STUDY ON THE IMPACT OF DIRECTIVE 2007/64/EC ON PAYMENT SERVICES IN THE INTERNAL MARKET AND ON THE APPLICATION OF REGULATION (EC) NO 924/2009 ON CROSS-BORDER PAYMENTS IN THE COMMUNITY

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Final report

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Glossary

Terminology abbreviations

AML	Anti-money laundering
ANAED	Spanish Association of Payment Institutions
API	Authorised payment institution
APIQ	Authorised payment institution survey questionnaire
ATM	Automated Teller Machine (cash machine)
AUT	Competent Authorities Response
BAIG	Business association interview guide
BBAN	Basic Bank Account Number
BEN	Charges of the PSP are paid only by the beneficiary (code in a SWIFT instruction)
BIC	Bank Identifier Code (SWIFT code)
BNB	Bulgarian National Bank
BUIG	Business user interview guide
CA	Consumer Association
CAQL	Consumer Association Questionnaire Long
CAQS	Consumer Association Questionnaire Short
CBR	Complaint Board Response
CCD	Consumer Credit Directive (Directive 2008/48/EC)
CI	Credit institution
CIQ	Credit institution survey questionnaire
CIT	Cash-in-transit service provider
CRD	Consumer Rights Directive
ECB	European Central Bank
EEA	European Economic Area
EMD II	Second Electronic Money Directive (Directive 2009/110/EC)
EMI	E-money institution
EPIF	European Payments Institution Federation
EU	European Union (EU-27)
F/X	Foreign exchange
IAMATN	International Association of Money Transfer Networks
IBAN	International Bank Account Number (ISO IBAN)
MFI	Monetary financial institution
MIF	Multilateral interchange fees
MS	Member State (EU-27)
OPS	Overlay payment services
OUR	Charges of the PSP are paid only by the payer (code in a SWIFT instruction)
PI	Payment institution
PIN	Personal identification number
PSD	Payments Services Directive (Directive 2007/64/EC)
PSD-Annex	Annex to the PSD (PAYMENT SERVICES (DEFINITION 3 IN ARTICLE 4))
PSP	Payment service provider
PSU	Payment service user
SHARE	Charges of the PSP are shared (code in a SWIFT instruction)

SME	Small and medium-sized enterprises
SPSP	Small PSP (registered small payment institution / waived payment institution)
ToR	Terms of Reference
UKMTA	UK Money Transmitter Association

Member State abbreviations

BE	Belgium
BG	Bulgaria
CZ	Czech Republic
DK	Denmark
DE	Germany
EE	Estonia
EL	Greece
ES	Spain
FR	France
IE	Ireland
IT	Italy
CY	Cyprus
LV	Latvia
LT	Lithuania
LU	Luxembourg
HU	Hungary
MT	Malta
NL	Netherlands
AT	Austria
PL	Poland
PT	Portugal
RO	Romania
SI	Slovenia
SK	Slovakia
FI	Finland
SE	Sweden
UK	United Kingdom

Executive summary

Introduction

1. The present study examines the effects of Directive 2007/64/EC on payment services in the internal market (PSD) and Regulation (EC) No 924/2009 on fees and charges for cross-border payments (Regulation 924). The research was required to cover *"the impact of the PSD on the Internal Market and any problems which may have arisen"* and to include *"legal and economic information"*. Its aim was also to *"identify areas where amendments might be considered appropriate, regarding a possible revision of the PSD and/or the Regulation on cross-border payments."*

2. The report is based on four different sources of information. It examines the PSD, together with its official implementation reports, alongside national legislation and legal opinions on its intended legal, economic and social effects. It uses information on payment services markets and payment services from official statistics as far as they are available at national and EU level and payment service providers and information from a data collection exercise on payment fees and charges faced by payment service users. The other main source of information was a number of surveys of key stakeholders (payment service providers, competent authorities, users, consumer associations, complaint authorities, businesses and legal experts) who responded to questionnaires containing open and closed questions and made national information available.

Surveys played a particularly significant role in this research because of the limited availability of specific statistics, which reflects in part the relatively short period between the implementation of the PSD Directive by Member States and the undertaking of the present study. As a result, the practical effects of the PSD on markets and stakeholders are not yet fully observable. Although the Directive itself requires an implementation report after 5 years, the actual implementation of the PSD by Member States occurred only about 3 years ago.

The result was that it was only possible to assess changes in the market for payment services over a period of about 2 to 2 ½ years. Moreover, the range of official statistics on the payments services markets in the EU is rather limited and the payment services providers often do not produce internally some of the statistics that would have been required for a thorough quantitative assessment of all of the impacts of the PSD. In cases where data were lacking, the study draws on the qualitative views of stakeholders and the knowledge of legal and business experts who were specially appointed to advise the project team.

General observations on the PSD

3. The PSD provides a comprehensive legal framework for the provision of payment services in the European Economic Area and created a new type of payment service providers, namely payment institutions.

4. Following the implementation of the PSD, payment services within the scope of the PSD can only be provided by credit institutions, electronic money institutions, payment institutions (the new type of financial institution created by the PSD), post office giro institutions which are entitled under national law to provide payment services, the European Central Bank and national central

banks when not acting in their capacity as monetary authority or other public authorities and Member States or their regional or local authorities when not acting in their capacity as public authorities.

5. The study comes to the general conclusion that the PSD has, in the short period since its introduction, **reached some of its general goals**. Its positive impact in terms of shorter execution times and greater transparency are not only apparent in the observed practice but were confirmed by users and competent authorities. The PSD also substantially contributes to achieving an overall Single Market in payment services and provides the legal framework to achieve this objective. However, at the present time, this is still very much work in progress.

6. No substantial impact of the PSD can so far be observed with regard to market **entry** of new providers, technical **innovations**, and **efficienc**y of the provision of payment services. As a result of so far relatively limited entry by *de novo* payment service providers and so far relatively limited new cross-border provision of payment services, the effect of the PSD from this perspective is at the present time relatively weak.

New payment institutions and their payment services

7. As of late August/early September 2012, the number of **authorised payment institutions (APIs)** stood at 568. In addition, 2,203 institutions were registered as **small payment services providers (SPSPs)** under Article 26 of the PSD which waives some of the PSD's regulatory requirements based on the size of providers. These SPSPs are limited in the scope and scale of their operations.

8. "Money remittance" is the payment service APIs are most commonly authorised for (40% of all authorisations). The other **PSD payment services** which account for a large proportion of total payment service authorisations include *"issuing and/or acquiring of payment instruments"*[1] (19% of the total number of authorisations) and *"execution of payment transactions including transfer of funds on a payment account with the user's payment service provider or with another payment service provider"*[2] (15% of total authorisations). Practically all SPSPs provide remittance services.

9. The number of APIs and SPSPs varies greatly across Member States. For example, in late August 2012, the number of APIs ranged from 224 in the UK to 0 in Latvia and Poland. Only 9 EEA States had SPSPs at that time, and the number of such SPSPs ranged from 988 in Poland to 23 in Norway. No single factor stands out as being a key cause of these divergences.

The waiver under **Article 26 for SPSPs** ensures the continued existence of many providers, very often offering niche services (including payment channels to very specific regions or countries of the world), which would not otherwise be able or ready (in terms of costs, resources, business scale, business concept) to upgrade their business to the level of an authorised financial institution. This is especially important for small communities given the trend among credit institutions to reduce coverage of some territories with physical offices. A number of competent authorities noted in the survey responses that, in the absence of the waiver, a considerable number of such providers might have continued to operate with no authorisation. However, competent authorities also warn that many consumers are not aware of the difference between authorised and regis-

[1] This is payment service No 5 in the PSD-Annex.
[2] This is payment service No 3 in the PSD-Annex.

tered payment institutions and that, as a result, their funds are not segregated or safeguarded otherwise. Therefore, a requirement for SPSPs to inform their customers of the fact that funds are not safeguarded would be valuable addition from the point of view of consumer protection.

10. A review of the date of incorporation of the APIs, as reported in the national business registers, shows that more than 85% of current APIs existed before 2008. Therefore, the PSD has not yet had a discernible impact on the **entry of new players into the market**.

11. As of late August 2012, only 32% of APIs had sought a **passport** to provide payment services into another EEA Member Sate. The extent of passport take up varies greatly, ranging from 75% in Austria to nil in Greece, Hungary, Italy, Lithuania, Portugal and Slovenia. Typically, payments institutions obtained passports to a limited number of EEA Member States while in the UK in particular, passports were often sought for the whole EEA. However, an analysis of the services offered on the websites of this latter group of APIs showed that, at the present time, they typically provided payment services to no more than four EEA Member States outside their home country.

12. Payment institutions raised the concern that the **passporting process** is not working as effectively as it could be. This is due to the fact that the application, at the national level, of other, non-fully harmonised EU legislation (such anti-money laundering, consumer protection, and data protection) diverges in a number of cases and, thus, specific requirements and obligations have to be met before payment institutions can effectively passport their services into EEA Member States outside their home country. Those concerns are also reported by the credit institutions as obstacles to unification of their product portfolio across EEA markets. In some cases, the actual passporting process can take a long time with no clear information when the process is likely to be completed and the reasons for the lengthy process.

13. Importantly, however**, innovative payments institutions** are of the opinion that the PSD and its passporting regime supports innovation because it allows these institutions to access new markets in the EEA and achieve the scale required to operate sustainably.

14. A number of competent authorities also want to see an improvement in the **communication process** concerning the passporting system, both during and after the notification process. While there is no general desire for changes to the passporting provision in the PSD, there is a clear demand for a broader platform for discussion of current problems in the passporting regimes.

15. The PSD imposes on payment institutions a number of requirements which aim to make these institutions safe. These requirements relate to a) the **initial capital** required at the time of the authorisation (Article 6 of the PSD); b) the **own funds** to be held at all times by payment institutions (Articles 7 and 8 of the PSD); and c) **safeguarding of funds**, which have been received for the execution of payment transactions. Funds are to be safeguarded by either 1) holding such funds in an account separate from the operational account(s) of the payment service provider and insulating such funds from claims of the other creditors, or 2) holding an insurance policy or comparable guarantee. Stakeholders are of the view that all these precautionary principles in the PSD are adequate. While three different methods can be used to calculate the on-going own fund requirements, the selection of a particular method does not have any impact on the actual number of APIs and, so far, has not raised concerns among APIs about the creation of an uneven level playing field due to the fact that the three methods yield, in some cases, significantly different own funds requirements for identical APIs.

16. The PSD foresees that the rules for **access to payment systems** by authorised payment institutions and small payment service providers should be objective, non-discriminatory and proportionate and should not inhibit access more than necessary to safeguard against specific risks such as settlement risk, operational risk and business risk, and to protect the financial and operational stability of the payment system. Payment systems designated under Directive 98/26/EC are excluded from the PSD payment system access provision. Although no APIs have so far complained to the relevant competent authorities about lack of access to a payment system, the responses of most APIs to the consultation on the EC Green Paper "Towards an integrated European market for card, internet and mobile payments" clearly shows that these APIs are seriously concerned about the unlevel playing field and higher cost of doing business that they face in comparison to credit institutions as a result of not being able to directly access payment systems.

17. Access to a payment system is less of a preoccupation for many APIs, especially the smaller APIs. For such APIs, **access to a bank account for operational purposes (i.e. an own account) and maintaining such an account** is a more important issue. Such access is viewed as problematic by a number of payment institutions and in some cases acts as a brake especially on cross-border provision. While such bank account access issues are outside the scope of the PSD, they require nevertheless further policy attention for domestic and cross-border competition reasons.

18. The PSD foresees that payment institutions may engage in **credit granting** related to payment services provided that a) the credit is ancillary to and granted exclusively in connection with the execution of payment transaction, b) has a short duration not exceeding 12 months where provided in third markets under passporting regime and c) can only be granted from the institution's own funds. The 12-month limit on credit extended by API beyond home market merits revisiting as, a priori, there is no obvious reason to limit it to 12 rather than 9 or 15 months. The survey responses of competent authorities also suggest that a common body overseeing both payment institutions and consumer credit would alleviate some of the problems which emerged in relation to APIs providing credit.

Fees and charges of payment services

19. One of the objectives of the PSD was to strengthen competition in the market for payment services and to increase the efficiency of the supply of payment services. Unfortunately, quantitative data on the **cost of production of payment services** by the various payment service providers is almost inexistent and only qualitative information was provided by stakeholders in their responses to the various surveys. Overall, it appears that for most payment service providers the costs have remained the same. The few who had seen changes were split between respondents that reported an increase and those that noted a decrease in cost.

20. An analysis of **fees and charges** for a range of payment transactions collected for a sample of payment service providers (credit institutions and payment service providers) shows that, in the second half of 2012, when the final data were collected, Regulation 924 requiring equal charges for cross-border payments in euros and domestic payments is fully respected for credit transfers of less than EUR 50,000. Only a few breaches were observed for credit transfers above this amount.

21. A comparison of the level of fees and charges prevailing in 2012 with those reported in previous studies for earlier years shows that, in general, **fees for domestic and cross-border credit transfers have decreased**, if one focuses on transfers initiated in home-banking channels. For over-the-counter transfers, the picture is mixed with fees actually higher in 2012 than in 2005 in some countries. In the case of withdrawals at ATMs using a debit card, fees did not change much from 2005 to 2012, although there are differences across Member States. Some consumer associations reported the emergence of new charges.

22. Consumer organisations noted **equal charges** for cross-border payments in national currencies in euros in countries outside the euro area would have benefits for many EU consumers. Sweden has already implemented such an equalisation of charges for cross-border payments and Romania has announced such a policy, but it was not yet implemented at the time this study was conducted. While the direct benefits of increased harmonisation and equality in fees are obvious, there are no data in Sweden to provide robust evidence on this issue. The Swedish Bankers' association pointed out that the new rule was already common practice before the Directive came into force.

23. At the present time, the pattern of **usage** across the EU-27 is mixed. In the euro area, 13% of all providers of cross-border transactions in excess of EUR 50,000 used ad valorem charges and in the non-euro area this figure was 52%. For debit card ATM withdrawals, the survey of fees and charges shows that 23% of payment service providers in the euro area and 40% in the non-euro area did use ad valorem charges. Finally, in the case of credit cards, the figures are 43% and 79% in the euro area and non-euro area respectively. While in principle a fixed fee structure may be more appropriate because the cost of effecting a payment is largely fixed, it is not obvious that a move to a flat fee structure would necessarily be advantageous for payment service users who mainly make payments of relatively small value. For example, if, following the introduction of a flat fee, payment service providers aim to keep unchanged the revenues generated by an ad valorem fee, it would significantly increase the cost of payment services for users making small payments and benefit those effecting large payments. In practice, however, the costs to the consumers of ad valorem charges are large for a variety of payment transactions other than small credit transfers.

24. Fourteen Member States representing about half of the EU Population have banned altogether **surcharging** for the use of specific payment instruments. Denmark allows it for the usage of credit cards but not for the usage of debit cards. Twelve Member States representing the other half, including Germany, the UK, Spain and Poland, impose no restrictions on surcharges. Surcharges may sometimes represent additional income for the payees if they charge an extra fee over and above the cost they face when credit cards are used by the payer.

25. Studies of the cost of various payment instruments show that cashless instruments, in particular debit cards, are often the cheapest form of a payment instrument from the perspective of society. However, the available data on the use of different payment instruments in different Member States do not show unambiguously that blanket prohibitions on surcharges on card usage reduce **cash usage**.

26. Article 19 of Consumer Rights Directive 2011/83/EU (CRD), which must be transposed into national law by 13 December, 2013 will prevent "*traders from charging consumers, in respect of the use of a given means of payment,* ***fees that exceed the cost borne*** *by the trader for the use of*

such means.” However, many stakeholders are of the view that the CRD will not be an effective tool to limit the surcharges - it will be difficult to enforce it as the actual quantification of the true costs incurred by merchants when accepting payments by cards may be very complex and difficult and applicable only to consumer transactions. Overall, an approach such as the one adopted in Denmark, which prohibits surcharges on the use of the national debit card but not for credit cards, is likely to strike a good balance between protecting consumers and encouraging cashless payments, even if so far the empirical evidence on the link between a surcharging ban and the use of cash is not conclusive.

Scope of the PSD

27. The **list of payment services** listed in the Annex to the PSD sets out the payment services which are within the scope of the PSD, namely:

1) *Services enabling cash to be placed on a payment account as well as all the operations required for operating a payment account.*
2) *Services enabling cash withdrawals from a payment account as well as all the operations required for operating a payment account.*
3) *Execution of payment transactions, including transfers of funds on a payment account with the user's payment service provider or with another payment service provider:*
    a) *execution of direct debits, including one-off direct debits,*
    b) *execution of payment transactions through a payment card or a similar device,*
    c) *execution of credit transfers, including standing orders.*
4) *Execution of payment transactions where the funds are covered by a credit line for a payment service user:*
    a) *execution of direct debits, including one-off direct debits,*
    b) *execution of payment transactions through a payment card or a similar device,*
    c) *execution of credit transfers, including standing orders.*
5) *Issuing and/or acquiring of payment instruments.*
6) *Money remittance.*
7) *Execution of payment transactions where the consent of the payer to execute a payment transaction is given by means of any telecommunication, digital or IT device and the payment is made to the telecommunication, IT system or network operator, acting only as an intermediary between the payment service user and the supplier of the goods and services.*

28. Nearly half of the **competent authorities found the list adequate**. The improvements sought by the other half required an even stricter approach involving a more specific description of services with less leeway for interpretation. Concepts like *“payment account”*, *“payment instrument”* and *“acquiring related activities”* should be clarified. While some wanted a more restrictive definition which would not include services that do not need to be integrated, others wanted an enlarged list constantly including new services following technical innovations.

29. Issues arise in relation to e-money services and payment services where they are regulated in different ways by the **PSD** and **Directive 2009/110/EC (EMD II)**. Recent developments in payment services cast doubt on the desirability of these distinctions. On-line payments, mobile payments and other payment modalities are developing with the proliferation of IT terminals. Only very simple money remittance services for payers and services to collect funds for payees may in future still be eligible for PSD payment services. All other payment methods may qualify as e-money.

30. Because the licensing regime for payment services providers is founded on the *possession of funds,* payment initiation services (also referred to as "**overlay type services")** may easily fall out of the scope of the PSD. However, in the eyes of the customer the provider may still appear as if he was a payment services provider. This criterion should be reconsidered in this context.

31. The role of the PSD in defining regulated payment services will also have an impact on the view consumers and providers will have of the market. The exclusion of some services (**negative scope**) may have the further effect of creating the impression of a fragmented payment market in the eyes of stakeholders. Limited acceptance of payment instruments (Article 3.k of the PSD), payments via network operators (Article 3.l of the PSD), and commercial agents (Article 3.b of the PSD) are examples of this. Their open formulation invites providers to avoid supervision. This is exacerbated in cross-border transactions by the lack of a harmonised approach to exemptions at national level. Exempt providers can thus obtain a competitive edge over authorised providers in niche markets on pre-paid cards, independent ATM deployment, bill payment and money exchange.

32. **Low-value payments** provided by authorised providers enjoy a 'light' regime under the PSD. If, however, a choice is available to the provider through the design of products and services, mitigated rules for low-value payments lose out to full exemptions in the case of limited network payment instruments and payments via network operators. On the other hand, unlike electronic payment devices, paper cheques have no comparable problems for stakeholders and should be excluded from the PSD.

33. For **e-payments** and low-value payments, exemptions should be aligned with the general idea of consumer protection in payment services by means that create sufficient incentives to adopt consumer friendly behaviour with regard to execution, liability for unauthorised and defectively executed transactions, and for fees.

34. The exclusion of **one-leg transactions** in any currency has received the fiercest criticism from consumer organisations and some competent authorities. Since extra-EEA money transactions are usually money remittances undertaken by vulnerable consumers such as immigrants and migrant workers, the inclusion of such payments within the scope of the PSD would add a significant social feature to the PSD. One-leg transactions are already often dealt with in the same way and with the same tools as two-leg transactions in many operational respects. Only key features (including timelines, charges and liability which anyway are key for any payment service), tend to be differentiated between one-leg and two–leg transactions by providers because they are crucial to profitability and risk. However, extending the PSD to one–leg transactions in any currency has provoked little reaction on the part of most of the providers surveyed. However, criticism of the extension by a third of the providers makes overall judgement very difficult.

Rights and Obligations

35. **Information and transparency** in financial services are a general goal of consumer protection and a special purpose of the PSD (Recital 18 of PSD). In general the information required by the law to be offered was seen as sufficient and adequate. Moreover, where informational gaps were mentioned, these were primarily a question of a better enforcement of the existing law and were expected to be overcome when providers have fully adapted their systems to the new requirements. In some areas, however, stakeholders required information more specifically tailored to the information gaps they had identified.

Information was assumed to be insufficient where complicated and technical issues arise. In these cases, consumers should have access to information they are truly able to understand. This information is likely to need to be concise and to the point.

There is a particular need for a better understanding of which services are not covered by the PSD, for example one-leg and payment initiation services. Changes in variable interest rates and charges occurring during the lifetime of the contract should be predictable. Conditions which can be changed through 'silent consent' are a challenge to users who do not monitor the contractual relationship and are reluctant to exercise their rights to object.

36. Experts were of the opinion that the contribution of the PSD to increased **standardisation**, customer confidence and a willingness to shop around could be improved. A more radical approach to standardisation through a unified information sheet and/or a set of general basic terms and conditions with limited derogations and a separate set of additional provider-specific terms could be trialled.

37. The PSD has successfully harmonised the **execution time** for payment transactions. The rule of one day (D+1) and the value date work well for users and providers although some consumer associations favoured a real time approach. Overall the PSD has significantly shortened execution times, thereby improving the efficiency of the market.

A problem has been identified with the interpretation of the *"cut-off time"* in Article 64.1.3 of the PSD, namely the precise meaning of the expression *"near the end of a business day"*. According to consumer associations and complaint boards this has led to different interpretations by suppliers with regard to the hour, with times set in practice between 1 p.m. earliest and 9 p.m. latest. The effect of harmonisation is hampered as a result. No problems have been reported with regard to the extended execution times for paper-based transactions.

38. Problems arising from **non-execution** or **defective execution** have been reported by some complaint boards but do not seem to concern consumer associations. Nor did complaint boards report irregularities in terms of the restoration of sums debited from accounts in such cases. The fact that there is no evidence of high losses in cases of defective execution or misuse of non-execution by providers may be because of the short time the legislation has been in force.

39. For the majority of complaint boards and for consumer organisations, **users' liability** for unauthorised payments is the main reason for complaints. Although Article 61.1 of the PSD restricts consumer's liability to EUR 150 where a lost or stolen payment instrument was used or inappro-

priate use was made of a payment instrument while all safety requirements had been met, the current situation in a number of Member States is seen as unsatisfactory. Consumer associations in some Member States report a positive impact, especially where the choice provided for by Article 61.3 of the PSD has led to the abolition of even a charge of EUR 150 to the payer. In other Member States, the implementation of the PSD has brought no changes to the existing situation whereby the payer bears the entire loss. National law as applied by the courts and the relevant conflict resolution bodies still burdens the payer with a total liability for all losses occurred before notification. The problem does not therefore seem to be the substantive rule contained in the PSD, which appears to be adequate. The uneven application of the law arises from the interpretation of the burden of proof for consumers in connection with the concept of *"gross negligence"*, which may be an obstacle preventing users from exercising their rights under Article 61.1 of the PSD. A reversed burden of proof may therefore provide a corrective.

40. At the present time, the **IBAN and BIC** codes are typically not required for domestic payments. A shorter version of bank account identification numbers, as provided for by Regulation 260/2012, and the use of the IBAN code alone would be welcomed by consumer associations. Consumer associations and complaint boards did not report serious problems concerning the use of the BIC and IBAN codes. However, financial sector experts reported that users are very concerned both about the need to use IBAN together with BIC and about the complexity of the IBAN itself. One possibility for simplification of the IBAN code would be to use letters instead of numbers in the IBAN to identify the bank at which the account is held (as is already the case in a number of European countries).

Out of court redress

41. **Complaint boards** are defined by their ability to receive and channel complaints to the competent authorities in Article 80 of the PSD. Accordingly there is a large variety of institutions which fulfil these conditions. The use of complaint boards varies significantly between Member States. Statistics are not always available, but the survey revealed that the number of complaints by country ranged from 0 to 39,186 cases in 2010 and 2011.[3] This is due to variations in accessibility, length of period of existence, awareness on the part of users and their confidence in these institutions. While in the UK and Ireland complaints to such institutions are quite common, in most other countries use of the complaint system has yet to be developed.

Recommendations

42. The table below sets out a number of **recommendations** for changes to the PSD which are based on the findings of the present study. The table is followed by a number of explanatory notes.

[3] The reference periods are calendar years for all EU Member States except the United Kingdom where the reference periods are financial years April 1, 2010 – March 31, 2011 and April 1, 2011 –March 31, 2012. See Annex 3.1 Table 4 for details.

Table of Recommendations for Amendments to the PSD

AREA	ISSUE	PSD ARTICLE	SUGGESTED CHANGE	EXPLANATORY NOTE
PAYMENT SERVICES LIST	**cash placement**	PSD-Annex no. 1	• add: *incoming transfers credited to a payment account*	**[1]**
	account operations	PSD-Annex no. 1-2	• remove: *as well as all the operations required for operating a payment account.*	**[2]**
	credit transfer, direct debit, card transactions	PSD-Annex no. 3-4	• remove: *payment card transactions*	**[3]**
	issuing instruments	PSD-Annex no. 5	• replace by: *execution of a payment transaction through a payment instrument that initiates transactions other than credit transfers and direct debits*	**[4]**
	acquiring	PSD-Annex no. 5 Recital 7	• replace by: *execution of a payment transaction for the payee initiated through a payment instrument by or through the payee* • clarification that all acquiring modalities are covered: *acquisition of transaction or transaction processing of any kind with possession of funds*	**[5]**
	money remittance	PSD-Annex no. 6	• refer to definition in Article 4 (13) PSD	**[6]**
	network payments	PSD-Annex no. 7	• remove	**[7]**
	new payment services		• add: *payment initiation services(also referred to as "overlay type services")*	**[8]**
NEGATIVE SCOPE	**limited acceptance instruments**	Article 3.k	• change focus to: *qualified relation between provider and user beyond payment transactions* (e.g. franchise)	**[9]**
	network payments	Article 3.l	• define more precisely by: *execution of payment transactions by the provider who (1) operates an IT network, (2) executes transactions for the subscriber of this network, (3) provides goods and services of a digital nature (4) delivered and consumed by a device designed to use that type of network* (i.e. mobile phone, tablets)	**[10]**
	commercial agents	Article 3.b	• define more precisely by: *agent for one party facilitating purchase of goods and services*	**[11]**

AREA	ISSUE	PSD ARTICLE	SUGGESTED CHANGE	EXPLANATORY NOTE
	direct payments	Article 3.a	• define more precisely by: *payment collection on behalf of payees where under the contract or the applicable law the intermediary is deemed payer or payee for the purpose of settling obligations regardless of the payment modalities (cash, credit transfer, etc.)*	**[12]**
	remaining exemptions	*money exchange* *ATM*	• delete *reference to payment account* (value transformation from one currency to another should always be exempted regardless of the way the funds are made available or are withdrawn unless the money exchange provider offers additional services for payment) • remove reference to *providing other payment services*	**[13]**
SCOPE	**one-leg**	Article 2.1	• extend: entire *title III applicable to all services and transactions* • extend: entire *title IV applicable to all payment transactions initiated through a payment instrument where the initiated transaction is not a credit transfer and/or direct debit*	**[14]**
	currency	Article 2.2	• extend: *entire title III and IV to all currencies transaction inside the EEA*	**[15]**
LOW VALUE		Article 34, 53	• include: *multipurpose payment instruments enabling both low-value and standard transactions*	**[16]**
OPTIONS	**microenterprises**	Article 30.2, 51.3	• provide: *an option for microenterprises to derogate the application of the PSD in countries which adopted the option provided by Article 30 (2) PSD*	**[17]**
	surcharging	Article 52.2	• Ban surcharging for the use of at least one payment instrument where the payer's account is immediately debited	**[18]**
	charges for information	Article 47,48 (3)	• remove	**[19]**
PAYMENT INSTITUTIONS	**deposits**	Article 16.4	• clarify: *payment account operated by payment institutions for users may show balance*	**[20]**
	initial capital	Article 6	• remove: *threshold for services provided in the form described in PSD-Annex no. 7* • add: *lower threshold for low-value transactions*	**[21]**
	own funds	Article 8	• remove: *threshold for services provided in the form described in PSD-Annex no. 7* • add: *lower threshold for low-value transactions* • clarify: *priority of e-money requirements for own funds over rules in the PSD for transactions with e-*	**[22]**

AREA	ISSUE	PSD ARTI-CLE	SUGGESTED CHANGE	EXPLA-NATORY NOTE
			money funds	
	access to pay-ment account		• add: formal process for resolving cases for when a payment institution faces problems in opening and/or maintaining a bank account	**[23]**
UNAUTHORISED PAYMENTS	**liability**	Article 60 Recital 33	• change: *burden of proof in line with Article 33 (instead of a national option as suggested in Recital 33 of the PSD)*	**[24]**

EXPLANATORY NOTES

[1, 2] The notion of *"account related services"* (Nos. 1 and 2 of the Annex to the PSD (PSD-Annex)) should explicitly include incoming transfers to a payment account in order to avoid doubts as to which payment service those incoming transfers constitute. The operating payment account should not be made a payment service by legal definition because the use of a payment account does not necessarily entail a payment transaction. Treating the operating account as a payment service would otherwise give rise to doubt over the interpretation of the PSD in many other areas (see section 4.1.2 of this report).

[3, 4] The definition of the services in No. 3-4 of the PSD-Annex should not include payment transactions through a payment card or similar device. This is to avoid overlap with services related to payment instruments (PSD-Annex No. 5). The latter should be reorganised to include execution of payment transactions through a payment instrument only, other than credit transfer and direct debits, which are covered by PSD-Annex No. 3-4, even if initiated by a payment instrument. This is because issuing a payment instrument is in itself not a payment transaction, which gives rise to the same concerns as with 'account related services' (see section 4.1.2).

[5] The description of acquiring services should be reorganised in order to remove existing doubts over the meaning of *"acquiring payment instruments"*. Such payment service does in fact not exist in the market. The description should include all existing modalities of payment services for payees handled by payment instruments in order to avoid doubts over the scope of the PSD in the area of acquiring (see section 4.1.2).

[6] The description of money remittance (PSD-Annex no. 6) should adopt the wording of the definition in Article 4(13) of the PSD to ensure coherence (see section 4.1.2).

[7] The payment services defined in PSD-Annex No. 7 *("payments facilitated by network operators"*) should be removed in order to avoid doubts over the interpretation of the PSD. This is because those services clearly overlap with other payment services contained in the PSD-Annex (see section 4.1.2).

[8] The list of payment services should include payment initiation services to ensure that an adequate regulatory regime for providing those services is created as well as to ensure a level playing-field among all providers (see section 4.1.3).

[9, 10, 11] The exemption for limited acceptance instruments (Article 3.k of the PSD), network payments (Article 3.l of the PSD) and commercial agents (Article 3.b of the PSD) should be formulated much more precisely in order to avoid existing concerns expressed by all stakeholders over the scope of exempted activities and the position of the consumers making use of exempted services (see section 4.2.2-4).

[12] The exemption for direct payments (Article 3.a. of the PSD) should be amended to alleviate existing doubts as to the position of a third party which facilitates the payment while deemed to be a payer or payee under the relevant contract or the laws applicable to the third party (see section 4.2.7).

[13] The exemption for money exchange (Article 3.f of the PSD) should not refer to payment accounts in order to avoid existing concerns about the position of money exchange providers offering cashless money exchange (see section 4.2.5). The exemption for an independent ATM operator (Article 3.o of the PSD) should not be linked to the fact that the operator does not offer payment services. This creates uncertainty since a user is mostly unable to verify whether this condition is met (see section 4.2.5).

[14, 15] The extension of Title III of the PSD in its entirety to all payment services and transactions protects consumers undertaking payment transactions outside the EEA just as extending Title IV of the PSD to transactions outside the EEA. However, the extension of title IV should be limited to certain services and transactions in order not to undermine the efficiency of providers and payment systems. Extending Title III and IV of the PSD to transactions in any currency within the EEA (i.e. two-leg transactions in any currency) will also be of benefit to consumers (see section 4.3).

[16] The mitigated PSD regime for low-value transactions (Article 34, 53 of the PSD) should not focus on single-purpose instruments because it runs counter to existing trends in the payments market. The current situation results in limited deployment of the mitigated regime by providers (see section 4.4).

[17] Review of the option to treat microenterprises as consumers (Article 30.2, 51.3 of the PSD) is needed in order to ensure access by microenterprises to business payment products (see section 4.6).

[18] At the present time, 12 Member States do not prohibit surcharging for credit cards. In order to allow consumers the use of at least one non-cash payment instrument without incurring extra cost, surcharges on payment instruments where the payer's account is immediately debited when the payment is effected with the card should be prohibited (see section 3.5).

[19] The option to provide information on paper once a month and free of charge (Article 47.3, 48.3 of the PSD) appears to be an unjustified burden on providers (see section 4.7).

[20] The prohibition against payment institutions offering deposits (Article 16.4 of the PSD) should clarify whether payment accounts operated by payment institutions for users are permitted if they

store user's funds for future transactions, in order to avoid existing doubts over the scope of activities allowed for payment institutions (see section 4.1.2).

[21, 22] If the recommendation to remove payments facilitated by network operators (PSD-Annex, No. 7) is accepted, the provisions referring to those services (on initial capital, own funds – Article 6, 8 of the PSD) will also need to be amended. Lower capital thresholds could be considered for low-value transactions. To avoid an overlap between the PSD and the e-money Directive, it is necessary to clarify that the own-funds rule under the e-money Directive prevails over the PSD own-funds requirements where the transaction is effected in e-money (see section 4.5.3).

[23] The issues faced by payment institutions in opening bank accounts make it necessary to establish a formal process for addressing these issues similar to the process foreseen for access to payment systems (see section 5.6).

[24] In light of divergent national rules on the burden of proof relating to unauthorised payments, Article 33 of the PSD should be made binding and the option removed (see section 7.1).

1 Research Purpose and Methodology

This chapter explains the purpose of the research and identifies the beneficiaries. It also introduces the way in which the research was conducted, the choices made with regards to the structure of this report, and discusses the availability of the data contained in this report.

1.1 Purpose of the research

The purpose of this project is an evaluation of the *implementation* of the European legal framework for payment services in cross-border transactions through the Payment Services Directive 2007/64/EC (PSD) and Regulation (EC) No 924/2009 on cross-border payments (Regulation 924).

1.1.1 General criteria

The technical specifications of the tender[4] require assembly of evidence as to the legal and economic *impact of the PSD and Regulation on cross-border payments on the Internal Market and any problems which may have arisen, and identification of areas where amendments might be considered appropriate.*

The findings are intended to assist the Commission in preparation for its implementation report as required by Article 87 of the PSD and Article 15 of Regulation 924/2009[5]. Article 87 requires that the European Commission must provide a review of the Directive with particular regard to its scope, its prudential and authorisation requirements and the mandatory time periods. Article 15 requires a review of the Regulation with particular regard to use of the IBAN and BIC codes, and of market developments arising from the regulations governing fees and accessibility for direct debit transactions.[6]

The criteria for effective implementation of the PSD are set out in the Recitals of the PSD, which specify the objectives of the directive. These objectives are further clarified in the Terms of Reference (ToR). Recital 5 lists the following aims: “to ensure the coordination of national provisions on prudential requirements, the access of new payment service providers to the market, information requirements, and the respective rights and obligations of payment services users and providers”.

The ToR distinguishes between existing problems, impeding development of a single payment market, which the directive and Regulation were intended to resolve, the goals of the regulations and the means seen as appropriate to address both.

These are identified as follows:

Problems

- *limited range of providers (banks for regular payment services, money remitters, etc.)*

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[4] Invitation to tender n° MARKT/2011/120/H.

[5] See terms of Reference of the Contract. The most significant work and analysis concerns the provisions of the PSD. However, because the Terms of Reference include research into the effects of Regulation 924, both are assessed together where possible, despite both laws being distinct and not establishing the same type of rules.

[6] The third element had been the ceiling of EUR 50.000 which has already been removed.

- *variations in timescales for the completion of payments and the availability of funds*
- *undefined and often unenforceable provider liability*
- *lack of transparency in charges*

Goals

- *ensuring European-wide minimum payment transaction services,*
- *increasing competition by providing access to the market by a wider range of providers,*
- *harmonising payment services to enable comparison between them and to facilitate cross-border commerce*

Means

- *introduction of a well-defined legal category of payment institutions, to which non – discriminatory access is guaranteed*
- *standardising and shortening execution times*
- *provision for end-to-end liability*
- *ensuring full price disclosure for users including disclosure of all additional charges*
- *regulation of the extent to which fees may be deducted directly from the payment*
- *creation of a fair distribution of the burden of risk arising from unauthorised transactions*
- *harmonisation of information duties and other contractual requirements*

1.1.2 Hypotheses to be verified

The ToR break the above goals down further into a number of questions. These have been used as hypotheses upon which to structure this research. The hypotheses follow the headings used in both the Directive and the Regulation, and may be summarised as follows:

General Information

The research was tasked to monitor the economic and legal consequences of the PSD and its effects on market integration, on the cost of providing payment services, on the efficiency of those services, on the convergence of prices and procedures, as well as benefits for users in terms of price, performance and innovation.

Charges

The ToR required the research to pay close attention to prices and fees charged in the EU, especially with regard to differences between the Member States and particularly with regard to differences between euro and non-euro MS.

Subject matter, scope and definitions

The ToR required a description of the integration of payment service markets, of the emergence of new payment institutions (PIs) and of the identity of payment users. This included an assessment of the effects of the Directive and the Regulation on cross-border transactions involving EU Member States with different currencies, and those passing from or into non-EU countries (one-leg disadvantages). The ToR further required a redefinition of the scope of application of the PSD (e.g.

new payment services such as overlay services), and a legal assessment of whether the form of the rules (negative scope, list) is adequate and exhaustive.

Market access, structure and prudential rules

The ToR required the research project to examine the effectiveness of the PI licensing provisions in terms of promoting competition by means of new provider entries into the market and their use by multimarket PIs. The ToR placed particular emphasis on the creation of pan-EU payment services and effective cooperation between supervisors in the context of the passport notification system.

It also required scrutiny of the effectiveness of prudential requirements on providers in terms of own funds and initial capital requirements, on the safeguarding of users' funds, as well as consideration of whether the waiver regime for small providers facilitates their access to the market.

This entailed the collection of data on the consumer views of the impact of credit granted by PIs, the application of ring-fencing and the effect of a register of API and SPSP on consumer interests.

It further included analysis of the effectiveness of the system of mandatory access to payment systems and the exclusion of designated payment systems.

Transparency and information requirements

The ToR included consideration of the transparency and information requirements. Their aim was an improvement in user confidence, better-informed user choice, greater ability to shop around, and greater standardisation of fully automated EU-wide payment services.

It further required assessment of the impact of low-value derogations on future growth in online and mobile payment services, and of problems resulting from the similarity between standard payment and prepaid (e-money) transactions, and the potential scope for rationalisation in the context of the separate legal regimes within the EU.

Finally, the ToR required assessment of the impact of the decision to place micro-enterprises in the category of consumers, rather than treating them as business entities, on their access to the market.

Rights and obligations of users and providers

The intention of the PSD was that harmonised rights and obligations assist providers to establish cost-efficient, fully automated payment systems with reduced compliance costs.

The ToR required the monitoring of surcharging from the perspective of the various stakeholders. This included assessment of the reasons given by Member States for the prohibition of surcharging, as well as the effects of such prohibitions on competition and efficiency and whether surcharging is linked to actual costs or has in fact become a supplemental source of income.

It further required assessment of the impact of the harmonised refund rule in MS where existing rules were seen as more favourable to users prior to the adoption of the PSD.

The experience of payment service users in terms of execution times and value date also came within the scope of the research. In particular, in MS where shorter execution times have been usual, an assessment of how transactions have developed since 1.1.2012 and whether the additional day allowed for paper-based orders has been of benefit were covered. Similarly, consumer experience of providers' liability formed part of the ToR.

Analysis of the issues arising in relation to regulation 924/2009

The ToR included an assessment of the impact of qualitative and quantitative market changes and of the rationale for charging users on an ad valorem basis.

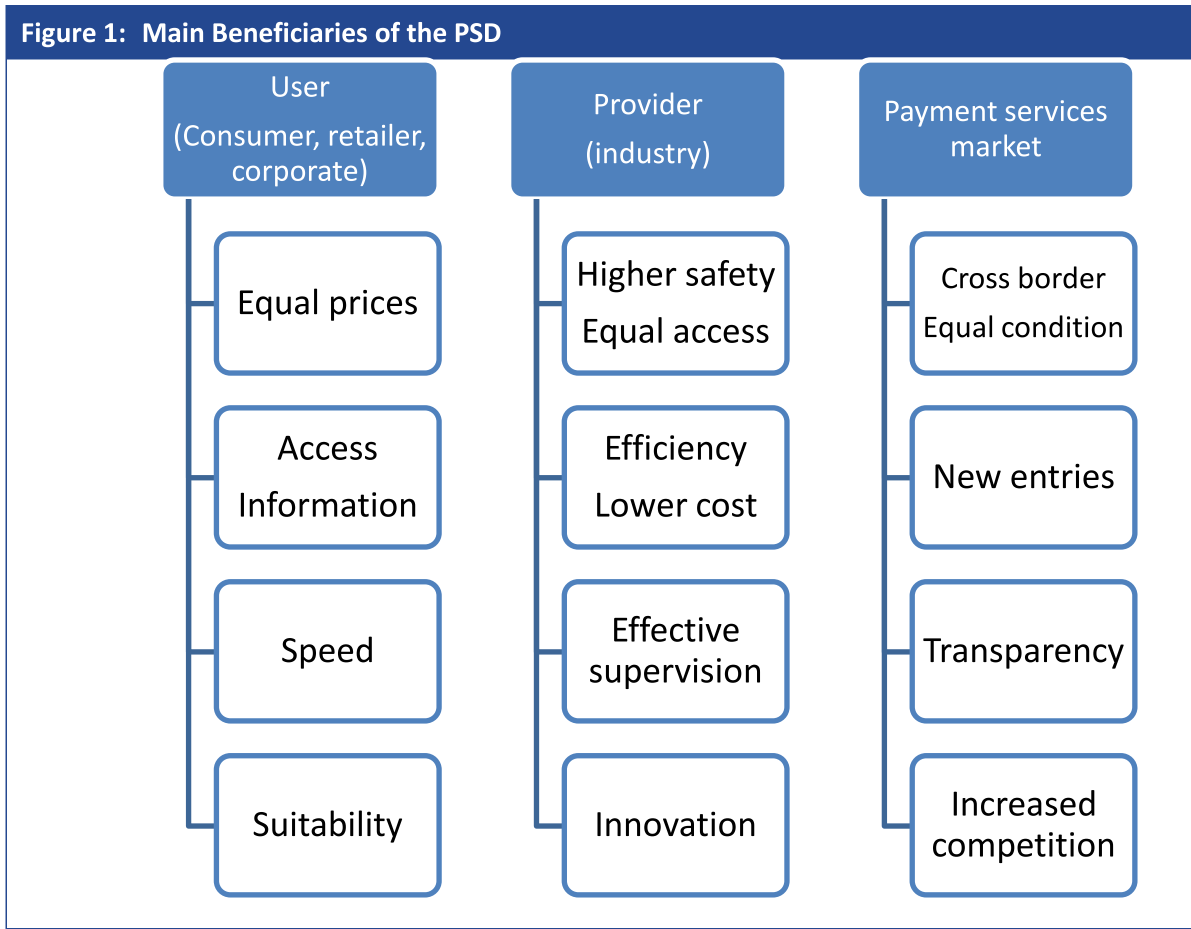
With regard to IBAN (International Bank Account Number) and BIC (Bank Identifier Code), the ToR included assessment of the need for automation, of whether both identifiers are still necessary and in which MS they are obligatory. They further required consideration of how these identifiers could be simplified and whether users would be willing to switch to IBAN alone. In addition, an assessment of the cases of Sweden and Romania with regard to the effect of Regulation 924 on non-EU currencies was included.

The ToR required monitoring of obstacles created by Regulation 2011/924 to innovation as well as possible conflicts between that Regulation and other regulatory provisions.

1.2 Beneficiaries of the PSD

The stated objectives of the PSD identify **users** (mainly consumers), **providers** and the **internal market** as the main target beneficiaries. These three categories accordingly form the points of reference for this evaluation and define the stakeholders to be surveyed. Statistical data and survey responses will therefore inform analysis of what constitutes a well-functioning market and these research targets are shown in the Figure below.

Figure 1: Main Beneficiaries of the PSD



Source: iff own presentation

Ten separate surveys have been drawn. Six targeted the demand and provider sides. Three targeted state agencies responsible for supervision. One survey consulted experts as to legal aspects. Further, phone interviews and requests for comments were targeted at particular sub-groups (technical experts for example) where information was necessary and could not easily be collected via the use of questionnaires. Desk research was also used.

Table 1: Overview of surveys conducted and other research methods employed

Survey	Form	Period	Sent	Received
Consumer I	Q	April-July	>150	(CA/MS) 20/18 (34/27 in total)
Consumer II	Q	June-Aug	>75	(CA/MS) 14/13 (34/27 in total)
Businesses	I	June-August	30	30 – 15 large retailers and 15 large non-retailers
Banks	Q	June-August	>500	98 individual banks and 6 associations
Payment I.	Q/I	June-August	>200	36
e-money I.	Q	August - September	>20	5
Authorities	Q	February – March, June-September	27*2	25 first survey/27 second survey
Complaint Boards	Q,E,T	June – August	76/27	43/21
Complaint Boards	M	June – August	-	16/15
Legal experts	Q,E,T	June – August	76/27	43/21

Note: CA means Consumer Associations surveyed, MS means Member States represented by the stakeholder answers, Q= questionnaire, T=Telephone, I=interview, M=review of materials.

1.3 Conduct of the research

The intention of the research was not to assess how far the PSD has been implemented in national legislation, but to evaluate its practical effects. Its effect is by its nature economic and social[7] and can rarely be directly attributed to the Directive and the Regulation. They have an impact only after a number of legal and factual stages have been passed and specific conditions have been met.

There is also a significant difference between directly applicable *Regulations* and indirectly applicable *Directives* which “leave to the national authorities the choice of form and methods”[8] in the way legislation is implemented at national level. Since the control of Payment Systems uses both forms, a distinction must be drawn between *Regulation* 924/2009, which is directly applicable with immediate effect, and *Directive* 2007/64/EC (PSD), which requires specific additional legal steps

[7] Although there is a wide range of literature concerning the effective implementation of EU-law (see Rosin, P. Implementation of the EU Unbundling Guidelines in Germany: a legal perspective In: Handbook Utility Management (2009), p.493-505; Markus, Till. Legal Implementation of Integrated Ocean Policies : the EU's Marine Strategy Framework Directive - In: International Journal of Marine and Coastal Law, Bd. 26 (2011), 1, S.59-90); Reifner, Impact of Directive 2002/65/EC concerning the distance marketing of consumer financial services on the conclusion of cross-border financial service contracts between professionals and consumers - Final Report Project No. SANCO/2006/B4/034), the theoretical discussion on how evaluation of laws can be structured was discussed in the late 1970s was especially detailed. See i.e. Knoepfel, P. Öffentliches Recht und Vollzugsforschung: Beiträge der sogenannten Implementationsforschung zur staats- und verwaltungsrechtlichen Parlamentsdiskussion. - Bern : Haupt, 1979.

[8] Article 288 (ex Article 249 TEC) “To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A **regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A **directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. …” (Consolidated Version of the Treaty on the Functioning of the European Union, Official Journal C83/50 30.3.2010).

for its implementation, each of which have the propensity to be a reason for a failure to meet the intended objectives. Furthermore the rules set out in Regulation 924/2009 are the same in each MS, while the rules provided by the PSD have taken different forms. This may in itself provide a reason for a mismatch in terms of the achievement of its aims. Whereas Regulation 924/2009 came into force immediately after its publication on November 1, 2009[9], also the PSD had to be transposed (on the same date) into national law, even though it had been passed and published two years earlier.

We therefore expected that technical rules concerning timescales for the execution of transactions or governing the amounts of money involved in Regulation 924/2009 have not only by definition changed national law but have also shown immediate economic and social effects. On the contrary, the investigation into the effective implementation of the PSD required a legal assessment of its transposition from EU to national law and a socio-economic assessment of the effects these regulations have for national markets, providers and users.

With regard to legal assessment, this task has to a large extent already been carried out by the "General Report on the Transposition by the Member States version 2.0" of August 2011.[10] In this report, national legislation was compared with the wording of the EU regulations. Its conclusion is that Member States in fact have transposed the PSD in such a way that comparable rules now exist, enabling comparison of outcomes. The national "law in the books" has therefore been assessed. The present study extends this work to implementation. It is focussed on "law in action"[11] in the MS. This therefore entails primarily economic and sociological research.

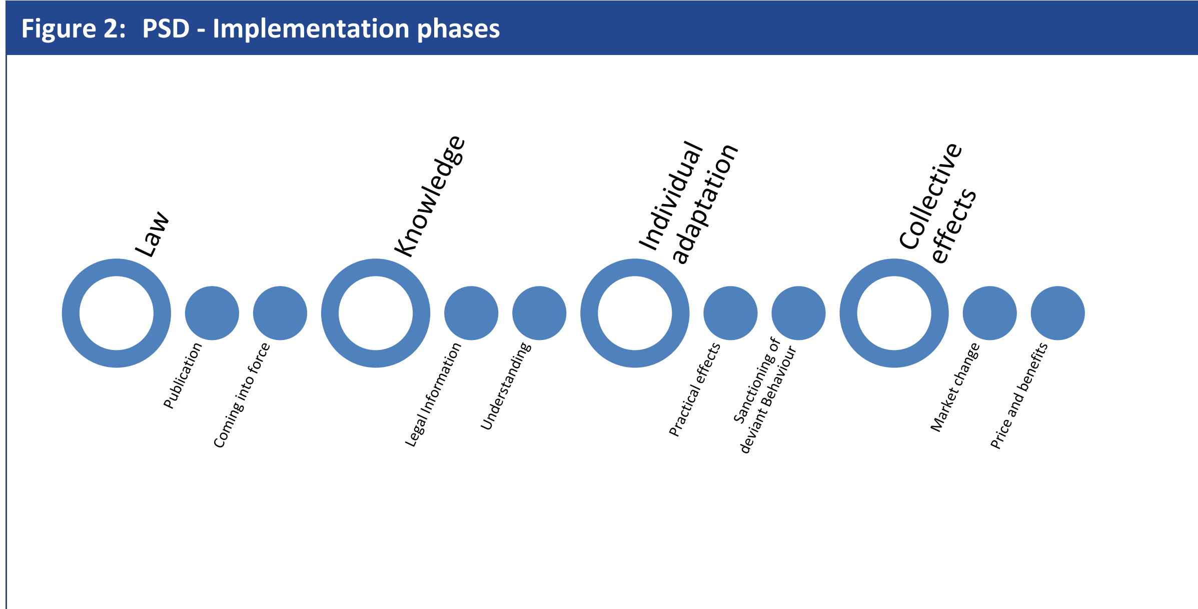
The following figure illustrates the number of factual steps to be taken by legislation which intends to impact on day-to-day life. It is based on the nature of law in a democratic society, which relies to a large extent on the willingness of informed citizens to accept and respect new legislation.

[9] Article 17 Regulation 924/2009 "It shall apply from 1 November 2009."

[10] TIPIK Communication Agency, Directive 2007/64/EC General Report on the transposition by the Member States Version 2.0 – August 2011 Framework Service contract No 100015.

[11] This distinction has been developed by Wisconsin Law School; see Paul D. Carrington and Erika King, Law and the Wisconsin Idea, 47 Journal of Legal Education 297 (1997).

Figure 2: PSD - Implementation phases

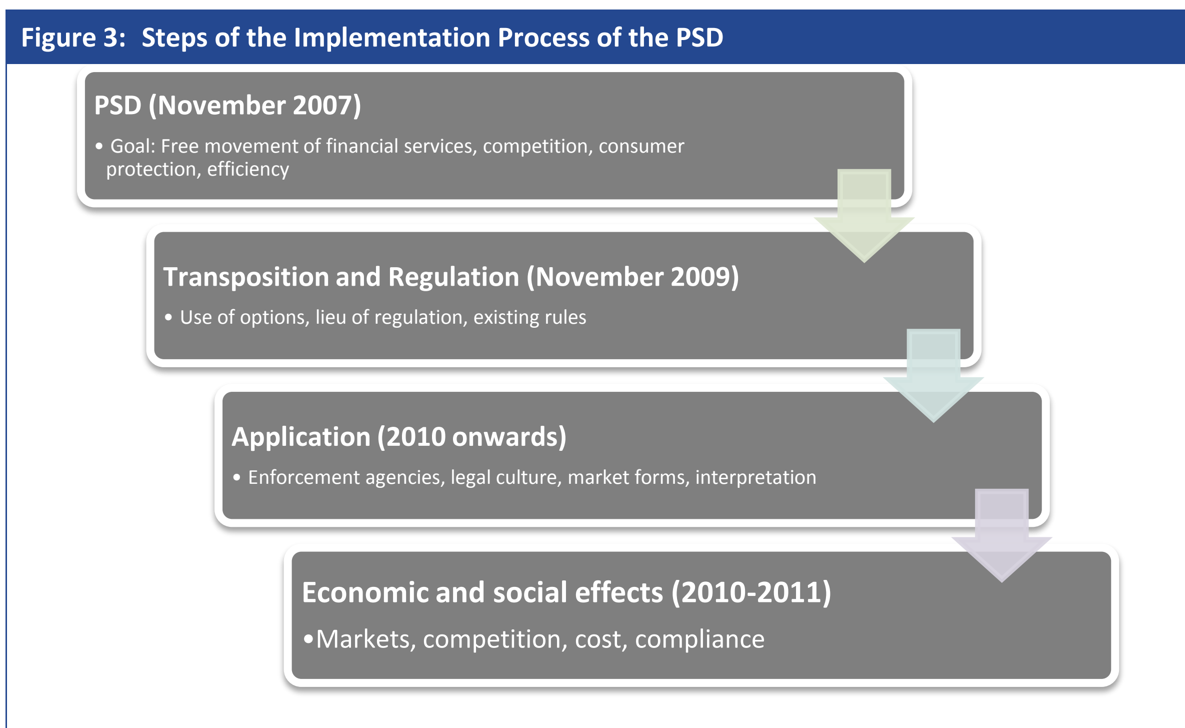


Source: iff own presentation

Differences may arise from variations in the level of legal education and the availability of legal advice in Member States. Irrespective of those variations, legal expertise is still necessary. Legal considerations play an important part in the investigation of the reasons for ineffectiveness or for adverse effects of the Directive arising from measures taken following the transposition of the PSD into national law. Such an investigation involves questions of legal interpretation, as well as questions of whether public or private law is applied in enforcement, whether out-of-court settlement procedures are accessible and effective, and whether the consumers concerned are sufficiently informed and supported by collective organisations in the enforcement of their rights. All these elements are also emphasised in Chapter 5 of the PSD (Articles 80 to 83), in which out-of-court procedures are addressed as one aspect of enforcement. Legal analysis can only verify whether institutional arrangements have been made. Examination of the methods of implementation requires research into its scope, scale, use, accessibility and resources. The project therefore required interdisciplinary work across several national and linguistic boundaries.

The following figure shows the progression from the PSD to its transposition into national law together with the coming into force of Regulation 904/2009 in 2009 and its subsequent implementation into the socio-economic reality of payment systems in the EU. It also illustrates the time restrictions of this research described below in the availability of data.

Figure 3: Steps of the Implementation Process of the PSD



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1.4 Structure of the report

An option for the structure of the report was to mirror the legal structure of the PSD and add a section, concerning Regulation 924/2009. The two forms of legislation do not, however, have separate economic implications. They merely reflect the Council's statutory obligation to act in accordance with the Treaty and its subsidiarity principles.[12] From an economic standpoint, both the PSD and Regulation 924/2009 are legally binding and overlap with regard to the economic and social areas in which they are intended to have effect. Moreover, the structure of the PSD to a large extent only reflects legal requirements, not socio-economic objectives. General and specific, substantial and procedural, public and private, binding and non-binding rules are grouped together to achieve a legal structure which is not necessarily structured around outcomes.

Monitoring implementation and the social and economic impacts of the legislation instead requires a structure which groups issues and indicators according to the economic areas in which this regulation operates, such as markets, innovation, prices, information and efficiency.

There would have also been a third way of ordering this report. Since most information has been collected through empirical research, its results are for the most part grouped by reference to the various empirical surveys carried out in order to present its methodology, problems and instruments in a coherent manner.

[12] For the choice between a Regulation and a Directive see Protocol (No 30) on the application of the principles of subsidiarity and proportionality (1997) No 6 (subsidiarity of regulations). The Treaty (see i.e. Article 37, 40) sometimes refers to both forms but many instances only allow Directives (see Article 44, 46, 47). Chapter 4 on Payments and Capital (Article 56 ff.) includes both where referring to "measures".

All three structures can be justified: the legal structure in the light of the necessity to propose legal amendments, the economic structure to keep information of the same type together and the structuring by surveys if there is to be an emphasis on scientific and methodological aspects.

The final structure is a compromise. In order to stay as close as possible to the regulations, we decided to split the report into a main report and an Annex, in which the results of surveys conducted with the help of questionnaires are presented by survey, and which includes the methodological aspects and shows how the information was collected.

The structure of the main report was again a compromise between the legal structure of the PSD and Regulation 924/2009 on the one hand and the economic and social impacts on the other. We generally followed the structure of the PSD. However, when dealing with some of the underlying questions set out in the ToR (see 1.1.2), we found that a number of social and economic effects and opinions were required which could be attributed equally to rules in different sections of the PSD. Some involved either the same source of information (i.e. stakeholder opinions) or the same economic issues (i.e. markets, prices and cost).

We therefore inserted a general section at the beginning relating to information relevant to the legislation as a whole. We then inserted a section on Prices, Charges and Cost, in which the substantive rules contained in Regulation 924/2009 and the disclosure rules in the PSD were addressed together. We were then able to continue following the order of the PSD and its sections: Scope, Market Access, Prudential Regulation, Transparency, Rights and Obligations. There is, however, a difference in substance. We re-ordered the hypotheses underlying the ToR as to the effects of these provisions. For ease of reference, the following table shows the relationship between the questions set out in the ToR (third column) and the sections of the report (first column), adding the relevant beneficiaries (second column).

Table 2: Allocation of questions from the ToR in the report

Questions	Target	No in ToR
2. General Information		
Innovation, developments	Markets	I(v)
Providers	Providers	II(i)
Online and mobile solutions	Providers	III(ii)b
Interdependencies between PSD and Regulation	Stakeholders	
3. Prices, Charges and Cost		
Prices	Markets	0(iii)
General information on charges	Consumers	0(ii)
Consumer prices	Consumers	O(i)
Charges based on the value of the payment.	Consumers	0(ii)
Economic rationale and effects	Consumers	V(ii)
Surcharging	Consumers	IV(iv)
Justification of surcharges	Markets	IV(iv)
Extension to non-euro EU currencies	Consumers	V(iv)
4. Subject Matter, Scope and Definitions		
List of payment	Markets	I(iv)
"Negative scope"	Markets	I(iii)
"One-leg transactions"	Consumers	I(ii)
Varied use of options	Markets	I(i)
Micro-enterprises	Markets	III(iv)/IV(iii)
Low-value payment instruments and electronic	Consumers	III(ii)a
Classic payments and prepaid payments (e-money)	Markets	III(iii)
"Authorised or registered payment institutions"	Markets	II(vii)
5. Market Access, Structure and Prudential Rules		
Licensing regime	Markets	II(i)
Calculation of own funds	Markets	II(ii)
Prudential requirements	Markets	II(iii)
Passport regime	Markets	II(iv)
Home and host supervisors	Markets	II(v)
Mandatory access	Markets	II(viii)
Granting of credit by payment institutions	Providers	II(vi)
Efficiency and low cost through harmonisation	Providers	IV(i)
Cost-efficient, automated processing and reduced legal costs.	Providers	IV(i)
6. Transparency and Information Requirements		
Transparency and information requirements	Consumers	III(i)
Consumer confidence and consumer choice	Consumers	III(i)
Standardised information requirements	Providers	III(i)
Framework contracts (Article 40 et seq.)	Consumers	IV(ii)
7. Rights and obligations		
Execution time and value date (Article 68 et seq).	Consumers	IV(vi)
Shorter maximum execution times (Article 72)	Providers	IV(vii)
IBAN and BIC	Consumers	V(iii)
User interest to switch to "IBAN only" transactions.	Providers	V(iii)
Refund rules Articles 62/63 and ex-ante regime	Consumers	IV(v)
Non-execution or defective execution	Consumers	IV(viii)
Limited liability of payers in case of not authorised payments	Consumers	-

1.5 Availability of data

1.5.1 Data

The research focussed on empirical evidence. Data were required which could provide answers to the questions posed in the ToR or, if those answers were not sufficiently conclusive, at least provide a contribution capable of informing the underlying hypotheses. The manner in which data were collected, and the type and sources of data depended on the ways in which the questions were formulated. Data therefore consisted of facts, opinions, predictions and law, and included the following:

- **Objective data** as to markets and individual firms. This was available either through official statistics and internal surveys by providers and their trade organisations or, in the case of numerical data, from internal management information systems of the providers concerned where such data was made available to us.
- **Subjective data,** which provide the normative assumptions made by the main stakeholder groups on the effects the PSD has on their business or use of payment services. This is of particular relevance to the evaluation of the success or failure of a measure.
- **Expert knowledge** derived from experience in the field as well as a theoretical understanding of the mechanisms involved in cases where alternatives are under discussion.
- **Legal information** which is especially relevant to questions as to the scope of application of the legislation in point.

While markets are assessed by objective quantitative data, effects on stakeholders required subjective opinions. Restrictions in terms of access to the objective data needed as a result of time (1.5.1) and the absence of statistics (Annex 1.10) made it necessary to obtain indirect information relating to objective data by inquiries with experts and administrative bodies. Surveys of directly interested stakeholders, however, provided objective information which could be used where there was a significant consensus. With regard to legal information, the quantitative aspect is less relevant, because the existence of a legal problem does not depend on the frequency with which it arises. Economic and social problems, on the other hand, have a quantitative impact which can only be assessed over time and with a sufficiently large amount of data.

As the following sections explain, both conditions could not fully be met. The research has therefore attempted to include possible and conceivable problems, in order to enable conclusions to be drawn. Even problems which are merely conceivable at present, together with negative expectations of stakeholders and the incidence of individual problems at this stage may, however, be indicators of future developments which could be addressed on a precautionary basis.

1.5.2 Short timeframe for analysis

The time limit of 5 years fixed by Article 87 PSD for this review reflects an assumption that the effects of a commercial law would have become apparent in the economy within that timeframe. Whereas this is true of the direct impacts of the Regulation, implementation of a Directive depends, as outlined above (Figure 3), on a number of other factors. From a legal standpoint, the true date of its becoming “law in action” is the end of 2009. Even this is questionable in relation to certain tasks involving for example the creation of supervisory institutions, conflict resolution bodies and authorisation mechanisms.

There was even disagreement as to whether the date for transposition into national law would only relate to the law itself or whether it also involved the introduction of bye-laws. While this postponed the date on which the Directive "came into force", the obligation on the Commission to provide a consistent report (necessitating thorough preparation for a complex area of legislation with many new aspects) puts the date from which the Commission can refer to existing empirical data even further back than originally anticipated. Furthermore, it is important not to forget that our research involves a survey of impacts over a limited period of time, since the Directive has effectively been operational since the end of 2009 and collection of our data started at the end of 2011. This means that we are assessing a maximum of only two years of implementation. It may be expected that, over time, much more information will emerge with different or additional implications.

The research findings show that, although a number of impacts are currently identifiable, it is difficult to distinguish between those which arise from an expectation, those which are derived from an immediate reaction, or even a fear, those brought about by an implementation problem, and those which relate to structural changes which will persist.

In future, the research team therefore recommends that consideration be given to revision of the provisions in Article 87 PSD relating to the impact assessment obligations of EU law. Options include:

- Instead of a fixed date the report could fix a period of for example five years starting from an event which shows that the Directive has started to take effect (require national reports from the supervisory authorities and take the first report as a starting point).
- Split the Report into a first report three years after the transposition date which focuses mainly on legal implementation, institutional implementation and the opinions provided by stakeholder representatives and the supervisory agencies, followed by empirical and market research a further three years after delivery of the first report.

1.5.3 Time sequence, panel data aspect

Another problem highlighted by this research is the "before and after" view of the market data on payment services contained within all the questions asking whether some procedures have increased, improved, are better or worse, etc. This implies effects of the PSD which can only be measured if the practice within payment services has changed and this change can be attributed to the intervention of the PSD.

To provide such a view requires first that the same data are available before and after the PSD came into force and, second, a theoretically sound assumption that the PSD is the cause of these changes.

Neither of these requirements could be met in full. A clear causal link can only be identified where Regulation 924 sets clear standards which come into force with immediate effect. As far as administrative actions are concerned, information from the supervisory offices has been used as far as it was available. For the majority of hypotheses, statistical data are not yet available or similar historical data prior to the PSD do not exist. As a result, the absence of measurable data limits the extent to which some hypotheses could be tested. The research team therefore had to rely more heavily on experiential data rather than quantitative data as will be explained further below.

1.5.4 Payment services as an own category

Strict rules as to time periods and price, the single passport and authorisation requirements will soon give rise to Europe-wide statistics, which will be clearly distinct from those generated by other financial services. As many of those services are related to other services and combined in a single bank account, it is difficult to assess a distinct attitude towards payment functions alone, in isolation from the credit and savings functions of that account.

Discussion of the true cost of bank accounts for providers has not yet come to a unified conclusion, in which cross-subsidising mechanisms and income from its use as a marketing tool for other services have been isolated so that costs are comparable. This is also true of single transactions, where fees and charges are waived when higher balances are held with the provider concerned. Similar issues arise in connection with the cost of credit card transactions. "Free credit cards" may hide their cost in the interest charged on the credit they provide. Low credit cost may be compensated for by high fees.

There is a long tradition of functionally defined international trade organisations representing financial institutions that offer mortgages, consumer credit, investment and various insurance products and that collect data for their members which are easy to access. A comparable degree of organisation for providers of payment services does not yet exist.

2 The PSD and the market for payment services

This chapter provides useful background information to the PSD and the market for payment services. It reviews payment services provided by credit institutions, electronic money institutions and post office giro institutions. It also covers the impact of the PSD and Regulation 924 on product and service innovation. It closes with a brief analysis of the interdependencies between the PSD and Regulation 924.

2.1 Introduction

Prior to the implementation of the PSD, in most EU Member States, a number of financial institutions (other than credit institutions, electronic money institutions and post office giro institutions) provided selected payment services such as, for example, remittances and other types of cross-border transfers of funds, under a regulatory regime which varied greatly across the EU.

The PSD defines common rules, obligations and rights for payment service providers and users, and created a new type of financial institution, namely a "*payment institution which is a legal person that has been granted authorisation in accordance with Article 10 of the PSD to provide and execute payment services throughout the Community*" (Article 4(4) of the PSD).

Following the implementation of the PSD, six different categories[13] of payment service providers are now distinguished from a regulatory perspective (Article 1 of the PSD):

1) Credit institutions within the meaning of Article 4(1)(a) of the Directive 2000/48/EC
2) Electronic money institutions within the meaning of Article 1(3)(a) of Directive 2000/46/EC
3) Post office giro institutions which are entitled under national law to provide payment services
4) Payment institutions within the meaning of the PSD
5) European Central Bank and national central banks when not acting in their capacity as monetary authority or other public authorities
6) Member States or their regional or local authorities when not acting in their capacity as public authorities

The present chapter provides information on payment services in the EU-27, the number of payment service providers and their activities in the EU.[14]

[13] Note that only the first four types of payment services are discussed in this report.
[14] While data in this section is largely descriptive, the data included is paramount to understanding the market for payment services as it stands today.

2.2 Payment services provided by credit institutions, electronic money institutions and post office giro institutions

2.2.1 The value and number of payment transactions in 2011

According to the latest European Central Bank (ECB) payments statistics, 8,829 institutions offered payments services to non-monetary financial institutions in the EU-27 in 2011 and EUR 90.6 billion transactions involving non-monetary financial institutions were undertaken for a total value of EUR 240.24 trillion (see Table 3 overleaf).[15]

The ECB statistics cover all credit institutions but only a few of the existing payment and e-money institutions.[16]

In terms of the value of payment transactions undertaken by payment service providers included in the ECB statistics, the UK, Germany and France account for 73% of the total EU-27 transactions in value but for only 59% of the EU-27 transactions in volume.

[15] See European Central Bank, Payment Statistics, data as of September 2012.

[16] As explained in the ECB Payment Statistics General Notes document: In some countries, information from some or all of these payment institutions is not available or is restricted to transaction data. When data are included, they are under “Other institutions offering payment services to non-MFIs”.

Table 3: ECB payments statistics - number of institutions offering payment services[1] and value and volume of transactions in 2011

Country	Total number of institutions providing payment services to non-MFIs	Total value of transactions (EUR trillions)		Total number of transactions		Average value in EUR
		EUR trillions	Percentage of total	millions	Percentage of total	
Austria	767	2.90	1.2%	2,363.10	2.6%	1,226.67
Belgium	110	4.07	1.7%	2,501.31	2.8%	1,626.56
Bulgaria	40	0.14	0.1%	101.97	0.1%	1,328.56
Cyprus	151	0.63	0.3%	93.70	0.1%	6,764.97
Czech Republic	60	1.75	0.7%	979.75	1.1%	1,791.20
Denmark	162	0.77	0.3%	1,695.38	1.9%	452.61
Estonia	45	0.16	0.1%	313.59	0.3%	516.50
Finland	344	4.46	1.9%	2,183.36	2.4%	2,044.97
France	662	28.42	11.8%	17,538.26	19.4%	1,620.71
Germany	1942	67.99	28.3%	17,775.92	19.6%	3,824.60
Greece	59	1.25	0.5%	189.23	0.2%	6,582.99
Hungary	194	1.67	0.7%	852.14	0.9%	1,963.59
Ireland	483	0.69	0.3%	682.75	0.8%	1,016.20
Italy	797	10.05	4.2%	4,159.58	4.6%	2,415.11
Latvia	28	0.42	0.2%	238.58	0.3%	1,773.77
Lithuania	114	0.22	0.1%	275.84	0.3%	809.57
Luxembourg	147	1.13	0.5%	927.84	1.0%	1,217.16
Malta	34	0.13	0.1%	31.83	0.0%	4,161.67
Netherlands	306	6.87	2.9%	5,647.85	6.2%	1,216.70
Poland	1083	7.93	3.3%	2,674.51	3.0%	2,965.47
Portugal	269	1.77	0.7%	1,791.74	2.0%	987.61
Romania	51	1.43	0.6%	322.20	0.4%	4,436.82
Slovakia	35	0.88	0.4%	503.97	0.6%	1,752.00
Slovenia	35	0.34	0.1%	339.75	0.4%	1,004.78
Spain	337	11.92	5.0%	5,535.92	6.1%	2,152.75
Sweden	199	1.54	0.6%	3,071.23	3.4%	502.76
United Kingdom	375	80.69	33.6%	17,794.86	19.6%	4,534.38
EU Total	8829	240.24	100.0%	90,586.14	100.0%	2,652.06

Note: The institutions covered by the ECB statistics reported in the table above include all credit institutions of the EU27 but only a few of the existing payment institutions and e-money institutions
Source: European Central Bank, Payment Statistics, data as of September 2012

It is important to note that the transactions shown in Table 3 above refer to transactions undertaken by consumers, businesses and governments, and thus do not reflect typical consumer payment patterns.

2.2.2 Evolution of the different forms of non-cash payment

In the last 10 years, there has been a large and generalised increase in the importance of payment cards in the total number of non-cash transactions. During the same period, cheques lost considerable ground even though they were already little used in a large number of EU countries at the start of the decade. Cheque usage is a very country-specific phenomenon and remains strong in countries such as Cyprus, Malta, France, Greece, Ireland, Italy, Portugal and the UK (see Figure 4).

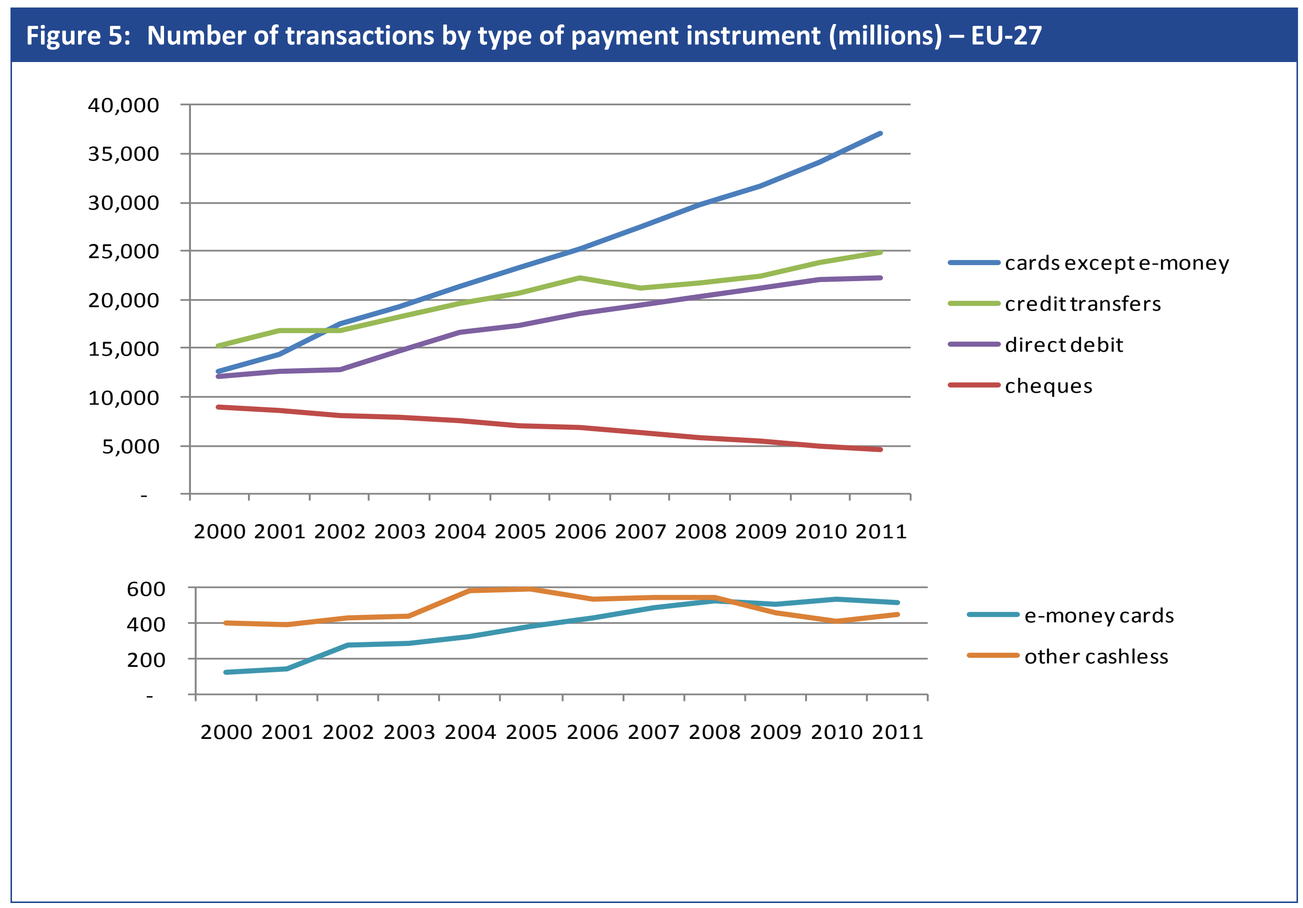
Figure 4: Relative importance of different payment instruments in overall number of transactions(top graph 2011, bottom graph averages 2000-02)

Source: European Central Bank, Payment Statistics, data as of September 2012

There has been a very large increase (83%) in the number of annual transactions in the EU-27 over the period 2000-2011, from EUR 49,484 million in 2000 to EUR 90,586 million in 2011.[17] This increase is driven by the increase in payment card transactions and the numbers of credit transfers and direct debits. Cheques are the only non-cash payment instrument showing a decrease over the period 2000-2011 (see Figure 5 below).

[17] Source: European Central Bank, Payment Statistics, Data as of September 2012.

Figure 5: Number of transactions by type of payment instrument (millions) – EU-27



Source: European Central Bank, Payment Statistics, data as of September 2012

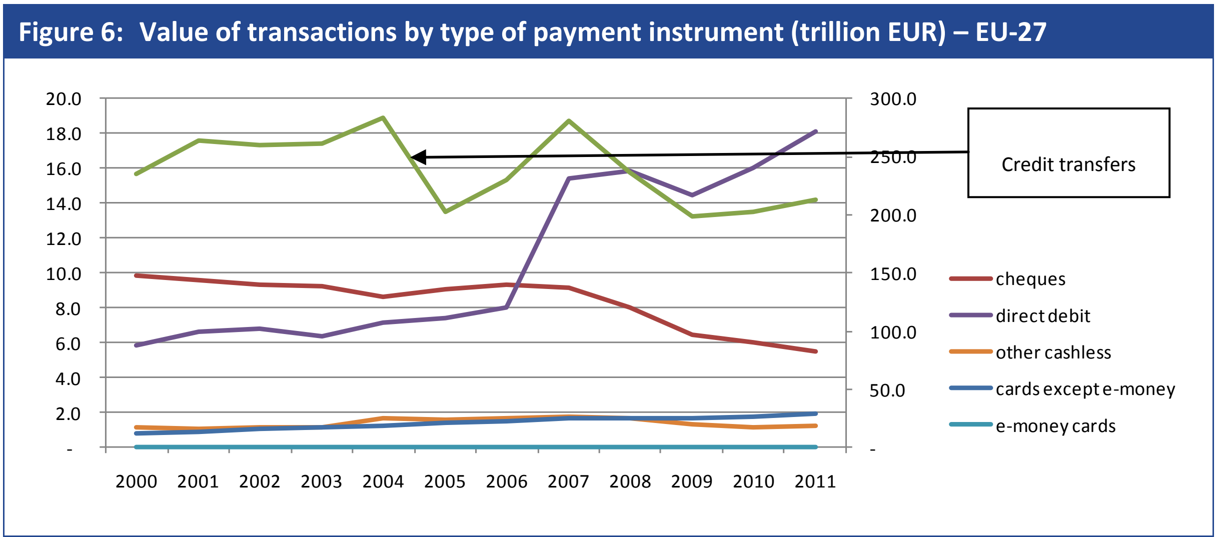
In terms of payment value, the picture is very different. The total value of all annual payments decreased by 5% between 2000 and 2011: from EUR 252.7 trillion in 2000 to EUR 240.2 trillion in 2011. The decrease reflects the weakening of economic conditions since 2008. Instead the value of payment flows between 2000 and 2007 grew by 22%.

While, overall, credit transfers account for the bulk of the value of all payment transactions (see Figure 6 overleaf where the value of credit transfers is shown on the right-hand axis, while the value of the payments using other payment instruments are shown on the left hand side axis)[18], the total value of credit transfers has increased only moderately over the past eleven years.

Cheques are the second most important payment instrument in value terms and account for a much larger overall value than payment cards (Figure 6). The value of cheque payments per year has increased slightly despite the fact that the actual number of cheque transactions have decreased over that period (as shown in Figure 5).

[18] Credit transfers by value in 2011 totalled EUR 213.5 trillion, representing a share in total payments of 88.86% (table 9.1a and 9.2a).

Figure 6: Value of transactions by type of payment instrument (trillion EUR) – EU-27



Source: European Central Bank, Payment Statistics, data as of September 2012

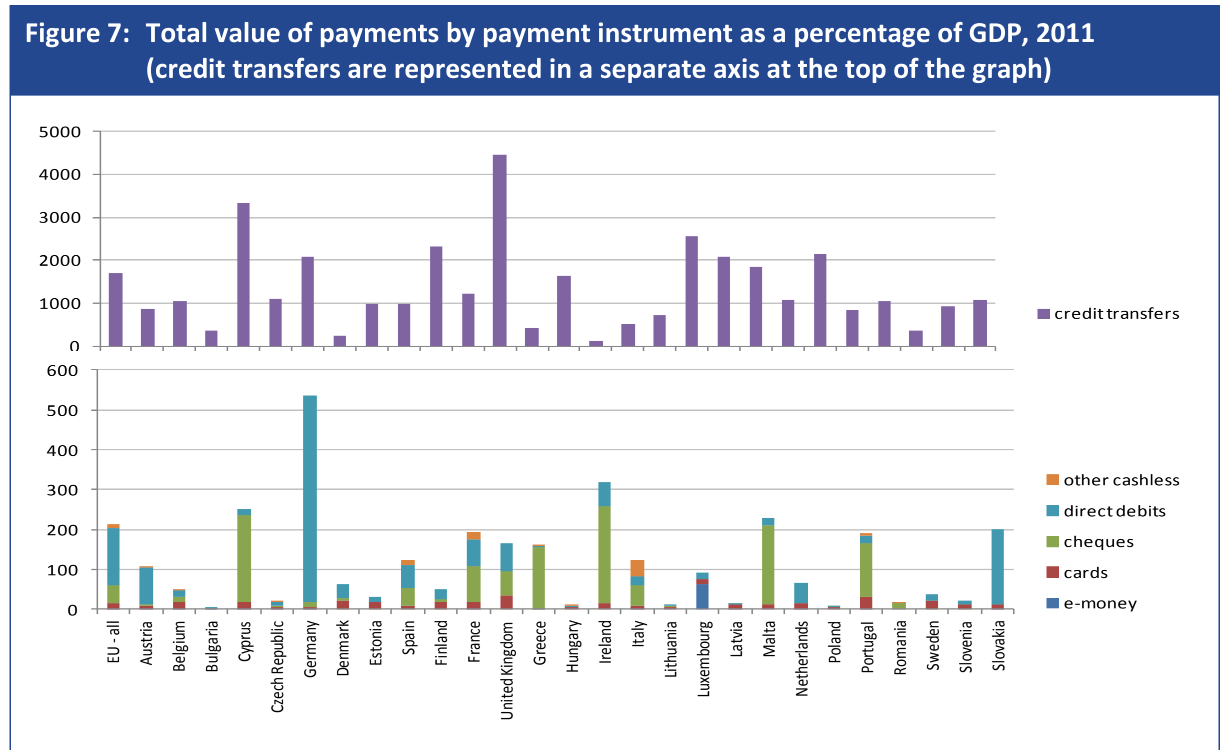
The two figures below present further information on the value of payment transactions broken down by payment instrument used for each EU Member State.

Figure 7 shows the relative importance of payment services for each national economy (e.g. credit transfers at 1,689% of EU GDP), with the relative importance of different payment instruments varying greatly across the EU in 2011. In order to take account of the different sizes of the EU economies, the cross-country data comparison scales the payment values of the different payment instruments by the level of national GDP (at current prices).

The following are the most noteworthy differences:

- The value of credit transfers (as a percentage of GDP) is very high in the UK and Cyprus compared to other EU Member States;
- Direct debits (as a percentage of GDP) account for a very large proportion of the total value of all payments in Germany and Slovakia;
- Cheques (as a percentage of GDP) account for a relatively large share of the total value of all payments in Cyprus, Ireland, Malta and Portugal.

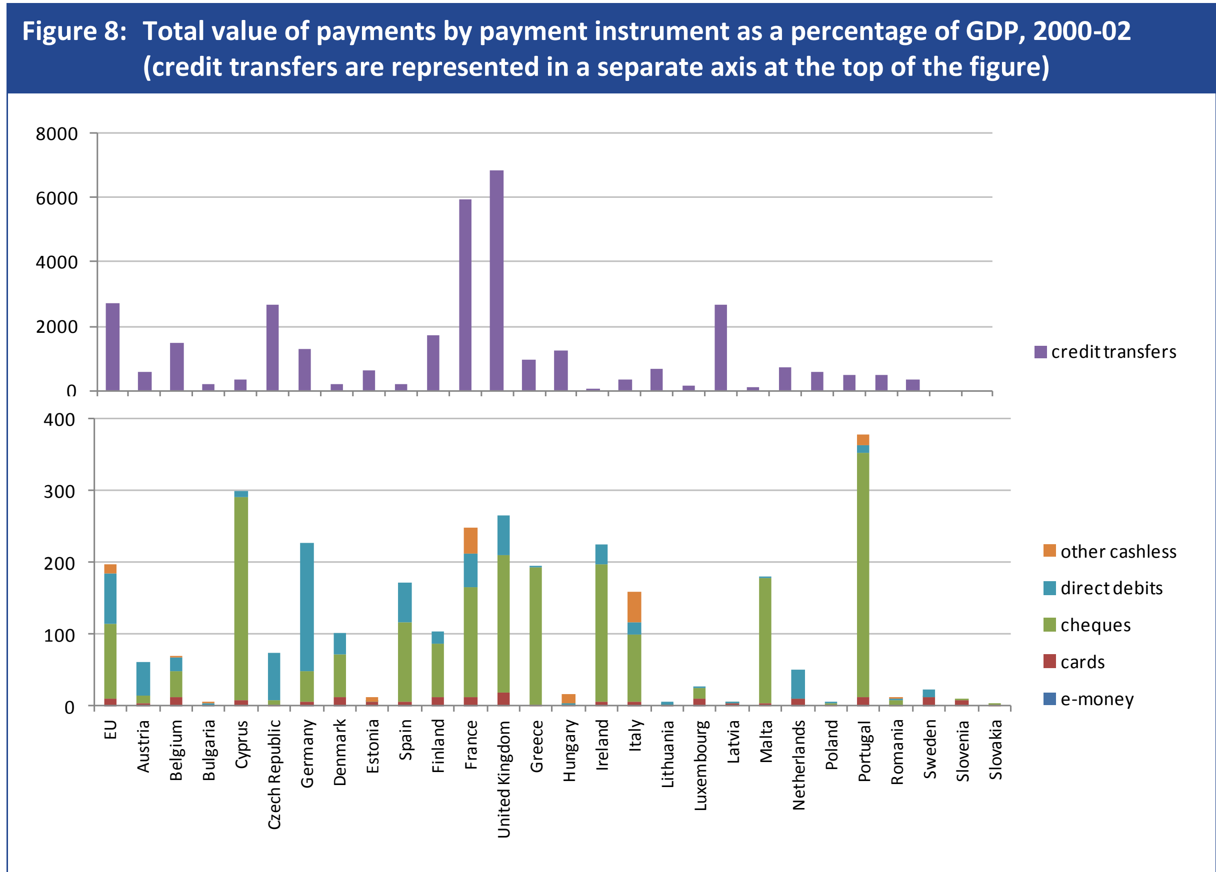
Figure 7: Total value of payments by payment instrument as a percentage of GDP, 2011 (credit transfers are represented in a separate axis at the top of the graph)



Notes: Because of the much higher total value of credit transfers, these are shown in a separate figure. Note that there were no data for cheques in the case of Bulgaria and the Netherlands, no data for e-money in the case of Denmark, Estonia, Finland, Ireland, Hungary, Malta, Poland, Romania, Slovakia, Slovenia, Sweden and the United Kingdom
Source: European Central Bank, Payment Statistics, data as of September 2012

A comparison of the data shown in Figure 7 and Figure 8 clearly highlights the decreasing importance of payments made by cheque as a percentage of GDP in all EU Member States and the increased role of direct debits and/or credit transfers.

