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## figo GmbH consultation input on the draft of 'The Retail Banking Market Investigation Order 2017'

(published 23-11-2016: <https://www.gov.uk/government/news/open-banking-transformation-moves-a-step-closer>)

Hamburg, December 21st 2016

Dear sir or madam,

figo GmbH (figo) from Germany does not intend to provide input on the CMA's Draft Order in detail. However, we would like to use your current public consultation to describe our very specific business model as a **Banking Service Provider** as well as to provide a few insights from a non-UK-based market participant.

Due to the ongoing innovation within the financial technology market, the PSD2 already provides an outdated scope, even without being fully transposed yet. As the UK market still considers PSD2 as a useful basis to avoid fragmentation, this is also a challenging situation for the UK. By providing input to this consultation, we would like to make sure, that the CMA is aware of innovative business models and market participants like figo. Business models that at first sight might not be subsumed under PSD2, should be taken into account today, in order not to ignore one of the PSD2's - and also the CMA's Draft Order's - main objectives, i.e. to foster innovation in the financial market. Moreover, figo plans to provide its services within all EU-countries. This includes the UK regardless of any prospective national regulatory requirements, which we are willing to fulfil. As of today we are already actively involved in the Payments UK PSD2 Advisory Group.

Please find below a detailed description of our business model considering PSD2 aspects. We have no objections with regard to the disclosure of our input as part of the ongoing consultation process. If you need any further explanations, please feel free to contact our Head of Regulation:

Kind regards,  
The team of figo GmbH

## figo is a Banking Service Provider

We describe figo GmbH as a “Banking Service Provider”. We offer B2B-services relating to the third party payment account access covered by PSD2 as well as services beyond that coverage.

For the purpose of this consultation we focus our further description on the PSD2-scope. In that regard figo GmbH aims at becoming a EU-regulated Payment Institution, i.e. a licensed PISP as well as a registered AISP. Our aspired post-PSD2 services in 2018 might be described on the basis of the following different contractual model options:

- (1) **figo acting as a licensed PISP** by means of contractual relationships with
- a. non-PSD2-regulated companies, acting as payees (= charged B2B-service, e.g. for E-Commerce or Factoring companies) OR
  - b. non-PSD2-regulated companies, acting as Payment Feature Providers (= charged B2B-service, who only make use of the PIS for a user-friendly feature of their actual product range, such as credit transfer by photo or accounting and receivables management applications) AND in either case
  - c. the payment service users (= free of charge user agreements with payment service users, i.e. payers)

and provided that sensitive payment data is not forwarded to non-PSD2-regulated third parties as well as that any data is not further utilised by figo but only for the provision of the payment initiation service.

- (2) **figo acting as an AISP subject to registration** by means of a contractual relationship with
- a. non-PSD2-regulated Data Benefit Providers (= charged B2B-service, who only make use of the AIS-data for a user-friendly feature of their actual product range, such as account change/alert/monitoring providers, comparison portals or credit portals (in the latter case for risk management/credit rating purposes) as well as
  - b. the payment service users (= free of charge user agreements with payment service users, i.e. AIS-end users)

and provided that sensitive payment data is not forwarded to non-PSD2-regulated third parties as well as that other data is only forwarded on the basis of an explicit consent by the AIS-end user with forwarding certain earmarked AIS-data to a specific data benefit provider in compliance with relevant data protection rules.

- (3) **figo acting as a PSD2 service provider** (IT infrastructure/outsourcing service provider) for licensed or subject to registration PISP or AISP (e.g. AISP/PISP who do not want to build the overall IT infrastructure needed to provide their licensed/registered services or ASPSP providing own PIS/AIS services to their customers) and without any contractual relationship with the end-user. The PSD2 outsourcing partner role also includes figo acting as a XS2A Service Provider, i.e. an IT infrastructure/outsourcing service provider for ASPSP, who have to build and maintain a PSD2-compliant XS2A interface.

- (4) figo acting as a **beyond-PSD2 service provider**: it is expected that services under this model option will be provided in combination with the aforementioned models in order to take into account any services beyond the scope of PSD2, i.e. account information services beyond payment accounts or by means of added-value data formats as well any initiation of transactions beyond payments, e.g. security orders.

We are aware that options (1b) and (2) were not considered when the PSD2 content was finalised. As a consequence, a few strict interpretations of PSD2 details have been expressed lately, e.g. that Art. 67 para. 2 (f) of PSD2 would imply a similar strict interdiction

of further data utilisation by AISP as Art. 66 para. 3 (g) of PSD2 does for PIS.

Today's advanced market developments however show an urgent need for the proposed overall concept by figo. Established innovations and successful use cases would be hindered to a large extent, if the described options (1b) and (2) will not be implemented in a legally watertight way. From our point of view, especially context-related use cases of AIS are a major driver of the PSD2-intended innovation. Consumers tend to share their personal data in cases of benefits, such as more convenient and automated user processes. And there is still considerable room for more innovative business concepts on that PSD2-basis, which will lead to further economic growth for the European market, if it is not unnecessarily over-regulated. The law and regulatory requirements have to step in on a second level, i.e. to meet these newly developed market needs and make sure that the processes requested by the consumer are built and maintained in a secure way, instead of generally limiting the consumer's freedom. A potential strict interdiction of further data utilisation by AISP would only have an unfortunate inhibitory effect on the actually intended innovation by PSD2. In the medium term, consumer freedom will assert itself eventually (see recent antitrust authorities' decisions in favor of this development in Europe as well as the developments around the EU regulation 2016/679 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).

