

# Single Rulebook Q&A

<b>Question ID</b>	2021_5726
<b>Status</b>	Final Q&A
<b>Legal act</b>	Directive 2015/2366/EU (PSD2)
<b>Topic</b>	Passporting
<b>Article</b>	11(9), 19, 28
<b>Paragraph</b>	-
<b>Subparagraph</b>	-
<b>COM Delegated or Implementing Acts/RTS/ITS/GLs/Recommendations</b>	Regulation (EU) 2017/2055 - RTS on passporting under PSD2
<b>Article/Paragraph</b>	-
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<b>Disclose name of institution / entity</b>	Yes
<b>Name of institution / submitter</b>	ACPR
<b>Country of incorporation / residence</b>	France
<b>Type of submitter</b>	Competent authority
<b>Subject matter</b>	"Triangular " passport
<b>Question</b>	Are "triangular" passports possible under the current legal framework governing the passporting rights among the EU Member States?
<b>Background on the question</b>	The "triangular" passport can be described as such: a payment services provider (PSP) licensed in a country A has recourse to an intermediary (possibly a branch, or a PSP agent) located in a country B in order to provide payment services in a country C through such intermediary. The PSD2 keeps silent, neither foreseeing nor preventing expressly such practices, in particular referring to Article 11 (9) of PSD2 which allows a licensed institution to benefit from the freedom of establishment (FE) and the freedom of provision of services (FPS) without limitations, and Articles 19 and 28 related to the submission process of a request for FE or FPS passport. Against this background, it may be inferred that: - triangular passports drawing on the use of a branch are possible insofar as the branch

forms, with its parent entity, a single legal person, and that person can exercise its passporting rights under the FPS in another Member State, - whereas no PSP could notify triangular passports using agents, who form a separate legal person from the PSP, since only the PSP holds the passporting rights under PSD2 and no agent does. (An exception would be admitted only in the case of intermediaries who hold passporting rights like insurance intermediaries and credit intermediaries who are out of the PSD2 scope.) Yet, we see that practices are not harmonized across EU countries since certain Member States notify triangular passport based on the intermediary of a PSP agent, while other reject or do not simply notify such passports. Such different, if not opposite, views among national competent authorities (NCAs) draw on the silence of PSD2 on this issue, and are further fueled by concerns relating to the supervisory challenges associated with triangular passports : - knowing which AML-CFT and consumer protection regulations are applicable to the services provided in the country C by the agent on behalf of the PSP (Home country A law, or country B or C ) ; - and which authority would be the Home authority for supervision related issues (between the country A Home authority of the PSP, or the country B Host authority of the agent). In order to address those supervisory challenges and provide for an harmonized legal framework for triangular passporting drawing on a separate legal entity, it should be considered to explicitly add specific 'triangular' passports provisions by amending the primary law, i.e. PSD2 and the implementing regulations. In this respect, a more flexible position could be envisaged, which would allow such triangular passporting setups, possibly to be notified under the FPS process, underlying the outsourced provision of services through an agent located in a EU country other than the PSP's country and than the host country.

**Final answer**

In accordance with Article 11(9) of Directive 2015/2366/EU (PSD2), a payment institution authorised in one Member State must be allowed to provide the payment services that are covered by its authorisation throughout the Union, pursuant to the freedom to provide services or the freedom of establishment. Article 19(5) PSD2 further provides that if the payment institution wishes to provide payment services in another Member State by engaging an agent or establishing a branch, it must follow the procedures set out in Article 28 PSD2.

PSD2 does not explicitly cover, nor prohibit a “triangular passporting” scenario whereby a payment institution (or, mutatis mutandis, an e-money institution) authorised in a Member State A uses an intermediary (a branch or an agent) located in a Member State B in order to provide payment services in a Member State C.

The passporting rights under the PSD2 always belong to the payment institution. In a “triangular passporting” situation where services are provided via a branch of the payment institution, it is the payment institution itself that is providing the respective payment services in Member State C,

	<p>using its passporting rights, since the branch has no separate legal personality (Article 4(39) PSD2). Similarly, where the payment services are provided via an agent, it is still the payment institution itself that is deemed to be providing the respective payment services in Member State C, using its passporting rights as, under PSD2, the agent always “acts on behalf of a payment institution in providing payment services” (Article 4(38) PSD2).</p> <p>The payment institution can therefore provide payment services in the host Member State C without having a physical presence in that Member State, through an agent or a branch located in a Member State B, in accordance with the procedure in Article 28 PSD2. In such cases, the passport notification should be sent by the competent authority of the home Member State (Member State A) to the competent authority of the host Member State (Member State C). The services provided in the host Member State C will be provided under the sole responsibility of the payment institution. It is also important that the payment service users in Member State C are properly informed that the agent is providing services on behalf of the payment institution (Article 19(7) PSD2).</p>
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