Figure 8: Total value of payments by payment instrument as a percentage of GDP, 2000-02 (credit transfers are represented in a separate axis at the top of the figure)



Notes: Because of the much higher total value of credit transfers, these are shown in a separate figure. Note that there were no data for cheques in the case of Bulgaria and the Netherlands, no data for e-money in the case of Denmark, Estonia, Finland, Ireland, Hungary, Malta, Poland, Romania, Slovakia, Slovenia, Sweden and the United Kingdom

Source: European Central Bank, Payment Statistics, data as of September 2012

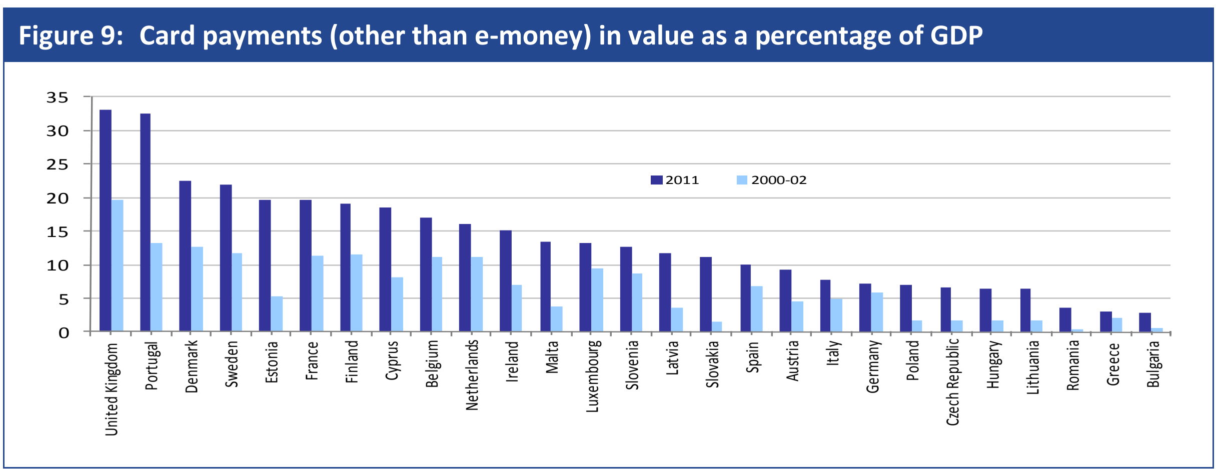
2.2.3 Notes on different payment instruments

The next sub-sections present more detailed information on a selection of payment instruments including payment cards, cheques, credit transfers, direct debits and e-money.

Payment cards

The use of payment cards both in terms of value (as a percentage of GDP) and in terms of number of transactions (per inhabitant) has significantly increased over the last ten years (see Figure 9 and Figure 10).

Figure 9: Card payments (other than e-money) in value as a percentage of GDP



Source: European Central Bank, Payment Statistics, data as of September 2012

Slightly different patterns emerge from a ranking of the countries in relation to value and volume of payment card use:

- In value terms, the UK and Portugal show the largest use (see Figure 9).
- In terms of number of transactions, the UK ranks fourth and Portugal only ninth (see Figure 10).

This implies that the use of cards in these two countries is for higher average value transactions than, for example, in Denmark, Sweden and Finland.

The growth over the last ten years has been substantial and, in many countries, the use of payment cards has more than doubled in both value and volume terms. In fact, in Romania, Slovakia, Bulgaria, Poland, Czech Republic, Lithuania, Estonia, Hungary, Malta and Latvia, the use of cards tripled, even though the usage level remains limited in Bulgaria, Romania and Greece. In terms of value and volume, residents of these latter countries are the lowest users of payment cards.

Overall across EU Member States, the increases in the number of transactions have been larger than the increases in the total value of card transactions. This implies that payment cards are increasingly used for lower-value transactions.

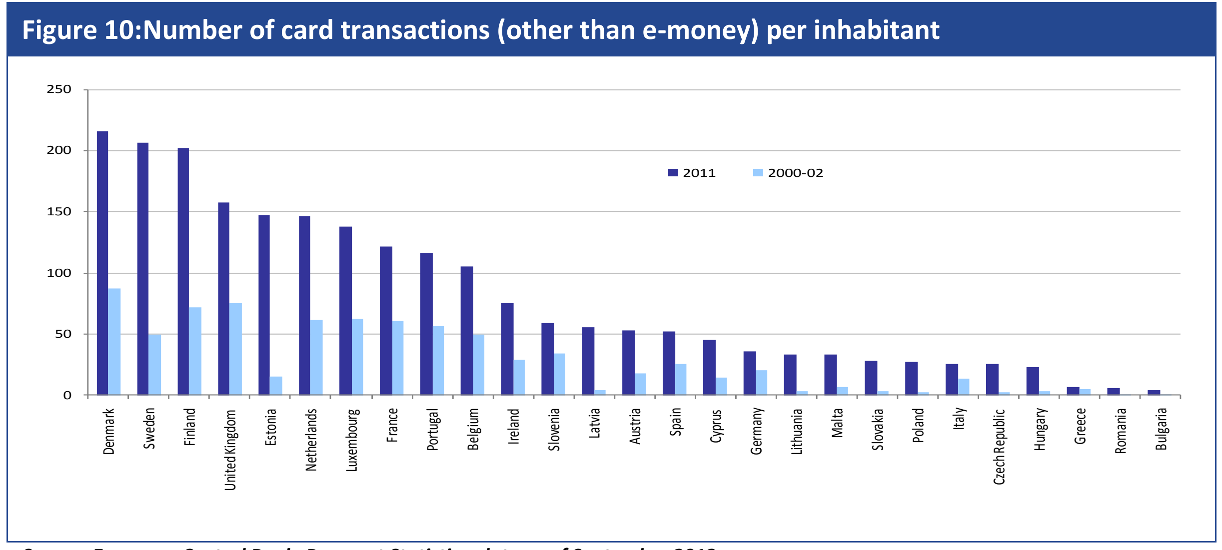


Figure 10: Number of card transactions (other than e-money) per inhabitant

Source: European Central Bank, Payment Statistics, data as of September 2012

One might expect a positive correlation between the number of card transactions and the penetration of point-of-sale (POS) card accepting terminals. The figure below, which provides the information on POS terminals per million inhabitants, shows that POS is not as strong a driving force behind the use of payment cards as first anticipated.

Whereas POS card terminals have a very high penetration rate in Finland, Ireland, Greece, Spain, Malta, Cyprus and Portugal, penetration is low in Germany, Bulgaria, Hungary, Slovakia, Poland and Romania. There has nevertheless been significant overall growth of POS terminal penetration across EU countries, with the EU average rising by almost 40% (see Figure 11).

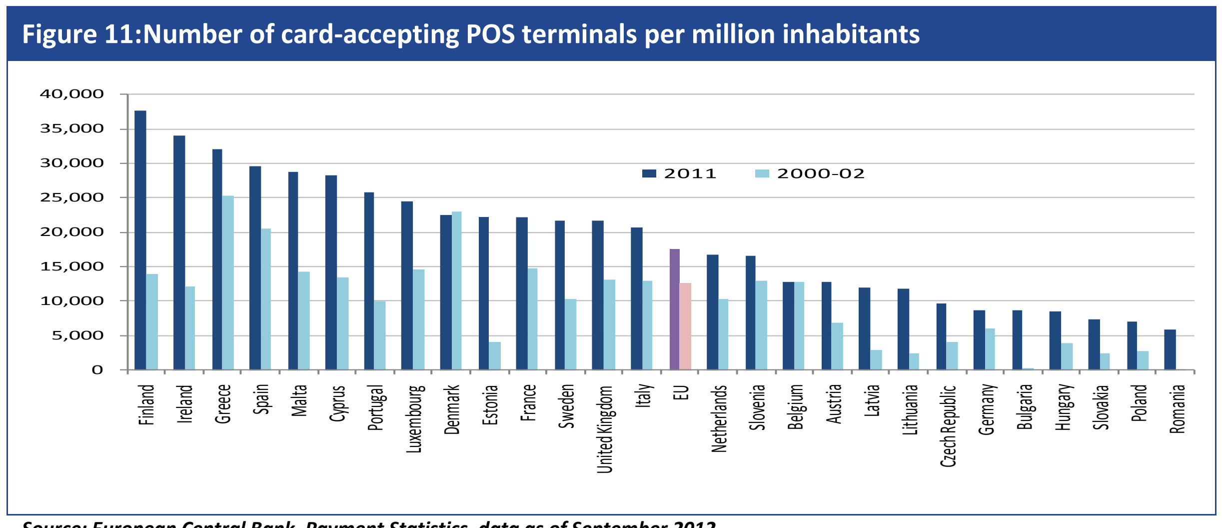


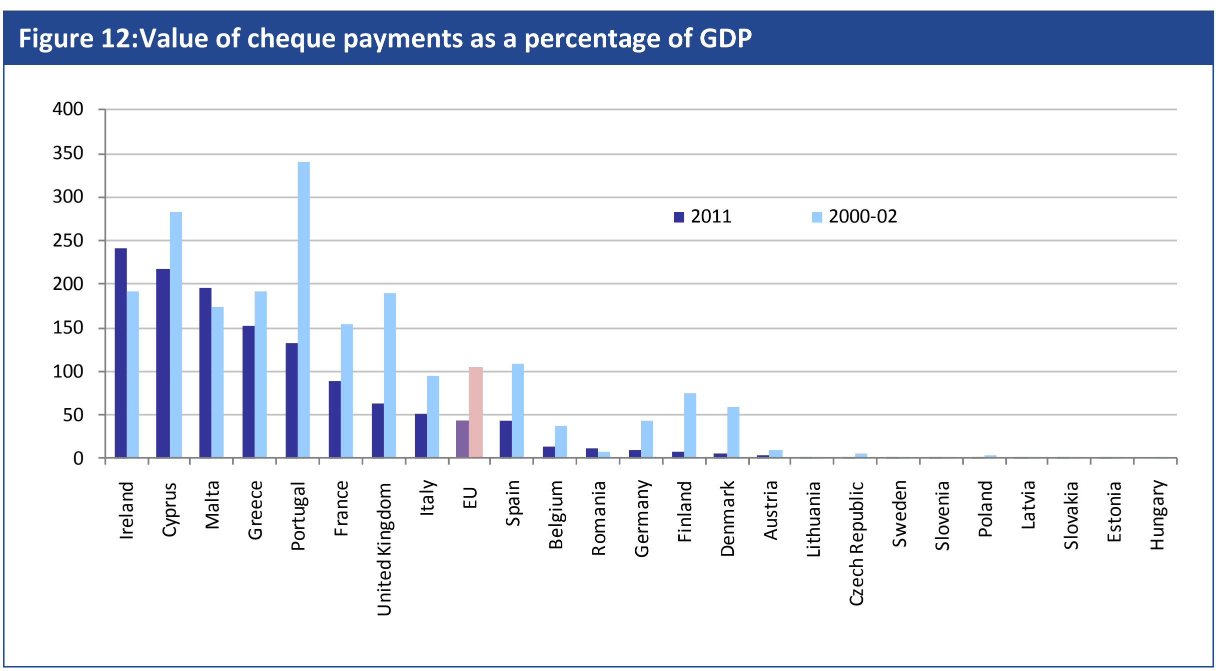
Figure 11: Number of card-accepting POS terminals per million inhabitants

Source: European Central Bank, Payment Statistics, data as of September 2012

Cheques

In value terms, cheque use declined over the period, but the total value of cheque transactions relative to GDP is still very significant in some countries, especially in Cyprus, Ireland, Malta and Portugal (Figure 12). Moreover, in these four countries, the value of cheque payments accounts for 40% or more of the total value of payments (Figure 13).

Figure 12:Value of cheque payments as a percentage of GDP



Note: no data for Bulgaria and the Netherlands
Source: European Central Bank, Payment Statistics, data as of September 2012

In contrast, cheque payments account for only a very small share (less than 5%) of total payments in value in 15 EU Member States (Austria, Belgium, Czech Republic, Estonia, Finland, Germany, Latvia, Lithuania, Luxembourg, Poland, Romania, Slovenia, Slovakia, Sweden and United Kingdom) (see Figure 13).

Figure 13: Value of cheque payments as a percentage of the value of all payments

Note: no data for Bulgaria and the Netherlands

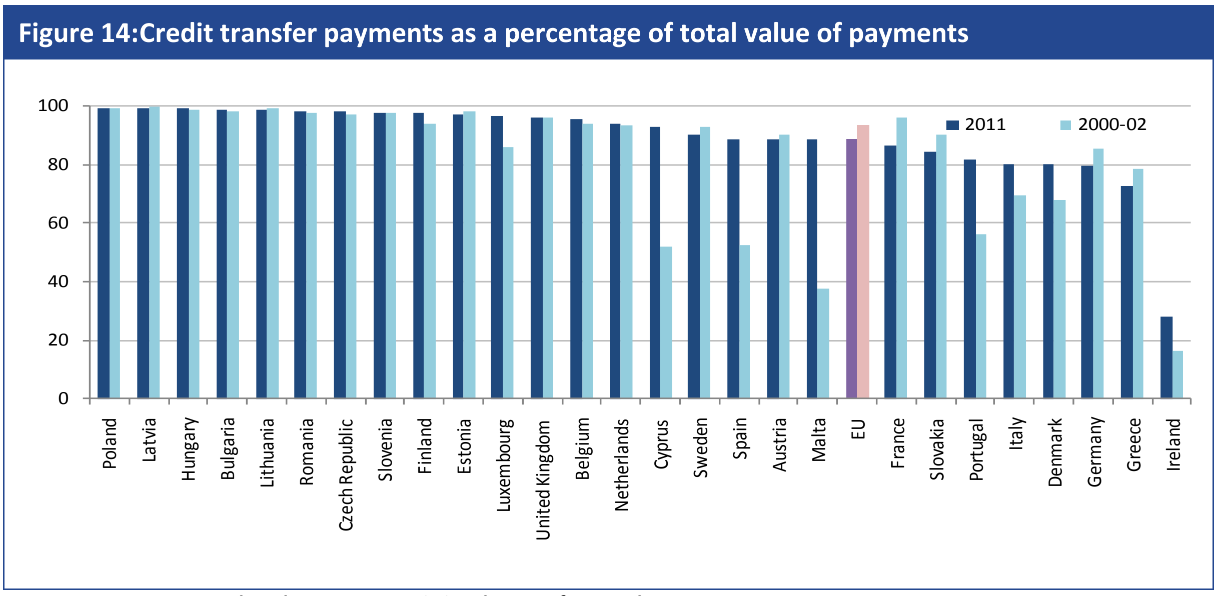
Source: European Central Bank, Payment Statistics, data as of September 2012

Credit transfers

As already noted, credit transfers are by far the most significant payment form in value terms, accounting for more than 90% of the total value of all payments in 16 EU Member States (Belgium, Bulgaria, Czech Republic, Cyprus, Estonia, Finland, Hungary, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Romania, Slovenia, Sweden and United Kingdom) and between 80% and 90% of the total value of all payments in a further 8 Member States (Austria, France, Germany[19], Italy, Malta, Portugal, Slovakia and Spain).

[19] In Germany, the precise share is 79.6%.

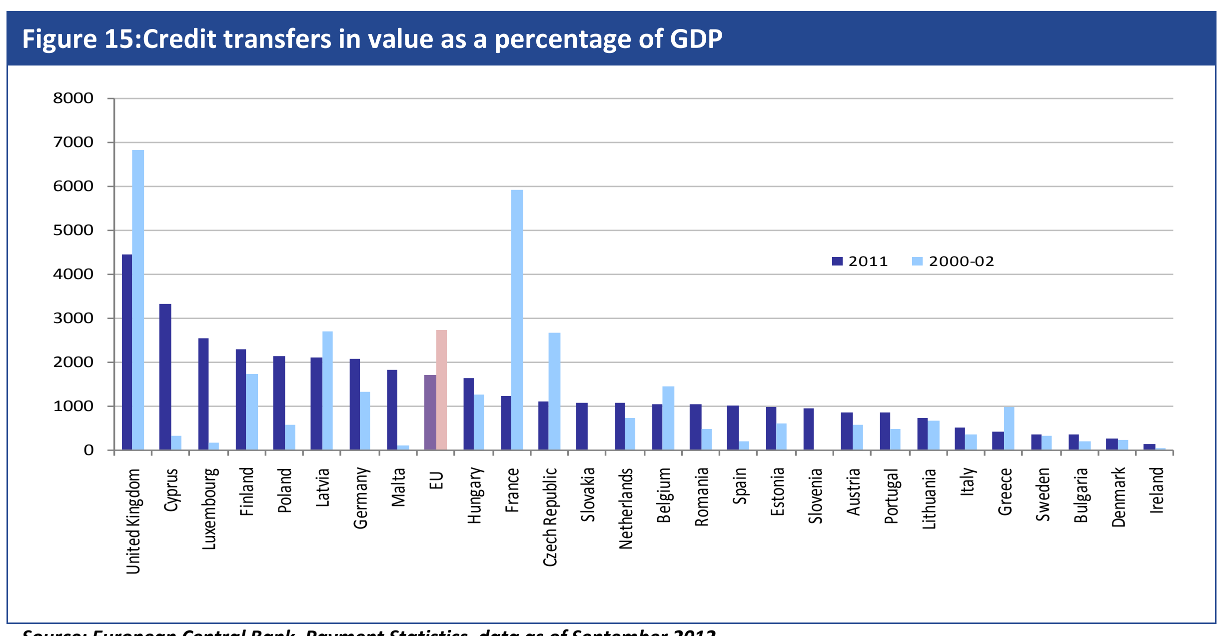
Figure 14: Credit transfer payments as a percentage of total value of payments



Source: European Central Bank, Payment Statistics, data as of September 2012

However, when expressed as a percentage of GDP, the value of credit transfers decreased in the countries where they were the largest between 2000-2002 (e.g. France and the United Kingdom). These countries were therefore responsible for the fall in the EU-wide average (see Figure 15) because in most other countries, the total value of credit transfers has increased significantly over the last 10 years (see Figure 15).

Figure 15: Credit transfers in value as a percentage of GDP

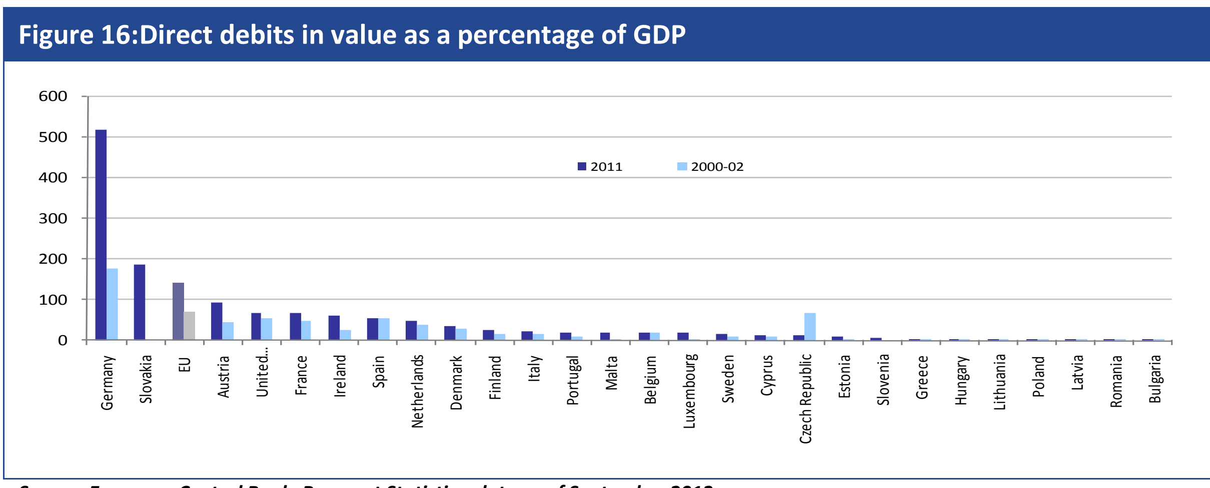


Source: European Central Bank, Payment Statistics, data as of September 2012

Direct debits

Direct debits represent a sizeable proportion of the value of all non-cash payments in Germany, Slovakia, Ireland, Denmark and Austria (Figure 16). However, in a large number of countries, direct debits are hardly used at all and no visible increasing trend in the usage of direct debits can be observed in these countries.

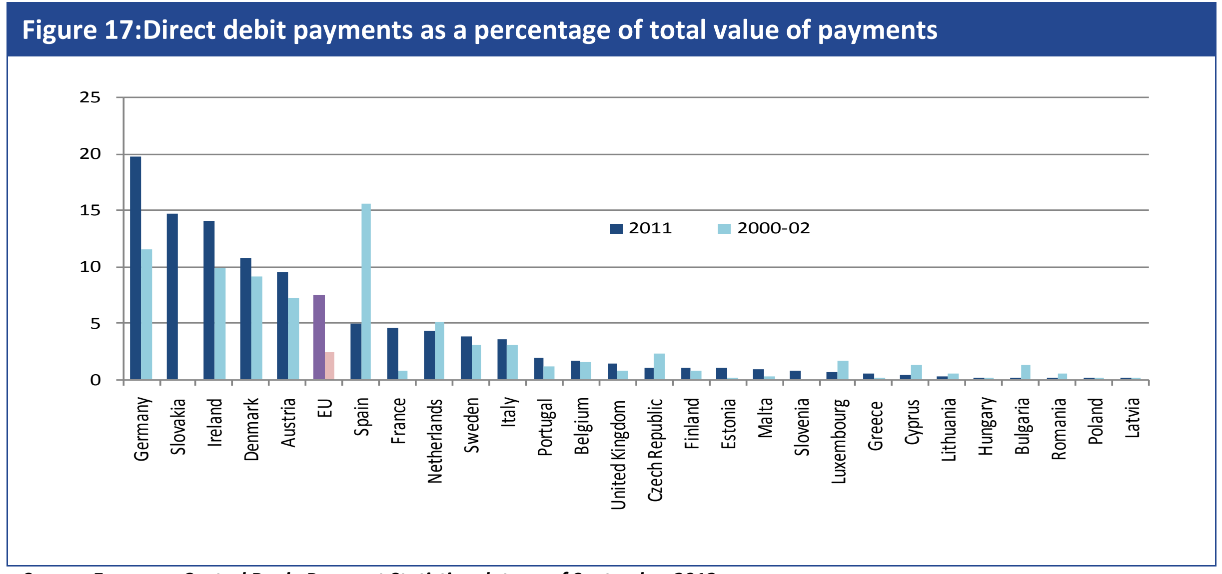
Figure 16:Direct debits in value as a percentage of GDP



Source: European Central Bank, Payment Statistics, data as of September 2012

In the five countries listed above (i.e., Germany, Slovakia, Ireland, Denmark and Austria), direct debits account for between 20% and almost 10% of total payments in value. In all the other Member States, direct debits account for less than 5% of the total value of all payments and are almost non-existent in the majority of these Member States (see Figure 17).[20]

Figure 17:Direct debit payments as a percentage of total value of payments



Source: European Central Bank, Payment Statistics, data as of September 2012

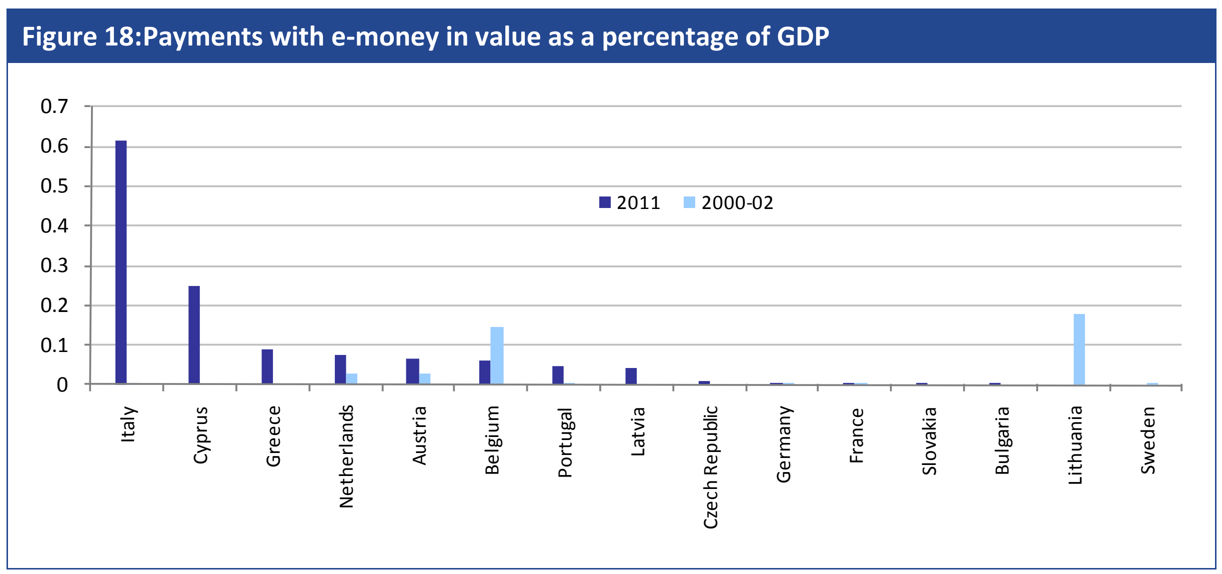
[20] That is, direct debits account for less than 2.5% of the value of all payments.

E-money

E-money still has very low penetration in 2011, the last year for which payment data are available (see Figure 18). In value terms, e-money as a payment instrument accounts for even less than it does in terms of the number of transactions conducted.

But in terms of increase E-money has been a very rapidly-growing payment form and it is possible that, when updated statistics become available, one will observe a larger role for e-money from its low base.

Figure 18:Payments with e-money in value as a percentage of GDP



Note: no data for e-money in the case of Denmark, Estonia, Finland, Ireland, Hungary, Malta, Poland, Romania, Slovakia, Slovenia, Sweden and United Kingdom

Source: European Central Bank, Payment Statistics, data as of September 2012

2.3 Payment institutions

2.3.1 Introduction

In addition to the credit institutions covered by the ECB payments statistics, as of late August 2012, the following payment service providers are authorised or registered in the EU based on registers and reporting from the competent authorities:

- 568 authorised payment institutions (APIs), a new type of financial institution created by the PSD, were authorised in the European Economic Area (EEA) (566 in the EU-27) to provide one or several of the payment activities listed in the PSD-Annex (see Table 4 below);
- In addition, 2,203 small payment institutions (SPSPs), i.e. those benefiting from the waiver under Article 26 of the PSD, were active in the Czech Republic, Denmark, Finland, Latvia, Netherlands, Norway, Poland, Sweden and the United Kingdom;
- Finally, 71 e-money institutions are licensed in the EEA.

When referring to payment institutions (a subset of payment service providers), we have classified these as being either authorised payment institutions (APIs) or registered small payment institu-

tions (SPSPs). The distribution of payment institutions (APIs and SPSPs)[21] is highly concentrated, in each case a few countries accounting for the vast majority of such institutions in the EEA. For example, in the case of:

- APIs: the UK accounts for 39.4% of all APIs in the EEA, and the UK together with Spain (8.1%), Italy (7.9%), Germany (6.5%), Netherlands (4.9%) and Sweden (4.3%) account for 71% of all APIs in the EEA.
- SPSPs: Poland (44.8%) and the UK (43.6%) account for 88.4% of all small payment institutions.

The distribution of e-money institutions is also highly concentrated in the EEA, with such institutions able to operate from 17 countries, and the UK accounting for 42.2% of all e-money institutions in the EEA.[22]

[21] For more details on the spread in the number of payment institutions, see section 2.3.7 of this report which contains a detailed figure of the numbers per billion of GDP.

[22] Note that e-money institutions are not APIs or SPSPs because they come under the remit of the E-Money Directive.

Table 4: Number of e-money institutions and payment institutions (APIs) and small payment institutions (SPSPs) in the EEA

Country	Number of e-money institutions	Number of Authorised PIs (APIs)	Number of small payment institution (SPSPs)	Share of total number of e-money institutions in the EEA (%)	Share of total number of APIs in the EEA (%)	Share of total number of small payment institution in the EEA (%)
AT	0	4	0	0.0%	0.7%	0.0%
BE	2	9	0	0.0%	1.6%	0.0%
BG	2	9	0	2.8%	1.6%	0.0%
CY	1	10	0	1.4%	1.8%	0.0%
CZ	1	13	60	1.4%	2.3%	2.7%
DE	5	37	0	7.0%	6.5%	0.0%
DK	2	6	55	2.8%	1.1%	2.5%
EE	0	8	0	0.0%	1.4%	0.0%
EL	0	11	0	0.0%	1.9%	0.0%
ES	1	46	0	1.4%	8.1%	0.0%
FI	2	5	9	2.8%	0.9%	0.4%
FR	4	12	0	5.6%	2.1%	0.0%
HU	0	2	0	0.0%	0.4%	0.0%
IE	0	10	0	0.0%	1.8%	0.0%
IT	4	45	0	5.6%	7.9%	0.0%
LT	1	20	0	1.4%	3.5%	0.0%
LU	3	4	0	4.2%	0.7%	0.0%
LV	5	0	34	7.0%	0.0%	1.5%
MT	3	14	0	4.2%	2.5%	0.0%
NL	2	28	30	2.8%	4.9%	1.4%
NO	0	2	23	0.0%	0.4%	1.0%
PL	0	0	988	0.0%	0.0%	44.8%
PT	0	9	0	0.0%	1.6%	0.0%
RO	0	7	0	0.0%	1.2%	0.0%
SE	0	23	44	0.0%	4.0%	2.1%
SI	0	4	0	0.0%	0.7%	0.0%
SK	3	6	0	4.2%	1.1%	0.0%
UK	30	224	960	42.2%	39.4%	43.6%
Total	71	568	2,203	100.0%	100.0%	100.0%

Note: data as of last week of August 2012/first week of September 2012

Source: websites of competent authorities and information provided directly by competent authorities. The list of competent authorities is provided in Annex 8.3.

In the table above, note that the difference in the number of APIs providing money remittance services in the different Member States explains in large parts the difference across Member States that exists in the total aggregate number of APIs.[23]

2.3.2 Type of payment services which APIs are authorised to provide

Payment institutions are authorised to provide one or several payment services listed in the Annex to the PSD (PSD-Annex), namely:

1) *Services enabling cash to be placed on a payment account as well as all the operations required for operating a payment account.*
2) *Services enabling cash withdrawals from a payment account as well as all the operations required for operating a payment account.*
3) *Execution of payment transactions, including transfers of funds on a payment account with the user's payment service provider or with another payment service provider:*
    a. *execution of direct debits, including one-off direct debits,*
    b. *execution of payment transactions through a payment card or a similar device,*
    c. *execution of credit transfers, including standing orders.*
4) *Execution of payment transactions where the funds are covered by a credit line for a payment service user:*
    a. *execution of direct debits, including one-off direct debits,*
    b. *execution of payment transactions through a payment card or a similar device,*
    c. *execution of credit transfers, including standing orders.*
5) *Issuing and/or acquiring of payment instruments.*
6) *Money remittance.*
7) *Execution of payment transactions where the consent of the payer to execute a payment transaction is given by means of any telecommunication, digital or IT device and the payment is made to the telecommunication, IT system or network operator, acting only as an intermediary between the payment service user and the supplier of the goods and services.*

In the rest of this chapter, we will refer to the above list of payment services as PS No1, PS No2 and so on and so forth, to refer to the list of services contained in the Annex. The reader is thus invited to refer to this list as and when necessary.

In the EEA as a whole, competent authorities gave, on average, 1.7 authorisations per API.[24] However, this average masks a considerable degree of variation across the EEA (see Figure 19 below):

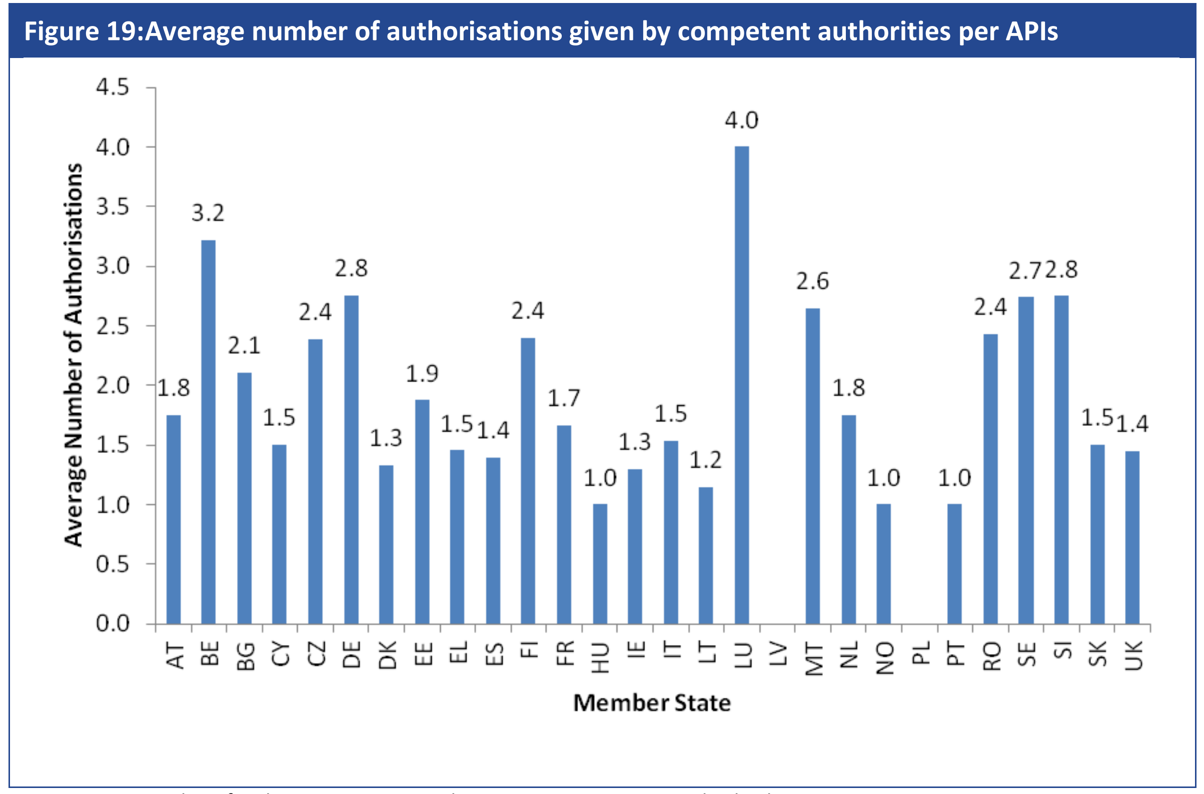
- In 2 EEA countries, APIs obtained on average 3 or more authorisations (BE and LU)
- In 8 EEA countries, APIs obtained on average between 2 and less than 3 authorisations (BG, CZ, DE, FI, MT, SE, SL and RO)

[23] See page 40 for more details.

[24] An API can be authorised for any one or for all seven of the above listed distinct payment service activities. Annex 4.1 provides more detailed information on the authorisations given to APIs.

- In 16 EEA countries, APIs obtained on average between 1 and less than 2 authorisations (AT,CY, DK, EE, EL, ES, FR, HU, IE, IT, LT, NL, NO, PT, SK and UK)

Figure 19:Average number of authorisations given by competent authorities per APIs

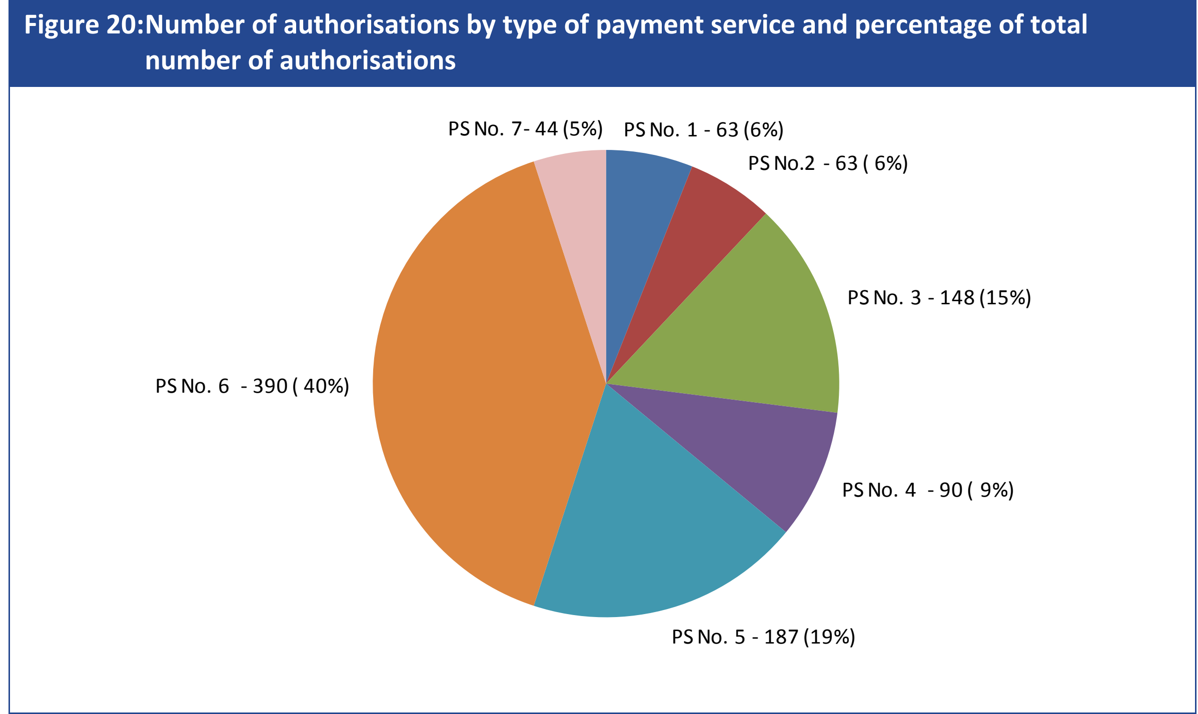


Note: Average number of authorisations per API. There are no APIs in Latvia and Poland.
London Economics analysis of PI registers and additional information provided by competent authorities. The list of competent authorities is provided at Annex 8.3.

The figure below shows that the largest number of authorisations was issued in relation to money remittances (payment service No 6). The 390 authorisations for this payment service account for 40% of the total number of payment service authorisations given to APIs;

- Payment service No 5 "issuing and/or acquiring of payment instruments" is the second largest payment service in terms of the total number of authorisations (187 or 19% of the total).
- Next is payment service No 3 "execution of payment transactions including transfer of funds on a payment account with the user's payment service provider or with another payment service provider", which constitutes the third-largest service in terms of authorisations (148, 15%).
- The other remaining four payment services (No.s 1, 2, 4 and 7) each account for less than 10% of all payment service authorisations issued to APIs in the EEA. It is also worth noting that the distribution of authorisations by type of payment service varies greatly across the EEA.

Figure 20:Number of authorisations by type of payment service and percentage of total number of authorisations



Note: PS No. X refers to payment service No. X in the PSD Annex. The first figure after "PS No. X" is the total number of authorisations in the EEA for this payment activity and the figure in (...) is the percentage of total authorisations in the EEA accounted for by authorisations for this type of payment services.

Source: London Economics analysis of PI registers and additional information provided by competent authorities. The list of competent authorities is provided at Annex 8.3.

The UK has issued the largest number of authorisations for each type of payment service. The UK accounts for 52.8% of all "money remittance" authorisations issued in the EEA and 36.5% of all EEA authorisations for "services enabling cash to be placed on a payment account as well as all the operations required for operating a payment account" (see Annex 4).

In conclusion:

- The "money remittance" payment service accounts for a clear majority of authorisations in Greece, Italy, Ireland, Lithuania, Portugal, Spain and the UK.
- The "issuing and acquiring of payments instruments" service accounts for a majority or close to a majority of authorisations in Austria, Denmark, Hungary and Norway.
- In the other EEA states, the authorisations are more evenly spread across the various types of payment services.

2.3.3 Distribution across the EEA of APIs – providers of money remittance services and other APIs

The big difference across the EEA in the number of APIs only authorised to provide money remittance services (payment service No. 6 in the PSD-Annex) explains to a large extent the differences in the number of APIs across EEA countries (see table below).

The group of APIs only authorised to provide money remittance services totals 330 (compared to 568 for the whole population of APIs). The UK stands out as having a very large number of APIs providing only money remittance services.

The large number of such APIs (and SPSPs) in the UK reflects the fact that, already well prior to the PSD, money remittances and bureau de change services were provided by a large number of businesses in the UK which were formally supervised by the UK tax authority (HMRC). As part of the PSD implementation process, these businesses were told by the relevant competent authorities that if they wished to continue to operate they needed to either seek a license to operate as an authorised payment institution (API) or to register with the competent authority as an SPSP, i.e. an institution benefiting from the waiver under Article 26 of the PSD.

Table 5: Number of authorised payment institutions by type of authorisation

Country	Number of APIs	Number of APIs only authorised to provide money remittance services	Number of APIs authorised to provide money remittance services and/or other payment services defined in the PSD
AT	4	0	4
BE	9	2	7
BG	9	4	5
CY	10	6	4
CZ	13	3	10
DE	37	13	24
DK	6	0	6
EE	8	6	2
EL	11	9	2
ES	46	37	9
FI	5	0	5
FR	12	3	9
HU	2	0	2
IE	10	6	4
IT	45	19	26
LT	20	19	1
LU	4	0	4
LV	0	0	0
MT	14	1	13
NL	28	10	18
NO	2	1	1
PL	0	0	0
PT	9	6	3
RO	7	1	6
SE	23	0	23
SI	4	0	4
SK	6	1	5
UK	224	184	40
Total	568	330	238

Source: London Economics analysis of PI registers and additional information provided by competent authorities. The list of competent authorities is provided at Anne 8.3.

2.3.4 Business activities undertaken by APIs

So far, the analysis has focused on the payment service authorisations of APIs. But this provides only a partial picture of the heterogeneity of the API group. A particular type of authorisation (activity) may indeed regroup very different businesses.

For example, institutions authorised to provide money remittance services may be traditional low-value money remitters operating on selected corridors. They may also be international fund transfer institutions able to transfer funds to a large number of countries in the world, or foreign ex-

change brokers providing services to consumers and/or businesses. However, these institutions also include companies whose main activity is outside the financial services industry such as property management companies and housing cooperatives.

In order to identify the broader type of business activities undertaken by the various APIs, information from the websites of the APIs was collected, analysed and used to construct a typology of the activities of APIs. This typology (shown in the table below) is also used in the following section to estimate the overall value and volume of activity of the APIs. More information on the distribution of the APIs by main activity and date of incorporation is provided in section 5.3 which discusses, among others, the extent to which competition in the market for payment services has evolved.

Table 6: Typology of activities undertaken by APIs

Type of activity	Comment
Money remittance, transfers and retail foreign exchange activities	The institutions in this group provide the PSD payment service No 6 – money remittance
Foreign exchange broking	Such institutions are licensed as APIs only in the UK and provide the PSD payment service No 6 – money remittance. The foreign exchange transactions value is very large
Card acquiring	A number of card acquirers in the EU are APIs providing primarily PSD payment service No 5
Card schemes	Two major three-party schemes are APIs providing primarily the PSD payment service No 5
Internet payment service provision	This category includes APIs whose only business activity is to provide secure forms of payments for e-commerce providing primarily the PSD payment service No 5
Service provision	APIs in this category are providing a wide range of services to financial institutions that provide payment services to payment service users (PSUs). Such services include, among others, running networks of ATMs, renting POS devices, proving IT solutions, verification, etc. This group of APIs does not interface directly with PSUs. Some of the APIs in this group, as part of their business offer, may also provide acquiring services and internet payment services. These APIs typically provide the PSD payments service No 7 and, in a number of cases, payment service No 5
Card issuing	A few financial institutions issuing cards are APIs providing primarily the PSD payment service No 5
Credit provision	A small number of non-bank credit providers are APIs in the EU-27. Typically, these APIs provide one or several of the first four categories of payment services listed in the PSD Annex.
Other financial services provision	This small group of APIs includes financial advisors, brokers (other than foreign exchange brokers, payroll processors, etc.). They provide one or several of the first four categories of payment services listed in the PSD Annex
Telecoms operators and telephony service providers	A few telecoms operators from Central Europe are APIs, providing typically the PSD payment services No. 6 and No 7
Other business service provision	This group of APIs includes, among others, a number of housing cooperatives in Sweden, property management companies in Lithuania,

Table 6: Typology of activities undertaken by APIs	
	companies delivering pensions to the homes of the pensioners in Lithuania, bill aggregators and bill payment firms in Lithuania, one transport company in Cyprus and a large industrial conglomerate in the Czech Republic. These APIs provide one or several of the payment services listed in the PSD Annex

Source: London Economics analysis of the websites of APIs

2.3.5 Size of the API sector

The present section provides estimates of the value and volume of transactions for the key groups of APIs, some of which have already been discussed in the previous section. The following APIs were included in the present analysis below: 1) APIs undertaking money remittance, transfers and retail foreign exchange activities; 2) foreign exchange brokers; 3) card acquirers and 4) internet payment services providers and service providers.

The total value of transactions in the EEA undertaken in 2010 by APIs through money remittance, transfers and retail foreign exchange activities, plus foreign exchange brokers and card acquirers (i.e. groups 1, 2, and 3) amounted to EUR 594.5 billion (see table below).[25]

Table 7: Value and number of transactions of different API groups - 2010

Group of APIs	Value of transactions (in billions of EUR)	Number of transactions (in millions)
Money remittance, transfers and retail foreign exchange activities	30.7	113.6
Foreign exchange broking	24.7	
Card acquiring	458.6	8792.5
Three-party card schemes	78.8	592.0
Internet payment service provision + general service provision - turnover	1.7	

Source: Nilson Report, London Economics and PaySys

2.3.6 Statistics from the ECB on payments transactions and APIs

While the ECB statistics[26] cover payment transactions between MFI and non-MFIs, it is important to note that, because payment institutions do not access payments systems directly but indirectly by holding one or several account(s) at one or several banks (see discussion in section 5.6) any payment operation, which is undertaken by a payment institution for a payment service user, will involve the use of a bank account, and, therefore, the transaction will be included in the MFI payment statistics published by the ECB.

The only exception is a cash-to-cash remittance where a payment service user asks a money remitter to transfer a certain amount of funds, pays for the transfer in cash and the beneficiary receives

[25] Annex 4.2 provides details of how the estimate of the size of the API sector is derived from various data sources.
[26] See European Central Bank, Payment Statistics, data as of September 2012.

cash in a remitter's office at his/her location. In such a case, the payment will be included in the ECB statistics only if any cash received/paid out by a receiver is immediately deposited in/withdrawn from the remitter's account.

2.3.7 Small payment institutions benefiting from the waiver (SPSPs)

The PSD provides, under Article 26, the option for Member States to waive the application of all or some of the PSD provisions to payment service providers (either legal or natural persons) when the total amount of payment transactions executed by this entity does not exceed EUR 3 million per month. Providers satisfying this requirement are subject to registration with the competent authorities. The disadvantage a payment service provider has for obtaining the waiver is the limited scale of business allowed and that the entity will have no right to provide payment services in other EU Member States. SPSPs (denominated in various jurisdictions as "small providers" or even "small payment institutions") may employ agents and set up branches in their home market.

The waiver option has been adopted by 15 EEA States but is currently used by payment institutions in only 9 EEA States.

In some of the EU Member States where the waiver has been adopted, this has been done with modifications that had not been foreseen by the PSD. This is the case, for example, with the upper threshold (set by the PSD at EUR 3 million monthly calculated as the total of transactions during the last 12 months). This threshold has been set as low as EUR 100,000 per annum in Slovenia. In a number of Member States, exempted entities may provide only selected payment services. In Slovenia and Luxembourg, whose laws provide for such an option, it remains unused up to now.

2,203 small payment service providers (SPSPs were registered in the EEA by late August 2012. As already noted, nearly 90% of all registrations took place in Poland (988 = 44.8%) and the UK (960 = 43.6%). (see table below).

Table 8: Number of SPSPs in the EEA

Country	Number of SPSPs	Country	Number of SPSPs
Poland	988	Latvia	34
United Kingdom	960	Netherlands	30
Czech Republic	60	Norway	23
Denmark	55	Finland	9
Sweden	44	EEA - total	2203

Source: London Economics analysis of PI registers and additional information provided by competent authorities. The list of competent authorities is provided at Annex 8.3.

The vast majority of SPSPs in Poland provide mostly bill payment services with no contract with the biller – this is the reason why they need to register. Before this industry developed, the only providers were Polish post and credit institutions - with a leading role played by PKO BP and its network of agencies and cooperative banks. However, as these services became too expensive for consumers, a rapid development of the bill payment industry resulted.

In the UK, and in the other EEA countries with SPSPs (other than Poland), the SPSPs typically undertake small value transfers and remittances, and retail foreign currency transactions. The only exception is the Netherlands where only APIs are allowed to provide money remittance services.

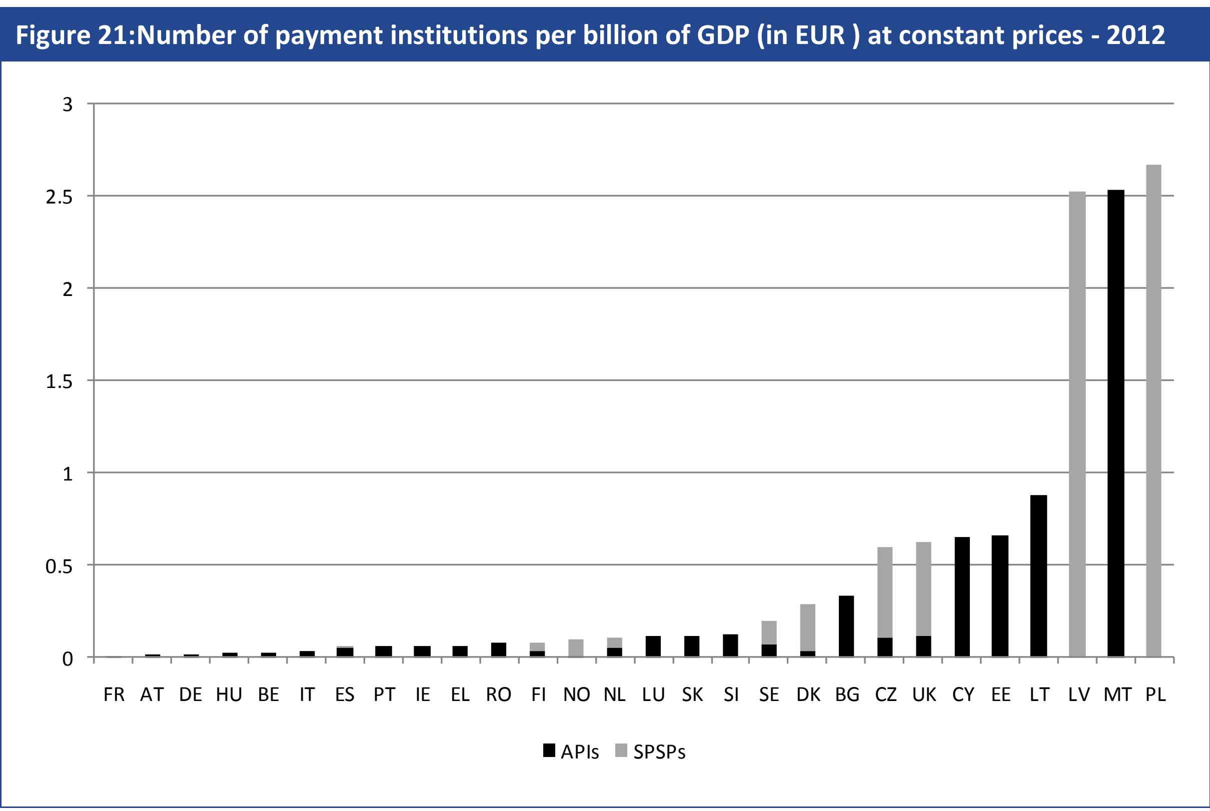
The impact of the use of the waiver is discussed in greater detail in section 5.5.

2.3.8 Spread in the number of payment institutions

As the various EEA states vary greatly in size, the figure below compares the number of APIs (authorised) and SPSPs (registered) relative to GDP. The picture which emerges from such an analysis is somewhat different from one focusing on the absolute numbers only. While Poland is still among the set of countries with the largest number (in relative terms) of APIs and SPSPs, of particular interest is the fact that the UK no longer stands out as having so many more APIs and SPSPs. On a relative basis, smaller countries such as Malta and Latvia have more APIs and SPSPs than the UK (see figure below).

On the other end of the scale, a number of large countries such as France, Germany and Spain stand out as having very few payment institutions once the size of the country is taken into account.

Figure 21:Number of payment institutions per billion of GDP (in EUR) at constant prices - 2012



Note: GDP at market prices (billions of 2005 euros) in 2012 Q1 taken from Eurostat.
Source: London Economics analysis of PI registers and additional information provided by competent authorities. The list of competent authorities is provided at Annex 8.3.

There does not appear to be a clear link between the number of APIs and the size of the respective economies. However, to explain the differences in numbers of APIs across Member States other factors and drivers should be considered. They include:

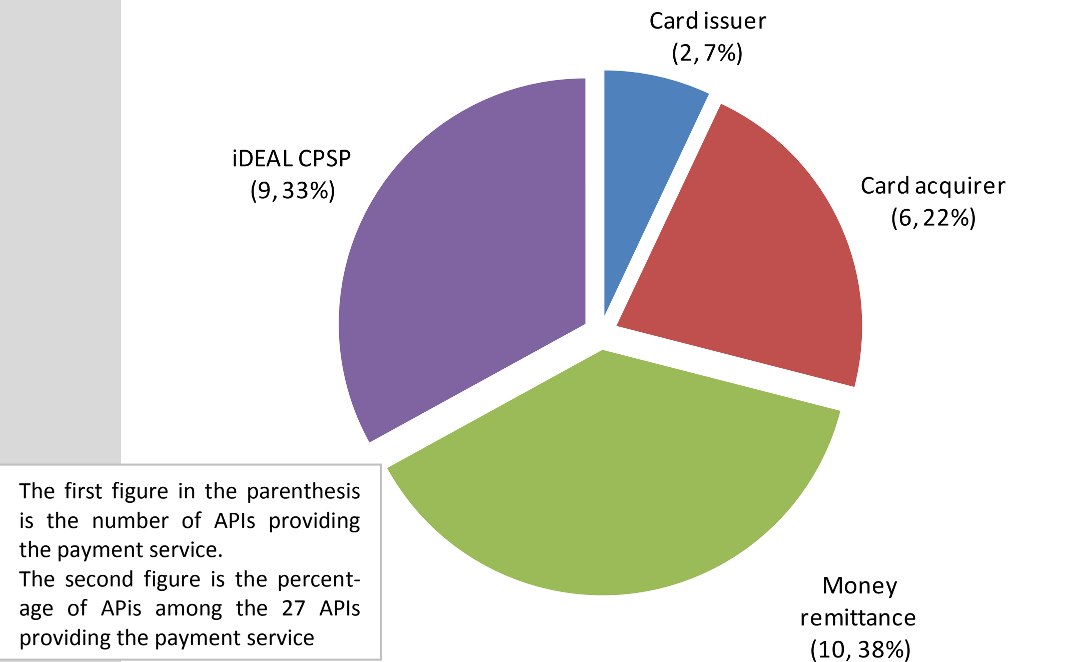
- Local payment customs and business models (for example, the popularity of sub-acquiring in the Netherlands is a main driver behind approximately 13 APIs – see for more details the case study for the Netherlands below).

- Local traditional/historical role and dominance of banks within the card acquirer market. For example, the card-acquiring business is traditionally dominated by banks in France. Therefore one would hardly find APIs within this market although the French market is one of the biggest card markets in Europe.
- Local traditional/historical role and dominance of banks within the card issuing market (e.g. the popularity of store cards and other payment cards, issued by non-banks in some Member States)
- Popularity of outsourcing in the payments business (e.g. in some countries, outsourcing of ATM business is quite usual; independent ATM providers could need a PI licence).
- Bypassing the relative severity of the national competent authority and the complexity/duration of the application process by using the passport option (for example, this could be the main driver behind the large number of APIs in the UK which are using passports into other Member States).
- Degree of concentration of business within the relevant market segments (e.g. most of the 13 money remittance providers (APIs) in Germany are very small companies. This segment of the German market is dominated by some players from other Member States and some credit institutions).
- Type of cooperation in issuing certain payment instruments (e.g. in the card business, a non-bank could have the option of obtaining a direct issuing licence from the payment scheme, therefore needing a PI licence. The other option is to cooperate with a bank as formal legal issuer in the background (rent-a-BIN-model).
- Business models of innovative products are based on the existence of a PI (e.g. the new internet payment scheme iDEAL in the Netherlands is the driver for 23 PIs (either authorised or registered) see case study of the Netherlands below).

APIs and SPSPs in the Netherlands and sub-acquiring

In the Netherlands, a relatively high proportion of payment institutions are card acquirers.

In June 2012, there were 27 APIs and 31 SPSPs. Within the Dutch internet payment system iDEAL (which is owned by Dutch banks), banks are an issuer and an acquirer at the same time. But, specialised payment service providers can be certified as “sub-acquirer” of the acquirer bank with a direct contract to the merchant. These certified sub-acquirers collect the funds on their accounts before transferring the funds to the merchant’s bank account. Therefore, these collecting payment service providers (CPSPs) require a payment institution licence.



The figure above shows the distribution of the 27 APIs across the various types of payments services they provide. The iDEAL scheme lists 23 domestic CPSPs, of which 9 are an API and 8 are an SPSP. Moreover, six additional payment institutions are currently going through the payment institution application process. Another 11 CPSPs (banks and APIs) from other European countries are also active in the iDEAL scheme using the passporting provision.

Another reason for the relatively high number of payment card acquirers with a payment institution licence (6) is the popular business model of “sub-acquiring“ in the traditional card business (debit or credit card), by receiving funds from the original acquirer on behalf of the merchant. Probably 4 of the 6 acquirers authorised as payment institution are sub-acquirers (e.g. Rent a PIN B.V., Sepay B.V.).

Without the popularity of the sub-acquiring business model within the iDEAL-scheme and in the card business, the number of APIs would be only about 14, of which 10 are money remittance providers.

2.4 Impact of the PSD and Regulation 924 on product and service innovation

2.4.1 Introduction

This section investigates whether the regulatory framework provided by the PSD and Regulation 924 is an obstacle to innovation and development of new payment services and products. Because stakeholders had little to comment on the impact of the Regulation, this section in fact only concerns the impact of the PSD on innovation.

What we uncovered about the impact of the Regulation 924 from stakeholders is as follows: The vast majority of credit institutions that responded to the question on service innovation did not report any negative impact on innovation.[27] The same was true for the few payment institutions which responded to the question of the impact of Regulation 924 on innovation.[28]

As a result, the present sub-sections first reviews the views of technical experts on major innovations which have occurred since the PSD was adopted in 2007 followed by the views of major stakeholders and the project experts on its impact. It concludes with a general assessment of the implications of the new PSD rules for innovation.

2.4.2 Assessment by experts

Two types of experts were consulted in the preparation of this report: technical experts and legal experts. Both provided information that is relevant to assessing the impact of the PSD on innovation.

Views of the Technical experts

Overall, the experts of the project team see only a limited positive impact of the PSD on innovation.

Over the last 3 to 4 years, no innovation worldwide has occurred which would be comparable with the emergence, in the mid-nineties, of digital cash (e-purses or token-based) as a new money instrument alongside traditional cash (paper money and coins) and scriptural account-based money. Over the last three years, for which the effects of the PSD were monitored for the purpose of this report, similar innovations have not been observed. Most digital cash projects have failed. Only card-based e-purses survive today but still do not have significant relevance in terms of market shares.

Worldwide, the usage of currencies for payment transactions which are not issued by the state or central banks (i.e., the so called private or complementary currencies) is still scant. Most of those currencies are still paper-based or account-based. If prepaid, account-based private currencies would be subject to the e-money Directive in Europe. Following in the footsteps of Bitcoin, a new form of Internet money, it is possible to envisage the creation of innovative payment systems based on digital cash and private currency.

[27] Responses to question 4 in survey questionnaire sent to credit institutions (CIQ).

[28] Responses to question 5 of the survey questionnaire sent to authorised payments institutions (APIQ).

Besides cash, payment systems are usually account-based. Payment instruments are linked to payment accounts held at credit institutions (including central banks), payment institutions, e-money institutions or other private entities (which are not subject to regulation). The funds used for payment transactions are usually denominated in state-issued currencies. This basic structure is for the time being not seriously challenged by any innovation.

Technological innovation takes place at the level of the instruments which give remote access to the funds held in the payment accounts: access by cards, mobile, computer and other electronic devices. The impact of innovation could be the emergence of new access instruments or the technical improvement of the existing instruments (e.g. EMV chip, contactless by NFC etc.). We see no interdependence between European regulation (such as the PSD) and this kind of worldwide technological innovation.

Funds held on payment accounts can be accessed and used directly through bank-owned system(s) and instruments, by partnerships between banks and third-party providers (such as telecommunication companies or credit card systems) or through separate systems (e.g., through overlay services). The entry of such intermediaries is a structural innovation in the payment services industry, which was traditionally dominated by banks.

Another structural innovation is the dispersion of funds by users across several accounts usually not held with banks, but at payment institutions or at e-money Institutions. Payers and payees are using several payment accounts distinct from their main bank account(s). These accounts may have a limited purpose (e.g. only usage for e-commerce payments or mobile payments), accessibility or services or may face other restrictions. But payment services linked to these accounts are generating specific benefits to payment users not offered by traditional current accounts held with banks.

Both structural innovations, which could be observed not only in the European market, are directly affected by the PSD and other European regulatory activities (e.g. E-Money Directive).

Views of the legal experts

The legal experts were not best placed to assess the effects of the PSD on innovation. While providing valuable details of national law and practices, this survey was nevertheless also an additional source of information for other aspects of payment services markets. While some highlighted the positive impact of the more efficient legal framework with regard to the speed of transactions, and to a stricter deadline for refund of direct debits (BG, ES, LT), lower prices, better regulation for value dates and an efficient model for sharing costs (ES) etc., views or evidence of links to product innovation were not provided.

2.4.3 Assessment by stakeholders[29]

Payment service providers

In general, payment service providers who submitted responses to our questionnaire on this matter were of the view that the PSD did not have any significant impact on innovation.

[29] Due to their limited competence focused on complaints, the complaint boards were not asked about the main benefits of the PSD or which new features in the PSD have made the most significant improvements for users.

However, institutions that have been identified as 'innovative payment institutions'[30] expressed a more positive opinion. As part of the project, the views of a small number (ten) of innovative payment institutions in France, Germany, Netherlands and Slovakia on the impact of innovation were gathered during a special round of interviews. The selection of the payment institutions participating in these special interviews was based on suggestions from the technical experts advising the project team.

Some of the payment institutions consulted were of the view that the passporting provision of the PSD (discussed in section 5.2) supports innovation as it facilitates achieving the required scale to operate sustainably. Likewise, other payment institutions felt that the passporting regime opened up the possibility for them to bring their innovative offer to the payment market from which they had been previously excluded pre-PSD.

Overall, the broad consensus among the innovative payment institutions consulted for this project is that the PSD is positive for innovation as it opens new business opportunities both domestically and abroad. However, a number of such payment institutions mentioned that the benefits are not yet fully reaped. This is due to some problems with the passporting process and the effect that other legislation such as the anti-money laundering legislation have.[31]

Payment service users

The majority of business users consulted during the project was of the view that the PSD did not have a negative impact on product and service innovation. Consumer associations did not express views on the impact of the PSD on innovation.[32]

2.4.4 Conclusion

Overall, the impact of the PSD on innovation appears to be positive for the experts as well as the stakeholders consulted. However, so far the impact of the PSD on innovation remains limited in magnitude in relation to new providers and new market entries or technical innovations. Regulation 924 is not viewed by stakeholders as having a detrimental impact on innovation but no positive impact was identified by stakeholders.

2.5 Interdependencies between Regulation 924/2009 and the PSD

At issue is how the PSD rules and those of the Regulation 924 correlate and whether there are any inconsistencies or gaps between the Directive and the Regulation, especially in the case of the Articles from Title III and IV of the PSD.

The scientific literature on Directive and Regulation provided no evidence that both instruments overlap. The two instruments complement each other and contribute jointly to the creation of an internal market for payments. This complementarity is not new and cross-referencing of the two instruments was already present in 2001. According to Despina Mavromati (2007), writing about

[30] Innovative payment institutions are defined as payment institutions having brought to market new payments services and products in recent years. This type of institutions included in our survey were identified by technical experts working on this report.
[31] For more details on this point, see the section on passporting in this report.
[32] Responses to question 6.1 in business users interview guide (BUIG) and 1.f in business associations interview guide (BAIG). The survey questionnaire sent to consumer associations had questions regarding new PSP entrants (question 3) and new types of payment services used by consumers (question 7) but answers do not inform on the impact of the PSD on innovation.

Regulation 2560/2001 (which preceded Regulation 924/2009) and the PSD, the two texts are parallel.[33] She expressed some doubt with regard to a potential overlap of transparency conditions in both legal instruments. After the adoption of Regulation 924/2009 this issue has not been raised any more.

Possible interactions between the Regulation 924/2009 and the PSD are limited:

- Recital 4 of Regulation 924/2009 does explain that the scope of Regulation 2560/2001 needed to be extended to cross-border direct debits to conform to the objectives of Directive 2007/64/EC and Recital 22 defines a starting date for the application of the Regulation consistent with the Directive in order to ensure legal coherence between the texts.
- Article 1(2) makes reference to the Directive and the definition of a service provider under the Regulation (Article 2) is shared with the Directive.
- The payments committee established by Directive 2007/64/EC also serves as a regulating agency co-operating with national authorities at national level under Article 3(2).

Also, while it is useful that these two complementary pieces of legislation share some key mechanisms such as IBAN and complaint bodies, again we have not identified any clear overlaps there either. However, there exists a gap between the PSD and Regulation 924 regarding the use of the IBAN.

Under Regulation 924, a provider has the duty to provide the user with its BIC and IBAN. These two standards are unique identifiers under the PSD but not the only possible ones. Under the PSD, the provider must inform the user about what information or unique identifier is needed for the execution of the payment order and may request information from the user which is not the BIC and IBAN. Given that Article 4 of Regulation 924 is about “Measures for facilitating the automation of payments”, the current wording in the PSD in fact allows the provider to ask for information which the provider of the beneficiary is not required to provide (in light of Regulation 924).

According to some scholars, it is possible to conceptualise the Regulation as simply a tool to the application of the Directive. All payment transactions can be thought of as national payment transactions wherever the payments are made (within the EU). Since there is no need to differentiate cross-border and domestic payments, all payments can be conceptualised as domestic payments.[34]

It appears from the survey of the literature and the review of the questionnaires completed by consumer associations, that their respective frontiers are not called into question at this stage. The Directive and the Regulation seem to be complementary rather than overlapping.

On the other hand Regulation 260/2012[35], which was not studied in this report, may have a wider impact. Its reading, however, may also reinforce the point that both are complementary rather than overlapping. For example:

[33] See for example, Mavromati, D (2007) p. 65.
[34] See, Mavromati, D (2007) p. 148 making a similar point concerning Directive 2560/2001 and the PSD.
[35] REGULATION (EU) No 260/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) 924/2009, Official Journal of the European Union, L94/22 30 March 2012.

- Recitals 3 and 4 articulate the PSD as the legal foundation for an internal market for payments of which SEPA is a fundamental element, and Regulation 924/2009 as providing a number of facilitating measures for the success of SEPA.
- Recital 13 also shows complementarity explaining that other rights of users are already established under the PSD and should be fully ensured.

But closer links between the two instruments are laid down in Recital 32 (on refund rights for direct debit, making a clear link with the review of the PSD currently being undertaken).

3 Prices

This chapter starts by dealing with current levels of charges and fees, for domestic as well as cross-border credit transfers, direct debits as well as cards and ATMs. It also looks at the evolution of charges and fees for users including ad valorem charges. Other topics include the extension of equal charges for cross-border payments in national currencies other than the euro and surcharging.

3.1 Current levels of charges and fees for domestic and cross-border credit transfers, direct debits, usage of cards and ATMs

3.1.1 Introduction

Regulation 924/2009 stipulates, among others, that “charges for cross-border payments within the Community are the same as those for payments in the same currency within a Member State” (Article 1.1 of Regulation 924/2009). The Regulation originally limited this equality of charges to cross-border payments of up to EUR 50,000 (Article 3.1). However, an amendment to the regulation in 2012[36] eliminated the upper limit and, as of April 1, 2012, the “equality of charges” rule applies to all cross-border payments.

Moreover, the Regulation applies to “cross-border payments which are denominated in euro or in the national currencies of the Member States which have notified their decision to extend the application of this Regulation to their national currency” (Article 1.2). At present, this is the case for Sweden and Romania, although in the latter case, the implementing legislation has not yet been passed.

At issue is whether this rule of equality of charges is respected by payment service providers. In order to verify the application of this rule, a substantial fee and charges collection exercise was undertaken as part of this project. The findings of this exercise are presented in the following section.

Before proceeding with the review of these results, it is important to note that a 2008 report of the European Commission on the application of Regulation (EC) No 2560/2001[37] on cross-border payments in euro has already found that this Regulation had resulted in a reduction in the charges for cross-border payments in euro to the level of national charges. As a result, the scope for further reductions as a result of the implementation of Regulation 924/2009 may have been more limited.

3.1.2 Results of analysis of fees and charges

The present chapter presents the findings of our analysis on fees and charges. Because of the volume of data involved, this section only presents key findings. A more detailed analysis of fees and charges is provided in Annex 5.

[36] REGULATION (EU) No 260/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009, Official Journal of the European Union, L 94/22, 30 March 2012.

[37] See European Commission (2008), the accompanying staff paper and the two 2005 studies by Retail Banking Research Ltd on which the 2008 analysis is based.

3.1.3 General methodology

250 credit institutions were selected such that the number of credit institutions sampled per country is roughly proportional to the population of that country and the number of credit institutions operating in that country. In addition, all payment institutions which made their fees available over the Internet were included.

Price information was gathered from the payment service providers' websites for the following domestic and cross-border transactions:

1. Credit transfers
2. Debit and credit card payments
3. Debit and credit card ATM withdrawals
4. Direct debits

For credit transfers, the fee charged may vary depending on whether the payment instruction is given through online banking, a visit at a branch, by post using a paper form or via smartphone. This study compares two different transaction methods:

1. The cheapest method available (usually online)
2. Over-the-counter transactions

The advantage of using the first metric is that we do not have to make any assumptions about which method is most commonly used in which Member State. The obvious shortcoming of this approach is that there are very different penetration rates of online banking across different Member States and the cheapest fee is, in most cases, the online banking fee. As a result, we also analyse fees charged by banks when customers make credit transfers in the branch. Again, this is not perfect for cross-country comparisons as in some countries online banking is by far the most common form of transferring credit and offline transfers are often not even offered.

Once this data was gathered, the marginal cost of each transaction was calculated and compared across Member States. Due to the existence of periodical account fees, this approach may lead to misleading results and hence a 'consumer banking profile' was constructed based on which average monthly banking charges were calculated. It should be noted that the profile used is not a typically representative profile, but instead is based on survey responses from national banking associations.[38] The marginal cost, although more complex to examine, should therefore be seen as the more reliable source of cross-country comparison.

3.1.4 Key findings of the fee and charges collection exercise

Overall, the vast majority of credit institutions listed the same fees for domestic and cross-border transfers when the transaction was below EUR 50,000.[39] However, numerous breaches were found

[38] National banking associations were asked to provide any studies, reports or other information they had on the profile of typical payment service users (consumers).

[39] Two credit institutions quoted different prices for over-the-counter transactions to the euro area and domestically. Online transfer costs, however, were the same for both transactions.

for transfers in excess of EUR 50,000 in the data collection exercise undertaken between June and August shortly after the Regulation was amended.[40]

Several months after the initial data collection, we therefore went back in October and November 2012 to verify these fees in a second round of data collection. In the meantime, the vast majority of institutions had the time to update their price lists and were no longer in breach. Clearly the data collection fell during a transition period when not all credit Institutions had updated their price lists.

Those which still remained in breach were contacted directly via phone and/or email in order to verify that the price lists listed were up-to-date and that these fees were indeed charged.

The following Table 9 shows the number of transactions priced in violation of Regulation 924/2009 per Member State at the first round of data collection in July 2012 and those which remain in breach after the second round of data collection in October and November 2012.

[40] See footnote 36.

Table 9: Number of breaches by type of transaction and Member State.

	Sending online		Sending over-the-counter		Receiving		Total	
	1st round	2nd round	1st round	2nd round	1st round	2nd round	1st round	2nd round
Austria	6	1	0	0	4	0	10	1
Belgium	0	0	0	0	0	0	0	0
Bulgaria	2	0	2	0	0	0	4	0
Cyprus	0	0	0	0	0	0	0	0
Czech Republic	4	2	0	0	0	0	4	2
Denmark	4	2	2	1	0	0	6	3
Estonia	0	0	0	0	0	0	0	0
Finland	0	0	1	0	0	0	1	0
France	1	0	0	0	0	0	1	0
Germany	0	0	0	0	1	0	1	0
Greece	0	0	0	0	1	1	1	1
Hungary	4	0	8	1	0	0	12	1
Ireland	2	1	1	0	1	0	4	1
Italy	2	1	5	2	1	0	8	3
Latvia	0	0	0	0	0	0	0	0
Lithuania	0	0	2	1	0	0	2	1
Luxembourg	1	1	1	1	1	1	3	3
Malta	0	0	0	0	0	0	0	0
Netherlands	5	3	2	2	3	2	10	7
Poland	2	0	2	0	0	0	4	0
Portugal	1	1	3	2	0	0	4	3
Romania	0	0	1	0	0	0	1	0
Slovakia	0	0	0	0	0	0	0	0
Slovenia	0	0	0	0	0	0	0	0
Spain	1	1	1	0	2	2	4	3
Sweden	1	0	1	0	0	0	2	0
UK	0	0	4	1	0	0	4	1
TOTAL	**36**	**13**	**36**	**9**	**14**	**6**	**86**	**30**

Source: London Economics

There are two reasons why a bank remained in breach after the second round of data collection: either the bank confirmed to us that their fees were in violation or after several attempts to contact them via phone and email, we still did not receive a response. In the former case, some banks confirmed the same prices we had in our data, while other banks quoted different numbers, yet still remained in breach. Further details on the data used can be found in Annex 5 of this report.

Similarly for payment institutions, a few breaches remain, summarised in Table 10 below. The breaches were the same in the first and second round of data collection. Therefore, the columns "1st round" and "2nd round" in the table below contain identical figures.

Table 10: Number of breaches by Member State, first and second round of data collection.

	1st round	2nd round
Belgium	1	1
Bulgaria	1	1
Cyprus	3	3
Czech Republic	2	2
Greece	5	5
Romania	1	1
Spain	2	2
United Kingdom	2	2
TOTAL	17	17

Source: London Economics

The other key result to note is that prices across the European Union still vary significantly. Regardless of the approach considered, that is comparing marginal costs or average monthly banking costs, over-the-counter fees or online fees, the same group of countries consistently emerge as having the most expensive banking charges.

Figure 22 below, for example, illustrates the monthly fees a consumer with the assumed profile is likely to face in each Member State. The high cost in Spain is driven by the fact that the assumed profile includes many credit transfers and charges for these are particularly high in Spain. Further analysis and other metrics of comparing the cost of payment services across countries can be found in Annex 5 which presents a detailed analysis of the information on fees and charges which has been collected as part of this project.

Furthermore, these extremely large differences in price demonstrated in Figure 22 below do not account for purchasing power differences across the Member States, which would increase the large price gaps we find.[41]

[41] This exercise is also considered in Annex 5.

Figure 22:Average monthly cost of banking, (EUR)

Source: London Economics

3.1.5 Conclusion

While payment service providers in general do appear to respect the rule of equality of charges, it cannot be said that this has led to convergence of prices across Member States.

However, without a complete and reliable banking profile (including overdrafts etc.) in each Member State, as well as detailed information on the cost to the payment service providers for producing the different payment services, it is not possible to conclusively say that a lack of competition is driving these findings.[42]

3.2 Evolution over time of charges and fees for users

3.2.1 Introduction

The PSD aims to stimulate competition in the market for payment services and achieve a considerable step forward in terms of consumer choice, safety and efficiency as compared with the present national systems (Recital 4 of the PSD).

At issue is whether charges and fees have fallen since the implementation of the PSD in the various Member States.

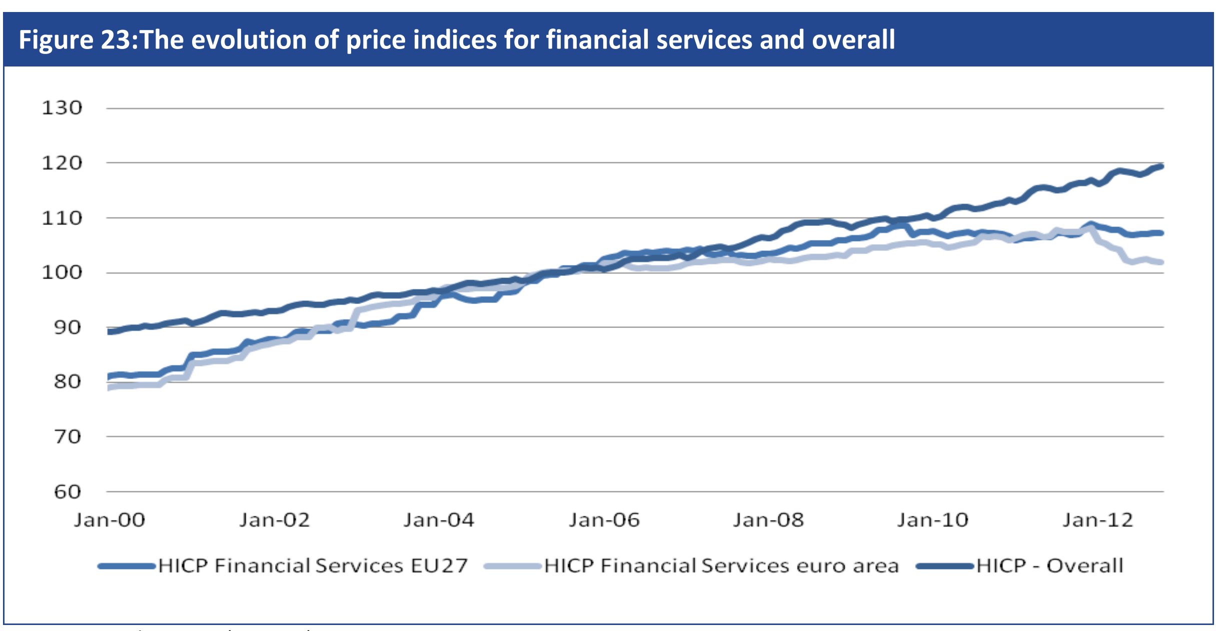
[42] The discussion in Annex 5 develops this topic further and provides a more detailed analysis on the findings presented here.

3.2.2 The general evolution of the cost of banking in Europe

Eurostat publishes harmonised indices of consumer prices (HICP), which is a harmonised consumer price index based on a single set of definitions. Among these, a sub-index of “Financial Services” is included and shown in Figure 23 below for the EU-27 and the euro area, in comparison to the evolution of the general HICP. It should be noted, however, that this index covers the cost of banking in general and therefore is a much broader measure than looking at the individual transactions considered in our study. The base year is 2005.

As can be seen in Figure 23 the HICP for financial services has been steadily increasing, yet at a lower rate than the overall HICP. In the euro area, we can even see a sharp drop in the index, suggesting that the cost of banking has fallen in the euro area, while it has remained roughly constant in the non-euro area.

Figure 23:The evolution of price indices for financial services and overall



Note: 2005 is base year (i.e. =100).
Source: Eurostat

3.2.3 The evolution of the cost of making a domestic payment

A study on the impact of Regulation EC 2560/2001 on bank charges for national payments (this Regulation was later repealed by Regulation EC 924/2009)[43] gathered price data for domestic transfers in the EU15 Member States. Unfortunately, this study differentiates between the cost of sending online and the cost of sending with a paper form only in a few countries, noting that in Finland and Belgium consumers are not charged anything for online transfers.

The data for 2001 and 2005 in Table11 is taken directly from the report and is contrasted with our findings from 2012. Prices in Austria, Finland, Ireland, Italy and Portugal have remained roughly the same. Prices in Belgium, on the contrary, appear to have increased slightly and in Spain over-the-counter transactions have become significantly cheaper. In France, the prices for online trans-

[43] See RBR (2005), Study on the impact of Regulation 2560/2001 on bank charges for national payments and European Commission (2006), Staff Working Document on the impact of Regulation (EC) No 2560/2001 on bank charges for national payments, SEC(2006) 1783.

fers have fallen from over EUR 4 to under EUR 0.30. In the Netherlands, Denmark, Sweden and the UK the prices for over-the-counter fees have increased substantially, for example, from zero to EUR 6 in the Netherlands.

Table 11: Evolution over time of fees in selected Member States

	2001	2005	2012	
	Online/Over-the-counter	Online/Over-the-counter	Online	Over-the-counter
Austria	0.00-1.20	0.00-1.20	0.11	0.89
Belgium	0.00-0.25	0.00-0.30	0.50	0.52
Finland	0.00-4.00	0.00-4.00	0.00	2.70
France	2.30-3.502	2.85-3.90	0.29	3.44
Germany	0.00-2.00	0.00-2.00	0.01	0.43
Greece	min 5.58	min 12.00	0.53	11.75
Ireland	0.00-0.76	0.00-0.76	0.11	0.44
Italy	0.25-4.00	2.00-5.00	1.39	3.67
Luxembourg	0.00	0.00-1.50	0.17	1.20
Netherlands	0.00	0.00	0.00	6.00
Portugal	0.00-1.50	0.00-3.50	0.42	3.26
Spain	2.52-28.10	3.18-29.104	2.45	2.93
Denmark	0.25-2.00	0.25-2.00	0.07	3.19
Sweden	0.00-1.65	0.00-1.65	0.23	6.77
UK	0.00	0.00	0.00	4.29

Source: RBR (2005) Study on the impact of Regulation 2560/2001 on bank charges for national payments for 2001 and 2005 data and London Economics for 2012 data).

3.2.4 Evolution of prices for cross-border payments

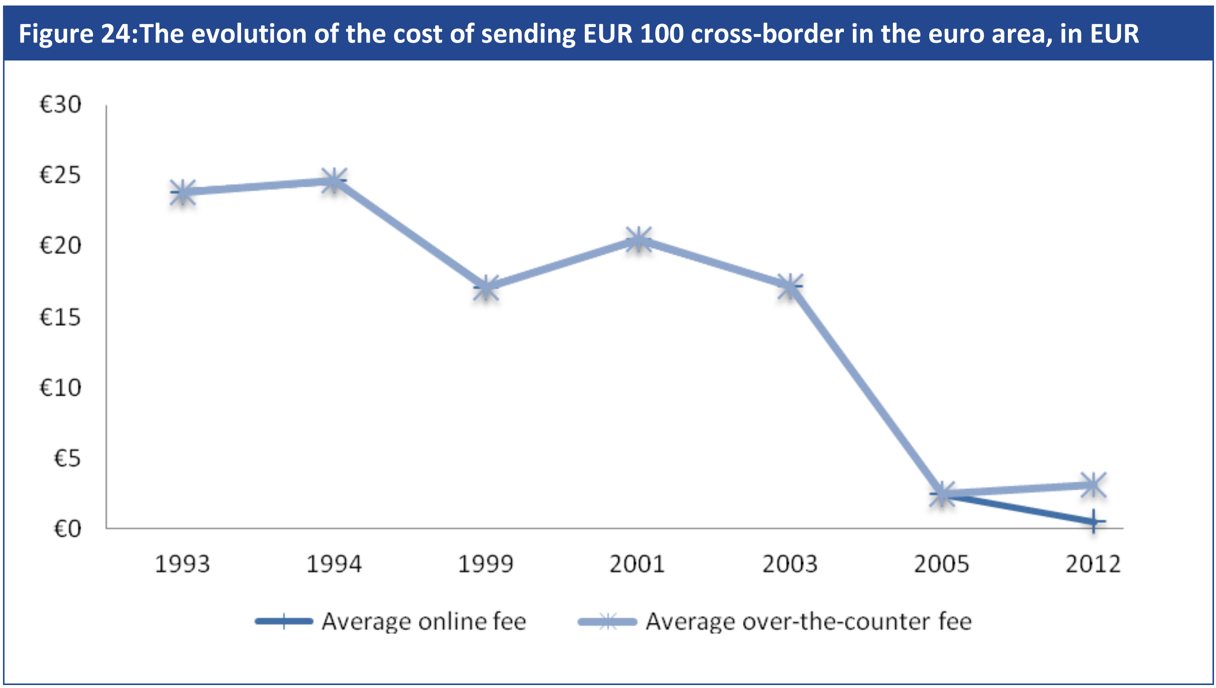
In 2006, the European Commission published a working paper on the impact of Regulation EC 2560/2001 on bank charges for national payments. The aim of this study was to determine if Regulation 2560/2001 has led to a reduction in banking prices. The average prices of sending EUR 100 cross-border in the euro area found by this study, together with our findings from 2012, are depicted in Figure 24 below. The sharp drop between fees found in 2003 and 2005 is attributed by the authors of the working paper to the introduction of Regulation 2560/2001.

The previous studies did not differentiate between different methods of transferring funds, such as over the counter or online, no doubt also because online payments were of smaller importance at the time. We include for 2012 separately the cost of transferring EUR 100 cross-border online and over the counter. This reveals the interesting trend that online transactions prices have further fallen compared to the 2005 value, while over-the-counter transactions have become more expensive.

This can be explained firstly by the increased popularity of online banking and secondly by the fact that some banks actively discourage over-the-counter payments in favour of online payments as these are cheaper for the institution. This was almost universally the case in the Netherlands, for

example, where credit institutions charged significant fees for over-the-counter transfers and nothing for online transfers.

