45. In all cases, in accordance with PSD2 and the RTS on passporting, the passport notification provided to the host CA should include a description of the internal control mechanisms that will be applied by the PI/EMI/agent/distributor in order to comply with the obligations in relation to the prevention of money laundering and terrorist financing under the AMLD<sup>28</sup>.

This opinion will be published on the EBA's website.

Done in Paris, 24 April 2019

[signed]

Jo Swyngedouw

Acting chairperson

For the Board of Supervisors

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<sup>26</sup> The situation may, however, be different where an MS has taken up the option in Article 4 of AMLD to extend the scope of the AMLD to distributors and/or agents themselves.

<sup>27</sup> Commission Delegated Regulation (EU) 2018/1108 of 7 May 2018 supplementing Directive (EU) 2015/849 with regulatory technical standards on the criteria for the appointment of central contact points for electronic money issuers and payment service providers and with rules on their functions.

<sup>28</sup> Article 10(1)(l); field 10 of Annex III and field 17 of Annex IV of the RTS on passporting. See also the requirements under the EBA Guidelines under PSD2 on the information to be provided for the authorisation of payment institutions and e-money institutions and for the registration of account information service providers (EBA/GL/2017/09), available at: <https://eba.europa.eu/-/eba-publishes-final-guidelines-on-authorisation-and-registration-under-psd2>.