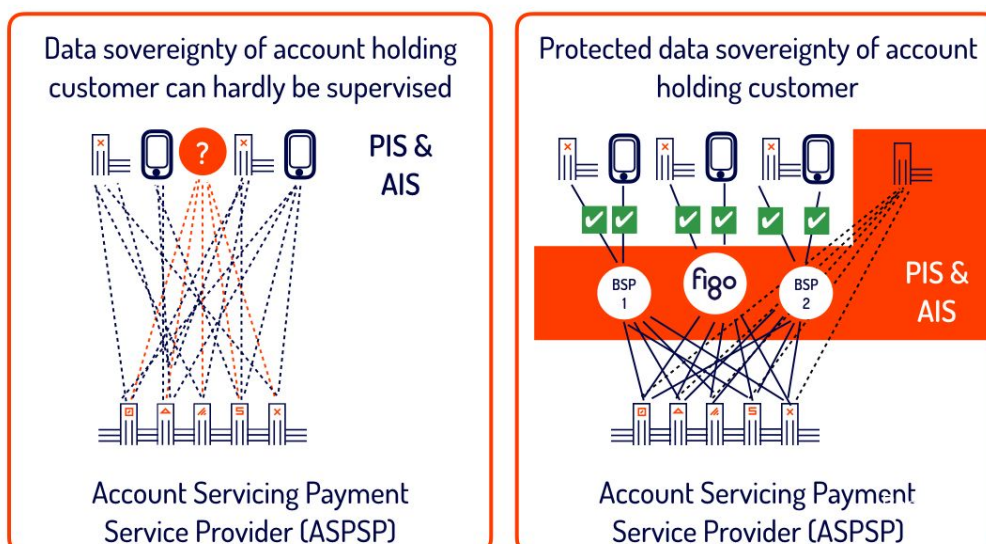
Assuming accordingly that data benefit providers will be allowed to bring their AIS-featured products to the market, another PSD2 loophole has to be rectified. Given their business model and strategies, the majority of data benefit providers, who only make use of AIS as a small component of their product range do not aim at becoming a registered AISP or being "treated as a payment institution". That is why today they already make use of market participants like figo to access the financial resources of their B2C-clients. Looking ahead and based on our extensive business partner experience, data benefit providers want a full PSD2-compliant service support by a regulated AISP next to the option of outsourcing the IT infrastructure needs for AIS-components. They would rather forgo successful consumer friendly features instead of applying for an own AISP-registration. This is due to the fact that from a market perspective the latter overall requires similarly high standards and efforts as becoming a fully licensed payment institution.

Similar conditions apply for contractual model option (1b), i.e. payment feature providers. These also merely make use of the PIS for a user-friendly feature of their actual product range, such as credit transfer by photo or accounting and receivables management applications. They rely on market participants such as figo to be able to maintain their payment feature products without their own need to apply for a PISP-license.

From our point of view, bundling PISP as well as bundling AISP such as figo provide a win-win situation for all market participants, as implementing contractual model option (1b) and (2) in a legally watertight way would lead to increased consumer and data protection as well as IT-Security by

- upstream (and we propose regulatory binding) “Know Your Third Party”-processes, incl. a risk-based and scaled transfer of PSD2 requirements by PISP/AISP to data benefit providers and payment feature providers or payees,
- streamlined and transparent communication processes between PISP/AISP and ASPSP (considering clearly and technically sorted processes for PISP and AISP),
- implementing centrally enforceable and effectively controllable standards from the perspective of EU-wide and national supervisory bodies as well as
- the establishment of high-quality API infrastructure standards.

The following illustration displays our understanding of figo’s role in a post-PSD2 Europe. On the left, we display our concerns about a PSD2 infrastructure without any Banking Service Providers (BSP) and on the right a post-PSD2 world including the added value by BSP like figo:



That is why, we hereby make use of the possibility to state that an explicit license exemption for payment feature providers as well as a registration exemption for data benefit providers are needed

on the condition that these market participants engage licensed PISPs/ registered AISPs. At best a fully EU-harmonised clarification can be achieved, e.g. being provided as part of the EBA's mandate concerning the information to be provided to the competent authorities in the application for the authorisation of payment institutions covered by Art. 5 para. 5 of PSD2 (compare current [EBA consultation](#)).

With regard to our services beyond PSD2 coverage we also shared our view with the European Banking Authority (EBA) on how it could have an active role in further fostering innovation and growth developments in the open banking market. In a first step, a severe consideration by the EBA of all provided consultation input with regard to a need for clarification on the PSD2-scope would help the market to establish a legally watertight basis, what will consequently foster innovations. ASPSPs can define more clearly, which sort of access they can legally monetise, e.g. by offering charged and hence so-called "premium API access" to third parties and on the basis of explicit consent of end-users.

Moreover, we encouraged the EBA to clarify in its rationales of the RTS on communication, that PSD2 does not prevent market participants to make bilateral agreements and obtain explicit customer consent on premium access to banking data beyond the PSD2/RTS-limitations. For example the growing market for XS2B(rokerage) could be actively supported by a clear statement of EBA. Given this, the urgently needed and slowly growing cooperation between banking incumbents and fintechs would be actively supported by an EU authority which would lead to general economic growth for all EU market participants. As a positive side effect a clear statement in that regard would override the general veto players, who still discuss principles of the PSD2-scope that are no longer questionable after PSD2 entered into force on 12 January, 2016. If this view is not shared by the EBA as well as national legislators and other involved authorities and moreover by banking incumbents, we expect a much slower and demanding process but eventually still the same result in this matter. As from a consumer perspective as well as from a competition law perspective, there is no reasonable ground for a legal discrimination against non-payment accounts.