Bird & Bird

# Safeguarding requirements for Belgian payment institutions and electronic money institutions

Julien Sad

*6 February 2023*

Last year, the National Bank of Belgium (**NBB**) released a Circular (available in French here and in Dutch here – **the Circular**) in which it clarified certain safeguarding requirements for payment institutions (**PIs**) and e-money institutions (**EMIs**).

Both institutions are expected to comply with these requirements since the beginning of 2023 (more precisely, the NBB gave them until Saturday 31 December 2022).

The NBB Circular covers three topics related to safeguarding:

1. the obligation for the institution to safeguard the funds, including when it has outsourced the payout of the funds to another payment service provider (**PSP**) in the payment chain;
2. certain clarifications in connection with the main safeguarding methods; and
3. other expectations when reporting to the NBB on the safeguarding measures that have been taken.

We address each topic in turn, including relevant Q&As from the European Banking Authority (**EBA**) on the same topics.

## *1. The obligation to safeguard the funds when there is a chain of PSPs for the processing of the payment transaction*

PIs must safeguard all funds received from their payment service users (**PSUs**) or through another PSP for the execution of payment transactions.

The same applies to EMIs when they provide payment services, and when they receive funds in exchange for the issuance of e-money.

This obligation only applies to institutions that engage in payment service activities that require them to enter into possession of their payment service users' (**PSU**) funds (i.e. services 1 to 6 as listed in Annex 1A to the Law of 11 March 2018), or when the EMIs receive funds from their users.

The safeguarding obligation is twofold:

1. Any funds received by the institution must at all times be clearly identified in its accounting and separated from the funds of any natural or legal person other than the PSU. This "internal segregation" obligation is not as such a "safeguarding measure" in the sense that it does not protect PSUs' funds in case of an insolvency event affecting the institution.
2. If funds are still held by the institution and not yet delivered to the payee *or transferred to another PSP* by the end of the business day following the day when the funds have been received (Day + 1), the institution must ensure that those funds are either placed in a "safeguarding account" which is separate from the institution's working capital and other funds, or invested in low-risk liquid secured assets, or covered by an appropriate insurance policy (or comparable guarantee).

In relation to point 2 above, the NBB clarified that a PSP's safeguarding obligation ends when it has transferred the funds to the payee or to **another PSP that is mandated by the payee (i.e. the payee's PSP)**. If the payer's PSP has outsourced the payout of the funds to an intermediary PSP (which by definition is not mandated by the payee, but rather by the payer's PSP) and has therefore transferred the funds to that intermediary PSP, the payer's PSP must normally continue to safeguard the funds for the benefit of its PSU (despite the fact that the payer's PSP does no longer hold the funds). Put differently, it is not sufficient for the funds to be safeguarded for the benefit of a PSP in the payment chain, but the funds must always be safeguarded for the benefit of the PSU.

The EBA confirmed this conclusion in a Q&A 2020_5502 (published on 6 January 2023 – available here) stating that "… *The transfer of funds of* [PSUs] *to a payment account held in the name of the* [PI] *with another* [PSP] *would not be considered as "transferred" in the meaning of Article 10(1)(a) PSD2 and therefore would not discharge the* [PI] *from the safeguarding requirements*".

The NBB has introduced an exception to this rule: the payer's PSP may be discharged from its safeguarding obligation if it can demonstrate that the funds are sufficiently protected by the intermediary PSP in accordance with above safeguarding methods that the NBB considers equivalent (**Equivalent safeguarding method**). The NBB considers this is the case when the intermediary PSP (1) is authorised as a **PI, EMI or credit institution**, and (2) is established in the EU. Additionally, the NBB may take the same view in relation to other **credit institutions established outside the EU**, but only on the basis of a legal opinion issued by external counsel (it does not seem possible for an institution to rely on the NBB's exception if the intermediary PSP is a non-bank financial institution located outside the EU). The NBB makes clear that the institution will only be discharged from its safeguarding obligation when the intermediary PSP demonstrates that the funds are actually protected in accordance with the Equivalent safeguarding method. This means that the safeguarding obligation does not end automatically because e.g. the institution would have transferred to funds to an EU-based intermediary PSP.

## 2. *Safeguarding methods*

Pursuant to Articles 42 and 194 of the Law of 11 March 2018 (transposing Article 10 of PSD2), the funds can be safeguarded in either of the following ways:

They can be deposited into a distinct client account, whether global or individualised, held by a credit institution established in the EU or a Belgian branch of a credit institution established outside the EU (**Third-Party Account**). Note that it is also possible to have the safeguarding account held with a credit institution established outside the EU, but only with the NBB's permission.

They can be invested in low-risk, liquid and secure assets as defined by the NBB in the Circular (**Low-Risk Investment**).

They can also be invested in a qualified money-market fund within the meaning of Article 4, 8° of the Royal Decree of 19 December 2017 (**Money Market Fund Investment**).

They can be covered by an appropriate insurance policy (or some other comparable guarantee) from an insurance company or a credit institution which does not belong to the same group as the institution itself (**Insurance Coverage**).

The NBB has provided guidance on its expectations for methods 1, 2, and 4 (we discuss them below), but did not address method 3 (presumably, the NBB did not feel it had to since this method essentially refers to

investments in units of certain undertakings for collective investment in transferable securities (**UCITS**) under Directive 2009/65/CE, as amended).

It is worth mentioning recent EBA Q&A 2020_5264 (available here), in which the EBA stated that "… *it is up to the* [PI] *to decide whether it will fulfil the safeguarding requirement via one of the two methods or a combination of both. Either way, the* [PI] *must ensure that all funds are covered at any time by the safeguarding, and that the internal governance foresees a proper documentation regarding the safeguarding approach itself and, in particular, how and through which method the funds are safeguarded*".

