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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the application of Directive 2007/64/EC on payment services in the internal market and on Regulation (EC) No 924/2009 on cross-border payments in the Community

(Text with EEA relevance)

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I DIRECTIVE 2007/64/EC

1. INTRODUCTION

This report reviews how Directive 2007/64/EC on payment services in the internal market (hereinafter: "the PSD") has been applied as required by Art 87. The period considered by this Report goes from 2009 till 2012. Art 87 requires a report on a number of issues: Scope of the directive (especially low-value payment instruments and electronic money); One-leg transactions and transactions in all currencies; Authorisation requirements and barriers to market entry; Prudential requirements (initial capital/ own funds/ safeguarding); Granting of credit by payment institutions; Execution time and non-execution or defective execution. This report though does not limit its scope to these issues only.

The PSD review process was based on 2 dedicated external studies. The first study, "the legal study" provided a legal conformity assessment on the transposition of the PSD in the 27 Member States[1]. The second study, "the economic study", analysed the economic impact of the PSD and related Regulation 924/2009 on cross border payments in euro in comparison to their original objectives[2]. For the same purpose, input by Member States and the relevant market actors was gathered via the Commission's advisory committees for the retail payments policy.

This report describes the transposition of the PSD (section 2); considers its application and impacts (section 3); identifies main issues emerging from the application of the PSD (section 4) and draws a number of conclusions (section 5).

2. TRANSPOSITION OF THE DIRECTIVE

The PSD entered into force on 25 December 2007 with deadline for transposition by Member States into national law by 1 November 2009. Some Member States went beyond the deadline. To implement the PSD, most Member States introduced a new legal act in their legal corpus[3].

The implementation of the PSD did not lead to major issues and Member States properly implemented it[4]. Throughout the transposition procedure, the Commission services cooperated with Member States and provided assistance to ensure correct transposition.

However, despite the full harmonisation approach[5] of the Directive, the legal study highlighted that the PSD contained both specific and abstract provisions which led to difficulties for implementation throughout the EU. Some Member States have complemented the PSD provisions with additional national rules.

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1 http://ec.europa.eu/internal_market/payments/docs/framework/transposition/psd_transposition_study_report_en.pdf

2 London Economics and Iff in association with PaySys Study.

3 Tipik – p4

4 Tipik– p5

5 Article 86(1) of the PSD

The PSD contains 25 optional provisions. When a Member State chose to make use of an option, it had to inform the Commission[6].

The high number of Member States' options results from the need to take into account of the specificities of domestic markets and from the negotiation process leading to the adoption of the PSD[7]. Stakeholders were in general neutral with regard to the impact of the optional provisions. This diversity has not led to jurisdictional arbitrage either by users or providers for the location of their activities[8].

3. APPLICATION AND IMPACTS OF THE DIRECTIVE

3.1. Title I – Subject matter, scope and definitions

3.1.1. Scope

Article 2 defines the scope. The Annex attached to the PSD defines the activities covered by the terms 'payment services' and contains 7 categories of payment services. Together with Article 3 defining the negative scope, this list defines the services falling under the scope of the PSD.

The economic study concluded that the existing list was adequate. This is supported by stakeholders.

Yet, feedback received also raised some concerns in respect to the definitions and the comprehensiveness of the Annex. It was felt that some services ought to be included in the payment services list. New technological and business developments ought to be considered as well. The inclusion of 3rd party providers offering payment initiation services was also deemed important.

3.1.2. Territorial and currency scope

Pursuant to Article 2(1), the PSD and its rules on transparency of conditions, disclosure requirements and conduct of business only applies to intra-EU transaction, the so-called "two-leg transactions". .

However, 13 Member States have taken the initiative to extend some of the PSD rules to one-leg transactions[9] to the EU segment of inbound or outbound payment transactions, either via national legislation for 11 Member States or by allowing contractual derogations for the 2 Member States. The PSD limits its scope to payment services in EU currencies. 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.

These different regimes have an impact on stakeholders and on consumers. In addition consumers are simply not aware that there are different regulatory regimes in application[10]. On the providers' side, less than 25% use different systems and procedures for one-leg and two-leg transactions[11].