Figure 24:The evolution of the cost of sending EUR 100 cross-border in the euro area, in EUR



Note: 2012 averages are based on the EU15 Member States only, in order to ensure consistency with past studies. The averages for 1993 are missing data from Austria and Finland. The 1999 average includes no data from Greece.
Source: European Commission (2006) Staff Working Paper on the impact of Regulation EC No 2560/2001 on bank charges and national payments and London Economics

The data plotted in Figure 24 above is outlined in greater detail in Table12, allowing us to examine trends in individual countries. The prices for online transfers have almost universally dropped, with the exception of Belgium where we note a small increase from EUR 0.15 to EUR 0.50. There are a number of instances also where the over-the-counter fee has fallen: Germany, Greece and Spain. In all other countries the over-the-counter fee is higher than the 2005 fee with the Netherlands standing out in particular with an increase from zero to EUR 6.

Table 12: The evolution of the cost of transferring EUR 100 cross-border, in EUR

	Study 1993	Study 1994	Study 1999	Study 2001	Study 2001	Study 2003	Study 2005	Current study 2012	
Method	-	-	-	-	-	-	-	online	o-t-c
Austria	–	–	10.61	17.4	22.27	11.19	0.6	0.11	0.89
Belgium	23.93	23.06	13.37	11.87	12.84	14.26	0.15	0.5	0.52
Finland	–	–	20.11	14.36	21.26	18.71	2	0	2.7
France	34.79	33.01	16.88	18.06	25.41	22.62	3.4	0.29	3.44
Germany	19.57	26.16	13.78	11.93	14.73	10.56	1	0.01	0.43
Greece	27.23	32.78	–	–	47.33	31.09	12	0.53	11.75
Ireland	23.04	27.13	25.98	25.04	36.08	22.24	0.38	0.11	0.44
Italy	19.79	20.88	18.28	19.74	28.61	16.71	3.5	1.39	3.67
Luxembourg	16.84	15.75	8.91	9.58	9.79	9.89	0.75	0.17	1.2
Netherlands	17.69	18.84	10	11.45	12.11	11.11	0	0	6

Table 12: The evolution of the cost of transferring EUR 100 cross-border, in EUR									
Portugal	34.37	26.75	29.68	31.04	28.08	18.12	1.75	0.42	3.26
Spain	21.1	22.04	20.5	20.56	24.65	19.78	4	2.45	2.93
Average	23.84	24.64	17.1	17.37	23.6	17.19	2.46	0.50	3.10

Note: Only price information for the countries listed above is used, in order to ensure consistency with past studies. Results for two studies are presented for 2001. The first are based on a sample of 352 and the second of a sample of 1480. Both studies are report in the EC Staff Working Paper listed in the source below.

Source: European Commission (2006) Staff Working Paper on the impact of Regulation EC No 2560/2001 on bank charges and national payments, p.9 for results of studies from 1993 to 2005 and London Economics for 2012 data

3.2.5 Debit card charges

The same Commission working paper also analysed the evolution of prices for ATM cash withdrawals. The study noted a slight increase in charges between 2001 and 2005 and concluded that this increase was likely due to the introduction of Regulation 2560 which required withdrawal charges for domestic and cross-border transactions to be identical.

Looking at the price information we gathered in 2012, we note that this trend did not continue, but that, on average, prices in the euro area have remained constant (slight drop from EUR 1.45 to EUR 1.42 as shown in Table13 below). At the individual country level, some prices have increased and some have fallen. Finland stands out in particular where prices have been raised from zero to an average of EUR 1.84. In Luxembourg on the contrary, average prices fell from EUR 3.00 to EUR 1.41.

Table 13: The evolution of the cost of withdrawing money from another provider's ATM, in EUR

Country	2001	2005	2012
Austria	0.00	0.00	0.12
Belgium	0.07	0.10	0.05
Finland	0.00	0.00	1.84
France	0.78	1.00	0.79
Germany	4.50	4.25	4.37
Greece	1.00	2.94	1.30
Ireland	0.40	0.40	0.09
Italy	2.20	2.20	1.59
Luxembourg	3.00	3.00	1.41
Netherlands	0.00	0.00	0.00
Portugal	0.00	0.00	0.00
Spain	2.98	3.45	4.10
Average	**1.24**	**1.45**	**1.42**

Note: Only price information for the countries listed above is used, in order to ensure consistency with past studies.

Source: "Commission Staff Working Paper addressed to the European Parliament and the Council on the impact of Regulation EC No 2560/2001 on bank charges and national payments" and London Economics for 2012 data

3.2.6 Views of stakeholders

Payment institutions

Overall, the majority of payment institutions responding to the survey noted a moderate decrease in fees over the last few years

Credit institutions

In contrast, the majority of credit institutions that responded to the question about the evolution of fees and charges do not report any decreases in charges and fees for domestic payments as a result of the implementation of the PSD although some note that fees have decreased as a result of other factors such as an increase in competition. A number of institutions noted, however, that fees for cross-border payments have decreased.[44]

Consumers

Most consumer associations did not give any information about changes of the overall level of prices except for two organisations: the Danish Consumer Council noted that the PSD had no effect on cost level.[45] The same evaluation came from the Dutch *Consumentenbond* in relation to cross-border prices.[46] Overall, it appears that consumer associations see no trend of a falling price level for payment transactions.

If prices were mentioned it was in relation to breaches of the free information principle (reported by several consumer associations),[47] and higher charges for payment transactions which are not covered by Reg. 924 in relation to ordinary national payment transactions.[48] The Cyprus Consumers' Union & Quality of Life reported for example that the charges for payments in foreign currencies (e.g. British pounds, US dollars) are higher than for payments in euro.[49]

Businesses

The views from the businesses that participated in the consultations were mixed. A small majority reported a decrease in fees while a large minority reported no change in fees and charges for payment services.[50]

Complaints bodies

Complaint boards did not give any information about the changes of the price level in general. But prices for payment services were one of the most-named complaints received in the last two years.[51] In relation to the main focus of complaints, complaint boards mentioned excessive costs for cash transfer, account maintenance fees, charges for credit transfer, international money

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44 Answers to question 6 CIQ.
45 Answers to question 1 CAQL and to question 1 CAQS. For further details, see also Annex 2.2.
46 Answers to question 1 CAQL and to question 1 CAQS. For further details, see also Annex 2.2.
47 Answers to question 11 CAQL. For further details, see also Annex 2.8.
48 Answers to question 64 CAQL and to question 17 CAQS. For further details, see also Annex 2.12.4.
49 Answers to question 5 CAQL and to question 4 CAQS. For further details, see also Annex 2.12.4
50 Answers to question 6g BUIG and question 1d BAIG.
51 See answers to introductory question CBR about the main focus of the complaints in the last two years. For further details, see also Annex 3.2.

transfers, ATM withdrawals and bank card service fees.[52] Furthermore complaint boards singled out explicitly charges for payment transactions, rate of commission, costs and charges themselves, charges for one-leg transactions, charges for information sent by email to users, charges not in line with PSPs' actual costs, transactions in currencies other than euro or the national currency of the Member State in question, charges for framework contracts for periods after cancellation through the user and charges for the termination of a payment account that had been opened more than 12 months ago.[53]

Therefore the answers from the complaint boards back up the overall impression of consumer associations and indicate that the price level has not decreased. On the contrary, new unexpected charges have occurred. Overall, complaints about charges were not only focussed on information on charges but mainly on charges themselves (e.g. for information, for notification, in the case of currency conversion and one-leg transactions etc.).[54]

Charges were especially criticised by the OFT (UK) in relation to ATM transactions in foreign currencies: "The OFT investigated the travel money market in 2011 and as part of our investigation considered the use of credit and debit cards abroad. The OFT found that card issuers in the UK effectively charge consumers in the exchange rate provided to the payer by adjusting the exchange rate used by the payment network for the transaction. This charge by the card issuer is typically in the range 2.75% to 2.99% of the amount of the transaction." (See Annex 3, Box 24 for more information.)

3.2.7 Conclusion

The comparison of the 2005 and 2012 fee data shows that in general fees for domestic and cross-border credit transfers have decreased if one considers online transfers. For over-the-counter transfers, the picture is mixed with fees actually higher in 2012 than in 2005 in some countries. In the case of withdrawals at ATMs using a debit card, fees did not change much from 2005 to 2012 although there are differences across Member States.

As no fee data exist for 2009, the year when the PSD was implemented at national level, it is impossible to determine whether the observed changes between 2005 and 2012 occurred before or after the implementation of the PSD.

The qualitative information gathered through the surveys of stakeholders undertaken for the current project suggests that the impact of the PSD on fees and charges for payment services appears to be small, ranging from nil for many stakeholders to a small decrease. New charges were also mentioned by consumer associations.

It is important to note that charges and fees had already fallen considerably by 2005-06 for domestic payments and cross-border payments in euro in the euro area countries. Annex 5 provides the results of a detailed analysis of fees and charges for a range of cross-border transactions and the trend in fees and charges over time.

[52] See previous footnote.

[53] Answers to CRB questionnaire, questions 4, 5, 6, 12, 17, 25, 32-36, 49, and 63. See final remarks and introductory question about the main focus of the complaints in the last two years. For further details, see also Annex 3.

[54] See previous footnote.

3.3 Use of ad valorem charges

3.3.1 Introduction

Charges and fees for payments services which are based on the value of the payment (i.e. ad valorem charges and fees) introduce different costs for users of payment services depending on the amount of the payment and complicate the comparison of services offered by payments services providers and their costs. A user would have to undertake such a comparison for different payment amounts. Moreover, depending on the tariff structure of various payment providers, it is possible that a user would have to use different payment service providers to achieve the lowest cost for each payment he/she wishes to make. This may impact on user behaviour and actual competition in the market place.

The present section presents the economic rationale for such ad valorem charges. It then discusses information on the extent to which ad valorem fees and charges are used. Finally, presents information on the actual use of ad valorem charges and fees and sets out the views of stakeholders on this issue.

3.3.2 Economic rationale for ad valorem fees and charges

There exist three different potential reasons for using ad valorem fees and charges instead of fixed rates.

- First, if the cost of providing payment services increases with the amount of the payment to be effected, an ad valorem fee or charge could be efficient from a resource allocation perspective if the fee rate reflects the actual cost.
- Second, there may also be a redistributive argument in favour of ad valorem fees if the ad valorem fees are set at such a level that they do not cover the cost of small payments and generate revenues in excess of costs for large value payments. In such a case, users effecting large payments implicitly subsidise users making small payments. While from a social perspective such a cross-subsidisation may be desirable, it sends, however, a misleading economic signal to users and may result in excessive use of payment instruments by users making small payments.
- Finally, payment service providers may use ad valorem charges as a way to generate revenues in excess of the costs actually incurred. However, it is important to note that such a practice will not necessarily increase the overall profit of the payment service providers. The overall impact on the financial bottom line of payment service providers will depend on whether the net revenues generated from payment fees and charges are used to subsidise some other services offered to their clients or as a source of profit.

The results of the survey of payment institutions suggest that it is the revenue generation motive which is the main reason for use of ad valorem charges.[55]

[55] Answers to question 8.2 CIQ. It should be noted that only a few payment institutions (5) responded to this question.

3.3.3 Extent of the use of ad valorem fees and charges

Ad valorem charges only play an important role for larger transfers, usually in excess of EUR 50,000. Below this threshold only Hungarian banks, two Spanish banks and one Belgian bank in our sample used ad valorem fees.[56]

Ad valorem charges are also frequently used for ATM withdrawals.

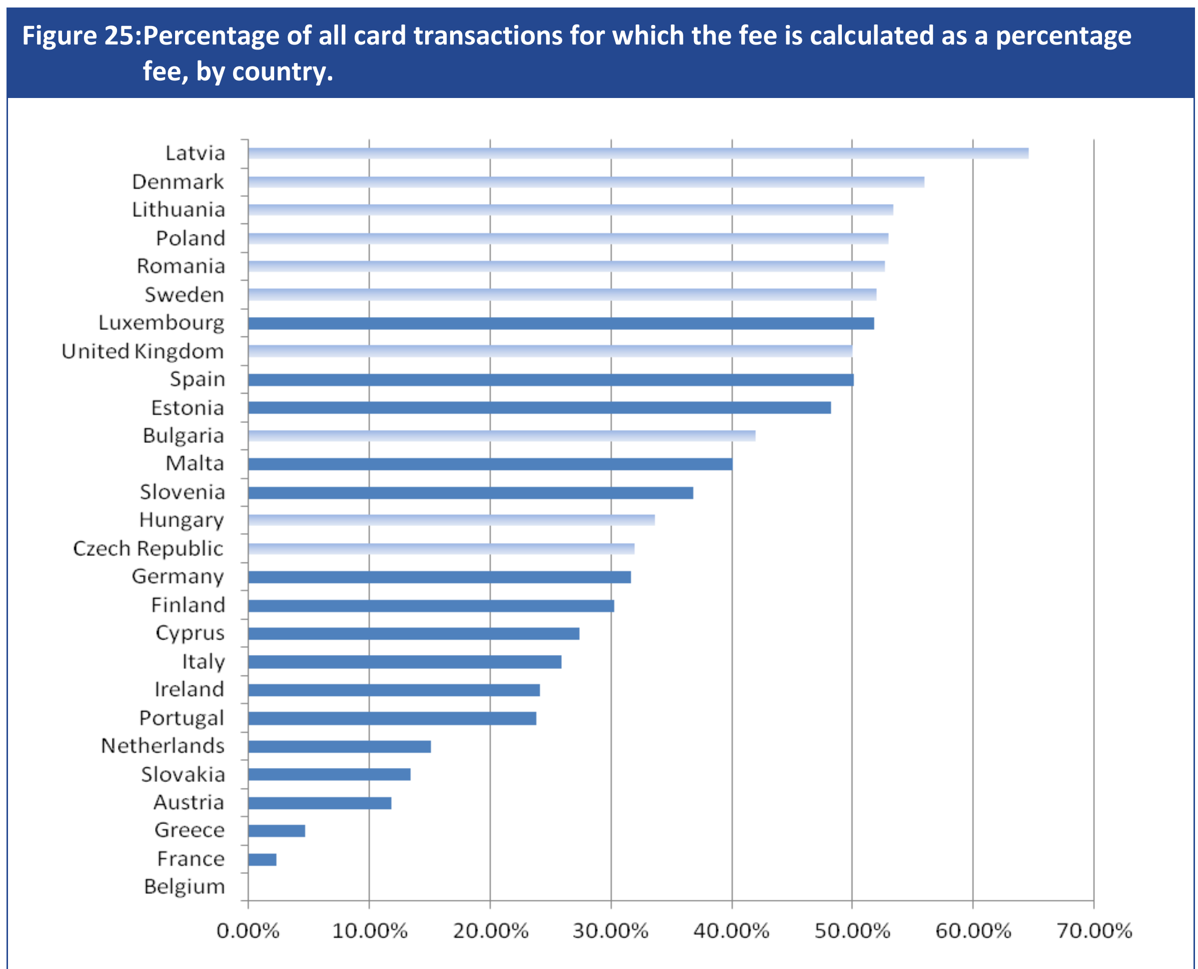
Overall:

- In the euro area, 13% of all providers of cross-border transactions in excess of EUR 50,000 used ad valorem charges and in the non-euro area this figure was 52%.
- For debit card ATM withdrawals, 23% of payment service providers in the euro area and 40% in the non-euro area did use ad valorem charges.
- For credit cards, the figures rose to 43% and 79% in the euro area and non-euro area respectively.

Ad valorem charges are more frequently observed in the non-euro area as can be seen, for example, in Figure 25 below. Further breakdowns and analysis can be found in Annex 5.

[56] The two Spanish banks charge on average EUR 2.63 for the domestic transfer of EUR 100, while the remaining Spanish banks charge EUR 2.36 on average. Similarly the one Belgian bank charges EUR 1.95 while the average charged by all the other banks is EUR 0.33. Also in Hungary, the banks using ad valorem fees charge on average more than those who use fixed fees (EUR 0.07 for fixed fees and EUR 0.22 for ad valorem charges).

Figure 25:Percentage of all card transactions for which the fee is calculated as a percentage fee, by country.



Note: euro area countries are listed in dark blue and non-euro area countries in light blue.
Source: London Economics

3.3.4 The cost of ad valorem charges to the consumer

The effect of ad valorem charges on the consumer can be strikingly large. Here we compare the cost of making the same transaction for consumers who face fixed fees and ad valorem fees. It should, however, be noted that this analysis ignores all kinds of cross-subsidisation and periodic account fees.

Transfers

Table 14 below contrasts the fees charged by banks using ad valorem fees and those using fixed fees for a domestic transfer of EUR 75,000.

In some countries, banks using both types of pricing structure exist, which allows for a direct comparison of the two. For example, the average cost of sending EUR 75,000 in Cyprus is EUR 13.50 for customers of banks using fixed fees and EUR 124.50 for customers of banks charging ad valorem fees. On average across the EU, the cost of this particular transfer is EUR 8.45 for banks charging fixed fees and EUR 155.63 for banks charging ad valorem fees.

Table 14: Cost of sending EUR 75,000 (or equivalent) domestically, for banks charging a fixed fee and those charging ad valorem fees

	Fixed fees		Ad valorem fees	
	Transaction cost	Account fee	Transaction cost	Account fee
Austria	0.11	3.70	-	-
Belgium	6.33	2.22	118.55	0.00
Bulgaria	-	-	99.25	0.83
Cyprus	13.50	0.00	124.50	0.00
Czech Republic	-	-	52.80	5.78
Denmark	2.04	0.00	-	-
Estonia	0.32	0.00	-	-
Finland	0.00	0.88	-	-
France	12.61	1.52	487.50	2.38
Germany	0.01	3.92		
Greece	5.33	0.00	90.00	0.00
Hungary	-	-	158.89	1.50
Ireland	0.11	1.43	-	-
Italy	1.55	4.35	-	-
Latvia	7.86	0.77	-	-
Lithuania	11.59	0.00	-	-
Luxembourg	0.17	2.44	-	-
Malta	4.00	0.00	-	-
Netherlands	0.00	1.56	-	-
Poland	7.59	8.62	59.54	2.38
Portugal	0.39	0.00	-	-
Romania	-	-	102.78	0.54
Slovakia	0.15	6.33	-	-
Slovenia	3.85	1.96	-	-
Spain	80.00	5.00	262.50	4.44
Sweden	0.23	1.49	-	-
United Kingdom	37.50	0.00	-	-
Average	**8.45**	**2.01**	**155.63**	**1.79**

Note: "-"indicates that no data exist.
Source: London Economics

Since these higher transactions fees may be caused by other lower costs, we also include the monthly account fee in the table. While it is true that accounts which charge ad valorem fees have a lower account fee (EUR 1.79 versus EUR 2.01 on average), this difference is small. Looking individually at the countries in which both types of charges co-exist, we see that in Cyprus, Greece and Spain, the periodic account fees are very similar (or even cheaper for accounts with fixed fee charges), yet the ad valorem charges are significantly higher.

Card fees

A similar trend can also be observed when comparing the charges for debit and credit cards: ad valorem charges are on average significantly more expensive for the consumer.

Table 15 below compares the cost of withdrawing EUR 100 from another provider for banks which charge ad valorem fees and those which charge fixed fees (domestically for euro area countries and within the euro area for non-euro area countries). For debit cards, the average costs for banks charging fixed fees are EUR 1.03 and for banks charging ad valorem fees is EUR 2.85.

Table 15: Cost of withdrawing EUR 100 (or equivalent) domestically, for banks charging a fixed fee and those charging ad valorem fees

	Debit cards		Credit Cards	
	Fixed fee	Ad valorem	Fixed fee	Ad valorem
Austria	0.12	-	-	3.38
Belgium	0.05	-	2.38	-
Bulgaria	0.45	-	1.02	3.89
Cyprus	2.58	-	-	4.35
Czech Republic	1.44	-	-	2.67
Denmark	0.89	4.03	0.65	3.91
Estonia	-	3.29	-	4.44
Finland	0.68	3	-	4.00
France	0.79	-	0.64	-
Germany	4.07	4.78	3.12	4.56
Greece	1.30	-	1.29	-
Hungary	1.22	2.08	2.83	3.46
Ireland	0.09	-	-	2.11
Italy	1.59	-	3.25	3.88
Latvia	3.57	4.34	-	4.24
Lithuania	-	2.60	-	2.60
Luxembourg	-	1.41	-	4.49
Malta	2.50	3.33	-	4.17
Netherlands	0.00	-	4.50	4.17
Poland	0.49	-	0.00	3.00
Portugal	0.00	-	0.00	5.48
Romania	0.00	1.16	-	1.91
Slovakia	1.58	-	8.65	4.98
Slovenia	0.32	0.44	-	8.03
Spain	-	4.1	-	4.70
Sweden	0.00	-	2.04	2.91
United Kingdom	0.00	2.50	0.00	3.85
Average	**1.03**	**2.85**	**2.17**	**3.97**

Note: "-"indicates that no data exist.
Source: London Economics

Once again, the more informative comparison is within Member States for those countries in which fees of either kind exist. In Denmark, for example, the difference is very large ranging from EUR 0.89 for fixed fees and EUR 4.03 for ad valorem fees. For debit cards, there is not a single country where the average cost of ad valorem charges is lower than of fixed fee charges.

For ATM withdrawals using a credit or deferred debit card the picture is less clear, with two Member States having a lower average cost when ad valorem fees are used than when fixed fees are used (Netherlands and Slovakia). However, on average across the EU, the same pattern still emerges, with banks using ad valorem charges being significantly more expensive for consumers.

3.3.5 Views of stakeholders

Competent authorities

Interestingly, a clear majority of the competent authorities who responded to the question in the survey questionnaire on the change in the nature of the fees and charges indicated that the use of ad valorem fees is decreasing, with the reported extent of the decrease varying from 'slightly' to 'very much'.[57] A few competent authorities reported an increase in the use of ad valorem fees while another few reported that either the use of ad valorem fees remained the same or that a mixed pattern could be observed, the use increasing for some types of payment instruments and decreasing for other types.

In terms of the impact of a move to a flat fee or charge for all payment services, the few competent authorities who addressed this point expressed a concern that individuals with small payments might be affected negatively if the flat fee is set at an average level reflecting the usage of payment services of all users. They also noted that large businesses and large public entities can, at the present time, negotiate the charges they pay for the provision of payment services. As a result, a move to a flat fee structure may not be necessarily more advantageous for them.

Payment service providers

Only credit institutions were asked to provide an explanation for the use of ad valorem fees and charges. According to most respondents among the minority of credit institutions who responded to the questions on ad valorem charges and fees, the use of an ad valorem structure reflects a business decision.[58] A few institutions also reported that costs are increasing with the value of the payment and hence an ad valorem structure is justified.

Consumers

Consumer associations did not give any answer related to questions over whether charges for credit transfers, card payments and ATM withdrawals in different Member States are now lower based on the value of the payment and if charges based on the value of payments used in the EU have an economic rationale and effect. Nevertheless, charges for ATM withdrawals were an issue raised by several consumer associations.[59]

57 Answers to question 13.4 in the questionnaire sent to competent authorities (CAQ).
58 Answers to question 8.2 CIQ.
59 For further details, see also Annex 2.

Businesses

The majority of businesses surveyed do not see any reason for costs to be increasing with the value of the payment and are strong advocates of flat fees and charges.[60]

Complaints bodies

Complaint boards were not consulted on this specific question about charges based on the value of payments. But a number of complaints about charges in general were identified by complaints boards (see Annex 3).

3.3.6 Conclusion

At the present time, the pattern of usage of ad valorem fees and charges across the EU-27 is mixed. While in principle a fixed fee structure may be more appropriate because the cost of effecting a payment is largely fixed, it is not obvious that a move to a flat fee structure would necessary be advantageous for payment service users which mainly make payments of relatively small value. For example, if, following the introduction of a flat fee, payment institutions aim to keep unchanged the revenues generated by an ad valorem fee, it would significantly increase the cost of payment services for users making small payments and benefit those effecting large payments.

In practice, however, the costs to the consumers of ad valorem charges are large for a variety of payment transactions other than small credit transfers.

However, rather than aiming to regulate the nature and level of fees, the best approach may be to ensure robust competition in the provision of payment services by making it easier for consumers to switch payment service provider (see discussion in section 5.3) and let such competition drive down the overall level of fees and charges.

3.4 The extension of the equal charges principle for cross-border payments in national currencies other than the euro

3.4.1 Introduction

Mirroring the equality of charges in euro area countries for domestic and cross-border payments in euros, Member States outside the euro area can impose through national legislation equality of charges for domestic payments in national currency and cross-border payments in euros.

Non-euro area Member States wishing to apply such a policy have to notify the European Commission according to Article 14 of Regulation 924.

At the present time, among the Member States outside the euro area, only Sweden applies such an equality of charges for domestic payments in Swedish krona and cross-border payments in krona and euro, and this since 2002, following the adoption of Regulation 2560/2001, the predecessor of Regulation 924.[61]

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[60] Responses to questions 6g BUIG and 1d BAIG.

[61] See Communication from the Commission pursuant to Article 9 of Regulation (EC) No. 2560/2001 of the European Parliament and of the Council published in the Official Journal of the European Communities, C165/36 of 11 July 2002. The Communication indi-

On 26 May 2011, Romania notified the Commission that it was applying the equal charges rule to cross-border payments in national currency (the lei) and that as of 1 January 2012, cross-border payments in lei and in euro should be charged the same as national payments in lei.[62] However, the competent authority,[63] the national banking association,[64] and individual credit institutions[65] have all reported that, at the present time, the equal charges rule was not applied as of July 2012 because the national implementing regulation had not yet been passed.

At issue is whether the extension of the equal charge rule to all Member States outside the euro area would benefit users.

3.4.2 Analysis and stakeholder views from Sweden

In order to address this question, a number of Swedish stakeholders (consumer association,[66] competent authority,[67] national banking association,[68] and individual banks[69]) were consulted on the Swedish experience. More generally, the survey of competent authorities asked for views on this question.

The equality of charges will yield a direct benefit for users who undertake cross-border payments, especially consumers and SMEs who are not in a position to negotiate payment fees and charges with their payment service provider. The impact on payment users not undertaking cross-border payments depends on the reaction of the payment service providers. If they increase domestic charges (or reduce them by less than would have otherwise been the case), the users undertaking only domestic payment transactions will be worse off while those undertaking a mix of domestic and cross-border payments will be better- or worse-off, depending on the relative importance of the two types of payments in their overall volume of payments.

In this regard, it is useful to note the observation from the Swedish Consumers' Association which says that the impact is positive. Fees have fallen following the entry into force of the rule on equal charges. However, there exists no analysis or study on consumers' satisfaction with such an equality of charges. The Swedish Financial Supervisory Authority confirmed that there has been no attempt to collect views from the general public on the measures taken. But the authority noted that the observed reduction in fees is positive evidence even though earlier surveys on fees showed that providers may not change their fees immediately but only over time.

The data on fees and charges presented in Annex 5 shows that indeed the fees for domestic payments in Swedish krona and cross-border payments in euro are equal.

cates that on 28 June 2002, the Commission received notification that the Swedish authorities has decided to extend the Regulation's application to the Swedish krona and states that this extension shall take effect fourteen days after publication in the Official Journal of the European Communities.

62 Communication from the Commission pursuant to Articles 14(1) and 3(3) of Regulation (EC) No 924/2009 of the European Parliament and of the Council on cross-border payments in the Community and repealing Regulation (EC) No. 2560/2001. Official Journal of the European Union, C209/20, 15 July 2011.

63 The information was obtained through bilateral email exchange.

64 Ibid, footnote63.

65 Answers to question 8.3 CIQ.

66 Ibid, footnote 63.

67 Ibid, footnote 63.

68 Ibid, footnote 63

69 Answers to question 8.3 CIQ.

According to the Swedish Bankers Association, banks in Sweden had in practice already applied the equality of charges principle for domestic and cross-border payments in Swedish krona even though there was no legal requirement to do so before the entry into force of the notification of the Swedish government to the European Commission.[70]

The Swedish Bankers Association also notes that the Swedish banks feel that they had a bad experience from this rule. Customers get very confused because they are not aware of the fact that transactions in Swedish krona are treated differently according to the Regulation in any other countries but Sweden. The more developed the SEPA regime for euro payments becomes, the more discrepancies there are with the offering of SEK payments under Regulation 924/2009. Customers do not understand that the prerequisites for Swedish krona and euro offerings under the Regulation are totally different. For example, a Swedish customer making a payment in Swedish krona to another EU country expects the lower domestic price[71] to apply (like in the case of cross-border payments in euro) at both ends, i.e. sending and receiving. However, this is not the case as the lower price applies only in Sweden.[72] From the banks' perspective, in the long run, the Regulation also implies that payments in Swedish krona have to be subsidised as the infrastructure efficiencies built in the EEA for SEPA payments in euro are not in place for other currencies.

Moreover, the national reporting and reporting for tax purposes for cross-border transactions within EEA means that, *ceteris paribus*, the cross-border payments in Swedish krona are not comparable to domestic transactions which do not have such requirements.

According to the Swedish competent authority, the reduction in fees in general only applied to SHARE payments, not BEN or OUR payments, as the national payment system only uses the SHARE method.

Overall, a normal charge on cross-border payment fell from between 50 to 80 SEK before the implementation of Regulation 924 to currently a typical level of approximately 10 SEK.

3.4.3 Extension to other non-euro area Member States

As Sweden has already implemented the equality of charges and Romania has announced that it will do so, there are only 8 Member States (Bulgaria, Czech Republic, Denmark, Hungary, Latvia, Lithuania, Poland and the United Kingdom) which could implement such an extension. As an illustration of the importance of the economic link between these countries (as well as Romania and Sweden) and the euro area, the figure below shows the value of total imports of goods and services from the euro area and transfers to the euro area as a percentage of their respective GDP.

[70] See footnote 61.

[71] Due to the equalisation of charges for domestic payments in national currency and cross-border payments in euro.

[72] See, Swedish Bankers' Association, Comments on the Commission's Consultative Document to contribute to the Preparation of a report on the Application of regulation (EC) No 2560/2001 on Cross-Border Payments in euro, 12 January 2006.

Table 16: Value of imports of goods and services from and transfers to the euro area from non-euro area Member States		
Country	**Value in millions of EURO**	**Value as a percentage of GDP**
Bulgaria	11,020	28.6%
Czech Republic	57,911	37.1%
Denmark	46,858	19.5%
Latvia	4,890	24.2%
Lithuania	8,171	26.5%
Hungary	46,581	46.7%
Poland	98,187	26.6%
Romania	31,620	23.2%
Sweden	79,264	20.4%

Note: No data available for the United Kingdom in the Eurostat database
Source: Eurostat

Not all the payments associated with the imports of goods and services from the euro area and the transfers to the euro area would benefit from an equalisation of charges. This is because the large business payment service users may have already negotiated such an arrangement with their payment service provider. Nevertheless, the data show that overall, the payment flows between the euro area countries and each of the non-euro area Member States are large. Potential gains for users from an equalisation of charges are likely to be significant, especially as the differences in fees and charges for domestic payments in national currency and payments in euros are important in most of these countries (see Annex 5 for detailed figures).

So far, out of the non-euro area competent authorities, other than Sweden and Romania, only one (Lithuania) has undertaken an analysis of the potential impact of either an equalisation of charges for cross-border payments and domestic payments in the national currency only or a full equalisation of charges, including equal charges for cross-border payments in euro and domestic payments in the national currency.[73] The conclusion of this analysis was that full equalisation was likely to be detrimental to users who make only domestic payments. However, according to the authority, as the SEPA project accelerates and cost structure of cross-border payments converges with national ones, this issue may be looked at again.

Complaint boards do not typically provide views on potential policy changes. Nevertheless, when the complaints boards reported cases of complaints in relation to Regulation 924, these complaints related to:

a) situations where complainants did not know that the general rule of Regulation 924/2009 was not applicable in certain cases like payments other than those for payments in the same currency within a Member State (e.g. payment in British pounds in Member State with euro currency);

[73] Answers to question 13.5 CIQ.

b) payments to a payee in a country outside the scope of the Regulation or cross-border payments without using BIC and IBAN.[74]

3.4.4 Conclusion

The application of the equality of charges rule to domestic payments in national currencies of countries outside the euro area and cross-border payments in euros would most likely benefit payment service users from non-euro area countries. A reduction in the cost of cross-border transactions will undoubtedly stimulate and strengthen the internal market. At issue, however, is whether payment service users who undertake only or mainly domestic payments would face higher fees which would offset the banks' income loss arising from the reduction in cross-border charges.

That said, the costs and benefits to consumers of extending the provisions of Regulation 924 to a Member State's national currency (as has been the case for Sweden since 2002) is difficult to quantify as there are few indicators other than convergence of charges to judge the Swedish experience. Based on these considerations, the current regime of letting the Member State decide if and when to implement such an equal charges rule appears to remain appropriate as national economic and social considerations can be fully taken into account in this process.

3.5 Surcharging

3.5.1 Introduction

Article 52(3) of the PSD stipulates that "The payment service provider shall not prevent the payee from requesting from the payer a charge or from offering him a reduction for the use of a given payment instrument. However, Member States may forbid or limit the right to request charges taking into account the need to encourage competition and promote the use of efficient payment instruments".

Information gathered through the survey of competent authorities[75] and from a card scheme, shows that in total 14 Member States have prohibited surcharging in general, one country has prohibited surcharging for the use of debit cards but not credit cards and 12 Member States have not prohibited surcharging in general.

Table 17: Surcharging in EU Member States

Countries with blanket prohibition on surcharging	Countries with different surcharging rules for credit and debit cards	Countries allowing surcharging
Austria, Bulgaria, Cyprus, Czech Republic, France, Greece, Hungary Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Sweden	Denmark (prohibition for debit cards, no prohibition for credit cards)	Belgium, Estonia, Finland Germany, Ireland, Malta, Netherlands, Poland, Slovakia, Slovenia, Spain, UK

[74] Answers to questions 63-65, final remarks and introductory question CBR about the main focus of the complaints in the last two years. For further details, see also Annex 3.2.

[75] Answers to question 7 AUT.

It should be noted, however, that the UK Office of Fair Trading has recently announced that it was forcing airlines to eliminate surcharges for the use of a debit card to pay airline tickets bought on-line[76] and the *Consumer Rights (Payment Surcharges) Regulations 2012* implementing a ban on above cost payment surcharges will come into force on 6 April 2013.[77]

The few competent authorities that provided an explanation of why surcharges are prohibited in their Member State noted that the prohibition aimed at encouraging consumers to switch away from cash-based transactions to more efficient payment instruments.[79]

This section first presents some of the evidence on the costs to society (i.e., the social costs) of the use of different payment instruments. Next, the section presents information on the extent of surcharging in selected Member States (mainly countries where surcharging is not prohibited). Thereafter, the section examines whether one can observe a clear link between a prohibition of surcharging when credit cards are used and the importance of cash payments. Finally, the section presents the views of a range of stakeholders on the issue of surcharging and an efficient use of payment instruments and sets out a number of conclusions.

It is important to note that the analysis below neither addresses the issue of the merchant fee (i.e. the fee paid by the merchant to the card system), an issue for which a voluminous literature exists[80] and which has been the subject of a number of court cases in the EU, the US and other countries[81], nor does it address the issue of surcharging prohibitions imposed by card networks.[82]

But first, this section provides some information on the social cost of various payment instruments including an ECB-coordinated study on the social cost[83] of payment instruments. Thirteen central banks actively participated in the latter study (Denmark, Estonia, Finland, Greece, Hungary, Ireland, Italia, Latvia, the Netherlands, Portugal, Romania, Spain and Sweden).

The recently released findings regarding the social cost of various payment instruments at the point of sale for Denmark and Sweden are summarised below. In both cases, the debit card is the cheapest instrument, next comes cash and the credit card is the most expensive payment instrument.[84]

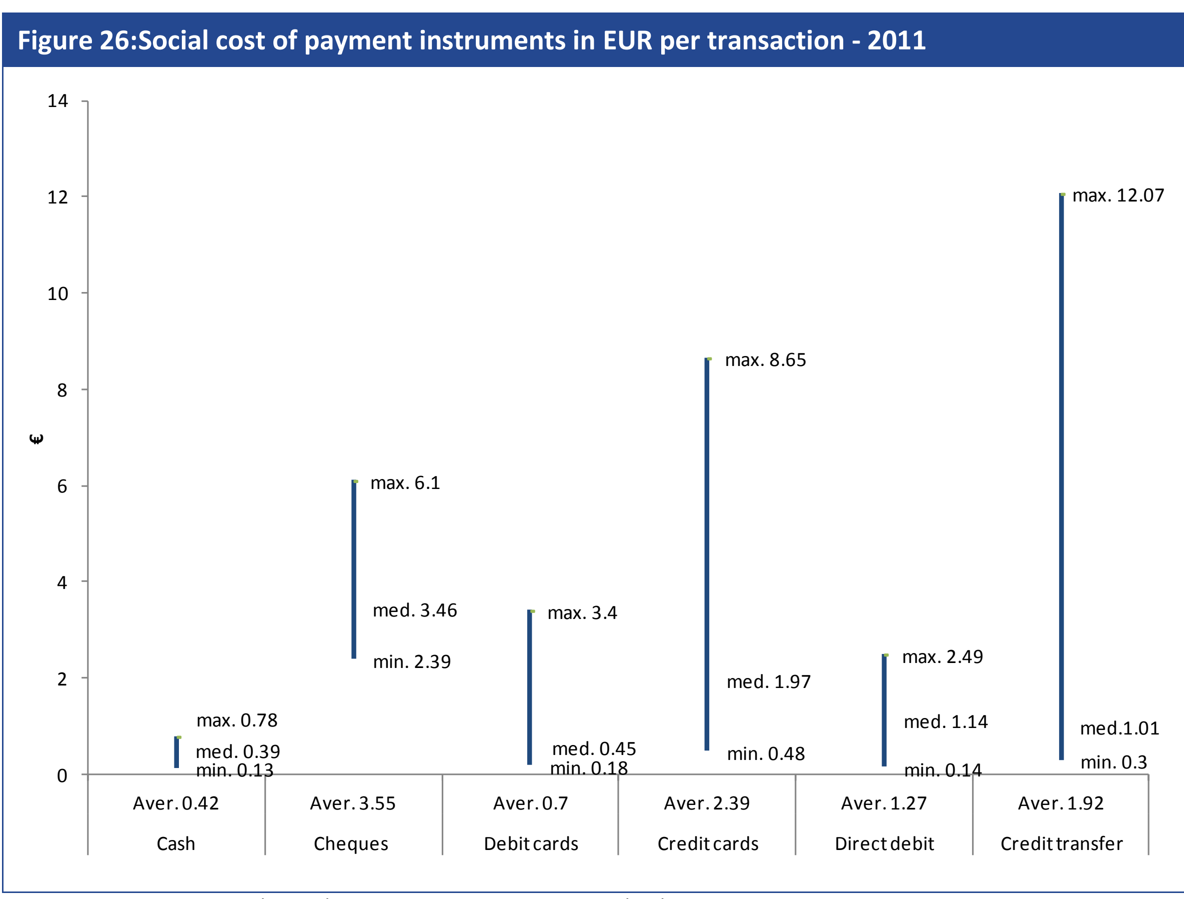
Denmark: social cost per transaction at point of sale: cash - EUR 0.99, domestic debit card - EUR 0.42, international debit card - EUR 1.60 and international credit card - EUR 2.84

Sweden: social cost per transaction at point of sale: cash- EUR 0.78, debit card -EUR 0.42 and credit card - EUR 1.10

[76] See OFT (2012), Press Release - Airlines to scrap debit card surcharges following OFT enforcement action, 58/12, 5 July 2012.
[77] See https://www.gov.uk/government/consultations/consultation-on-the-early-implementation-of-a-ban-on-above-cost-payment-surcharges..
[79] Answers to question 7 of CAQ.
[80] See, for example, Rysman and Wright, (2012) for an overview of the most recent literature on this topic.
[81] For example, the lawsuit in the USA filed in 2005 on behalf of some seven million merchants who claimed that MasterCard and Visa had colluded, separately, with banks to eliminate competition and increase the price of their credit card transactions.
[82] For example, the 'no discrimation rule' of Visa prohibits merchants from explicitly adding surcharges to transactions, unless local law expressly requires that a merchant be permitted to do so.
[83] The social costs include the private costs borne by payment service users and providers and the costs borne by society more generally and which are not passed on to payment service users and providers.
[84] See Danmarks Nationalbank (2012) and Sveriges Riksbank (2012). We do not report earlier studies such as the one from the Bank of Finland (2008) because either the data are already somewhat out of date or the analysis does not distinguish between credit and debit cards.

However, it is important to note that according to the ECB study[85], the debit card is not in all Member States the cheapest payment instrument from a social perspective. As the figure below shows, the range of the social cost of cash in euro per transaction falls well within the range of the debit card, suggesting that, for a number of the countries, the cost per transaction of cash is lower than the cost of the use of a debit card.

Figure 26:Social cost of payment instruments in EUR per transaction - 2011



Notes: max. = maximum, med. = median, min. = minimum, Aver. = weighted average
Source: Schmiedel et al. (2012)

3.5.2 The extent of surcharging in selected Member States and the impact on consumers

In order to assess the static impact of surcharges on consumers, we commissioned a survey of businesses engaged in various consumer-facing activities (retail, leisure, restaurants and hotels, travel, etc.) from ResearchNow, a provider of on-line business surveys.

Besides asking a few questions about the economic characteristics of the business participating in the survey, the survey asked questions shown in Annex 6 about the surcharging practices of the business. Below, we present the results of this survey. It is important to note that the survey data set provided to the project team was anonymised. Thus, the project team did not undertake any independent verification of the survey results.

85 See Schmiedel et al. (2012).

The surcharging survey was run in Belgium, Denmark, Finland, France, Germany, Ireland, Netherlands, Spain and the UK.

France is a special case. While we understand that surcharging is officially prohibited, we also understood that some merchants were nevertheless applying surcharges and the objective was to find out how extensive this practice is.

In Denmark, only surcharging for the use of credit cards is allowed.

The table below suggests, at least on the basis of the survey results, that surcharging is not a widespread practice in countries allowing surcharging. The countries with highest share of surcharging merchants are Ireland (15%), the UK (14%) and the Netherlands (10%).

Table 18: Proportion of merchants that apply surcharges on credit cards, by country

Country	No surcharge	Surcharge
Belgium	93%	7%
Denmark	91%	9%
Finland	99%	1%
France[1]	96%	4%
Germany	91%	9%
Ireland	86%	14%
Netherlands	90%	10%
Spain	92%	8%
UK	86%	14%

Note: Surcharging is not allowed in France
Source: Analysis of surcharge survey

Detailed survey results presented in Annex 6 show that surcharging practices in 2012 are somewhat more prevalent than in 2009, in all countries except Belgium and Finland. For example, in Denmark, 9% of merchants are surcharging in 2012, but only 5% did so in 2009.

In contrast, none of the merchants who are not surcharging in 2012 did surcharge in 2009.

The average surcharge across sectors and countries ranges from 1% in the travel/hotel/hospitality sector in Belgium and entertainment/recreation sector in Ireland to 4.1% in the same sector in Spain. Across all sectors and all countries, the average surcharge is 2.7%.

Table 19: Average surcharge, by country and sector (%)

Country	Catering/ Res-taurants	Entertainment / Recreation	Retail	Travel/Hotel/ Hospitality	Other
Belgium				1.0%	%
Denmark	2.6%		1.6%	1.7%	2.1%
Finland				1.0%	0.4%
France	3.0%	2.2%	3.3%	3.5%	3.4%
Germany	3.9%	3.7%	2.5%	2.7%	2.9%
Ireland	2.8%	1.0%	2.6%	2.4%	2.7%
Netherlands	2.7%	2.7%	3.0%	3.0%	2.0%
Spain	3.3%	4.1%	2.6%	3.0%	2.5%
UK	3.9%	2.3%	2.2%	2.6%	2.7%

Source: Analysis of surcharge survey

It is important to note that not all sales of merchants applying surcharges attract such surcharges as some sales may involve the use of payment instruments (such as, for example, cash) which are not subject to surcharges. The average proportion (in a particular sector) of sales subject to the surcharging ranges from 0.1% in France (catering/hospitality) - a country where surcharging is not allowed - to 26.9% in the UK (travel).

Table 20: Average share of total annual sales subject to surcharge, by country and sector (%)

Country	Catering/ Res-taurants	Entertainment / Recreation	Retail	Travel/Hotel/ Hospitality	Other
Belgium				0.8%	0.0%
Denmark	9.7%		0.6%	2.6%	1.2%
Finland				0.7%	1.7%
France	0.1%	1.4%	1.5%	2.2%	0.5%
Germany	0.8%	3.0%	1.1%	8.4%	1.9%
Ireland	3.6%	3.3%	3.2%	34.8%	2.4%
Netherlands	18.5%	2.9%	1.5%	10.0%	4.0%
Spain	1.7%	11.0%	4.1%	10.2%	3.4%
UK	1.6%	4.0%	4.8%	26.9%	5.3%

Source: Analysis of surcharge survey

The figures on the shares of merchants actually applying a surcharge, the average surcharge rate and the share of sales subject to surcharging at merchants applying surcharges can be used to compute the surcharge cost incurred by consumers by applying the shares and rate to total consumer expenditures using the Eurostat COICOP (see Annex 6 for details).

The results of the calculation of the monetary value of the surcharge are shown in the table below. The largest monetary value of the surcharges is observed in the travel/hotel/hospitality sector in the UK, reflecting a relatively high surcharge rate and a high incidence of surcharging.

Altogether, the monetary value of the surcharges in these countries stands at EUR 731 million.

Table 21: Total value of the surcharge (EUR millions), by country and sector				
Country	Catering/ Restau-rants	Entertainment / Recreation	Retail	Travel/Hotel/ Hospi-tality
Belgium				0.24
Denmark	4.44		0.31	0.79
Finland				0.10
France	0.05	2.38	3.44	5.17
Germany	2.46	17.70	5.92	49.45
Ireland	2.19	0.14	1.53	42.69
Netherlands	12.16	3.06	1.63	19.87
Spain	4.16	21.24	9.80	60.07
UK	5.53	11.64	22.70	398.59

Source: Analysis of surcharge survey

It is important to note that the surcharge cost does not reflect the savings that consumers may make in the absence of surcharging as the merchants applying surcharges may increase their price to recoup the costs they incur in accepting certain instruments.[86] Obviously, the precise response of merchants in such a situation will depend on the state of competition of the sector in which they operate, and whether the surcharge reflected the costs faced by merchants when accepting a card payment, or was, at least in part, a source of profit for merchants.

3.5.3 The impact of surcharging on the use of payment instruments

Consultations with competent authorities in Member States[87] revealed that very little analysis has been undertaken by public authorities concerning the impact of surcharging on consumer behav-iour.

The Lithuanian competent authority noted that a recent consumer survey conducted on behalf of the Bank of Lithuania showed that, in case of a 1 per cent surcharge, 70 per cent of consumers would have changed their payment habits. Among them, two consumers out of three would have used cash exclusively.[88]

The Dutch authorities noted a few studies on this topic undertaken by the Dutch central bank (see Annex 6) and some useful information is provided by some recent UK OFT material on surcharging.

[86] For example, Sveriges Riksbank (2012) notes the following in its 'Response by Sveriges Riksbank to consultation regarding the European Commission' Green Paper on card, internet and mobile payments', Financial Stability Department, Dnr 2012-141-STA, March': *The Riksbank favours the approval of surcharges and these should as far as possible reflect the actual costs of a certain payment instrument. At present, the merchant pays fees to the banks for cash and for card payments, but are not able to price these services directly to their own customers. This results instead in a general surcharge on goods and services. Such a situation does not give the consumers any indication of the costs of different payment instruments and thus risks counteracting the efficient use of these instruments. The differences in the costs of different instruments should instead be as transparent as possible. It should be up to the merchants to determine whether a fee should be charged for a certain payment instruments, and if so the level of the fee. However, the Riksbank would like to make it clear that it should be possible to charge fees for all types of payment instruments'* p. 2.

[87] The question on whether competent authorities had done any studies on the impact of surcharging on consumer behaviour was addressed to competent authorities in an e-mail to competent authorities focusing only on this issue. In addition, question 7 in the AUT sought the competent authorities' views on why a surcharging prohibition had been adopted if surcharging is prohibited in their country.

[88] The survey results are not publicly available. But, the Bank of Lithuania shared the key findings in its response to Q7 AUT.

In particular, in a study published by the Dutch central bank, Jonker (2011) focuses on the surcharging behaviour or merchants. He finds that merchants of many products or high valued products may prefer to opt for uniform prices and not to surcharge. This is because unit transaction costs fall once they accept card payments. On the other hand, merchants of medium or low-value products or who have few customers will see average unit costs rise through card acceptance. The author argues that, in general, if card acceptance increases average unit transaction costs, merchants will be less likely to accept cards or more likely to surcharge.

Another study published by the Dutch central bank and written by Bolt et al. (2008) finds that, among the various groups of consumers, men are significantly less likely than women to use cash when there is a surcharge. However, men are not significantly more likely to use a debit card in such a case. The authors note that these results suggest that men tend to look for other ways to evade a surcharge. Interestingly, they also show that low and high income earners are more sensitive to surcharges relative to middle income earners.

The OFT notes that that payment surcharges are most likely to result in consumer detriment where they lack transparency and where consumers lack a practical way to avoid the surcharge, as the surcharges reduce the extent to which consumers shop around and compare full price offers. This weakens the competitive pressure between retailers and can result in consumers not getting the best deal.[89]

In order to assess to what extent the ban on surcharging affects the use of payments instruments, the two figures below show a) the number of credit transactions on a per capita basis across the various Member States and b) the value of cash withdrawn from ATMs, also on a per capita basis.

A prohibition of surcharging reduces the cost of payments by cards for users relative to a situation where surcharging is allowed and may encourage a greater use of cards at the expense of cash. Unfortunately, the ECB payments statistics do not provide information on the number or value of cash transactions. However, the ECB statistics provide information on cash withdrawals at ATMs. As in most Member States, salaries, social benefits and pensions are typically directly paid to the beneficiary's account at a financial institution, the cash withdrawal at ATMs may be a good proxy of the actual use of cash in transactions.[90]

The analysis below provides first a comparative analysis of card and cash usage across Member States in 2012 and next reviews changes over time in the relative share of these payment instruments.

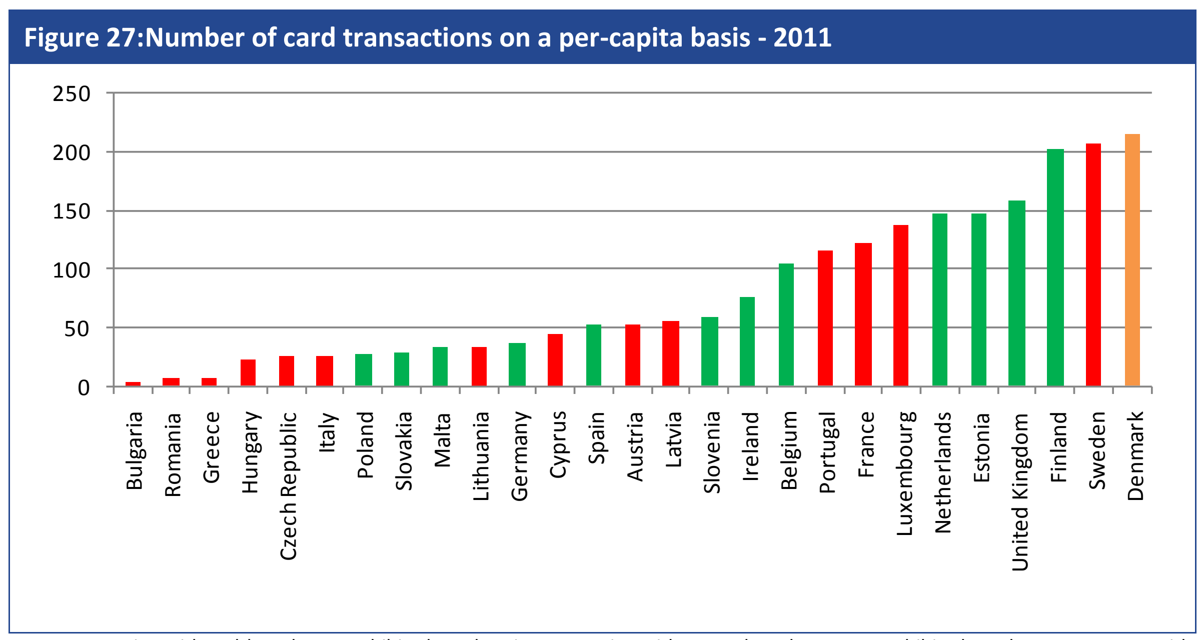
Cross-country comparison of card usage in 2011

The data on card usage does not suggest that overall card usage is systematically lower in countries which allow surcharging (shown in green) than in countries prohibiting surcharging (shown in red in the figure below).

[89] See OFT website OFT website http://www.oft.gov.uk/OFTwork/markets-work/super-complaints/which-payment-surcharges which presents the OFT's response to the Which? super complaint on payment surcharges.

[90] A similar approach had been adopted by Hasan et al. (2012) in their study on retail payments and economic growth.

Figure 27:Number of card transactions on a per-capita basis - 2011

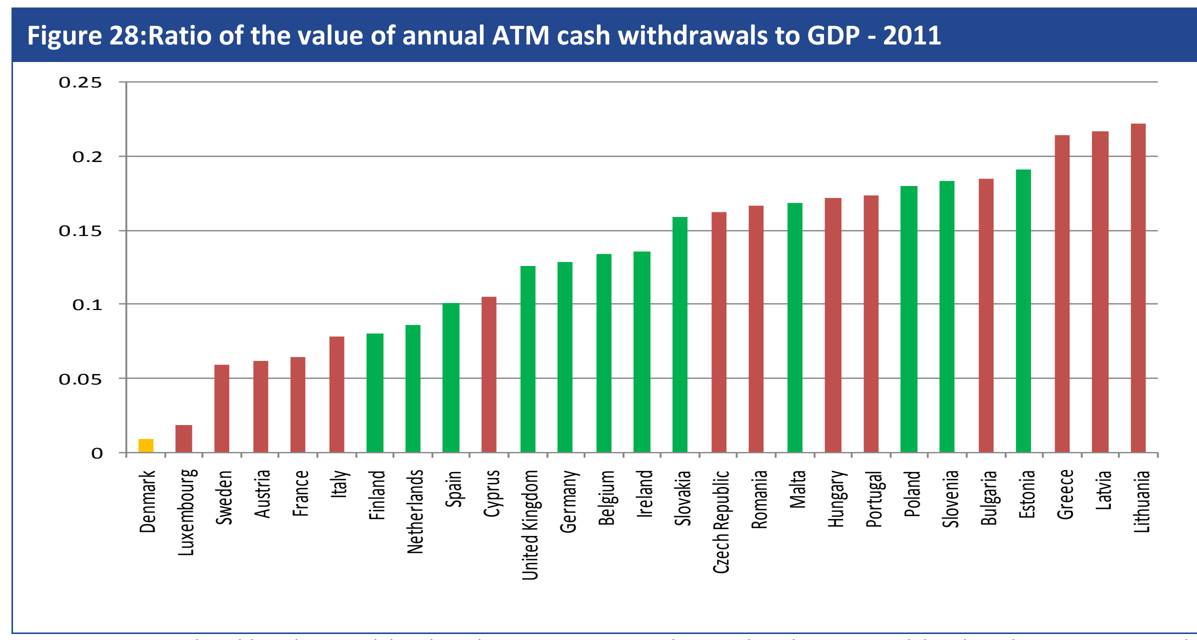


Notes: countries with red bars have prohibited surcharging; countries with green bars have not prohibited surcharges; country with orange bar has prohibited surcharges on debit cards but not on credit cards
Source: ECB payments statistics

Moreover, cash usage, as proxied by the value of annual ATM withdrawals[91] (expressed as a ratio of GDP), shows no strong relationship with the existence or not of a prohibition on surcharging (see figure below). Obviously different per-capita income levels across the EU-27, *ceteris paribus*, will impact the level of cash usage. However, an analysis of cash usage limited, for example, to the EU15 yields the same conclusion that there does not appear to be a link between cash usage and the prohibition or not of surcharging.

[91] We follow the approach of Hasan et al. (2012) to approximate the use of cash in an economy.

Figure 28:Ratio of the value of annual ATM cash withdrawals to GDP - 2011



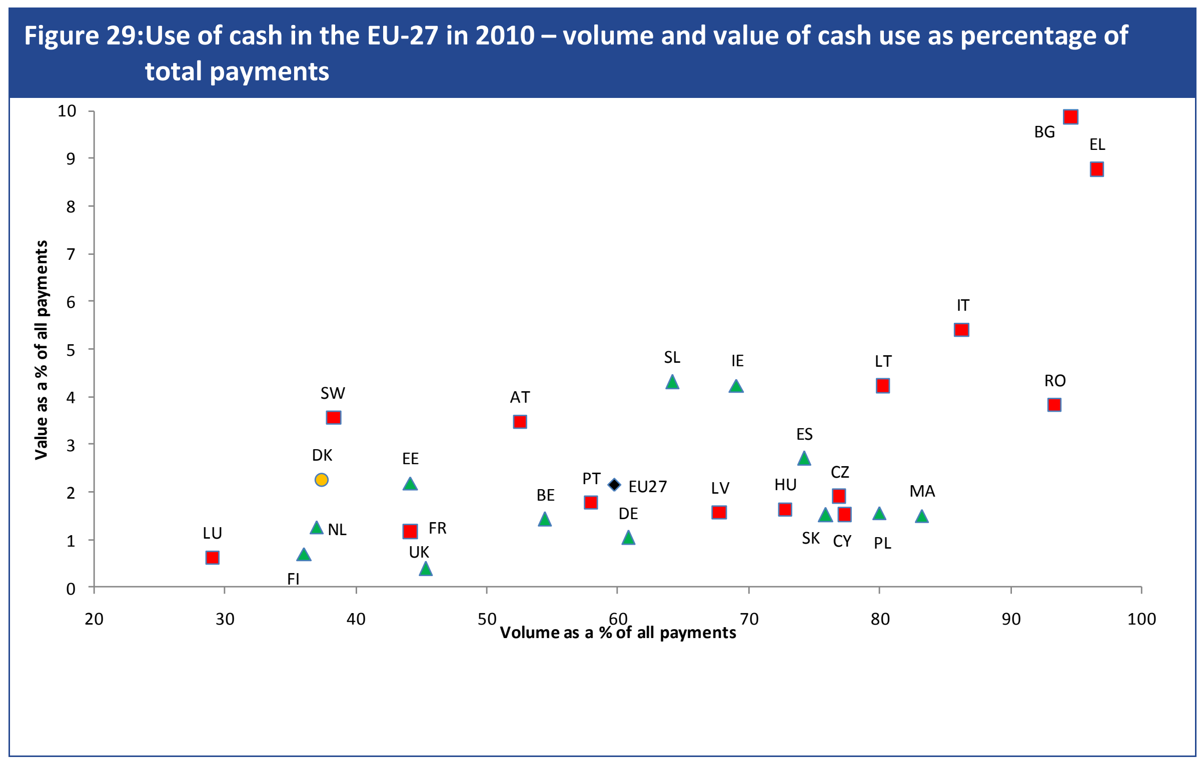
Notes: countries with red bars have prohibited surcharging; countries with green bars have not prohibited surcharges; country with orange bar has prohibited surcharges on debit cards but not on credit cards

Source: ECB payments statistics

In October 2012, the ECB released a study on the economic and social cost of payments instruments[92] which provides more refined estimates of the use of cash in payment transactions. The figure below which plots the volume and value of cash used in the different economies also shows no correlation between the general use of cash and the prohibition/non-prohibition of the use of surcharges for certain payment instruments.

[92] See Schmiedel et al. (2012).

Figure 29:Use of cash in the EU-27 in 2010 – volume and value of cash use as percentage of total payments



Notes: countries with red squares have prohibited surcharging; countries with green triangles have not prohibited surcharges; country with orange circle has prohibited surcharges on debit cards but not on credit cards

Source: Schmiedel et al. (2012)

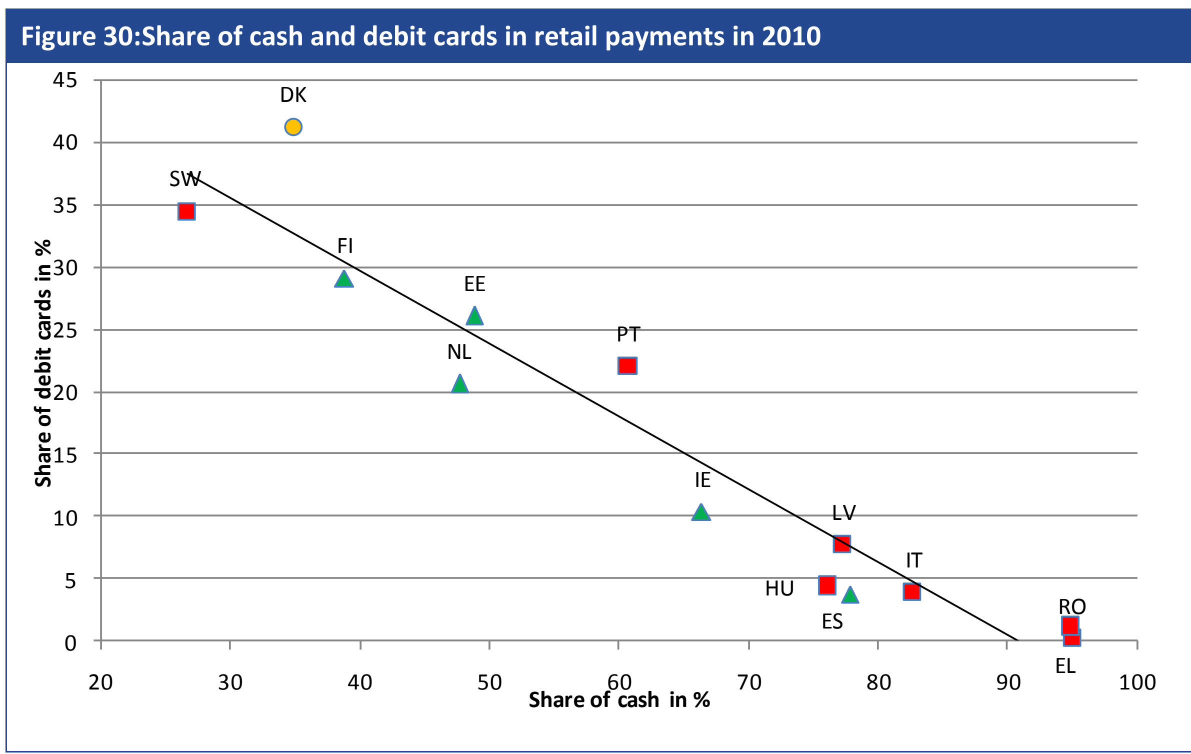
However, at the retail level among the 13 countries for which information is available, the use of cash and debit card are highly negatively correlated (-0.96), implying that an increase in the use of debit cards is associated with a reduction in the use of cash (see table below and Figure 30). For example, countries where debit cards account for a relatively large share of the total value of retail payment (such as Denmark and Sweden), show a much lower cash usage than countries where debit cards account for only a very small share of total retail payment (such as, for example, Italy, Spain, Romania and Greece).

The correlation between the use of cash and credit card is also negative but much smaller (-0.33). This implies that there is considerable more variation across countries in the use of credit cards for a given cash usage level (see table below and Figure 31). This implies that, across EU Member States, substitution between cash and credit cards as payment instrument is, so far at least, limited. For example, the usage of credit card accounts for slightly more than 5% of total retail payments in value in Sweden and Ireland and slightly less than 5% in Spain. But, the share of cash in total retail payments ranges from about25% in Sweden to somewhat more than 65% in Ireland and almost 80% in Spain.

Table 22: Correlation between use of various payment instruments at retail level - 2010					
	Cash	**Debit card**	**Credit card**	**Direct debit**	**Credit transfer**
Cash	-	-0.96	-0.33	-0.53	-0.79
Debit card	-0.96	-	0.32	0.43	0.67
Credit card	-0.33	0.32	-	0.32	0.01
Direct debit	-0.53	0.43	0.43	-	0.13
Credit transfer	-0.79	0.67	0.32	0.13	-

Source: Schmiedel et al. (2012)

Figure 30:Share of cash and debit cards in retail payments in 2010



Notes: countries with red squares have prohibited surcharging; countries with green triangles have not prohibited surcharges; country with orange circle has prohibited surcharges on debit cards but not on credit cards

Source: Schmiedel et al. (2012)

Figure 31:Share of cash and credit cards in retail payments in 2010

Notes: countries with red squares have prohibited surcharging; countries with green triangles have not prohibited surcharges; country with orange circle has prohibited surcharges on debit cards but not on credit cards

Source: Schmiedel et al (2012)

Changes in the share of cards in payments

Obviously, a simple comparison of the shares of cash and cards in transactions may not provide the full picture of the impact of a prohibition of surcharging, especially for the usage of debit and or credit cards. In order to provide a perspective on the dynamics of the use of cash and cards, the table below compares the growth rate of the share of the usage of cards in the total usage of cards and cash[93] (and cards in the usage of cards, cash and cheques) for three different periods, namely 2005-2007, 2007-2009 and 2009-2011. As well, information is provided on the level of card usage in the combined usage of cards and cash. As the results for cash and cards are very similar to those for cash, cards and cheques, the discussion below focuses only on cash and cards.

[93] The estimate of the cash usage is based on ATM withdrawals.

Table 23: Relative share of the value of transactions made by cards and growth rates									
Country	Surcharg-ing status	Cards / Cash + Cards				Cards / Cash + Cards + Cheques			
		2011	Growth rates			2011	Growth rates		
			2005-07	2007-09	2009-11		2005-07	2007-09	2009-11
Denmark (Debit cards)	Prohibited	85%	1%	1%	1%	67%	53%	28%	16%
Sweden	Prohibited	79%	5%	17%	4%	77%	5%	19%	5%
Luxembourg	Prohibited	78%	1%	0%	6%	78%	60%	0%	6%
France	Prohibited	74%	2%	-1%	2%	17%	17%	23%	15%
United Kingdom	Allowed	72%	4%	2%	6%	30%	18%	30%	36%
Finland	Allowed	70%	12%	-3%	9%	56%	20%	9%	27%
Portugal	Prohibited	64%	3%	5%	11%	18%	24%	43%	51%
Netherlands	Allowed	61%	6%	4%	5%	61%	6%	4%	5%
Austria	Prohibited	59%	3%	7%	6%	46%	-1%	19%	11%
Cyprus	Prohibited	55%	3%	-10%	1%	7%	35%	8%	22%
Belgium	Allowed	54%	-2%	-5%	1%	39%	11%	16%	3%
Ireland	Allowed	50%	9%	2%	10%	6%	30%	67%	40%
Spain	Allowed	48%	7%	1%	4%	16%	24%	44%	29%
Estonia	Allowed	48%	28%	15%	8%	48%	28%	15%	8%
Italy	Prohibited	48%	0%	-2%	-14%	12%	14%	14%	11%
Malta	Allowed	40%	25%	13%	12%	6%	29%	44%	36%
Slovakia	Allowed	40%	85%	11%	4%	40%	88%	11%	4%
Slovenia	Allowed	39%	4%	-2%	-10%	39%	4%	-1%	-9%
Germany	Allowed	35%	9%	2%	9%	24%	10%	21%	20%
Latvia	Prohibited	31%	23%	9%	9%	31%	23%	9%	10%
Czech Republic	Prohibited	28%	26%	8%	24%	26%	32%	10%	23%
Poland	Allowed	28%	19%	13%	15%	27%	20%	13%	15%
Hungary	Prohibited	26%	18%	12%	8%	26%	18%	12%	8%
Lithuania	Prohibited	21%		1%	8%	20%		6%	9%
Romania	Prohibited	17%	-54%	9%	22%	11%	-58%	47%	25%
Bulgaria	Prohibited	13%	-42%	0%	3%	13%	-42%	0%	3%
Greece	Prohibited	12%	-1%	-7%	-18%	2%	-6%	15%	-9%
Denmark (Credit cards)	Allowed	11%	-2%	0%	8%	9%	48%	26%	23%

Source: ECB payment statistics

In the case of Denmark, information for debit cards and credit cards is presented separately as surcharges on debit cards are prohibited in Denmark while they are not in the case of credit cards.

The data shows no systematic relationship between the usage of cards (as a proportion of total card and cash usage) and a surcharging prohibition or absence of a surcharging prohibition.

In fact the correlation[94] between the growth rate of the share of the usage of cards in total card and cash usage is very close to zero (and negative) over the periods 2007-2009 and 2009-2011 and slightly larger but still negative over the period 2005-2007.

[94] The correlation analysis focused on the relationship between the growth rates of the share of card usage in total card and cash usage and a series which takes the value of 1 if the country prohibits surcharging and zero otherwise.

This is shown in Figures 32 and 33 overleaf which, for each country, show the level of the share of card usage in total card and cash usage in 2011 (large bars in green and red) and the growth in the share of card usage in total card and cash usage over the three periods).

Figure 32:The share of transactions accounted for by cards when considering those made by cash or cards across EU Member States

100%
80%
60%
40%
20%
0%
-20%
-40%
-60%
-80%

SE LU FR UK FI PT NL AT CY BE IE ES EE IT MT SK SI DE LV CZ PO HU LT RO BG EL

■ Growth rate 2005-07 (Correlation coefficient with prohibiting surcharging = -0.378)
■ Growth rate 2007-09 (Correlation coefficient with prohibiting surcharging = -0.068)
■ Growth rate 2009-11 (Correlation coefficient with prohibiting surcharging = -0.059)
□ 2011 share

Note: green bar = country does not prohibit surcharging, red = country prohibits surcharging

Source: ECB payments statistics

Figure 33:The share of transactions accounted for by cards when considering those made by cash, cheque or cards

100%
80%
60%
40%
20%
0%
-20%
-40%
-60%
-80%

LU SE NL FI EE AT SK SI BE LV UK PO CZ HU DE LT PT FR ES BG IT RO CY MT IE EL

■ Growth rate 2005-07 (Correlation coefficient with prohibiting surcharging = 0.280)
■ Growth rate 2007-09 (Correlation coefficient with prohibiting surcharging = -0.349)
■ Growth rate 2009-11 (Correlation coefficient with prohibiting surcharging = -0.382)
■ 2011 share

Note: green bar = country does not prohibit surcharging, red = country prohibits surcharging

Source: ECB payments statistics

3.5.4 Views of stakeholders

This section of the report dedicated to the issue of surcharges, presents the views of stakeholders other than competent authorities, and especially those of consumers who are the most concerned subgroup of payment service users.

Businesses

The very large retail businesses which participated in the consultations[95] undertaken as part of the project and operating in several Member States with different surcharging regimes have indicated that typically they do not surcharge even if it is allowed as they prefer to adopt a single, pan-European approach to how they treat and process customers at the till. Therefore, they typically do not apply surcharges in Member States where such surcharges are allowed. Obviously, the practice of smaller businesses and larger businesses in other sectors may differ from that described above.

Complaints bodies

Two complaint boards (Hungary and Luxembourg) have reported cases in relation to surcharging.[96] One case from Luxembourg demonstrates the request of merchants to use surcharging and rebates: “A claimant was of the opinion that pursuant to the PSD a PSP could not prevent him from asking his buyers to pay a charge (“surcharge”). The CSSF informed the claimant that the Luxembourg Law of 11 November 2009 which implemented the PSD had made use of the possibility offered by Article 52 (3) of the PSD to forbid the payee to request a charge from the payer for the use of a given payment instrument.”

Consumers

For consumer associations, ‘Surcharges and rebates were introduced by the payment services Directive to allow merchants to steer consumers towards using more efficient and cheaper means of payments.’[97] While the provision is understood to have been built as a means to encourage competition amongst means of payments, it transpires that consumer associations have not encountered much use of rebates[98], but much more frequent use of surcharges. For BEUC, surcharges and rebates were an ill-designed tool that failed to achieve its objective to the detriment of consumers.[99] For some, the practice whereby consumers are asked to pay a surcharge on some forms of payment is seen as abusive because it requires consumers to ‘pay for the right to pay’.[100]

95 The issue of surcharging was discussed bilaterally in telephone or face-to-face interviews with selected retailers.

96 See answers to question 36 CBR.

97 CAQL18 ADICAE in response to CAQL Question 10.

98 Out of our sample of 32 consumer associations in 26 Member State, only a few mentioned rebates. For example, in Italy (CAQL2 Altro), rebates do exist it seems but if consumers pay in cash (a transaction outside the scope of the PSD in any event). CAQL19 Test Achats also mentions that while surcharges are frequent, rebates are very rare. In Sweden (CAQL25 Vk) explained also that it was common to levy fees but it was unusual for a discount to be offered.

99 BEUC (2012), Response to the European Commission Consultation on the Green Paper, towards an integrated European market for card, internet and mobile payments, 15.

100 CAQL19 Test Achats (BE) in response to CAQL Question 33. See also, OFT (2012), Payment surcharges, response to the Which? Super-complaint, OFT1349resp, executive summary, para 1.2 and 1.5.

Impact of the absence of a prohibition of surcharges on consumers

In the Member States where surcharging is allowed, it was not surprising to find that some retailers and other payees were using surcharges.[101] We reviewed data from 12 Member States with no restrictions on surcharging. Denmark was not included as this Member State only carries a prohibition on debit cards surcharges. Out of our sample, two respondents did not provide an answer[102], two lacked information[103] in order to reply and one had no opinion.[104]

Out of the respondents who did provide information on this issue, the vast majority felt that practices were widespread, although in light of economic data on this issue discussed above, the problem may not be as widespread as consumer associations seemed to perceive it to be.[105] The consumer associations however did support the view that charges may be excessive where they existed and figures from the Office of Fair Trading in the UK for example, support this assessment.[106]

Indeed, out of the 12 consumer associations representing 10 Member States, 7 consumer associations from 5 Member States[107] thought that the practices were widespread, and one reported having knowledge of some surcharging practices[108] without going as far as qualifying them as widespread. No respondents said that surcharges were not used.

The main sectors where surcharges are reportedly used were: airlines[109], tickets for events, online purchases in general[110], cable TV companies charging for bills not paid by direct debit.[111]

In the UK, action is underway to address surcharges and provides an interesting case study. In 2011, Which? started a campaign to 'stop rip-off charges' and took a super-complaint to the OFT concerning primarily the use of surcharges in the airline industry.[112] In its decision on the super-complaint on card charges, the Office of Fair Trading in the UK accepted that the practice caused consumer detriment. It stated:

'The OFT considers that payment surcharges are most likely to result in consumer detriment where they lack transparency and where consumers lack a practical way to avoid the surcharge, as the surcharges reduce the extent to which consumers shop around and compare full price offers. This weakens the competitive pressure between retailers and can result in consumers not getting the best deal. We believe that making the headline price more meaningful for comparisons and ensuring information on surcharges is provided in a clear and timely manner would help consumers avoid surcharges and encourage competition between retailers, driving down the price of genu-

101 Answers to question 36 CAQL and to question 10 CAQS. For further details, see also Annex 2.9.2.
102 CAQS5 ECC Fin (FI), CAQL9 ZPS (SI).
103 CAQS6 lGtk (MT), CAQS12 FK (PL).
104 CAQL13 Ugandi (EE).
105 Further, see OFT (2012), Payment surcharges, response to the Which? Super-complaint, OFT1349resp, Annex B on the use of surcharges in the UK, shows that outside of the travel sector, the use of surcharges is fairly limited and sporadic (at para B1).
106 According to the OFT (2012), in 2010 consumers would have paid an estimated £300 million in surcharges in the airline sector only.
107 CAQL19 Test Achats (BE); CAQL21 CRIOC (BE) & CAQL18 ADICAE (ES), CAQL16 Consument (NL) & CAQL8 NIbud (NL), CAQS15 ECC Irl (IE), CAQS13 Which? (UK).
108 CAQL11 vzbv (DE).
109 CAQS15 ECC Irl (IE): the ECC-Net centre conducted an informative survey on this subjecthttp://www.eccireland.ie/downloads/Study_on_currency_and_payment_card_fees_(2).pdf, last consulted 26/07/2012.
110 CAQL8 Nibud (NL) explained that the practice is quite widespread and this is particularly so especially for payments over the Internet.
111 CAQS15 ECC Irl (IE).
112 CAQS13 Which? (UK). See for more details, Which? Magazine, Below the Belt, April 2011, pp. 8-10 that detail the findings of the consumer association and unfair fares and card charges applied by the airline industry.

inely optional surcharges. To address the concerns raised in the super-complaint we are recommending that the Government introduce measures to prohibit retailers from surcharging for debit cards to ensure a meaningful and consistent solution across the economy'.[113]

The OFT solution is two-fold: ban on debit card surcharges and information on surcharges for other payment methods. This is however not the way the UK is proposing to proceed. As it stands in the UK, and within the context of the implementation of Directive 2011/83/EC, the control of payment surcharges has been 'fast-tracked' by the Government and a separate consultation on a ban was launched. To date this consultation process falls short of the OFT recommendations and only explores the potential for a prohibition on excessive surcharges directly in line with Article 19 of Directive 2011/83.

Impact of a prohibition or limit on surcharges on consumers

What our survey of consumer associations found is that in Member States where the surcharges are already banned or limited (we have included Denmark here), consumers are still facing problems.

41% of our sample did not have an opinion or did not answer the question. Out of the respondents however, an important number of consumer associations reported problems concerning surcharges because the law is simply not well respected (France being the most obvious case in point)[114] or because it was too limited in scope to stop abusive practices. Indeed, 8 consumer associations in 8 Member States did indicate that despite a prohibition in place in their country, they were aware of surcharging still occurring[115] (see Annex 2 for details). Only one of the respondents thought the prohibition worked well and had no practices to report.[116]

In particular, in France it was apparent that despite a blanket ban, the consumer association Que-Choisir had to sue Easyjet in order to stop the use of a surcharge and target other retailers. In this case, the court found in favour of the consumer association and ordered the airline to pay damages for the use of illegal terms in their contracts. One of the problematic clauses concerned the possibility for Easyjet to add EUR 4 for all online bookings not paid using a Visa Electron or 'Carte Bleu'. The court reminded Easyjet that in the current state of the legislation in France, the airline could not apply surcharges for the use of certain payment methods.[117]

Further, consumer association reported that surcharges were applied to a number of payment methods and not limited to credit cards. According to TAENK, surcharging is used on payments like card payments (Internet and shops) and direct debits in Denmark.[118] Other respondents confirmed that the surcharges were both applied online and in shops and that it was applied to credit cards as well as other payment methods.[119]

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113 http://www.oft.gov.uk/OFTwork/markets-work/super-complaints/which-payment-surcharges, last consulted 26.07.2012.

114 CAQS7 UFC (FR) clearly explained: Surcharging is not allowed in France. However, some companies don't respect the law. The respondent mentioned Easyjet, which lost a case against them on this issue.

115 CAQS11 CCU (CY), CAQS9 SOS (CZ), CAQL1 TAENK (DK), CAQS7 UFC (FR), CAQS3 ECC Lux (LU), CAQL15 Deco (PT), CAQL22 Conso (RO), CAQL25 vk (SE).

116 CAQL23 EKPIZO (EL).

117 Dorothee Moisan, EasyJet va devoir modifier ses clauses, trompeuses pour le consommateur, AFP 31 Janvier 2012.

118 CAQL1 TAENK (DK).

119 For example, CAQL25 Kv (SE) mentioning that although surcharges were prohibited, it was common to levy additional fees for consumers paying by credit card. By contrast, it was unusual for consumers to be offered discounts. CAQS9 SOS (CZ) some shops (although not many) may apply the surcharges.

Most problematic industry sector(s) using surcharges for consumers

While a number of issues were mentioned[120], the most cited problem concerned the airline industry.[121] Surcharging in the airline industry seems to be an issue that affects consumers in all Member States, whether the practice is banned or not. Indeed a number of consumer associations reported problems even when they were based in a Member State where a prohibition of surcharges was in place. [122]

Box 1: Surcharges in the airline industry
ECC-Net Ireland conducted a survey of the airline industry published on 12 July 2012 that gathered data from all over Europe and found that consumers were hit by charges for the use of their payment cards. The study, entitled 'The cost of paying' found: *47% of the airlines checked (26 out of 55) levy payment card fees on customers when buying flight tickets online. Whilst most airlines do offer the possibility to pay using payment methods that attract no fee, these payment methods are not always widely available, rendering unrealistic for many consumers the prospect of avoiding such fees.* *Having regard to the fees incurred by consumers where no "free-of-charge" payment option is used, the additional cost for an individual consumer to book a one-way flight with that group of airlines is, on average, EUR 7.43. The same consumer booking a return flight would pay, if the same group were considered, EUR 10.58. The fees for a return flight for two people, to give another example, would be EUR 16.78. None of these three figures seems to bear a reasonable relationship to the costs actually incurred by the airlines when processing payments but it should also be noted that the most expensive airlines in these three categories impose fees rising to EUR 16, EUR 20 and EUR 32, respectively, i.e. almost twice the average.* *73% of the airlines imposing payment card fees do not indicate the price supplement in a clear, transparent and unambiguous manner at the start of the booking process, as required by Article 23(1) of Regulation [EC] No. 1008/2008 on air services.*

Source: ECC-Net Study on Airlines' Currency & Payment Cards Fees, The Cost of Paying, July 2012, p. 5.

Part of the issue here may be linked with the fact that the PSD does not address cross-border situations. Indeed, consumers established in a Member States where the surcharge is banned may

[120] Other issues were cited: CAQL1 TAENK (DK) reported 'Some payees surcharge their customers for using direct debit'. This is a problem, because there is in effect only one provider in Denmark and hence consumers cannot switch to another provider and avoid the charge. CAQL15 Deco (PT) reports that surcharges are still applied at gas stations for the use of credit cards, a fact already well known in Portugal. Incidentally, CAQL11 vzbv also cited surcharges for payments at petrol stations, although the respondent said those were not yet common and it should be borne in mind that in Germany surcharges are not prohibited.

[121] The answers here included answers to the long Questionnaires, Questions 36 on surcharges and Q32 on information concerning surcharges because respondents did refer to this question and did not necessarily partition their answers. Unprompted, the airlines were mentioned 11 times out of the responses from 12 consumer association showing that this remains a problem, even in countries where surcharges are banned.

[122] CAQL11 vzbv (DE), CAQL1 TAENK (DK): 'Some airlines surcharge more than permitted' and CAQS13 Which? (UK) launched a super-complaint against the airline sector and a recent decision of the OFT found in their favour. See also for MS where surcharges are banned CAQL 22 Conso (RO) where the respondent reports Wizzair imposes charges that the consumers cannot avoid despite the prohibition. CAQS7 UFC (FR) mentioned Easyjet and explained that they had recently won a case against them. CAQS3 ECC Lux (LU) explained that consumers continued to complain about surcharges in the airline industry in particular for credit card payments.

be paying a surcharge to an airline company based in a Member State where surcharges are allowed.[123]

Potential solutions to alleviate consumer detriment caused by surcharging

The adoption of the Directive on Consumer Rights (CRD) could go some way towards curbing the problems faced by consumers, since surcharges, although not banned, will be limited to actual costs. Indeed, Article 19 of Directive 2011/83/EC states: 'Member States shall prohibit traders from charging consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means.'

One, however, must express some doubts as to the effectiveness of such measure prohibiting excessive costs only. There are several reasons for this.

In light of national experiences it is uncertain that a prohibition of excessive charges only could work. Indeed, according to the OFT a cost-reflective solution may not fully address concerns, because surcharges can legitimately vary between retailers and would still be dripped to consumers through the purchasing process.[124] Further, the numerous comments received by the European Commission in response to the consultation on the Green Paper "*Towards an integrated European market for card, internet and mobile payments*"[125] also raises doubts. According to the feedback statement published by the European Commission, stakeholders were of the opinion that the provision of the CRD, which obliges Member States to prohibit traders from surcharging above their costs, would have a limited impact on surcharging practices and *"they considered it difficult in many circumstances to establish costs categories clearly related to a single payment transaction. More importantly, respondents on this aspect felt that there was no practical way to enforce this provision or to control how these costs are calculated by merchants.*[126]

Those concerns are further echoed in the consultation by the Department for Business, innovation and Skills in the UK. In both the consultation and the impact assessment, the difficulties pertaining to the definition of the notion of 'cost borne by the trader' was highlighted. The consultation recognised that it is very difficult for traders to know with precision on a transaction per transaction basis what their actual cost is. The consultation goes as far as accepting that trader may aggregate costs, although the level of aggregation will vary from trader to trader. Further difficulties concerning which costs could be included in this calculation are apparent.[127]

As a result, if calculating the 'actual cost borne by the trader' is so difficult for the trader himself, it follows that enforcing Article 19 CRD at national level could prove costly if not impossible. In the UK, the consultation proposes to also allow consumers a private action to enforce their rights. However, since proving that a charge is not in line with the cost borne by the trader will be extremely difficult if not impossible for consumers, this solution seems illusory.[128]

[123] BEUC (2012), Response to the European Commission Consultation on the Green Paper, towards an integrated European market for card, internet and mobile payments, p. 15.

[124] OFT (2012), Payment surcharges, response to the Which? Super-complaint, OFT1349resp, p.46, para 6.54.

[125] See European Commission, Directorate General Internal Market and Services (2012), Feedback statement on European Commission Green Paper "Towards an integrated European market for card, internet and mobile payments", 27 June 2012 available at http://ec.europa.eu/internal_market/payments/cim/index_en.htm.

[126] European Commission, Directorate General Internal Market and Services (2012), Feedback statement, *op. cit*. p. 17.

[127] See also, BIS (2012), Consultation on the early implementation of a ban on above cost surcharges, September 2012, p. 28 on quantification of costs.

[128] See also, BIS (2012), Consultation on the early implementation of a ban on above cost surcharges, September 2012, p.35.

To preserve competition between providers, information of consumers concerning the surcharge will need to be efficiently communicated. Obligations on the provider to provide information about the surcharge, when those are currently allowed, do not always seem to be effective for consumers and are therefore a cause for worry. Some consumer association did complain about the lack of adequate information.[129] Further, information on surcharges has a limited effect on consumers‘ decisions as to which form of payment to use. The economic data analysed above demonstrates indeed, that the cost of the surcharge may have little impact on consumers moving away from one form of payment to prefer another.

One alternative may therefore be to follow in BEUC’s footsteps and advocate a blanket ban on surcharges.[130] The rationale for such ban is that surcharges are not an ‘optimal policy tool to improve competition in the payment services sector.’[131] This is also a position that was taken by a number of our respondents[132] and favoured by some contributors to the response to the consultation on the Green Paper.[133]

Another alternative may be to follow the Danish model. This is a solution that BEUC does also consider as an interesting alternative, although mindful of the national landscape that explains its success in Denmark.[134] Under this model, the national debit card Dankort is a means of payment available to all consumers free of charge. Payments using other international credit cards can carry a surcharge. This model is also one that was favoured by the OFT in its recommendations.[135] Such model enables better access for consumers to free payment methods. But it does not solve all problems, since cross-border issues, for example, would remain. Further, it is possible that charges currently showing as an excessive surcharge could be simply pushed to the basic cost of the item or towards another part of the transaction process such as an administrative charge not relating to the payment method for example.[136] Therefore effective final price transparency should also accompany this model in order to protect consumers efficiently.