## Third-Party Account

If the institution decides to safeguard the funds on the basis of a Third-Party Account, then it must comply with the following requirements:

- The agreement (including the applicable T&Cs) concluded with the credit institution for the opening of the account must expressly confirm that the account is a "client account" for the purposes of Article 42(1), 2°, a) (in case of a PI) or Article 194(1), 2°, a) (in case of an EMI) of the Law of 11 March 2018. If this is not the case, the institution must ensure that the credit institution produces separate document with the exact same confirmation. What matters here is that it must be clear that funds deposited on the account do not belong to the institution, but to its PSUs (meaning that institution's creditors, including the credit institution holds the account, could not have any right over these funds).
- It is required that the credit institution holding the safeguarding account issues a certificate at least every three years, indicating (1) the IBAN number associated with the safeguarding account and (2) the amount held on this account at this moment.
- The institution must provide the NBB with the agreement (including the applicable T&Cs) and the certificates issued by the credit institution in accordance with relevant/applicable NBB reporting schemes. Ideally, the institution should always specify the contact details of the person in charge at the credit institution holding the safeguarding account.

In Q&A 2021_5755 (available here), the EBA was asked whether a Third-Party Account should qualify as a payment account under PSD2 and therefore be made accessible to PSD2 third-party service providers (**TPPs**) if it is accessible online. The EBA stated that:

"… *if the safeguarding account is used for the execution of payment transactions, it is then a payment account which, if accessible online, must be accessible to* [TPPs] *through the relevant interface … the* [PSU] *of the PI/EMI however should not be able to access safeguarding accounts through TPPs, since these accounts are opened in the name of the PI/EMI, and not in the name of the PSUs of the PI/EMI. If the payment account is accessible online, the respective PSU (an EMI or a PI) has the right to make use of TPPs' payment services …*".

## Low-Risk Investment

The NBB has defined the key criteria for an asset to be considered low-risk, liquid and secure.

First, "liquid" means that the asset has the ability to be easily sold with a minimum negative impact on its price; as a result:

- The asset must be freely transferable without any constraints from a regulatory or contractual point of view;
- There must be an active market for this asset with a group of diversified buyers and sellers, including in troubled times;
- There must be reliable price data published on a regular basis.

The NBB takes the view that eligible liquid assets include certain level 1 assets and level 2A assets referred to in Regulation 2015/61 on liquidity coverage requirement for credit institutions, in particular those items set out in Article 10 1°, a), b), c), d), e), and g), as well as those listed in Article 11, 1°, a), b) and e).

Second, "secure" means that the assets must be protected against various risks inherent in their nature; as a result:

- The assets must be clearly identified in the accounting at any time;
- They must be held in a separate securities account with a regulated entity governed by the law of an EU Member State, or a Belgian branch of an entity governed by the law of a non-EU Member State;
- The assets must be distinctly identifiable;
- In order to mitigate foreign exchange risk, the institution must monitor the risks associated with investment in assets that are denominated in a currency other than the currency of the funds to be safeguarded;
- The maturity of the assets must be limited in order to manage the security risk (the NBB recommends that the institution limits the weighted average maturity of the portfolio up to max. 2 years);
- The assets in which the institution decided to invest cannot be financial instruments related to the institution itself (nor to one of its affiliates).

Third, "low-risk" means that the various risks associated with the assets are limited. Where the institution invests in financial instruments, it must therefore ensure that:

- The issuer of these financial instruments is solvent (its rating must be of category 1 as set out in Annex III to Regulation 2016/1799);
- The credit risk associated with the investment must be limited (meaning that the value of the underlying assets must be sufficiently high and the concentration risk must be limited).

## Insurance Coverage

Where the institution safeguards the funds on the basis of an Insurance Coverage, the NBB clarified that it must ensure that the following conditions are satisfied:

- The insurance policy (or the comparable guarantee) must specify that the beneficiaries are the PSUs of the institution;
- The obligation to pay under the insurance policy (or the comparable guarantee) exists as from the moment the institution is unable to meet its financial obligations vis-à-vis its PSUs;
- The amount that is covered must be equal to the highest amount of all sums, over a period of three years at the end of the working day following the day of its receipt, not transferred by the institution to the payee or to another PSP (or from the use of e-money or e-money redeemed).

Unlike other safeguarding methods, the Insurance Coverage is subject to the NBB's prior approval. To that end, the institution willing to safeguard the funds through this method must provide the NBB with at least the following information:

- The draft agreement to be signed with the insurance company (or the credit institution), which expressly confirms that the purpose is to grant an insurance policy (or a comparable guarantee) to the institution within the meaning of Article 42(1), 3° (in case of a PI) or Article 194(1), 3° (in case of an EMI) of the Law of 11 March 2018;
- The amount that is covered by such insurance policy or comparable guarantee; and
- A description of the internal procedure followed by the institution to assess every year the amount that must be covered by the insurance policy (or the comparable guarantee), based on the institution's own calculations of the funds that must be safeguarded. Ideally, the institution should always specify the contact details of the person that is in charge at the insurance company or the credit institution.

# *3. Reporting to the NBB*

As regards the reporting to the NBB in terms of safeguarding measures taken by the institutions, the NBB refers to the relevant circulars, namely (1) Circular NBB_2018_31 on the periodic reporting scheme for payment institutions (available here in French and Dutch) and (2) Circular NBB_2019_10 on the periodic reporting scheme for electronic money institutions (available here in French and Dutch).

Additionally, the NBB recommends that the institutions share any relevant document with the statutory auditor, so as to include them in the annual report on the appropriateness of the measures taken by the institution to safeguard the funds.

# Thank you

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