3.1.3. Negative scope

Article 3 sets a list of payment transactions or services to which the PSD does not apply. This negative scope makes it difficult for consumers to figure out which activity falls under which regulatory framework. According to a survey undertaken on behalf of the Commission, 82%

6 http://ec.europa.eu/internal_market/payments/framework/options_en.htm
7 iff, London Economics and PaySys – p169
8 iff, London Economics and PaySys – p171
9 iff, London Economics and PaySys – p136-9
10 iff, London Economics and PaySys – p141
11 iff, London Economics and PaySys – p148

out of 24 consumer associations in 20 different Member States and 15 competent authorities support amending the negative scope[12]. Stakeholders ask either for clarification or deletion of certain exemptions. Moreover, payment service providers tend to assess themselves whether their operations fall in the scope of the PSD. This can lead either to regulatory evasion or competent authorities being submerged by information requests from providers[13].

3.1.4. Low-value payments and e-money

Article 34 and Article 53 lay down the principles for derogations to respectively information requirements and conduct of business rules for simple payment products for to low-value transactions. The PSD provides for flexibility as Member States can choose to reduce or double the amounts laid down in the provisions for national transactions as well as increase those amounts for pre-paid instruments[14]. Many Member States decided to double the amount and raised the ceiling for prepaid instruments to EUR 500. According to a survey undertaken on behalf of the Commission, only 17 out of 69 credit institutions stated they offered instruments falling under the low-payment transactions derogation. This lighter legal regime competes directly with other even lighter regimes provided by the PSD (i.e. the waiver for small payment institutions, exempted payment activities). The threshold, the level of information requirements and the limitation of the rights and obligations for low-value transactions have been considered to be adequate[15].

3.1.5. Microenterprises

Articles 30(2) and 51(3) hold that Member States may provide that Titles III and IV are applied to microenterprises. The latter are defined in the PSD by reference[16] to the Commission Recommendation 2003/361/EC for the definition of micro, small and medium-sized enterprises[17].

9 Member States have used the option as far as Title III[18] is concerned and 8 as regards Title IV[19]. According to the economic study, the optional provisions might be adequate for the smallest microenterprises but not for those with a scale up to EUR 2 million balance sheet total and 10 employees[20].

3.2. Title II – Payment service providers

3.2.1. Passporting regime

The number of “passported” payment institutions in Member States varies greatly across the EEA. In some countries, a significant number of payment institutions applied for passports; in others, no payment institutions have sought to obtain a passport to operate abroad[21].

For stakeholders, “passporting” is an important feature[22]. Competent authorities tend to apply divergent approaches. Nevertheless, the introduction of the passporting regime is a significant change and although the effects of this provision on the market have not yet been witnessed, the PSD set a stable framework for a pan-European development of payment institutions[23].

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12 Iff, London Economics and PaySys – p130-1
13 iff, London Economics and PaySys – p131
14 Article 34(2) of the PSD
15 iff, London Economics and PaySys – p152-3
16 Article 4(26) of the PSD
17 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri= OJ:L:2003:124:0036:0041:en:PDF
18 Tipik– p31
19 Tipik– p42
20 iff, London Economics and PaySys – p165
21 iff, London Economics and PaySys – p175
22 iff, London Economics and PaySys – p180-183
23 According to data existing in 13 Member States - iff, London Economics and PaySys – p177

3.2.2. Authorisation requirements

Some Member States have required additional information and more details on the application form[24] payments institutions have to submit to operate.

It is worth noting that in 6 countries, the number of new payment institutions created after 2007 account for 50% or more of all payment institutions which currently exists[25].

3.2.3. Prudential requirements (initial capital/ own funds/ safeguarding)

The PSD lays down rules for prudential requirements on payment institutions including initial capital[26], own funds[27] and safeguarding requirements[28].

3.2.3.1. Initial capital requirement

The initial capital needed ranges from EUR 20 000 to EUR 125 000 depending on the operations undertaken by the provider.

3.2.3.2. Own fund

12 Member States have decided to apply the option provided by Article 7(3)[29] whereby Member States may choose not to apply methods established by Article 8 in respect to the calculation of own funds for payment institutions which are included in the consolidated supervision of the parent credit institution[30].