3.5.5 Conclusion

At the present time, only 12 Member States allow surcharging on all cards and one on credit cards only. However, consumer organisations report that surcharging also occurs occasionally in Member States where surcharging is prohibited, suggesting a lack of enforcement of the surcharging prohibitions when in place.

129 Although the lack of respondents to this question does not allow us to conclude that it is necessarily the case. However, amongst Member States where surcharging is allowed and where information should be provided, note: CAQL16 Consum (NL) stating that consumers are often not aware of the cost of their chosen way of payment. By contrast, CAQL1 TAENK (DK) confirmed that consumers were informed beforehand and CAQL13 UGANDI (EE) also noted that consumers were informed beforehand, but regretted that in the mass of information they receive this information about charges often gets missed, still leading many consumers to get unpleasant surprises.

130 BEUC (2012), Response to the European Commission Consultation on the Green Paper, towards an integrated European market for card, internet and mobile payments, p. 16.

131 BEUC (2012), Response to the European Commission Consultation on the Green Paper, towards an integrated European market for card, internet and mobile payments, p. 16.

132 See for example, CAQS13 Which? (UK), CAQL21 CRIOC (BE).

133 European Commission, Directorate General Internal Market and Services (2012), Feedback statement on European Commission Green Paper “Towards an integrated European market for card, internet and mobile payments”, 27 June 2012 available at http://ec.europa.eu/internal_market/payments/cim/index_en.htm, p. 16-17.

134 BEUC (2012), Response to the European Commission Consultation on the Green Paper, towards an integrated European market for card, internet and mobile payments, p. 16.

135 OFT (2012), Payment surcharges, response to the Which? Super-complaint, OFT1349resp, p.45, para 6.49.

136 For more on this point, see BIS (2012), Consultation on the early implementation of a ban on above cost surcharges, September 2012, p.31 discussing transfer of costs from a payment surcharge to the basic cost of the item.

In Member States where surcharging is permitted, the surcharge may in some cases exceed the cost incurred by a merchant when accepting a card payment and is a source of income for the merchant (see for example the conclusions of the investigations by the OFT in the UK)[137].

Abstracting from any consumer detriment issues arising from the fact that, in some cases, the cost of the use of card is made apparent to a consumer only late in the transaction process (for example, when booking airline tickets online), any such cost reduces the incentive to pay by card when a no-cost payment option such as cash exists.

From a consumer perspective, a total ban on surcharges spanning all payment mechanisms would offer the most effective way of protecting consumers across all sectors of the economy, although our review showed that the most pronounced detriment resided in the travel industry. A total ban would facilitate enforcement since any surcharge could be easily shown to the illegal and action taken by enforcement authorities.

However, from an economic perspective a total ban may not be the most welcomed solution, since some merchants do face high costs associated with certain payment methods. Studies examining the total social cost of cash, debit and credit card payments conclude that in some cases the debit card is the payment instrument with the lowest cost, followed by cash and then the credit card. The difference between the cost of debit and credit cards reflects differences in the multilateral interchange fees (MIF).

Thus, from an efficiency perspective, as long the MIF of debit cards remains substantially lower than the MIF of credit cards, their use should be encouraged to reduce the reliance on cash in Member States where the social cost of using cash is higher than that of using a debit card. The case of surcharges on credit cards is more complex as the social cost of this payment instrument is higher, reflecting, among others, the MIF that merchants have to pay to the card schemes when accepting a payment by credit card.

Consequently, controlling surcharging seems to be also linked to a control of what happens further up the payment services' supply chain.[138] Such reality does not provide efficient relief to consumers who remain faced with surcharges imposed by merchants who may have little incentives to negotiate better MIFs.

Therefore imposing some restrictions on the level of the surcharge may be a more viable solution compared to a total ban. From an efficiency point of view, if users face different costs for the use of different payment instruments (i.e. surcharging is permitted), they should make their choice on the basis of the difference in true costs and not be influenced in their choice by levels of surcharges which also generate net income and profit for the merchant. In the latter case, usage of credit cards is likely to be sub-optimal as the cost to the consumer paying with a card exceeds the true cost of payment faced by the merchant.

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[137] See OFT (2012), Payment surcharges, Response to the Which? super-complaint, OFT1349resp.

[138] This is a view shared by respondents to the feedback statement, p. 16. The statements explains: *'As regards the idea of surcharging in general, the consumers, merchants, as well as some public authorities and PSPs (payment processors) that commented on the subject were often of the view that the discussion on surcharging and other steering practices is secondary to the discussion on interchange fees in* general'. See, European Commission, Directorate General Internal Market and Services (2012), Feedback statement on European Commission Green Paper "Towards an integrated European market for card, internet and mobile payments", 27 June 2012 available at http://ec.europa.eu/internal_market/payments/cim/index_en.htm.

But this solution, reflected in Article 19 of the new Consumer Rights Directive[139] which specifies that "*Member States shall prohibit traders from charging consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means*" may help eliminate consumer detriment arising from the use of credit cards (especially for some online transactions), but is unlikely to resolve all detriment faced by consumers. Stakeholders expressed considerable scepticism as to the ability of Article 19 CRD to successfully address consumer detriment, primarily because determining what is 'an actual cost borne by the trader' is a very complex exercise.

From a consumer perspective, a better solution in the control of surcharges may therefore reside in imposing a ban on surcharges for at least one payment instrument where the money is immediately debited from the payer's account (akin to debit cards in Denmark or the UK), while continuing to allow surcharges on credit cards. Because the popularity of payment methods vary from member state to member state, it is important to note that the payment instrument on which surcharges will be prohibited ought to be a popular instrument in the member state in question, so as to allow the widest number of consumers to benefit from the free payment method(s). It is possible to envisage that surcharges for credit cards and other payment methods be subject to a limit on the cost borne by the trader. Such solution would enable consumers to have access to a free payment method, while retaining the option to pay with other payment methods that, although more expensive would prevent merchants to use surcharges as a source of revenue. Coupled with effective information on the final price of goods and services, this solution may offer the best protection to consumers. In the avoidance of doubt, the PSD should be amended to reflect the proposed changes.

Because the economic data uncovered do not unambiguously demonstrate that blanket prohibitions of surcharges on debit and credit card usage have had a positive impact on the reduction of the use of cash and a push towards more effective payment forms, adopting a consumer friendly approach seems a sensible way to proceed, especially given the discontentment expressed by consumer associations in our surveys.

[139] See DIRECTIVE 2011/83/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

4 Scope

The present section discusses the scope of the PSD. It first reviews the list of payment services explicitly listed in the PSD. Then it focuses on the payment services which are explicitly excluded from the scope of the PSD. The issue of the so-called one-leg transactions is addressed next. The chapter then reviews the impact of the harmonisation of rights and obligations of payment service providers on the costs of production of payment services. Thereafter, the special treatment of low-value payments is analysed, addresses classic and prepaid payment and discusses the special case microenterprises. Finally, the chapter analyses then different options foreseen by the PSD and their take up.

4.1 List of Payment services

This chapter discusses the functioning of the list of payment services annexed to the PSD (PSD-Annex). A brief overview of the distribution of these services as provided by the different APIs is set out in Section 2.3.2. and Table 6. How innovations in this sector relate to existing payment services is also described in Section 2.4.2. Additional empirical data on the distribution of these services and their functioning can be found in the various sections of the report which look at the pricing of various services (e.g. see Table 5) and provide details of the prices and charges applied to specific transactions.

Despite strenuous efforts, the research team was unable to find comprehensive data reflecting the operation of all payment services as defined by the PSD in the PSD-Annex or under its provisions on negative scope. Distinctive payment services and activities are still relatively new concepts, and statistics reflecting factual developments, and any services not being provided within the PSD, are not yet available. The contents of this chapter are therefore largely based on expert opinion obtained through questionnaires and interviews, as well as on the experience of the research team and the informed views of experts in this field.

It was necessary therefore to project the effects of the PSD and Regulation 924 from an interpretation of the law in the light of practice developed within the previous legal framework in order to reach a hypothesis. We have worked on the assumption that the opinions of experts combined with the views of stakeholders presented in this chapter will at least contribute to the validity of any changes required.

4.1.1 Legal choice

The definition of payment services is a core element of the PSD. There are two possible approaches to this. One is a general definition of payment services and the second is a definition based on specific services identified as those which are to be regulated. This approach enables the PSD to target only services that are central to the payment services market. It also, however, provides scope for step-by-step extension of the law in the future as appropriate as the market itself develops.

The PSD has opted for the second approach. Taken together with the negative scope (Article 3 PSD), these choices reflect the policy decisions defining the set of markets, services and providers to be regulated by the PSD. It is a cautious and tentative approach which takes into account the fact that, until now, the scope of the application of the Directive has been set in different ways,

even under EU law. For example, the core legislation prior to introduction of the PSD, Directive 97/5/EC on cross-border credit transfers (repealed by the PSD), was applicable only to cross-border transactions in the currencies of Member States or in euros (ECU), up to a value of EUR 50,000. A cross-border payment was defined as a transaction carried out at the initiative of an originator through a credit institution in one Member State, making funds available to a beneficiary through an institution in another Member State. In principle, the geographical scope was in line with the EEA, to which the PSD refers. Directive 2002/65/EC concerning the distance marketing of consumer financial services instead used a broader scope of application than the PSD. Commission Recommendation 97/489/EC concerning transactions by electronic payment instruments and, in particular, the relationship between issuer and holder, instead applies only to electronic payment instruments.

4.1.2 Listed payment services

Cash placing on a payment account and operations required for operating a payment account

Placing cash in a payment account[140] (alone or combined with other operations) constitutes a payment transaction and as such falls within the notion of payment services. The available evidence provides no reason to challenge either the inclusion of cash placed in a payment account within the scope of the PSD or the PSD's adequacy in the context of the establishing the internal market for payment services. Maintaining those operations within the scope of the PSD is indispensable for preserving the coherence of a regulatory framework for payment services.

Operating an account is an activity usually inherently connected with executing payment transactions, and it is therefore at the heart of payment services. It makes handling payment transactions more efficient both for the user and the provider. However, the account is not a tool conceived exclusively for payment transactions. The account is a useful tool for many purposes beyond the facility offered by payment products. It is used for saving, borrowing and in escrow services. Opening and maintaining an account does not in itself constitute a payment transaction. Only incoming and outgoing transfers of funds constitute payment transactions.

In principle, payment legislation covering transfers alone, with no reference to payment accounts, would be sufficient to maintain the coherence of the legal framework. Inclusion of a payment account in the definitional realms of a payment service therefore has a negative impact on the market. The source of the evidence for the expected negative impact comes from the assessment provided by industry experts. It has not been confirmed directly by stakeholders (providers, users, competent authorities) Among the providers surveyed, only one credit institution in Poland (out of 80 credit institutions and 9 associations of credit institutions that shared their views on the adequacy of the list of payment services) recommended that the list of payment services should exclude various types of deposit products. Only one competent authority reported problems with the distinction between a payment account and a money remittance.

The following key areas have been identified as those where a negative impact can be expected over the coming years:

[140] PSD-Annex no. 1: “Services enabling cash to be placed in a payment account as well as all the operations required for operating a payment account.”

a. what constitutes a “payment account” from the perspective of non-bank providers facing greater regulatory obligations when providing payment accounts along with other payment services;
b. impact of the account on basic payment services (e-money, low value);
c. what constitutes a “payment account” from the point of view of transparency, information and conduct of business rules (for all providers) ;
d. the flexibility available to non-bank institutions in offering payment accounts provided that they are prohibited from accepting deposits.

The PSD provides no guidance as to when a payment product is deemed to be an account. Not every tool designed for recording financial operations is necessarily a payment account. At the same time, the number of payment transactions and payment service activities whose characteristics closely resemble those typical of payment accounts is continuously increasing as a result of developments in IT and other forms of communications technology.

First of all, the range of applicability of the concept of payment account is of crucial importance to payment institutions wishing to make use of the less constraining regulatory regime available under the PSD for money remitters and telecommunications service providers.[141]. Any doubt as to whether the payment product includes a payment account creates a situation of potential risk where the lighter requirements are applied.[142] Reference to the payment account in the Annex is a source of issues in the area of e-money based services. The PSD explicitly covers payment services using cash, scriptural funds and e-money.[144]

Thus, a payment account for e-money should be treated in the same manner as any other payment account. However, EMD II treats a payment account (and a payment instrument as well) as a tool for storing e-money and not as a tool for handling payment transactions.[145] This results in uncertainty about the status of a payment account for e-money under the PSD. If a payment account offered with e-money is considered a PSD service, e-money providers need to comply with PSD standards for payment accounts instead of applying only requirements pertaining to e-money issuance and handling (the account as inherent to the process of e-money issuance). This works against the uniformity of payment products and against establishing the internal market for payment services. [146]

From the perspective of obligations towards users, all providers are negatively affected by the absence of guidelines as to which account-based products are subject to the PSD. Technical accounts, fixed-term deposits and purely mortgage-related accounts are clearly not payment accounts. An examination of the terms and conditions of account-based products shows that the

[141] The lighter regime for those services consists of a reduced level of initial capital (EUR 20,000 and EUR 50,000 respectively, as opposed to EUR 125,000 for the provision of payment services including a payment account), a lower own-funds scaling factor (scaling factor k for Methods B and C of 0.5 and 0.8 respectively as opposed to 1 for other services), and discounted supervisory fees in Member States where the level of fees is dependent upon the type of payment service provided.

[142] For example, if a payment institution, which offers a simple money remittance service, develops an add–on to this service which unexpectedly qualifies as a payment account, the institution would immediately need to increase its initial capital six-fold and double its own funds. These circumstances are not unlikely to arise, given that in the course of the survey conducted for the purposes of this study, one authority urged clarity regarding the distinction between the payment account service and the money remittance service.

[144] Article 4.15 of the PSD.

[145] See Article 9.1 of the EMD II: “Member States may also provide for the granting of the optional exemptions under this Article to be subject to an additional requirement of a maximum storage amount on the payment instrument or payment account of the consumer where the electronic money is stored”.

[146] See section 4.4 for more details.

negative impact of the PSD's approach to accounts arises with regards to products with a saving or partial saving dimension which offer a certain level of freedom to deposit or withdraw funds entirely or partially during the term of the contract (i.e., the funds may be withdrawn from the account or deposited in the account during the term of the contract with no need for the specific agreement of the provider).[147]

Finally the current PSD approach to account based services has an adverse impact on the understanding which account based services can be offered by non - bank providers. There is no doubt that a payment account may be operated by payment institutions. Neither payment institutions nor e-money institutions may accept deposits.[149] Accepting pre-paid funds has been explicitly confined to e-money institutions.[150] In light of those limitations, the mere reference to the payment account in the PSD-Annex is not enough to define whether the account operated by a payment institution may hold a credit balance (in readiness for future payment transactions). Taking into account the restrictive sanctions for breaching the deposit acceptance prohibition, the current approach of the PSD to the current account has the potential to discourage competition in the internal market among account providers.

Payment institutions surveyed in the course of the study do not report concerns pertaining to account operations, including credit balances. However, the concern in relation to credit balances arises in the discussions among stakeholders, which is reflected in the question put to the Commission Services.

The position of European Commission services is that payment institutions may offer payment accounts to the extent that the payment institution accepts payment of a customer's funds into a payment account with an order for a payment transaction or series of payment transactions to be executed by a given date (where it is necessary to place the funds in a payment account in advance of the execution of the payment transaction) and the funds do not remain under the control of the payment institution longer than is necessary for operational and technical reasons.[151] [152]

[147] Credit institutions adopt varying approaches to these products. They range from full compliance with the PSD's payment account and transaction principles to offering these products as savings accounts (outside the scope of the PSD). To do this, superficial minor limitations on the account's flexibility are imposed (for example, transfers only between pre-registered accounts). This works against the uniformity of payment products and the establishing the internal market for payment services..

[149] Article 16.4 PSD: "Payment institutions shall not conduct the business of taking deposits or other repayable funds within the meaning of Article 5 of Directive 2006/48/EC", Article 6.2 EMD II: "Electronic money institutions shall not take deposits or other repayable funds from the public within the meaning of Article 5 of Directive 2006/48/EC.

[150] Recital 7 of EMD II: "It is appropriate to introduce a clear definition of electronic money in order to make it technically neutral. That definition should cover all situations where the payment service provider issues a pre-paid stored value in exchange for funds, which can be used for payment purposes because it is accepted by third parties as a payment." E-money may not be issued by payment institution unless a Member State takes advantage of the waiver under Article 3.3 EMD II extended to payment institutions (Article 10 EMD II: "Without prejudice to Article 18, Member States shall prohibit natural or legal persons who are not electronic money issuers from issuing electronic money.").

[151] Answer to question no. 155 of the "Your questions on PSD", a Question and Answers facility provided by the European Commission services on the website http://ec.europa.eu/internal_market/payments/framework/transposition_en.htm#question.

[152] Those guidelines cannot counteract the uncertainty discussed above because the guidelines are directly applicable only to basic payment services, mainly money remittances. In the areas where the uncertainty is most notable (e.g. acquiring), the guidelines fail to take into account the core process of receiving funds for the payee (account holder). Taking into account that the PSD neither provides for a deadline for withdrawing the funds from the account nor distinguishes between funds deposited in a payment account by a user and funds received by a user (incoming transaction), the uncertainty over the account based product available to payment institutions is not resolved. An examination of the product portfolios of payment institutions and their terms and conditions reveals that they are reluctant to include a payment account in their range of products. Apart from credit card issuers and acquirers, payment institutions rarely offer fully-fledged payment accounts. The unclear position on payment accounts is thus an obstacle to the development of competition in the payment account submarket.

Overall, the "operations required for operating a payment account" currently included in the PSD list of payment services have an adverse effect on the integrity and efficiency of the payment market. Maintaining them within the scope of the PSD compromises the coherence of the regulatory framework for payment services. The PSD would benefit from limiting the payment services list to operations which constitute a payment transaction, namely the placing, transfer and withdrawal of funds. In the case of a payment account, the operations that constitute the payment component of account-based products are receiving transactions for the payee or on behalf of the payee, be it in the form of cash, placing funds in the account or the incoming transfer of funds other than cash.

Cash withdrawals from a payment account

Cash withdrawal from a payment account is a payment service where the provider which operates the account of origin pays cash out of this account or via a person acting on behalf of the account provider.[153]

Cash withdrawal from a payment account is a basic service. By its nature it constitutes (alone or with other operations) a payment transaction and falls within the notion of payment services. The available evidence provides no reason to challenge the inclusion of cash withdrawals within the scope of the PSD or its adequacy for establishing the internal market for payment services. Maintaining these operations within the scope of the PSD is indispensable for preserving the coherence of the regulatory framework for payment services.

Credit transfers, direct debits, card transactions

The execution of credit transfers, direct debits and card transactions appears to be the most widespread service covered by the PSD.[154]

A credit transfer is a service offered to a payment account holder by his/her account provider to make available funds in the designated payment account.

Although the PSD does not explicitly require that a credit transfer facility be offered only in conjunction with a payment account on the payer's and the payee's side (as opposed to a direct debit), in practice credit transfers are offered only as a service complementary to a payment account (both from the perspective of the payer's and payee's provider).

A direct debit is a payment service for debiting a payer's payment account, where a payment transaction is initiated by the payee on the basis of the payer's consent to the payee, to the payee's payment service provider or to the payer's own payment service provider.[155]

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[153] PSD-Annex no. 2: Services enabling cash withdrawals from a payment account as well as all the operations required for operating a payment account.

[154] PSD-Annex no. 3:Execution of payment transactions, including transfers of funds on a payment account with the user's payment service provider or with another payment service provider:
— execution of direct debits, including one-off direct debits,
— execution of payment transactions through a payment card or a similar device,
— execution of credit transfers, including standing orders.

[155] Article 4.28 of the PSD.

Credit transfers and direct debits by their nature constitute payment transactions and fall within the notion of payment services. The available evidence provides no reason to challenge the inclusion of cash withdrawals in the scope of the PSD or its adequacy for establishing the internal market for payment services. Maintaining credit transfers and direct debits within the scope of the PSD is indispensable for preserving the coherence of the regulatory framework for payment services.

A payment transaction through a payment card or a similar device is discussed under issuing and/or acquiring a transaction initiated by payment card or similar device.

The execution of transactions funded from a credit line extended by the provider[156] usually takes place when a current account is accompanied by an overdraft facility or a regular line of credit or where a credit card is offered.

Credit transfers, direct debits and card transactions constitute payment transactions regardless of whether they are pre-paid or post-paid. The conclusions reached in the previous section remain valid regarding those operations covered by a line of credit.

The impact of the PSD-Annex on granting credit by payment institutions is discussed in section 4.15.7.

Issuing and/or acquiring payment instruments

Issuing and acquiring is a payment service provided under a framework contract subject to the PSD.[157]

A payment instrument is any personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider, and used by the payment service user in order to initiate a payment order.[158] The PSD does not provide a specific definition of a payment card.

The payment instrument concept covers payment cards, home banking and all other measures which enable the user to access the funds.[159]

Services based on payment instruments include:

156 PSD-Annex no. 4: Execution of payment transactions where the funds are covered by a credit line for a payment service user:
— execution of direct debits, including one-off direct debits,
— execution of payment transactions through a payment card or a similar device,
— execution of credit transfers, including standing orders.

157 PSD-Annex no. 5: Issuing and/or acquiring of payment instruments.

158 Article 4.23 of the PSD.

159 The notion of the "payment instrument" is very broad. One of the competent authorities expressed explicit concern about its reach, which may include virtually any device. The European Commission Services have clarified that, despite the fact that the wording of the payment instrument definition suggests that it covers any agreement on the manner the payment is ordered (which might include filing a paper order after verification of ID in the provider's premises), the rationale behind the payment instrument is to regulate the modalities of ordering payments through digitally automated means of user or funds identification (see answer to question no. 34 of the "Your questions on PSD", a Question and Answers facility provided by the European Commission services on the website http://ec.europa.eu/internal_market/payments/framework/transposition_en.htm#question). The reference to personalisation raises the question of whether the concept of payment instrument covers anonymous payment cards. But it seems that such cards can be considered at least a set of procedures and, thus, would be covered by the payment instrument definition.

- issuing a payment instrument which in principle accompanies the conclusion of a framework contract; issuing a payment instrument does not constitute a payment transaction,
- execution by the payer's provider (instrument issuer) of an individual payment transaction initiated with payment instruments: execution by the issuer is governed by terms and conditions provided for in the framework contract,
- execution by the payee's provider (including the acquirer) of an individual payment transaction initiated with payment instrument.

Despite the clear adequacy of including operations initiated by payment instruments, the PSD is not sufficiently clear with regard to payment transactions initiated by payment instruments.

The PSD-Annex covers only execution of payment transactions through a payment card or a similar device. Transactions initiated by payment cards regardless of whether the card is linked to a payment account (debit cards are usually linked, credit cards not necessarily) are transactions falling under points 3 and 4 of the PSD-Annex because those services do not require explicitly that the payment transaction is executed from and to a payment account.

The PSD does not address the issue of whether executing payment transactions via payment instruments other than a "payment card or similar device" is covered as an issuing payment instrument under point 5 of the PSD-Annex or falls under transactions under payment services defined in points 3 and 4 of the PSD-Annex to the PSD, or as a payment service defined in point 6 (money remittance).[160]

In addition, the PSD does not clarify the status of transactions initiated by instruments constituting only distance banking (i.e., ensuring access to a payment account to enable the usual transactions such as credit transfers or direct debits, including internet or mobile banking). There is no justification for treating those operations as a category of transactions different from the underlying transactions just because the latter have been initiated via a payment instrument.

Payment transactions initiated by payment instruments could be included in the scope of the PSD in order to preserve the coherence of the regulatory framework for payment services. Given the proliferation and nature of innovative payment services as opposed to existing payment cards, the PSD no longer needs to make reference to payment cards as a benchmark for stand-alone services based on payment instruments other than those initiating credit transfer or direct debit. This approach ensures that the list of payment services will remain appropriate in the long term for establishing the internal market for payment services in the area of payment instruments.

Issuing a payment instrument is a service provided under a framework contract subject to the PSD. In current circumstances, issuing instruments is an activity inherently connected with executing payment transactions. However, issuing does not in itself constitute a payment transaction. Only transfers initiated by using the instrument constitute payment transactions. In principle, it would suffice for payment legislation to cover transfers alone, with no reference to payment instruments, in order to maintain the coherence of the legal framework. Market developments may lead to the widespread decoupling of the instrument issuer and the funds handler (which is promoted e.g. by Payfair); however, at the moment, issuers in principle participate in transaction execution.

[160] Evidence from competent authorities demonstrates that this uncertainty extends to transactions where the funds are e-money. One competent authority explicitly urges to clarify which payment service from the PSD-Annex is adequate for e-money transactions.

All those reasons suggest that the inclusion of a payment instrument on the payment services list as a service separate from the execution of payment transactions may have a negative impact on the market. This includes the potential incoherence of payment products and obstacles to establishing the internal market for payment services.

As in the case of the concerns about payment accounts, the evidence of a negative impact comes from analysis by industry experts. Designating the mere issuing of a payment instrument as a separate payment service has similar effects to the inclusion of a payment account in general. Money remitters and providers of telecommunications services referred to in payment service No. 7 of the PSD-Annex cannot make use of the lighter regime for those services (reduced initial capital level, lower own-funds scaling factor, discounted supervisory fees in Member States where the level of fees is dependent upon the type of payment service provided), if a payment instrument issued by those providers can be identified in the service. Given the wording of services provided via telecommunications (payment service No. 7 of the PSD-Annex), providing this kind of service without issuing payment instruments is not feasible.

Inclusion of mere issuing payment instruments results in the same ambiguity for an e-money issuer as discussed in the payment account section (see above). If a payment instrument offered with e-money is considered a PSD service, e-money providers need to comply with PSD standards for payment instruments instead of applying only requirements pertaining to e-money issuance and handling.

This negative impact is only partially confirmed by stakeholders. Major stakeholders (providers, users, competent authorities) perceived no negative impact in the inclusion of issuing a payment instrument. When interviewed about payment instrument issues, providers and competent authorities took the opportunity only to promote inclusion of new online and mobile payments (see below). No concerns have been identified. For consumers, concerns arise only with regard to prepaid cards. This is, however, discussed in a very general context only, which is whether they are covered by the PSD or not. For more details, see section 4.4.

Altogether, the available evidence suggests that, in practice, the inclusion of a mere issuing payment instrument on the PSD payment services list does not, at the present time, significantly affect the integrity and efficiency of the payments market. However, the discussion above shows that maintaining issuing separately within the scope of the PSD may compromise the coherence of the regulatory framework for payment services. The PSD would benefit from limiting the payment services list to operations which constitute a payment transaction which is execution of the transaction initiated by payment instruments, provided that those instruments are not specific communication tools for initiating transactions already included in the payment services list.

Executing payment transactions through a payment instrument for the payee (including acquiring) is a service provided under a framework contract. Payment operations initiated with payment instruments executed by the payee's provider fall within the notion of payment services. This includes operations commonly referred to as "acquiring".

The PSD provides neither a definition nor a description nor a reference to *acquiring*.[161] For the purpose of this study, "acquiring" is understood as a service provided by a payee's payment provider to the payee to receive incoming payment transactions for the payee which are initiated by a

[161] The reference to "acquiring" in the PSD-Annex, under point 5, is the only one in the PSD.

payer via the payee or by the payee by means of a payment instrument and which are not payment transactions covered otherwise by the PSD (credit transfer, direct debit), regardless of whether the acquirer holds a payment account for the merchant.

The PSD approach to acquiring has an adverse impact on the integrity of the payment market. The available evidence confirms the need to reconsider the approach to acquiring.

The first area of negative impact is the wording of the PSD. When including acquiring on the payment services list it refers to “issuing and/or acquiring payment instruments”. While the issuing of payment instruments is clearly an existing and widespread service, “acquiring payment instruments” is hardly a service that can be found in the market.

A number of Member States decided not to follow the approach of the PSD. The examples are:

- “acquiring payment transactions” - the UK and also Ireland;[162]
- “accepting and settling payment instruments” – Austria;
- “accepting and settling of transactions initiated with payment instruments” - Germany.

The negative impact of the differences in the wording is amplified by the fact that acquiring comes close to a payment account and may take various forms.

Merchant acquiring is a payment service by its nature, which is very close to operating a payment account and undertaking all the operations required for operating a payment account, in particular when the acquirer provides an account to the merchant. Both a payment account provider and a merchant acquirer receive transactions for the payee. However unlike the standard payment account, the acquirer is active in the process of ordering the payment, compared with the provider of a standard account, who is usually inactive at this stage and becomes aware of the payment order only once it has been initiated and is under execution. The acquirer’s involvement usually takes the form of payment order transmission, validation, authorisation, etc.

As far as various forms of acquiring are concerned, two major forms predominate:

- the acquirer “purchases” transactions from merchants,
- transactions are processed “on behalf” of the merchant by the acquirer.[163]

The PSD does not clarify whether it wants to apply to both “acquiring” and “on behalf of the merchant” modalities. At the same time, the PSD provides no guidance as to when a payment service provided to a payee-merchant constitutes *acquiring* and when it constitutes only a payment account.

The negative impact of the wording of the PSD is confirmed by stakeholders, and by competent authorities in particular. Interpretation of the word *acquiring* under the PSD is considered one of the most challenging issues. Four authorities point to specific concerns on the variety of acquiring modalities and on ATM acquiring.

[162] Ireland however extended this approach to payment instruments referring to “issuing and/or acquiring of payment transactions”.

[163] See UK’s FSA position: “The FSA’s role under the Payment Services Regulations 2009 Our approach”, Annex “Merchant Acquiring”, section 2.1.

The unstructured interviews revealed cases where merchant providers deem themselves to be outside the PSD when applying the "acquisition" approach. They base their opinion on referral to the unusual wording of the PSD (acquiring payment instruments with no reference to payment transactions).

The same ambiguity exists with the issuing of e-money (see above). If acquiring is offered to cover merchants accepting e-money, its providers need to comply with PSD standards for acquiring and not only with the requirements pertaining to e-money issuance and handling.[164]

Payment transactions through payment instruments executed by the payee's provider should be included in the scope of the PSD in order to preserve coherence of the regulatory framework for payment services. By their nature they constitute payment transactions.

To counteract the negative impact of the current acquiring description the PSD payment services list could refer to the execution of payment transactions for the payee initiated with the payee's involvement, instead of acquiring payment instruments. All services provided primarily to the payee to facilitate payments from a payer by means of a payment instrument should be covered by the PSD.

Money remittance

Money remittance[165] requires, as a key prerequisite of a payment service, that the provider does not operate a payment account for the payer or the payee. (This does not exclude accepting a payment order to transfer funds from a user's account operated by another provider nor to a payee's account operated by another provider).

A key example of money remittance is the remittances service offered by large agency network providers where the payer gives cash to a payment service provider's agent to make it available to the payee through another agent. According to one competent authority, the simplicity of its definition could lead to the inclusion of all professional transfers of funds.

Services to accept payments of utility and other regular household bills are covered.[166] Attempts to circumvent the application of the PSD are reported by the Commission Services and a number of competent authorities (see below).

Maintaining money remittance within the scope of the PSD is indispensable for preserving the coherence of the regulatory framework for payment services.

[164] Along with the confusion over the scope of acquiring, another key concern is the fact that the PSD takes little account of the basic needs of acquiring services, mainly the absence of an explicit option for the acquirer and the merchant to agree execution times for making available the funds to the merchants. For a more detailed discussion see section 7.1.

[165] Article 4.13 of the PSD.

[166] Recital 7 of the PSD.

Execution of payment transactions by means of electronic device by a network operator

The service listed under point 7 of the PSD-Annex[167] is a payment service offered by a network operator, mostly a telecommunications operator, to transfer funds from a payer to a supplier of goods and services, provided that the payer's consent is communicated by means of a digital device.

The prerequisites for qualifying a service as a payment by a network operator are the following:

a) the provider of the payment service operates a digital network

b) the payment service is not designed as a general purpose transfer service but is designed to pay for goods and services

c) the consent to execute the payment transaction (not the payment order in general) is communicated by means of a digital device in principle connected to the network of the operator.

Key examples of such payment services are the premium rate services of telecommunications operators.[168]

The services of network operators, as defined under point 7 of the PSD-Annex, by their nature overlap with other payment services provided for in the PSD-Annex. This is because payments by network operators, in practice, are an add-on of at least a payment instrument to money remittance, but not excluding the payment account or acquiring services.

Evidence from industry experts reveals that this is the source of a negative impact on market integrity. Inclusion of network payments on the payment services list compromises the coherence of the regulatory environment of payment services. In the absence of clarification of whether network payments are separate payment services and whether they consume the inherent sub-operations listed separately in the PSD-Annex (issuing of a payment instrument, execution of transactions), there is no certainty as to whether the provider is eligible for the mitigated regulatory requirements provided for services of network operators. Therefore, the current wording of services by network operators triggers similar concerns to those under payment account and payment instruments (see above).

Altogether, the inclusion of services by network operators in the PSD payment services list has an adverse effect on the integrity and efficiency of the payment market. Maintaining them within the scope of the PSD compromises the coherence of the regulatory framework for payment services. The PSD would benefit from removal of the reference to services by network operators in the payment services list. Services provided by network operators do not require providing for a separate category of payment services under the PSD.

[167] "Execution of payment transactions where the consent of the payer to execute a payment transaction is given by means of any telecommunications, digital or IT device and the payment is made to the telecommunications, IT system or network operator, acting only as an intermediary between the payment service user and the supplier of the goods and services".

[168] Those services, however, benefit mostly from the exemption in Article 3.l of the PSD. See section 4.2.

4.1.3 Unlisted payment services – payment initiation services (overlay), online and mobile payments

Payment initiation services

Payment initiation services (also referred to as "overlay payment" services or OPS) which rely on third-party provider access to an account are a payment-related service which the PSD neither explicitly covers nor exempts. Yet much controversy surrounds such payment related services. This section attempts to first define what is meant by payment initiation services and describe the current practice of a number of third party providers as well as the issues it raises. Next, the views of stakeholders are explored. Finally, this section concludes showing what specific changes in the PSD may provide a more effective regulatory approach to the use of payment initiation services.

Definition of Payment initiation services and current issues

The European Forum on the Security of Retail Payments (SecuRe Pay[169]) understands the services of third-party providers as taking place whenever any licensed or non-licensed service provider accesses a payment account or obtains data from a payment account without being the account issuer.[170] Payment initiation services are defined in the following way:

"Payees offer OPS as a payment solution on their website and should the payer choose to pay using the OPS during the checkout process he/she will be required to indicate his/her payment account operator. This information is needed to start the redirection process, which goes via the third-party provider. This provider triggers an online banking session with the account operator through the same technical user interface typically used by the payer for traditional online banking. The payer is redirected from the web merchant website to the third-party provider website, where he/she is asked to provide his/her online banking login credentials to the third-party provider. Based on successful authentication with the account operator– conducted by the third-party provider on behalf of the payer, the payer is presented by the third-party provider with a pre-filled payment form (subject to sufficient balance based on a check of the information layer (current status data and/or historic data)).

The payer can usually not change this payment form anymore (except for the possibility to choose another payment account to be debited, should he/she hold multiple payment accounts with the same account operator and should the third-party provider support this functionality). Based on the authentication and authorisation details provided by the payer to the third-party provider, the latter authorises the transaction in the payer's online banking service with his/her account operator. The same authorisation codes as for traditional online banking transactions are used. Finally, the payer and the payee receive confirmation of the successful payment initiation from the third-party provider. Throughout the authentication and authorisation process, there is one (typically) secured session between the payer and the third-party provider and another one between the third-party provider and the account operator".

[169] The Forum was established in early 2011 at the suggestion of the Payment and Settlement Systems Committee of the ECB as a voluntary cooperative initiative between relevant European authorities - supervisors of payment service providers and overseers in particular. Its purpose is to facilitate common knowledge and understanding of issues related to the security of electronic retail payment services and instruments. In April 2012, under the auspices of the Forum, Recommendations for the Security of Internet Payments have been issued. They are available on the ECB's website: ecb.europa.eu/pub/pdf/other/ recommendationsforthesecurityofinternetpaymentsen.pdf.

[170] See the questionnaire of the Forum on Payment Account Access by Third Party Service Providers via the Internet.

It transpires that payment initiation services share the following features:

- the user has a payment product where either funds or a credit facility are available
- the user gives a third party provider (offering payment initiation services) his/her consent to access the account including making available user-specific credentials
- the third party, based on the received consent and credentials, accesses the user's account and orders the payment
- the payment is transferred directly from payer's account to the payee.

A third party provider is in principle under contract with a merchant in order to facilitate payments by bank account holders to merchants. This is the case for Sofort AG, thus far the most used overlay service based in Germany.[171] This provider claims to operate in Germany, Austria, Switzerland, Belgium, Italy, Netherlands, and the United Kingdom.[172] The service offers payers the option of paying merchants directly from the payer's bank account. This is done by disclosing home banking credentials to Sofort AG. The provider then uses those credentials to log into the payer's home banking facility and orders the payment.

A number of issues are linked with the operation of overlay payment services, the most important of all being linked with the fact that they are not covered by the PSD (see below).

Another issue, worthy of notice, concerns competition in the market place. Indeed, the dispute opposing Sofort AG and Giropay provides an illustration. Giropay is a subsidiary of the German banks community. From a user's perspective, Giropay offers a service sharing identical functionalities with that of Sofort AG. However, the mechanism under which the service is offered differs because in the case of Giropay, the service is based on the contractual consent of the bank operating the payer's account. The difference is that with Giropay the user does not disclose credentials to the third party but logs in to the home banking facility on his own[173] The lawsuit was filed by Giropay in front of the Regional Court of Cologne (Germany), on the grounds of unfair competition. Giropay claimed that Sofort AG would lead bank clients to abuse their passwords (PIN) and transaction authentication numbers (TAN), and therefore endanger the security of internet banking.

In the course of the dispute, the German competition authority (Bundeskartellamt) took the position in 2011 that the terms and conditions from the banks Giropay is a subsidiary of, were invalid insofar as they prevent providers like Sofort AG from lawfully offering their services.[174]

Apparently for similar reasons in 2011 the European Commission opened an antitrust investigation into the standardisation process for payments over the Internet undertaken by the European Payments Council. The Commission will undertake a careful examination of the standardisation process to ensure that competition is not unduly restricted, for example, through the exclusion of new entrants and payment providers who are not controlled by a bank.[175]

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[171] Other providers include: Trustly (Sweden) or Citadel commerce, UseMyFunds (UK). These services are expanding all over the world.
[172] Based on information available from www.payment-network.com in November 2012.
[173] The same mechanism governs the services of iDeal (Netherlands), eps online Ueberweisung (Austria).
[174] See press release in "Die Welt" as of 04 April 2011, available under http://www.welt.de/wirtschaft/webwelt/article13061344 /Welche-Bezahlsysteme-im-Internet-sicher-sind.html.
[175] See press release available under europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1076.

The key issue concerning payment initiation services, concerns the fact that those services are neither explicitly covered nor exempted by the PSD.

Given that the underlying concept of payment initiation services is that the funds are not transferred via the third party provider, the third party provider is in principle not caught by the PSD regime.[176]

The discussion on the payment initiation services focuses currently on whether third party providers (currently non-bank providers) should be authorised to access the account operated by the payment service provider (mostly credit institutions) and whether third parties need to be regulated even though they do not enter into possession of funds.

However, the challenges triggered by payment initiation services are more complex than access to an account.

In fact, the issue is whether a fundamental change of a key paradigm of the payment industry should take place, whereby the current “privity” of the user-provider relationship should be changed. Currently, the “privity” of the user-provider relationship is reflected, inter alia, in the professional confidentiality principles applicable to payment service providers and precluding providers from disclosing customer information to entities not authorised by relevant laws or by the user vis-à-vis the provider. General enabling payment initiation services requires that this paradigm is amended so that, at least, every payment service provider may request that the payer’s provider gives the former access to the funds or the account of the payer (including bank-to-bank request, bank-to-non-bank, non-bank-to-bank, etc.). Today this is not the case, not even between credit institutions.

However, given that providers apply significantly divergent standards and requirements, and the supervision of their performance is not harmonised, abandoning the current “privity” paradigm would expose the whole European financial sector to the risk of customer data leakage proportional to the strength of its weakest point (third party provider) in the EEA.

Views of stakeholders

The fact that third party providers are outside the PSD, is considered detrimental to the market by all stakeholders. Competent authorities put payment initiation services on the list of services that need immediate inclusion within the scope of the PSD. The rationale for this inclusion is anchored in the negative impact that would follow if those services were to remain outside the PSD. In particular, this negative impact would be linked to the risk for consumers as well as the risks for providers on issues such as bank secrecy, data protection and payment security.

The negative impact of the position payment initiation services currently have is mostly experienced by credit institutions, operating the accounts that payment initiation services access. Those credit institutions either oppose unconditionally third-party providers or accept their participation in the payment process but only under very restrictive conditions.

[176] The PSD fails to provide explicitly that the possession of funds is the key factor prompting the application of the PSD to a service and its provider. The possession of funds is referred to only in the exemption for technical providers (Article 3.j of the PSD). The decisive role of the funds’ possession may be however assumed in light of the PSD’s goals which include securing consumers against the provider’s default. Where the provider does not enter into the possession of the funds, this risk of default is not present.

Objections to third-party providers are common for all credit institutions questioning third-party access and focus on:

- risk of breaching data protection, privacy and banking laws
- money laundering issues
- indefinite risk of fraud (inability to define time window within which the third party provider may access the account)
- inability to handle fraud the same way those can be currently handled
- undermining the most basic principle that the use of the user's credentials is tantamount to payment authorisation making it even more difficult to prove that the transaction has been authorised by the payer.

Credit institutions highlight that consent of the payer is not sufficient to justify the use of payment initiation services. As long as the consent is given to the third party provider instead of to the account provider, that consent provides no reliable ground for disclosure of financial information under the relevant privacy and banking secrecy laws. Further, given the crucial meaning and complex legal environment of banking secrecy, the customer is not usually aware of the true implications of giving consent to an unknown third-party able to obtain account information which are otherwise only available in exceptional circumstances to entities such as by public authorities regarding criminal proceedings or the enforcement of obligations, for example.

Surprisingly, credit institutions are not uniform in opposing acceptance of payment initiation services. Out of fifty-two credit institutions and seven associations of credit institutions which commented on this issue, the responses of twelve credit institutions and one association of credit institutions did not reveal any specific position taken by the respondent and could not be interpreted either as support or rejection of payment initiation services. Twelve credit institutions and four associations of credit institutions were prepared to consider the concept of third-party provider accessing the account held by those institutions. However, when they did so, it was under a number of reservations detailed below. The overall picture is that half of the industry is ready to at least work on the basic framework for payment initiation services.

Such framework should, as far as credit institutions were concerned, take the following prerequisites into account:

- the scope of available information about the account is predefined (excluding in any case availability of funds in general and transactions posted to the account)
- third party providers are licensed and listed in a public register
- a third-party provider offers the service under the contract with the account provider or within a dedicated scheme
- the third-party provider meets multiple conditions including ensuring banking secrecy, antifraud measures, security, clear and explicit information to the user, sharing of responsibility between the account provider and third party provider
- the third-party provider bears reasonable costs.

In the view of those institutions which were prepared to share views on payment initiation services, Titles I, II and IV of the PSD need to be reviewed in order to accommodate those services (see below for more details). Credit institutions expect that authorisation is required for any third party provider that is visible to the account holder in the payment process.

Several consumer associations also supported the inclusion of payment initiation services in the scope of the PSD. For example, the German consumer association was of the opinion that payment initiation services ought to be caught within the scope of the PSD because it was important not to allow circumventions and to enable the rules of the PSD to apply whenever consumers pay non-cash.[177] For the French consumer association, despite that the fact that payment initiation services are not yet being widely used by French consumers, there was a need for more precisions on this topic, for example on banking secrecy or security.

One third party provider reported a negative impact of the PSD insofar as it eliminates similar providers from the PSD umbrella. Contrary to the suggestion of credit institutions that third party providers avoid authorisation, this particular respondent wished to obtain authorisation for its core services.

A starting point for solutions concerning the inclusion of payment initiation services in the scope of the PSD

While, as we have seen, there are many concerns about payment initiation services, they nevertheless have a very strong potential for bringing viable innovation on the payments market.[178]

With the exception of major existing card schemes, there is hardly an EEA-wide harmonised mechanism enabling users to access their funds in order to make payments outside of a direct interaction with the bank (in the bank premises, via online facilities) where the payment is instantly verifiable by the payee (merchants) and regardless of whether the payer and the payee are clients of the same bank.

The arrangements underpinning the major card schemes are now dated. They do not entirely satisfy the needs of the developments currently taking place. In those developments, efficiency (instant messaging and availability of funds) and costs play a key role. The innovations offered by or based on major card schemes usually only add to the existing mechanisms. Therefore, they cannot overcome the systems' inherent constraints (pricing, funds flow, etc.).

This is true, in particular, for e-commerce. On the one hand, any payment mechanism, if it is to provide adequate solutions and support for innovation cannot copy the inefficiencies of the existing schemes. On the other hand, it is true that any new mechanism needs to achieve the scale of reach or something close to that achieved by major card schemes. This has taken these schemes dozens of years of market development (both on issuing and accepting side).

[177] CAQL11 vzbv (DE).

[178] This is confirmed explicitly by e-commerce merchants' community: "[…] web merchants encourage banks to 'open up their accounts' for third party merchant services, fostering innovation and competition, supporting recent investigation by competition authorities in Germany. Web merchants welcome third party merchant services […]", a statement of E-Payments Merchant Initiative in the "Position Paper. Online payments in Europe. Key issues and requirements of Web Merchants in Europe <<Improve conversion>>. Ten recommendations", available under http://www.thuiswinkel.org/cms/streambin.aspx?requestid=6EE68028-0083-4729-9686-C049D57534BD.

The only payment-related mechanism so far that has reached or even exceeded the scale of card schemes proliferation is the user's online access to his/her account with the ability to order a payment. The banks developed this feature individually with no central body (comparable to the card schemes). Despite independent development of online access to an account the available technology made online access relatively uniform.[179]

Payment initiation services take advantage of those developments. Relative "harmonisation" of access and payment ordering technologies enables the third party providers to extend their services to new banks with no lengthy timelines for technical integration and, more importantly, for entering into contract with the bank. The result is that payment initiation services may reach scales comparable to card products in a short time.

The trade-off of such development is the increased risk for the user. To put it simply, under payment initiation services, the historically basic concept of the payment process "give me EUR X from your wallet" turns into "give me your wallet" (out of which the payee or its provider takes EUR X). This triggers security concerns which are broader than the mere fear of the risk of one-off fraud.

Under existing concepts of online access (developed prior to payment initiation services), the third party provider may obtain crucial information on the financial status of the user. The result is that the existing development of payment initiation services puts the risk entirely on the payer (consumer). Meanwhile, other stakeholders derive benefits from the use of payment initiation services. For example, the merchant pays less fees for processing payment than when compared to card scheme fees or express transfers fees.

Unfortunately, the concerns we have outlined above will govern the developments of payment initiation services for as long as the underlying concept for existing online access relies on the assumption that the user is **the only person** to access the account. Indeed, to tackle concerns with payment initiation services, while still preserving the innovative potential of those services, this basic assumption needs to be shifted. Instead, the basic underlying assumption should hold that the user is **one of the persons** to access the account, but remains **the only person to decide** on who else may get access to the account. The concept under which the user is one of the persons to access the account and the only one able to decide who gains access removes most obstacles to the sustainable development of payment initiation services. Indeed, this way of conceptualising access to accounts ensures neutrality with regards to future developments in this area.

When considering payment initiation services, one needs to take into account that, given the current pace and scale of developments, the payment initiation services are only one step towards future developments. Indeed, the mechanics based on user credentials may, and will no doubt be one day applied directly by merchants as soon as interbank settlements become instant or at least the payment order becomes generally irrevocable for the payer and its provider. For merchants operating above a certain scale of payments and which use payment initiation services, those obstacles are the last ones that justify incurring the costs of another provider beyond the payer's and payee's provider (normally they should be capable to process the transfer of value between two parties).

[179] Not derogating the relevance of the multiple and crucial differences among home banking / online banking / mobile banking access concepts.

The payment initiation service shall be subject to authorisation under the PSD if acting as an intermediary between the payer and the payee on a regular basis, regardless of whether it enters into possession of the funds or not. The fact that the payment initiation service assumes an obligation directly to the payer or the payee to effect the payment shall be sufficient to justify the need for authorisation.

Payment initiation services should not be developed by placing all the risks on the sole shoulders of the user concerning for example, fraud and access to sensitive information. A solution weighing the risks versus the benefits seems indispensable.

A very preliminary and rough concept for further consideration might be to envisage a system where each provider operating an account for the payer, which offers the user personal remote access to the funds (e.g. home banking), is under a duty to provide access by the persons authorised by the user, on not less favourable conditions,. For example, an operational solution might involve two sets of credentials that the account providers are under a duty to provide to the user, where one is for user access and one is reserved to parties authorised by the user. If such solution was taken forward, primary or secondary legislation might need to pre-designate the scope of the available information and activities that will be included in such system and give the user an option to amend the scope or block the access.

The current PSD mechanics are only partially adequate to regulating third party providers. This is because the PSD focuses on the default risk of the provider that enters into the possession of the funds (authorisation, own funds, funds safeguarding, liability for defective execution etc.). Concerning the risks beyond possession of the funds, the PSD does not provide an adequate solution to mitigate these risks. It is not currently possible for the PSD measures to be simply extended to payment initiation services because they would make little sense. This is because, as already explained, the risks that need to be tackled for payment initiation services are different from those at stake when compared with payment services subject to the PSD.

From a prudential supervision perspective, the third party providers should at least be subject to the general duty of safe handling the access to the user's account and the specific duty to provide a security of a kind close to insurance or guarantee to cover risk generated by the third party provider (e.g. the risk that the credentials may be used to order new transactions without the user's authorisation).

From the perspective of the PSD's existing conduct of business rules, third party providers are closest to the position of a party transmitting a payer's payment order to the payer's provider. The PSD provisions referring to a payee's provider transmitting the payment order to payer's provider thus appear best suited to extend to third party providers. However, it is important to take into consideration that these are scarce and that they take no account of the fact that the payer's provider cannot identify whether the party ordering the payment is the user or the third party provider.

In cases of access by the third party provider, the enforceability of the user's authorisation to the third party provider cannot be verified. This is not the case with direct debit and card payments. It is for this reason that no solution to key security concerns is provided (i.e. who bears the liability for unauthorised transactions) under the current wording of the PSD. It is obvious that the single use of an payment initiation service cannot result in a consumer's full liability vis-à-vis the account provider for all subsequent unauthorised transactions as a result of disclosure of the consumer's

credentials to a third person. On the other hand, it is unfair to preserve the primary full liability of the account provider when the provider cannot recognise who actually orders the payment (user or third party provider) and thus fail to apply adequate antifraud measures. This specific situation calls for completely new liability sharing mechanisms to be thought out, a process that will strongly depend on the general mechanics of payment initiation type services adopted by the PSD if any.

As already pointed out, the concerns outlined above will govern the developments of payment initiation services for as long as the existing on-line banking facilities offered by the banks to the users rely on the assumption that the user is the only person to access the account.

As far as the PSD transparency of conditions and information requirements are concerned, assuming that a payment initiation service is a service provided to the user primarily as a single payment transaction (which needs not always be the case), those requirements could be extended to the payment initiation services with relative ease. Dependent upon the exact nature of the payment initiation service, the third party provider will generally be released from providing information requirements due to the fact that the transaction is initiated with a third-party payment instrument under a framework contract.[180]

Online and mobile payments

In the payments market a substantial number of payment activities focus either in form or in substance on the online or mobile phone environment. Those payment modalities are being developed for the proliferation of widespread multipurpose IT terminals (PCs, advanced telephones, tablets, etc.).

The view is widespread that those payment activities are a separate payment service which needs separate or supplementary regulation within the PSD. This is clearly the case with credit institutions. In the research survey, these institutions most often point to online and mobile payments as requiring inclusion in the scope of the PSD (they are mentioned three times more often than payment initiation services).

At the moment, mobile - or Internet-focused payment services do not, in general, appear to be new payment services in their own right requiring to be listed as such in the PSD-Annex. They are neither specific nor new payment modalities but rather well-known forms of payment with specific new channels for access to funds (precisely for filling in a payment order, which in fact constitutes a communications channel). A payment transaction executed via an interbank network by a payer's order remains a credit transfer even when it has been initiated using either an open application tool (web browser) or a dedicated application on a phone or tablet. This point of view remains valid even when these basic payment services are enriched with add-on features, however only so long as the underlying mechanics remain unchanged.

While Internet and mobile payments remain specific channels for accessing funds for purposes of basic payment transactions (credit transfer, money remittance), rather than specific payment transactions or services in themselves, including them on the list would have an adverse impact on the technological neutrality of the list. Obviously, new payment services, born in the current era of ultraportable IT terminals with comprehensive connectivity, may develop. It is when the underly-

[180] Article 35 sec. 2 of the PSD.

ing mechanism has become significantly enriched to such an extent that it is no longer comparable with a credit transfer or a four-party scheme transfer, that reconsideration of the list of payment services in the PSD-Annex will be needed.

The need for immediate improvement is the definition of and rules applicable to payment instruments. A two-fold approach would be welcome that corresponds to a clear existing distinction (user-provider communication modalities for instituting basic transactions such as home or internet banking, as opposed to instruments triggering transactions usually subject to end-to-end processing, such as payment cards).

4.1.4 General views of stakeholders

A number of stakeholders shared detailed views on the list of payment services as well as on some payment services not listed. This was discussed above. However, the overall assessment that emerged from the research was that the existing list of payment services is in general adequate for most stakeholders.

Nearly half of the competent authorities which commented in general on the current scope of the PSD considered the list adequate. While a few deemed the scope to be too wide, the excess appears to be attributable to a description of payment services that is too general (and therefore allows for broad interpretation), instead of specific, redundant payment services. A large majority of credit institutions are also of the opinion that the PSD list of payment services is adequate. It appears that consumer associations are fairly satisfied with the content of the definitions, which may explain why only a small number of respondents (8 in total), mostly from larger Member States (France, UK, Germany), listed issues concerning the definition in their answers.

None of the complaint boards reported any complaints about the adequacy of the payment services list,[181] which is not really surprising seeing as complaint boards do not question the focus of legal rules when dealing with complaints.

The various services that respondents have suggested as needing to be included in the PSD are:

- e-money in different forms (general, virtual money, e-money convertors) – Three recommendations from competent authorities referring to e-money directly, four recommendations made by consumer associations referring to pre-paid cards (seen by the consumers as needing inclusion in the PSD as not yet covered)
- escrow services – two recommendations made by competent authorities
- account aggregation, crowd funding, payment acquiring, payment integration, bill payment, VAT refund services, hawala payments – each was mentioned once by competent authorities
- social networks, cheque collection, payment offered to non-payment accounts from a payment account, bill collections for a third party - each one recommended by either a credit institution or association of credit institutions
- transactions where the bank is a creditor, payment account, payment instrument – each had one recommendation from consumer associations.

[181] Answers to question 7 CBR.

One competent authority suggested complete revision of the payment services list in the PSD-Annex. In its view, the list is unnecessarily detailed and could be simplified in order better to reflect the underlying service and type of risk to which consumers are exposed, the respondent also stressing the need to make both the PSD and EMD II more 'future-proof'. According to that respondent, the activity of issuing e-money could easily be included in the new classification and since the authorisation standards for payment institutions and e-money institutions are similar, it would be unnecessary to retain separate authorisation processes. The following list of payment services was suggested to constitute the PSD-Annex:

i. operating payment accounts, including making payments to and from those accounts (this would include credit cards and prepaid cards);
ii. making payments that do not involve an account (e.g. money remittance);
iii. merchant acquiring; and
iv. payment initiation (overlay type) services.

The table below summarises the stakeholders' position regarding the list of payment services and draws some of the conclusions on the negative scope discussed in the next section.

Table 24: Stakeholders' views on the list of payment services			
Issue	Consumers	Competent Authorities	Providers
Payment services list : *adequate*	Majority (only 8 consumer associations report issues)	nearly 50%	nearly all
Services to be included in payment services list	**e-money / pre–paid** (4 associations)	- **e-money** (3 authorities) - **escrow** (2 authorities) - **other services** mentioned: account aggregation, crowd funding, payment integration, bill payment, VAT refund services, hawalla payments	**on – line, mobile, social payments** **other services mentioned**: bill collection for a third party, check collection
Inclusion of payment initiation services (overlay type)	**few**	**majority**	**20% no opinion** **25% ready to accept payment initiation services if at least a basic legal framework is provided for** fierce criticism of the general concept of the payment initiation services prevails
Exemptions	**excessive:** **mobile payments** (11 associations) **independent ATM** (9 associations) **on - line payments** (named "IT purchases" – 8 associations) **other services mentioned**: money exchange, travellers cheques, cash back, cheques	**nearly 70% faced issues** more clarity and precision urgently needed both within PSD and in the interpretation among the Member States **30% did not oppose** 9 authorities issued individual guidance or clearance for 300 times	**no issues with exemptions** **majority considers exempt industries "niches"** industries perceived to compete through exemptions: telecommunication, third party providers (overlay type), independent ATM deployers, bill payment providers, foreign exchange bureaus

Source: London Economics research

4.1.5 Conclusion

The list of payment services in the PSD-Annex defines primarily the scope of the payment industry subject to new rules. The other determinants are negative scope, both legs, EEA currency, Member States' options.

The overall picture that arises from the current analysis of the PSD's impact is that the list of payment services is basically adequate for the purpose of establishing, at Community level, a modern and coherent legal framework for payment services. Payment services listed in the PSD-Annex cover all existing major payment intermediary services, the functioning of which affects the overall efficiency of the internal market for payments.

A straightforward application of the PSD is hindered mostly by an insufficiently clear definition of payment services on the PSD-Annex list. Activities related to payment accounts, payment instruments and acquiring (both "acquisition" and "transaction processing") need substantial clarification. Consistency between the PSD-Annex, exemptions and other grey areas (payment activities "ancillary" and "on behalf of payee") needs to be ensured.

E-payments (online payments, mobile payments and other payment modalities, which are developing through the proliferation of widespread multipurpose IT terminals) were mostly perceived a separate category of payment services, which need to be explicitly included in the payment services list. However as long as they are specific channels for accessing funds for the purposes of regular payment transactions (credit transfer, money remittance), including specific payment transactions/services on the list would have an adverse impact on the technological neutrality of the list. The need for improvement in this area relates to the concept and rules on payment instruments. A two-pronged approach would be welcome, corresponding to a clear existing distinction (user-provider communication modalities to initiate basic transactions such as home or internet banking, as opposed to instruments triggering transactions subject to specific, usually end-to-end processing, such as payment cards).

Finally, the current state of play in the payments market requires the inclusion of payment initiation services (overlay type) regardless of whether the service provider enters into possession of funds. To exploit their substantial potential for innovation, a paradigm change is necessary, which seems possible. The key challenge is to substitute the current paradigm that only the user accesses its account via home banking with a new paradigm, whereby the user is only one of the persons able to access the account.

4.2 Negative scope

4.2.1 Introduction

15 types of payment services are exempt from the PSD.[182] The negative scope creates exceptions to the general rule that all products and services of a payment nature are subject to strict and harmonised transparency and execution rules. Given that payment intermediary services include numerous products and services of a different scale and nature, some are excluded from the scope of regulation in order to maintain their market presence. Being included in the licensing and supervisory regime typical for financial institutions might render certain services either useless (e.g. charity activities) or excessively regulated (e.g. transactions within a payment scheme).

The PSD itself gives reasons for negative scope only with respect to cash payments (as there is an existing internal market) and for paper cheques (where more time is needed for processing). But

[182] Direct cash payments, commercial agency, cash transportation, non-professional cash collection, cash back, money exchange, paper cheques, drafts, vouchers, postal money orders, transactions within a payment system, securities asset servicing, technical providers, instruments of limited acceptance, payments facilitated by network operators , payments among providers , intra-group payments, independent ATMs.

even here the PSD expects to provide a model for good practice[183]. The general idea of exemptions is that the PSD framework does not need to be fully comprehensive.[184] The unspoken assumption, which seems to have been one of the factors determining the exemption range, is the proportionality of the regulatory regime in relation to the risks presented by the services, and the significance of the payment service in the market both now and in the near future. The PSD attempts to strike a balance between straightforward and proportionate regulation.

According to the TIPIK report on implementation, most Member States implemented the negative scope of the PSD correctly. The following table provides an overview of exemptions adopted by Member States:

183 Recital 19 of the PSD.
184 Recital 6 of the PSD.

Table 25: Implementation of negative scope by Member States

Article 3 of the PSD	Austria	Belgium	Bulgaria	Cyprus	Czech Republic	Denmark	Estonia	Finland	France	Germany	Greece	Hungary	Ireland	Italy	Latvia	Lithuania	Luxembourg	Malta	Netherlands	Poland	Portugal	Romania	Slovakia	Slovenia	Spain	Sweden	United Kingdom
(a) direct cash payments;	+	+	+	+	+	+	+	c	-	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
(b) commercial agency;	+	+	+	+	+	+	+	+	-	+	+	f	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
(c) cash transportation;	+	+	+	+	+	+	+	+	-	+	+	g	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
(d) non - professional cash collection;	+	+	+	+	+	+	+	-	-	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
(e) cash back;	+	+	+	+	+	+	+	+	m	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
(f) money exchange;	+	+	+	+	+	+	+	-	m	e	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
(g) payment transactions based on any of the following documents drawn on the payment service provider with a view to placing funds at the disposal of the payee:	+	+	+	+	+	+	+	d	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	j	+
(i) Geneva paper cheques;	+	+	+	+	+	+	+	d	m	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
(ii) paper cheques similar to Geneva paper cheques;	+	+	+	+	+	+	+	d	m	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
(iii) Geneva paper-based drafts;	+	+	+	+	+	+	+	d	m	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
(iv) paper-based drafts similar to Geneva paper – based drafts;	+	+	+	+	+	+	+	d	m	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
(v) paper-based vouchers;	+	+	+	+	+	+	+	d	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
(vi) paper-based traveller's cheques;	+	+	+	+	+	+	+	d	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
(vii) paper-based postal money orders;	+	+	+	+	+	+	+	d	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
(h) transactions within a payment or securities settlement system;	+	+	+	+	+	+	+	+	m	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
(i) securities asset servicing;	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
(j) technical service providers;	+	+	+	+	+	a	+	+	m	+	+	+	+	+	h	+	+	+	+	+	+	+	+	+	+	+	+
(k) instruments of limited acceptance;	+	+	+	+	+	-	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
(l) payment facilitated by network operators;	+	+	+	+	+	+	+	l	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	k	+
(m) payment transactions carried out between payment service providers, their agents or branches for their own account;	+	+	+	+	+	+	+	l	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+

Table 25: Implementation of negative scope by Member States

Article 3 of the PSD	Austria	Belgium	Bulgaria	Cyprus	Czech Republic	Denmark	Estonia	Finland	France	Germany	Greece	Hungary	Ireland	Italy	Latvia	Lithuania	Luxembourg	Malta	Netherlands	Poland	Portugal	Romania	Slovakia	Slovenia	Spain	Sweden	United Kingdom
(n) payment transactions between a parent undertaking and its subsidiary;	+	+	+	+	+	b	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	i	+	+
(o) independent ATMs.	+	+	+	+	+	+	+	+	-	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+

Source: TIPIK Communication Agency, Directive 2007/64/EC Report on the transposition by the Member States

Explanations:

+ relevant provision has been implemented in national implementing measure and conforms with the PSD
- relevant provision has not been identified

a Denmark has not implemented a list of examples following the word '*including*'.

b No relevant reference to the phrase '*without any intermediary intervention by a payment service provider other than an undertaking belonging to the same group*' has been identified in Danish law.

c Wording of the Finnish provision seems to be confusing, as it refers to cases when the payee gives cash to the payer. Finnish law also does not refer to the words '*without any intermediary intervention*'.

d Finnish law conforms to the PSD; however it does not refer to every point included in Article 3(g) separately as the PSD does, since it refers to the content thereof in a more general manner.

e The wording of German law is more general than that of the PSD, as it does not provide a detailed description of cash transactions

f Commercial agents working under employment agreements are not excluded by Hungarian law from regulation

g Hungary has not implemented a list of examples following the word '*including*'.

h Latvian law is less specific than the PSD, as it has not implemented the full wording. It lacks the provision which implements the part commencing with the words '*which support the provision of payment services*'.

i Spanish law seems to contain a contradiction, as it provides that transactions should be carried out by intermediaries and, at the same time that transactions should not be carried out by any intermediary. In all likelihood, the contradiction is attributable to a typo.

j The introductory wording of Article 3(g) has not been transposed into Swedish law; however the underlying points have been implemented in a proper way.

k According to the Swedish Government's legal proposal for the law implementing the PSD, contents of Article 3(l) do not constitute payment services and Sweden has not implemented the mentioned article, in order to avoid superfluous regulation.

l According to the TIPIK Report, the Finnish law has not explicitly exempted the relevant services. However, the exemption may be inferred from the entirety of the provisions transposing the PSD.

m According to the TIPIK Report, the relevant service has not been explicitly exempted. However, the exemption may be inferred from the entirety of the legal acts applicable to the relevant service.

4.2.2 Instruments of limited acceptance

"Services based on instruments that can be used to acquire goods or services only in the premises used by the issuer or under a commercial agreement with the issuer either within a limited network of service providers or for a limited range of goods or services" are exempted from the scope of the PSD (Article 3(k)). The provider of those services does not need to obtain authorisation or registration, or to comply with a specific code of conduct.

The conditions for the exemption are:

- the service involves an instrument,

- the service is designed for paying for goods or services (not a general purpose payment service),
- the goods and services are purchased on the issuer's premises (used directly by the issuer or linked with the issuer in some way),
- the limited nature of either the service provider network (regardless of the range of goods or services) or of the range of goods and services for which the payment is affected. The PSD is not clear whether a limited range of goods available for payment in itself justifies the application of the exemption or whether the specific relationship between payee and instrument issuer is still needed. Recital 5 of EMD II, which copies the exemption for limited acceptance instruments appears to confirm that a limited scope of goods in itself justifies the exemption: "*This Directive should not apply to monetary value stored on specific pre-paid instruments, designed to address precise needs that can be used only in a limited way, because they allow the electronic money holder to purchase goods or services only in the premises of the electronic money issuer or within a limited network of service providers under direct commercial agreement with a professional issuer, or because they can be used only to acquire a limited range of goods or services*".

The fact that use of the instrument is restricted to either a specific payee community (e.g. university or railway membership cards) or to the consumers of certain goods or services (usually linked somehow, e.g. through a public subsidy system) provides inherent checks and balances to mitigate the risks against which the PSD protects the users of the payments market.[186] Key practical examples of limited acceptance instruments are store cards, petrol cards, membership cards, and public transport cards. Whilst not being limited by payment volumes, services of that kind cannot be considered of "limited acceptance" once the acceptance network constitutes stores of listed merchants or they otherwise develop into a general purpose instrument. This guidance is provided again only by recital 5 of EMD II (see above). The PSD recital 6 is silent about this.

The neutrality of the exemptions with regard to market and technical developments is ensured by the use of highly general wording which provides leeway for different interpretations of concepts such as "limited network", "limited range" and "commercial".

The broadness of any exemption has the potential to yield a substantial negative impact. Providers may attempt to align their products to match the exemption in order to avoid a regulatory burden. Given that the majority of providers offer mass services, it may be assumed that all providers referring to exemptions decide to do so in order to save the costs of PSD compliance. This is true not only for unauthorised providers (where the advantages are the most striking since there is no need to apply for and maintain authorisation) but also for authorised providers. For the latter, locating a product outside the PSD can reduce overall compliance costs (usually the costs of raising and maintaining own funds, costs of safeguarding funds, costs of providing required information, no need to keep the fees due from users in line with providers costs). This leaves customers unprotected and deprives regulatory authorities of their powers. At the same time, instruments and services offered under the exemption may be hard for consumers to distinguish from payment instruments subject to the PSD. Consumers with average financial capability are not sufficiently well informed to be able to recognise the specific status of the service.

[186] This exemption does not cover instruments issued by a seller of goods or services allowing only for the payment of the issuer's goods or services. The reason is that no payment intermediary participates and the advanced payment option is an ancillary feature which is exempt both in general and based on Article 1 sec. 2 PSD. The participation, in this case, of technical providers assisting an issuer (if any) does not require a specific exemption because such providers are exempt in Article 3 sec. j PSD.

The available evidence demonstrates that this negative impact of the exemption for limited acceptance instruments is occurring.

Firstly, the current approach to exempt limited acceptance services makes it difficult to apply regulatory powers. This concern is expressed directly by the competent authorities. In the course of the survey, five competent authorities asked for clarification of the meaning of *limited network* or *limited acceptance*, especially in cases where the service is provided through the Internet. In cross-border matters, one competent authority urged clarification of which competent authority is responsible for verifying whether a limited network which had been asserted was indeed a limited network when the service was provided on a cross-border basis by a payment institution.

Limited network instruments triggered the most reactions from credit institutions. In their view, the limited network services were sometimes so significant, widespread and powerful that they become perfect substitutes for other payment instruments under the PSD. At the same time they do not offer the same protection to customers, who frequently, as already mentioned, have little awareness of the difference between instruments subject to the PSD (e.g. general purpose payment cards) and limited acceptance payment instruments (e.g. store cards).

These results contradict the perception of the issue offered by consumers' organisations. In the course of the survey, store cards, which are the closest to limited acceptance instruments, came bottom of the list of what consumer representatives asked to be included in the scope of the PSD (see Figure 34 below). However, given the evidence of consumers' limited awareness of the PSD and the issues surrounding payment services more generally, these results should not be taken at face value and do not, in themselves, justify retention of the current provision.

The experience of industry experts is that a substantial number of providers made use of the flexibility available for the design of their current and future products and services in order for their services to fall under the exemption for limited acceptance instruments. In the UK cards market, many instruments exist which are able to take advantage of the limited acceptance exemptions, representing a market that may already be bigger than the market for cards issued under the PSD/EMD II.

The available evidence justifies consideration of whether improvement of the limited network exemption is needed. Contrary to other services exempt under the PSD (e.g. agency exemption), instruments benefiting from the limited acceptance exemption include no inherent, self-explanatory warnings that the service provided is not a payment service subject to the PSD. It remains an open question whether adequate wording is possible to make the relevant segment of the market exempt with no detriment to users while still maintaining a level playing-field. This has been highlighted by numerous competent authorities in the course of the survey. Having concluded that any wording adopted will either be too vague or too restrictive, the authorities' responses focused on an alternative approach. Two competent authorities suggest abandoning the descriptive approach in favour of exempting transactions under a very low threshold (EUR 5 was proposed, or the thresholds provided for in anti- money laundering legislation), regardless of the general purchasing capacity of the instrument or payment service.

The concerns expressed by these competent authorities, and their proposal, were entirely supported by industry experts. The proposal deserves careful consideration because it provides the desired level of legal certainty by leaving no room for continuing discussions on the scope for eligibility of limited network/range. From a user perspective, it provides a more intuitive and simple

dividing line between payment services (subject to all PSD protective measures) and "waived" payment services, where no specific user perspective governs the relationship with the provider.

Should, however, the limited network exemption be preserved, exempting payment mechanisms involving entities beyond the seller, the purchaser and their technical providers may be accepted under one clear condition. This condition is that those additional entities (issuers) participate only because of a specific relationship with the provider, which goes beyond the basic need to appoint a facilitator of payment services used by the instrument holder (e.g. instruments accepted in a network of subsidiaries or franchisees operating under the same brand). The current reference to premises is insufficient in that it may suggest that a lease relationship between the issuer and seller could be an adequate substitute for all the checks, balances and regulation inherent in other exempt services or PSD compliant services.

4.2.3 Payments by network operators

According to the PSD, "Payment transactions executed by means of any telecommunications, digital or IT device, where the goods or services purchased are delivered to and are to be used through a telecommunications, digital or IT device, provided that the telecommunication, digital or IT operator does not act only as an intermediary between the payment service user and the supplier of the goods and services", are exempt.

In principle, the PSD covers services offered by a network or technology operator, usually a telecommunications operator, to transfer funds from a payer to the supplier of goods and services, provided that the payer's consent (not necessarily the whole payment order) is communicated via a digital device. The operator whose services facilitate payment for digital goods and services where the operator adds intrinsic value (which means going beyond mere payment acting as an intermediary in payment services) is exempt. The operator does not need to obtain authorisation or registration, or to comply with a specific code of conduct.

The prerequisites for exemption include:

- the payment service is not designed as a general purpose transfer service but is designed as a means of paying for goods and services,
- the payment is made to an entity operating a digital network or technology,
- the payment transaction (in principle the whole payment transaction, not only consent) is executed by means of a digital IT device,
- goods or services purchased are deliverable and usable via a digital IT device (regardless of who produced them, regardless of who finally provides them and regardless of whether delivery takes place via the operator's network),
- the operator adds intrinsic value to the purchase which goes beyond merely acting as an intermediary in payment services.[190]

Key examples of exempt digital network payments are payments for ring tones, applications (apps), games, etc.

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[190] Neither a direct payment relationship nor a direct debtor-credit relationship between the user and third-party content producer or supplier may exist – see rec. 6 of Directive 2009/110/EC, which repeats the exemption for digital network payments.

As described above with regard to limited acceptance instruments, the pre-designated community (user–operator–content provider) provides internal checks and balances to mitigate the risks against which the PSD protects the market and users. The provider (network operator) has a specific relationship both with the sellers and the payers exceeding a pure relationship in which payment services alone are provided.

Whether the exemption for digital network payments is indispensable in order to preserve the proportionality approach is questionable. Limited acceptance instrument exemption seems to be adequate to cover the network operators' services (after minor corrections e.g. substituting the reference to premises with the link between the services to be paid for and the core operator's services provided to the user).

The broadness of the exemption has similar potential for substantial negative impact, as is the case with limited acceptance instruments. Any network operator may act as an intermediary in payment services for digital goods and services, not only mobile operators. It is true that, due to the existence of a few clear dividing lines (including the presence of a digital network operator), the exemption for payments by network operators is more predictable about its reach than that for payments by limited acceptance payment instruments. The requirement that the nature of the products and services has to be digital, still offers substantial scope for providers to align their products with the exemption in order to avoid regulation. Recent cases of the distribution of vouchers allowing access to real goods clearly demonstrate the uncertainty as to the actual reach of the exemption. As in the case of a limited acceptance instrument, customers are left unprotected and the regulatory authorities are deprived of their powers. At the same time, instruments and services offered under the exemption may be barely distinguishable for customers from payment instruments subject to the PSD. Those mass services include no inherent, self-explanatory warnings that the service provided is not a payment service subject to the PSD.

The relevance of the exemption is proportional to the size and relevance of the business of network operators.

Network operators, where mobile operators play a leading role, facilitate the transfer of value from hundreds of millions of subscribers. The terms and conditions of services provided by the telecommunications operators reveal that they tend to rely on the digital network payment exemption in order to remain outside the scope of the PSD. These are primarily low-value transactions, but their volume makes the overall numbers extremely high.[191]

Unlike limited acceptance instruments, payment services provided by operators appear to be clearly identified by consumers from among all intermediary services. Of all exempt areas, mobile phone payments were pointed to most frequently by consumer associations. Part of the "digital purchases", which the survey responses refer to, include payments through network operators. In fact, consumers perceive the services provided by network operators as posing the biggest risk of all exempt services. This may be the result of negative experience with premium rate services, where there has been abuse by content providers, or due to technical deficiencies in billing systems, which are very unpleasant for consumers to deal with.

[191] According to the "Study on pan-European market for premium rate services" (Cullen International SA and WIK Consult GmbH, 2005) the EU market for premium rate services in 2004 was estimated 4.5-6.5 billion euro. In 2012, in the UK alone, the market for those services is worth 1.48 billion euros (1.2 billion GBP based on information available under phonebrain.org.uk belonging to the UK premium rate services regulator PhonepayPlus).

The current conditions under which network payments may be exempted makes it difficult to supervise them efficiently. The evidence comes again directly from the competent authorities. In the course of the survey, the exemption for network payments was the second most criticised exemption by the competent authorities. Two explicitly considered the wording of the exemption to be too vague. One suggested abandoning the exemption completely. This conclusion supported by the fact that, among authorised payment service providers, less than ten telecommunications providers were identified. In view of the overall number of telecommunications and the diversity of the services they provide, it is difficult to believe that only such a small number of telecommunications services require authorisation.

The key risk of the network payments exemption is that it does not effectively prevent network operators from providing payments for real goods and services. Extending this exemption to cover general commerce is a threat to the level playing-field. The available evidence reveals that it mainly takes place through distribution of vouchers or tickets for physical goods and services. This evidence was again provided by the competent authorities. In the course of the survey, two competent authorities explicitly confirmed this phenomenon. Their approach was to refuse to acknowledge the network operators' exemption as including services where the services or goods, paid for by means of a network operator, are not digital (including tickets for an event or public transport) unless the operator resells the goods or services. One authority additionally required that the delivery of the use of goods or services be effected by the device managed by the operator.

The available evidence appears to be sufficient to justify improving the network payment exemption. As with limited acceptance instruments, it is doubtful whether adequate wording can be found to make the relevant segment of the market exempt with no detriment to users and the "level playing-field". Consideration should be given to the possible combination of the exemptions for limited acceptance instruments and network payments. A minimum alternative is to prevent extension of the exemption to cover payment for services of an offline nature (vouchers, ticketing).

4.2.4 Commercial agency

Exemption for payments through a commercial agency is defined in the PSD as: "Payment transactions from the payer to the payee through a commercial agent authorised to negotiate or conclude the sale or purchase of goods or services on behalf of the payer or the payee".

Payment transactions facilitated by an agent involved in negotiating the exchange of goods or services on behalf of either party are exempt. This includes the usual commercial agents, (i.e. commercial representatives, trade intermediaries, etc.) who act on behalf of one party (seller/provider or buyer). An agent does not need to obtain authorisation or registration. An agent can accept payments from customers (including prepayments for purchase contracts, final payments, etc.) with no need to comply with the PSD's conduct of business rules.

In payment transactions where a commercial agent acts as an intermediary in the usual scenario (services/goods provider (payee)–customer (payer) and commercial agent), the risks against which the PSD secures the market and users do not arise in principle.

Whether the specific exemption for commercial agents is indispensable is debateable in light of the approach to exempt ancillary services (see section 4.2.7).

As in the case of limited acceptance payment instruments, commercial providers may attempt to align their products to match the exemption in order to avoid a regulatory burden. The key enabler is the broad nature of the term "agent". In the absence of adequate qualifiers the exemption may be understood to extend to an agent who is:

- acting strictly on behalf of any of them (i.e. authorised formally to a conclude a contract), or
- acting for one or both parties.[192]

According to the industry experts, a number of attempts to refer to this exemption have been made by intermediaries accepting payments for the payee, mostly bill payment providers and acquirers. Based on the insufficient clarity of the PSD regarding a situation where the provider acts for both parties at the same time, providers facilitating the trade of goods or services between a payer and payee may seek to rely on the exemption for commercial agents to remain outside the PSD regime. The most straightforward example is that of an operator of any communication tools (platforms) facilitating the exchange of goods and services with a complementary facilitation of corresponding payments (online commerce platforms etc.).

This was partially confirmed by the competent authorities. The competent authorities that commented in detail on this issue did not seem to apply a restrictive approach to the exemption due to the absence of legal justification. However, they all stated that the scope of the agency exemption definitely needs clarification and limitation. A possible solution has been proposed by one competent authority which suggested an explicit restriction of the agency exemption to an agent of either the payer or the payee, but not of both.

Only one credit institution views the exemption for commercial agents as distorting the level playing-field. No reaction was available from users.

The available evidence justifies careful revision of the issue of commercial agency.

There is no need to exempt commercial agents who facilitate payment as a complementary feature. Such activities are exempt on the basis of these being ancillary activities.[193]

If for any reason the existing exemption for commercial agent is kept in the PSD, the exemption should be limited to businesses focused on actively soliciting customers (unlimited) on behalf of a limited number of principals.

Businesses providing mere communication and/or dealing hubs with no specific focus on any of the participants should not benefit from the exemption. The key prerequisite for benefiting from the exemption should be the active solicitation. The notion of active solicitation excludes unlimited number of principals and, as far as the transaction underlying the payment is concerned, secures a close relation with one of the parties to the transaction only, not with both.

[192] The PSD does not clarify whether the agent which acts for both parties benefits from the exemption. The wording of the exemption adopts the same „or" approach to multiple layers of the provision beyond „payer or the payee". „Or" seems to be used in the exemption in a broad sense including both alternatives taking place at the same time. Otherwise under the phrase „goods or services" the user of the exempt services would be precluded from purchasing / selling goods and services at the same time and with one and the same party. The broad interpretation is apparently adopted by competent authorities.

[193] See Article 1 sec. 2 PSD.

Making all intermediaries, which can demonstrate that they contribute something to the sale of goods or services (online commerce platforms, social platforms including exchange of value, escrow) exempt, would probably be going too far in light of the need to achieve customer protection, establish a level playing field (especially in the case of online payment services), and achieve market integration, efficiency and security.

4.2.5 Other exemptions

The majority of the PSD exemptions, other than those discussed above, are either positive or neutral in the payment services market. The exemptions discussed upon below require attention and careful consideration.

Direct cash payments

The exemption for direct cash payments is defined in the PSD as: “Payment transactions made exclusively in cash directly from the payer to the payee, without any intermediary intervention”.

Direct cash payments between payer and payee involve no intermediary and the need to exempt those activities is questionable. For direct obligation settlements, user protection measures against an intermediary’s default or unfair practices are irrelevant.

The ambiguity is amplified by the reference to cash. Whatever modality the payee and payer choose for settling financial obligations (cash or non-cash), there is no justification for considering their relationship from the PSD perspective.

The PSD would thus benefit from removal of this exemption. Accepting payments on behalf of the payee is discussed in section 4.2.6 below.

Cash transportation

Cash transportation is defined in the PSD as: “Professional physical transport of banknotes and coins, including their collection, processing and delivery”.

Cash handling services are exempt. The exemption is fully functional within its core scope of application (pure transport of cash). However, a possible negative impact is identified with respect to enriched cash processing services, where the cash is handled partially via a provider’s account. A number of providers previously processed cash via their own account (the cash collected from a customer’s premises is deposited in the processor’s bank account and transferred to the customer’s account or obtained from the customer to the processor’s account, withdrawn in cash and distributed onward to customer premises).

In the course of inter-governmental discussions, a consensus seems to prevail that those services are exempt as well.[194] In the available literature, the same approach is taken.[195]

This contradicts the evidence available from providers.

194 See the Summary Report of the Payments Committee Meeting of 09.10.2009, PC/011/09, sec. 8.3.

195 G. Schaefer in “Effects of the Payment Services Act on the Austrian Financial Market”, Financial Stability Report 19 – June 2010, pp. 93. They are considered exempt because they are an ancillary service to the main service (cash handling), which is not a payment service. Ancillary services are discussed in section 4.2.7.

Below we present a case study of the issues which have arisen with respect to cash transportation.

Based on the ECB decision of 16 September 2010 regarding the authenticity and fitness checking and recirculation of euro banknotes (ECB/2010/14), professional cash-in-transit (CIT) companies (also called cash handlers), credit institutions and even retailers themselves may operate within the cash recirculation process under certain technical conditions (certified banknote-handling machines). These cash handlers are allowed to re-circulate cash received by retailers after checking the authenticity and the fitness of use directly for retailers or ATMs without involving the local central bank. By shortening the total recirculation process, this decentralisation and privatisation of cash recycling would enhance the efficiency of the cash considerably.

At the same time, the German Central Bank (Deutsche Bundesbank) intended partly to withdraw from this business by closing down a large number of local branches (more than 50% have been closed in the last few years) and increasing the cash recycling fees. The German cash-in-transit firms (CIT), based on their previous activities, were best suited and willing to take over this task.

As a consequence of the implementation of the PSD into German law, a cash handler wishing to be involved in this new business of decentralised cash recycling requires authorisation as a payment institution (authorisation for payment services Nos. 1 and 6 of the PSD-Annex with the CIT depositing the collected cash on its own account at the German Bundesbank).

During the latter six months of 2010, the leading German cash handlers (such as Kötter, Brink´s, Unicorn, Securlog) either applied for an authorised payment institution licence or were preparing to file for a licence with the German Financial Supervisor (BaFin) as the competent authority. In preliminary talks with BaFin, it became clear that BaFin would insist on the establishment of a separate entity for this payment service based on Article 10 (5) of the PSD (implemented into the German law by ZAG § 8). BaFin interpreted the separation of payment services as a condition to be fulfilled for a licence request and not as a possible result of the audit process (Article 10 (5): "the competent authorities may require the establishment of a separate unity…").

Because the recirculation of cash is a technical extension of the transport of cash, the separation into two companies (one for transport, one for recirculation as payment service) could have significant practical consequences (separation of processing, reporting, transport-vehicles, employees etc.). This hurdle was the main reason for the withdrawal of all applications without waiting for a final decision from Bafin. Another reason was uncertainty around the attitude of retailers and whether they would switch from Bundesbank recirculation to CIT recirculation (independent of its authorised payment institution (API) status).

Some of the CITs operating internationally considered obtaining an API licence in another Member State, but the practical usage of the European passport within Germany as the host country seemed to be uncertain as a consequence of preliminary talks with BaFin.

The Bundesbank finally closed the accounts of CITs which had not been licensed as APIs by the end of April 2011 (end of the transition period). Until that date, CITs were able to offer retailers an earlier value-date for cash collected by using their accounts at the Bundesbank. In addition, the Bundesbank decided to postpone the planned closure of further bank branches in order to prevent making things worse for national cash recirculation at its branches.

CITs also considered the possibility of entry into the regulated payment services market as APIs in other European countries (such as France and Poland) but, as of now, no CIT appears to be licensed as an API (to the knowledge of the authors of this study).

The impact of the exemption as currently applied by the competent authorities is:

- Less efficiency - the current lack of cash recirculation by licensed CITs in several Member States is based on regulation by the PSD and leads to inefficiency in daily cash circulation (retailer – CIT - central bank – CIT – retailer), because for other players such as banks (without a traditional cash transport facility), cash recirculation is not a profitable business.
- Less competition - although the Bundesbank wanted to privatise this part of its business by selling it to non-banks, its strong market dominance remains. Cash recirculation is still a monopolistic market without market pricing. A competitive market would improve efficiency and probably lower cash handling costs for retailers.

The PSD would benefit from clarification that all cash handling services are exempt from its scope.

Money exchange

Exemption for money exchange is defined in the PSD as "Money exchange business, that is to say, cash-to-cash operations, where the funds are not held on a payment account".

