**Opinion on the application of the EBA Opinion:**

**Arguments on transitional rules for payment systems to migrate to ‘Strong Costumer Authentication’” (May 2020)**

**KEYWORDS:**

*PSD2 — Payment services — Transitional rules for payment systems — Strong Costumer Authentication —Reg (UE) n. 2018/389 (RTS)— EBA Opinion on the elements of strong customer authentication under PSD2 of 21 June 2019.*

**FACTS:**

On 13 January 2018, Legislative Decree no. 218/2017 took effect, implementing EU Directive 2015/2366/EU in Italy, the second payment-services directive (PSD2). With respect to the directive previously in force (PSD1, EU Directive 2007/64/EC), one of the most revolutionary aspects of EU law in 2015 is represented by the new authentication system requested of bank intermediaries, known as “Strong Costumer Authentication” (SCA). Cognizant of the major undertaking falling to payment-service providers to implement the system in question, PSD2 extended the deadline for implementing the new authentication system. Indeed, the date of implementation was extended to 14 September 2019. That extension notwithstanding, the European Banking Authority resolved with its opinion of 16 October 2019 to extend the SCA-migration deadline further, to 31 December 2020.

*Posed herein is a question regarding the validity of that opinion: might it in some way influence the rulings of the Arbitro Bancario Finanziaro (ABF)? Imagine, for example, a instance of phishing taking place after 14 September 2019 but before 31 December 2020. In terms of the authentication, would the PSD1 or the PSD2 rules apply?*

**LEGAL ANALYSIS:**

* **Legal provisions with specific reference to EU directive when applying:**

Art. 29, par. 1, letter a), Reg (UE ) n. 1093/2010; EBA Guidelines on the security of internet payments under PSD1 (EBA/GL/2014/12; whereas 107; 4, par. 30; art. 98, par. 4, par 2, of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market (PSD2); Commission Delegated Regulation (EU) 2018/389 of 27 November 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for strong customer authentication and common and secure open standards of communication (RTS); Opinion of the European Banking Authority on the elements of strong customer authentication under PSD2, EBA-Op-2019-06, 21 June 2019; Legislative decree, 15 December 2017, n. 218, implementing Directive (EU) 2015/2366 on payment services in the internal market.

**LEGAL SOLUTION:**

One of the fundamental changes introduced by PSD2 is to formalise payment security requirements in national law.

The strong customer authentication (SCA) has in practice been applied in a number of EU Member States, including through the EBA Guidelines on the security of internet payments under PSD1 (EBA/GL/2014/12\_Rev1). EBA Guidelines are non-binding and addressed to competent authorities and financial institutions; they continue to apply until the RTS on SCA and CSC under PSD2 apply from 14 September 2019 onwards (now extended to 31 December 2020).

After deep analysis and discussions among us, we came to the conclusion that, also looking at the ABF case-law, the SCA is to be considered mandatory even before the January 2018, according to the Banca d’Italia (the National competent authority) Circolare n. 285/2013 (version updated in 2016), implementing the EBA/GL/2014/12.

The ABF has stated even in 2014 that the authentication must be based on the use of two or more elements categorized as knowledge, possession and inherence.

Thus, since the mandatory SCA, as shaped by PSD2, will go into effect on the first of January 2021, the specific requirements of the independence of authentication elements and the dynamic linking to a specific amount and payee, will not be considered mandatory before that deadline.

**SUGGESTED SOLUTION:**

This was a very nuanced question requiring in-depth analysis, both in terms of understanding which version of the statute and regulations would apply at any given time, and also in terms of primary and secondary laws.