Regular money exchange services based on cash, mainly bureaus de change, are exempt. The need to exclude traditional money exchange services from the PSD is obvious. In the absence of a payment intermediary in the usual sense, the risks inherent in payment services are minimal because of the nature of this business (transformation of value by one and the same entity as opposed to transfer of value between different entities).

Nevertheless, the exemption is still not neutral in its impact on the market. The wording of the exemption suggests that the exemption does not cover currency exchange services where the funds (ingoing or outgoing) "touch" a payment account, with no clarification as to which of the payment accounts (the provider's account or the customer's account) is relevant.

Pursuant to a contrary reasoning, any transactions where funds are held on any payment account fall within the scope of the PSD. A corresponding payment service is, however, difficult to identify in the PSD-Annex.

The uncertainty about the exact PSD approach to the money exchange business when a payment account is involved affects the clarity and coherence of the regulatory framework for payment services. This is clearly confirmed by the evidence from the competent authorities. While two competent authorities said that steps should be taken to ensure that money exchange with an account is not exempt, two competent authorities said that their approach was that money exchange businesses are exempt regardless of how the funds were made available to the provider (e.g. via payment card) or collected from the provider after exchange.

Money exchange services in general were identified by three consumer associations as requiring inclusion within the scope of the PSD (see table above). Pure money exchange however has little to do with payment services, which are at the core of the PSD. This must then be noted as a gen-

eral call for protection of consumers making use of currency exchange which exceeds the scope of the PSD.

The PSD would benefit from clarifying that money exchange services are exempt, regardless of how the funds are made available to the provider/user, unless the account is offered as a service to the user by the money exchange provider.

Technical providers

The PSD says that it does not apply to "services provided by technical service providers, which support the provision of payment services, without them entering at any time into possession of the funds to be transferred, including processing and storage of data, trust and privacy protection services, data and entity authentication, information technology (IT) and communication network provision, provision and maintenance of terminals and devices used for payment services".

This exemption covers technical services close to payment services where the provider does not take possession of the funds. In principle, the exemption gives rise to few objections. Nevertheless it is an important part of the discussion on the position of new emerging services. See sections 4.1 for further analysis.

Independent ATM withdrawals

According to the PSD, "Services by providers to withdraw cash by means of automated teller machines acting on behalf of one or more card issuers, which are not a party to the framework contract with the customer withdrawing money from a payment account, on condition that these providers do not conduct other payment services as listed in the Annex" are exempt.

Cash withdrawals from automated teller machines operated by pure ATM facilitators are in principle exempt. Exemption pertains to the operator itself and its relationship with the person withdrawing cash. The exemption does not extend to the relationship between the person and their provider of payment services enabling cash withdrawal. The detailed preconditions for exemption include:

- The ATM operator acts on behalf of a card issuer,
- The ATM operator is not a party to the framework contract with the person withdrawing cash from a payment account,
- The ATM operator does not provide other payment services.

The reason for exempting independent ATM withdrawals is to leave the regime for independent operators of stand-alone machines outside the scope of the PSD. These include ATMs in supermarkets and nightclubs which do not belong to a bank network.

The available evidence shows that the exemption may have a negative impact. The exemption has the potential to compromise the level playing-field because, in some Member States, independent ATM providers became major providers of cash withdrawal services (this includes the UK, Poland, Germany, Sweden). In the UK, for example, out of over 63,000 machines deployed at the end of

2010, over 27,000 were owned by independent ATM providers.[196] In the remaining Member States, the leading independent ATM providers operate thousands of ATMs.[197] This is also mentioned by stakeholders who report difficulties in understanding the rationale for the exemption.[198]

Exempt ATM services appear to be well identified by consumers among all intermediary services. Of all exempt areas, third-party ATMs were identified as the second most desired by consumer associations to be included in the PSD (see Figure 34 above). If combined with calls for inclusion of cash-back services within the scope of the PSD, cash withdrawals offered by third-party providers become top of the list of areas where change is sought by consumer associations. Survey responses from complaint boards[199], which handle individual real-life consumer complaints, do not however report negative consequences of these exemptions.[200]

The PSD would nevertheless benefit from exempting cash withdrawals by operators that are not issuers of the instrument used for the withdrawal (regardless of whether an ATM operator provides other payment services or not). This is because users are in the main unable to ascertain what payment service the ATM operator provides (if any).

4.2.6 Views of stakeholders

Beyond the detailed analysis above, the general approach of the PSD to exemptions needs to be reconsidered.

For users, the main concern about exemptions is that they cannot identify which payment services they can expect to be covered and which to fall outside the PSD. This undermines their confidence in access to adequate payment services and their willingness to use a payment service. This situation is caused mainly by the absence of a general, self-explanatory distinction between services covered and those exempted (like the "EEA territory/currency" keyword which explains the general scope of the PSD).

[196] According to UK Payments Administration Ltd, information available in January 2013 under ukpayments.org.uk /resources_publications/key_facts_and_figures/cash_machine_facts_and_figures/.

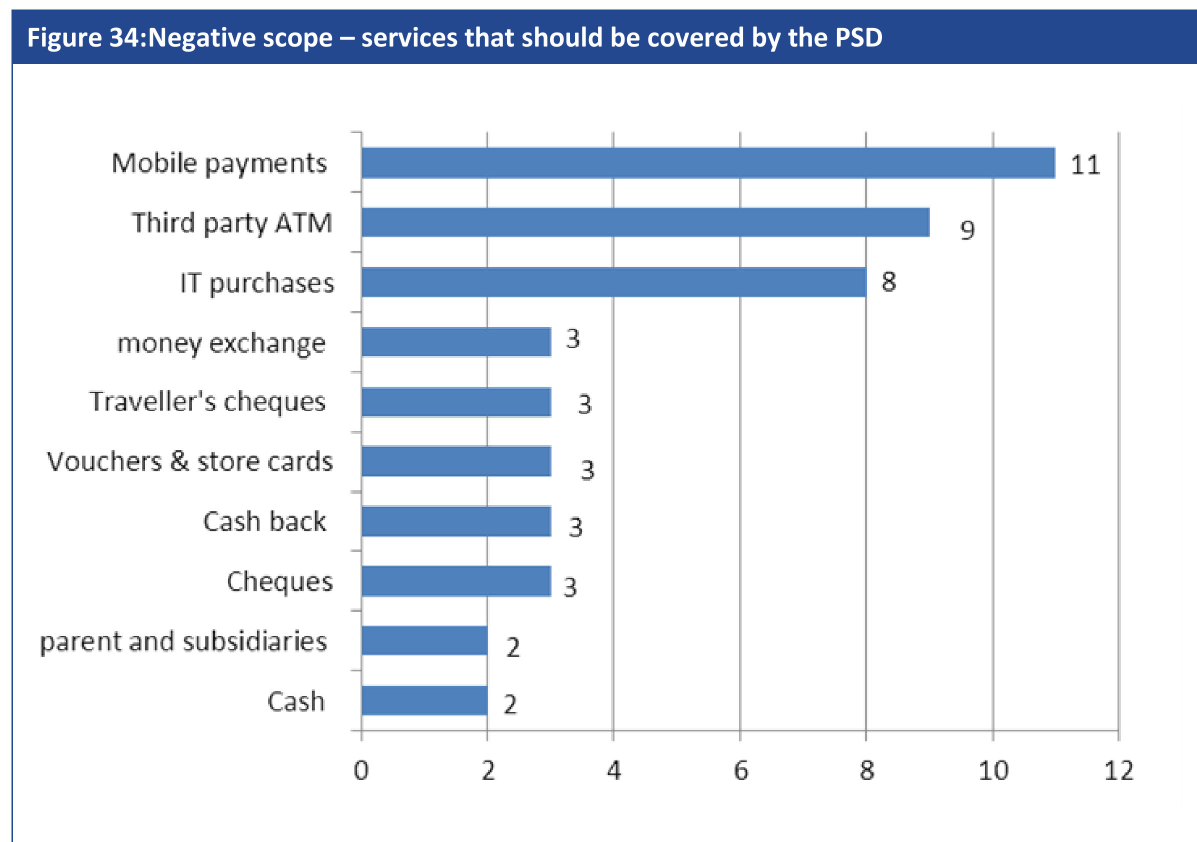
[197] According to Banking Automation Bulletin by RBR, October 2012, pp. 6.

[198] See question no. 14 of the "Your questions on PSD", a Question and Answers facility provided by the European Commission services on the website http://ec.europa.eu/internal_market/payments/framework/transposition_en.htm#question: "Why are Independent ATM Operators (IAOs) who solely provide basic cash withdrawal services (as opposed to any other payment service provider who provides ATM services next to other payment services) excluded from the provisions of the PSD, as this seems not to support the creation of a level playing field? In the reply the Commission Services clarified that "This derogation was decided by the co-legislators."

[199] Answers to question 6 CBR.

[200] For analysis of the impact that ATM fees have on the payment market, see section 3.1.

Figure 34:Negative scope – services that should be covered by the PSD



Note: Most cited out of 19 CA respondents in 16 Member States.
Source: *iff consumer survey*

This is perfectly illustrated by the fact that consumer associations have suggested including all the exempt services they recognise within the scope of the PSD (see Figure 34 above). Of the respondents who answered the relevant question on negative scope (24 consumer associations representing 20 Member States), 82% clearly supported the amendment of negative scope, and only the remaining 18% of respondents were broadly satisfied with it and did not see the need for revision of its scope. The voices against a change in the negative scope argued their position on different grounds for example, consumer associations either:

- reported no complaints or consumer problems about those services;
- thought priorities should lie elsewhere; or
- did not think that the inclusion of such activities would improve the protection of consumers.

It is, however beyond doubt, regardless of the consumer approach, that a range of exemptions is more or less indispensable. This is due to concerns about proportionality, even though finding a solution sometimes requires a casuistic approach. The key concern about the exemptions, however, across all stakeholders, is for clarity. Given that they intervene in the level playing-field, the application of public regulatory powers, the enforcement of consumer protection rules, and the certainty over their exact extent are all crucial to the coherence and efficiency of the regulatory framework.

The uncertainty of the extent of the exemptions is the main concern of the competent authorities. Only 7 of the 22 competent authorities who gave their views on this issue considered the list of exemptions to be sufficiently clear. The 15 competent authorities who objected to the current approach to exemptions suggested some possible ways of achieving greater clarity. Some of these general proposals are listed below:

- exemptions should be clarified by a document that may facilitate incorporation of exemptions into the legal framework of Member States
- exemptions should be formulated in a more precise way to avoid confusion about their meaning
- extensive harmonised guidance rules.

The negative impact of the current approach to exemptions is amplified by the fact that a number of Member States decided to amend the wording or the scope of exemptions. In the absence of harmonisation of the guidance (whether general or individual) by the competent authorities of Member States, a uniform approach to exemptions does not seem feasible. To counteract these developments, one competent authority pointed out that all Member States' interpretation ought to be the same in order to ensure a level playing-field.

The information provided by competent authorities on the guidance and/or clearance they issued relating to the exemptions since implementation of the PSD illustrates the scale of the problems faced by stakeholders. For example, individual guidance or clearance was issued over 300 times by just nine competent authorities. The number of guidance and clearances issued ranges from just one by one authority to over 100 by two other authorities. [201]

The idea of a uniform approach to guidance and clearance is however not sufficient in itself to counteract the current deficiencies of the regulatory framework. This is because many providers decide on the applicability of exemptions with no prior reference to the competent authorities. Providers may consider it more likely that they will avoid sanctions for misunderstanding exemptions (usually issued by bodies close to public prosecutors and not by competent authorities) rather than escape sanctions (or other regulatory measures) for misconduct as an authorised provider (i.e. when providing the same service under the PSD regime with prior authorisation). This confirms that the absolute priority is to ensure clarity as to exemptions in the PSD text itself.

A number of individual issues were raised by competent authorities. They relate to:

- payment transactions ancillary to the main activity (2 competent authorities);
- clarification of how to define a bill paying service (1 competent authority);
- whether financial firms, such as securities firms, offering payment services as an ancillary service should be exempted (1 competent authority);
- the status of cash on delivery services (1 competent authority);
- Internet stores (1 competent authority).

While in no way denying the relevance of the above considerations, it would appear that the exempt services are niche services. As stated above, the scale of the exempt services is almost im-

[201] These two competent authorities are the Financial Market Authority of Austria and the National Bank of Slovakia.

possible to measure. This is because the exemption is not aimed at a specific industry, service type, or provider type.

The picture of the relevance of the exempt services is partially given by providers. Of the 81 credit institutions and 9 credit institution associations that commented on this issue, 62 credit institutions and 5 associations of credit institutions explicitly considered providers of exempt services as “niche” providers. Most saw no negative impact of exemptions on competition among providers. All, apart from 4 credit institutions and 1 credit association, experienced no problems with exemptions in general. Only one institution complained that exemptions distorted the level playing-field, which was also amplified by divergent interpretation in different Member States. This was the case with commercial agents, technical service providers and limited acceptance instruments. An unjustified competitive advantage in providing exempt services was identified by only two credit institutions. The beneficiaries of the exemptions were identified as telecommunications providers, overlay service providers, independent ATM operators, bill payment service providers located in convenience stores, and foreign exchange bureaus.

None of the authorised payment institutions which responded to the survey questions reported that the exclusions from the PSD had a negative impact on either their organisation’s capacity to provide payment services in the EEA outside their home country, or on the efficiency of the European payment market.

4.2.7 Other activities exempt from the PSD

Under the PSD, two areas, not regulated explicitly in the PSD, are considered not to be covered by the PSD. These are the “ancillary activity” and “payment collection”.

Regular occupation or business activity

In principle, the PSD covers payment services listed in the PSD-Annex insofar as they are provided as a regular occupation or business activity.[202]

In a simple case, the payment activities of a provider are at the core of its activities (i.e. not “ancillary”). This does not preclude the provider from offering accompanying services to other services (e.g. payment intermediation by the operator of an e-commerce platform in payments between users of such platform). In such cases the activity must be deemed to be the provision of payment services subject to the PSD, regardless of the scale of the payment activities.

In a hypothetical opposite case, payment services “ancillary” to the core business are generally exempt. Under such a scenario, the volume of activity of the provider’s key business may be so high that the volume of the payment transactions “ancillary” to the core payment services activity is also very high (e.g. utility companies and their payment collection service). Those services nevertheless remain outside the scope of the PSD, and furthermore are not subject to customer protection measures. As in the case of limited acceptance instruments, customers have little means of recognising or ascertaining the “ancillary” nature of the service. It is therefore unlikely that they will be aware that the transaction is taking place outside the scope of the PSD when they use the service.

[202] Article 1.2 PSD.

The concerns over the approach to "ancillary" activities have confronted the competent authorities in practice. The view of one of them is that, under the PSD, the basis for considering services to be either ancillary or standard is not sufficiently clear to ensure that the PSD is uniformly applied across all Member States. Further points raised by the authorities were that attempts were made by money exchange service providers to avoid the PSD regime using the "ancillary" exemption.[203]

The PSD would benefit from a more precise definition of ancillary activities not covered by the PSD.

Payment collection

A possible mechanism for intermediating in fund transfer is where the intermediary provider receives the payment from the payer on behalf of a payee ("payment collection"). Less often, but not excluded, is a variation in which the intermediary pays the payee on behalf of the payer.

Under national legislation in force in the Member States, the activities on behalf of a third party are mostly attributable to that third party (as they have effect as if such activities were undertaken by the third party). A simple example is services usually provided by individuals collecting payments (usually in person) on behalf of one or a limited number of payees (e.g. public bodies or utility companies).

The PSD fails to clarify whether intermediation of that kind is within the scope of the PSD. This encourages stakeholders to develop various approaches to payment collection. The frequent outcome is that services of that kind are deemed exempt. The justification is usually sought in the exemption for commercial agents (see above). Following this reasoning, the exemption is then extended to the activities of any agent, regardless of whether the agent is involved in soliciting the customer to purchase (as is required in the exemption for commercial agents).

The position of those providers has been strengthened by the views expressed by the European Commission Services and a number of competent authorities. The Commission Services favour exempting bill paying services on the grounds of acting on behalf of the payee. A purposive interpretation has apparently been applied, albeit nominally, by means of a reference to the commercial agency exemption. The exact position of the Commission reads as follows: "....while some business models for bill paying services clearly falls within the PSD scope (e.g. when the service is being provided by the bill payment service provider to the customer wishing to pay his invoice and is effectively a simple money remittance service), other models operate on the basis of the invoice issuer as the principal, with the provider as his agent providing a means by which the bill payer can settle their bills. In this model, the invoice issuer provides the consumer with the option of settling the invoice by payment to the bill payment service provider. Such payment extinguishes the debt by virtue of the agency relationship between the bill payment service provider and the invoice issuer and is therefore equivalent to payment direct to the invoice issuer. In the event of the failure of the bill payment service provider, the risk lies with the invoice issuer, as the client. The bill

[203] This competent authority provides valuable insight into the potential scale of the uncertainty if the "ancillary" exemption is not clarified: "Please note that there are various issues surrounding this latter business, some of which still need to be investigated: Do we need to draw a line (and where) between a (permissible) currency exchange ancillary to a payment transaction and a payment transaction that in essence serves a currency exchange and which therefore would be subject to any national framework regulating currency exchange business? If such a line is drawn, would a payment institution need to put in place controls in order to prevent that its services are used for the latter kind of transactions?"

payer has no exposure, as the receipt issued by the bill payment service provider is evidence of the debt having been extinguished. This is not a payment service; because the invoice is settled as soon as the money is given to the bill payment service provider, there is no request for execution of a payment transaction and therefore no payment order being made. This service would therefore fall under the exemption in Article 3(b) of the Directive". [204]

The same approach has been expressed publicly[205] by a competent authority.

Following this reasoning, the bill payment providers might feel secure in remaining outside the PSD. However, in light of the universality of the rationale provided by the Commission Services and the competent authorities, providers of services other than bill payment services seem to have adopted the payment collection approach for mass services. Various competent authorities have reported cases of that kind in acquiring and even in payment services accepting payments for consumers (no further details provided). The competent authorities pointed out that it is too easy for providers to meet the preconditions for "payment collection". Users usually pay no attention to the terms and conditions of the service, where the provider adopts the capacity of agent and regulates the moment of extinction of the debt. Competent authorities commenting on payment collection either consider payment collection services to require authorisation under the PSD or urge an explicit clarification in the PSD that those services are indeed exempt.

Exempting payment collection with reference to agency exemption has an adverse impact on the coherence of the regulatory framework for payment services. Under the existing wording of the PSD exemptions, simple payment collection services are not explicitly exempt on the basis of the direct payment exemption[206]. This is because this Article excludes "any intermediary intervention" and focuses on cash. Nor are such services explicitly exempted by the commercial agency exemption.[207] The reason is that the collector participates neither in the negotiating nor the concluding of the contract (with the contract usually having been already successfully negotiated and concluded before the collector steps in).

In view of those considerations, exempting payment collection services must be seen as a purely purposive interpretation of the PSD. However, the rationale that apparently gave rise to the purposive interpretation (the payee takes up the risk of the provider's default) is not entirely in line with the PSD. The PSD aims at protecting payment service users in general and not payers only.

From the evidence available through the research, there does not appear to be any justification in extending the PSD to simple collecting services where an individual is commissioned by a payee to collect their debts in situations where this person is acting in a capacity equivalent to that of the creditor. This is, however, valid only with respect to services provided on a limited scale, usually by individuals collecting payment for one or a limited number of payees. Making available the payment collection exemption to providers developing an open, general-purpose service with no specific relation with a payee would justify entrusting the provider with the authority to cause the termination of the payer's obligation to pay (which can be evidenced e.g. by the fact that it is the merchant that gives the security to the provider, not the opposite). This should be disruptive for the creation of a level playing-field.

[204] Answer to question no. 414 of the "Your questions on PSD", a Question and Answers facility provided by the European Commission services on the website http://ec.europa.eu/internal_market/payments/framework/transposition_en.htm#question.

[205] See e.g. Question 25 in UK FSA's Perimeter Guidance (Payment Services Scope) Instrument 2009.

[206] Article 3a of the PSD.

[207] Article 3b of the PSD.

Furthermore, accepting a broad approach to payment collection would go against the basic rationale for any kind of authorisation. The need for authorisation would then in fact depend solely upon the provider's success in persuading the user to accept the mechanism, whereby the provider acts on behalf of the user with debts settled when the provider obtains the funds.

4.2.8 Conclusion

A large number of activities have been exempted by the PSD. The exemptions are mostly indispensable for reasons of proportionality. Otherwise, providers would either need to cease to provide services or would provide them on less favourable terms.

The exemptions for instruments of limited acceptance, services of network operators, commercial agents are seen as going beyond the proportionality principle. They are susceptible to being used outside their proper purpose. The neutral wording adopted in the exemptions allowing for technical and market developments give providers the opportunity to design products to meet the exemptions through minor, superficial external limitations. Clarifying the exemptions is one of the most urgent tasks of PSD revision.

Activities ancillary to payment services, as well as services accepting payments on behalf of users, also need to be clarified and limited to avoid circumvention of the PSD.

4.3 One-leg transactions

4.3.1 Introduction

The core PSD rules (transparency of conditions, disclosure requirements and conduct of business rules in Titles III and IV) only apply to the so-called "two-leg" or "both-leg" transactions.

The two-leg approach means that both the payer's and the payee's payment service provider (e.g. the banks of the payer and the payee, the issuer of the card and merchant's acquirer) are located in the European Union irrespective of the domicile and origin of the payer or payee and of the number and domicile of any intermediaries.

One-leg transactions are outside the scope of the PSD except with regard to the principles of value dating and availability of funds. However, Member States may extend the application of provisions of the Directive where either the payer's payment service provider or the payee's payment service provider is located outside the Community.

With respect to currency, the core PSD provisions cover only payment transactions where a payment order is denominated in the currency of a Member State.

Following the decision of the EEA Joint Committee[208], the PSD has been inserted into Annex IX of the EEA Agreement. The effect of this decision is that, under the PSD, the "community" needs to be considered to include all EEA member states. "Currency of a Member State" includes the currency of any EEA member state. As a result, payment transactions denominated in Swiss Francs are subject to the PSD. This is because Liechtenstein is part of the EEA. However, note that all

[208] Decision of the EEA Joint Committee No 114/2008 of 7 November 2008 amending Annex IX (Financial services) and Annex XIX (Consumer protection) to the EEA Agreement.

transactions within the EEA, including to or from Liechtenstein, are included, while transactions to and from Switzerland are excluded.[209]

The limited scope of the PSD concerning one-leg transactions impacts on all users regardless of their status. However, the limited application of the PSD primarily affects consumers, because the PSD's most customer protective measures, such as transparency and conduct of business (including obligatory information, limitations of charges, payment order revocation, refund right, liability for unauthorised transactions or non-executed or defectively executed transactions), do not apply to one-leg transactions.

Further, the key PSD measures (execution times, the no-deductions principle, fees and charges distribution, and transaction authorisation which cannot be derogated vis-à-vis non-consumers either) are also not applicable when the transaction does not fall within the scope of the PSD. In view of the flexibility given to Member States by the PSD in this respect, the application of the PSD in the Member States differs with regard to the application of the one-/two-leg perspective, and with regard to coverage of currencies and EU/EEA territory. The table (Table25) below gives an overview of those differences.

Table 26: Approach to two-leg and one-leg transactions in the EU Member States

Member State	two-leg rule (understood as:)		one-leg rule	comment to one/two leg	currency scope	comments to currency
	EU	EEA				
Austria			+	National approach, i.e. either PSP or payment service user is located in Austria.	all	Provisions concerning value date are applicable only to EEA currencies.
Belgium		+	partially covered	Provisions concerning value date and prohibited clauses are applicable when either payer's or payee's PSP is located in Belgium. Provisions concerning liability for non-authorised payments are applicable if the payer's PSP is located in Belgium.	EEA	Provisions concerning liability for non-authorised payments are applicable to all currencies.
Bulgaria	+			Either both payee's and payer's PSPs or the sole PSP are/is located in the EU.	not enacted	Legislation does not directly mention the application to certain currencies, however, the application to the currencies of the EU/EEA States can be inferred.
Cyprus	+		partially cov-	A list of provisions applicable in one-leg approach is provided in National Implement-	EU	A list of provisions applicable to all currencies is provided in the National Implementing Measure e.g. derogation from informa-

[209] Answer to question no. 275 of the "Your questions on PSD", a Question and Answers facility provided by the European Commission services on the website. http://ec.europa.eu/internal_market/payments/framework/transposition_en.htm#question, Question 275 FAQ: "As far as the scope of application of the PSD with regard to transfers in CHF, see the answers to Questions 149 and 193. Once the Directive has been incorporated into the EEA-Agreement, the notion 'currency of a Member State outside the euro area' used in Article 2(2) shall be read as including the currencies of the three EEA-EFTA States, counting therefore CHF as well".

Table 26: Approach to two-leg and one-leg transactions in the EU Member States

Member State	two-leg rule (understood as:) EU	EEA	one-leg rule	comment to one/two leg	currency scope	comments to currency
			ered	ing Measure e.g. derogation from information requirements for low-value payment instruments, consent and withdrawal thereof for a payment transaction.		tion requirements for low-value payment instruments, consent and withdrawal thereof for a payment transaction.
Czech Republic			+	There is a possibility of contractual derogation from some of the provisions in respect of one-leg transactions, e.g. PSP's liability for unauthorised payment transactions, execution time and value date.	all	There is a possibility of contractual derogation from some of the provisions in respect of transactions in currency of non-EU State, e.g. PSP's liability for unauthorised payment transactions, execution time and value date.
Denmark		+	partially covered	A broad list of provisions applicable in one-leg approach is provided in National Implementing Measure, e.g. PSP's liability for unauthorised payment transactions, execution time and value date. As a consequence, the one-leg approach seems to prevail.	EU	According to TIPIK's comments, the relevant provisions cover currencies of EEA States as well, however it does not stem from the wording of the National Implementing Measure's translation. A list of provisions applicable to all currencies is provided in the National Implementing Measure e.g. PSP's liability for unauthorised payment transactions, execution time and value date.
Estonia			+	National approach, i.e. provisions of the National Implementing Measure are applicable to entities established and acting in Estonia as well as to Estonian activities of foreign entities unless foreign law provides otherwise.	not enacted	It is not specified to which currencies National Implementing Measure is applicable, thus it should apply to all currencies.
Finland		add on	+	A list of provisions applicable in the one-leg approach is provided in National Implementing Measure, e.g. value date, liability of respectively the payer and the payee for an unexecuted or incorrectly executed payment order.	all	A list of provisions applicable only to EEA currencies is provided in the National Implementing Measure, e.g. value date, liability of respectively the payer and the payee for an unexecuted or incorrectly executed payment order.
France		+			EU	The provisions apply if the PSPs of the payee and the payer are located in the territory of metropolitan France, in overseas departments, St. Barthélémy, Saint-Martin, Mayotte and Saint Pierre and Miquelon and if the transaction is conducted in euros as well as in the territory of metropolitan France, in overseas departments, Saint Martin r St. Barthélémy, the other on the territory of

Table 26: Approach to two-leg and one-leg transactions in the EU Member States

Member State	two-leg rule (understood as:)		one-leg rule	comment to one/two leg	currency scope	comments to currency
	EU	EEA				
						metropolitan France, in overseas departments, St. Martin, St. Barthélémy or in another Member State of the European Community or in another State Party to the Agreement on the European Economic Area, and if the transaction is conducted in euros or the currency of a Member State which is not part of the euro area.
Germany			+	Minister of Finance is empowered to decide that the rules are applicable to PSPs who are located outside the EEA. The scope of PSP's duty to inform users according to relevant provisions is limited to payment services which are provided within the EEA.	all	The scope of PSP's duty to inform users under the relevant provisions is limited to payment services which are provided in currency of one of EEA states.
Greece	+				EU	
Hungary		add on	+	Provisions concerning PSP's duty to inform users under the relevant provisions, and commissions, fees and other payment obligations charged by the PSP are applicable to payment transactions within the EEA.	all	Provisions concerning PSP's duty to inform users according to relevant provisions and commissions, fees and other payment obligations charged by the PSP are applicable to payment transactions in a currency of one of EEA states.
Ireland	+				EU	
Italy	+				EU	
Latvia		+	partially covered	According to the Latvian Financial and Capital Market Commission, the exception refers to one-leg transactions, where the payer's PSP is located in the EEA and the payee is located outside the EEA.	EEA	
Lithuania		add on	+	Law on Payments, Art. 3(1) *"This Law shall apply to payment transactions executed within the Republic of Lithuania, and to and from other Member States and foreign states."* Foreign state means the	not enacted	The National Implementing Measure does not limit the scope of applicability to particular currencies, so it is considered to be a reference to all currencies.

Table 26: Approach to two-leg and one-leg transactions in the EU Member States

Member State	two-leg rule (understood as:)		one-leg rule	comment to one/two leg	currency scope	comments to currency
	EU	EEA				
				state outside the EU and EEA.		
Luxem-bourg		+			EEA	
Malta		add on	+	Application of some provisions is excluded in respect of one-leg transactions e.g. currency conversion services, applicable charges, derogation for low-value payment instruments and electronic money.	EU	The Maltese implementing measure refers only to "currency of a Member State", whereas e.g. in Para. 2(2)d it differentiates between "Member State" and "EEA State".
Nether-lands	par-tially cov-ered	+		Art. 4:22 which implements Title IV of PSD (Rights and Obligations in Relation to the Provision and Use of Payment Services) is applicable only when both payer's and payee's PSPs or the sole PSP is located in the Community.	EEA	
Poland		+			EEA	
Portugal	+				EU	
Romania	+				EU	
Slovakia		+			all	Application of provisions implementing Titles III and IV of PSD (rights and duties of payment services provision, commercial terms and conditions and information provision on payment services and dispute resolution through the permanent arbitration court) is limited to payment transactions in currencies of EEA States.
Slovenia		+			EEA	
Spain	+			Credit institutions from Spain that responded the survey completed within the study report that Spain has extended PSD implementation to one-leg transactions.	not enacted	Legislation does not directly mention the application to certain currencies, however, the application to the currencies of the EU/EEA States can be inferred.
Sweden		+			EEA	
United Kingdom		+			EEA	

Notes: EU: Direct reference only to euro and currencies of Member States; EEA: Direct reference to Euro, currencies of Member States and EEA States; All: Applicable to the currencies of non EEA State's currencies as well; Not enacted: No direct reference to the application of National Implementing Measure to particular currencies
Source: TIPIK Report

14 Member States apply the PSD rules to "two-leg" transactions with no exceptions. The remaining Member States either primarily apply the "two-leg" approach with some provisions extended to one-leg transactions or apply primarily the "one-leg" approach with some provisions applicable to "two-leg" transactions only.

In the latter, derogations from "one-leg" in favour of the "two-leg" typically involves execution time, value date, liability for unauthorised payments transactions and information requirements.

Among Member States which adopted primarily the "one-leg" approach, only Austria did not provide exceptions. In the remaining Member States, the derogation from the "one-leg" principle in favour of "two-leg" transactions is provided for in the national legislation, except in the case of the Czech Republic where the derogation can be covered in the contract.

Member States which extended the application of the PSD to "one-leg" transactions tend to apply the PSD to currencies of non-EU/EEA states as well as to EU/EEA currencies. A number of exceptions from the PSD rules apply to transactions in the currency of non-EU/EEA states, and those exceptions tend to cover the same issues as in the case of "one-leg" transactions.

The one-leg approach adopted by some Member States corresponds partially to recent developments in the laws of the United States on electronic remittance transactions regulated by the recently amended Electronic Funds Transfer Act.[210] The act applies to remittance transactions sent to a person or company in a foreign country. Key common areas are the extensive information requirements and the refund rights. The key difference is the limited scope of the US approach, which is confined to consumers and transfers exceeding USD 15 and where the provider's scale of business exceeds 100 transactions per year.

4.3.2 Impact of the two-leg approach

The scope of the application of the PSD has in general been limited (i.e. regardless of the specific exemptions) by territory and currency. Those limitations reflect the different levels of efficiency of payment mechanisms within and outside the EEA at the time the PSD was passed. The limitation of the scope of the PSD apparently made it easier to enact the PSD, bringing much advantage to customers. The downside is the inherent fragmentation of payment offerings. Effort is needed on the part of users to understand their different situations (more protection for payment transactions covered by the PSD and less for remaining transactions along with the difference between payment transactions and framework contracts) and the dividing line between PSD and non-PSD transactions. Accordingly, providers need to maintain adequate parallel mechanisms for the different payment transaction categories. Such an approach may be the source of a potential negative impact, particularly when the disadvantages exceed the advantages of selectively improved conditions.

[210] The New subsection B to Regulation E of the Electronic Funds Transfer Act amended under Section 1073 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Available evidence on the impact of the two-leg approach on users does not provide a clear-cut picture.

It is beyond doubt that the selective approach of the PSD is of crucial importance to consumers given the position of remittances outside the EEA undertaken by consumers. Indeed, the latest Eurostat[211] data show that, in the EU-27 in 2011, remittances sent by migrants to their country of origin amounted to 39.1 billion euros. Of these 39.1 billion euros, 28.5 billion euros were sent to outside the EU-27, while remittances sent within the EU-27 stood at 10.7 billion euros.

Surprisingly, despite the apparent high relevance of one-leg transactions in consumers' life and the substantial impact of the two-leg principle, consumer associations in nearly half of the Member States did not give an opinion on this issue, which can be interpreted either as a lack of concern or as a problem of understanding.[212]

Those findings give rise to the assumption that consumers are in fact not aware of or do not understand the idea of the selective PSD approach. Further, complaints about this issue were rare. The Spanish complaint board mentioned problems with charges in relation to one-leg transactions and the Office of Fair Trading has investigated ATM transactions in foreign currencies.[213] Complaint boards point out the limited scope of EU law in these cases. The complaint boards seem to be preoccupied to a large extent with explaining the limited scope of Regulation 924/2009 and the PSD.

A valuable contribution to explaining why the confusion about the scope of the PSD among consumers is so widespread was provided by one competent authority. According to this authority, the message to consumers about any new protective regulatory measures is understood as saying that a certain industry is in general regulated. In the PSD's case, the apparent but incorrect perception is that all services, transactions and providers within Member States are regulated and supervised.

The difficulties consumers face in understanding the PSD's selective scope is confirmed by the experience of providers. Almost half of credit institutions and their associations (of the 51 credit institutions and 8 associations of credit institutions that commented on this point) are of the view that customers are not aware that the PSD is limited to two-leg transactions only.[214]

This means that the potential of the PSD to deliver a harmonised internal market is substantially blocked by limited awareness among customers. As a result, consumers do not steer the providers towards full PSD compliance and – more importantly – towards competing through voluntarily extending the PSD standards to non-EEA transactions. Because the European Union is not sufficiently equipped ensure adequate education of consumers on those aspects, the legislation would need to provide either a uniform standard or a dividing line between transactions in and outside the PSD which is as simple and straightforward as possible.

Detailed assessment of the impact on consumers of the selective PSD application was provided by consumer associations. Where consumer associations expressed an opinion, 15 consumer associa-

211 See Eurostat (2012).
212 Answers to questions 4 and 5 CAQL and to questions 3 and 4 CAQS. For further details, see also Annex 2.4 and Annex 2.5. Of 33 responses received from consumer associations representing 27 Member States, the consumer associations from 7 Member States gave an inconclusive answer as to their position regarding one – leg transactions and consumer associations from another 5 Member States did not express an opinion on the issue.
213 See answers to question 3 and 4 CBR. For further details, see also Annex 3.8.5, Box 24 and Box 25.
214 Answer to question 7.1 CIQ.

tions in 13 Member States showed strong support for the inclusion of one-leg transactions within the scope of the PSD.[215] By contrast, only two consumer associations in 2 Member States opposed the inclusion of one-leg transactions.

The rationale for this support for the inclusion of one-leg transactions seems very much anchored in a desire to offer or strengthen protection for consumers who have a need to transact outside of the borders of the EU.

For many, it made little sense to offer two regimes of consumer protection. As the UK respondent Which? (UK) puts it: 'There is no reason why EU consumers sending remittances outside of the EU should enjoy less protection than those sending remittances within the EU. Consumers using remittances are often vulnerable (e.g. immigrants sending money to support families at home) and should be protected'. This is a point of view also expressed by EKPIZO (EL), which noted in particular the same need for information for consumers entering into cross-border transactions beyond the confines of the EU as for consumers who deal within the EU. For the Polish Consumer Federation, the current state of play was an 'unjustified limitation of consumer protection'. Even in countries where the national legislation had already extended the scope to include one-leg transactions, consumer associations supported an extension of the scope of the PSD to benefit all consumers. This was for example the case in Germany, where vzbv explained: 'if someone is doing business with consumers in the EU, they should be made to observe EU standards'.

Generally, support for the inclusion of one-leg transactions within the scope of the PSD revolved around concerns for the protection of consumers using remittance services, but a number of general benefits applicable to all payment types were identified by respondents:

- On information and transparency:
  - Protection against inadequate information or wrong information being provided to consumers;
  - Providing fee transparency;
  - Providing consumers with the ability to compare services through increased information;
- On fees and charges:
  - Avoiding problems with fees and in particular high charges;
- On execution:
  - Protection against wrongful release of payments to third parties or against lost payments/remittances;
  - Protecting against inadequate execution;
  - Imposing some liability on providers;
  - Better safety through the inclusion of a right to refund;
- Fraud prevention and detection;
- Enabling consumers to gain access to complaint bodies within the scope of the PSD.

Overall, it seemed clear from the responses favouring an extension of the scope to one-leg transactions that respondents would welcome the application of both Title III and Title IV of the PSD to

[215] Answers to question 4 CAQL and to question 3 CAQS. For further details, see also Annex 2.3.

one-leg transactions and that such an extension would need to cover all provisions including those on execution times.

Indeed, this was a point stressed by a number of respondents. In Germany, for example, the provisions relating to the PSD, Articles 54 to 61, Articles 64 to 66 and Articles 74 to 78 have already been made applicable (in principle) to one-leg transactions, but with the possibility for a PSP to vary this by contractual agreement with its PSU (Payment service user).

However, the consumer association (vzbv) showed support for an extension of this coverage to one-leg transactions in areas where protection is not yet available. Indeed, the respondent mentioned execution times (covered by Articles 68 to 73 of the PSD) that currently do not apply to one-leg transactions and expressed the wish to see execution time rules also apply to one-leg transactions. Similarly, in Spain 'the law has generally applied Titles III and IV of the PSD to one-leg transactions' (with some exceptions concerning execution times and value date); the respondent expressed strong support for coverage of one-leg transactions in order to avoid non-payments and delays in paying suppliers.

The protection consumers receive by virtue of the application of Titles III and IV of the PSD does not apply to transactions made in a currency other than the euro or the currency of a Member States outside the euro area (the UK for example). As a result, European consumers who use other currencies for payment transactions remain unprotected.

The majority of consumer representatives (16 consumer associations representing 14 Member States) supported the inclusion of all currencies within the scope of the PSD.[216]

The opponents to an extension in scope seemed mostly motivated by 'actual need' rather than opposing the extension of applicability on grounds of principle. Indeed, the Association of Slovak Consumers for example, explained that most transactions are performed in euros and that the use of other currencies was 'not a big deal', implying that the status quo was sufficient for Slovak consumers. Similarly, in Luxembourg, it seems that very few consumers encountered cross-border problems concerning payments in currencies other than the Euro. Finally, the response from Ugandi opposed the extension on the grounds that the respondent did not see advantages in extending the scope to using local currencies.

Conversely, the support of proponents of an extension in scope was based primarily on a need for consistency and stronger protection for consumers.

A number of respondents did indeed show support for extension as they felt that it currently makes little sense for some consumers to be protected under the current regime when others are not, depending merely on the currency they execute their transactions in. 'From the point of view of the consumer it should not change anything and consumers ought to enjoy the same level of protection whether they make payments in Euros, CZK or a foreign currency' according to SOS (CZ). This is a position that was echoed by a number of other respondents.

[216] Answers to question 5 CAQL and to question 4 CAQS. For further details, see also Annex 2.4. Respondents were asked if the scope of the Directive should be extended to other currencies. Data from 33 questionnaires representing 27 Member States was analysed. 7 respondents abstained on this question and 5 respondents expressed no opinion. The currency question was answered positively by 21 consumer associations representing 1914 Member States. 2 respondents from different Member States were uncertain and 3 Respondents representing 3 Member States did not see a need to extend protection.

The support may partly be explained by the fact that this is an area where consumer associations report being aware of problems in particular concerning international transfers as well as charges concerning foreign exchange transactions. It is thus an area where problems are apparent and adequate solutions need to be found.

The consumer associations surveyed identified a number of benefits associated with the inclusion of other currencies within the scope of the PSD[217]:

- consistency and coherence in the legal regime applicable to consumers
- it would enable consumers to benefit from the protection offered by Title III and Title IV of the Directive and in particular:
  - it would enable consumers to benefit from rules on transparency and
  - to benefit from refund rights
- it would encourage competition by:
  - driving a reduction in transaction costs
  - enabling better comparison of services and
  - giving consumers more confidence to explore the market and encouraging cross-border transactions.

The fragmented application of the PSD has no specific impact on providers. The main challenge and focus of effort was in upgrading providers' conduct of business rules to PSD standards for EEA transactions. This was clearly confirmed by the results of our survey. Only 13 credit institutions and 1 association of credit institutions noted the internal resource implications of the need to maintain two processes, including value date and charges (see below for more detailed discussion).[218] Some customer issues focusing on understanding the dividing line between EEA and non-EEA transactions, fees, execution time and value date were noted by a few respondents.

Evidence from providers, however, demonstrates something more important. To obtain an overview of the impact of two coexisting payment standards, providers were asked whether they use separate or common IT tools, processes and procedures for EEA versus non-EEA transactions. The survey revealed that the coexistence of two payment service levels occurs mostly in the area of rights and obligations, not in the actual processing of transactions.

Of the 56 credit institutions and 4 associations of credit institutions which commented on this issue, only 14 credit institutions and 2 associations of credit institutions reported maintaining different IT systems or subsystems for PSD and for non-PSD transactions, and 24 credit institutions and 2 associations of credit institutions reported maintaining different procedures for those two categories of transactions. The legitimate explanation is that providers use basically the same systems and same core procedures for PSD and non-PSD transactions. At the same time, with the exception of 1 credit institution and 1 association of credit institutions, all of the respondents reported that they do not compute the costs of maintaining different IT tools.

[217] Answers to question 5 CAQL and to question 4 CAQS. For further details, see also Annex 2.4.
[218] Answers to question 7.1 CIQ.

Despite the apparent high level of internal harmonisation governing providers' processing of EEA and non-EEA transactions, providers are very reluctant to apply the PSD to one-leg transactions in any currency. This is clearly confirmed by the surveys.[219]

Among the credit institutions that responded to the survey, only a few voluntarily apply the PSD regime to one-leg transactions and/or transactions in a currency from outside the EEA in the absence of a legal obligation to do so, even if there might be potential advantages in terms of competitive advantage, customer satisfaction, etc. The general application of PSD standards to all payment transactions is reported by 9 credit institutions and 1 association of the 55 credit institutions and 5 associations that commented on this issue. Two credit institutions and one association reported a partial extension of the PSD to one-leg cards and/or commercial payments and/or availability of funds.

Even fewer credit institutions reported having extended PSD standards voluntarily to all currencies. Only 7 credit institutions out of 55 that commented on this issue declared having done so, 2 others reported a partial extension of the PSD to all currencies, for cards and commercial payments respectively. With the exception of one credit institution, all the institutions which extended the PSD regime to all currencies did the same to one-leg transactions.

The reasons given for extension of the scope of the PSD include:

- benefits of implementing and maintaining a uniform IT system,
- expectation of better understanding by customers,
- possible operational efficiency,
- opportunity to differentiate from competitors,
- expected lower costs of PSD implementation.

With regard to cards, one provider explicitly mentioned the fact that it would be too complicated to operate a parallel set of rules and operations.

When users perceive that completely different standards apply to one-leg compared with two-leg transactions, significant harmonisation of providers' internal measures for handling will be required. This includes execution time (both for outgoing and incoming transactions – decisive for float earnings), charges, liability, and handling customer complaints. Those measures, although relatively limited, are apparently decisive for payment profitability and efficiency from a providers' perspective, as well as for the user's perception of a fragmented application of the PSD on the other.

The call by consumer associations for the application of the PSD to be extended to non-EEA transactions in any currency discussed above was not taken up by other stakeholders.

Only one competent authority[220] explicitly supported extending the PSD to one-leg transactions and all currencies. The minimum area of extension is transparency of conditions and information requirements, liability for unauthorised transactions, and obligations of providers and users in relation to payment instruments. More of the competent authorities referred in general terms to

[219] Answers to question 7.3 CIQ.
[220] Answer to question 12 AUT.

the need to adopt a unified approach to all payment services, but made no explicit proposal for extension of the scope of the PSD. Reluctance to promote the extension of the PSD is attributable to an absence of concerns about selective PSD application. Of the 11 authorities that commented on its merit, 4 reported that there are no issues and 4 limited their assessment to a comment that, in their jurisdiction, the PSD applies beyond the EEA but report no issues (Cyprus, Latvia, Spain, Sweden).

Of the credit institutions and associations of credit institutions which commented on a possible extension of the scope of the PSD to one-leg transactions (where half of the responses were from 3 Member States: Romania, Luxembourg and the United Kingdom), a majority were opposed and criticised heavily any attempt to do so. Their objections were supported by detailed reasoning (see below). However, of the 91 institutions interviewed, only 26 credit institutions and 3 associations of credit institutions commented on the implications of extending the PSD to one-leg transactions. Regardless of the position on the PSD's extension taken by those which answered the question, the fact that two-thirds of credit institutions and two-thirds of associations of credit institutions decided to leave this matter unanswered may suggest that extending the PSD to one-leg is not an idea that evokes uniform opposition of credit institutions.

None of the few payment institutions[221] which responded to the questions concerning one-leg transactions stated that the fact that the PSD does not cover payment transactions in which either the payer or the payee's payment service providers are located outside the EEA, creates problems for their customers or operations.

Key concerns pertaining to the hypothetical extension of the PSD relate to the lack of a legal regime corresponding to the PSD to which non-EEA providers are subject. This is seen as the main obstacle to making the PSD's execution times, charges policy, no deductions principle, and value dating liability applicable to one-leg transactions, given that a payer's provider is liable to the payer for any failure to observe all those measures.

According to these institutions, applying the PSD to one-leg transactions would seriously increase the volume of resources needed to process payment transactions and the risks inherent to them.

At the same time, credit institutions foresee a negative impact on revenues, an elimination of charge differentiation (e.g. for express payments), a loss of earnings on float, and very high implementation costs.

The expected positive impact is a reduction of some operational costs (including staff training), a simplification of bank operations, a unification of the fees and charges structure and transparency for consumers.

The objections of providers to an obligatory extension of the PSD standards to non-EEA transactions in any currency are backed by the industry experts interviewed in the course of the study. Experts highlighted that the existing global payment environment is very fragmented. Dozens of regional initiatives to set up specific settlement mechanisms are underway, the most ambitious being in the Gulf region of the Middle East, in Russia and the CIS countries according to SWIFT.[222] In order to align their operations with those developments, providers need to apply a different

[221] Answers to question 8.1 APIQ.

[222] Dialogue magazine of SWIFT, Issue 21, Q3 2009, excerpt available at https://www.swiftcommunity.net/ communities/33/blogdetail/18133.

approach and to appoint the appropriate partners (correspondent banking). The differentiation is easily visible in payment services pricing, terms and conditions, and the defective execution ratio. Extending the PSD service level to all payment transactions regardless of territory and currency would be a very substantial intervention in the payment market. This makes sense only if overall capability and costs of an industry upgrade to a comprehensive PSD standard is no more costly than the value of benefits for users and the distribution of such benefits among users.

Industry experts highlighted that the need for comprehensive advanced protection of the user is not uniform across customers. Consumers engage in extra-EEA transactions mostly when using money remittances and card transactions. For this group of users, the need for protection relates mainly to the transparency of conditions and the handling of irregularities.[223]

For enterprises, only basic PSD rules which cannot be derogated from contractually matter for the assessment of a possible extension of the PSD to one-leg transactions. These rules include execution time and the no-deductions principle. Those needs are, to a considerable extent, satisfied under the current PSD regime.

Finally, experts commented that an unconditional extension of the PSD may result in a considerable number of small-scale providers ceasing to offer one-leg currency transactions to the detriment of their customers. This corresponds with the developments observed following the enactment of rules on the equal pricing of national and cross-border payments in Euros (Regulation 924/2010), when a number of providers ceased offering cross-border credit transfer initiation through the internet.

The objections of the provider community and industry experts were confirmed by the experience of providers from the Member States which have extended the PSD to one-leg transactions.

A Spanish credit institution complained that execution time and value date cannot be guaranteed when a payee is outside the EEA. At the same time, a decrease in revenues was reported. A Cyprus credit institution reported that the implications for the provider are mainly negative given that the PSD is aimed at protecting the customer, and this cannot be enforced effectively against non-EEA providers.

4.3.3 Views of stakeholders

The section above on impact contains evidence from stakeholder responses from our research. The table below summarises key decisive determinants identified for extending the scope of the PSD.

Table 27: Overview of stakeholder views on determinants for extending the scope of the PSD

Issues	Consumers	Complaint boards	Competent authorities	Providers
Awareness and	**<50%:** no reaction to one-leg issues (con-	often need to explain to		**>50%:** perceive consumers' lack of awareness of

[223] This corresponds to some extent to the new approach adopted in the USA (effective from February 2013) to electronic money transfers to foreign countries or remittance transfers. The New subsection B to Regulation E of the Electronic Funds Transfer Act amended under Section 1073 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which requires specific transaction disclosures, error resolution dispute rights and transaction cancellation rights with respect to consumers.

Table 27: Overview of stakeholder views on determinants for extending the scope of the PSD				
Issues	**Consumers**	**Complaint boards**	**Competent authorities**	**Providers**
understanding	sumers from nearly half of the MS)	consumers the limited scope of the PSD		selective PSD scope
Handling	little understanding of why differences between transactions within EU vs. outside EU or in EU vs. non EU currency key issues are execution times, liability, charges for currency conversion	complaints concerning information, charges and value dates	report no concerns about selective PSD approach	**<25%:** use different systems and procedures for one-leg vs. two-leg transactions **<10%**: apply PSD voluntarily to all transactions (mainly to card payments) selective PSD scope hardly affects credit institutions differences in approach mostly in key conduct of business rules (execution time, charges, liability)
Extension to one leg and to all currencies	**~50%:** support (consumers from around half of the MS) **~7%:** explicitly oppose		supported explicitly by only one authority	**~2/3** did not comment at all heavy criticism in the comments received
Expected impact of extension	enhanced transparency universal consumer protection more confidence reduction of costs clear provider liability			**~1/3:** predict negative impact including decrease of revenues and increase in resources and operational risk expected benefits are reduction of some operational costs, operational simplification, unification of fees and charges

Source: London Economics research

4.3.4 Experience of Member States which extended the scope of the PSD to all currencies

A number of countries extended the scope of their national legislation implementing the PSD to cover transactions in any currency (see table 26 above). However, except for some minor issues, the core PSD measures in those Member States were limited to transactions in the EEA or in EU currencies. This is either explicitly provided for in the legislation (sometimes via secondary legislation) or subject to a contractual derogation by the parties. Some Member States (Bulgaria, Estonia, Lithuania [224] and Spain) did not adopt a specific currency precondition for the application of the

[224] The Central Bank of the Republic of Lithuania supports the proposal to extend certain PSD provisions to currencies of non-EU Member States (Answers to question 12.1 CAQ). Lithuania seems to have extended most of the PSD regulations to non EEA curren-

PSD at national level. Even in those Member States, however, the national implementation of the PSD is understood to apply only to transactions in EEA currencies. This is confirmed by the survey of credit institutions. In reply to the question as to whether they had experienced problems when applying the PSD to all currencies (if any), the majority reported none. This was also the case for institutions from the Member States which had adopted a loose approach as to the scope of the currency caught by their legislation. This may be explained only by the fact that those institutions were able to refer to the relevant legislation or to provide contractually for limiting core PSD measures to EEA currencies.

For those reasons, it is difficult to draw any conclusion on the possible experience of the Member States where the PSD standards are extended to all currencies. The decision to extend the PSD to any currency must therefore rely on feedback from stakeholders on the expected impact reported in the previous section.

4.3.5 Conclusion

The core PSD rules apply only to payments where both end-providers are located in the EEA and transact in the currency of an EEA state.

For users this means that the PSD's protective measures do not apply whenever a non-EEA currency is used (e.g. the US Dollar) and whenever one of the end-providers is outside the EEA (e.g. credit transfer to Switzerland). Consumers are deprived of protection relating to information, transaction execution, charges, and liability. This protection is most needed precisely for one-leg transactions and non-EEA currencies given that the extra-EEA transactions undertaken by consumers are usually cash remittances by the most vulnerable social groups. The fact that extra-EU remittances are three times the value of intra-EU remittances should also be taken into account.

Consumers feel disadvantaged by the limited scope of the PSD.

Providers are not disadvantaged by the limitation of the PSD to the two-leg principle and EEA currencies. Where IT infrastructure and general procedures are concerned, one-leg transactions are handled by providers in the same way and with the same tools as PSD transactions. The differences visible to users are in fact limited to selected areas which include execution time, charges and liability. Nevertheless, those areas appear crucial to providers' performance in terms of profitability and risk, which makes providers reluctant to extend the application of the PSD to one-leg transactions voluntarily. Providers are even more set against extending to any currency.

As regards the providers' true and comprehensive ability to handle one-leg transactions in any currency under the PSD standards, the result of the survey shows that providers are not uniformly and firmly against putting one-leg transactions in any currency under the same umbrella as existing PSD transactions. In the survey of credit institutions, as many as two-thirds of credit institutions and credit associations did not offer any views on the impact of potential extension of the scope of the PSD.

cies. The position of the Central Bank implies a positive experience in Lithuania from the broader scope of the PSD application in terms of currency.

The conclusion of the assessment is that a widening of the scope of the PSD at least to transactions inside the EEA for all currency payment transactions could be carefully attempted, and adopting part of the rules of the PSD for one-leg transactions is feasible.

However, a general extension of the existing rules to one-leg transactions and/or all currencies, as proposed by a number of consumer associations and competent authorities, has to be considered a difficult challenge for providers, given today's fragmentation of the global payments market. A negative impact on providers' performance is expected due to the lack of enforceability of the PSD service level against non-EEA providers, while their participation is indispensable to handle extra EEA payments. At the same time, the changes will probably not benefit the majority of users. Even for this group the benefit is questionable given that the PSD narrows their choice on key aspects (e.g. use of OUR/BEN pricing options widely recognised in global business relations).

A vital issue that needs to be taken into account is that, following the unconditional extension of the PSD, a considerable number of small-scale providers may cease offering one-leg or any currency transactions to the detriment of their customers. This is inferred from the observed developments following the enactment of rules on the equal pricing of national and cross-border payments in Euros (Regulation 924/2010), where a number of providers ceased offering cross-border credit transfer initiation through internet channels.

4.4 Low-value payments

4.4.1 Introduction

The PSD provides for mitigated rules on the transparency of conditions, information requirements and the conduct of business for low-value payments.[225]

Low-value payments are payments where, under the relevant framework contract:

- the value of the individual payment transaction does not exceed EUR 30, or
- the instrument has an overall spending limit of EUR 150, regardless of the value of an individual transaction, or
- the instrument stores funds that do not at any time exceed EUR 150.

For national transactions, national legislation may reduce or double those amounts, and for prepaid instruments, those amounts may be increased to EUR 500.

By providing for mitigated rules for low-value payments, the PSD aims to promote a cheap and easy-to-use alternative to standard payment services which, in many cases, do not meet the needs of the market in low-priced goods and services.[226]

The PSD provisions on low-value payments apply exclusively to payment instruments. Due to the fact that the headings of the relevant provisions refer to electronic money as well, the regime for

[225] Articles 34, 53 PSD.
[226] Recital 30 of the PSD.

low-value extends to e-money services regardless of the nature of the services (whether it relies on payment instrument, or payment account, etc.).[227]

Low-value products benefit from the following mitigated PSD rules:

- limited scope of information that needs to be provided before entering into a contract (only basic characteristics, liability, charges, other material information);
- limited (all low-value instruments) or eliminated (anonymous instruments or where technical restrictions apply) post-transactional information (reference, amount, charge);
- less cumbersome process for framework contract change;
- none (for anonymous instruments or where technical restrictions apply) or limited (instruments with no possibility to block further use) issuer's liability for unauthorised transactions including the absence of a need to maintain an infrastructure for notification of irregularities;
- no need to report refusal of payment order if refusal is apparent;
- no need to accept revocation of a payment order;
- freedom to define execution times.

4.4.2 Impact of the derogation for low-value payments

Low-value payments show substantially different characteristics from standard payments. Key issues for such payments are speed, finality of payment, and anonymity. Before the PSD, these needs were addressed by rules on e-money including a lighter Anti-Money Laundering regime. The PSD attempts to ensure the overall coherence of the regulatory regime for low-value payments for the execution of transactions.

Evidence available for assessing the impact of the PSD's low-value payments regime is very scarce in general. Beyond industry experts' views, on which this assessment mainly relies, stakeholders provided very limited input.

Services eligible

The current PSD rules on low value are directly applicable to simple payment products only dedicated to low-value transactions (pre-paid cards, pre-funded on-line accounts). Taking advantage of the mitigated rules for low-value payments is questionable in the case of multipurpose instruments where one and the same instrument offers different modalities, one for standard payments and one for low-value payments (under the PSD's thresholds for low value), while relying on the same personalised security features. In such a case, the instrument in general may hardly be considered to meet the low-value threshold unless separate and specific access channels for both categories of payments are provided. Customers are not interested in holding separate payment instruments, one for low-value instruments and one for higher transaction limits. They want one instrument in order to cover all their usual expenditure.

[227] European Commission Services confirmed applicability to e-money, see answer to question no. 372 of the "Your questions on PSD", a Question and Answers facility provided by the European Commission services on the website http://ec.europa.eu/internal_market/payments/framework/transposition_en.htm#question.

The negative impact potentially resulting from the design of the low-value regime seems to find confirmation in the evidence collected from providers. Only 17 credit institutions and 4 associations of credit institutions (of the 69 credit institutions and 6 associations of credit institutions that commented on it) stated that they or their members offer payment instruments meeting the criteria of low-value instruments under the PSD. More importantly, only 8 credit institutions and 3 associations of credit institutions reported to have undertaken an assessment of the advantages of the PSD rules on low-value payment transactions. A few credit institutions reported that the costs of setting up and maintaining divergent processes for standard and low-value transactions would be higher than the expected benefits[228].

Promoting single purpose instruments dedicated exclusively to low-value transactions should not be the effect of EU laws.[229] That unintended result may be an obstacle to developing efficient payment modalities.

Thresholds

The mitigated PSD rules for low-value instruments have the potential to open the way to broad use of cashless instruments for the purchase of low-priced goods and services. No evidence has been found against the adequacy of existing PSD thresholds for low-value payments. The thresholds seem adequate; although, in many EU countries, payments of under EUR 25-30 may overall provide very significant transaction volumes. The PSD thresholds may require an adjustment upwards as a result of future developments.

Information requirements

Infrequent use of the low-value regime by providers (see above) is evidence that the current incentives provided for in the PSD for low-value transactions is not sufficient.

The level at which information requirements for low-value transactions have been limited in the PSD is primarily adequate to the nature of low-value payments. Further limitation of information requirements would not be sustainable because, in fact, a reduction in the information that has to be provided would make it almost impossible for consumers to use the low-value service and be reliably informed.

There is room for improvement elsewhere. Given the nature of low-value transactions, the delivery of information may be safely downgraded to "making available" from the existing active provision requirement. The cost-efficient option of the use of internet or announcements in physical locations for sharing relevant information with the user would be a potential alternative.

The nature of those products accordingly allows the provider to derogate from contract changes requirements and transactional information[230] with no need to agree this with users. Agreement with users assumes individual interaction with the user (even if limited to the provision of terms and conditions and obtaining consent of the user to them) which is an obstacle to the efficient distribution of mass products.

[228] Answers to Question 7.9, CIQ.

[229] See also the discussion on co-badging in Feedback statement on European Commission Green Paper "Towards an integrated European market for card, internet and mobile payments", pp. 7 where multipurpose and multi-issuer instruments are considered.

[230] See Article 34.1.b,c of the PSD.

Rights and obligations in relation to the provision and use of payment services

The way in which rights and obligations have been limited in the PSD for low-value transactions is essentially appropriate for low-value payments. The mitigation covers the obligations of providers that have a significant effect on the costs and efficiency of payment services and e-money services and include execution deadlines, liability, the availability of measures for notification or blocking requests and other anti-fraud measures. However, most of the lighter obligations have been made conditional upon different preconditions inherent in the mechanics or quality of the payment instrument or the efficiency of the providers' IT infrastructure.[231] More importantly those preconditions differ from preconditions for lighter information requirements. Altogether this leads to uncertainty as to whether the provider is eligible for the application of the mitigated regime or not.

The main area of improvement is the 'operationalisation' of preconditions for benefiting from the mitigated regime including uniform preconditions for all mitigated information requirements and rights and obligations. The nature of the low-value payments in our view allows for extending all mitigated obligations unconditionally to anonymous instruments as well as e-money instruments.

4.4.3 Possible impact on developments in innovative payment services

The available evidence for assessing the impact of the PSD's low-value payments regime is again scarce with respect to growth in the area of innovative payment modalities. Due to the absence of representative data from stakeholders concerning the impact of the PSD on innovation in the area of payment services and the use of exemptions, the assessment is limited to certain issues and reliant on the views of the industry expert.

Potential for positive impact

Whether the mitigated regulatory regime for low-value payments has the potential to support innovative payment modalities is questionable. This is the result of the competing regulatory regimes under the PSD with regard to low-value payments.

The current state of play under the PSD seems to disadvantage low-value transactions. A provider that wishes to offer low-value instruments and to benefit from mitigated legal requirements still needs to obtain authorisation (which means meeting many detailed and challenging requirements), unless local legislation allows it to offer those payment services under the waiver. The only benefit for such a provider, in comparison to a full-scale provider, is the lighter conduct of business rules.

On the other hand, both PSD and EMD II exempt limited acceptance instruments and payments facilitated by network operators.[232] Many e- and mobile payments are at the very early stages of development. At this stage, designing the service to meet the preconditions for exemption for limited acceptance instruments is feasible.

In contrast to authorised or registered providers of low-value payments, providers of exempt services benefit from full freedom both in terms of authorisation and conduct of business rules, and this regardless of the transaction thresholds. This means that for providers of innovative services

[232] Article 3.k-l of the PSD.

aimed at low-value purchases, meeting the exemptions under the PSD may be the first and natural choice.

Network operators are in an even better position than providers of limited acceptance instruments (see section 4.2.2 for more details). They are free from any requirements in the long term when their acceptance network may grow.

Only after reaching a certain scale of business will the PSD rules on low values possibly become the target regime. Migrating to this regime, however, will not be painless because previously limit-free instruments will be subject to low-value thresholds which will be an incentive either to stay within the exemption scope or to provide fully-fledged payment services (not low value) under authorisation.

National transactions

The PSD regime for low-value transactions offers an extension of eligible services where they are used for national payment transactions.

Reference to national payment transactions weakens the potential to support innovative payment modalities.

Limitations related to national payment transactions may be technically feasible and make sense in pre-paid payment cards with a structured physical acceptance network. However, in the case of innovative payment modalities covering e-commerce, reference to a national payment transaction is a serious obstacle. Providers of those services usually operate in many markets (to reach adequate transaction volumes). Taking advantage of the EU freedoms, they are not necessarily based (registered, authorised) in any of the markets where they operate. The e-commerce payees (merchants) are very flexible in structuring their business geographically and often serve customers from countries other than that of the merchant’s location. In the case of payments for intangible services, defining the location of the service and the corresponding transaction is very often a challenge.

Those concerns clearly militate in favour of abolishing any reference to national transactions in the rules on low-value payments.

4.4.4 Conclusion

Despite a proliferation of low-value transactions, providers are not eager to deploy payment services under the mitigated rules. The design of low-value derogations promotes single-purpose payment instruments which are not favoured by users. The overall impact of low-value derogations is judged to be very limited in general. The room for improvement includes enabling the required information to be ‘made available’ instead of imposing the active provision of the information and accordingly giving up the need to agree derogations with the user. This move should be accompanied by uniform preconditions for making use of the modified regime.

The low-value rules do not promote growth of innovative solutions, including e-payments (online, mobile). The main reason for this is that the low-value regime competes with the exemption for limited acceptance payment instruments and for payment services provided by network operators.

The low-value regime loses out because it entails an obligation to obtain a licence and respect the PSD's requirements as opposed to having the complete freedom offered by the exemptions.

The PSD will substantially benefit from harmonising all measures aimed at promoting simplified payment services focused on low-value payments. Otherwise, the development of innovative standardised payment modalities may be considerably hampered. Customers may be offered fragmented services of limited application.

4.5 Classic and prepaid payment

4.5.1 Introduction

E-money is regulated by the second Electronic Money Directive (2009/100/EC) (EMDII). EMD II defines e-money as "electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions as defined in point 5 of Article 4 of [the PSD], and which is accepted by a natural or legal person other than the electronic money issuer".

E-money transactions are within the scope of the PSD. This is because the PSD's concept of funds, which co-constitutes the concept of payment transaction, explicitly includes e-money.[233] It makes the PSD principles applicable to pre-paid services insofar as transaction execution is concerned. In consequence, all payment services in e-money are covered by both EMD II and the PSD while payment services whose subject is scriptural money or cash is covered only by the PSD.

4.5.2 Issues resulting from similarities between classic payments and prepaid payments

The existing design of the e-money regime and the PSD is the source of multiple concerns which are faced by most stakeholders. Those concerns have an adverse impact on the efficiency of providers and on users' confidence in payment services.

Delimitation

The key concern about the classic versus e-money payments is the dividing line between them. This dividing line is of the utmost importance because of the substantially divergent legal consequences of providing those services.

Despite recent convergence, both the approach of the PSD and the EMD II continue to diverge on some core issues. For example, for non-bank providers, the answer to the question of whether the product offered or intended is a classic payment or e-money has critical implications because it means different initial capital and own funds based on transaction volume for payment services as opposed to outstanding e-money for e-money services. For all providers, the answer is critical for choosing the right regime for rights and obligations in relation to the customer (obligatory disclosure, charges required from e-money services as opposed to payment services).

A divergent approach for classic payments and for e-money services has been adopted by anti - money laundering legislation, which provides a light regime only for e-money services.

233 See the above definition of e-money, definition of payment transactions, Article 5 point 5, 15 of the PSD.

EMD II is commonly understood to be a regulation for pre-paid payment products, including stored value cards, and pre-funded online accounts. Issuance (top-up) and redemption (withdrawal) of e-money is in principle regulated exclusively by EMD II.

However, having included e-money in the concept of funds, the PSD applies to e-money as far as transaction execution is concerned. Having said that, the key distinction between the PSD and the EMD II regime is the nature of the funds (scriptural/cash, subject only to the PSD, compared with e-money, subject to both PSD and EMD II) and not the nature of the payment execution (often mistakenly referred to as the "payment account versus e-money" issue[234]).

In more simple terms, the distinction is that in classic payments, funds are made available to a provider for a pre-defined transaction whereas in e-money services the funds are made available to a provider for the purpose of undefined future transactions.

Recent developments in payment services make that distinction virtually irrelevant. If this dividing line were to be followed, only the simplest money remittance services for the payer and services to collect funds for the payee would be eligible for the PSD to apply. Most remaining payment activities would need to be deemed e-money. The concept of a 'payment institution' would then face substantial challenges with respect to providing services based on framework contracts (accounts, payment instruments) without a credit facility.[235]

Evidence from stakeholders on the practical impact of those concerns is scarce. The analysis of the impact is therefore based mostly on evidence from industry experts and literature research.

A key positive impact on providers of the existing distinction between classic and e-money products focuses on the modified AML requirements. Customer due diligence measures may be not applied by e-money providers within the thresholds provided. This enables simplified payment services to be offered where customer adoption is not blocked by disproportionate customer due diligence measures.[236]

The confusion with respect to the distinction between classic payments and e-money, in particular between a payment account and account-based e-money, substantially outweighs the advantages such a distinction provides. In fact the confusion seems to be so substantial that only authorisation as such seems to matter for stakeholders. As commented by one competent authority, "economically there is no difference between the opening of a payment account and/or the issuance of a payment instrument according to the PSD on the one hand and the provision of e-money according to the EMD on the other hand".[237] [238] Cases are known where a credit institution offers the same account-based product which is deemed to be an e-money account insofar as the transac-

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[234] Both directives assume the link between electronic money and either payment instrument or payment account (see Article 53.3 of the PSD and Article 9.1.3 of the EMD II).

[235] The eligibility of payment institutions to provide account-based services has been discussed in section 4.2.

[236] See Article 11.5.d of Directive 2005/60/EC Of The European Parliament And Of The Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and corresponding derogation in Article 3.3 of Regulation (EC) No 1781/2006 of The European Parliament And Of The Council of 15 November 2006 on information on the payer accompanying transfers of funds. If the device cannot be recharged, the threshold is the maximum amount stored in the device which cannot exceed EUR 150. If the device can be recharged, a limit of EUR 2 500 is imposed on the total amount transacted in a calendar year, except when an amount of EUR 1 000 or more is redeemed in that same calendar year by the bearer.

[237] Answers to Question 3.3, CAQ.

[238] Other areas of concern for competent authorities with respect to e-money is the term "payment instrument" which covers virtually any device (see sec. 4.1 for more details) and uncertainty about which payment services from the PSD-Annex is the right one with respect to the operations on e-money.

tion volume does not exceed e-money AML thresholds (see above). Following the transactions beyond those thresholds, the product is deemed to be a standard account although there is no change in the product itself.

Since most of the e-money products in the EU market are account-based (not token-based or e-purses), many providers attempt to qualify prepaid services as pure payment services with no e-money component. This, it seems, is due to a clearer regulatory picture in the PSD than other legislation. This is especially the case if the business concept at stake enables AML benefits of qualifying for e-money to be left aside. Such an approach is supported by the fact that even the decision to go for a more restrictive e-money regime does not provide certainty. The reason is the lack of certainty over the exact scope of the e-money definition. Each e-money issuer offers the user either a payment instrument or a payment account. Each e-money issuer also provides services to payees which are very similar to acquiring. However, neither the EMD II nor the PSD clarify whether this is the same as providing separate payment services as those listed in the PSD-Annex or if those activities are inherent in, and included in, the concept of issuing and redeeming e-money. Due to the ambiguity that exists, in some cases, the same product offered by two different providers in a single Member State may be offered as e-money or a current account, at the sole discretion of the provider.

The existing situation has an adverse effect on users.

Customers mostly do not perceive any difference between classic payment products and e-money products because, from their perspective, they are very similar and interchangeable. Customers are very often surprised that while, from their perspective, the product they use is identical to a payment account or payment card, the funds may have an “expiry date” or the funds may not be covered by any deposit guarantee scheme.

This is clearly confirmed by the consumer associations surveyed in the course of this study.

Surprisingly, the unclear position of pre-paid cards is a source of substantial concern for consumers. While the consumers apparently consider that pre-paid cards fall outside the regulatory framework, they designate those products as most needing to be included in the regulatory scope.

Figure 35:Services most cited 8 Consumer Associations in 8 Member States

Service	Value
transactions where bank is creditor	1
other def	1
def 'payment instrument'	2
def 'payment account'	1
OBeP	1
pre-paid cards	4
Overlay services	3

Source: iff consumer survey

The use of pre-paid cards appears to be developing, according to the consumer associations who mentioned this issue. Indeed, according to a report from pse Consulting in 2008, the prepaid card market was set to represent EUR 132bn in Europe by 2015. However, it is unclear whether pre-paid cards can be considered as 'payment services' and, therefore, whether users can benefit from the protection of the PSD.

UFC-Que Choisir for example explained: 'Pre-paid cards are often used by French consumers. The PSD could be improved on this topic' and Which? goes further: 'We believe that pre-paid cards should be included in the list of payment services'.[239]

The main issues[240] raised by consumer associations concerning pre-paid cards were:

- The lack of clarity as to how pre-paid cards are regulated (between the PSD and e-Money)
- The fact that consumers are often unable to tell the difference between credit, debit or pre-paid cards
- The high fees applied to those cards
- The absence of an obligation, at present, to give any unused funds back to a consumer who stops using the card.

In addition, *which?* UK also mentioned the potential those pre-paid cards represent for un-banked consumers. Indeed, the respondent explained that it 'is often easier for consumers on low income to get a prepaid card than to open a bank account'. Therefore, as with mobile payments, to include such payment instruments within the scope of the PSD would enable low-income consumers to gain access to payment services and benefit from the protection offered by the PSD.

239 For further details, see also Annex 2.5.2.
240 For further details, see also Annex 2.5.2.

The European Consumer Organisation (BEUC) reported that there is no clarity "about the concept of e-money which is not always clear to consumers. For example, though PayPal accounts seem to work like bank accounts, and PayPal is even a registered bank in Luxemburg and participates in that Member State's DGS (deposit guarantee scheme), money on these accounts is not protected deposits but e-money". The Federation of German Consumer Organisations (VZVB) confirmed this standpoint of BEUC. In VZVB's opinion "that the current concept of e-money is not easy to understand for consumers and may lead them astray in terms of their initial idea of the safety of their money, as e-money is not protected by the DGS".

The existing ambiguity within the regulatory framework is apparently difficult to tackle even for the competent authorities. In the course of the survey, three competent authorities spoke in favour of including e-money within the scope of the PSD in different respects (general, virtual currencies, e-money convertors).[241]

4.5.3 Stakeholder's suggested solutions

The need to clarify the regulatory framework for payment services from the perspective of classic payment as opposed to e-money predominates. Merging the PSD and EMD II regime is a solution that should be considered first.

Competent authorities

Clear support for this merger comes from the competent authorities. Of 18 competent authorities that commented on this issue, 12 questioned the current co-existence of divergent legal regimes. In their view, both payment and e-money institutions provide services in the same market and "carry out almost the same activities". This makes it very difficult to assess whether an activity falls under the PSD or EMD II. Suggestions from the competent authorities included merging the PSD and EMD II legal regimes and reviewing the current list of payment services in the PSD to include the issuance of e-money in the new classification. Consequently, there would be only one category of payment institution which could offer one or more payment services[242].

At the same time, most competent authorities that favour merging both regimes are of the view that issuance of e-money should still be a separate activity and the payment institutions that wish to pursue that activity need to meet special capital and prudential requirements. Such an approach is also backed by the competent authorities which do not explicitly support the merger. In their view, if the regimes were merged, regimes for issuing e-money and for other payment services should remain on a different level and reflect existing differences.[243]

Providers

While non-bank providers made little comment on that point, according to one payment institution, merging the two regimes would maximise opportunities available to firms in the fast-moving emerging payments and e-money sector without posing any increased risk. This can be achieved by creating a single type of institution (presumably still called a "payment institution") which can apply for a sub-part to its PI license, allowing it to issue e-money as another payment activity.

[241] Answers to Question 3.3, CAQ.
[242] Answers to Question 3.3, CAQ.
[243] Answers to Question 3.3, CAQ.

The credit institution community only partially supports the idea of a merger. The majority of credit institutions (47 of 70 individual credit institutions and 7 of 9 associations of credit institutions that commented on this issue) do not object to the co-existence of two divergent legal regimes for similar payment services. This may suggest that credit institutions are satisfied with the current regulation. However, more probably, credit institutions tend not to pay much attention either to prepaid products or to the divergent legal regimes. In any case, their licence covers all payment services, so any doubt over the dividing line within the regulatory regime is not necessarily relevant to them (except in relation to customer rights).[244]

Twenty-five respondents (23 credit institutions and 2 associations of credit institutions) questioned the current two-fold approach, urging that the two regimes should be made coherent and finally merged. One association of credit institutions justified merging the regimes by saying that e-money payments are included in the payment services list and that e-money providers are identified as one of the payment services provider categories. It was suggested that the merger should only be envisaged when the revision of Regulation 924 is included, and with the goal of avoiding ambiguity and incoherent or divergent interpretation. One credit institution emphasised that merging the PSD and EMD II should be an opportunity to simplify the legislation, but care must be taken to ensure that it is not inadvertently made more complex (e.g. by combining all the requirements of the two Directives in one). There needs to be a degree of harmonisation.[245]

Industry experts

Support for the merger comes from industry experts as well. They favoured merging both classic payment services and e-money into one single regime. Under a single payment license a provider would be entitled to provide all payment services, except accepting deposits (i.e. offering advantages related to the period of time the funds are kept by the provider), be it a pre-paid service or post-paid service.

If e-money survives, whether merged into the PSD or in a separate directive, the following considerations have been submitted by industry experts:

- Coherence needs to be ensured when defining payment services, e-money, payment instruments and payment accounts. Whereas an instrument and an account are tools for accessing and recording funds and operations, electronic money is funds which may be recorded and processed via a payment account.
- A coherent and precise distinction needs to be made between e-money and other categories of funds. Currently, the only hard dividing line (although not very practical) is that funds may be considered e-money when their circulation is limited only to persons under a contract with the issuer.[246] However, this does not prevent a third-party acquirer acting as the issuer's agent in e-money redemption. On the other hand, the defining attribute of scriptural money is unlimited transferability ("acceptance" by third parties). Redemption does not necessarily provide a clear dividing line because it relies on rather vague features (i.e. the process of transforming e-money into cash or scriptural money to enable withdrawal or transfer to other providers).

244 Answers to Question 7.3c, CIQ.
245 Answers to Question 7.3c, CIQ.
246 See Article 11 sec. 7 of the EMD II: "Notwithstanding paragraphs 4, 5 and 6, redemption rights of a person, other than a consumer, who accepts electronic money shall be subject to the contractual agreement between the electronic money issuer and that person."

- A coherent regulatory approach needs to be established for funds held by a provider. Under EMD II, pre-paid funds in principle constitute e-money. The payment institution offering the payment account may receive funds into that account (incoming transfer), which will subsequently be used to fund future transactions not defined at the moment the funds are received by the payment institution. This demonstrates a functional distinction from e-money.
- It needs to be ensured that e-money activities per se include payment services in order to avoid situations where, when transferring e-money between two users, the e-money provider performs a payment transaction in terms of the PSD, requiring that separate own funds be maintained under the PSD.

4.5.4 Conclusion

In the absence of a clear dividing line between classic payment services and e-money-based payment services, providers, in principle, face substantial compliance risks. In practice, however, they are free to design a retail consumer payment service either way.

Overall, the impact of the similarities between classic payment and pre-paid payments (e-money) along with the co-existence of substantially different legal requirements under two different directives is negative. This was confirmed by all stakeholders. Only the credit institutions are not unanimous in identifying a negative impact (less than half object to the current state of affairs). This may, however, be reasonably attributed to the fact that they are authorised to provide all payment services. This makes dealing with divergent regimes easier.

Overall, stakeholders are seeking clarification and, generally, suggesting the merger of both regimes. Under a harmonised regime, a provider may provide under a single authorisation all payment services apart from accepting deposits. Specific measures could be applicable to the pre-funded payment services and pre-paid funds deposited with the provider.

Regardless of the decision regarding a possible merger of the PSD and EMD II, all e-money related services (pre-funded instruments and accounts including pre-paid cards, virtual money, conversion services) need to be closely integrated with payment services, including ensuring the coherence with regard to exemptions, rules for low-value payments, and the money laundering regime.

4.6 Microenterprises

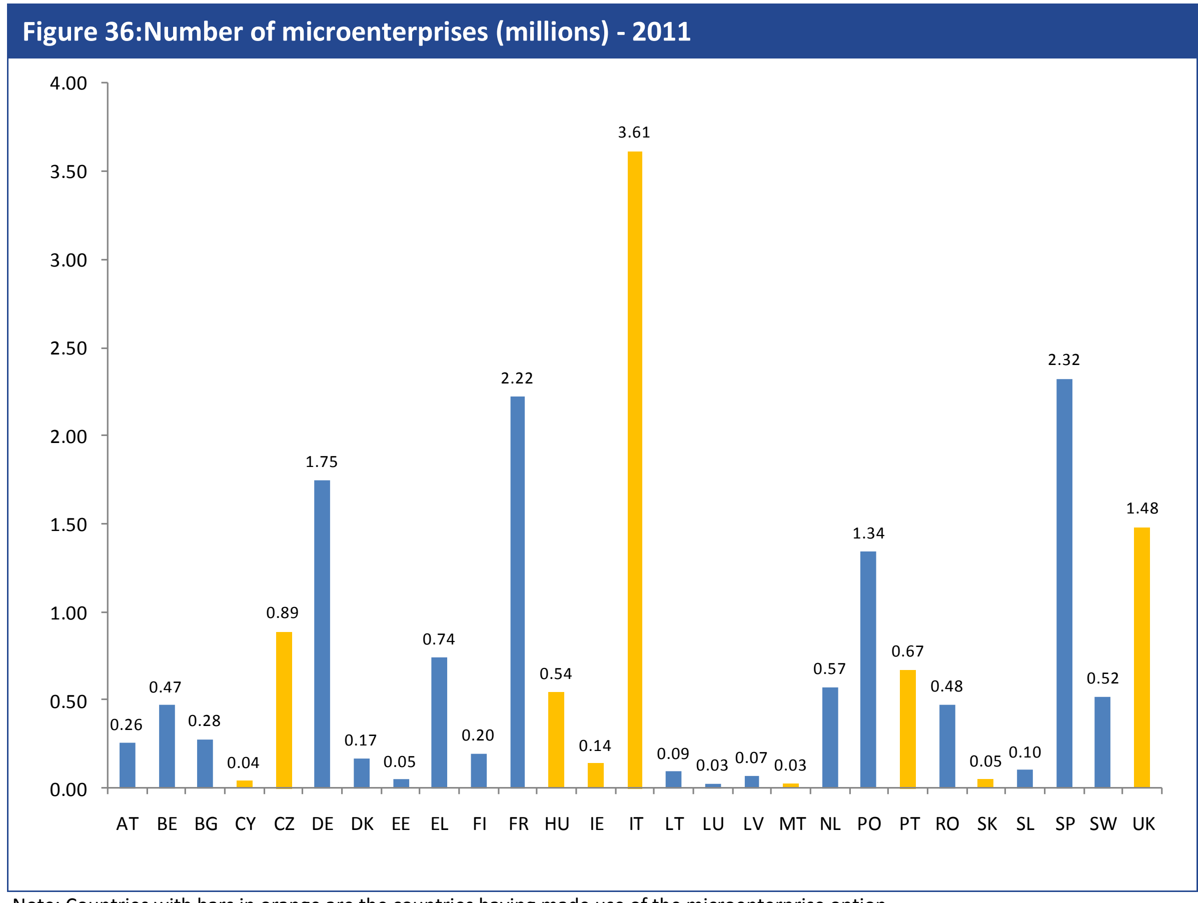
4.6.1 Introduction

The PSD's customer protective measures apply only to consumers in the sense that they cannot be derogated from contractually. The other users benefit from the unconditional application of the PSD only with regard to a few protective measures including execution times, the no deductions principle, charges distribution, the authorisation of payment transactions, the refusal of payment orders, instrument blocking. The PSD gives Member States the option to deem microenterprises as equivalent to consumers.[247] A microenterprise is an enterprise which employs fewer than 10 per-

[247] Article 30.2, 51.3 of the PSD.

sons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million[248]. Microenterprises account for the bulk of SMEs in the EU27 (see figure below).

Figure 36:Number of microenterprises (millions) - 2011



Note: Countries with bars in orange are the countries having made use of the microenterprise option
Source: Ecorys (2012)

248 See Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.

Figure 37:Share of SMEs accounted for by microentreprises - 2011

Note: Countries with bars in orange are the countries having made use of the microenterprise option
Source: Ecorys (2012)

The use of this option by a Member State means that all PSD customer protective measures are applicable to products for microenterprises.

According to the TIPIK Report, the following Member States have adopted the principle of equality between consumers and microenterprises in relation to Title III and IV PSD (transparency of conditions and information requirements for payment services, conduct of business rules):

- Czech Republic
- Cyprus
- Hungary
- Ireland
- Italy
- Malta
- Portugal
- Slovakia
- United Kingdom

The rationale behind treating microenterprises in the same way as consumers was not explained in the PSD recitals. The apparent rationale is to protect small-scale enterprises from providers' practices which tend to apply the same standards to microenterprises as to large businesses in terms of customer obligations and liability.

4.6.2 Impact and Views of stakeholders

Extending the PSD application to microenterprises may appear very favourable to microenterprises. However the available evidence is that the impact is not entirely positive.

These users may indeed require and deserve to benefit from the same protection as consumers. Based on unstructured discussions with one- and two-person enterprises, they indeed appreciate being treated like a consumer. This could legitimately be applied to all one-man enterprises which adopt the status of employee when they take on work.

Nevertheless, most microenterprises, although mostly involved in relatively small-scale activities, are enterprises, not natural persons or non-profit organisations. From that perspective their business needs are not very different from those of standard enterprises. These needs may be difficult to satisfy with consumer-oriented products.

A few credit institutions expressed the view that extending consumer protection to microenterprises resulted in limiting the availability of genuine business payment products.

Evidence from industry experts suggested that key problems for microenterprises arising from their treatment as consumer customers, as opposed to business customers are:

- the restrictions on fees and charges imposed by the PSD, which prevents design of the charging structure to meet the business needs of microenterprises;
- the length of the process of changing the framework contract (2-month period), which impedes fast reaction to market changes;
- rigidity in interest rates insofar as they are not linked to the reference rate;
- a long reporting period for irregularities, combined with a consumer approach to liability for unauthorised transactions and refund rights, which is an obstacle for microenterprises seeking to issue cards to employees.

The negative impact is confirmed by providers. Fifteen credit institutions and 3 associations of credit institutions reported operational challenges from a provider's or customer's perspective.[249]

Credit institutions, which find it troublesome to treat microenterprises as consumers, complain that it is difficult to identify accurately which enterprise is a microenterprise because the parameters for deciding their status (employment, balance sheet total) vary over time.

For example, one credit institution commented in detail on this point: "The screening process necessarily requires access to information that is not readily available to the payment service provider through public channels because the definition of a "microenterprise" is based on criteria that would not be normally known to anyone but the customer (e.g. number of employees and annual turnover figures)". Microenterprises sometimes "omit to notify providers that their status has changed", which is very disruptive for handling those issues.[250]

All those concerns are amplified by the fact that microenterprises need to be deemed consumers only for the purpose of payment services and not for other financial services offered by the pro-

[249] Answers to Question 7.6, CIQ.
[250] Answers to Question 7.6, CIQ.

vider. The overall result is high costs for providers, including the need to create a distinct operational set-up for microenterprises. Two institutions reported that they address this problem through equal treatment of all enterprises as consumers, however only with regard to transparency and disclosure requirements. One provider implemented a specific IT tool to identify microenterprises.[251]

One credit institution reported that the treatment of microenterprises as consumers deprived several microenterprises of beneficial services and they did not appreciate this artificial restriction on their services. Another reported that microenterprises treated unconditionally as consumers are deprived of advanced services such as SEPA business-to-business direct debit. In general credit institutions also concluded that microenterprises might prefer a less paternalistic regime if it gives them more freedom to negotiate terms which suit them better.[252]

One credit institution reported that it had withdrawn from offering payment products to microenterprises in Italy, Ireland, the UK, Slovakia and Sweden.[253] No other instances were found of providers ceasing or limiting their offer of payment services to microenterprises in order to avoid treating microenterprises as consumers. Nor were any cases identified of providers deciding to choose/avoid a specific jurisdiction or to enter/ not to enter a specific market depending on application of the option to treat microenterprises as consumers.

PSD would benefit from reconsidering this option to include at least the following amendments:

- voluntary consent to being treated as a consumer needs to be ensured for microenterprises. Only microenterprises know which payment services they need. Compulsory treatment of microenterprises as consumers may deprive microenterprises of some advantageous payment services and thus have an adverse effect on their ability to compete with larger enterprises;
- if voluntary consent is ruled out, treatment of microenterprises as consumers could be limited to Title III of the PSD. This may allow microenterprises and payment service providers more freedom to negotiate in relation to the conduct of business;
- alternatively, the microenterprise in principle is an enterprise under the PSD, but could elect to be treated as a consumer.

4.6.3 Conclusion

Microenterprises seem to be dissatisfied with the fact that they cannot access business-orientated services. This is mainly attributable to the fact that the category of microenterprises covers enterprises which have reached a scale of up to EUR 2 million balance sheet total and 10 employees, no longer comparable with that of a one-person business, which may indeed require protection comparable to consumers.

Providers reporting that they are subject to the requirement to treat microenterprises as consumers report substantial difficulties and inefficiencies. Those difficulties are both very simple, such as the ability to identify and monitor the status of a microenterprise, and more complex, such as divergent treatment of a microenterprise by a provider when the microenterprise uses other finan-

[251] Answers to Question 7.6, CIQ.
[252] Answers to Question 7.6, CIQ.
[253] Answers to Question 7.6, CIQ.

cial services (consumer standards for the purpose of payment services and enterprise standards for other services including investment and lending).

The PSD would benefit from offering microenterprises the option to request treatment as businesses whenever the Member State exercises the option to treat microenterprises as consumers. Alternatively, a change in the paradigm may be envisaged, whereby a microenterprise in principle is an enterprise under the PSD but may request the provider to treat it as a consumer.

4.7 Options in the PSD

4.7.1 Introduction

The PSD is in principle a maximum harmonisation directive (Article 86.1 of the PSD). However, a substantial number of optional amendments have been left to the discretion of Member States. The options are the following:

- waiver of the application of PSD provisions with regard to institutions under Article 2 of the capital requirements Directive – Article 2(3) of the PSD
- not to apply on-going capital requirements when a payment institution is included in the consolidated supervision of the parent credit institution – Article 7(3) of the PSD
- calculation of safeguarding requirements when funds can be used for future payment transactions and for non-payment services – Article 9(2) of the PSD
- application of safeguarding requirements to genuine (non-hybrid activities) payment institutions – Article 9(3) of the PSD
- threshold of EUR 600 for applying safeguarding requirements – Article 9(4) of the PSD
- option to take into account professional secrecy rules under the relevant provisions of the capital requirements Directive – Article 22(3) of the PSD
- waiver of authorisation/supervision requirements of payment institutions – Article 26(1) of the PSD
- limitation of payment activities carried out by waived entities under Article 26 – Article 26(4) of the PSD
- application of disclosure requirements to microenterprises – Article 30(2) of the PSD
- burden of proof of compliance with disclosure requirements lies with the payment service provider – Article 33 of the PSD
- low-value/e-money payments: reduce/double amounts under Article 34(1) and increase them for prepaid instruments up to EUR 500 – Article 34(2) of the PSD
- more favourable provisions on termination conditions – Article 45(6) of the PSD
- provision of information to the payer on paper once a month free of charge – Article 47(3) of the PSD
- provision of information to the payee on paper once a month free of charge – Article 48(3) of the PSD
- no application of out-of-court procedures to corporate bodies – Article 51(2) of the PSD
- application of rights/obligations under Title IV to microenterprises – Article 51(3) of the PSD
- limitation of the application of the surcharge rule – Article 52(3) of the PSD
- low-value/e-money payments: reduce/double amounts under Article 34(1) and increase them for prepaid instruments up to EUR 500 – Article 53(2) of the PSD
- limit derogation under this provision to accounts or instruments of a certain value – Article 53(3) of the PSD
- reduction of a payer's liability for unauthorised use of a payment instrument taking into account the nature of personalised security features of the payment instrument – Article 61(3) of the PSD

- shorter maximum execution times for purely national payment transactions – Article 72 of the PSD
- transitional provisions in favour of legal persons under certain conditions – Article 88(3) of the PSD
- transitional provision for natural or legal persons eligible for the waiver under Article 26 – Article 88(4) of the PSD.

The following table provides an overview of options adopted by the Member States:

Figure 38:Use of options by EU Member States

Article of PSD	Austria	Belgium	Bulgaria	Cyprus	Czech Republic	Denmark	Estonia	Finland	France	Germany	Greece	Hungary	Ireland	Italy	Latvia	Lithuania	Luxembourg	Malta	Netherlands	Poland	Portugal	Romania	Slovakia	Slovenia	Spain	Sweden	United Kingdom (FSR)[i]	United Kingdom (PSR)[i]
2(3)	Y	N	N	N	N	N	N	Y	Y	Y	N	N	Y	Y	N	N	N	N	Y	Y	N	N	N	N	N	N	Y	Y
7(3)	N	N	N	Y	N	N	Y	Y	Y	Y	Y	N	Y	N	Y	N	Y	N	Y	N	N	N	N	N	Y	N	Y	Y
9(2)	N	Y	N	Y	Y	N	Y	Y	Y	Y	Y	c	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y
9(3)	Y	Y	Y	Y	N	N	Y	N	Y	Y	Y	Y	Y	Y	N	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
9(4)	N	N	N	N	N	Y	Y	Y	N	N	N	N	Y	Y	N	N	Y	N	N	N	N	Y	N	N	N	Y	Y	Y
22(3)	Y	Y	Y	Y	Y	N	Y	N	Y	N	Y	N	N	Y	N	Y	Y	N	N	N	Y	Y	N	Y	Y	Y	Y	N
26(1)	N	Y	N	N	Y	Y	Y	Y	N	N	N	N	Y	Y	Y	Y	Y	N	Y	Y	N	N	N	Y	N	Y	Y	Y ?
26(4)	N	a	N	N	N	N	Y	N	N	N	N	N	Y	d	Y	N	Y	N	N	Y	N	N	N	Y	N	N	N	?
30(2)	N	N	N	Y	Y	N	N	N	N	N	N	Y	Y	Y	N	N	N	Y	N	N	Y	N	Y	N	N	N	h	Y
33	N	Y	N	Y	Y	N	N	b	Y	Y	Y	Y	N	Y	Y	Y	N	Y	N	Y	Y	Y	Y	Y	Y	N	h	N
34(2)	Y	a	N	N	Y	N	N	Y	N	N	Y	N	Y	Y	N	N	Y	N	Y	Y	N	Y	N	N	N	N	Y	Y
45(6)	Y	Y	N	N	N	Y	N	Y	N	N	N	N	N	Y	N	N	N	N	N	Y	Y	N	N	N	N	N	h	N
47(3)	Y	a	N	N	N	N	N	Y	Y	N	Y	Y	N	Y	N	N	N	N	Y	N	Y	Y	Y	Y	Y	Y	h	N
48(3)	Y	a	N	N	N	N	N	Y	Y	N	Y	Y	N	Y	N	N	N	N	Y	N	Y	Y	Y	Y	Y	Y	h	N
51(2)	N	Y	N	N	N	N	Y	Y	Y	N	N	N	Y	N	N	Y	N	N	Y	N	N	N	N	Y	Y	Y	Y	?
51(3)	N	N	N	Y	Y	N	N	N	N	N	N	Y	Y	Y	N	N	N	Y	N	N	Y	N	Y	N	N	N	h	Y
52(3)	Y	a	Y	Y	N	Y	N	N	Y	N	Y	Y	N	Y	Y	Y	Y	N	N	N	Y	Y	N	N	N	Y	h	N
53(2)	Y	a	N	N	Y	N	N	Y	N	Y	Y	N	Y	Y	N	N	Y	N	Y	Y	N	Y	N	N	N	N	Y	Y
53(3)	Y	Y	Y	Y	N	N	N	N	N	Y	N	N	N	Y	N	N	N	N	N	Y	N	Y	N	Y	Y	N	h	N
61(3)	Y	Y	N	N	N	N	N	Y	Y	N	N	Y	Y	Y	Y	N	N	N	Y	N	Y	Y	Y	N	N	Y	h	Y
72	N	Y	Y	N	Y	N	N	N	N	N	N	c	N	N	N	Y	N	N	e	N	Y	Y	Y	Y	N	N	h	?
88(3)	Y	N	Y	Y	N	N	Y	Y	N	Y	Y	Y	Y	Y	N	N	Y	N	f	Y	g	N	N	Y	Y	Y	h	N
88(4)	N	a	N	N	Y	Y	Y	Y	N	N	N	N	Y	N	N	Y	Y	N	f	Y	N	N	N	Y	N	Y	Y	Y

Source: TIPIK Report, the PSD options overview on the EC's website ec.europa.eu/internal_market/payments/framework/transposition _en.htm#options and the survey of the competent authorities

Notes:

N Option has not been transposed by the Member State.

Y Option has been transposed by the Member State (in full or partially).

a Option can be transposed in secondary legislation adopted by the King. It is not clear whether the secondary legislation has been adopted or not.

b According the PSD options overview on the EC's website, Finland has transposed the option, however relevant legal provisions could not be found.

c According to the PSD options overview on the EC's website, Hungary has transposed the option, however relevant legal provisions could not be found.

d The Bank of Italy is to establish the list of activities, however according to the TIPIK Report and the PSD options overview on the EC's website, the option has not been transposed.

e Shorter maximum execution times can be established by Ministerial Decree, however it is not clear if the Decree has been issued.

f According to the PSD options overview on the EC's website the Netherlands has transposed the option, however the relevant legal provision could not be found.

g According to the PSD options overview on the EC's website, Portugal has transposed the option, however relevant legal provision could not be found.

h The Minister is empowered to transpose the options, however it is not clear if the regulation has been adopted.

i The FSR 2010 is the primary and only notified measure concerning Gibraltar and the PSR 2009 is the primary and only notified measure concerning England, Scotland, Wales and Northern Ireland.

The table reveals that the options most often adopted are:

- calculation of safeguarding requirements when funds can be used for future payment transactions and for non-payment services – Article 9(2) of the PSD – 22 Member States;
- application of safeguarding requirements to genuine (non-hybrid activities) payment institutions – Article 9(3) of the PSD - 22 Member States;
- limitation of the application of the surcharge rule – Article 52(3) of the PSD – 15 Member States;
- burden of proof of compliance with disclosure requirements lies with the payment service provider – Article 33 of the PSD – 17 Member States;
- option to take into account professional secrecy rules under the relevant provisions of the capital requirements Directive – Article 22(3) of the PSD - 17 Member States.

The options adopted least are:

- limitation of payment activities carried out by waived entities under Article 26 – Article 26(4) of the PSD – 6 Member States;
- more favourable provisions on termination conditions – Article 45(6) of the PSD – 7 Member States;
- shorter maximum execution times for purely national payment transactions – Article 72 - 8 of the PSD Member States.

Most options have been applied in Italy (18 out of 23), Finland and Ireland (15). Malta, Denmark (5), Bulgaria (6) and Latvia (7) have chosen the least number of options to implement.

Most options have specific reasons for being adopted. Many of them were indispensable in order to reach an agreement on proceeding with the PSD. Many others enable the characteristics and developments of national markets to be taken into account. Finally, some of the options promote the use of cashless payments where the local market is sufficiently mature to absorb the overall impact of the option.

4.7.2 Impact and views of stakeholders

The variety of options and their unequal relevance makes a general overview across all Member States difficult. The options open to Member States reflect the varying state of play of the pay-

ments market in various Member States. The final number of options and the relevance of issues for which options exist are a significant challenge to the concept of maximum harmonisation.

Surcharging is a key concern for most stakeholders. For a more extensive discussion of surcharging, see section 3.5

Credit institutions

A considerable volume of evidence of the impact of the varied use of options was provided by credit institutions and their associations.

Most credit institutions, in responding to the questionnaires, noted that the options for Member States have a neutral impact on operational efficiency, offers, competition and integration of the European payments market.[254] There is no apparent correlation between the responses of credit institutions from a particular Member State and the number or subject of the options implemented by that state.

Abstracting from the "neutral" responses, more "negative" than "positive" responses were provided regarding the provision of information to the payer/payee on paper once a month free of charge. This option is considered as having the most negative impact on the European payments market.

Another option where negative assessment by credit institutions prevails (beyond neutral replies) is the payer's liability for unauthorised use of the payment instrument taking into account the nature of personalised security features of the payment instrument under Article 61(3).

In both cases, it should be understood that the respondents considered that the PSD would benefit from removal of those measures.

In contrast, the following options were judged more positively than negatively for the European payments market (i.e. more "positive" than "negative" replies, abstracting from "neutral" ones): shorter maximum execution times for purely national payment transactions set out in Article 72, non-application of out-of-court procedures to corporate bodies set out in Article 51(2) and reducing/doubling/increasing of amounts in respect of low-value/e-money payments under Articles 34(1), (2) and 53(2). Given that the optional measures judged positively are mostly dependent upon individual developments in the Member States concerned (efficiency of national payment systems, purchasing power of the local currency related to EUR 30/150 thresholds in low-value transactions), preservation of those measures as options for Member States would appear to be appropriate.

Some credit institutions raised the issue of inconsistency in provisions concerning surcharges. As a result of a prohibition of surcharges in a majority of the Member States, consumers from those States usually expect the same approach to be adopted in the whole EEA.[255] This causes confusion among cardholders, and may consequently damage the transparency of the market and the integration of the European payments market. Surcharging is also reported to be used occasionally to the detriment of cardholders, as an additional income for merchants not connected with the main transaction. According to credit institutions, travel services and e-commerce are the areas most

[254] Answers to Question 5.3, CIQ.
[255] Answers to Question 5.3, CIQ.

affected by this, in which different solutions have the most negative impact. Respondents suggest implementing a uniform model of surcharging in all EEA States.[256]

A majority of credit institutions and their associations are of the opinion that their offering in the different States has not been affected by the use of different options by the EEA States. Nevertheless, several respondents reported problems in achieving harmonisation and standardisation of their services, since their offerings have to be adapted to the different jurisdictions.[257] This may cause additional costs and increase the administrative burden faced by payment service providers. Customers are therefore treated differently according to the Member State where payment services are to be provided. Some services are limited by payment service providers to particular countries or to a certain group of customers, which may lead, for example, to exclusion of microenterprises (see below) from business products, due to the fact they are treated as consumers in some countries.

Industry experts

Evidence from industry experts points to the following options that affect most of the payments market:

- The option to waive authorisation/supervision requirements on payment institutions combined with the option to limit payment activities carried out by waived entities (see section 5.5); overall, this option has a positive impact on the internal market because it preserves the existence of small payment service providers, which fill niches within the mass payment market.
- Limitation of the application of the surcharge rule (see section 3.5).
- Application of consumer standards to microenterprises (see section 4.6); overall, this option has a negative impact because it forces providers and users to offer and use business products constrained by consumer protection measures which conflict with business needs while this need arises mostly (if ever) in one-person businesses (see extensive discussion of microenterprises option in section 4.6).
- Shorter maximum execution times for purely national payment transactions – overall, this option has a positive impact because it is at the forefront of further improvements to the PSD in order to reach the standards of instant online or mobile payments for the whole payment infrastructure; due to seriously divergent developments in national payment infrastructures this measure will be kept optional.

4.7.3 Conclusion

The number of options, the variety of their nature and their unequal relevance has made it difficult to provide a structured assessment of the effects of the options in general.

Stakeholders are usually neutral about the impact of options. Neither users nor providers tend to avoid operating in specific Member States simply because a specific option has been used. Nor can the existence of any provider or payment service be attributed to a significant degree to exercise of a specific option.

[256] Answers to Question 5.3, CIQ.
[257] Answers to Question 5.3, CIQ.

The surcharge option (limiting the right of the payee to request surcharge) is one of the options most frequently adopted (15 Member States).

The option to provide information free of charge has been adopted by nearly half of Member States (13). Despite this relatively moderate adoption rate, it is much criticised by providers suggesting the need for its removal from the PSD. Neither consumer representatives nor complaint boards[258] note substantial issues with charges for information (as opposed to the quality of and access to obligatory information which was discussed earlier). This means that this option should be reconsidered in order to identify any potential for improvement. The same is also true for the option to limit the payer's liability for unauthorised use of a payment instrument (adoption by 14 Member States).

The option to waive authorisation and supervision requirements was adopted by over half the Member States (15). This option has had the most visible impact on the payments market due to the existence of waived providers. The detailed impact is discussed in section 5.5.

The option to shorten the timeline for national transactions has had a positive impact overall on the market. This view is also shared by providers. However adoption of this option is low (8 Member States) which prevents the option from achieving its full potential (see for more details chapter 7.1). Due to variations in the efficiency of national infrastructures the shortening of timelines will be kept optional.

The option to apply consumer standards to microenterprises (9 Member States) has had a negative impact on the market overall. In Member States applying this option, microenterprises are prevented from benefiting from business-oriented payment products. Payment service providers also are prevented from rolling out pan-European business services for microenterprises (for extensive conclusions see section 4.6).

[258] Answers to question 11 CBR. For further details, see also Annex 3.8.

5 Market Access, Structure and Prudential Rules

In this chapter, we will discuss the extent of the take-up of the right of establishment and freedom to provide cross-border services and look at the institutional arrangements supporting the passporting regime in place under the PSD. We will then discuss the impact of the PSD's licensing regime on competition, focussing on payment institutions. This chapter will also discuss the application of the prudential capital and own fund requirements under the PSD. This will be followed by a section on the use and impact of the waiver for small payment providers (SPSPs). Finally, this chapter focusses on access to payment systems and the granting of credit by payment institutions.

5.1 Extent of the take-up of the right of establishment and freedom to provide services cross-border

5.1.1 Introduction

Article 25 of the PSD specifies how the right of establishment and freedom to provide services (i.e., the so-called 'passporting') is to be exercised by APIs. This Article specifies the following:

> "*In order to provide payment services in another Member State under the PSD passporting regime, an API must provide a 'notice of intention' to its home competent authority. This notice must identify the payment service(s) in the EEA State in which the API is seeking its passporting rights. Additionally, details, if any, of a proposed EEA branch must be provided. The home competent authority must then inform the host competent authority within a month of receiving the notice of intention with the details of the authorised payment institution and the information provided in the notice of intention.*
>
> *In cases where an API intends to provide payment services in another EU Member State via an agent, the home competent authority has to inform the competent authority of the host Member State of the intention to register the agent. It then has to take the opinion of the competent authority in the host country into account prior to proceeding with the registration of the agent.*
>
> *APIs exercising passporting rights are subject to supervision. This may take the form of providing relevant information on request and on-site inspections for reasonable grounds of suspicion, such as money laundering.*"

Overall, the PSD passporting framework has the potential to have substantial positive impact on the payments market.

- From the perspective of payment institutions, passporting provides APIs with a tool to expand into other EEA markets without incurring high market entry costs or having to operate under multiple authorisations.
- Competent authorities benefit from saving resources associated with assessing and authorising payment institutions which have already been assessed and authorised by an equivalent authority in another Member State.

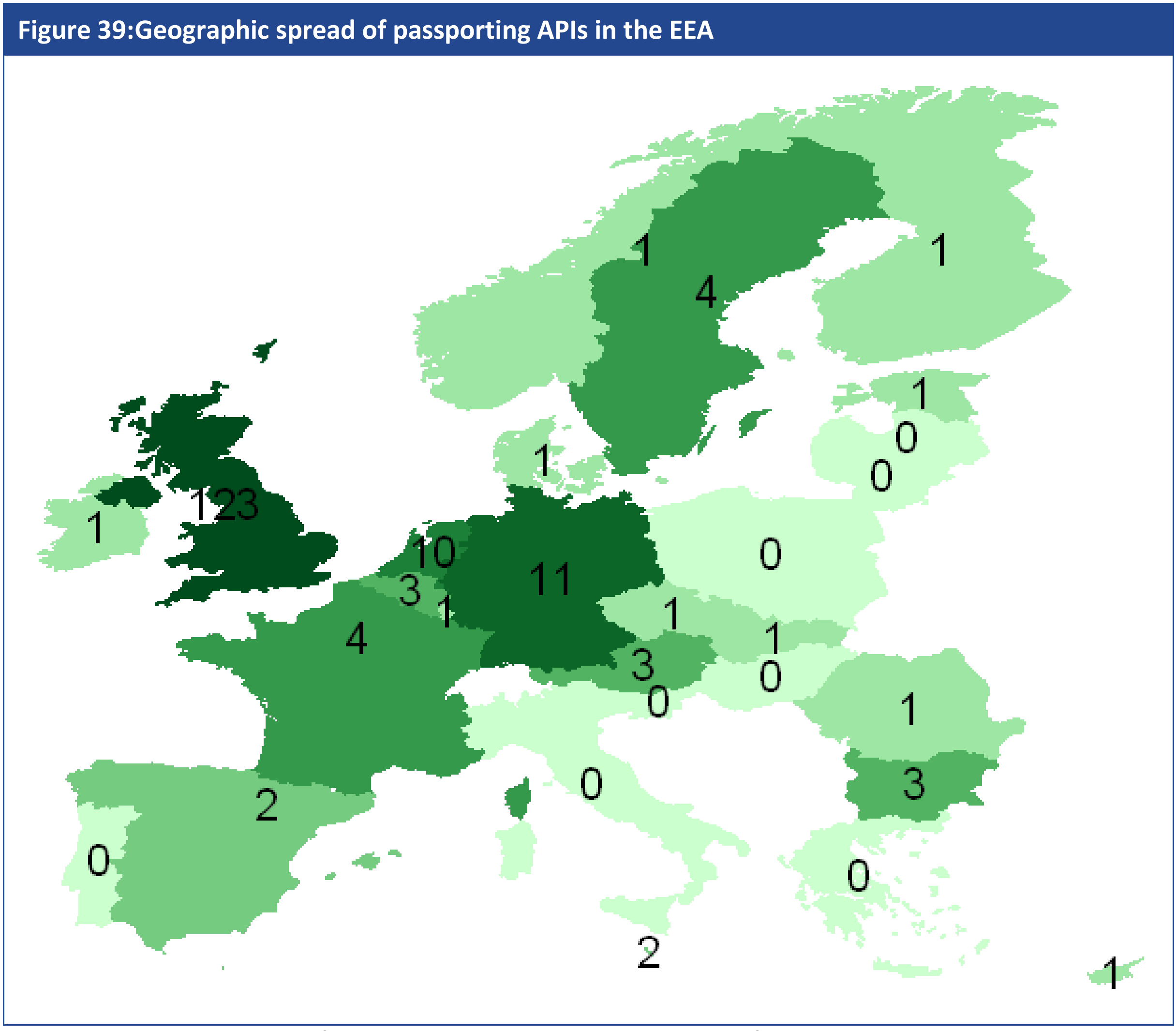
- Customers may have more choice over services of providers from other Member States which otherwise might not be available, thus enhancing competition. Moreover, customers may benefit from Europe-wide services instead of services from a series of more local service providers.

Many authorised payment institutions have exercised the right of establishment and freedom to provide services (the passport) and the next sub-section provides detailed information on the passporting activities of authorised payment institutions and the views of various groups of stakeholders on such passporting activities. The issue of how regulators view the current passporting arrangements is addressed separately in the next section.

5.1.2 Take-up of passporting by APIs

The APIs using a passport are heavily concentrated in the United Kingdom which accounts for 70% of all passporting APIs in the EEA as of late August /early September 2012 (see figure below).

Figure 39:Geographic spread of passporting APIs in the EEA



Source: Registers on the websites of the competent authorities and complementary information provided by the authorities

Moreover, in each EEA State, typically, only a fraction of the APIs has sought passporting rights.

- In fact, there are only three cases where 50% or more of APIs have sought to obtain passports - Austria (75% of APIs), Norway (50% of APIs) and the United Kingdom (55%) (see table below).
- No APIs in Greece, Hungary, Italy, Lithuania, Portugal or Slovenia have sought passports.

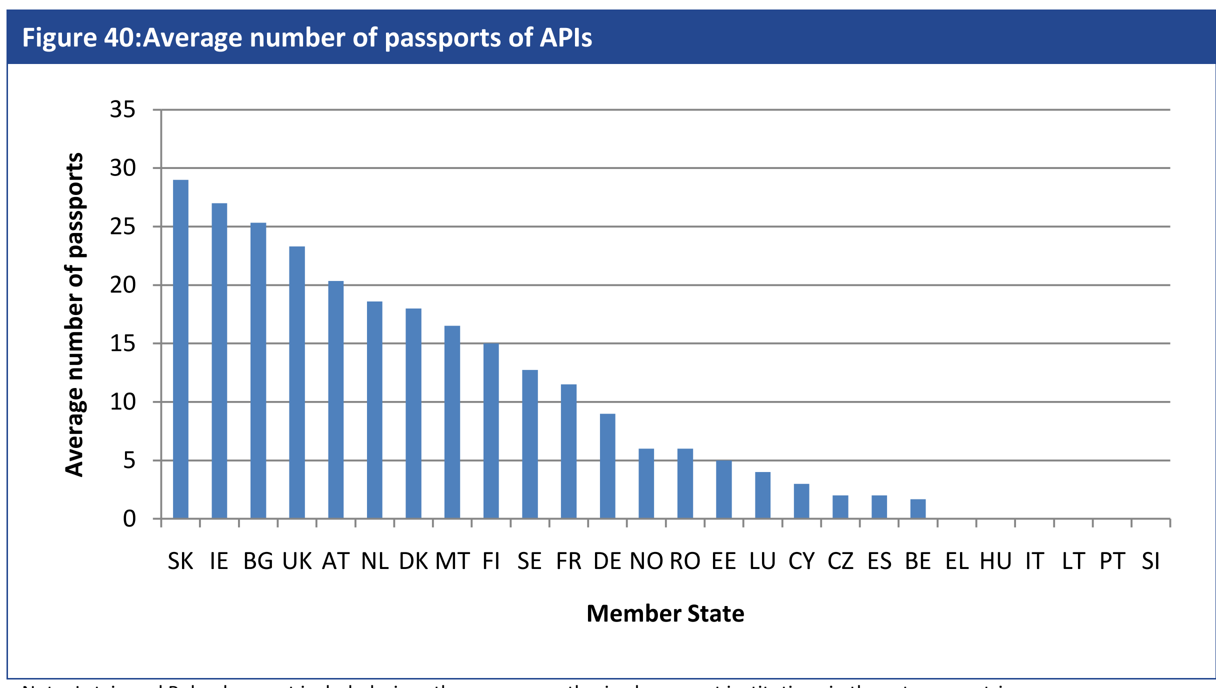
Table 28: Total number and proportion of passporting payment institutions by Member State

Member State	Number of APIs	Number of passporting APIs	Percentage of passporting APIs in total number of APIs
AT	4	3	75.0%
BE	9	3	33.3%
BG	9	3	33.3%
CY	10	1	10.0%
CZ	13	1	7.7%
DE	37	11	29.7%
DK	6	1	16.7%
EE	8	1	12.5%
EL	11	0	0.0%
ES	46	2	4.3%
FI	5	1	20.0%
FR	12	4	33.3%
HU	2	0	0.0%
IE	10	1	10.0%
IT	45	0	0.0%
LT	20	0	0.0%
LU	4	1	25.0%
MT	14	2	14.3%
NL	28	10	35.7%
NO	2	1	50.0%
PT	9	0	0.0%
RO	7	1	14.3%
SE	23	4	17.4%
SI	4	0	0.0%
SK	6	1	16.7%
UK	224	123	54.9%
EEA	568	175	30.8%

Note: Latvia and Poland are not included, since there are no authorised payment institutions in these two countries.
Source: Registers on the web sites of the competent authorities and complementary information provided by the authorities

The passporting policy of the APIs varies greatly across EEA States. In a number of EEA States (in particular in Slovakia, Lithuania, Bulgaria and United Kingdom) many APIs sought to passport their activities to 27 or more EEA States, while in other Member States APIs seem to have adopted a more selective approach to passporting (see figure below).

Figure 40:Average number of passports of APIs



Note: Latvia and Poland are not included, since there are no authorised payment institutions in these two countries.
Source: Registers on the web sites of the competent authorities and complementary information provided by the authorities

A detailed analysis of the bilateral passporting activities of APIs in various EEA States (i.e., from country x to country y and vice-versa) is reported in Annex 7. It shows that the following country pairs show stronger bilateral activities than other country pairs in the EEA. These pairs of countries (listed below) always involve neighbouring countries:

- Austria – Germany
- Czech Republic – Hungary
- Czech Republic – Slovakia
- Belgium – Netherlands

In terms of the type of payment services provided by APIs passporting their payment services outside of the home country, the bulk of passporting APIs (60%) are accounted for by APIs only authorised to undertake money remittances.

It is important to note that while many APIs sought a large number of passports, they are typically providing payment services in only 3 or 4 EEA States outside their home Member State.[259]

In bilateral discussions with a number of APIs that sought a very large number of passports but offered their services only in a limited number of EEA States, the majority indicated that blanket coverage of the EEA was sought because a) there was no or little difference in the cost of applying for one or several passports and b) it provided more flexibility (to APIs) to quickly adjust their offerings to changing market demands in the different EEA States.

[259] This finding was made based on an analysis of the websites of the APIs having obtained 27 or more passports.

The information available from the websites of the competent authorities does generally provide information on the type of cross-border payment services provision undertaken by APIs in a particular Member State. However, the country notes accompanying the statistics on the value and volume of the different payment instruments used in each EU Member State, produced by the ECB[260], provides such a breakdown even if the payment services provided by the APIs are not included in the official payments statistics for a number of EU countries.

The ECB data on cross-border provision by APIs show that (see Annex 7 for more details):

- The number of APIs having obtained a passport to provide payment services into the 13 Member States for which detailed data exist (namely, Austria, Bulgaria, Cyprus, Czech republic, Estonia, Ireland, Italy, Latvia, Lithuania, Poland, Spain, Slovenia and Slovakia) has increased substantially from 2010 to 2011 (see Table 29 below).
- The vast majority of APIs providing cross-border payment services into these countries do so without establishing branches or using agents. In Ireland and Italy, the share of APIs providing cross-border payments on a freedom-to-provide-services basis stands at 80% and in the other 11 Member States, this share stands at more than 95%.

[260] See European Central Bank Payments statistics (http://sdw.ecb.europa.eu/reports.do?node=100000761)

Table 29: Provision of cross-border payment services by APIs in EU Member States

	2010				2011				Change 2011-2010	Share of APIs providing cross-border services without branches or use of agents
	Through a branch	Through agents	Direct service provision without branch	Total	Branch	Through agents	Direct service provision without branch	Total		
Austria	2		69	71	3		124	127	56	98%
Belgium										
Bulgaria	0	1	43	44	0	1	81	82	38	99%
Cyprus	0	4	37	41	0	5	91	96	55	95%
Czech Republic	0	3	42	45	1	3	99	103	58	96%
Denmark										
Estonia	0	1	42	43	0	1	85	86	43	99%
France										
Finland										
Germany										
Greece										
Hungary										
Ireland	5	8	70	83	8	11	83	102	19	81%
Italy	0	5	40	45	13	10	98	121	76	81%
Latvia	0	2	39	41	0	3	93	96	55	97%
Lithuania	0	2	43	45	0	2	99	101	56	98%
Luxembourg										

Table 29: Provision of cross-border payment services by APIs in EU Member States

	2010				2011				Change 2011-2010	Share of APIs providing cross-border services without branches or use of agents
	Through a branch	Through agents	Direct service provision without branch	Total	Branch	Through agents	Direct service provision without branch	Total		
Malta										
Poland	3	5	43	51	6	6	92	104	53	88%
Portugal										
Spain	0	1	45	46	2	1	105	108	62	97%
Slovakia	0	1	39	40	0	4	80	84	44	95%
Slovenia	0	2	42	44	0	2	88	90	46	98%
Sweden										
United Kingdom										

Source: European Central Bank Payments statistics (http://sdw.ecb.europa.eu/reports.do?node=100000761)

5.1.3 Views of stakeholders

Below are the views expressed by payment institutions and users on how well the PSD passporting regime is working for APIs and users.

Views of APIs

At the present time many APIs are of the view that the PSD's passporting regime has not reached its full potential due both to concerns specific to the passporting process and an insufficient level of harmonisation of information, transparency of conditions and conduct of business rules (because of non-harmonised AML, consumer protection and data protection rules).

A majority of payment institutions that responded to the survey provide payment services in Member States other than the home Member State.[261] Of these, only a few provide services on a pan-European basis and are typically the large APIs which already provided payment services in many EU countries prior to the implementation of the PSD.

Only some payment institutions report major issues with entering a new market under the passporting regime.

The issue most frequently raised relates to an apparent resistance by some host authorities against providing services without a physical presence in a host Member State and prolonging the passporting procedure by conducting robust anti-money laundering checks and checking compliance with the host country's consumer protection requirements. Some noted these additional checks take 6 to 9 months.

These factors result in uncertainty about how long it takes to complete the required passporting procedures. In particular, the process for registering a foreign agent is viewed as often very slow and resulting in an uneven playing field between domestic and foreign APIs. This is because a domestic API wishing to register a domestic agent can do so much more quickly than a foreign agent.[262]

Consumers

There is limited awareness of passporting and passporting issues among consumers. Nevertheless, some concerns over the passporting regime were raised.

In order to assess the impact of the passporting regime on consumers, consumer associations were asked to comment on the level of awareness consumers have about their providers' authorisation status (i.e. local provider or operating under a passport).[263]

While 13 consumer associations from 12 Member States did not answer this question[264], not a single respondent did indicate that consumers were aware of the legal regime under which the provider was interacting with them. Eight (excluding these Member States from any representa-

[261] Answers to question 3.5 APIQ.

[262] In bilateral consultations with APIs, a number of APIs mentioned a domestic agent can be registered in many cases within 1 or 2 week while registering a foreign agent typically adds 6 weeks to the process.

[263] Answers to question 8 CAQL and to question 7 CAQS. For further details, see also Annex 2.7.2.

[264] AQL12 Arbeiterk (AT), CAQL21 CRIOC (BE); CAQS11 CCU (CY), CQAS14 CCA (CY), CAQL17 Poradna (CZ), CAQL1 TAENK (DK), CAQL18 ADICAE (ES), CAQL ECC Fin (FI), CAQS3 ECC Lux (LU), CAQL16 Consument (NL), CAQL15 Deco (PT), CAQL25 Kv (SE), CAQL9 ZPS (SI).

tion in the results) were responses where the respondents had no opinion[265], mostly due to a lack of information on this topic in the consumer association.

Out of those answering who felt qualified to do so (a total of 11 consumer associations representing ten Member States), they overwhelmingly noted that consumers were not aware of the legal regime under which providers were operating[266] whereas two consumer associations indicated that some consumers may be aware of the legal regime under which the provider was operating.[267]

These results are easily explained by the fact that passporting is not something that consumers will be aware of as they enter into a relationship with a provider. Indeed, passporting is something that happens before the provision of services can take place in a MS and it seems reasonable to then infer that the legal regime a provider is operating under will have little effect on consumers and their decision to transact with a given payment service provider.

In any event, according to Which? in the UK (where passporting activities are high), *'we do not generally believe that consumers are aware of the difference and we also do not think that it should be necessary for consumers to know where the registered office of the payment service provider is located. Consumers should be able to expect the same level of protection from native payment service providers [as] from those who passport their services into the UK'*.[268]

Consumer associations were also asked to comment on the impact of passporting (positive or negative).[269] An important number of consumer associations did not answer this question (totalling 13 CA and excluding 12 MS from our data in the process).[270] A further six CA explained that they lacked information to answer this question, excluding a further five MS from our results.[271] Another six consumer associations (excluding another three MS)[272] expressed no opinion.

Out of only eight consumer associations representing eight MS[273] who felt equipped to reply, a small number saw this system as a way to increase competition and thus consumer choice[274], perhaps in this way joining in with the views of APIs themselves (detailed above). However, most consumer associations who provided answers did raise the following concerns over passporting:

- forum shopping, meaning that providers may eventually seek authorisation only in those MS that have the most liberal authorisation regime;[275]
- difficulties for national regulators in stopping a payment institution that is not delivering good service to consumers authorised in another MS;[276]

[265] CAQS2 VKI (AT), CAQL19 Test Achats (BE), CAQL4 abv (BG), CAQL23 EKPIZO (EL), CAQL2 Altro (IT), CAQL10 lbka (LT), CAQL24 PTAC (LV), CAQS10 zss (SK).
[266] CAQL17 Poradna (CZ), CAQL11 vzbv (DE), CAQS15 ECC Irl (IE), CAQS7 UFC (FR) explained: 'Consumers totally ignore the existence of passporting and the difference between nationally authorised payment institutions and those that benefit from a foreign authorisation'; CAQS1 Pater (LV), CAQS6 lGtk (MT), CAQL22 Conso (RO), CAQS13 Which? (UK).
[267] CAQL14 OFE (HU), CAQL8 Nibud (NL): 'Some providers advertise their 'foreigness' (e.g. Deutsche Bank), while others do not and only show it in the contract (e.g. Paypal)'.
[268] CAQS13 Which? (UK).
[269] Answers to question 9 CAQL and to question 8 CAQS. For further details, see also Annex 2.7.2.
[270] CAQL12 Arbeiterk (AT, CAQL21 CRIOC (BE), CAQS11 & CAQS14 (CY), CAQL17 Poradna (CZ), CAQL1 TAENK (DK), CAQL18 ADICAE (ES), CAQL5 ECC Fin (FI), CAQS3 ECC Lux (LU); CAQS1 Pater (LV), CAQL15 Deco (PT), CAQL25 Kv (SE), CAQL9 ZPS (SI).
[271] The following declared lacking information to be able to answer: CAQS9 SOS (CZ), CAQL23 EKPIZO (EL), CAQL10 lkba (LT), CAQS6 lGtk (MT), CAQS12 FK (PL), CAQS10 zss (SK).
[272] CAQS2 VKI (AT), CAQL19 Test Achats (BE), CAQL13 UGANDI (EE), CAQL24 PTAC (LV), CAQL16 & CAQL8 (NL).
[273] CAQL4 abv (BG), CAQL11 vzbv (DE), CAQS7 UFC (FR), CAQL2 Altro (IT), CAQL22 Conso (RO), CAQS13 Which? (UK); CAQL14 OFE (HU).
[274] CAQL4 abv (BG), CAQL15 ECC Irl (IE), CAQL14 OFE (HU).
[275] CAQS7 UFC-Que Choisir (FR), CAQS13 Which? (UK).

- Difficulties for consumers to complain about institutions operating under a passport.

French and Irish consumer associations discussed their approach to consumers reporting problems with payment institutions operating under a passport. Consumers are generally referred to the ombudsman of the country where the payment institution's authorisation was obtained. However, it was felt this approach was wrong and consumers should instead be referred to the ombudsman in the country where the product was marketed, typically the consumer's residence.[277] Complaint boards from other Member States like Denmark and Germany mentioned that in the case of passporting they do nothing, referring users to the authority in the original Member State without knowing the results.[278]

As a result, it seems that the passporting regime has not fully convinced consumer associations and may benefit from improvements.

Complaints bodies

There could be complaints from users or other stakeholders about enterprises which are acting with a passport in another Member State or from PSPs in case of lack of access to technical infrastructure.

A few cases were reported by complaint boards in relation to authorisation and passporting.[279] The German authority reported several complaints in relation to passporting, which they solved by referring the users to the authority that was responsible. One case was also reported by the Danish Financial Supervisory Authority in relation to a payment provider with a limited permission to carry out payment services in Denmark. The Hungarian Authority noted "unauthorised activity" in relation to derogations for low-value payments (Article 53)[280] and the Banka Slovenije reported complaints in matters of Article 9 PSD with the following decision.[281]

Table 30: Example of complaints in relation to authorisation and passporting
"A payment institution did not properly safeguard funds which the payment institution received from the payment service users or through another payment service provider for the execution of payment transactions. Because of the specific business model (three-party scheme), the payment institution considered safeguarding requirements to only apply when the funds are actually received from the payment service users and not in cases when the payer's credit line has been debited for the amount of the transaction but the funds from this credit obligation will be paid only later. Banka Slovenije imposed a fine on a payment institution due to the violation of safeguarding requirements - it did not safeguard all the funds received from payment service users in such a manner that they would be insulated in the event of insolvency".

276 CAQS7 UFC-Que Choisir (FR).
277 CAQS7 UFC-Que Choisir (FR), CAQS15 Irl (IE).
278 Cases were reported from Denmark and Germany. The Spanish complaint board has concerns about "real control of PI activity in the host country when it is carried out by way of agents". See Answer to question 9 CBR.
279 Answers to question 9 CBR.
280 Answer to question 37 CBR.
281 General statement of the Banka Slovenije before question 8 CBR.

5.1.4 Conclusion

The study shows that passporting by APIs is used in several Member States but with different levels of penetration. The bulk of passporting APIs (60%) is accounted for by APIs only authorised to undertake money remittances. It is important to note that while many APIs sought a large number of passports, an analysis of the websites of the APIs having obtained 27 or more passports, at the present time, are typically providing payment services in only 3 or 4 EEA States outside their home Member State. In the absence of any data on the provision of cross-border services prior to the implementation of the PSD, it is unfortunately not possible to assess the extent to which the PSD has promoted the actual provision of cross-border payment services.

All in all, passporting by APIs for activities in other Member States is still a niche in relation to the whole market of payment services. It is too early to assess if passporting of APIs will have a positive impact on the market and if problems can be solved within the existing regime of the PSD. Therefore, no adjustments or changes to the current regime are suggested at the present time.

5.2 Institutional arrangements supporting the passporting regime

5.2.1 Introduction

Article 24 of the PSD stipulates that:

- the competent authorities shall cooperate with each other and where appropriate with national and European monetary authorities and other relevant competent authorities; and
- allow the exchange of information between competent authorities in various Member States and with European and national monetary authorities and other relevant authorities.

Moreover, Article 25 of the PSD foresees that, in the case of an API passporting to an EEA Member State, the competent authorities of the source Member State shall cooperate with the competent authorities of the host Member State and the competent authorities in the host and source Member State *„shall provide each other with all essential and/or relevant information, in particular in the case of infringements or suspected infringements by an agent, a branch or an entity to which activities are outsourced. In this regard, the competent authorities shall communicate, upon request, all relevant information and, on their own initiative, all essential information*".

This article also sets out the respective responsibilities of the competent authorities of the source and host countries for carrying out the necessary inspections and controls.

5.2.2 Views of competent authorities[282]

Competent authorities apply very divergent approaches to the general passporting framework.

The most important issue raised concerns a disagreement between competent authorities over whether the cross-border provision of payment service actually takes place (which requires notification) or the customer only makes use of local payment service at a distance (i.e. of the home Member State).

The approach applied by the respondent raising this issue is that if the product clearly addresses a specific market such services are provided under the freedom to provide services. However, the competent authority of the home Member State may not agree and therefore would not consider launching a notification procedure.

Another key issue is a lack of agreement among competent authorities over the interpretation of what constitutes a payment service.

Other issues are more of an operational nature and are discussed below.

Out of those operational issues, the notification of intent to provide services in another EU Member State including registration of agent is the stage of the passporting procedure that causes the fewest issues. By contrast, the greatest negative impact on the efficiency of the notification proc-

[282] This section based on answers to question 10 of AUT.

ess arises with regard to the level of cooperation and mutual approach of competent authorities of home and host Member State.

The competent authorities see the negative impact on the market mostly resulting from the performance of the other authorities rather than the performance of the payment institution.

Out of the 16 competent authorities who commented on these issues, only four reported 'no issues' with passporting. Out of the other competent authorities, the following issues were most often referred to:

- divergent interpretation of the PSD including its scope and the exemptions;
- poor quality of information provided by home authorities including content (incomplete notification) and validation of information;
- inefficient exchange of information between home and host authorities (including absent or delayed replies);
- poor handling of supervisory powers in general (the cases reported include situations where the home authority was not aware of the registration of a specific agent beforehand or where a notifying payment institution was not listed in the register before the passport notification);
- insufficient home assessment of payment institutions and/or their branches or agents;
- disregarding guidelines on passport notification; and
- unreasonable expectations or unjustified objections of host authorities.

Further, competent authorities also raised key issues regarding due diligence of payment institutions in the passporting process. Those included incomplete AML procedures, processes and internal control frameworks that have to be exercised by the agent through whom the payment services are provided. Another objection raised by one authority is a payment institution's reluctance to designate a person in charge of the institution's activity in the host Member State.

A last issue reported by competent authorities as impacting negatively the supervision of payments market is the time frame for passporting. Notwithstanding the complaints of payment institutions regarding the occasionally lengthy passporting procedures, one respondent suggested extending passporting deadlines for a right of establishment to three months for the home competent authority and two months for the host authority.

In essence, there exist a number of issues between competent authorities regarding the passporting procedure and the required exchange of information. But, perhaps more importantly, questions remain regarding what happens after the passport has been approved. Competent authorities, whose countries are hosts to many passporting institutions, feel that they do not receive sufficient information about the activities and performance of these institutions.

As a result, some passporting APIs[283] expressed the opinion that some of the issues that they encountered during the passporting process may simply reflect a desire of the host competent authority to ensure that they can fully assess the passporting-in institution.

[283] See section 5.1 for a discussion of the views of APIs on passporting.

5.2.3 Conclusion

The responses from many of the competent authorities suggest that there is a need for better communication among the authorities during the passporting process, and more importantly, after the passport has been granted so that both the home and host competent authorities are fully apprised of any developments affecting the passporting entity.

There is no consensus among the authorities regarding potential changes but there is a clear demand for a broader platform to discuss current problems with the passporting regime. Therefore, it seems to be useful to establish a roundtable for competent authorities with regular meetings to discuss current problems with passporting.

5.3 Impact of PSD licensing regime for payment institutions on competition

5.3.1 Introduction

One of the key objectives of the PSD is to promote a single market in payment services (Recital 1 of the PSD) and to "remove legal barriers to entry by establishing a single license for all providers of payment services which are not connected to taking deposits or issuing electronic money [namely the payment institutions]" (Recital 10 of the PSD).

As shown in chapter 2 on the market for payment services[284], as of late August 2012, there were 568 authorised payment institutions, 2,203 small payment institutions and 71 e-money institutions in the EEA.

Moreover, as shown in the previous section a number of such payments institutions are providing payment services in other Member States, using the passporting provision in the PSD (Article 25).

At issue is whether, as a result of these structural changes in the market for payment services, users have benefitted from more choice and competition.

In order to assess the impact of the PSD on competition, it is necessary to look at both consumer behaviour on the demand side and the evolution of the supply side.

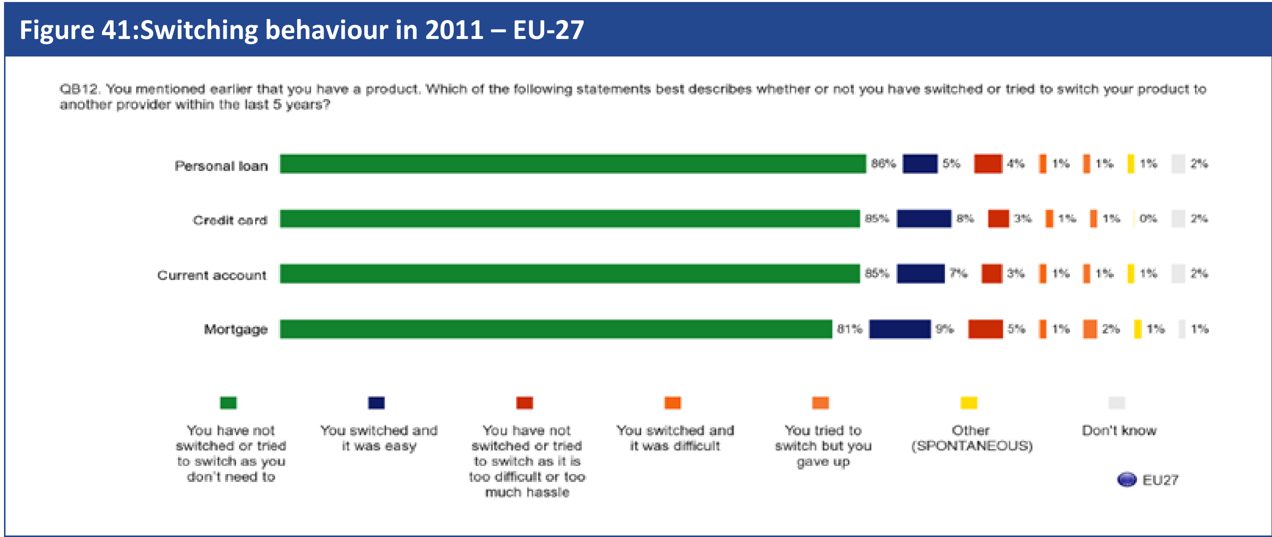
5.3.2 Consumer Behaviour

As is shown in Figure 41, the special Eurobarometer on retail financial services[285] found that 85% of respondents with a current account or a credit card have not switched or tried to switch to a new provider during the past five years because they did not see any need to do so. 4% did not switch because it was difficult or gave up during the switching process because it was too difficult.

Overall, only 9% of survey participants switched to a new credit card provider and 8% to a new current account provider.

[284] See Chapter 2, p. 15
[285] Special Eurobarometer 373 "Retail Financial Services", April 2012.

Figure 41:Switching behaviour in 2011 – EU-27



Source: Special Eurobarometer 373 "Retail Financial Services", April 2012

These figures suggest that, in general, consumers do not exert a strong pressure on the market for credit card payment services and for payment services requiring a bank account (direct debit and credit transfer). There are, however, significant differences across EU Member States:

- In the case of current accounts, the non-switchers account for 90% or more of the population in Bulgaria, Cyprus, Greece Lithuania and Portugal and for between 85% and 90% of the population in Belgium, Czech Republic, Estonia, Finland, Germany, Ireland, France, Latvia, Luxembourg, Malta, Slovenia and Spain (see Figure 42 below).
- In the case of credit cards, the non-switchers account for 90% or more of the population in Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, Greece, Lithuania, Luxembourg, Malta, Netherlands and Portugal (see Figure 43 below).

Figure 42:Current account switching in EU Member States

	Base	You have not switched or tried to switch as you don't need to	You switched and it was easy	You have not switched or tried to switch as it is too difficult or too much hassle	You switched and it was difficult	You tried to switch but you gave up	Other (SPONT.)	Don't know
EU27	22469	85%	7%	3%	1%	1%	1%	2%
BE	975	85%	8%	3%	1%	1%	1%	1%
BG	279	93%	2%	3%	0%	0%	0%	2%
CZ	879	88%	5%	6%	1%	0%	0%	0%
DK	997	78%	14%	3%	2%	1%	1%	1%
DE	1508	88%	7%	2%	1%	1%	0%	1%
EE	937	89%	7%	1%	0%	2%	0%	1%
IE	833	85%	3%	4%	1%	0%	0%	7%
EL	801	95%	5%	0%	0%	0%	0%	0%
ES	888	86%	8%	2%	1%	1%	1%	1%
FR	1005	85%	7%	2%	1%	2%	1%	2%
IT	780	84%	5%	8%	1%	1%	0%	1%
CY	363	93%	4%	3%	0%	0%	0%	0%
LV	849	86%	11%	0%	1%	0%	0%	2%
LT	856	91%	6%	0%	1%	0%	1%	1%
LU	487	88%	6%	1%	1%	2%	1%	1%
HU	685	81%	9%	7%	2%	1%	0%	0%
MT	351	89%	4%	4%	0%	0%	0%	3%
NL	991	84%	9%	4%	1%	1%	1%	0%
AT	937	80%	8%	7%	2%	1%	1%	1%
PL	675	79%	9%	3%	1%	1%	0%	7%
PT	828	94%	2%	2%	0%	1%	0%	1%
RO	283	77%	5%	2%	0%	1%	1%	14%
SI	979	87%	9%	1%	1%	1%	1%	0%
SK	783	81%	9%	5%	1%	2%	1%	1%
FI	993	89%	6%	3%	1%	1%	0%	0%
SE	1003	83%	11%	2%	1%	1%	2%	0%
UK	1228	84%	7%	5%	2%	1%	0%	1%

Highest percentage per country *Lowest percentage per country*
Highest percentage per item | Lowest percentage per item

Source: Special Eurobarometer 373 "Retail Financial Services", April 2012

Figure 43:Credit card switching in EU Member States

	Base	You have not switched or tried to switch as you don't need to	You switched and it was easy	You have not switched or tried to switch as it is too difficult or too much hassle	You switched and it was difficult	You tried to switch but you gave up	Other (SPONT.)	Don't know
EU27	10774	85%	8%	3%	1%	1%	0%	2%
BE	551	91%	6%	2%	0%	0%	1%	0%
BG	120	91%	0%	1%	0%	2%	0%	6%
CZ	269	94%	1%	5%	0%	0%	0%	0%
DK	706	78%	15%	3%	1%	1%	1%	1%
DE	548	89%	5%	2%	1%	0%	1%	2%
EE	312	91%	5%	1%	1%	0%	1%	1%
IE	452	80%	5%	5%	0%	1%	1%	8%
EL	181	92%	3%	2%	2%	1%	0%	0%
ES	462	86%	9%	2%	1%	1%	1%	0%
FR	779	86%	8%	1%	1%	1%	1%	2%
IT	327	84%	6%	5%	2%	1%	1%	1%
CY	260	91%	4%	3%	1%	0%	0%	1%
LV	413	87%	10%	1%	1%	0%	0%	1%
LT	168	92%	4%	0%	1%	0%	1%	2%
LU	438	92%	4%	0%	1%	1%	1%	1%
HU	88	84%	7%	7%	1%	1%	0%	0%
MT	293	91%	2%	3%	1%	0%	0%	3%
NL	521	90%	5%	2%	1%	1%	0%	1%
AT	306	84%	7%	6%	1%	1%	0%	1%
PL	192	78%	9%	3%	1%	1%	0%	8%
PT	194	92%	1%	5%	0%	1%	0%	1%
RO	177	70%	5%	7%	0%	1%	0%	17%
SI	439	86%	9%	1%	1%	0%	3%	0%
SK	242	84%	9%	4%	1%	1%	0%	1%
FI	600	89%	8%	2%	1%	0%	0%	0%
SE	601	82%	13%	2%	1%	0%	2%	0%
UK	660	82%	12%	3%	1%	1%	0%	1%

Highest percentage per country *Lowest percentage per country*
Highest percentage per item | Lowest percentage per item

Source: Special Eurobarometer 373 "Retail Financial Services", April 2012

Unfortunately, similar statistics do not exist for remittances but discussions with remitters during the course of the project suggest that consumers are price sensitive and more likely to switch payment service provider than in the case of current account and credit cards.

5.3.3 Changes in the payments industry

One of the objectives of the PSD was to increase competition in the payments market by stimulating entry in the domestic payments markets, either on a cross-border basis or through the creation of *de novo* institutions.

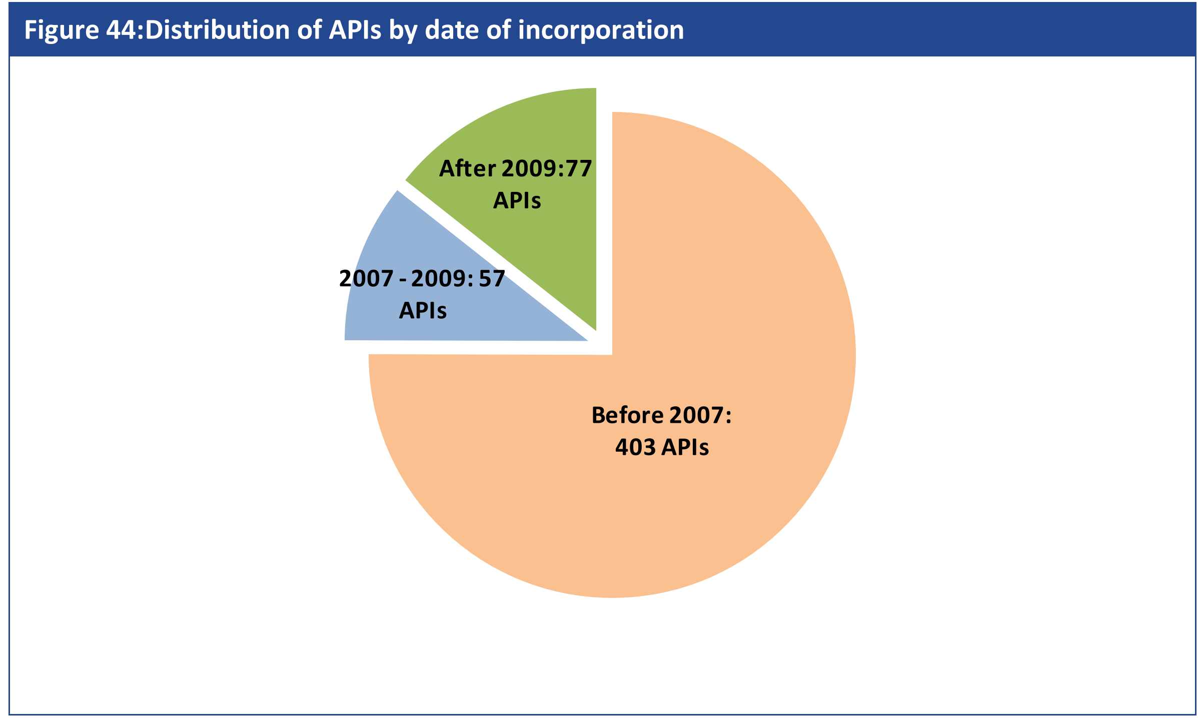
The previous analysis of the passporting activities of APIs showed that, indeed, a number of APIs (which previously focused on their domestic market only) are providing payment services outside their home country, although overall the magnitude of this new cross-border activity is still limited.

The analysis below focuses on the creation of new APIs following the adoption of the PSD.[286] We distinguish three periods, namely the period before 2007, the years 2007 to 2009 and the post-2009 period. The latter period covers the years following the implementation of the PSD at the national level. The years 2007-2009 are a transition period as the PSD was adopted at EU level in November 2007 and during the subsequent years was transposed at national level. It is possible that some entrepreneurs or businesses decided to create new payment institutions in anticipation of the implementation of the PSD in their country. Therefore, in order to capture the full effect of the PSD on the creation of APIs, the pre-PSD period is defined as covering the period up to 2007.

As already noted, in total, there are 568 APIs. However, there are 24 APIs for which the date of incorporation could not be identified (3 in Bulgaria, 3 in Greece, 1 in Hungary, 4 in Italy, 6 in Malta, 1 in the Netherlands, 3 in Portugal, 1 in Slovakia, 1 in Spain and 1 in the United Kingdom). Moreover, there are 7 APIs for which the activity they undertake could not be identified (1 in Malta, 1 in Spain and 5 in the United Kingdom). Therefore, the analysis of the date of incorporation of the APIs focuses on a sample of 537 APIs. To simplify the analysis, the APIs were grouped in five groups based on their main activity (or activities) identified from their respective websites (and not the official authorisations). These main activities are remittances, acquiring and card issuing, F/X broking and retail, services in support of payment services, non-bank credit provision and other activities (typically not related to the provision of payment services).

Of the 537 APIs, 75% (403 APIs) had been created before 2007, 11% (57 APIs) between 2007 and 2009 and 14% (77 APIs) after 2009 (Figure 44).

Figure 44:Distribution of APIs by date of incorporation



Source: London Economics

286 Ideally, one would want also to analyse the market share of APIs. Unfortunately, the data to undertake such an analysis do not exist. However, it is useful to recall that the payments activity of all the APIs is only about 1/5 the size of the corresponding activity of credit institutions.

Remitters account for 67% of new APIs created during the period 2007-2009 followed distantly by acquirers or card issuers (18%). In contrast, acquirers and issuers account for 39% of the new payment institutions in the post-2009 period and remitters for only 37%.

Table 31: Distribution of APIs by main activity and date of incorporation

	Remitter	Acquirer/Card issuer	F/X	Support for payment services	Non-bank credit lenders	Other
Before 2007	158	97	62	6	30	50
2007-2009	38	10	7	0	1	1
After 2009	28	30	13	2	0	4
Total	224	137	82	8	31	55

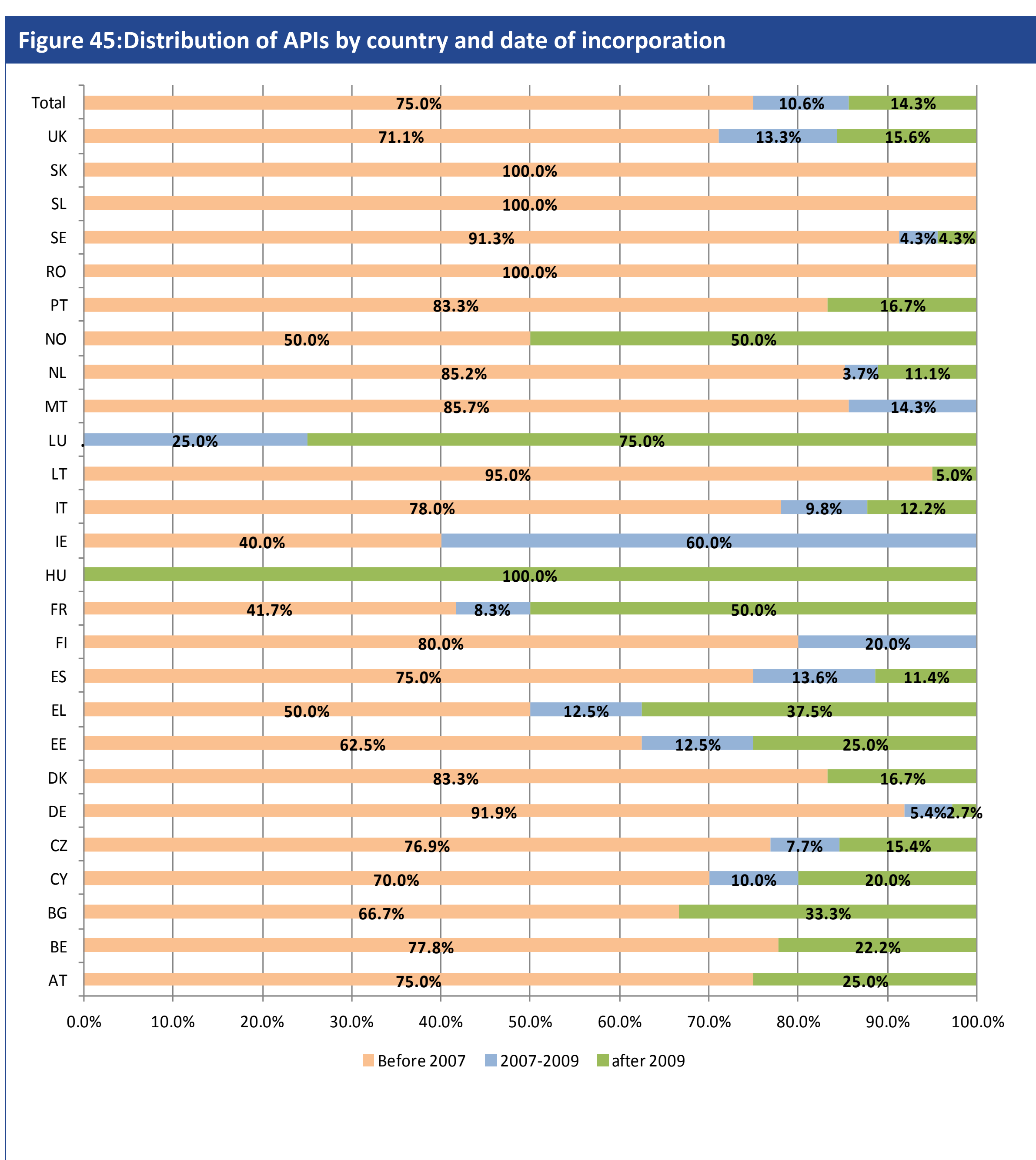
Source: London Economics

The intensity of creation of new APIs during the transition years and in the post-PSD period varies considerably across countries.

During both periods, the UK accounts for the bulk of the newly created APIs (51% during the transition period and 44% during the post-2009 period). Other countries accounting for a significant share of new APIs during the transition period include Ireland (10% of the total), Spain (10% of the total) and Italy (7% of the total). During the post-2009 period, only France, Italy and Spain stand out as having created a significant share of the new APIs created during this period (8%, 7% and 7% of the total respectively).

While the creation of new APIs was largely concentrated in a few countries, in France, Greece, Hungary, Ireland, Luxembourg and Norway, the APIs created during the transition years and the post-2009 period account for 50% or more of all the APIs which exist currently in each of these countries (see Figure 45).

Figure 45:Distribution of APIs by country and date of incorporation



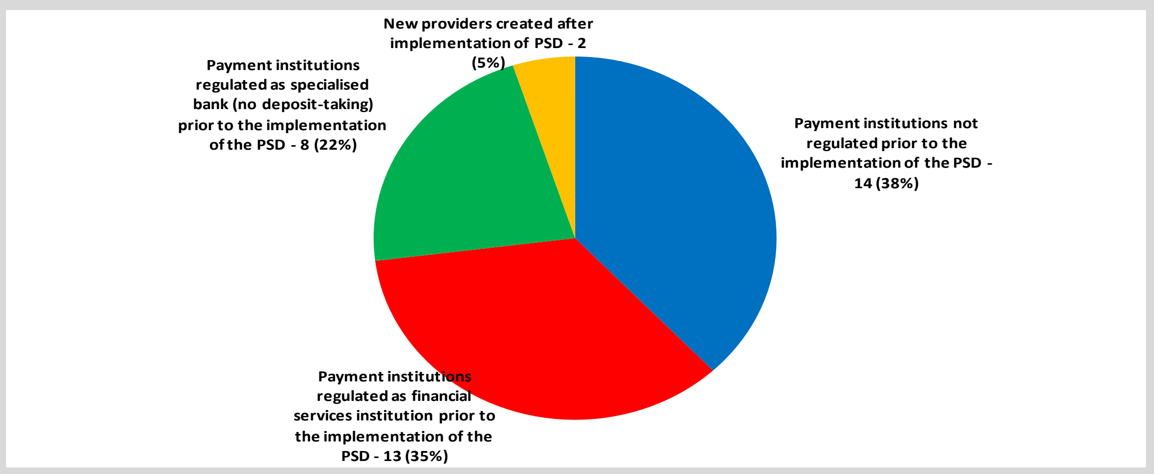
Source: London Economics

Box 3 below provides more details on the APIs in Germany, their actual business and the evolution of the API sector in Germany since the implementation of the PSD.

Box 3: APIs in Germany

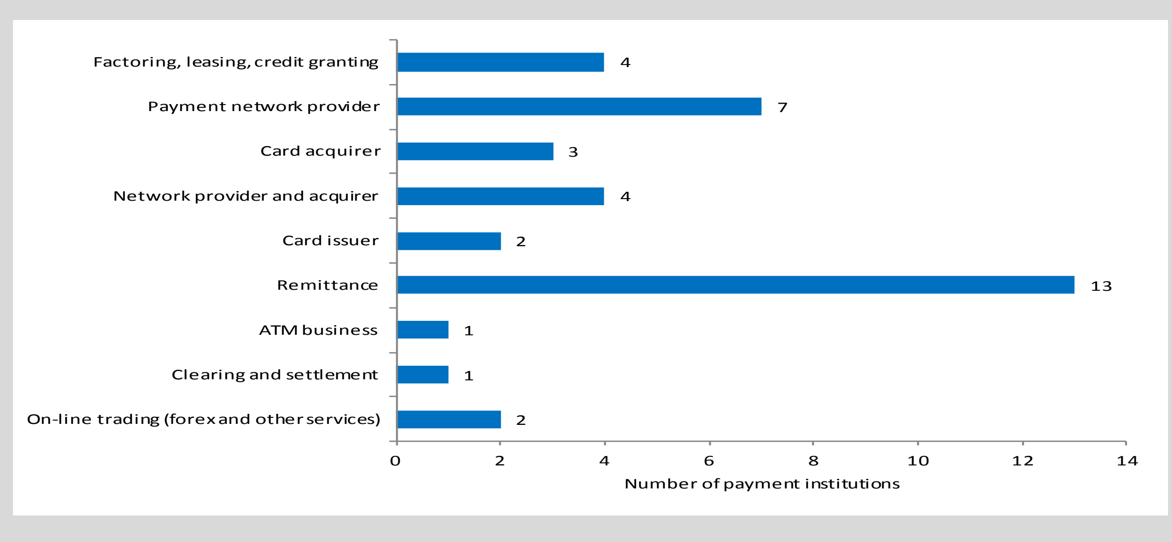
As of June 2012, there were 37 authorised payment institutions, listed and regulated by BaFin, the German banking oversight authority. 35 (95%) of all payment institutions were active in the market before the PSD was adopted in 2007. The new payment institutions are a) a money remittance service provider (Money Exchange Deutschland GmbH) and b) the on-line postal service provider (Deutsche Post Zahlungsdienste GmbH.

Most of the payment institutions which already existed before the adoption of the PSD were already regulated by BaFin as specialised banks or as financial services institution (e.g. money remittance providers). Specialised banks (without a licence for deposit-taking) required an additional or replacement licence as payment institution providing payment services. About 38% of the payment institutions were not regulated before the implementation of the PSD. Most of them are active in the payment card business as acquirer, merchant network provider and issuer. One listed payment institution with former ATM business is not active at the present time (Cash Express Gesellschaft für Finanz- und Reisedienstleistungen).



A third of all the APIs are relatively small money remittance providers (usually with a few employees) within a market niche (e.g. transfers into Philippines). The market activity listed here is the core business of the API. The list of licensed activities (PSD-Annex listing Nos. 1-6) does not necessarily represent the core business because:

- licenses could be necessary for a payment service (e.g. execution of CT or DD) as part of another more comprehensive service
- licenses were requested by PI “on the shelf“ or for planned activities.



The active usage of the European passport is probably only practised in card business (acquiring business).

As noted above, the majority of APIs were already regulated by the competent authority before the implementation of the PSD. For these payment services providers, the PSD resulted in a change of the regulatory regime. The former regulatory regime was much „lighter".

Passporting is almost exclusively relevant in the card acquiring business, where acquirers are extending their activities to other European countries. At the same time, there is more competition in the domestic market from foreign competitors entering the German acquiring market. Probably only one or two companies were able to extend their activities, favoured by the new legal framework of the PSD (e.g. access to the acquiring license of the international card schemes as a non-bank) .The two newly-founded APIs (after 2007) have no significant market shares until now.

For the 38% of payment institutions which were not regulated before the implementation of the PSD, the main impact of the PSD is the high costs caused by regulation. The only potential benefit for these companies is the option of passporting their service to other EEA Member States.

5.3.4 Views of stakeholders

Payments service providers

Among payment institutions which responded to the survey, 50% indicated that competition has increased 'much' or 'very much', 30% were of the opinion that the increase was limited and 20% reported no increase.[287] All of these institutions reported that the increased competition emanated from established payment service providers and not from domestic or cross-border service providers.

In contrast, the majority of credit institutions indicated that there is little evidence that the emergence of payment institutions and electronic money institutions has affected competition in the payment service markets in the EEA States.[288] A majority believe that these payment service providers operate in niche markets.

Consumers

Out of the consumer associations that answered the question[289] about the creation of new payment service providers (20 consumer associations) following the implementation of the PSD in their countries, a total of nine consumer associations from nine Member States felt that the introduction of new payment service providers had a positive impact and two consumer associations reported seeing only some small positive effects. But four thought there was no effect of those new payment service providers on the market. No respondents, however, thought the impact had been negative, although one association could foresee potential negative effects, while five consumer associations gave no answer or had no opinion.

The consumer associations overall reported that the number of newly created institutions was rather small and when such creations have occurred, the popularity of those institutions remains limited. Indeed, The Bulgarian Financial Forum for example, commented: *'We are aware of new payment institutions being created since 2010 but unfortunately the popularity of these institutions*

287 Answers to question 6.1 APIQ.
288 Answers to question 5 CIQ.
289 Answers to question 3 CAQL. For further details, see also Annex 2.6.

is not high'.[290] A similar story is recorded in the Netherlands where Nibud reported that there are *'institutions registered but they seem to operate on a low scale and mostly in the field of cash transfers'*.[291] In Denmark, the consumer association reported that no new payment service provider was established since the PSD.[292]

It may still be too early to review the impact of the PSD on the creation of new payment institutions. However, such low impact in some Member States may also be explained by the fact that new payment service providers do not need to register in all Member States but can obtain authorisation in one Member State to then passport into another.

The bottom line is that consumer associations do not report any problems with the creation of new PSPs. However, they reported that the number of new institutions is not very high and that in any event, those new institutions were not much used by consumers, suggesting that the impact on competition from the creation of new payment service providers in the wake of the PSD is limited.

Businesses

Business users mainly focused on the barriers to cross-border competition in the provision of acquiring services.[293] They noted that rules of the international card schemes, which impose the use of the MIF of the location of the card transaction, even if the merchant uses acquiring services of a service provider located in a Member State with a lower MIF, are a barrier to cross-border competition in acquiring services and the development of single market in that payment service.

Complaint bodies

There were no complaints reported by complaint boards in relation to new payment service providers.[294]

5.3.5 Conclusion

An analysis of the date of registration of the APIs with their national business register shows that more than 85% of the current APIs existed before 2008. No strong impact of new APIs on the market can be discerned so far. Among the APIs the assessment of whether competition increased since the adoption of the PSD was mixed. Besides new rules for payment transactions (execution times, information, SHA-option) there is no clear positive or negative impact for new APIs through the licensing regime whereas passporting was more often used by existing APIs to offer their services in other Member States. Payment service providers, especially APIs, have not noted that there is a need for change of the licensing regime itself. It is in general too early to see the impact of the licensing regime for other stakeholders such as consumers. Concrete complaints in relation to new payment service providers were neither reported from consumer associations nor from complaint boards. Based on the assumption that more competition is coming through the passporting regime for APIs than through market entry of new APIs, there seems to be no need to change the licensing regime of the PSD at this stage.

[290] For further details, see also Annex 2.6.
[291] For further details, see also Annex 2.6.
[292] For further details, see also Annex 2.6.
[293] Answers to question 1e BAIG.
[294] Answers to question 3 CBR.

5.4 Application of prudential capital and own funds requirements

5.4.1 Introduction

The PSD imposes a number of requirements on payment institutions which aim to make these institutions safe. These requirements relate to:

- the initial capital required at the time the authorisation is provided by the competent authority (Article 6);
- the own funds to be held at all times by payment institutions (Articles 7 of the PSD). Under Article 8 of the PSD payment institutions need to hold at all times, own funds that can be calculated in accordance with one of three methods (A, B or C), as determined by national legislation;
- safeguarding requirements that require funds (which have been received from payment service users or through another payment service provider for the execution of payment transactions) to be safeguarded by either 1) holding such funds in an account separate from the operational account(s) of the payment service provider and insulating such funds from claims of the other creditors in case of bankruptcy or 2) having an insurance policy or a guarantee in place (Article 9 of the PSD).

The present section looks into whether the user protection foreseen by the PSD is effective and whether the different methods for calculating own funds have an impact on the number of APIs.

5.4.2 Effectiveness of prudential regime

Views of stakeholders

This sub-section reviews the effectiveness of the prudential regime from the point of view of the competent authorities, APIs, consumer associations and complaint boards.

Competent authorities

In most Member States, the competent authorities find that the application of prudential requirements has proven adequate in the promotion of financially sound payment institutions. In fact, 16 respondents out of the 27 competent authorities agree that initial capital base is sufficiently high, while only 5 (Cyprus, Finland, France, Greece and the United Kingdom) disagree and 6 (Czech Republic, Denmark, Italy, Portugal, Romania and Spain) did not express an opinion.[295]

Similarly, 14 respondents find that own funds are set sufficiently high, while four respondents (Cyprus, Finland, France and Greece) disagree and nine do not express an opinion (Czech Republic, Denmark, Italy, Luxembourg, Portugal, Romania, Spain, Sweden and the United Kingdom).

Finally, according to 16 national authorities (73%), safeguarding requirements in their home country are adequate for fully protecting the interests of payment service users, while five find that this is not the case.

[295] The information on the views of the competent authorities is taken from the survey responses to questions in section 5 and 6 of the survey questionnaire for competent authorities.

Despite widespread agreement, some authorities are wary about the suitability of the PSD's prudential requirements for payment institutions. The main reason given for the inadequacy of these provisions is that opening up the payment services market to businesses other than banking institutions has brought additional risks that are not commensurate with the relatively low capital requirements. New entrants lack the relevant experience in this line of business and may not have the necessary resources from the outset to manage all the risks; but they are, nonetheless, able to enter the market thanks to low initial and on-going capital requirements.

More specifically, one regulator finds that initial capital requirements for payment institutions providing payments to and from an account (PS No. 1 of PSD Annex) and those executing payment transactions that involve holding value for customers (PS No. 3 of PSD Annex) should be aligned with that of e-money institutions (EMIs). In fact, the higher e-money requirements (£350,000 for EMIs compared to £50,000 for APIs) are rationalised precisely on the higher risks associated with storing value for customers; however, the PSD allows PIs offering payment accounts to hold customer funds in these accounts for an extended period. Eliminating this inconsistency would prevent inadequately capitalised firms from being authorised to conduct relatively high-risk activities. On the other hand, payment transactions that do not involve the creation of an account (e.g. PS No. 2 of PSD Annex) are associated with risks that are reflected in the current low initial capital requirements.

As for on-going capital (or "own funds") requirements, one regulator finds that methods A, B, and C, each aligned with a single area of risk, are a "one-dimensional means to tackle a multidimensional threat"; a combination of the three methods may be more suitable. Other respondents advocate removing the choice in the method of calculating own funds and, rather, making the method contingent on the payment service(s) provided. In particular, as with initial capital, one authority deems that none of these methods (based on fixed overhead, average monthly payment volume, and the preceding year's income) directly measures the risks arising from the business activities of payment institutions that hold value for customers. The respondent proposes that the choice of methods be removed and that all payment institutions providing payments to and from accounts and merchant acquirers (PS No. 1 and 3 of PSD annex), use the method based on outstanding liabilities (provided for by the second E-Money Directive)[296], which is considered a better measure of the risk of loss of customer funds. Payment services that do not involve a payment account should require own funds calculated based on average monthly payment volumes (Method B).

The vast majority of the regulators did not use the option to adjust the level of a PI's own funds requirement, despite maintaining the legal authority to do so. In fact, according to surveyed competent authorities, only Ireland and Latvia did so. When such adjustments did occur, the authorities generally raised the required level of funds, the reason being covering risks linked to activities other than payment services. Interestingly, while the majority of PIs that completed our survey found the level of own fund requirements to be adequate, those who didn't also considered it "too low for the nature of the payment business and the need for consumer protection".[297]

In regard to safeguarding requirements (or "ring-fencing"), the most popular approach used across Member States is funds segregation[298], as noted by 81% of regulators. 4 out of 5 PI respondents

[296] Second Electronic Money Directive (Directive 2009/1100/EC).
[297] For more on PIs views, see further below.
[298] Art 9(1) a of the PSD.

adopted this method of ring-fencing.[299] Reasons given for its popularity include clarity, convenience, cost-effectiveness and conformity with national laws and customs. Moreover, it is considered the most conservative in protecting customers' interests. The least used approach is the insurance method: only two authorities claim it is the most commonly applied by payment institutions in their home countries. This is mainly due to unavailability of insurance policy products or better suitability of segregation/insulation of funds.

Among the regulators, reasons for dissatisfaction with the safeguarding requirements set out by the PSD are for the most part related to a specific method of ring-fencing, and to the fact that payment institutions have discretion over which method is used and how it is implemented. For instance, one respondent finds that investing in secure liquid low-risk assets as a means of segregation is in fact very risky, and should not be available as an option. Other concerns have to do with when safeguarding requirements start to apply. In the case of segregation, one national authority finds that the lag between when funds are received by the payment institution and when safeguarding must start to apply (by the end of the following business day) creates a "window of risk," and that this window should be shortened by requiring same-day safeguarding. Similarly, another regulator finds that, in relation to third party schemes, it is unclear whether ring-fencing requirements start to apply at the moment when the payment institution provides credit to a payee, or when the credit has been paid off and the funds have been received from the payment users. Greater clarity in this respect may facilitate the interpretation of the provision and promote the creation of a level playing field across Member States. Finally, there are concerns over the lack of safeguarding requirements in relation to small payment institutions (SPSPs).

Payment Institutions

From the perspective of payment institutions, opinions are mixed. The majority find initial capital levels to be adequate both for the nature of the payments business and the need for customer protection while several find that it is not high enough to protect customers' interests, and one considers it too high for the nature of the business. None, however, encountered difficulties in meeting the initial capital requirements.[300]

Among the PIs, all respondents maintain that their method of choice is applied with clarity and most of them do not face operational problems in implementing safeguarding measures. This being said, one organisation finds these measures to be too time-consuming and another organisation encounters difficulties in adjusting the amount of safeguarded funds in real time, arguing that it would be more practical and economical to review and adjust this amount over a longer time frame. These, however, appear to be more cost-related issues than actual operational difficulties.

Consumer Associations

Some consumer associations are aware of the protection of deposited funds. Therefore they plead to include mobile payments explicitly in the scope of the PSD and to ensure the appropriate safety of the funds.[301] For example, some welcomed raising thresholds for initial capital requirement and own fund.[302] For Altroconsumo in Italy, for example, the minimum capital requirement of just EUR

[299] The fifth adopts the insurance method.
[300] Based on answers to question 8.5 APIQ.
[301] Answers to question 8 CAQL and to question 7 CAQS. For further details, see also Annex 2.7.1.
[302] CAQL22 Conso (RO).

20,000 is insufficient and the thresholds should be raised.[303] Similarly, the methods for calculating own fund ought to be clarified in order to provide more certainty for consumers.[304]

Complaints Bodies

Complaint boards have reported about some problems with safeguarding requirements and funds.[305]

Conclusions about the effectiveness of the prudential regime

Overall, most stakeholders agree that the prudential requirements put in place by the PSD (initial capital requirement, own funds to be held at all times and safeguarding requirements) are sufficient for promoting sound financial payment institutions. As a result, the majority of regulators did not make use of the option to adjust the level of own-funds requirements.

The most common form of safeguarding used by PIs is "ring fencing", that is holding funds which have been received from payment service users in accounts separate from the operational accounts of the payment service provider. This has caused some dissatisfaction among the regulators, who argue that payment institutions should not have free choice over which safeguarding requirement to choose. Similarly, it is not clear at what point in time safeguarding should begin and whether or not this creates a window of risk.

Similarly, some regulators argue that the choice available for the calculation of own funds between methods "A", "B" and "C" should be removed and instead the method made contingent on the payment service provided.

Overall, the present prudential requirements appear adequate and no changes are proposed, although some minor amendments may be welcomed.

5.4.3 Impact of the different regimes for the calculation of own funds on the number of payment institutions authorised in the various Member States

We have already highlighted above issues relating to the effectiveness of the application of prudential requirements and the calculation of own funds under Article 8 of the PSD. This sub-section tries to assess more precisely the impact of the different regimes. Indeed, Article 8 of the PSD specifies that the own funds that APIs have to hold at all times are to be calculated according to one of the three methods specified in the PSD with the selection of the specific method to be applied in a particular Member State to be determined by the competent authority of that country in accordance with national legislation. Article 8 of the PSD sets out three different methods which can be used to determine the level of required own funds:

- The first method (method A) uses an API's fixed overheads as the base for determining the level of required own funds.
- The second method (method B) uses the total amount of payment transactions undertaken by an API as the base.
- Finally, the third method (method C) uses the net operating income of an API as the base.

303 CAQL2 Altro (IT).
304 CAQS6 lGtk(MT).
305 See Annex 3.7.

The table below shows the approach adopted in each of the Member States with regards to the selection of the regime for the calculation of the own funds. In some countries, the choice of method is set out in legislation. In other cases, the competent authority decides on a case-by-case basis[306] while in other countries the API chooses the method, subject in some cases to approval by the competent authority.

Table 32: Method used for calculating own funds of APIs in the EU

Method used for calculating own funds	Country(ies)
Choice of the method is left to payment institution and is unconditional	Czech Republic, Hungary, Lithuania, Luxembourg and Romania
Choice of the method is left to payment institution but requires approval of competent authority	France, Netherlands, United Kingdom
Choice of method is decided by competent authority on a case-by-case basis	Belgium, Cyprus, Denmark, Ireland, Portugal and Slovenia
Method A	Finland, Latvia, Slovakia
Method B	Austria, Bulgaria, Germany, Greece, Italy*, Malta**, Poland, Spain, Sweden
Method C	Estonia
	* = Typically method B, but method A can also be used **= Typically method B but selection of method on a case-by-case basis

Source: Survey of competent authorities and TIPIK study.

As to the impact of the choice of one or the other approaches on the number of APIs in a country, the figure below shows that, over all the EU-27 Member States, there exists no strong link between the own-funds method and the number of APIs. In fact the correlation between the number of APIs and the selection of the own-funds method applied is close to zero.

However, if one disregards the large number of APIs in the UK, countries selecting method B appear in general to have a somewhat larger number of APIs than other Member States. But, this simply reflects the fact that three countries with relatively large API populations (Germany, Italy and Spain) have selected method B.

[306] In the case of Denmark, the legislation specifies that “account shall be taken of the type of payment services provided and the scope of these“ (Article 13.2 of Payment Services and Electronic Money Act, Consolidating Act No. 365 of 26 April 2011) and in the case of Slovenia, the legislation stipulates that the level of own funds “shall be calculated on the basis of the method that is for each payment institution stipulated by the Bank of Slovenia with a decision, considering the types and complexity of payment services performed by a payment institution as well as scale of payments and risks to which that the payment institution will be exposed“. In contrast, the legislation does not specify the considerations and factors a competent authority should take account of in selecting the method to be used by a specific payment institution in the case of Belgium, Cyprus, Ireland and Portugal (Belgium (Art. 6. § 1e Arrêté royal portant approbation du règlement de la Commission bancaire, financière et des Assurances concernant les fonds propres des établissements de paiement, 5 févirer 2010), Cyprus, (article 5(4) of Payment Services Law of 2009. Directive issued by virtue of sections 5, 7, 8, 9, 10, 11, 12, 19, 20, 23, 91 and 93), Ireland (article 13.1 of Statutory Instruments. S.I. No. 383 of 2009 European Communities (Payment Services) Regulations 2009), Portugal (article 31.2 of Decreto-Lei n.º 317/2009. D.R. n.º 211, Série I de 2009-10-30)).

Figure 46:Selection of own funds method and number of APIs

Country	Number of APIs
EE	8
SE	23
ES	46
PL	0
MT	14
IT	45
EL	11
DE	37
BG	9
AT	4
SK	6
LV	0
FI	5
SL	4
PT	9
IE	10
DK	6
CY	10
BE	9
UK	224
NL	28
FR	12
RO	7
LU	4
LT	20
HU	2
CZ	13

Number of APIs: 0, 50, 100, 150, 200, 250

Red = Choice of the method is left to payment institution and is unconditional

Blue = Choice of the method is left to payment institution but requires approval of competent authority

Orange = Choice of method is decided by competent authority on a case-by-case basis

Purple = method A

Green = method B

Black = Method C

Source: Survey of competent authorities and TIPIK study and LE analysis

Impact of the choice of method on the level of own funds required

To assess the potential impact on the level of required own funds of the three methods, we have modelled the ‘own funds’ requirements of hypothetical payment institutions, of different sizes, under the three models provided to calculate these figures, namely a small, a medium-size and large payment institution and run sensitivity analyses to test our conclusions. For the purpose of the analysis, we assume that the API is a money remitter. The data used in the simulations reflect a composite of accounts of a number of APIs.

The large payment institution

The assumed features of the large payment institution are described below:

- Total payment transactions are EUR 10billion per annum.
- The payment institution charges a 3% fee on these transactions.

- The payment institution has fixed overheads (in the form of occupancy, equipment, supplies, depreciation and amortisation) which are equal to 1% of transactions.
- The payment institution is subject to a scaling factor of 0.5.

The analysis has been sensitivity tested by increasing and decreasing the scale of the payment transactions to EUR 5billion and EUR 20billion, and using three different fee ratios, namely 2%, 3%, and 4%[307]. For these scenarios we have also assumed that overheads are 20% lower in the EUR 5billion scenario compared to the EUR 10billion scenario, and higher by 20% in the EUR 20billion scenario then in the EUR 10billion scenario.

Table 33: Own fund requirements – large payment institution scenarios

		EUR 20billion transactions	EUR 40billion transactions	EUR 80billion transactions
Low fees (2%)	Method A	EUR 8,000,000	EUR 10,000,000	EUR 12,000,000
	Method B	EUR 1,200,000	EUR 1,720,000	EUR 2,760,000
	Method C	EUR 1,580,000	EUR 2,330,000	EUR 3,830,000
Standard fees (3%)	Method A	EUR 8,000,000	EUR 10,000,000	EUR 12,000,000
	Method B	EUR 1,200,000	EUR 1,720,000	EUR 2,760,000
	Method C	EUR 1,950,000	EUR 3,080,000	EUR 5,330,000
High fees (4%)	Method A	EUR 8,000,000	EUR 10,000,000	EUR 12,000,000
	Method B	EUR 1,200,000	EUR 1,720,000	EUR 2,760,000
	Method C	EUR 2,330,000	EUR 3,830,000	EUR 6,830,000

The results reported in the table above provide a clear and consistent picture: Method B consistently yields the lowest own funds requirement on payment institutions of this scale, if we assume that overheads are relatively static to scale.

We have tested this assumption by running the same scenario where overheads are more reactive. For the following scenarios we have assumed that overheads are 50% lower in the EUR 20billion scenario compared to the EUR 40billion scenario, and increase by 50% from the EUR 40billion scenario to the EUR 80billion scenario.

Table 34: Own fund requirements – large payment institution scenarios – flexible overheads

		EUR 20billion transactions	EUR 40billion transactions	EUR 80billion transactions
Low fees (2%)	Method A	EUR 5,000,000	EUR 10,000,000	EUR 15,000,000
	Method B	EUR 1,200,000	EUR 1,720,000	EUR 2,760,000
	Method C	EUR 1,580,000	EUR 2,330,000	EUR 3,830,000
Standard fees (3%)	Method A	EUR 5,000,000	EUR 10,000,000	EUR 15,000,000
	Method B	EUR 1,200,000	EUR 1,720,000	EUR 2,760,000
	Method C	EUR 1,950,000	EUR 3,080,000	EUR 5,330,000
High fees (4%)	Method A	EUR 5,000,000	EUR 10,000,000	EUR 15,000,000
	Method B	EUR 1,200,000	EUR 1,720,000	EUR 2,760,000
	Method C	EUR 2,330,000	EUR 3,830,000	EUR 6,830,000

The first thing to note is that the results of the Method B and C calculations remain unchanged, as these methods do not use overheads in their calculations.

[307] Assuming zero price elasticity of demand for this service as the fee changes; as the price changes, exactly the same volume is used.

The second is that, at this scale of activity, the change in fixed overhead assumption is too small to change the result that Method B yields always the lowest own funds requirement for payment institutions of this scale.

The medium sized payment institution

The assumed characteristics of the medium payment institution are as follows:

- Total payment transactions are EUR 100m per annum.
- The payment institution charges a 3% fee on these transactions.
- The fixed overhead to transactions ratio is 2%.

Again, we have tested three scenarios where payment transactions are of EUR 50m, EUR 100m and EUR 200m, again with overheads moving by 20% from scenario to scenario.

Table 35: Own fund requirements – medium-size payment institution

		EUR 50m transactions	EUR 100m transactions	EUR 200m transactions
Low fees (2%)	Method A	EUR 160,000	EUR 200,000	EUR 240,000
	Method B	EUR 83,000	EUR 142,000	EUR 196,000
	Method C	EUR 50,000	EUR 100,000	EUR 185,000
Standard fees (3%)	Method A	EUR 160,000	EUR 200,000	EUR 240,000
	Method B	EUR 83,000	EUR 142,000	EUR 196,000
	Method C	EUR 100,000	EUR 145,000	EUR 255,000
High fees (4%)	Method A	EUR 160,000	EUR 200,000	EUR 240,000
	Method B	EUR 83,000	EUR 142,000	EUR 196,000
	Method C	EUR 100,000	EUR 185,000	EUR 315,000

Here, for low fee levels Method C becomes the approach which yields the lowest own funds requirement for payment institutions of this scale. However for higher fee levels (3% and 4%), Method B once again yields the lowest own funds requirement.

The small sized payment institution model

The small size payment institution has the following characteristics:

- Total payment transactions are EUR 10m per annum.
- The payment institution charges a 3% fee on these transactions.
- The fixed overhead to transactions ratio is 2%.

Again, we have tested three scenarios where payment transactions are of EUR 5m, EUR 10m and EUR 20m, again with overheads moving by 20% from scenario to scenario.

Table 36: Own fund requirements – medium payment institution scenarios

		EUR 50m transactions	EUR 100m transactions	EUR 200m transactions
Low fees (2%)	Method A	EUR 16,000	EUR 20,000	EUR 24,000
	Method B	EUR 8,000	EUR 17,000	EUR 33,000
	Method C	EUR 5,000	EUR 10,000	EUR 20,000
Standard fees (3%)	Method A	EUR 16,000	EUR 20,000	EUR 24,000
	Method B	EUR 8,000	EUR 17,000	EUR 33,000
	Method C	EUR 8,000	EUR 15,000	EUR 30,000
High fees (4%)	Method A	EUR 16,000	EUR 20,000	EUR 24,000
	Method B	EUR 8,000	EUR 17,000	EUR 33,000
	Method C	EUR 10,000	EUR 20,000	EUR 40,000

In the case of a small payment institution, the simulations show a much greater degree of variability, with all three methods yielding at least once the lowest own funds requirement depending on the precise features of the scenario.

Key observations to draw from the scenarios

The computation of the own funds requirements for payment institutions of different activity size and key characteristics (in terms of the level of fixed overheads and fee/commission margin) illustrates the fact that, for payment institutions of a given size and characteristics, the level of own funds yielded by each of the three methods can differ significantly. Thus, in cases where competent authorities adopt different methods, similar APIs based in different countries will face a different cost of doing business as they will have to hold significantly different amounts of own funds.

5.4.4 Views of stakeholders

Competent authorities

The vast majority of regulators note that current own-fund calculation methods as well as levels do not discourage payment service providers.[308]

Payment Institutions

All API respondents also noted that it was not a problem for their organisation to meet the own-funds requirements.[309] Two APIs noted that the use of different methods for calculating the level of required own funds may result in an uneven playing field among similar APIs from different Member States. However, none reported that this was a significant issue at the present time.

Conclusions regarding the impact of the selection of the own fund regime on the number of APIs

The selection of the regime for own funds does not appear to have any impact on the number of institutions registering as payment institutions with the relevant competent authorities. However, the analysis above showed the level of required funds that results from the application of the different methods may be significant, occasionally raising questions about the level playing field for

308 Answers to questions 5 and 6 AUT.
309 Answers to question 8.5APIQ.

APIs subject to different methods, especially if the APIs have no discretion in the selection of the method.

In practice, the stakeholder surveys do not suggest that the issue concerning an uneven playing field is a significant one. Therefore, no changes are proposed at the present time. However, it would be useful to monitor closely over the coming years the impact on competition and the single market of different own fund requirements for similar APIs and consider adopting a more uniform regime in the future if deterioration in the playing field was to be reported by APIs.

5.5 The use and impact of the waiver for small payment service providers

5.5.1 Introduction

The PSD foresees that all or part of a number of the procedures and conditions applying to the authorised payment institutions can be waived for small payments service providers (Articles 26 and 27). The extent of the actual take-up of the waiver option by Member State has already been discussed, to some extent, with the take-up of the other options foreseen by the PSD in section 4.7.

The extent to which the regulatory regime applying to these small payment institutions is lighter than the one applying to the authorised payment institutions depends on the nature of the waiver policy of the respective Member States.

In this section, we will focus on whether the waiver is an effective policy instrument and does not result in consumer detriment due to the less onerous requirements applying to SPSPs.

5.5.2 Use of the waiver in the EEA

As was already noted in the general chapter on the market for the payment services, the waiver option is used only in 9 EEA States, namely Czech Republic (60 SPSPs), Denmark (55), Finland (9), Latvia (34), Netherlands (30), Norway (23), Poland (988), Sweden (44) and the United Kingdom (960). In total, at the end of August/early September, there were 2,203 small payment institutions (i.e., SPSPs), about 3.7 times the number of authorised payment institutions.[310]

In Poland, SPSPs typically provide money remittance and bill payment services and in the UK money remittance services. In the Netherlands, SPSPs can provide any payment services except money remittances.

The waiver ensures the continued existence of many providers, very often offering niche services (including payment channels to very specific regions or countries of the world), which would not otherwise be able or ready (in terms of costs, resources, business scale, business concept) to upgrade their business to the level of an authorised financial institution.

This is especially important for small communities given the trend among credit institutions to reduce coverage of some territories with physical offices. A number of competent authorities noted in the survey responses that, in the absence of the waiver, a considerable number of such providers might have continued to operate with no authorisation.[311]

On the other hand, the waiver distorts the level playing field between authorised and SPSP in particular where the threshold of EUR 3 million per month has been preserved and where there are no major limitations on the scope of activities. SPSPs are free from most costly (both one off and constant) and cumbersome obligations including initial capital, own funds, funds safeguarding. This gives SPSPs an advantage over authorised providers. That said, their advantage is limited to their home country as they cannot passport.

[310] As noted in the chapter discussing the scope of the PSD, 15 Member States have used the option allowing for a waiver of all or part of the procedure and conditions applying to API. However, so far, payment service providers have prevailed themselves of this option in only 9 countries.

[311] Answers to question 9AUT.

Moreover, the threshold does not prevent SPSPs from effectively competing with authorised institutions on a large scale because they are not prevented from setting up multiple legal entities, each one remaining under the threshold. This is, for example, a possibility reported by one competent authority as a possible reason for the absence of any authorised payment institution in Latvia.

One issue which arises with regard to small institutions is the fact that both APIs and SPSPs are listed in the register which may create confusion for consumers if they do not fully understand the difference between an authorised institution and a registered institution. Consumers may erroneously believe that they are provided with the same protection in both cases. Such an erroneous belief may be reinforced by the fact that a SPSP may indicate on its website, letterhead and in its office that it is registered with the relevant competent authority.

5.5.3 Views of competent authorities

Of the 9 jurisdictions with SPSPs[312], 7 answered questions regarding the use and impact of the waiver. In general, competent authorities are of the view that, without the waiver, a number of small payment service providers would have failed to seek authorisation and would have continued to operate outside the law. [313]

The waiver is also viewed by some competent authorities as a way to allow entry into the payments service market by small providers. However, 5 competent authorities, including some viewing the waiver as a way to facilitate entry, are of the view that the monthly upper limit of EUR 3 million in payments transactions set by the PSD is too high and should be lowered to EUR 1 million.

One competent authority reports concerns over whether even a simplified regime limited to AML is adequate, given the fact that the small providers often have difficulties in understanding the rationale and application of AML rules.

The absence of a duty by SPSPs to safeguard funds is the main concern from the users' perspective. Indeed, competent authorities report that SPSPs' customers are generally not aware what the difference is between authorised and registered providers in general, and more specifically are not aware of the fact that funds entrusted to the SPSP are not segregated or safeguarded. In the UK, the collapse of Crown Currency in October 2010 clearly revealed a lack of understanding by users of the lack of protection afforded to them.[314] In this regard, it is important to recall that SPSPs have no duty to inform explicitly the customer of the fact that funds are not safeguarded.

5.5.4 Conclusion

Nine Member States have used the option to use the waiver for small payment institutions.

Several competent authorities responded that in the absence of such a waiver, the payment institutions would likely have simply continued to operate outside of the law. Further, some agree that it helps in facilitating market entry by small service providers and is thus beneficial for competition.

[312] As already noted, 15 jurisdictions have adopted the waiver option. But, at the present time, waived payment institutions exist only in 9 jurisdictions.
[313] This section draws on the responses of competent authorities to Q9 AUT.
[314] The payment service provider allowed individuals and business customers to pre-order foreign exchange at a set price up to a year in advance, with amounts of between £300 and £10,000 available.

However, competent authorities also warn that many consumers are not aware of the difference between authorised and registered payment institutions and that, as a result, their funds are not safeguarded or segregated. Therefore, a requirement for payment institutions to inform their customers of the fact that funds are not safeguarded would be valuable addition from the point of view of consumer protection.

5.6 Access to payment systems

5.6.1 Introduction

The PSD foresees that the rules for access to payment systems by authorised payment institutions and small payment service providers should be objective, non-discriminatory and proportionate and should not inhibit access more than necessary to safeguard against specific risks such as settlement risk, operational risk and business risk, and to protect the financial and operational stability of the payment system (Article 28 of the PSD).

Moreover, the PSD states that the access provisions do not apply to:

- payment systems designated under Directive 98/26/EC, payment systems composed exclusively of payment service providers belonging to a group composed of entities linked by capital where one of the linked entities enjoys effective control over the other linked entities; or
- payment systems where a sole payment service provider (whether as a single entity or as group) acts or can act as the payment service provider for both the payer and the payee and is exclusively responsible for the management of the system; and
- licenses other payment service providers to participate in the system and the latter have no right to negotiate fees between or amongst themselves in relation to the payment system although they may establish their own pricing in relation to payers and payees.

At issue is whether this access provision is effective and works well.

5.6.2 Designated payment services under Directive 98/26/EC

Most retail payment systems are designated under Directive 98/26/EC and are therefore not accessible to payment institutions. The Table 37 below lists the retail payment systems that are listed on the web sites of national central banks in the EU and the retail payment systems which are designated under Directive 98/26/EC and are listed as being designated on the website of the European Commission.

Table 37: Designated retail payment systems

Country	Payment Systems listed on the central banks' web sites	Designated retail payment systems
Austria	MaestroPOS operated by Europay Austria Zahlungsverkehrssysteme GmbH , Maestro Bankomat Europay operated by Austria Zahlungsverkehrssysteme GmbH , EasyPay operated by Hobex AG, VISA Electron operated by VISA-SERVICE Kreditkarten AG, Online operated by Western Union International Bank GmbH, VISA operated by VISA-SERVICE Kreditkarten AG, MasterCard operated by Europay Austria Zahlungsverkehrssysteme GmbH , Diners Club operated by AirPlus Air Travel Card Vertriebsges.mbH, American Express operated by American Express Bank Ltd., Quick, @Quick operated by Europay Austria Zahlungsverkehrssysteme GmbH, paysafecard operated by paysafecard.com Wertkarten AG, VISA Electron Prepaid operated by VISA-SERVICE Kreditkarten AG, Maestro Traveller operated by Europay Austria Zahlungsverkehrssysteme GmbH, Maestro SecureCode operated by Europay Austria Zahlungsverkehrssysteme GmbH , paybox operated by paybox austria AG, bill-it-easy operated by montax payment services gmbh Source: http://www.oenb.at/en/finanzm_stab/zahlungssystemaufsicht/aufsichtspraxis_der_oenb.jsp	Home Account Module Austria (RTGS Payment System; hoam.at) GELD-SERVICE AUSTRIA
Bulgaria	BISERA is a payment system for money transfers and payments between bank accounts in Bulgaria, BORICA was established in 1995 to service card payments, The System for Electronic Payments (SEP), launched into operation in December 2008, is the electronic payments settlement system servicing payments initiated by means of electronic payment instruments (EPI), RINGS Source: http://www.bnb.bg/PaymentSystem/index.htm	System servicing customer payments to be settled at a designated time (BISERA) operated by Bankservice JSC - RINGS
Belgium	Le CEC (Centre d'Echange et de Compensation) est le système automatisé belge de paiement de détail interbancaire – Source: http://www.nbb.be/pub/09_00_00_00_00/09_01_01_00_00.htm?l=fr	UCV-CEC
Cyprus	Cyprus Clearing House for cheques, Payment Cards System, operated by JCC Payment Systems Ltd, • Retail Credit Transfer System (JCCTransfer), operated by JCC Payment Systems Ltd - Source: http://www.centralbank.gov.cy/nqcontent.cfm?a_id=11788&lang=en	
Czech Republic	CERTIS Source: http://www.cnb.cz/en/payment_systems/	CERTIS
Denmark	Sumclearing Source: http://www.nationalbanken.dk/DNUK/Tasks.nsf/side/Netting_systems!OpenDocument	DN -Forespørgelsservice; KRONOS; Sumclearingen
Estonia	Settlement System of Ordinary Payments, ESTA Source: http://www.eestipank.ee/en/payment-and-settlement-systems	ESTA
Finland	PMJ (retail - direct debits and cards) Source: - http://www.suomenpankki.fi/en/pankkitoiminta/maksujarjestelmapalvelut/Pages/default.aspx	POPS System Interbank Online Express Giros and Cheques System; Interbank Payment System PMJ
France	CORE Source: http://www.banque-france.fr/eurosysteme-et-international/sepa/systeme-de-paiement-de-masse.html	CORE (FR)
Germany	RPS	HBV
Greece	DIAS S.A and Athens Clearing Office for cheques Source: http://www.bankofgreece.gr/Pages/en/PaymentsSystems/default.aspx	Athens Clearing Office; DIAS
Hungary	Interbank Clearing System ICS Source: http://english.mnb.hu/Penzforgalom/settlementsystems/ics	VIBER; Interbank Clearing System of GIRO Elszámolásforgalmi Rt; KELER – Central

Table 37: Designated retail payment systems		
		Clearing House and Depository (Budapest) Ltd.
Italy	BI-COMP Source: http://www.bancaditalia.it/sispaga/servpag/bicomp	BI-COMP
Ireland	Irish Paper Clearing Company Limited (IPCC) and Irish Retail Electronic Payments Clearing Company Limited (IRECC) Source: http://www.centralbank.ie/paycurr/paysys/Documents/THE%20IRISH%20CLEARING%20SYSTEM.pdf	Central Bank of Ireland
Latvia	SAMS (Real Time Gross Settlement System: high value, urgent, lats); EKS (electronic clearing system: retail, lats & euros) Source: http://www.bank.lv/en/payment-and-settlement-systems/systems	SAMS; EKS
Lithuania	LITAS-RLS; LITAS-MMS (ordinary retail); KUBAS (credit unions & their members) Source: http://www.lb.lt/official_list_of_systems	LITAS-RLS; LITAS-MMS
Luxembourg	STEP2 Source: (http://www.bcl.lu/en/payment_systems/index.html	
Malta	Malta Clearing House Source: http://www.centralbankmalta.org/site/payments.html	
Netherlands	Equens; Retail products - SE, CSS, CSM, Switch, VISA, V Pay, MasterCard, Maestro, PIN, Currence Chipknip, Currence Acceptgiro, Currence Incasso, Currence iDEAL, NVB (Spoedopdracht), UPSS Source: http://www.dnb.nl/en/binaries/Oversight%20of%20payment%20and%20settlement%20systems%202011_tcm47-269603.pdf	HAM-NL; CSS (Dutch domestic) and Equens CSM (SEPA)
Poland	SYBIR (paper-based, for credit-related documents (credit transfers and payment slips) and debit-related documents (cheques)); ELIXIR (credit transfers, direct debits, low-value cheques from savings accounts) Source: http://www.nbp.pl/homen.aspx?f=/en/system_platniczy/system_platniczy_en.html	SORBNET (the Polish RTGS system operating in zloty) and SORBNET-EURO system (the Polish RTGS system operating in euro); ELIXIR
Portugal	Interbank Clearing System (SICOI) - retail payments Source: http://www.bportugal.pt/en-US/SistemasdePagamento/Pages/default.aspx	SICOI
Romania	SENT (low-value large volume / retail); ReGIS (urgent / large-value) Source: http://www.bnr.ro/Retail-payments-3307.aspx	ReGIS, SENT
Slovakia	EURO SIPS Source: http://www.nbs.sk/en/payment-systems/oversight/systems-subject-to-oversight-by-the-nbs	Platobný systém EUROSIPS
Slovenia	SEPA IKP (credit transfers); Poravnava kartic - for transactions with MasterCard, Karanta and BA/Maestro payment cards at POS terminals and ATMs, which are operated by Bankart d.o.o.; Poravnava bankomatov - for transactions with domestic debit cards (BA Maestro, Activa Maestro) at ATMs when the holder of the card makes a withdrawal from an ATM belonging to another participant in the ATM settlement system and not to the participant with which he/she/it has an account; Multilateralni kliring Activa (MasterCard, Visa and Activa credit and payment cards and Maestro, Cirrus and Visa Electron debit cards); Multilateralni kliring MasterCard (Eurocard/MasterCard credit and payment cards, and Maestro and Cirrus debit cards); Moneta (mobile phone) Source: http://www.bsi.si/en/payment-systems.asp?MapaId=1480	SEPA IPK
Spain	SNCE (retail - cheques, transfers, direct debits, bills and various other transactions) Source: http://www.bde.es/bde/en/areas/sispago/	Sistema Nacional de Compensación Electrónica,

Table 37: Designated retail payment systems

		SNCE
Sweden	RIX (large value) Source: http://www.riksbank.se/en/The-Riksbank/The-Riksbanks-role-in-the-economy/	RIX; BIR Avvecklingstjänst (administered by Bankgirocentralen BGC AB)
United Kingdom	CHAPS - high-value and wholesale, but also "time-critical lower value payments (such as house purchase)"; Bacs. The UK's automated clearing house, processing in particular Direct Debits and Direct Credits; Paper-based cheque and credit clearings; LINK, the UK's ATM network Source:http://www.bankofengland.co.uk/markets/Pages/paymentsystems/default.aspx	FPS; CHAPS; CLS; BACS; Cheque Clearing System and Credit Clearing System

Source: Websites of central banks and website of the European Commission listing designated payment systems: http://ec.europa.eu/internal_market/financial-markets/settlement/dir-98-26-art10-national_en.htm

5.6.3 Views of stakeholders

Survey responses and bilateral consultations

At the present time, according to the survey responses from the APIs and the numerous consultations with APIs that were held in a face-to-face setting, none of the APIs consulted or which responded to the survey have direct access to a payment system, not even to retail payment systems which are not designated under Directive 98/26/EC. These APIs access payment systems indirectly through holding one or several accounts at a credit institution but not as an indirect participant in the meaning of Directive 2009/44/EC.[315] [316]

Moreover, none of the complaints bodies that are responsible for complaints about payment system access issues and responded to the survey indicated having received any complaints about access issues. Therefore, access by payment institutions to payment systems seems not to have been a problem so far. This may reflect the fact that, as already noted, payment institutions do not seem to have actively sought access to payment systems over the last few years.

This situation creates an uneven playing field between payment service providers as one group (the APIs) depends on a competitor group (the credit institutions) for access to the payment system. The uneven playing field manifests itself in different ways.

First, any payment order going to an API will take longer to execute than a payment order going directly to a credit institution as the funds have to move first from the payer's account to the API's account at a credit institution and only when received can then be transferred to the beneficiary.

Second, a credit institution may gain a deep knowledge about the activities of a potential competitor by monitoring the transactions flowing through the API's account.

Third, a credit institution may make it difficult for an API to open or maintain a bank account, an action which results in a barrier to entry into the payments market. For all these reasons, APIs may wish to gain access to a payment system.

[315] According to the Directive 2009/44/EC, 'an "indirect participant" shall mean an institution, a central counterparty, a settlement agent, a clearing house or a system operator with a contractual relationship with a participant in a system executing transfer orders which enables the indirect participant to pass transfer orders through the system, provided that the indirect participant is known to the system operator.' The Directive 2009/44/EC amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims.

[316] Answers to question 8.7APIQ.

However, as already noted, none of the APIs which responded to the survey had sought to access a payment system. Thus, they have no issues with regard to the access provision of the PSD.

However, a number of APIs indicated that they had encountered problems with either maintaining an existing account or opening an account. Such problems were noted in some cases in the home country of the API and in some cases when taking the passport into another EEA State.

The difficulty with accessing or maintaining a bank account hinders access to the payment system but this is not related to a breach of Article 28 of the PSD.

Responses to the EC Consultation on the Green Paper "Towards an integrated European market for card, internet and mobile payments"

The responses of a number of APIs to the Green Paper clearly show that they are concerned about the uneven level playing field arising from a lack of access to payment systems.[317] The consultation document included the following the question "*Is non-direct access to clearing and settlement systems problematic for payment institutions and e-money institutions and if so what is the magnitude of the problem?*".

Overall, the feedback statement notes that[318] "*there was no consensus amongst payment schemes and banks on whether non-direct access to clearing and settlement is problematic to non-bank payment service providers and e-money institutions. Some payment schemes and most banks claimed that these providers can operate with reduced costs and risks under non-direct access, and that many banks, especially smaller ones, use non-direct access. Other payment schemes and banks, most non-bank payment service providers and Telecom operators disagreed and highlighted that non-direct access generates higher costs, complexity and more lengthy processes. Whilst a few non-bank payment service providers believed that indirect access allows multi-banking and shopping around for the best deal, most of them agreed that direct access would be beneficial and foster their reliability as the involvement of central banks contributes to reductions in credit or liquidity risks. Most retailers and consumers favoured direct access, pointing to the need for openness and non-discrimination. Most payment schemes and banks agreed that in case direct access is granted, it should be based on a level playing field in terms of regulatory, solvency and prudential supervision requirements as well as risk management policies to ensure the integrity and security of payment systems. The need for the capital requirements framework to be enhanced to tackle systemic risk, a higher degree of involvement of regulators with new players and of monitoring by supervisors of their activities and licences, the need for SEPA card processing rules not to conflict with global rules were mentioned and for the implementation of the SCF at national level to be monitored were mentioned. It was also suggested that the Settlement Finality Directive (SFD) be amended to cover non-bank payment service providers and e-money institutions. Whilst some public authorities pointed to potential exclusionary effects against non-bank participants, the majority focused on the need to ensure that direct access does not raise operational and liquidity risks. One authority suggested amending the SFD and the PSD, to allow for direct access, since an entity, which is licenced and supervised (similarly to credit institutions) by a national authority, should benefit from similar conditions. In case a common framework is set, public authorities wanted it to focus on high level principles (settlement risks, consumer protection) and aim at security and effectiveness while maintaining low processing costs and transparency. It should also not constrain the*

[317] See, for example, the responses from ATOS, B +S Card Service, Diners International, Easycash, EPIF and the Groupement des cartes bancaires availiable at https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp.

[318] See European Commission (2012) pp. 10 and 11.

development of local payment card schemes. Payment systems should always be able to set access criteria to protect financial and operational stability".

5.6.4 Conclusion

Although no APIs have so far complained to the relevant competent authorities about lack of access to a payment system, the responses of most APIs to the consultation on the EC Green Paper "*Towards an integrated European market for card, internet and mobile payments*" clearly shows that these APIs are seriously concerned about the unlevel playing field and higher cost of doing business that they face in comparison to credit institutions as a result of not being able to access directly payment systems.

In order to ensure a full level playing field in the market for payment services, it would be useful to examine further how, and under which regulatory, precautionary and risk management conditions, payments institutions could be granted access to payment systems, including designated retail payment systems. In order to achieve a full level playing field, access to designated retail payment systems is necessary, as in many countries, all major retail payment systems are designated.[319]

That said, access to a payment system is less of a preoccupation for many smaller APIs. For such APIs, access to a bank account for operational purposes (i.e. an own account) and maintaining such an account is a more important issue. Such access is viewed as problematic by a number of payment institutions and in some cases acts as a brake on cross-border provision. While such bank account access issues are outside the scope of the PSD, they require nevertheless further policy attention for domestic and cross-border competition reasons.

[319] Therefore, the payment system access provision in the PSD does not apply.

5.7 Granting of credit by payment institutions

5.7.1 Introduction

The PSD foresees that payment institutions may grant credit related to payment services provided that a) the credit is ancillary to and granted exclusively in connection with the execution of payment transaction, b) has a short duration not exceeding 12 months when provided in the context of passported services and c) can only be granted from the institution's own funds (Article 16.3 of the PSD).

This section investigates whether this provision of the PSD is working well in practice.

5.7.2 Credit granting by APIs

In practice, there exist three main types of APIs which provide credit, namely;

- credit card schemes;
- non-bank credit institutions which have obtained the status of an API; and,
- acquirers if they make advances to their merchants and such advances are based on formal contractual arrangement.

It is most likely that any credit extended by non-bank credit institutions is not ancillary and granted exclusively in connection with the execution of a payment transaction, a condition which has to be met to allow credit to be granted under the PSD (Article 16.3.a). Such credit extension is the core activity of this group of institutions and is outside the scope of the PSD unless it is linked to the issuance of a card.

Depending on the amount of the credit and its nature, credit extended by APIs to consumers will also be subject to the Directive 2008/48/EC on consumer credit.

For example, credit extended through a credit card will be within the scope of the CCD except if credit is free of interest and without any charges, if credit is free of interest, has to be repaid within three months and only insignificant charges are payable or the maximum credit is below EUR 200. In the case of unsecured credit linked to the acquisition of a good or service or secured credit, such credit will be within the scope of the CCD unless the credit is free of interest and without any charges, or the credit is free of interest, has to be repaid within three months and only insignificant charges are payable, or the maximum credit is below EUR 200. The same conditions hold true for personal loans.

The 12-month limit for credit extended through credit cards may be an issue as such a credit is typically of a revolving nature with no precise reimbursement timelines provided that the debtor meets her/his regular monthly payments.

5.7.3 Views of stakeholders

Competent authorities

Overall, 16 competent authorities undertake surveillance and enforcement activities to ensure that any credit granted by payment institutions is not using funds received or held for the purpose

of executing a payment transaction, while five do not do so (Belgium, Malta (as no API provides credit) Hungary, Slovenia and Poland (not yet)) and six did not express an opinion (Czech Republic, Denmark, Italy, Portugal, Sweden and the United Kingdom).[320] No particular problems were noted by those authorities undertaking surveillance and enforcement activities.

The survey of competent authorities asked the authorities to indicate whether the overlap between the PSD and the Consumer Credit Directive (CCD) has created any issues in relation to the granting of credit by payment institutions. According to the 19 out of 22 respondents who responded to this question, this is not an issue.

The key issue that emerges from the survey arises from the fact that in certain Member States consumer credit and payment services are overseen by different entities. This raises some difficulties because the authority in charge of overseeing payment services may not be well-equipped to supervise credit activities and ensure that own funds of payment institutions are always adequate in light of the credit activity linked to payment services. Moreover, the two authorities may interpret the provisions of the PSD differently which gives firms scope to take advantage of divergent interpretations.

Consumer associations and complaint boards

Preliminary discussions with the European consumer association BEUC and national consumer associations have shown that it is too early to say anything about possible problems in this field because the APIs' market has not changed much so far. Therefore, specific questions about problems related to credit by payment institutions were not raised in the questionnaire for consumer associations and complaint boards.

5.7.4 Conclusion

The 12-month limit on credit extended by API when provided in the context of passported services merits to be revisited as a priori there is no obvious reason to limit it to 12 rather than nine or 15 months. In fact, the credit extended by credit cards is of an unspecified duration as long the debtor is in good standing and meets the minimum monthly payment obligations.

The survey responses from the competent authorities also suggest that a common body overseeing both payment institutions and consumer credit would alleviate some of the problems which emerged in relation to APIs providing credit.

[320] Answers to question 11AUT.

6 Transparency

This chapter deals with the effect that transparency and information requirements imposed by the PSD have on users. It investigates the adequacy of the rules governing framework contracts as well as the effect standardised information requirements have on providers.

6.1 Effects on users resulting from the harmonised and simplified transparency of conditions and information requirements

6.1.1 Introduction

The PSD provides for comprehensive rules on transparency of conditions and information requirements. This applies both to simple payment services ("single-payment transaction", e.g. one-off money remittance or bill payment) and more complex services based on framework contracts (under which "individual payment transactions" are executed).[321]

Transparency of conditions and information requirements include the designation of:

- specific pre-contractual information which should be proportionate to the needs of users, that is to say, narrow for single-payment transaction and more extensive for framework contracts and the individual payment transactions subsequent to it,
- pre- and post-transaction information,
- quality of information,
- information on delivery timing and modality (including direct and distant communication),
- charges for providing information,
- who carries the burden of proof that those requirements have been met.

Transparency of conditions and information requirements are only unconditionally binding in relation to the consumer. All those requirements may be derogated from contractually vis–à-vis non-consumers with the exception of microenterprises if national legislation made use of the option to extend consumer standards to microenterprises.[322]

Rules on transparency of conditions and information requirements focus on securing the consumers' practical, timely and effortless access to information on payment service characteristics and contractual terms and conditions before and during the relationship with the provider. Measures of that kind have the potential to ensure that the consumer is fully aware of the product's nature and value, can compare the products offered by various providers, and can choose the most competitive one, thereby increasing the market's efficiency and general level of services.

However, this potential proves feasible only if transparency of conditions and information requirements are designed and implemented properly, in particular if they properly weigh out the

[321] Framework contracts are payment service contracts which govern the future execution of individual and successive payment transactions (Article 4.12 of the PSD). The most common payment services provided under a framework contract are payment account, payment card, home banking facility, and acquiring. Framework contracts are covered in section 6.2 below.

[322] Article 30.2 of the PSD.

scope, costs, timing, and availability. Proportionality guidelines have been explicitly assumed by the PSD in this regard.[323]

6.1.2 Clarity and comprehensibility

Most providers have decided to include the required information in their terms and conditions despite a certain ambiguity in Article 42 of the PSD as to whether information designated therein shall constitute contractual terms, or whether it is designed to be information about binding terms regardless of their source.[324]

Combining all the required information in terms and conditions has the result of making them usually very extensive. This is because many information requirements do actually refer to conduct of business rules (Title IV PSD), where many provisions are each subject to separate compliance rules (e.g. liability, authorisation, refusal, and refund right).

In a number of payment products, those requirements are only part of the overall requirements when the product is subject to further transparency obligations (e.g. under the consumer credit regime). Furthermore, the terms and conditions need to include the entire set of usual contractual provisions indispensable for the relationship with the consumer.

Consequently, in order to comply with information which meets the transparency of conditions and information requirements in the PSD and other laws, contracts with consumers need to include numerous sections, paragraphs, and references. Cases are known where terms and conditions of consumer payment products amount to material of 60 pages of length.

The evidence obtained from consumer associations shows that the way information is currently provided to them by payment providers is far from comprehensible and clear. This has a negative impact on consumers.

Consumer representatives understand that in the area of payment services, complexity of terms and conditions is an issue that is difficult to circumvent due to the nature of those services. They are complex by nature and because of this complexity tend to require long documents that consumers are not accustomed to reading. However, if consumers are to make well-informed decisions and shop around, the legislative framework ought to facilitate the distribution of information that is meaningful to them.

In the course of the survey completed for the purpose of the study, the consumer associations mostly agreed that consumers do not receive clear and comprehensible information.[325] Twenty consumer associations in eighteen Member States were surveyed on this point. Eight consumer associations believe unequivocally that consumers do not receive clear and comprehensible information, and one consumer association felt that consumers did not always receive clear and comprehensible information. To name an example, in Austria, the Arbeiterkammer Wien reported that they had received complaints from consumers about incomprehensible statements. Not a single consumer association has stated that consumers have received clear and comprehensible information, raising here again concerns over the manner in which information is delivered.

[323] Recital 23 of the PSD.
[324] See e.g. Article 42.7.a of the PSD.
[325] Answers to question 18 CAQL and to question 9 CAQS. For further details, see also Annex 2.8.1.

The findings from the survey suggest that consumers are confused by the information they receive in most Member State where a response from a consumer association was received.

Part of the issue concerning the lack of clarity and the complexity of the information, no doubt, lies in the ability of the providers *"to decide how they can present the information in adhesion contracts"*. In Lithuania, information and conditions are normally documents that are "too big and not so easy for consumers" to understand. The Belgian respondent concurs: "it is a real problem in Belgium. The manner in which the information is provided (presentation, terms, footnotes, etc.) varies from one provider to the other, the documents are too long, seldom clear and sometimes even intentionally confusing. It is very difficult for a consumer to understand the tariffs in his or her own bank and it is impossible for consumers to compare". The German respondent agrees and noted that normally consumers are provided with lengthy conditions and prices, further explaining that "sending bunches of pages does not inform in time or allow a consumer to shop around in a comparable way". Respondents also indicated that information made available to consumers over the internet equally lacks in clarity. For example, consumers are sometimes told that prices and conditions may vary depending on the exact branch in which the account is held.

The data collection exercise undertaken for this study encountered similar problems with transparency. The price information was often buried in long and complex documents which differed between providers and Member States, making the data collection process a cumbersome exercise. In many instances not all the information was available as, for example, not many banks included the cost of cross-border payments, in particular cross-border direct debits. There were instances where even after calling the institution's service hotlines, we were still unsure what the correct prices were because the information provided over the phone either did not match what we found in the price lists or because different departments within the same institution gave out contradictory information. In several instances, we were left with the clear impression that the hotline operators themselves did not understand the price lists they were referring to, most probably because they were too complex. One credit institution even replied with an email stating that *"explaining all their prices for various cross-border transfers would simply be too complex to do via email"*.[326]

These difficulties associated with delivering clear information to consumers is compounded by the fact that Article 41 of the PSD, which requires disclosure of basic key information, is not well complied with in a number of the Member States surveyed. Consumer associations gave a clear indication that the provision of key information under Article 41 is still not occurring adequately. Out of the respondents[327], four consumer associations thought information was acceptable. By contrast, nine consumer associations thought consumers were not provided with the right information.

Indeed, according to the Bulgarian respondent, because the key information is located amongst the contractual terms and price list, it thus means that it is not easily accessible to consumers. Such terms and conditions often mix different types of services (savings accounts, fees for deposits) and cover a wide range of contracts, thus adding to the complexity for the consumer. This is a recurrent problem and the Danish response also attests that disclosure of basic key information is not well complied with. Spanish consumers also have difficulties understanding the contractual information provided to them, in the cases where it exists for them to read. The Spanish respondent noted: *"There is still a lack of or confusing information, especially in the way it is presented. A harmonised disclosure model throughout Europe, such as a single sheet as a summary document*

[326] See Annex 3 and following passages in this sub-section for more details of the data collection exercise.
[327] Answers to question 9 CAQS. For further details, see also chapter 2.9.3.

containing all the necessary information and relevant data, would be a good tool enabling consumers to obtain information (in a clearer and more direct way). Such a model sheet would also avoid the consumer unfriendly occurrence whereby each different provider presents their current information in a different way, via a different medium, and not condensed i.e. including any relevant information and all the terms of the contract, especially jargon terms". A further suggestion made by the Belgium respondent, who has created a comparative tool on the Internet that is frequently used by consumers, is to encourage providers to develop such comparative website tools that take a consumer's profile into account when presenting its contractual information.

Part of the issue leading to such lack of clarity is that the legislator has not prescribed any particular form in which the information should be provided other than requiring that the information be given in easily understandable words and in a clear and comprehensible form. One main issue to address may be to define what is "clear and understandable" for consumers.

For example, the Spanish response makes the following comment: (The expression) *"clear, comprehensible and in easily understandable words"* is not enough in view of the varying and poor financial education of the Spanish public. These are too subjective (…). Something like 'objective' and 'non-misleading' should be added (to the text) along with a description of what is considered (by those terms)'. There is support for this position from other consumer responses. The Italian respondent supported working primarily on clarity of the information to make it less technical, while the Portuguese response confirmed that work on financial literacy was required in order to enable consumers to make sense of the extensive information they are provided with.

The negative impact of the lack of comprehensibility of provider information shared by the consumer associations is partially confirmed by the other stakeholders. Two complaint boards named *"lack of information"* as one of the main subjects for complaints.[328] The complaints in question concerned the lack of information about conditions and costs, form and mode of payment in relation to credit cards in Portugal and fees imposed without notifying customers. Complaint boards did not report issues about standardisation of information. They only commented on the lack of information in relation to single payments before and after their execution.[329]

This evidence from complaint boards is clearly confirmed by the results from the research on the information on charges made available by credit institutions. The corporate websites of credit institutions were found to lack information about charges relatively often.[330] A common practice among the smaller credit institutions is for them to publish a price list containing only selected prices, most often transaction prices. In addition, several credit institutions provided information on prices of national transactions only, failing to mention the price of cross-border ones.

Only 29% of credit institutions provided a full list of fees for transfers. For 53% of the credit institutions surveyed, their disclosure on the Internet was missing 1 or 2 charges (the most frequently missing item being the price for a cross-border direct debit transaction). In contrast, more information is available for card transactions. Our research found that all fees for debit card transactions were being provided by 77% of the banks surveyed, and a similar 76% of them for all credit and deferred debit card fees. This relatively better performance on full fee transparency for cards

[328] Answers to introductory question CBR about the main focus of the complaints in the last two years. For further details, see also Annex 3.2.
[329] Answers to questions 16-30 CBR.
[330] See Annex 3 for results of the data collection.

compared to transfers still leaves customers of those credit institutions making up over 20% of total credit institutions, lacking a full price list.

A particular threat to consumer protection is that six credit institutions refused to provide a full price list despite direct contact being made by the research team. Two credit institutions provided contradictory information and a further two were unable to provide such information, because they did not know what their current price list actually was.[331]

Interestingly, the negative impact evidenced by responses from the consumer associations and other stakeholders above is not confirmed by results from the provider survey. Credit institutions reported that consumers were not exercising their right to information in a substantial way. Except for a few respondents (11 credit institutions out of 68 credit institutions, and 8 associations of credit institutions that also answered this question), all see the users as having been exercising their rights pertaining to obligatory information to only a limited extent or not at all. This however should not be seen as evidence that there are no problems linked with the provision of information, and that the evidence is contrary to the evidence provided by consumers associations, because limited use of information rights may be legitimately attributed to limited knowledge of those rights, which is partly due to the unclear presentation thereof by the providers.

6.1.3 Scope of information

The comprehensibility and clarity of information on payment services is substantially affected by the scope of the obligatory information. In fact, there is a contradiction between comprehensiveness and the comprehensibility required by the PSD and other complimentary directives. The more information provided, the less users have the time and the ability to read and understand the terms of service. Extensive information requirements are not per-se beneficial to consumers.[332] If the information is excessive, the consumer will compare different offers based only on primary features (e.g. those features highlighted by advertisements or readily available commercial information) with little or no regard to features such as value dating, which, in the financial industry can have a major effect on the final value or cost of the product.

A consensus exists over the general incomprehensibility of the terms and conditions, a defect partly attributable to the excessive scope of information. However, there is no clear evidence enabling us to isolate which information item or items may contribute the most to impeding the user's understanding of the information disclosed. There is therefore a clear need to improve research on consumers and other users' behaviour to help policy makers assess the effectiveness of disclosure in this area of information.

The views shared by consumer representatives are limited to a general complaint over comprehensibility. They do not refer to any specific area of obligatory information.

In addition, providers are mostly capable of providing all information required under the PSD in technical terms. Out of the 69 credit institutions and 9 associations which commented on this is-

[331] See Annex 5 for further details.

[332] In fact the real value for customers seems to be elsewhere, i.e. when the legal regime ensures that the level of service will not fall below a certain acceptable level, regardless of whether customers have read the terms and conditions.

sue of technical terms, as many as 55 credit institutions and 3 associations report that there are no problems related to information obligations and conditions for payment transactions.[333]

Credit institutions are divided over whether the scope of the obligatory information is appropriate. Many respondents judge the scope to be excessive. A few credit institution associations explicitly underline that framework contracts are too detailed and complex as a result of the information obligations. It was reported that customers complain to them about waste of paper and demand a more environment-friendly solution. This was also raised by one payment institution that deems the volume of pre-contractual information required under the PSD and other legislation excessive. In its opinion, it has become so burdensome that it actually has the effect of discouraging the customer from reading and using the information. In contrast, the said institution is more content with the PSD's flexible approach to the provision of required information, including the ability to provide or "make available" some of the information.

While none of the information required is deemed by the providers as strictly superfluous, some is technically more challenging to provide than the rest. This problem is reported only from the providers, although the difficulties are faced by users as well. The most frequently highlighted burdensome issues were:

- exchange rates in card transactions
- interest rates
- breakdown of the amounts of charges

Credit institutions provided no insight into why they had these concerns. According to the industry experts surveyed for the purpose of the study, a major issue is currency exchange rates applicable to card transactions. The PSD requires that the consumer is informed in advance of exchange rates to be applied or, if reference exchange rates are to be used, the relevant date for determining the exchange rate. Card issuers can process transactions only after receiving relevant information from the card scheme. The moment the transaction is recorded by the issuer may have nothing in common with the transaction date. What makes it more complicated is that card schemes hardly communicate exchange rates on the day they are applied. This makes it nearly impossible to define precisely the day which is relevant for currency exchange.

In practice, a consumer undertaking a card transaction has no way of knowing in advance the exchange rate that applies to this transaction unless the consumer makes use of an expensive Dynamic Currency Conversion service where available. Taking into account that this short-term uncertainty seems to be the trade-off for global reach and smooth acceptance of cards issued under global card schemes (which consumers appreciate), any attempt to improve consumers' situation in this respect needs an extremely careful impact assessment.

Other areas of concern are the breakdown of charges (i.e. the lack of certainty as to how far the charges need to be separated), information dependent on the moment of the payment order receipt where it was received after a cut-off time or outside working hours, and information on the

[333] The discussion in this sub-section draws on the answers to questions 7.10 CIQ and 8.11 APIQ.

credit value date in instances where either the payment account bears no interest rate[334] or where there is no payment account.[335]

The scope and delivery of obligatory information in single transactions gives rise to no major objections. The minor problem providers and non-consumers face is the enforceability of derogation to pre-contractual information requirements.[336] Before entering into contractual relations (which usually takes place only when payment is ordered), there is no opportunity to agree the derogation.

The evidence gathered demonstrates that the PSD has had an impact on the way consumers are informed, but it seems this impact does not yet go far enough. While consumer associations did not systematically mention standardised information leaflets as a possible solution at EU level, such as those existing for savings and credit products, this should be given more serious consideration. A standard form predefined by the PSD in which the providers demonstrate the key terms of their service, may be the only efficient way to help consumers to understand the key information of the payment product and compare the offers. Another option is to have an obligation upon the supervisory authorities of Member States or those at EU level to disclose typical conduct or usage patterns from observed practice, enabling providers to align themselves to an identified standard.

6.1.4 Information delivery

The efficiency of the PSD rules on transparency of conditions and information requirements is affected by the rules concerning their delivery, and the rules on the content and form of that information. The provider is under an obligation to either make the obligatory information available (all information required with respect to single payment transactions by default, and as an option with regard to pre- and post-transaction information related to individual payment transactions within a framework contract, if so agreed with the consumer) or to provide the required information (all information required with respect to single payment transactions if so requested by the consumer, and by default all information required under a framework contract).

While making the required information available hardly gave rise to concerns, there is evidence of considerable inefficiency with regard to the provision of information.

Under the PSD the provider needs to communicate the information actively and without further prompting by the user[337], on paper or another durable medium.[338] *"Durable medium"* includes both electronic mail where it can be stored on the computer's hard drive and web sites, as long as such sites are accessible for future reference for a period of time adequate for the purposes of information, and allow the unchanged reproduction of the information stored.[339]

Despite substantial leeway in the expression *"provide (…) on paper or durable medium"*, a large number of providers feels safest when providing information using paper. This triggers obvious complaints from providers but also from users about unnecessary costs and effort (see above). While such complaints may be entirely justified in general, addressing them at the PSD level does not appear justified.

334 See Article 48.e of the PSD.
335 See Article 39.e of the PSD.
336 Article 30.1 of the PSD.
337 Recital 27 of the PSD.
338 Article 41.1 of the PSD.
339 The definition of durable medium comes from Article 4 of the PSD and Recital 24 of the PSD.

The PSD provides sufficient room for manoeuvre for providers and users to agree any of the currently available cost-efficient communication channels, including web and e-mail.[340] The choice between paper and e-communication delivery (in terms of enforceability vis-à-vis the customer) is dependent on the current state of play in national legislation, jurisprudence and on prior agreements with the customer.

Those factors decide whether e-communication is allowed and enforceable. Most EU Member States follow the approach reflected in the PSD's definition, where e-communication is enforceable if the customer may be reasonably expected to handle incoming e-communications, e.g. explicit consent with relevant addresses, communication initiated by the customer, etc. *("instrument which enables (…) information addressed personally to him"* – see the definition of durable medium under Article 4.25 of the PSD).

Suggestions made by providers that the PSD should provide explicitly for general enforceability of e-communication or even press announcements seem to exceed the current state of play regarding electronic communication.[341] The PSD should closely follow the developments of this discussion and recognise e-communication as a generally enforceable means of provision of information as soon as it is recognised in all other areas of life.

One minor issue that the PSD might benefit from when reconsidered is the issue of recognition of bank account mail boxes as a way to provide the required information. Pursuant to Recital 27 of the PSD, information provided in a home banking internal mail box amounts only to the level of *"making available"*, while most information and conditions pertaining to a framework contract must be *"provided"* (i.e. actively communicated). Home banking mail boxes give rise to no excessive concerns about security and efficiency, which justifies recognising them as a form of provision of information.

6.1.5 Impact on the use of payment services and views of credit institutions

One of the legitimate expectations vis-à-vis harmonised transparency of conditions and information requirements is that the use of efficient payment services will increase among transacting parties in the economy.

The evidence supporting such an increased customer usage scenario has been obtained from providers.[342] Users have been judged to have become more confident as a result of the relevant PSD provisions by 46 credit institutions and 3 trade associations (out of the total of 75 and 9 that responded respectively). In some cases, the responses suggest that high standards were already in place before the PSD's implementation at national level, suggesting little room for material changes attributable to the PSD in those jurisdictions. This is the case in the Netherlands, where only one out of eight credit institutions perceives consumers as more confident.

When providers were asked about the usage of payment services, out of the 74 credit institutions and 8 associations that responded, only 19 credit institutions reported having noticed an increase in the use of payment services. Interestingly, two-thirds of all credit institutions experiencing increased use of payment services following the PSD implementation come from entities based in

340 See Recital 23 of the PSD, where it is confirmed that the provider is required to communicate obligatory information in a "standard manner".
341 This suggestion was made in response to questions 7.10 CIQ and 8.11 APIQ.
342 Answers to question 7.7.c CIQ.

Member States from Central and Eastern Europe (Romania 8, Czech Republic 1, Estonia 1, Malta 1, Poland 1, Slovenia 1, Cyprus 1, Latvia 1). In the absence of specific reasons, the increase is most likely attributable to a general growth in the use of payment services in those countries (as part of the economic development process catching-up and closing the gap between use of payment services in those countries and the EU average). Only 4 credit institutions out of the 74 credit institutions and 7 associations who commented on this point reported that more consumers have started to use the services of other providers, following the PSD's implementation.

The survey results overall, demonstrate that, for credit institutions, the PSD contributes to an increase in consumer confidence in the use of payment services. It is however, still too early to see the reflection of those developments in statistics showing a general increase of the use of payment services and migration of customers among providers that would indicate an increased occurrence of switching by consumers to find the best offer.

Please see the relevant subsections of Section 6.1 above for stakeholder views on the issues of clarity, scope and delivery of the information transparency provisions.

6.1.6 Conclusion

The PSD provides for harmonised information requirements with respect to their scope, overall quality and availability.

Product information in financial services is a constant and recurring concern for users, in particular consumers. The PSD attempts to address the challenge which low-quality disclosure practices bring to payment services markets.

The PSD has had an impact on the way consumers are informed, but it seems this impact still falls short of delivering on the objectives of the Directive. Consumers do not always receive the information they should be provided with and even when they have received it, they often struggle to make sense of what they have been provided with. While it is difficult to assess to what extent consumers actually understand the information they receive (without robust consumer research on this specific area), even if they were to be reading and understanding the information, there are very few signs visible to providers that consumers are making use of the information received.

Specific issues identified by our research relate to the scope (inadequate information), quality (unclear, difficult to understand whether or not all information is included), excessive technical content, opacity (with key information on pricing hard to find), and availability (with the decision on the way information is provided left to the provider). Complaints with regard to lack of full information available on the Internet, may warrant further measures being taken to address the frequent practice of referring the customer to more detailed conditions and specific pricing only available in the physical branch.

Information requirements are heavy for providers. This includes the scope of obligatory information in general, and several specific requirements in particular (e.g. information on exchange rates, interest rates, fee structure). 'Repapering' the customers each time the contract changes is seen as waste of resources by providers and also by some users.

Findings indicate that consumers have become more confident in their use of payment services. With a few rare exceptions, but this enhanced confidence level has failed so far to be reflected in

greater perceived customer mobility. Providers did not report any noticeable customer migrations to other providers.

The overall impact of the PSD's harmonised information requirements has been positive insofar as the complex nature of financial services is addressed by allowing for clarity and comprehensibility of information. Customers do receive and can request information relevant for them to make an informed decision on the use of payment services they want. Any failure in this respect is rather a question of enforcing existing PSD rules. However, it is questionable whether the PSD may further contribute to customer confidence and enable consumers to shop around based on the underlying paradigm of information requirements. A substantial breakthrough in customer awareness and confidence may require fresh legislative concepts including a standard information form or even uniform regular terms and conditions for the EU to which providers can apply additional terms or limited derogations.

6.2 Adequacy of rules on framework contracts

6.2.1 Introduction

The PSD provides for comprehensive rules governing framework contracts. Framework contracts are payment service contracts which govern the future execution of individual and successive payment transactions.[343] The most common payment services provided under a framework contract are payment accounts, payment cards, home-banking facilities and acquiring. Payment services where the payee's provider receives transactions for the payee are offered under a framework contract except in the case of simple money remittance. A framework contract itself constitutes no payment transaction.

Rules on framework contracts focus on:

- securing a consumer's effortless access to contractual terms and information in the period before and during the contractual relationship
- ensuring a painless process of contract change with no surprise to the consumer and sufficient time to make an informed decision whether to accept changes
- ensuring a smooth change of provider, including control of terms that usually discourage consumers from changing provider (long notice period, charges paid in advance, etc.).

Rules on framework contracts are unconditionally binding only in relation to the consumer. All those rules may be derogated from contractually vis-à-vis non-consumers except microenterprises if national legislation made use of the option to extend PSD standards to microenterprises.[344]

Basic contracting principles (formation of contract, interpretation, change, termination) are primarily the domain of the national laws of the Member States. The PSD intervenes in this area for payment services under framework contracts to ensure harmonisation of payment service levels. Harmonised rules on those contracts include designation of extensive pre-contractual information, designation of pre-and post-transaction information, information delivery modalities (including direct and distant communication), constant availability of contractual terms, change of the

[343] Article 4.12 PSD.
[344] Article 30.2 PSD.

framework contract including change of interest rate and currency, and termination of the framework contract. Rules on framework contracts are summarised below.

Information and conditions of the prospective framework contract at least to the extent required by the PSD[345] need to be communicated to the user before the user is bound by the contract or offer (unless distance-limited means of communication requested by the customer is used to enter into the contract) on paper or another durable medium, in understandable form, in the official (or agreed) language. The information and conditions shall be available all the time to the customer upon request.

Before ordering a payment transaction, the payer initiating the transaction may request specific information pertaining to the intended transaction (execution time, charges[346]). Extensive details on the payment transaction have to be provided after the transaction is ordered or received[347]. All mandatory information has to be provided free of charge.[348] Unilateral changes to the framework contract need to be notified to the user no later than two months before the date of application, in the same way as before the entry into the contract. The user may disagree with the changes and terminate the contract immediately and free of charge up to the day preceding entry into force.

Tacit acceptance can be assumed only after twice informing the user: once in the framework contract and once in the notification about the changes. Interest rate and exchange rate changes are in principle subject to the same conditions unless under the framework contract they are based on a reference rate or the changes are favourable to the user. Only with respect to the interest rate shall the user be subsequently informed of the change unless a specific frequency or manner of providing information has been agreed.

The framework contract may be terminated by the user at any time unless a notice period is provided for contractually, which cannot exceed one month. The framework contract may be terminated by the provider with two months' notice if agreed. The user pays no charge for terminating long-term contracts (indefinite or exceeding 12 months) after 12 months and any charges may not exceed the provider's costs. Periodical charges are due to the provider proportionally up to the termination of contract regardless of whether they are paid in advance or outstanding. Further requirements are provided for in the Consumer Credit Directive (CCD) for payment services linked to a credit facility (e.g. credit cards).

The rationale behind the comprehensive protective approach of the PSD towards framework contracts is that those contracts are the framework for the core payment services. Services provided under those contracts are far more common and economically important than contracts for single-payment transactions.[349] Due to the complexity of those contracts and various practices of providers related to those contracts, detailed measures to improve users' position of an adherent to a standard framework contract is needed.

In the following sub-sections, key issues related to framework contracts are discussed beyond the transparency of conditions and information requirements which are discussed in section 6.1for all payment services in general.

345 Article 42 of the PSD.
346 Article 46 of the PSD.
347 Article 47, 48 of the PSD.
348 Article 32.1 of the PSD.
349 Recital 24 of the PSD.

6.2.2 Change of framework contracts[350]

Rules on change of framework contract have a major impact on the overall effectiveness of the PSD regime for framework contracts.

The need to inform the customer of proposed changes is obvious. The key practical issue is the delivery of information about proposed changes and the two-month period between notifying changes and their entry into force.

Delivery of information about proposed changes

A vast majority of providers inform clients of the framework contract changes by letter (paper or electronic) and by other electronic channels. New terms and information are also available to customers via Internet banking and in credit institutions' branches. Altogether the predominant form is communication addressed individually to the customer. This is in line with the PSD, which requires in principle the same conduct for framework contract change as for entering into a contract.

The assessment of the impact of the PSD rules on framework contract insofar as delivery is concerned (section 6.2) also applies to contract changes. Specifically, providers feel that they are affected negatively by the need to deliver proposed changes in the manner prescribed for the entry into contract. One credit institution explains that "It has limited the possibilities to make changes, in a cost-effective way, by stipulating strictly the ways in which the changes are to be communicated". Credit institutions also complain about high operating costs. Several credit institutions underline that, following the implementation of the PSD delivery standards, many customers ask the institution to stop sending the changes on paper because of information overload.

Two-month period

Pursuant to the PSD, the changes to the framework contract must be proposed no later than two months before their proposed date of application.

For providers, the two-month notice period means substantial limitation of the number of changes to a contract per year. Given the sensitive nature of framework contracts, each change is a lengthy process that includes reaching a business decision, translating the business decision into contract wording, internal acceptance of the change, and mailing the notice.

Taking into account the speed of market changes, providers find it particularly detrimental to newly launched products, changes forced by the competitive environment, or innovative developments within existing products which usually require specific flexibility. While implementation of pure new functionalities is not subject to the contract change regime, in practice they very often interact with existing features, which may be changed only in line with the PSD.

One credit institution reports that a two-month notice period for changes to the framework contracts makes the whole process unwieldy and inefficient, especially where changes are to the customer's benefit. Another suggests that one month is normally reasonable and gives the customers adequate time to consider how to respond. Two months is a fairly long time, such that some customers may have forgotten that the changes will be applied.

[350] The discussion in this sub-section draws on the answers to questions 7.10 CIQ and 8.11 APIQ.

The European Banking Federation notes in the survey that a “strict PSD regime for changes in the terms and conditions also applies to changes that are to the benefit of the customer.” Limitation of strict PSD rules on framework contract changes is suggested to apply only to changes to the detriment of the customer. Consumers then benefit from changes which are beneficial for them with immediate effect.

A payment institution providing views independent of the survey urges that providers should be given the ability to change the terms and conditions on less than two months’ notice in exceptional or urgent circumstances driven by factors outside their control, provided the change fairly reflects the interests of the payment service user. Accordingly, the termination requirements should include a carve-out for situations where the user is in material breach of the framework contract, is insolvent, or in other circumstances where it is clear the relationship is irretrievably broken beyond user control.

The scale of negative impact on the provider seems however to be limited. While providers provide important arguments and examples in favour of inadequacy of the two-month period, this is the opinion of only a few out of over 60 credit institutions and 9 credit institution associations that commented on the adequacy.

A specific instance of framework contract change is the change of interest rate and fees. Based on evidence from industry experts, rules on change of interest rate are a challenge to providers. If for any reason a provider does not rely on reference interest rates, the provider is heavily limited by the two-month notification period. This may encourage those providers to apply the highest feasible interest rate to compensate for the inability to react immediately to market changes.

While promotion of reference interest rates remains a legitimate goal, the result where the alternative approach (non-reference interest rate) is seriously disadvantaged seems not to be justified by the current state of play in the market. This is even truer given that products where consumers would benefit most from the stability of a non-reference interest rate are mostly not subject to the PSD: Savings products are outside the scope of the PSD, and credit components to payment products are subject to the CCD, which does not require any kind of interest rate stability. Whereas consumer associations did not report any major problems about the design of the PSD procedure and were mostly satisfied with the two-month time period necessary to change the conditions of a framework contract, for contract changes they indicate that consumers were not well informed about changes to the framework contract. Overall, what seems to raise difficulty is the fact that in practice the prior delivery of contract changes and the two-month period may not always be properly respected. Out of the respondents[351], seven consumer associations reported some problems with the application of the rule, while three consumer associations did not have any problems to report. The problems included:

- Bulbank in Bulgaria changing its conditions and only informing its clients after their entry into force
- Vzbv in Germany declaring having taken legal action against a series of clauses enabling changes to interest rates that did not respect the two-month notice period

[351] Answers to question 21 CAQL. For further details, see also Annex 2.8.3.

- In Denmark, the respondent reported a potential breach of the Directive because the banking sector is now exempt from this rule regarding changes to charge-back conditions for credit cards.

Consumer associations were also concerned about the possibility, for a payment service provider (PSP), to include in their terms and conditions, a clause specifying that the consumer will be deemed to have accepted future changes unless he notifies the provider before the proposed date of entry into force of the new conditions.[352] The vast majority of consumer associations thought that this rule was not properly respected and that consumers encountered problems regarding the information concerning the right to terminate a contract or the fact that failure to respond would mean they were bound by a new framework contract.

When the changes occur, the consumer needs to be reminded that this is the case and also needs to be told that he has a right to terminate the framework contract immediately and without charge. Out of the respondents[353] who did provide an answer, the vast majority thought that the rule was not duly complied with and that consumers encountered problems regarding their information concerning the right to terminate a contract or the fact that failure to respond would mean they were bound by a new framework contract. Eight consumer associations indicated that they thought there were problems with the application of the rules laid down by Article 44 against two consumer associations believing the rules did not cause problems.

Compelling evidence of such problems came from Germany, where vzbv explained that it is taking legal action and thus has knowledge of non-compliant practices in this area. However, because of on-going cases, it declined to share the precise information on those cases and only volunteered the following examples of bad practices:

- a Berlin bank not informing consumers about their option of cancelling the contract. Legal action initiated in May 2012.
- a provider suspected of having switched a consumer to a different account type without informing them. Legal action under consideration.
- changes of co-branding stopping consumers making full use of their payment card on both sides of their Member State's border. The case concerned a PSP near the Dutch/German border. Those consumers had been using the Maestro scheme and were used to using their debit card to pay at supermarkets and making ATM withdrawals. Following the switch to Cirrus, the consumers were unable to pay in supermarkets in the Netherlands.

This is confirmed entirely by the evidence from complaint boards. Changing conditions of framework contracts were reasons for claims in four Member States (Germany[354], Hungary, Spain and Sweden) with a large number reported by Banco de España.

Germany reported that it was not the notice period that was a motive for complaints, but changes of the terms and conditions themselves as a consequence of the implementation of the PSD into national law. Complaints in relation to changing interest rates and exchange rates were reported from Spain, Estonia, Lithuania and Hungary, especially changing interest rates without proper notification of the consumer. Problems with framework contracts connected to information about

[352] Article 44.1.2 PSD.
[353] Answers to question 22 CAQL. For further details, see also Annex 2.8.3.
[354] See for original comment Annex 2.8.3, Box 5.

changes were reported from Estonia, Lithuania and Bulgaria. In Estonia, a PSP had changed its fees without prior notification of the consumer and in Bulgaria several PSPs announced new conditions and fees only on the Internet and not in a written individual form. Both issues were seen as non-compliant with the PSD and the national law by the complaint boards.

While such non-compliance clearly has an adverse effect on the efficiency of the PSD regime, the problem is not in the approach of the existing laws but in their enforcement. The PSD might help in this regard by providing for straightforward and efficient sanction (e.g., prohibiting raising fees when a provider is found to have breached the transparency and information requirements).

In light of the evidence gathered, the two-month period needs to be reconsidered. Shortening the period to one month seems to weigh out correctly the usual customer approach to contract changes (including to choosing a new provider) versus the efficiency concerns on the part of provider. But from the user perspective a shorter period could cause additional problems.

User lack of consent to changes

The PSD fails to address comprehensively user lack of consent to changes to the framework contract proposed by the provider. While users may disagree with the change[355], it is unclear under the PSD what the results of the user's objection are.

The PSD seems to suggest that the provider's duty in response to an objection is to inform the user of the right to terminate the contract immediately and free of charge. Regardless of timing issues (many steps need to be performed within one day), the primary concern is the absence of any rules on what the consequences of a user's disagreement notification are.

In the absence of specific rules in the PSD, usual contract principles apply. A user's lack of consent to changes proposed by a provider means that a unilateral proposal of one party to amend the contract has not been accepted by the other party, which makes the proposal irrelevant unless local laws or a prior agreement provides otherwise.

If the provider does not wish to keep the relationship with the user unchanged, the provider needs to terminate the contract. However, pursuant to Article 45 of the PSD, the provider may terminate the contract with two months' notice, which makes the contract change process last four months in total in the worst case.

This gives rise to substantial uncertainty in the contracting process both for the provider (divergent entry into force of new conditions) and the user (uncertainty as to whether the provider decides to keep providing the service under unchanged conditions). The PSD would benefit from clarifying the position of the provider and user subsequent to a user's lack of consent to changes.

A possible remedy is the right of the provider to terminate the contract following the user's notification of lack of consent with limited or no notice period or even *ex lege* termination of contract.[356] Customers may then be surprised at the sudden termination of contract, although it seems to be hardly detrimental to them. Customers will hardly treat the upcoming contract change as a specific opportunity to terminate the contract because it usually brings no specific

[355] Article 44.1 of the PSD.

[356] A solution of that kind was adopted in Polish implementation of the PSD. Where the consumer objects to the changes without terminating the contract the contract extinguishes *ex lege* the day before the proposed changes enter into force (Article 29 sec. 2 of the Polish Payment Services Act).

advantages to them. If the customer is not satisfied with the product, the customer terminates the contract when the customer is ready to do so (including choosing an alternative provider), which does not necessarily take place during the two-month period after changes are proposed.

6.2.3 Framework contract termination[357]

The PSD specifies the rules for framework contract termination including fees that can be charged.

The termination rules apparently provide adequate protection of the consumer because no general concern pertaining to their design was evidenced. However, what was evidenced is again non-compliance on the part of the providers.

Consumer complaints are reported in relation to charges for framework contracts for periods after cancellation through the user by complaint boards in Bulgaria and Luxembourg.[358] Users did not understand that they have to pay for the first 12 months; while afterwards, the cancellation period is only two months.

A single case was reported by the Danish Financial Supervisory Authority relating to closing "a complainant's account, while there still was approx. 50 euro on it, without any notice".

A particular problem was reported from Bulgaria. The Bulgarian National Bank (BNB) mentioned several complaints concerning the opening and closing of payment accounts, in which third parties had opened an account on their behalf. "The cases concerning the closing of a payment account were related to customers of providers complaining about the procedures that one should go through to cease the contract with the provider." The BNB has also received several complaints by PSP customers "about automatic rollover of payment service contracts which they claim they were not aware of." The Bulgarian complaint board declared that "the cases received with regard to the procedure for termination of a contract and closing of a payment account were solved in a timely manner and charged fees for the following period were solved in such a manner that the providers were closing the payment accounts and reversing the charged amounts. In good faith, after communication with the BNB, providers terminate the contracts and reverse the charged fees, even though it is clearly negotiated in the contract that the contract can be renewed automatically".[359]

Providers are apparently not, in general, adversely affected by the current termination mechanism. In the course of the survey where 69 credit institutions and 8 associations commented on termination, only eight credit institutions and three associations said they encountered problems related to the termination of framework contracts. One credit institution reported that the two-month notice period creates problems in relation to the bank's right to terminate the provision of credit with little or no notice. One credit institution also indicated that the main problems are the lengthy notice period and providing termination notice on paper or other durable medium. The payment institution which addressed the framework questions noted the fact that the fees are considered to be a contractual term, which requires two months' notice, before a change can be implemented. This is viewed as a deterrent against offering framework contracts. Based on evidence from industry experts the PSD would benefit from clarification regarding the rationale be-

[357] This sub-section draws on the responses to questions 7.10 CIQ and 8.4 APIQ.
[358] Answers to question 18 and question 25 CBR. For further details, see also Annex 3.8.3.
[359] See previous footnote.

hind providing for termination by the provider only with respect to contracts concluded for an indefinite period.[360]

With respect to recalculation of charges proportional to contract duration, the PSD would benefit from clarification of which charges are subject to proportional recalculation in the case of premature contract termination. Several periodical charges usually requested by providers are not directly charges for "payment services". Such concern is often reported with respect to the cost of card issuance or payment authentication devices, which is a pure "hardware" external cost included in monthly or yearly card or account fees, but not a direct cost of providing a payment service. Guidance on this particular issue in the PSD recitals would be welcome.

Based on the available evidence the existing PSD rules on termination should be kept unchanged except for clarifications of the technical concerns discussed above including termination following a user's objection to contract changes. The termination of the contract has the potential for more negative impact on the user than change of the contract which justifies maintaining the two-month termination period.

6.2.4 Conclusion

The PSD provides for extensive rules on framework contracts including their conclusion, minimum content, change (including change of interest rate, currency exchange, fees) and termination.

Framework contract changes are a continuous source of disagreement between users and providers. Based on the details of stakeholder views provided in the previous sections on changes and termination of contract, users feel insufficiently informed of upcoming changes including consequences of a lack of reaction (i.e. silent acceptance). This is particularly the case with changes in interest rates.

Problems experienced by users in this regard are again mainly a matter of enforcing existing rules. The PSD might help in this regard by providing a straightforward and efficient sanction (e.g., prohibiting raising fees if a provider is found breaching the transparency and information requirements). Despite the unclear position of the PSD on the consequences of a user's lack of consent to changes, none of the stakeholders reports problems in this respect.

The two-month period of advance notification is a source of practical problems for providers which seem to exceed the advantages for the consumers. A serious limitation of flexibility in a competitive environment is experienced including a delay in introducing changes favourable to customers. This applies in particular to changes of interest rates. A key proposal, which is shortening the advance notification period, deserves careful reconsideration.

Rules on framework contract termination are in principle adequate. While providers face minor problems with the two months' notice they need to give (including inability to react to urgent developments in customer performance) and proportional recalculation of charges rules on termination seem not to require major revision.

[360] Article 45.3 PSD.

6.3 Effects of standardised information requirements on providers

6.3.1 Introduction

The PSD provides for harmonised rules on transparency of conditions and information requirements for payment services and payment transactions which fall within the scope of the PSD. Rules on transparency of conditions and information requirements include the designation of specific pre-contractual information (narrow for single payment transaction, extensive for transactions under framework contracts), pre- and post-transaction information, quality of information, information delivery timing and modality (including minimum measures to be undertaken so that the information may be considered made available or provided in line with the PSD), charges for providing information, and burden of proof that those requirements have been met.

The payment market is covered to a substantial extent by providers which offer their services in more than one country either via passporting facilities or via subsidiaries. Harmonised transparency of conditions and information requirements together with standardisation of conduct of business rules may be reasonably expected to open the way for standardised services nationally and across borders within the EEA and in consequence fully automate operations across the EEA. To trigger this potential, the legal framework needs to enable providers to design and monitor payment services centrally, thereby limiting compliance costs and efforts at the stage of product launch and maintenance.

6.3.2 Assessment and views from providers

The positive impact of standardised information requirements on providers is hampered by various detailed factors.

The first major obstacle is the diverging transposition of the PSD into national legislation. Transparency and information requirements are numerous and far-reaching and the more extensive the requirements, the higher the probability of divergent implementation into national legislation. This is clearly the case with the PSD, where Member States have adopted in general a relatively lax approach to implementation. The divergence in implementation of transparency of conditions and information requirements is further amplified by the fact that the information requirements under the PSD are in part a reflection of the PSD's conduct of business rules, which are themselves implemented in a divergent manner in Member States.

The second major obstacle to true standardisation of payment services across the EEA is that the PSD is only part of the compliance challenges which providers face when launching and maintaining payment products. Payment products are usually subject to various additional laws (e.g. regarding consumer credit, distance contracts, unfair terms, money laundering, data and privacy protection, reporting, etc.). Only some of them have been harmonised across the EU and even if they are harmonised, implementation differs across Member States.

In addition, given that payments are sensitive services, divergent national consumer protection policies apply, which can be very different with respect to choice of measures and intensity.

The number of challenges beyond the PSD requirements is so high that providers have not been able to adopt a most effective approach where a payment product is designed in a one-off central-

ised process and maintained that way afterwards with no excessive risks when no local compliance assessment is undertaken.

For those reasons, the providers have only started to benefit from those developments. However, they are fully cognisant of the benefits of the harmonisation.[361] As many as one quarter of all individual provider replies state that those improvements made providing uniform services much easier. Only 18 credit institutions out of 79 see no benefit at all.[362] Except for a few credit institutions, all institutions provided the same responses to the question of the impact on offering services across borders. 63 credit institutions and 4 associations of credit institutions report that harmonised and simplified transparency of conditions and information requirements have made it at least a little easier not only to provide uniform services but to offer standardised and fully-automated primary payment services in general. Only 13 credit institutions consider the impact to be negative or non-existent.

More importantly the majority of providers see a direct positive impact on the cost base of providing payment services. More than three quarters of credit institutions (56) and two associations out of 72 credit institutions and 6 associations who responded consider that harmonised rights and obligations reduced legal compliance costs at least a little (with 12 credit institutions and one association seeing large savings in compliance costs). The remaining institutions see no savings, with one reporting that implementation of PSD necessitated a “one-off” investment which cannot be recouped. Another institution explained the lack of cost savings with the inconsistent timing of the implementation of the PSD across the EU.

The impression of general satisfaction with the PSD’s impact on standardisation on the part of credit institutions is underlined by the European Banking Federation in the survey. In its assessment of the need to revise the PSD in the area of information requirements it says that “new rules are not necessary, it is the application of the existing rules and the intention to preserve legacy services which causes problems in certain Member States”.

One payment institution questions the ability of the PSD to boost offering standardised and fully automated services across borders within the EU. The institution explains “there are numerous laws the providers have to take into account, which vary from country to country, such as consumer credit, consumer protection, AML, data protection (…) Consequently, despite the best efforts of the PSD, these laws still pose obstacles to the provision of standardised services across Europe.”

According to the industry experts the deficiencies in the PSD’s harmonisation transparency of conditions and information requirements do not affect all providers uniformly. The more straightforward a payment product is, the more the provider attempts to discount the advantages of PSD harmonisation.

Internet-based payment providers are very eager to use harmonised services regardless of the products offered. International money remittance providers seem to be very efficient in taking

[361] The discussion of the providers’ perspectives on the effects of harmonised and simplified transparency and information requirements draws on the responses to questions 7.8 CIQ and 8.9 APIQ.

[362] This positive picture is blurred substantially by the responses of associations of credit institutions. Contrary to the responses of individual credit institutions the associations report mostly no benefit at all. Those associations represent many banks, which counterweighs the picture conveyed by the replies of individual credit institutions. Given that replies of the credit institution are more diverse than those from associations, priority was given to the results from individual credit institutions when assessing the impact on the provider community.

advantage of harmonisation. Their terms and conditions and transaction information are usually substantially uniform across EU markets. The same approach is mostly followed by online account providers, payment integrators, etc.

Most providers of advanced payment products (regular current accounts, cards issued within global schemes – mostly credit institutions) are reluctant to apply a uniform approach across countries. This is in line with the extensive compliance resources they tend to maintain in each country and the high impact factors usually attributed by those institutions to non-compliance risk. Those institutions benefit from the PSD's harmonisation mainly in the early stages of product development and high-level product maintenance where those institutions may assume that the product can be offered in various markets on the basis of the same underlying assumptions.

The overall picture is that the PSD does a lot to harmonise information and transparency requirements. Harmonisation of transparency of conditions and other requirements are a *conditio sine qua non* for standardised payment products which indeed open the way for fully automated services across the EEA. As long as payment services are subject to various requirements beyond the PSD (including AML, privacy protection and consumer protection) the scale of the positive impact is dependent on harmonising the other requirements.

6.3.3 Conclusion

PSD provides for standardised information requirements with respect to payment services and transactions (Title III of the PSD). One of the goals is opening the way to providing standardised payment services. Enabling the provider's centralised design, handling and maintenance of uniform payment services for the whole of the EEA is indispensable to reach the ultimate full automation of payment services across the EEA with tight execution times, flat-rate charges and efficient irregularity handling.

It is definitely too early to assume that there has been a uniform prevailing positive effect. Standardisation of information requirements under the PSD is a first step on the long road to achieving the paradigm of standardised and straight-through processed payments.

7 Rights and Obligations

This chapter assesses the impact the PSD has on the liability of payers for unauthorised payment transactions. It also covers the impact of the refund rules, of the new rules on execution times and value dates. The chapter also deals with the impact of the rules on non-execution and defective execution of payment transactions under the PSD. Out of court complaints, although mentioned in this chapter are in effect dealt with under Annex 2 of this report.

With regards to Regulation 924, this chapter also assesses the handling of the new BIC and IBAN standards.

7.1 Impact on the liability of payers for unauthorised payments under the PSD

7.1.1 Introduction

In addition to the refund rights applicable to authorised transactions (Article. 62), there is also a refund right in relation to unauthorised transactions (Article 60). The principle of immediate refund on all unauthorised transactions applies unconditionally for all users.

Where an unauthorised payment transaction is initiated by means of a payment instrument, the user's liability is limited to 150 Euros when use of a lost or stolen payment instrument arises or where the payment instrument has been misappropriated (Article 61). Once the loss, theft or misappropriation has been notified, the user incurs no further liability and only remains liable where he or she was grossly negligent or acted fraudulently.

Under the PSD, the application of Article 61 may be limited by providers to consumers other than micro-enterprises if Member States extend the application of consumer rules to micro-enterprises (Article 51).

Immediate refund in cases of unauthorised transactions is strictly dependent on the liability of the consumer and on the interpretation of the notion of "gross negligence". The PSD intended that consumers face the same standard of restricted liability in all Member States under the PSD, as in the case of execution times.

In attributing liability for unauthorised payment transactions, consumers benefit from increased protection under the provisions of the PSD.

Commission Recommendation 97/489/EC concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder, provided recommendations as to liability in cases of unauthorised payment transactions made with a payment instrument, including limitation on liability of EUR 150 when the instrument is lost or stolen.

Under the PSD, with regard to payment cards, the liability of users, primarily consumers, is limited to a maximum of EUR 150 in cases of misuse by third parties. This limitation is underpinned by the need a) to strengthen trust in payment instruments in general and b) to reduce risks for individual

users.[363] This restricted liability exists to incentivise users to take care with their payment instruments and security information and may be reduced by Member States.[364] The maximum amount of EUR 150 is based on standard agreements between users and card issuers that were applied in the past.

Unfortunately, reliable and comprehensive data as to the number and the volume of unauthorised payments in the European Union do not exist. Therefore, it is impossible to assess the frequency of the application of the rule and amounts involved.

7.1.2 Views of stakeholders

The views expressed by consumer associations on liability varied widely.[365] Several saw restricted liability for consumers as a major benefit. Others reported serious problems with consumer liability. The German national consumer association, for example, criticised the limitation on liability because of the interpretation of Article 61 of the PSD in Germany, according to which consumers were strictly liable for the payment of 150 Euros irrespective of any negligence on their part. National law based on *prima facie* evidence in cases of unauthorised transactions has not changed. German consumers must still bear the entire loss.[366] Similar problems have been reported by associations from Denmark and Sweden.[367]

Several complaint boards (Cyprus, Denmark, Germany, Spain and Sweden) reported problems relating to notification of unauthorised or incorrectly executed payment transactions without undue delay (Article 58).[368] These issues are often related to the question of liability for losses. Interestingly, the Danish Complaint Board for Banking Services *"has ruled that the period of time for 'undue delay ' starts when the consumer becomes aware of the unauthorised transaction (and not when the payment provider forwards information revealing the transaction in question)"*.[369]

Large retailers consulted as part of the study did not consider the PSD liability rules on unauthorised payments as problematic. All reported that they had put strong safeguards in place, thus reducing the risk of liability for unauthorised payments. Some pointed out that this risk is much higher in the USA than in Europe.

Complaints in relation to liability for unauthorised payments by credit and debit cards were reported by complaint boards right across the European Union. Nine out of nineteen complaint boards cited unauthorised payment transactions using payment cards as the main subject of the complaints received.[370]

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[363] "Liability of payment service user in case of misuse of a payment instrument (limited to EUR 150). This amount may be reduced by Member States and there is no liability for unauthorised payments occurring after the user has properly notified his/her payment service provider." A clear restricted liability is seen as main goal of the PSD by the European Commission. Source: Payment Services Directive: Frequently Asked Questions, MEMO/07/152, Date: 24/04/2007.

[364] Recital 34 of the PSD.

[365] Answers to question 45 CAQL and to question 12 CAQS. For further details, see also Annex 2.9.1.

[366] For further details, see also Annex 2.12.6.10.

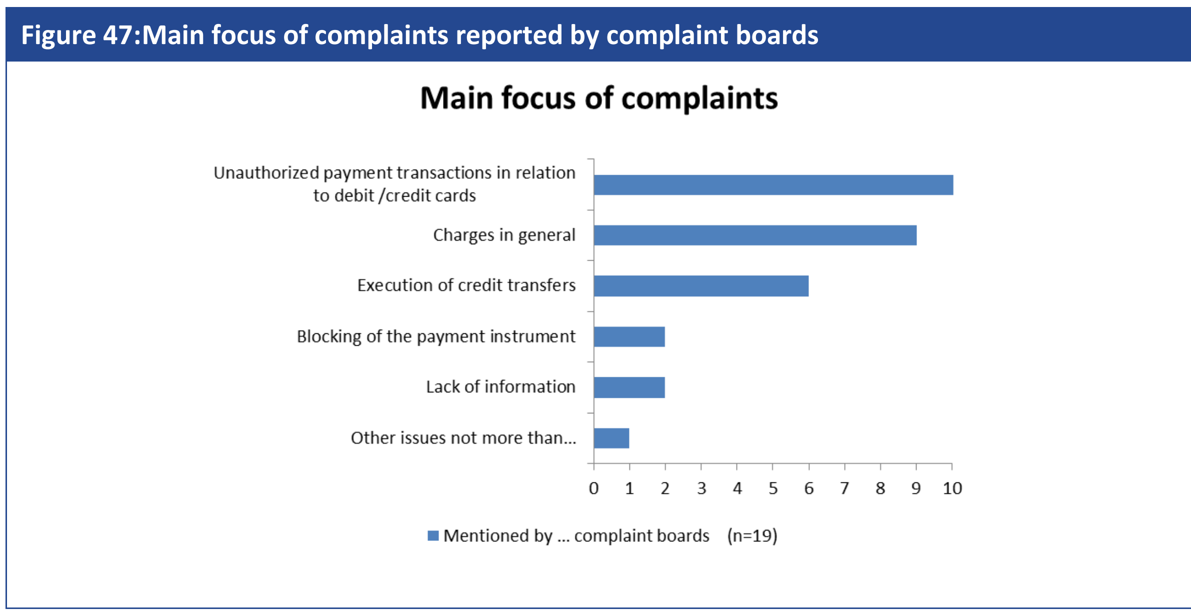
[367] For further details, see also Annex 2.12.

[368] Answers to question 44 CBR.

[369] See previous footnote.

[370] Answers to introductory question CBR about the main focus of the complaints in the last two years. For further details, see also Annex 3.2.

Figure 47:Main focus of complaints reported by complaint boards



Source: iff Survey results

Reports from the complaint boards indicate that the handling of these cases differs markedly from one Member State to another. The Bulgarian National Bank, for example, stated that users are not liable in general and do not even have to pay 150 Euros because the payment service provider bears the general burden of proof.[371] As already mentioned, the situation in Germany is very different. Consumers bear all losses arising from unauthorised use of payment instruments. The 2011 report of the ombudsman of the association of German banks stated that, in practice, a user cannot, as a rule, disprove prima facie evidence in favour of payment service providers.[372] Similar situations were reported by the Danish and the Swedish complaint boards (see Annex 3 for details).

According to the assessment of **payment experts,** the PSD rules, while covering all transactions where the provider cannot prove authorisation by the user, their primary area of application is payment instruments. The PSD extends protective measures, which previously applied only in certain EU Member States, to the whole EEA.

7.1.3 Conclusion

It was not possible to obtain reliable and comprehensive data as to the number and the volume of unauthorised payment transactions in the European Union[373]. Nevertheless, comments from com-

[371] Answers to question 45 CBR. For further details, see also Annex 3.11 Box 26.

[372] “Im Regelfall kann der Beweis des ersten Anscheins, der nach ständiger Rechtsprechung …für einen grobfahrlässigen Umgang mit der Girocard bzw. der PIN spricht, nicht erschüttert werden, so dass die Bank zu einer Ersatzleistung nicht verpflichtet werden kann.“, Ombudsmann der privaten Banken (2011): Tätigkeitsbericht 2010, p. 82.

[373] The ECB published for the first time in July 2012 a report on card fraud. According to this report, “The total level of fraud amounted to EUR 1.26 billion in 2010. This corresponds to an increase of 0.7% since 2007, but also to a decline of 12.1% since 2009. Fraud in relative terms, i.e. the share of the transaction value related to fraud, fell from 0.045% in 2007 to 0.040% in 2010, having reached 0.050% in 2009.In 2010 half of the value of fraud resulted from card-not-present (CNP) payments – i.e. payments via mail, telephone or the internet – while a third resulted from point-of-sale (POS) terminals and a sixth from automated teller machines (ATMs). The same trends were observed with respect to fraud volumes, although ATM fraud was less prevalent and POS fraud more significant. In terms of card types, fraud levels were more than four times higher for delayed debit and credit cards than for debit cards. Here too, CNP payments were the main channel for fraud, accounting for 58% of all delayed debit and credit card fraud and 39% of all debit card fraud. The figures for POS payments were 36% for delayed debit and credit card fraud and 30% for debit card fraud, while ATM fraud made up 31% of fraud using debit cards, but only 6% of fraud using delayed debit and credit cards. This

plaint boards and consumer associations suggest that the liability of consumers and other users is a major problem in some Member States.[374] For the majority of complaint boards, this is one of the most frequent subjects of complaint, and the current situation in Member States is being criticised by some consumer associations. Under the PSD, the liability of consumers for unauthorised payment transactions should be the same in each Member State. But, the answers and reports received from complaint boards show that the liability of consumers under the national law and the decisions taken by complaint boards as a result, differ significantly among Member States. This is due to differences in the application of the corresponding national law by the courts, especially with regard to the interpretation of the notion of gross negligence.[375]

Complaint boards were therefore often unable to help users in these cases.[376] Overall, the user's restricted liability[377] of up to 150 Euros in cases of the use of a lost, stolen or misappropriated payment instrument does not seem to have had the impact foreseen by the European Commission.

Nevertheless, consumer associations have also reported that rules governing liability have had a positive impact. The main problem remains the wide variations in law in the Member States. While, in some Member States, consumers or users are not liable for up to 150 Euros, in others they continue to bear the whole loss as they did before transposition of the PSD into national law.

The PSD has therefore not reached its expected goals of (1) restricting liability on the part of users in the case of unauthorised payment transactions and (2) sufficient consumer protection in the case of the use of lost, stolen or misappropriated payment instruments. The reason appears to be the variations in the non-regulated definition of *"gross negligence"*, which has led to different interpretations under national law.

7.2 Impact of harmonised refund rules under Article 62 and 63

7.2.1 Introduction

Separate refund rules are contained in the PSD in relation to 'pre-authorised' card transactions and direct debits.[378] Application of those refund rules may be limited by payment service providers to consumers, and, at the option of Member States, to micro-enterprises.

Under the PSD, consumers may, within a period of 8 weeks, request a full refund for an authorised payment transaction initiated by a payee (e.g. merchant in card transaction and creditor making use of a direct debit) if the transaction has been made without specifying an exact amount and the amount charged exceeded the amount the consumer could reasonably expect. The provider has 10 business days to refund or justify its refusal to refund. Framework contracts may also allow for refund of direct debits in other circumstances.[379]

pattern is also confirmed by transaction data, which show that ATM retrievals accounted for 46% of the transaction value of debit cards, but only 27% of the transaction value of delayed debit and credit cards." (p. 4 of the report).

374 For further details, see also Annexes 2.9 and 3.9.

375 See Annex 3.11.

376 Answers to question 45 CBR.

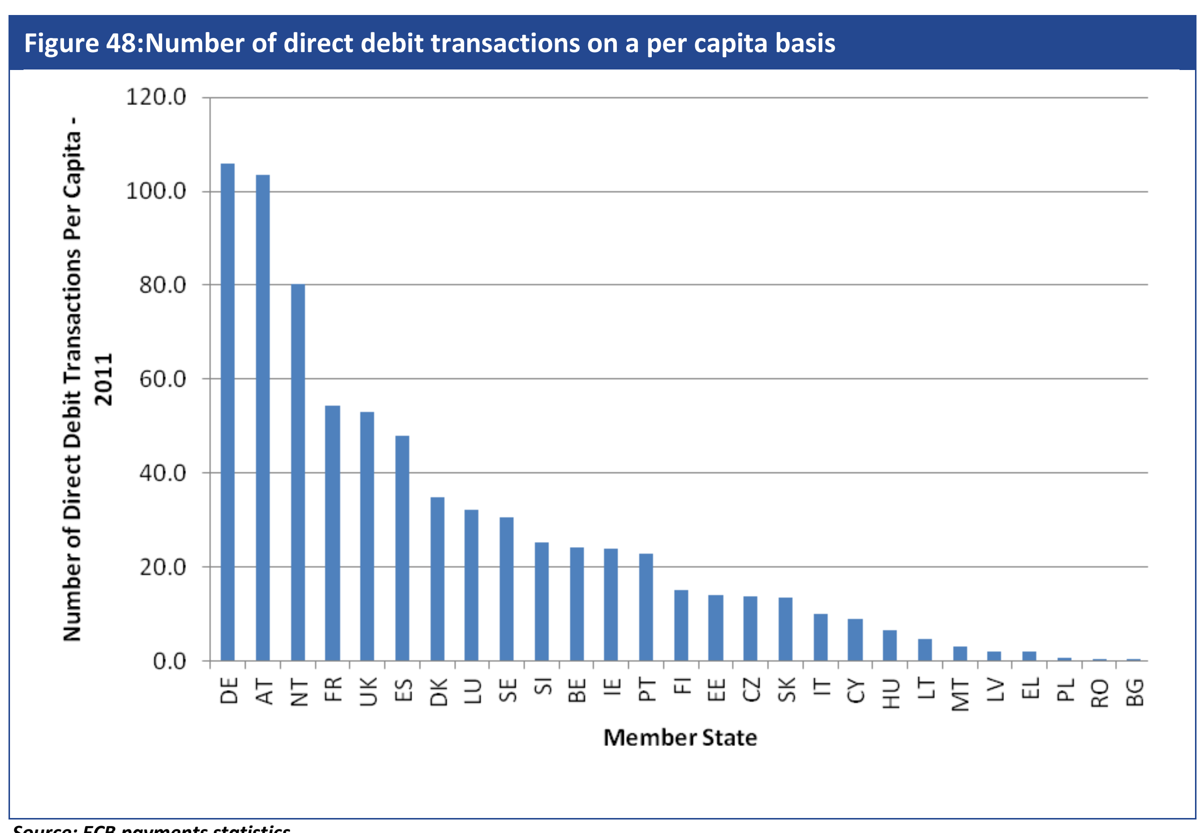
377 Article 61 of the PSD.

378 Article 62, 63 of the PSD.

379 Under the rules for unauthorised transactions (i.e. challenged by the user not because of an unexpected amount but because of not having ordered the transaction at all) the provider is under an obligation to refund an unauthorised payment transaction immediately and restore the debited payment account to the state it was in before the unauthorised transaction took place.

Direct debits are not used in the same way in all Member States. As the below Figure 48 shows, Germany also has the highest number of Direct Debit transactions per capita and also accounts for 39% of the volume of direct debits in the European Union.

Figure 48:Number of direct debit transactions on a per capita basis



Source: ECB payments statistics

7.2.2 Views of stakeholders

The evidence collected of the impact of harmonised refund rules is mixed.

The majority of respondent consumer associations reported problems with refund rights in general.[380] The problems cited were lack of knowledge of rights and conditions, as well as the absence of a clear definition of refund rights, unjustified refusals and lengthy procedures for refunds.

Most consumer associations did not report any problems in relation to direct debits. However, some concerns were identified.[381] These involved lack of clarity as to refunds in Luxembourg, refusals of refunds in France, and lengthy procedures for refunds, about which a high number of complaints (about 1,500 in the last 24 months) were reported by the British consumer association, Which?.

Few complaint boards regarded the right to a refund as problematic.[382] However, the Belgian and Spanish boards did raise concerns and referred to a number of complaints. Banco de España reported that they received a very large number of complaints on the issue, *"probably due to the fact that credit/payment institutions have differing deadlines (shorter deadlines) for refunding the*

[380] Answers to questions 45 and 47 CAQL and to questions 11 and 12 CAQS. For further details, see also Annex 2.9.1.
[381] For further details, see also Annex 2.9.1.
[382] Answers to question 47 CBR.

operation." The Belgian complaint board commented that expectations of consumers were sometimes too high with regard to the speed of refund and the Spanish complaint board noted that some payment service providers thought that *"some consumers might have abused this rule"*.[383]

In some Member States, the impact of the PSD refund rules is considered negative because the PSD refund regime is less favourable for users than the refund regime that prevailed before the adoption of the PSD. Three credit institutions in Italy, one in the Netherlands, one in Denmark, two in Portugal, one in Cyprus and one in Spain took that view.[384]

In Germany, national direct debits were usually not combined with up-front authorisation and refunds were therefore in principle possible without any limitation. The PSD restricts the right of refund to specific direct debits (higher amount than usually expected) and limits the right to eight weeks from the date on which the funds were debited. The German consumer association saw the impact of the implementation of the PSD as negative overall. Restriction of the general right to a refund, which was the legal standard under national law before implementation of the PSD, was seen as unnecessary. Existing German law was seen as a consumer-friendly standard which did not create problems for providers.[385]

7.2.3 Overall assessment

Provision of a right to a refund if the transaction has been made without specifying an exact amount is a powerful customer protection measure. It provides substantial security for consumers against unexpectedly large debits where they were not aware of the amount beforehand. The principal area of application is transactions using payment instruments, where the instrument is used as security for pending payments. This applies mainly to pre-authorised card transactions, which are most often used by travel services such as tour operators, car rental agencies and hotels. The other key area of application is direct debits.

The rules as to refund rights in this area potentially provide an effective balance between the interests of payees, who benefit from a straightforward charging process and the interests of payers, who benefit from the ability to recover debited funds. In particular, in the case of card payments, the refund right provides the security customers expect. The need for security results from the growing use of cards as security for pending payments where the amount is not defined at the time when the card is submitted for pre-authorisation.

Direct debits have always benefited from a kind of unconditional revocation, so that the existence of a refund right under the PSD in this context provides certainty for consumers and is sometimes even considered to be less favourable where there had previously been a less restrictive regime. This led a number of Member States to extend the refund right to all direct debits (i.e. an unconditional right to a refund regardless of whether the payer was surprised by the amount debited) either through national legislation or by a voluntary agreement on the part of providers of direct debit services (Poland).

Providers expressed substantial concerns with regard to the application of refund rights. They considered that the preconditions for refund rights were formulated in very broad terms (i.e., the

[383] See previous footnote.
[384] Answers to question 8.11a CIQ, see table with replies to 811.a CIQ,
[385] "Germany has proven that the open standard of in general refundable direct debits worked out well. Providers do not lose their claim should a consumer abuse this power and consumers would have to face the extra costs of the refund. Consumers in general did keep to the rules and did not abuse their powers with direct debits, and they won't do so in the future."

amount which payer could reasonably have expected to be debited). This latter condition makes refunds very difficult to apply in practice if a uniform approach is the aim as different providers may have different views of the amount that the consumer could reasonably have expected to be debited. The application of this right would benefit from guidelines drawn from past experience.

In addition to concerns about the preconditions for the right to a refund, providers raised substantial procedural issues. The PSD requires that providers refund the transaction in question within ten business days of receipt of a request for a refund. This timeframe is seen by stakeholders as subject to strict interpretation, in contrast to the PSD provision for a refund following defective execution "without undue delay", thus allowing for a degree of latitude.[386] The latter point of view is confirmed by Commission Services, which clearly prefer immediate reimbursement when the customer is not manifestly liable.[387]

A 10-day timeframe for the refund was generally seen as feasible for direct debits.

By contrast, a 10-day timeframe for refunds was seen as problematic for card transactions in the major four-party schemes. In order to handle their global coverage, the rules of those schemes provide for a much longer dispute resolution timeframe, measured in months. The provider is usually unable to decide on the merits of a request for refund within 10 working days. In such cases, the PSD offers providers no choice but to refuse the refund.[388] This, however, poses risks to the provider because facts fully justifying the refund may only become available in the weeks following refusal. Communicating a refusal at the end of the ten-day period in the absence of a decision on the merits of the case may then be seen as misleading the consumer, which is an unacceptable practice both legally and in terms of customer relations. The PSD requires careful revision in this respect, although a careful consideration of consumer rights will continue to be necessary.

Commercial payees, including merchants, are exposed to the risks of challenge to a payment in the weeks following the transaction. According to the payments experts, payees do not appear to be adversely affected to a significant degree by the right to a refund. Payees making wide use of direct debits are used to the fact that the debit is revocable. Merchants who accept card payments based on pre-authorisation (travel and accommodation industry) are usually subject to specific rules applicable within four-party card schemes. Under those rules, most were exposed to the risk of a payment challenge before the adoption of the PSD. This is confirmed by the fact that, following adoption of the PDS, card schemes announced that they had no plans to amend the scheme rules to reflect the right to a refund because the existing rules already covered it.

7.2.4 Conclusion

A refund right with respect to an unexpected and excessive debit with no prior consent as to the amount of the debit was a response to the risks faced by users providing direct debits or card transactions with pre-authorization and the interests of the other stakeholders.

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[386] Article 75 of the PSD.

[387] See answer to question No. 223 of the "Your questions on PSD", a Question and Answers facility provided by the European Commission services on the website http://ec.europa.eu/internal_market/payments/framework/ transposition_en.htm _#question Question 223 FAQ, " […]Therefore, this provision (Article 60.1 of the PSD has to be interpreted in such a way that it prevents highly unjustified claims […]".

[388] Article 63.2 of the PSD.

The position of consumer associations to this issue is split. Some of them see a positive impact while others had no opinion or as in Germany see a negative input for their situation. However, it must be taken into account that direct debits were not used in the same way in all Member States.

Harmonised refund rules provide a clear advantage to card users across the EEA. The advantage would not appear to be too costly or burdensome for providers, given that the concerns they report relate primarily to procedural issues. A key negative impact for providers is the short timeline for assessing the refund request (only 10 days, which providers tend to interpret restrictively) and insufficient clarity in the wording describing the pre-conditions for a refund. Merchants do not seem to be unduly concerned by the refund right. This is because, under existing card scheme regulations, sectors regularly using pre-authorisation (mainly travel and leisure) are used to frequent challenges and charge-backs in relation to pre-authorisation transactions.

Harmonised refund rules in principle provide similar advantages to payers making use of direct debits. However, several consumer associations (especially where the use of direct debits is well-established) reported that the PSD rules on direct debit refunds have a clearly negative impact on consumers. This is because an unconditional refund right with long timelines for the request previously existed. This was noted in particular in the responses from Germany. An ambivalent situation exists in Spain and the United Kingdom, where a report citing a significant number of complaints also referred to the new rules as having a positive impact.

The question of whether the more restrictive PSD rules led to deterioration in refund rights could not be answered because of lack of sufficient data on the actual use (number of cases, value of transactions at stake) of refund rights before and after the implementation of the PSD.

7.3 Impact in relation to execution time and value date

7.3.1 Introduction

Article 68 of the PSD provides various time limits for the execution of payment transactions.

A payment transaction initiated by a payer in Euros within the EEA and national payment transactions in the currency of the relevant Member State (including transactions involving currency conversion between that currency and the Euro) must be executed by the next working day. Execution is understood as crediting the funds to a payee's provider account (not the payee's own account). An additional working day is allowed in respect of paper-based payment orders.

Other payment transactions within the EEA and in EEA currency must be executed by no later than the fourth working day. End of day cut off times provide an additional working day for transaction execution.

On receipt by a payee's provider of an incoming transaction in any EU currency (with no exception for both legs), the funds must be made available immediately after the provider's account is credited and, where available, interest must be calculated up to / from the business day when the payee provider's account is credited. Specific execution deadlines are provided for cash deposits (same day for consumers), card transactions[389] and transmission of payment orders. Transactions in non-EEA currencies and one-leg transactions are not subject to specific execution times.

[389] Recital 43 of the PSD.

The execution time for payment transactions inside the European Union were shortened significantly inside the European Union while "outmoded" payment transactions such as paper-based payments were allowed additional execution time, because investment in a new standard would not appear to be appropriate for this type of payment transaction., The position of the user was strengthened with the introduction of a clear value date and immediate availability of funds, and providers were prohibited from realising additional income through the imposition of interest charges. At the same time, high standards of transparency for users and providers were introduced.

Before implementation of the PSD, the standard execution time for outgoing transactions varied considerably between providers. Information provided by credit institutions[390] indicates that execution deadlines ranged from same-day execution (mostly national transactions) to up to as much as 10 days, in the case of one Romanian credit institution. 46 institutions, out of nearly 70 respondents, formerly applied D+1 for a credit transfer in national currency from a payer in the home country to a payee in home country.

Consumer associations highlighted long execution times in relation to national and international payment transactions (taking up to one week).[391] The corresponding value date was also unfavourable to payers and payees in the past, when the value date did not correspond to the day of sending or receiving a payment.

The Directive accordingly reduced the execution time of payment transactions in several stages to one business day from 1 January 2012, with exceptions for paper-initiated payment transactions[392], and set a clear rule for the value date for incoming and outgoing payment transactions from and to the payment account.[393]

7.3.2 Outgoing transactions

Execution times

The PSD rules on execution times are somewhat imprecise. Execution times for payment transactions not made to a payment account are not explicitly regulated because the heading of Article 69 PSD refers to transactions to a payment account. Only recital 43 of the PSD confirms that it applies e.g. to money remittances. Article 69 et seq. provide no explicit rules with regard to execution times of a payment transaction initiated by or via the payee (from the perspective of payer's provider), including card payments. Rules provided for in Article 69.e of the PSD apply to the payee's provider and not to the payer's provider's performance. Again, only recital 43 of the PSD confirms that, in those cases, longer execution times may be agreed. The PSD does not provide for derogation from the immediate availability principle for payment services (provided to the payee) related to acceptance of payment instruments. In the acquiring services, the immediate availability principles cause substantial concerns when no payment account is held for the merchant. The Commission Services promote an interpretation of the PSD where time limits for card transactions may be agreed contractually between acquirer and merchant.[394] This approach finds, however, no explicit

[390] Answers to question 7.13 CIQ.
[391] For further details, see also Annex 2.9.3.
[392] Article 69 of the PSD.
[393] Article 73 of the PSD.
[394] See answer to question No. 107.2 of the "Your questions on PSD", a Question and Answers facility provided by the European Commission services on the website http://ec.europa.eu/internal_market/payments/framework/transposition_en.htm _Question 107.2 FAQ.

justification in the PSD text. The PSD would benefit from a clear and exhaustive clarification of all those issues in the text of PSD itself.

Provider respondents[395] did not report difficulties in fulfilling the execution time or in implementing the value dates for payment transactions envisaged by the PSD.

Thirty-three credit institutions out of 84 reported that D+2 had been applicable to cross-border credit transfers in the home country currency from a payer in the home country currency to a payee in the euro area, and 25 reported a period greater than D+2. Thirty-nine institutions reported that they had applied D+2 for cross-border credit transfers in the home country currency from a payer in the home country currency to a payee in an EEA country outside the euro area and 30 reported a period greater than D+2. Most credit institutions reported little or no negative impact in reducing EEA execution times to D+1. No major obstacles to compliance with PSD execution deadlines and no particular difficulty were reported by 51 of the 60 institutions which commented on this issue.

Those who report a negative impact from tighter execution times refer mostly to:

- complying with PSD with respect to rare EEA currencies
- divergent timing of PSD implementation in EU member states
- meeting execution deadlines for paper based orders
- redesign of IT systems of providers located in non EUR member state.

Only one respondent (a national association of banks) reported a significant negative impact arising from the shorter execution times. This was based on experience gained during implementation of the PSD standard. This respondent saw it as not being feasible, now and in the foreseeable future, to make payment transactions as fast and efficient as electronic communication.

A few minor complaints about execution times were raised by some consumer associations.[396] Some specific problems were reported: in some Member States longer transaction periods at the national and international level were reported by some consumer associations, which were in breach of the PSD. In Romania, cases were reported of EUR 50 surcharges for payment transactions in euros executed within D or D+1.[397]

Nevertheless, some consumer associations reported that the PSD had had a negative impact in relation to execution times. These included Belgium and Slovenia, where execution times even of D+1 were seen as too slow and a step backwards at national level.[398]

Businesses welcomed the shorter execution time and saw this as one of the major benefits of the PSD. Some businesses thought that, in view of existing clearing arrangements, it should be possible to move to D+0 execution, at least for payments within the euro area. Although Article 69.1 PSD allows for varying execution deadlines to be set until 1 January 2012 for outgoing transactions (D+1 / D+3) among PSD (within EEA and in EEA currency) and non-PSD transactions, over half of the credit institutions interviewed reported that they did not apply different execution times for

[395] Answers to question 7.13 CIQ.
[396] Answers to question 52 CAQL and to question 13 CAQS. For further details, see also Annex 2.9.3.
[397] For further details, see also Annex 2.9.3 and Box 7.
[398] For further details, see also Annex 2.9.3 and Box 8.

outgoing transactions, including execution deadlines, for transactions within the PSD and those outside the PSD.

Cut-off time

With the exception of a small number of institutions, the credit institutions interviewed [399] applied cut-off times for outgoing payment transactions. Any payment instruction received after the cut-off time is considered to have been received the next working day.

Although the PSD only allows for cut-off times for outgoing transactions close to the end of the working day, the cut-off times applied by credit institutions varied substantially, both in general and for specific payment products / transactions.

For credit institutions which responded as to their own cut-off times, the cut-off point varies from 1 pm to 9 pm with an average cut-off time of around 3 pm.[400] The following features of payment transactions are reported to affect the cut-off time set by the provider:

- domestic vs. cross-border transactions
- currencies (EUR vs. other EEA currencies)
- internal vs. external transactions
- value of transaction
- single payment transaction vs. framework contract payment transactions
- automated vs. semi - automated transactions.
- public holidays or non-business days in other Member States.

The box below provides information on cut off times from a selection of providers from several Member States:

[399] Answers to question 7.13 CIQ.
[400] Answers to question 7.13a CIQ

Box 4: Cut-off times of selected providers from several Member States

Provider from Portugal: 12:00

"For both national and international bank transfers, usual cut-off time is 12.00pm."

Estonia: 17:00

No common practice. Practice of one provider: internal payment 22:00, domestic payment to another Estonian bank 15:00 at a bank office or 17:00 in an electronic channel.

Italy: 13:00

Domestic/non SEPA 15:30, Domestic/SEPA 13:00, Cross-border: 13:00

Ireland: 15:30

The recent Central Bank review found inconsistency in the treatment of cut-off times. It recommended that such times should be set as close to the end of the business day as possible and not earlier than 15.30. It also recommended that the times be set out clearly for customers.

Latvia: 17:30

No common practice. Practice of one provider: 17:30 for next day transactions.

Source: iff legal expert survey

Despite the apparent satisfaction amongst consumer associations with regard to execution times, the interpretation of cut-off times gave rise to concerns. Indeed, it seems that this notion is interpreted very differently in the Member States and by individual PSPs, and this may have an impact on the way transactions are in fact executed. Unfortunately, very few consumer associations were able to contribute information on this issue.[401] A case was reported from Germany in which a bank had an official cut-off time of 2 pm. This was, for the German consumer association, a potential circumvention of the PSD. VZBV commented: "we expect it is feasible to use ordinary working hours as a cut-off time. The idea of speeding up payments might be circumvented if the decision on cut-off times is left to the institutions".[402]

Further concerns about cut-off times arose with regard to the relationship between the PSD rules on cut-off times and the receipt of payment orders. Payment orders received after the cut-off times were deemed to have been received the next working day with no allowance for the fact that this specific rule applies only to the calculation of execution times.[403] A number of PSD provisions not relating to execution times refer to the time of receipt of the payment order, including transaction information[404] and revocation of a payment order.[405] The PSD would benefit from a clear explanation that the fiction of receiving the payment order the next working day (when a payment is ordered after the cut-off time or not on a working day) is for the purpose of calculating

[401] Answers to question 48 CAQL. For further details, see also Annex 2.9.3.
[402] For further details, see also Annex 2.9.3.
[403] See however Article 64 sec. 2 of the PSD.
[404] Articles 38 and 47 of the PSD.
[405] Article 66 of the PSD.

execution times. All measures should be subject to agreement between the parties to avoid a situation in which a provider capable of executing instant internal transfers upon receipt of a payment order on a non-working day actually executes the payment order before its formal receipt.

Problems in relation to execution times were also reported by legal experts interviewed in the course of the study. For legal experts from Germany, the cut-off time is not clearly defined in national law which states that the cut off time is: „near the end of the business day".[406] The German legal wording, based on Article 64.11.3 PSD, allows leeway for interpretation. Köndgen says that the cut-off time could be before the end of the business day of the provider itself without further explanation while Meckel defines the cut-off time close to the end of the usual business day of a bank, which means close to the usual opening hours for the public in the affiliates of a provider. [407] Responses from several legal experts from other Member States also supported the view of consumer associations that there are no common cut-off times. The Maltese legal expert also claimed that there is a lack of clarity in the PSD as to whether the definition of 'business day' only covers instances where both the payer's and the payee's payment service providers are open for business. He also suggested that consideration should be given to whether the user should be informed of a possible delay in execution.

Paper-initiated transactions

Credit institutions mostly saw the provision of the additional time-period for paper-initiated payment transactions as necessary and adequate (57 out of 74 interviewed). Few thought additional time was unnecessary. Seven credit institutions stated that the additional period was too short and one wanted as much as an additional three working days.[408]

Availability of funds and value dating

Concerns were expressed as to the application of value-dating rules. Under the PSD[409], the debit value date for a payer's payment account is no earlier than the point at which the amount of the transaction is debited. At the same time, the credit value date for the payee's payment account is no later than the business day on which the payment is credited to the payee's provider account. There appears to be an overlap between the starting point of time of the payment, which is the point of time at which the transaction is debited (i.e., an intraday point in time) and end point which is "day" (regardless of point in time when the provider's account was credited). The PSD would benefit from clarifying this issue to avoid a situation where interest may have to be paid on the same funds to both the payer and the payee.

The great majority of credit institutions reported no negative impact of the PSD's stringent rules on immediate availability of funds and adequate value dating.[410]

Few credit institutions reported major problems in ensuring that the funds are available to the customer immediately the account of the credit institution has been credited and in giving the funds the appropriate value date.

[406] See § 675n abs. 1 S. 3 BGB (German Civil Code): "nahe am Ende des Geschäftstages".
[407] See Köndgen p. 487; Meckel p. 10.
[408] Answers to question 7.13 CIQ.
[409] Article 73 of the PSD.
[410] Answers to questions 7.14 and 7.16 CIQ.

This includes areas where providers initially expected problems such as crediting a provider's account on a bank holiday (especially in a bank outside EEA given that immediate availability applies to all incoming transactions in EEA currency including transactions from outside the EEA). Despite many concerns reported[411] by credit institutions just after PSD was passed, few credit institutions reported incidents of non-compliance within incoming transactions.[412]

Reports of non-compliance included making the funds available the next working day after a national bank holiday and the additional time needed for currency conversion. Almost all credit institutions interviewed understood "immediate availability"[413] to allow cut-off times for incoming transactions. Those cut-off times varied substantially among credit institutions, ranging from 1 pm to 8 pm with an average cut-off time of around 4.00 pm.[414]

Two-thirds of credit institutions interviewed reported that they did not apply different availability principles to incoming transactions including transactions subject to the PSD and those outside the scope of the PSD.[415] Almost all reported that they did not apply different value-dating principles to incoming transactions including transactions subject to the PSD and those outside the PSD.

None of the 33 consumer associations reported problems relating to value dates.[416] Any problems related to the execution time of cash placements[417] and were reported only from Bulgaria in relation to one specific credit institution. This is therefore not seen as significant beyond national borders. (See Annex 2 for details).

Despite holding generally positive views in relation to execution times and the availability of funds, users also reported some complaints. Complaints about execution times and value dates were reported by several complaint boards,[418] and a significant number of cases were reported from Germany. At the moment, however, it is unclear whether the complaints arise only in relation to the implementation of the PSD in national law or whether they represent on-going problems. It is important to note that the criticisms made by the German consumer association about unexpectedly short "business days" were borne out by complaints received by the German complaint board.

Complaint boards from Germany, Hungary and Spain reported several complaints as to the execution time of payment transactions. For example, 15% of all complaints received by BaFin, the German complaint board, related to this issue.[419] BaFin reported that the high number of complaints were due to the new rules in the first months of the implementation. Complaints were also reported from the Spanish and German complaint boards in relation to the cut-off times of the business day,[420] which has an effect on the receipt of payment. Both of these institutions also reported complaints relating to value date and the availability of funds (Article 73).[421]

411 This information was provided by payments experts. The concerns related how to credit available funds a provider's account after working hours and on bank holidays, how to handle currency conversion if needed, etc.
412 Answer to question 7.14a CIQ.
413 Article 73 of the PSD.
414 Answer to question 7.13a CIQ.
415 Answers to Q16 CIQ.
416 Answers to questions 54 and 55 CAQL and to question 13 CAQS. For further details, see also Annex 2.9.3.
417 Article 71 of the PSD.
418 See answers to question 52 CBR. For further details, see also Annex 3.2, 3.4 and 3.9.
419 See previous footnote.
420 Answers to question 48 CBR.
421 Answers to question 55 CBR.

7.3.3 Conclusion

Shorter execution times were the positive impact of the PSD most frequently mentioned by consumer associations.[422] While the scope of their application is limited to transactions in the EEA (both-legs principle) and in the currency of an EEA Member State, the deadlines of D+1 (with an additional working day for paper-based orders) and D+4 are of real value to consumers. The same applies to immediate availability and the same-day value date for incoming transactions (even for one-leg transactions). All in all, execution times for payment transactions of one day (D+1) and the clear rule of the value date works well for users and providers. The research indicates that payment service users have enjoyed new rights in terms of execution times and value dates, and this is a direct impact of the PSD.

Nevertheless, short cut-off times are a continuing, albeit minor, problem for consumers because providers do not always interpret the wording “the payment service provider may establish a cut-off time near the end of a business day” in favour of the user.[423] This is backed by criticisms from consumer associations and complaint boards as well as by information from providers showing a range of cut-off times from 1 p.m. to 9 p.m., which cannot be explained by cultural differences alone and the existence of different opening hours in the different Member States.

No problems relating to longer execution times for paper-based transactions were reported by stakeholders, possibly due to the fact that paper-based transactions appear to be becoming less frequent. No respondents sought a change in the regulation of paper-based transactions from that currently provided by the PSD.

At national level, D+1 was sometimes criticised as too long by consumer associations and “real time” transactions were seen as a future goal. The PSD would benefit from clarification of execution times in payment services relying on end–to–end processing, including payment cards.

7.4 Impact of rules on non-execution and defective execution

7.4.1 Introduction

The PSD provides for liability of providers for non - execution or defective execution of payments transactions covered by the PSD.[424] Those include non-execution, execution not of the full amount, and delayed execution.

Rectification of defective outgoing transactions falling within the scope of the PSD is by full refund of the amount of the non-executed or defective transaction and, where applicable, restoration of funds to the debited payment account, putting it in the state it would have been in had the defective payment transaction not taken place.

For incoming transactions falling within the scope of the PSD, obligatory rectification is by immediately placing the amount of the transaction at the disposal of the payee and crediting the amount to the payee’s payment account.

[422] For further details, see also Annex 2.9.3.
[423] Article 64 of the PSD.
[424] Article 75 of the PSD.

Regardless of liability, providers are under a duty to attempt to trace the payment transaction at the user's request.

These rules, which are subject to strict liability, may be derogated from contractually with non-consumers, other than with micro-enterprises where the relevant Member State has extended the application of consumer rules to micro-enterprises.

7.4.2 Assessment based on the views of stakeholders

The PSD rules on providers' liability for non-execution or defective execution of payment transactions were supported by consumers' associations. Several consumer associations[425] reported that the rules had had a positive impact because they had the effect of reducing consumers' losses and, indirectly, their liability.

They were, however, not unanimous in this. Two associations noted inadequate reactions by providers where that had been non-execution or defective execution of transactions. This negative experience was confirmed by complaint boards.[426] Problems with the execution of credit transactions were cited by one-third of complaint boards.[427] The Banco de España noted a large number of complaints specifically related to defective execution[428] and problems with incorrect unique identifiers[429] were reported. Complaints were also reported from Hungary, Bulgaria, Luxembourg and Belgium,[430] where non-execution of payment orders were reported as "mainly due to insufficient reserves in the consumer's account or incorrect references".

The German consumer association saw a negative impact of the PSD in that credit transactions were executed only on the basis of account numbers and no longer on the basis of the recipient's name, and a change in liability to the detriment of consumers, resulting in new risk potential.

In Germany, on-going legal discussion was reported in relation to the implications of shorter execution times and the simultaneous use of BIC and IBAN. With the implementation of the PSD, payment service providers no longer have an obligation to check the name of the payee. This could lead to more mis-directed payment transactions as a result of typing errors, because there is no mechanism for checking errors within the national system, which is a significant issue in Germany. Faster execution times make it more difficult to withdraw an erroneous payment transaction and this increases the risk for users. Rauhut has proposed that the bank account number should be added alongside an error checking number, using two letters of the alphabet referring to the payee in order to provide improved checks for mis-directed payment transactions.[431] Another author, Meckel, feared increasing litigation based on incorrect unique identifiers and problems under German law, although those fears cannot be confirmed at this point.[432]

Providers reported concerns about strict liability in certain areas of practical application. Of greatest concern was the lack of adequate description of liability to meet the requirements of transpar-

[425] Answers to question 57 CAQL and to question 12 CAQS.
[426] Answers to question 57 CBR.
[427] Answers to introductory question CBR about the main focus of the complaints in the last two years. For further details, see also Annex 3.2.
[428] Article 75 of the PSD.
[429] Article 74 of the PSD.
[430] Answers to question 39, 44, 56, 57 CBR and general remarks at the beginning of the questionnaire. For further details, see also Annex 3.2.
[431] e.g. Rauhut Fehlüberweisung wegen falscher Kontodaten ZBB 2009, pp. 32-46.
[432] see Meckel Das neue zivile Zahlungsverkehrsrecht Teil 3, p. 10.

ency of conditions and information provision.[433] The PSD provides that a refund is the remedy in all cases of defective execution, which is understood as a credit to a payee's provider account.[434] Interpreted literally the PSD rule could mean that defective execution would also cover late execution. Commission Services supported a purposive interpretation of liability rules where, in cases of late payment, the payer's right to demand a refund would not appear to be justified.[435] This would mean that any compensation for delayed execution may be requested only by reference to the national law applicable to the contract[436], which undermines the PSD's goals of harmonisation. The PSD urgently needs to clarify the provider's exact obligations when liability arises for non-execution in whole or in part (i.e., cases when the funds did not reach the payee's provider and cases where charges were debited from the payer's account and where no actual transfer of funds took place), and for late execution.

7.4.3 Remedy speed

A key determinant of the effectiveness of liability provisions is the speed with which users can obtain a remedy. The PSD provides no specific deadlines for completion of the remedy, using general terms such as "without undue delay" or "immediately.[437]

The following table shows the approach taken by Member States to the timelines for completion of a remedy.

[433] Article 42.5.e of the PSD.
[434] Article 75.1 of the PSD.
[435] See answer to question No. 76 of the "Your questions on PSD", a Question and Answers facility provided by the European Commission services on the website http://ec.europa.eu/internal_market/payments/framework/transposition_en.htm#_questionQuestion 76 FAQ.
[436] Article 76 of the PSD.
[437] In article 75 of the PSD.

Table 38: Responses to a special survey of national banking associations on remedy speed

	Response to question "How many days does it typically take in your country for a defective or unauthorised transaction to be remedied so that a debited account is restored to the state in which it would have been had the defective payment transaction not taken place?"	**Response to question** "Is the time for remedying a defective or unauthorised transaction specified in national legislation, a regulation, guidance by the competent authority, voluntary guidelines of the national banking association?"	**Legal instrument specifying the remedy speed**
Austria	Immediately	Yes	§ 46 Zahlungsdienstegesetz
Belgium	Unknown	No	N/A
Bulgaria	no information	no information	no information
Cyprus	2	No	N/A
Czech Republic	1	Yes	Act No. 284/2009 Coll. on Payment system, § 115
Denmark	Immediately	Yes	§ 61 in Betalingstjenesteloven
Estonia	Immediately(1)	Yes	Law of Obligations Act § 733 (answer: immediately)
Finland	Unknown	Partly(2)	FIN-FSA Standard 2.1 (point 6.4.4. Cancellation of payments from deposit accounts)
France	Varies depending on the complexity of the claim	No	N/A
Germany	Unknown	No	N/A
Greece	Same day(3)	Yes	Articles 53, 55, 57, 58, and 71 of Law 3862/2010
Hungary	Same day		
Ireland	Unknown	No	N/A
Italy	Unknown	No	Protocol specified in § IV.4 / IV.5, Banca d'Italia implementing provisions
Latvia	Immediately	Yes	Law on payment services and electronic money
Lithuania	"Could not happen"	Yes	National legislation - payments law
Luxembourg	Unknown	No	N/A
Malta	Same day	No	N/A

Table 38: Responses to a special survey of national banking associations on remedy speed

	Response to question "How many days does it typically take in your country for a defective or unauthorised transaction to be remedied so that a debited account is restored to the state in which it would have been had the defective payment transaction not taken place?"	**Response to question** "Is the time for remedying a defective or unauthorised transaction specified in national legislation, a regulation, guidance by the competent authority, voluntary guidelines of the national banking association?"	**Legal instrument specifying the remedy speed**
Netherlands	Unknown	In some cases[(4)]	
Poland	Unknown	Yes	Ustawa o Usługach Płatniczych (Payment Services Act), Article 46
Portugal	Same day	No	N/A
Romania	2[(5)]	No	N/A
Slovakia	Immediately	Yes	Slovak Payment Services Code
Slovenia	Unknown[(6)]	No	N/A
Spain	1	No	N/A
Sweden	1-3	Yes	Legislation implementing the PSD
United Kingdom	Immediately	Yes	Payment Services Regulations 2009, Regulation 61

Notes: No information means no response was received from national banking association; unknown means that the national banking association has no information on the number of days it takes to for a defective or unauthorised transaction to be remedied. 1. The Estonian Banking Association defines such cases as "extraordinary", so that there is no "typical" time, but reports that it tends to be immediate. 2. The Standard mentioned specifies the time; however, the PSD supersedes this Standard. 3. For defective or unauthorised transaction where the payer's or payee's payment service provider is liable same day (maximum next working day). For defective or unauthorised transaction where the payer's or payee's payment service provider is not liable, on request, make immediate efforts to trace the payment transaction and notify the payer of the outcome (minimum 10 working days after PSU request). 4. In only one instance there is a rule, and this is under the Dutch domestic direct debit scheme Incasso. The scheme rules stipulate that if a consumer states that he did not give a mandate (after the 56 day refund period of the PSD and before the end of the 13 month period, or in case of a non-refundable direct debit) for a direct debit the debtor and the creditor bank must investigate and where relevant reimburse the consumer within 15 working day, counting from the day the consumer has filed his case. 5. Maximum 2 days from the date of complaint. 6. This rarely happens as payments without the correct details cannot generally be processed. Therefore, there is little information.

Source: special mini-survey of national banking associations

Overall, less than 10 Member States appear to apply a precise deadline (number of days), and only some have provided for it in legislation. The remaining Member States either provide for no deadline or follow the PSD's approach of providing for an "immediate" remedy.

7.4.4 Conclusion

The rules contained in the PSD as to providers' liability for defective execution or non-execution have had overall a positive impact. Strict liability on the part of providers is indispensable for the proper functioning of the key PSD principles applicable to the execution of payment transactions.

The high level PSD principles of provider liability are adequate and the scope of providers' liability is adequately defined in the PSD. However, the solutions adopted by the PSD limit their potential to deal effectively with the problems they address. Refund, as a general remedy for payers in respect of all defects in the execution of transactions, is not fully applicable (as in the case of delayed execution). This results in reversion to national contractual remedies, undermining the objectives of the PSD.

The concern expressed by consumers' associations as to the absence of responsibility on the part of providers for verification of the payee beyond a unique identifier is understandable. However, it may be difficult to address. Indeed, the tight execution deadlines, from which consumers have confirmed that they benefit (see above), are feasible only to the extent that payment transactions are subject to automated processing. Validation of the unique identifier against a specific user would result in delays in the execution of transactions.

7.5 Out-of-court complaints

Out-of-court complaint and redress procedures were evaluated in the Member States of the European Union. The results are shown in Annex 3 of this report, including an executive summary of the current position, the number of complaints reported to have been received in the last two years and the main focus of the complaints reported.

7.6 Handling of the new BIC and IBAN standards

7.6.1 Introduction

Regulation 924/2009, which is the subject of the present study, is based on the use of BIC and IBAN for international payment transactions (see Recital 9 and Article 4). Note however, that following the introduction of Regulation 260/2012 of 14 March 2012, BIC no longer appear to be necessary and the use of the IBAN code alone should be the preferred solution for payment transactions in the future (see Recital 8). In any event, BIC will only be in use until 1 February 2016 (Article 5 (4, 5, 7), Article 16 (6) Reg. 260/2012.

7.6.2 The extent of use IBAN and BIC

The responses to a survey of national banking associations show that, at the present time, the use of BIC and IBAN is rare in the case of domestic payments (see for example Germany) and is typically used only in cross-border payments.[438]

[438] BEUC position: Proposal for a Regulation of the European Parliament and of the Council. Establishing technical requirements for credit transfers and direct debits in euro and Amending Regulation (EC) No 924/2009, 2011. See: www.beuc.org/custom/2011-00202-01-D.pdf. *P. 4.*

Table 39: Responses to survey on on use of BIC and IBAN

	Response to the question "Is the use of both IBAN and BIC at the present time required in your country to unequivocally identify a bank account for domestic and cross-border payments"		Response to the question "Once SEPA is fully implemented, will the use of both IBAN and BIC be required in your country to unequivocally identify a bank account for domestic and cross-border payments"	
	Domestic	**Cross-border**	**Domestic**	**Cross-border**
Austria	No	Yes	No	Provisionally (1)
Belgium	No	Yes	No	SEPA: just BIC until 1/2/2016. Non-SEPA: both
Bulgaria	no information received	no information received	no information received	no information received
Cyprus	No (2)	Yes	Yes	Yes
Czech Republic	No	Yes	Not yet decided	Yes
Denmark	No	No	Yes	Yes
Estonia	No	Yes	No	No
Finland	No (3)	No (3)	Yes	Yes
France	SEPA: yes	SEPA: yes		
Germany	SEPA: yes. Non-SEPA: no	SEPA: yes. Non-SEPA: no	Practice will comply with SEPA	Practice will comply with SEPA
Greece	No (4)	Yes	No	No
Hungary	No	SEPA: yes. Non-SEPA: no	No	No
Ireland	No	Yes	Yes	Yes
Italy	Yes	Yes	No (4)	No (4)
Latvia	No	Yes	No	No
Lithuania	No	Yes	Practice will comply with SEPA	Practice will comply with SEPA
Luxembourg	No (3)	Depends on country: either IBAN (generally for neighbouring countries) or both	Practice will comply with SEPA	Practice will comply with SEPA
Malta	No (6)	No (6)	Yes	Yes
Netherlands	No	No (7)	No (3)	No (3)
Poland	No	Yes	No (3)	No (3)
Portugal	No	Yes	No	Yes
Romania	No	Yes	No	No
Slovakia	No	Yes	No	No
Slovenia	No (3)	Yes	No (3)	No (3)
Spain	No	Yes	No (3)	No (3)
Sweden	No	SEPA: yes. Non-SEPA: no	No	SEPA: yes. Non-SEPA: no
United Kingdom	euro payments: yes. Sterling: no	euro payments: yes. Sterling: no	euro payments: yes. Sterling: no	euro payments: yes. Sterling: no

Notes: 1. Yes, however, provisions of Regulation (EU) 260/2012 may lead to alternative solutions; 2. Not for transfers using the National Clearing System (JCC); yes for SEPA; 3. IBAN required, but not BIC; 4. IBAN is mandatory *between consumers*; not BIC; 5. Currently yes, but the PSU will make BIC unnecessary from 2014 domestically and from 2016 cross-border; 6. BIC / SWIFT required; not IBAN; 7. BIC is required for the cheapest STP rate.

Source: Survey of national banking associations

Views of stakeholders

Views on the extent to which the use of both IBAN and BIC is necessary to identify bank accounts vary considerably for domestic and cross-border payments. In fact, the vast majority of credit institutions that responded to the survey stated that both IBAN and BIC are either indispensable or strongly preferred for execution of cross-border payments (71.7%).[439] Only 12% of respondents favoured either IBAN or BIC alone.[440]

On the other hand, for a small majority of banks, IBAN was stated to be sufficient for domestic payments (35.9%); the second largest group used neither (29.3%), although this percentage will shrink as the current legacy systems of certain Member States are phased out and IBAN/BIC is applied in processing payments. The percentage of banks currently requiring both IBAN and BIC is 27.2%.

When asked to describe the implications of Regulation 260/2012, under which a payment service provider is no longer able to insist that payment service users provide a BIC with their payment instructions, credit institutions gave broadly four types of responses:

- 12% of respondents (11 out of 92) claimed that the implementation of this regulation will have no impact on their organisation’s activities, as their institution is already equipped to retrieve the customer’s BIC individually.
- 10 respondents maintained that, while it is not an issue for domestic payments, there will be some cost implications and some need for systems upgrades for cross-border payments.
- A total of 38 respondents (41%) foresaw a considerable increase in clerical work, administrative costs, IT, operational risks, processing time, and a potential for incorrect or late delivery. Of these, 4 respondents believed that these costs should not be borne entirely by credit institutions and that they should have a right to charge a fee to customers who do not provide a BIC. Alternatively, they felt that banks should be provided with unlimited and cost-free access to an IBAN/BIC database.
- Finally, 5 banks responded that it is not currently possible for their institutions to derive a BIC from an IBAN code, and “solutions have to be found urgently”.

In relation to the costs and benefits that have arisen as a result of the adoption of the IBAN as the only identifier in domestic payment instructions, responses were more uniform. 23% of respondents did not report any costs, while only 6% claim they faced higher costs from this measure. For the most part, survey responses identified four main benefits from introducing IBAN-only payment instructions:

- increased standardisation, automation and STP;
- reduced execution time;
- reduced errors; and
- improved customer experience.

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[439] Though this figure drops to 66% if we exclude those who only require BIC and IBAN to ensure that transactions can be treated automatically (in STP form).

[440] Answers to question 8.1 CIQ.

In terms of cost, the most common concern was the cost of implementation and the cost of maintaining an up-to-date directory of BIC/IBAN codes. Of the banks that have still not implemented this measure, the primary concern also related to the development of IT systems. This was particularly true of countries where local identification codes are used for domestic payment instructions.

7.6.3 Potential simplification of the IBAN

Background

The IBAN is currently used by 60 countries and its structure is defined by the international standard ISO13616. This norm specifies that the IBAN consists of up to 34 characters with the following format:

- The first two characters are letters representing the country code (as defined in ISO3166-1) of the country in which the financial institution servicing the account resides.
- The third and fourth characters are numeric characters and represent the results of a calculation checking that the information as to bank and branch identifiers and the account number have been entered correctly. These are check digits and the precise calculation of these check digits is specified in clause 6 of ISO13616.
- The remaining 30 characters can be upper and lower case letters and numeric characters. This part of the IBAN represents the basic bank account number (BBAN) which uniquely identifies an individual account at a specific financial institution in a particular country and includes a bank identifier of the financial institution servicing that account.

The ISO also stipulates that the length of the BBAN is fixed by country and must include a bank identifier with a fixed position and length according to the relevant country.

The length and use of alpha-numerical characters in the IBAN varies significantly across the 27 Member States (presented in the table below). In total, only 7 Member States use letters to identify the financial institution servicing the account (Bulgaria, Ireland, Latvia, Malta, Netherlands, Romania and United Kingdom) and the length of the BBAN ranges from 12 in Belgium to 27 in Malta.

The differences between the domestic account number and the IBAN number also vary considerably across the EU:

- In five Member States, the IBAN is exactly the same as the domestic account number (Bulgaria, Latvia, Lithuania, Luxembourg and Romania)
- In one Member State, the domestic account number just misses the country code relating to the IBAN (Poland)
- In 10 Member States, the domestic account number misses the country code and check digits relating to the IBAN (Austria, Belgium, Denmark, Estonia, France, Germany, Hungary, Italy, Slovenia and Spain)
- In four Member States, the domestic account number misses the country code, the check digits and bank identifier relating to the IBAN (Greece, Ireland, Netherlands, United Kingdom)

- Finally, in five Member States, the differences between the domestic account number and the IBAN are more pronounced (Cyprus, Czech Republic, Malta, Slovakia and Sweden).[441]

Table 40: Structure of the BBAN in the 27 EU Member States

Member State	Length of the BBAN (number of characters)	Position of the bank identifier in the BBAN (i.e. position of characters of bank identifier)	Alphanumerical characters used in the bank identifier	Does the domestic account number include the bank and branch identifiers used in the BBAN?	
				Bank identifier	Branch identifier
Austria[7]	16	1 to 5	numbers	Y	-[1]
Belgium[7]	12	1 to 3	numbers	Y	-[1]
Bulgaria[5]	18	1 to 4	letters	Y	Y
Cyprus	24	1 to 3	numbers	N	N
Czech Republic	20	1 to 4	numbers	Y	-[1]
Denmark[7]	14	1 to 4	numbers	Y	-[1]
Estonia[7]	16	1 to 2	numbers	Y	-[1]
Finland[2]	14	1 to 3	numbers	-[2]	-[2]
France[7]	23	1 to 5	numbers	Y	Y
Germany[7]	18	1 to 8	numbers	Y[3]	Y[3]
Greece[8]	23	1 to 3	numbers	N	Y
Hungary[7]	24	1 to 3	numbers	Y	Y
Ireland[8]	18	1 to 4	letters	N	Y
Italy[7]	27	2 to 6[4]	numbers	Y	Y
Latvia[5]	17	1 to 4	letters	Y	-[1]
Lithuania[5]	16	1 to 5	numbers	Y	-[1]
Luxembourg[5]	16	1 to 3	numbers	Y	-[1]
Malta	27	1 to 4	letters	N	N
Netherlands[8]	14	1 to 4	letters	N	Y
Poland[6]	24	1 to 8	numbers	Y	-[1]
Portugal[8]	21	1 to 4	numbers	Y	Y
Romania[5]	20	1 to 4	letters	Y	Y
Slovakia	20	1 to 4	numbers	N	N
Slovenia[7]	15	1 to 2 for bank and 1 to 5 for payment institutions	numbers	Y	Y
Spain[7]	20	1 to 4	numbers	y	Y
Sweden	20	1 to 3	numbers	N	-[1]
United Kingdom[8]	18	1 to 4	letters	N	Y

Notes: 1 – no specific branch identifier is used in the domestic account number; 2- no information provided in the Register; 3 – included in the Bankleitzahl (the bank identifier of a domestic account); 4- the first character in the BBAN is a letter which is also the first character of the domestic account number; 5 – the domestic account number is identical to the IBAN; 6 - the domestic account number is identical to IBAN except that the country code is missing; 7 – the domestic account number is identical to the IBAN except that country

[441] No information on the structure of the domestic bank account identifier is provided in the IBAN Register for Finland.

code and check digits are missing; 8 - the domestic account number is identical to the IBAN except that country code, check digits and bank identifier are missing.
Source: SWIFT, IBAN Registry, October 2012

Suggestion for potential change

The high level of standardisation of bank account numbers should help to create a well- functioning and efficient market for payment transactions in the European Union. There is a demand for simple bank account numbers from users as expressed by BEUC in its review of the PSD and demand from providers for the clear identification of individual bank accounts, especially because payment transactions using the new standard will be executed only by using the bank account identification numbers and not by the name of the payee.

As the IBAN norm is used worldwide, examination of potential changes to the IBAN should be focused on modifications which could be implemented without having to change the ISO IBAN standard. The latter would involve complex multi-lateral discussions with the global financial services industry at ISO under ISO governance. These negotiations may require considerable time and resources before they are to be effective.[442]

Further considerations are that:

- the national code be defined by another standard (ISO 3166), which is easily understood and memorised;
- the check digits be derived from calculation using the method defined by ISO 7064 and specified with the ISO IBAN standard. These cannot be modified.

Thus, the only changes that could be made while remaining compliant with the ISO IBAN norm are modifications to the BBAN, which consists of the bank identifier, the branch identifier (if applicable) and the account number.

As, typically, the account number and the branch identifier in the BBAN are the same as the domestic account number (which generally includes the branch identifier when one is used in the IBAN), there is little scope to modify that part of the BBAN.

However, consideration could be given to making it easier for consumers to remember the IBAN of their account by using letters instead of numbers for the bank identifier, and the combination of letters in the bank identifier could be an abbreviation of the bank's name (as is the case in Bulgaria, Ireland, Latvia, Malta, Netherlands, Romania and United Kingdom).

From a cognitive perspective, this would make it easier to remember the IBAN, as only the check digits in the IBAN would not reflect information that it is easily understood or available to users. That said, using the abbreviation of a bank's name in the IBAN may result over time in incongruities when bank mergers and acquisitions occur, unless the abbreviation is changed to reflect the new name of the merged or acquired entities. Such changes would impact on end users as they would need to update their records and those of their counterparties. Further, use of an abbreviation of the bank's name within the IBAN would reduce the durability of the code and may inhibit the ease with which a customer could switch between banks.

[442] In the longer term, the IBAN could be potentially be shortened. But, this would require a totally new system of bank account numbers and bank identifier numbers for all providers and this is likely to be impossible to implement over the medium term.

Nevertheless, in view of its potential to make it easier for users to remember their IBAN, the replacement of the numerical bank identifier with an abbreviation of the bank name could warrant further consideration of potential benefits and costs for payment service users and providers.

7.6.4 Conclusion

At the present time, the IBAN and BIC codes are typically not required for domestic payments.

A shorter version of bank account identification numbers as provided for by Regulation 260/2012 and the use of the IBAN code alone would be welcomed by consumer associations.

Serious problems in the use of the BIC and IBAN codes were not reported by consumer associations or by complaint boards. However, industry experts reported that users are very concerned both about the need to use IBAN together with BIC and about the complexity of IBAN itself. One possibility for simplification of the IBAN code would be to use letters instead of numbers in the IBAN to identify the bank at which the account is held (as is already the case in a number of European countries).

7.7 Impact of the harmonisation of rights and obligations of payment service providers on the costs of production of payment services

7.7.1 Introduction

Title IV of the PSD harmonises the rights and obligations of payment service providers across the EU, thus creating in principle a level playing-field and reducing the cost of having to deal with different payment service laws and regulations across the EEA when offering payment services in more than one Member State.

At issue is whether these benefits have materialised. To address this research topic, payment service providers were asked to provide (in the survey addressed to them) an assessment of the impact of harmonisation on their efficiency and cost. These responses are presented below in section 7.7.3. As part of the analysis of costs, a number of payment service providers were also asked to provide a quantitative or qualitative assessment of the changes over time in the cost of producing payment services.

7.7.2 Analysis

It is important to note that data on the cost of the production of payment services are practically non-existent. This point was highlighted by the authors of the ECB study on the private and social cost of various payment instruments when they stated that "*Banks rarely have internal costing systems ... developed enough for data on the cost of different payment instruments to be available, and even the total cost of producing payment services is generally not extracted into a separate cost or profit centre*" (Schmiedel et al. (2012) p. 17).

The analysis below is therefore largely qualitative, using information from stakeholders. In particular, stakeholders were asked to comment on the efficiency gains that may arise in the area of legal compliance costs and from the provision of uniform payment services across the EEA.

7.7.3 Views of payment service providers on the impact of harmonisation

Credit institutions

Impact on legal compliance costs[443]

There seems to be a general consensus that the PSD's harmonised rights and obligations have led to a small reduction in legal compliance costs. A large majority of credit institutions which responded to a question about the impact of the harmonisation of rights and obligations noted a marginal decrease in legal compliance costs, while a few reported a larger reduction.

Among the few who reported that there has been no change, some argued that the same checks/controls are applied in payments within and outside the EEA; hence there is no reduction in legal compliance costs. Others believed that the implementation of the PSD increased the legal compliance costs, since the one-off investment to become compliant could not be earned back. Some also noted that these new consumer rights changed the existing client regime. As a result, the new administrative burden and cost due to new contractual information that had to be distributed did not result in a reduction in legal compliance costs.

In summary, the majority of respondents agreed that the PSD has resulted in a minor reduction in legal compliance costs when providing services in the EEA outside the home country.

Impact on provision of uniform intra-country or cross-border payment services[444]

A large majority of credit institutions are of the opinion that it has become easier to offer uniform intra-country or cross-border payment services as a result of harmonisation.

Those who felt that there had been no difference provided various reasons. As a payment service provider, some already offered uniform intra-country/cross-border payment services, unless national preferences in the market demanded national offers. There had therefore been no difference due to the harmonisation of rights and obligations. Others argued that the implementation of the PSD has not been harmonious enough.

One credit institution stated that the PSD and SEPA should not be seen separately and only after a full migration to SEPA will it become clear whether the PSD in its current form is the appropriate legal framework for promoting the development of the internal market.

Another credit institution believed that the uniform service should be based on a uniform payment scheme. Otherwise, the adaptation of harmonised rights and obligations to different payment schemes may undermine the effectiveness of the harmonisation initiative.

Overall, the views of credit institutions differed somewhat although most agreed that the harmonisation of rights and obligations has made it easier to offer uniform intra-country or cross-border payment services.

[443] Responses to question 7.8 in CIQ.
[444] Responses to question 7.8 CIQ.

Payment institutions

Impact on legal compliance costs[445]

Payment institutions which responded to the question on the impact of the harmonisation of rights and obligations on legal compliance cost were evenly split in terms of perceived impact. One-half of the group noted that legal compliance costs have reduced while the other half reported no change.

It is important to note, however, that the reason given generally for a "No change" answer is the fact that, due to the differences in anti-money laundering, data protection and consumer protection regimes across Member States, it is not possible to adopt a single code of conduct across the EU. As a result, any benefits that might arise from the harmonised rights and obligations specified in the PSD fail to materialise because of the differences in other relevant laws and regulations across the EU.

Impact on provision of uniform intra-country or cross-border payment services[446]

All payment institutions which have responded to the question of whether the harmonisation of rights and obligations has made it easier to provide uniform payment services (intra-country and cross-border) are of the opinion that the PSD has indeed made it easier to provide uniform services. A majority noted that it made it a little easier and a minority reported that it made it much easier.

7.7.4 Evolution of the costs of producing payment services

None of the payment service providers surveyed as part of the initial survey addressed to all credit institutions or consulted in a second targeted survey provided detailed information on the evolution of the costs of producing payment services.

However, a large majority indicated in the targeted survey that the production costs have not changed following introduction of the PSD.

In contrast, some institutions reported higher production costs for a variety of reasons, including more demanding information and recordkeeping requirements than before the PSD.

Only a few noted that the cost of producing payment services had decreased.

7.7.5 Conclusion

The survey results clearly show that payment service providers are of the opinion that the harmonisation of rights and obligations of payments service providers in the PSD has contributed both to facilitating the provision of uniform payment services across the EU and, for many payment service providers, to reducing legal compliance costs. A number of payment service providers noted that the expected benefits have not yet been fully realised because of the differences in other applicable laws and regulations (anti-money laundering, data protection, consumer protection) across the EU.

[445] Responses to question 8.9 APIQ.
[446] Responses to question 8.10 APIQ.

In general, the cost of producing payment services does not appear to have been impacted by the PSD although some payment service providers note an increase in costs while a few are of the view that costs have decreased.

8 General Conclusions

This study has reviewed the impact to date of the PSD and Regulation 924 on users of payment services, payment service providers and on the Internal Market for payment services. In doing so it identified a number of issues and suggested areas where changes and amendments might be considered appropriate.

The objectives of the PSD are to *"…establish at Community level a modern and coherent legal framework for payment services, whether or not the services are compatible with the system resulting from the financial sector initiative for a single euro payments area, which is neutral so as to ensure a level playing field for all payment systems, in order to maintain consumer choice, which should mean a considerable step forward in terms of consumer cost, safety, and efficiency, as compared with the present system*" (Recital 4 of the PSD).

The objectives of Regulation 924 are to ensure that "*charges for cross-border payments within the Community are the same as those for payments in the same currency within a Member State*" (Article 1 of Regulation 924) for "*cross-border payments in euro or in the national currencies of the Member States which have notified their decision to extend the application of this Regulation to their national currency*" (Article 2 of Regulation 924).

8.1 The market for payment services prior to the adoption of the PSD

Prior to the adoption of the PSD, the European market for payment services was highly fragmented and the legal frameworks regulating payment services and payments service providers varied across EU Member States.

The community of payment service providers was limited to banks (for regular payment services), money remitters and telecommunications companies.

Not only did the legal framework vary across Member States, but the quality of payment services provided to payment service users did also differ across Member States. For example, there were differences in:

- execution times and timescales for the availability of funds;
- payment service provider liability and enforcement difficulties; and,
- transparency of pricing policies.

The efficient functioning of the Single Market and the European economies depends significantly on the efficiency of payment markets, services and providers. The importance of the payment markets in the EU is clearly highlighted by the fact that the value of all payments in the EU in 2011 amounted to EUR 240.24 trillion or 19 times the GDP of the 27 EU Member States[447] and the total social cost of payment services in the EU27 is close to 1% of GDP (or EUR130 billion).[448]

[447] See Table 8b Payment and terminal transactions involving non-MFIs: Total value of transactions, ECB payments statistics available at http://www.ecb.int/stats/payments/paym/html/index.en.html.

[448] See Schmiedel at al. (2012) pp. 6 and 35.

Moreover, the existence of payment services that function well and efficiently is of key importance for e-commerce, especially cross-border e-commerce. The latter cannot effectively develop and increase the efficiency of the Internal Market without innovative and reliable payment services.[449]

8.2 Key features of the PSD

The key PSD measures aim at:

- ensuring a minimum payment service level to increase the use of efficient payment services;
- extending the range of payment service providers to stimulate competition;
- harmonising payment services to enable their comparability and facilitate cross-border provision.

In practical terms, the PSD aims to achieve these high level objectives by:

- introducing a new type of financial institutions, the payment institution and provides for the right of non-discriminatory access to non-designated payment systems;
- establishing defined and short execution times;
- providing for end-to-end liability;
- ensuring the transparency of payment service costs to the user, including float earnings;
- addressing the issue of deductions from the payment transaction amount;
- establishing a fair distribution of the burden from unauthorised transactions between the user and provider; and,
- harmonising information and contract requirements.

8.3 The market for payment services

8.3.1 New payment institutions

Following the transposition of the PSD into national law by the EEA Member States, only credit institutions, electronic money institutions, post office giro institutions and the newly-created payment institutions can provide payment services (Article 1 of the PSD).[450]

As of late August/early September 2012, the number of payment institutions stood at 568. In addition, 2,203 institutions were registered as SPSPs.[451] These latter institutions are subject to a less

[449] According to the latest Eurostat figures, in 2012, only 13% of individuals in the EU27 had ordered goods or services over the Internet from sellers from other countries (EU or non-EU) in the last 12 months (http://appsso.eurostat.ec.europa.eu/nui/setupModifyTableLayout.do). However, this EU-wide figure masks large variations across the EU27 with the percentage of individuals having ordered goods or services over the Internet from sellers from other countries (EU or non-EU) in the last 12 months ranging from 1% in Romania to 63% in Luxembourg.

[450] In addition, the following institutions can provide payment services according to Article 1 of the PSD (the European Central Bank and national central banks when not acting in their capacity as monetary authority or other public authorities (Article 1.e) and Member States or their regional or local authorities when not acting in their capacity as public authorities (Article 1f).

[451] More information on the number of payment institutions and SPSPs and their activities is provided in section 2.3.

onerous regulatory regime but are limited in their scale of operations.[452] The possibility to allow SPSPs to operate under a lighter regulatory regime (i.e. under Article 26 of the PSD) is useful in terms of proportionality and ensuring that small providers do not go underground. However, it also has resulted in confusion among users who may think that their funds would be safeguarded which is not a requirement harmonised by the PSD.

8.3.2 Payment service activities of payment institutions

Forty per cent of the authorisations of the different payment services listed in the PSD-Annex are accounted for by the "money remittance" [453] payment service.[454] The other PSD payment services which account for a large proportion of total payment service authorisations include "issuing and/or acquiring of payment instruments"[455] (19% of the total number of authorisations) and "execution of payment transactions including transfer of funds on a payment account with the user's payment service provider or with another payment service provider"[456] (15% of total authorisations).[457]

Practically all SPSPs provided remittance services.[458]

The number of payment institutions and SPSPs varies greatly across Member States but no single factor stands out as a key cause of these divergences.[459]

It should be noted that about ¾ of the 568 payment institutions were already actively providing payment services prior to the adoption of the PSD in 2007.[460] While the PSD has not resulted, at least so far, in a very large number of new payment service providers, it is important to note that innovative payments institutions are of the opinion that the PSD and its passporting regime (see discussion below) supports innovation because it allows these institutions to access markets from which they were previously excluded and achieve the scale required to operate sustainably.[461]

A significant number of payment institutions sought authorisation to cover their ancillary activities. This is the case for a number of non-bank credit providers, utilities, foreign exchange brokers, bill payment service providers, etc.[462]

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452 According to Article 26.a, payment institutions can make use of the lighter regulatory regime (i.e., the waiver) only if "the average of the preceding 12 months' total amount of payment transactions executed by the person concerned, including any agent for which it assumes full responsibility, does not exceed EUR 3 million per month.

453 Further details are provided in section 2.3.1.

454 This is payment service No 6 in the PSD-Annex.

455 This is payment service No 5 in the PSD-Annex.

456 This is payment service No 3 in the PSD-Annex.

457 The other payment services listed in the PSD-Annex, namely "Services enabling cash to be placed on a payment account as well as all the operations required for operating a payment account" (payment service No 1), "Services enabling to cash withdrawals form a payment account as well as all the operations required for operating a payment account" (payment service No 2), "Execution of payment transactions where the funds are covered by a credit line for a payment service user" (payment service No 4) and "Execution of payment transactions where the consent of the payer to execute a payment transaction is given by means of any telecommunication, digital or IT device and the payment is made to the telecommunication, IT system or network operator, acting only as an intermediary between the payment service user and the supplier of the goods and services (payment service No 7) account each for less than 10% of the total number of authorisations (i.e., 6% of payment service1, 6% for payment service 2, 9% for payment service 4 and 5% for payment service No 7).

458 See section 5.5.

459 See analysis in section 2.3.7.

460 See analysis in section 5.3 for further details.

461 See section 2.4.2.

462 See section 2.3.2.

In total, the value of transactions undertaken by payment institutions undertaking money remittance, transfers and retail foreign exchange activities, foreign exchange brokers and card acquirers was EUR 594.5 billion in 2010. In contrast, the total value of transactions undertaken by monetary financial institutions stood at EUR 240.24 trillion in 2011.[463]

8.3.3 Cross-border provision of payment services by payment institutions

Not only did the PSD introduce a new type of payment service provider, it also allowed these new providers to passport their services into the EEA outside their home country. A number of these payment institutions indeed obtained passports to provide their services cross-border.[464]

In fact, a number of institutions obtained passports for all EEA Member States. But, in many such cases, the payment institutions are in practice only active in a few EEA countries outside their home country.

Harmonisation across borders of the rules regarding the transparency of conditions and disclosure requirements and the harmonisation of conduct of business rules is also viewed by stakeholders as contributing to achieving an integrated European payments market.[465]

However, the potential gains from this harmonisation are stifled by differences across Member States in relation to other key laws and regulations in areas such as anti-money-laundering, data protection and consumer protection.

8.4 The PSD and competition in the market for payment services – number of payment service providers and prices of payment services

8.4.1 *The market for payment services and competition*

Overall, the impact of the PSD on competition in the payment services market has been limited so far because the number of payment service providers entering the market since the adoption of the PSD is relatively small[466] and new cross-border payment service provision is still also relatively limited.[467]

At the present time, payment institutions do access payments systems indirectly through having one or several bank accounts at one or several credit institutions.[468] This creates an uneven level playing field in the market for payment services between credit institutions and payment institutions in terms of higher cost and execution time as the latter have to route their payment transactions through the former. A number of payment institutions expressed interest in gaining direct access to payment systems in their responses to the consultation on the European Commission's Green Paper "*Towards an integrated European market for card, internet and mobile payments*".[469] However, so far no payment institutions have made a formal complaint to a relevant authority about being denied access to a payment system.

[463] See section 2.3.4 for a discussion of the value of the payment transactions undertaken by authorised payment institutions and section 2.2 for information on the value of payment transactions undertaken by monetary financial institutions.
[464] See section 5.1 and 5.2 for an extensive discussion of the use and functioning of the PSD passporting regime.
[465] See section 6.1.
[466] See section 5.3.
[467] See section 5.1.
[468] See section 5.6 details.
[469] See Consultation feedback statement (European Commission 2012).

Many smaller payment institutions are more concerned about access to and maintaining a bank account, both in a domestic setting and for cross-border operations. While this type of access issue is outside of the scope of the PSD, it impacts on competition in the market place for payment services. This is because some payment institutions may be prevented from accessing cost - effective safeguarding measures under Article 9 of the PSD and from offering their services domestically and/or abroad.

While payment system access issues impact on competition between credit institutions and payment institutions, another feature of the PSD may impact negatively on competition among payment institutions. The latter issue arises from the different use by Member States of the methods put in place by the PSD for establishing the level of own funds that payment institutions are required to hold.[470] The present study has shown that the level of required own funds varies across the three methods for identical payment institutions. Thus, as Member States have adopted different approaches regarding the selection of the method to be used for the calculation of the required own funds, an uneven playing field may be created between payment institutions which differ only in terms of their nationality. In practice, however, this does not appear to be a major concern. Only two payment institutions have raised this point during the consultations undertaken as part of this study.

In contrast, a number of features of the PSD clearly promote competition, especially cross-border competition. These are the articles of the PSD harmonising various aspects of the provision of payment services such as, for example, information requirements, refund rules, execution times, valued dates and liability of payers in case of non-authorised payments.[471]

8.4.2 Prices of payment services

In terms of prices for payments services, few key observations emerge from the present study.

First, almost practically all payment service providers respect the equal charges rule stipulated by Regulation 924 in terms of the fees charged for credit transfers, debit and credit card payments, debit and credit card ATM withdrawals[472] and direct debits. As already noted, Regulation 924 allows non-euro area Member States to apply also the equal charges rule to cross-border payments in their national currency. So far, only one country, namely Sweden, has done so. Romania has announced that it would follow suit but, the implementing legislation has not yet been passed.[473]

Second, these fees have not fallen much in recent years.[474] It should be noted, however, that charges and fees had already fallen considerably by 2005-06 for domestic payments and cross-border payments in euro in the euro-zone countries.

Third, most of the fees and charges do not vary with value of the transfer for credit transfers below EUR 50,000. Above this threshold, the use of ad-valorem fees is more common. The use of ad valorem charges is also common for ATM withdrawals.[475]

[470] See section 5.4 for a more in-depth discussion of the own-funds rules.
[471] See chapters 6 and 7 for more details and views of stakeholders on the impact of these rules on the provision of payment services and payment service providers.
[472] See section 3.4.
[473] See section 3.1.
[474] See section 3.2.
[475] See section 3.3.3.

Fourth, the PSD gives Member States the option to forbid or limit the payee's right to request from the payer a charge (i.e. to surcharge) for the use of particular payment instruments.[476] At the present time, 14 Member States prohibit surcharges on the use of both debit and credit cards while one (Denmark) prohibits surcharging for the use of the national debit card but allows surcharging for the use of credit cards. Consumer protection and a desire to encourage non-cash payment instruments are the key reasons cited by the relevant authorities in Member States for having implemented a ban on surcharges. In practice, the use of cash versus credit cards depends on many factors and a comparative analysis across EU Member States of the relative importance of cash in payment transactions does not reveal a strong and unambiguous link between a ban on surcharging for the use of cards and the relatively reduced importance of cash usage.[477]

8.5 Impact on payment service users[478]

The PSD provides for harmonised information requirements with respect to their scope, overall quality and availability. In principle, this should benefit payment service users, especially consumers. However, the present study found that consumers do not always receive the information that they should receive.[479] Specific issues concern the scope of the information, its quality, its complexity (i.e. excessively technical), its occasional opacity (e.g. sometimes it is difficult to find key information on prices) and its availability.[480]

The PSD also provides extensive rules on framework contracts, including their conclusion, minimum content, changes (including change of interest rate, currency exchange and fees) and termination. The study shows that framework contract changes raise significant concerns on the part of users. In particular, users feel insufficiently informed of upcoming changes and the consequences of not reacting to any information sent to them by payment service providers.[481]

The execution specified by the PSD and the clear specification of the value data are generally viewed as major positive impacts on users. In fact, the shorter execution time (D+1) was the most frequently mentioned positive impact of the PSD by consumer association.[482]

Similarly, the PSD rules regarding the payment service provider's liability for defective or non-execution is generally viewed as having a positive impact although some stakeholders wish that the payment's service provider responsibility should go beyond simply verifying the payee through a unique identifier.[483]

The PSD rules regarding a) the liability of payers in case of non-authorised payments and b) refunds are more problematic for users.

Information provided by complaint boards and consumer associations show that user liability is a major issue as in some Member States users have to be bear the full amount of the loss even though the PSD restricts the loss to the first EUR 150 in case of lost, stolen or misappropriated

[476] Article 52.3 of the PSD.
[477] See section 3.5 for an in-depth discussion of the surcharging issue.
[478] A detailed discussion of the impact of the PSD on consumers can be found at Annex 2.
[479] See section 6.1.
[480] See section 6.1.
[481] See section 6.2.
[482] See section 7.3.
[483] See section 7.4.

payment instruments. Moreover, there appears to be much variation across Member States in the definition of *"gross negligence"*, a concept which is not precisely defined in the PSD.[484]

The harmonised refund rules also are viewed as problematic by some stakeholders because in some Member States, the time period for making a claim of excessive debit with no prior consent by the payee has been shortened by the PSD relative to the pre-existing situation.[485] It should be noted that this issues arises only in some Member States and, that for stakeholders in other Member States, the clarity about the refund rules represents a clear improvement.

8.6 Scope of the PSD

A number of points are to be noted with regards to the scope of the PSD.

First, the description and wording of the payment services listed in the PSD-Annex is often a source of confusion[486], and would benefit from careful revision, in particular with regard to payment accounts (including clarification of which account-based services may be provided by the payment institutions), payment instruments, acquiring, and services offered by network operators. Simplification and streamlining are required to avoid any overlap between different types of payment services, which is a key source of confusion. Furthermore, the fact that specific prudential requirements apply only to some of the services listed in the PSD-Annex creates additional uncertainty.

Second, a large number of activities are exempt under the PSD.[487] While such exemptions impact negatively on market integration because different payment service providers may be treated differently, on balance the exemptions are beneficial as they introduce a fair degree of proportionality.

However, a few exemptions go beyond the proportionality principle and may warrant re-examination. This is the case, for example, of services where the provider offers instruments with a limited acceptance network, of services of network operators (mainly telecommunications operators) facilitating the purchase of digital goods and services, and cases where commercial agents act as payment intermediaries. Such payments activities are typically payment services offered on a large scale.

Third, the PSD is also silent in relation to a number of payment services, in particular payment initiation services.[488] A particular feature of those payment initiation services is their potential to stimulate innovation in payment services. However, the distribution of risk between the different parties involved in the service differs from that of standard payment services.[489]

Fourth, the PSD provides for mitigating rules for low-value payments, exempting the latter partially or fully from the application of many of the PSD rules. However, despite a proliferation of low-value transactions, providers are not eager to deploy payment services under these mitigated rules. Moreover, the design of low-value payment instruments promotes the single-purpose pay-

[484] See section 7.1.
[485] See section 7.2.
[486] See section 4.1.
[487] See section 4.2.
[488] These services are sometimes called "Overlay services".
[489] See section 4.1.3.

ment instruments which are not favoured by users. Therefore, the overall impact of the low-value derogation is judged to be very limited in general.[490]

Fifth, in the absence of a clear dividing line between classic payment services and e-money-based payment services, providers, in principle, face substantial compliance risks. In practice, however, they are free to undertake regulatory arbitrage and design payment services which fit the regulatory regime they prefer to the potential detriment of users.[491]

Sixth, the differences in the treatment of two-leg and one-leg transactions create confusion among users in terms of the protection available to them.[492]

Seventh, the PSD provides for a number of options that Member States can adopt. While the use of different options by various Member States has the potential to impact on market integration, the number of options, the variations between them and their unequal relevance has made it difficult to provide a structured assessment of the effect of these differences.[493] In some cases, the use of different options may result in an uneven playing field between payment service providers from different countries.[494]

The analysis of the PSD and its impacts suggest that a number of changes could be made to the PSD to enhance its effect and to clarify a number of its aspects. These recommended changes are discussed in the table below.

[490] See section 4.4.
[491] See section 4.5.2.
[492] See section 4.3.
[493] See section 4.7.
[494] For example, in some Member States, payment service providers have to treat micro-enterprises like consumers whereas in other Member States, micro-enterprises are considered to be business users. As a result, payment service providers in different Member States face different obligations when they provide services to microenterprises and similar microenterprises in different Member States have different rights when purchasing a payment service (see section 4.6).

8.7 Recommendations

The table below sets out a number of **recommendations** for changes to the PSD which are based on the findings of the present study. The table is followed by a number of explanatory notes.

Table of Recommendations for Amendments to the PSD

AREA	ISSUE	PSD ARTICLE	SUGGESTED CHANGE	EXPLANATORY NOTE
PAYMENT SERVICES LIST	**cash placement**	PSD-Annex no. 1	• add: *incoming transfers credited to a payment account*	[1]
	account operations	PSD-Annex no. 1-2	• remove: *as well as all the operations required for operating a payment account.*	[2]
	credit transfer, direct debit, card transactions	PSD-Annex no. 3-4	• remove: *payment card transactions*	[3]
	issuing instruments	PSD-Annex no. 5	• replace by: *execution of a payment transaction through a payment instrument that initiates transactions other than credit transfers and direct debits*	[4]
	acquiring	PSD-Annex no. 5 Recital 7	• replace by: *execution of a payment transaction for the payee initiated through a payment instrument by or through the payee* • clarification that all acquiring modalities are covered: *acquisition of transaction or transaction processing of any kind with possession of funds*	[5]
	money remittance	PSD-Annex no. 6	• refer to definition in Article 4 (13) PSD	[6]
	network payments	PSD-Annex no. 7	• remove	[7]
	new payment services		• add: *payment initiation services(also referred to as "overlay type services")*	[8]
NEGATIVE SCOPE	**limited acceptance instruments**	Article 3.k	• change focus to: *qualified relation between provider and user beyond payment transactions* (e.g. franchise)	[9]
	network payments	Article 3.l	• define more precisely by: *execution of payment transactions by the provider who (1) operates an IT network, (2) executes transactions for the subscriber of this network, (3) provides goods and services of a digital nature (4) delivered and consumed by a device designed to use that type of network* (i.e. mobile phone, tablets)	[10]

AREA	ISSUE	PSD ARTICLE	SUGGESTED CHANGE	EXPLANATORY NOTE
	commercial agents	Article 3.b	• define more precisely by: *agent for one party facilitating purchase of goods and services*	**[11]**
	direct payments	Article 3.a	• define more precisely by: *payment collection on behalf of payees where under the contract or the applicable law the intermediary is deemed payer or payee for the purpose of settling obligations regardless of the payment modalities (cash, credit transfer, etc.)*	**[12]**
	remaining exemptions	*money exchange* *ATM*	• delete *reference to payment account* (value transformation from one currency to another should always be exempted regardless of the way the funds are made available or are withdrawn unless the money exchange provider offers additional services for payment) • remove reference to *providing other payment services*	**[13]**
SCOPE	**one-leg**	Article 2.1	• extend: entire *title III applicable to all services and transactions* • extend: entire *title IV applicable to all payment transactions initiated through a payment instrument where the initiated transaction is not a credit transfer and/or direct debit*	**[14]**
	currency	Article 2.2	• extend: *entire title III and IV to all currencies transaction inside the EEA*	**[15]**
LOW VALUE		Article 34, 53	• include: *multipurpose payment instruments enabling both low-value and standard transactions*	**[16]**
OPTIONS	**microenterprises**	Article 30.2, 51.3	• provide: *an option for microenterprises to derogate the application of the PSD in countries which adopted the option provided by Article 30 (2) PSD*	**[17]**
	surcharging	Article 52.2	• Ban surcharging for the use of at least one payment instrument where the payer's account is immediately debited	**[18]**
	charges for information	Article 47,48 (3)	• remove	**[19]**
PAYMENT INSTITUTIONS	**deposits**	Article 16.4	• clarify: *payment account operated by payment institutions for users may show balance*	**[20]**
	initial capital	Article 6	• remove: *threshold for services provided in the form described in PSD-Annex no. 7* • add: *lower threshold for low-value transactions*	**[21]**

AREA	ISSUE	PSD ARTICLE	SUGGESTED CHANGE	EXPLANATORY NOTE
	own funds	Article 8	• remove: *threshold for services provided in the form described in PSD-Annex no. 7* • add: *lower threshold for low-value transactions* • clarify: *priority of e-money requirements for own funds over rules in the PSD for transactions with e-money funds*	**[22]**
	access to payment account		• add: formal process for resolving cases for when a payment institution faces problems in opening and/or maintaining a bank account	**[23]**
UNAUTHORISED PAYMENTS	**liability**	Article 60 Recital 33	• change: *burden of proof in line with Article 33 (instead of a national option as suggested in Recital 33 of the PSD)*	**[24]**

EXPLANATORY NOTES

[1, 2] The notion of *"account related services"* (Nos. 1 and 2 of the Annex to the PSD (PSD-Annex)) should explicitly include incoming transfers to a payment account in order to avoid doubts as to which payment service those incoming transfers constitute. The operating payment account should not be made a payment service by legal definition because the use of a payment account does not necessarily entail a payment transaction. Treating the operating account as a payment service would otherwise give rise to doubt over the interpretation of the PSD in many other areas (see section 4.1.2 of this report).

[3, 4] The definition of the services in No. 3-4 of the PSD-Annex should not include payment transactions through a payment card or similar device. This is to avoid overlap with services related to payment instruments (PSD-Annex No. 5). The latter should be reorganised to include execution of payment transactions through a payment instrument only, other than credit transfer and direct debits, which are covered by PSD-Annex No. 3-4, even if initiated by a payment instrument. This is because issuing a payment instrument is in itself not a payment transaction, which gives rise to the same concerns as with 'account related services'. (see section 4.1.2).

[5] The description of acquiring services should be reorganised in order to remove existing doubts over the meaning of *"acquiring payment instruments"*. Such payment service does in fact not exist in the market. The description should include all existing modalities of payment services for payees handled by payment instruments in order to avoid doubts over the scope of the PSD in the area of acquiring (see section 4.1.2).

[6] The description of money remittance (PSD-Annex no. 6) should adopt the wording of the definition in Article 4(13) of the PSD to ensure coherence (see section 4.1.2).

[7] The payment services defined in PSD-Annex No. 7 *("payments facilitated by network operators"*) should be removed in order to avoid doubts over the interpretation of the PSD. This is because those services clearly overlap with other payment services contained in the PSD-Annex (see section 4.1.2).

[8] The list of payment services should include payment initiation services to ensure that an adequate regulatory regime for providing those services is created as well as to ensure a level playing-field among all providers (see section 4.1.3).

[9, 10, 11] The exemption for limited acceptance instruments (Article 3.k of the PSD), network payments (Article 3.l of the PSD) and commercial agents (Article 3.b of the PSD) should be formulated much more precisely in order to avoid existing concerns expressed by all stakeholders over the scope of exempted activities and the position of the consumers making use of exempted services. (see section 4.2.2-4).

[12] The exemption for direct payments (Article 3.a. of the PSD) should be amended to alleviate existing doubts as to the position of a third party which facilitates the payment while deemed to be a payer or payee under the relevant contract or the laws applicable to the third party (see section 4.2.7).

[13] The exemption for money exchange (Article 3.f of the PSD) should not refer to payment accounts in order to avoid existing concerns about the position of money exchange providers offering cashless money exchange (see section 4.2.5). The exemption for an independent ATM operator (Article 3.o of the PSD) should not be linked to the fact that the operator does not offer payment services. This creates uncertainty since a user is mostly unable to verify whether this condition is met (see section 4.2.5).

[14, 15] The extension of Title III of the PSD in its entirety to all payment services and transactions protects consumers undertaking payment transactions outside the EEA just as extending Title IV of the PSD to transactions outside the EEA. However, the extension of title IV should be limited to certain services and transactions in order not to undermine the efficiency of providers and payment systems. Extending Title III and IV of the PSD to transactions in any currency within the EEA (i.e. two-leg transactions in any currency) will also be of benefit to consumers (see section 4.3).

[16] The mitigated PSD regime for low-value transactions (Article 34, 53 of the PSD) should not focus on single-purpose instruments because it runs counter to existing trends in the payments market. This situation results in limited deployment of the mitigated regime by providers (see section 4.4).

[17] Review of the option to treat microenterprises as consumers (Article 30.2, 51.3 of the PSD) is needed in order to ensure access by microenterprises to business payment products (see section 4.6).

[18] At the present time, 12 Member States do not prohibit surcharging for credit cards. In order to allow consumers the use of at least one non-cash payment instrument without incurring extra cost, surcharges on payment instruments where the payer's account is immediately debited when the payment is effected with the card should be prohibited (see section 3.5).

[19] The option to provide information on paper once a month and free of charge (Article 47.3, 48.3 of the PSD) appears to be an unjustified burden on providers (see section 4.7).

[20] The prohibition against payment institutions offering deposits (Article 16.4 of the PSD) should clarify whether payment accounts operated by payment institutions for users are permitted if they

store user's funds for future transactions, in order to avoid existing doubts over the scope of activities allowed for payment institutions (see section 4.1.2).

[21, 22] If the recommendation to remove payments facilitated by network operators (PSD-Annex, No. 7) is accepted, the provisions referring to those services (on initial capital, own funds – Article 6, 8 of the PSD) will also need to be amended. Lower capital thresholds could be considered for low-value transactions. To avoid an overlap between the PSD and the e-money Directive, it is necessary to clarify that the own-funds rule under the e-money Directive prevails over the PSD own-funds requirements where the transaction is effected in e-money (see section 4.5.3).

[23] The issues faced by payment institutions in opening bank accounts make it necessary to establish a formal process for addressing these issues similar to the process foreseen for access to payment systems (see section 5.6).

[24] In light of divergent national rules on the burden of proof relating to unauthorised payments, Article 33 of the PSD should be made binding and the option removed (see section 7.1).

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