The amount of own funds may be up to 20% higher or lower than the amount resulting from the chosen calculation method[31]. Only 2 Member States did not opt for this possibility. 2 countries only applied the possibility to increase the amount of the own funds requirements, the remaining Member Sates provided for the 2 possibilities[32]. However the vast majority of the regulators did not make use of the option although maintaining the legal authority to do so[33]. Stakeholders in general (including 16 national authorities) seem to agree that own funds requirements are sufficiently high[34].

3.2.3.3. Safeguarding requirements

2 possibilities are laid down regarding the safeguarding of funds: payment institutions can either hold such funds in a separate account or have an insurance policy in place. The former tends to be used by the majority of payment institutions in the EEA, because it was held to be clearer, convenient, cost-effective and in conformity with national laws and customs. The safeguarding requirements set a high level of protection for users[35].

3.2.4. Waived payment institutions

Natural and legal persons may be entered in the providers register[36] and enjoy lighter prudential rules under article 26 and 27. This option has been transposed in 15 Member States but so far, it has only been used in 9 of them. 2 203 so-called small payment institutions – or

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24 Tipik– p10
25 iff, London Economics and PaySys – p192
26 Article 6 of the PSD
27 Article 7 of the PSD
28 Article 9 of the PSD
29 Tipik– p12
30 pursuant to Directive 2006/48/EC
31 Article 8(3) of the PSD
32 Tipik– p13
33 iff, London Economics and PaySys – p198
34 iff, London Economics and PaySys – p200
35 iff, London Economics and PaySys – p197
36 Provided for in Article 13 of the PSD

waived payment institutions/registered payment institutions – have taken advantage of such a lighter regime so far. If the waiver was not offered as an option, some providers would operate outside the regulatory framework[37].

3.2.5. Access to payment systems

Most Member States transposed article 28 in a literal way[38]. The fact that this provision does not apply to all payment systems creates an uneven playing field between payment institutions and notably credit institutions. The responses received to the Commission consultation on the Green Paper "Towards an integrated European market for cards, internet and mobile payments"[39] shows that payment institutions are concerned about the impact of the PSD provision on access to payment systems. On the other hand, credit institutions tend to argue that payment systems should be protected against any risks that could have an adverse effect to the systems in general which is why, in their views, payment systems should remain supervised and limited in access.

3.3. Title III– Transparency and information requirements

3.3.1. Standardised conditions and transparency regarding information on prices and fee calculation for users and providers

Specific issues for consumers have been identified[40] and relate to the scope, quality, excessive technical content, opacity and availability.

Rules on transparency of conditions and information requirements apply 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). A major issue with single transaction is the provision of information regarding currency exchange rates applicable to card transactions[41]. 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. In practice, this is often not the case. Other areas of concern are the breakdown of charges and information on the credit value date in instances where either the payment account bears no interest rate or where there is no payment account.

The harmonized rules on framework 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 framework contract including change of interest rate and currency, and termination.

Major issues of concerns have proven to be few and to mainly concern changes to the framework contract. The delivery of information about proposed changes and the two-month period between notifying changes and their entry into force may not always be properly respected. A specific instance of framework contract change is the change of interest rate and fees.

The PSD fails to address comprehensively the user's lack of consent to changes to the framework contract.

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37 iff, London Economics and PaySys – p207

38 Tipik– p30

39 http://eur-lex.europa.eu/LexUriServ/ LexUriServ.do?uri=COM:2011:0941:FIN:EN:PDF – The responses: https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp

40 iff, London Economics and PaySys –p 295

41 iff, London Economics and PaySys –p 246

3.4. Title IV– Rights and obligations

3.4.1. Surcharging

The PSD considers surcharges as a steering tool for Member States. 14 of them have prohibited surcharging in general, 1 country has prohibited it for the use of debit cards but not credit cards and 12 have not prohibited it in general allowing it on all cards and 1 on credit cards only[42].

In Member States where surcharging is permitted, an issue is the fact that the cost linked to the use of the card is often disclosed to the consumer at a late stage. Controlling surcharging seems to be also linked to a control of what happens further up the payment services' supply chain. It has also to be recalled that the Consumer Rights Directive (211/83/EC) would limit the right to surcharge as from mid-2014.

3.4.2. Liability (unauthorised payment transaction)

Article 60 establishes a refund right in relation to unauthorized transactions. The principle of immediate refund on all unauthorized transactions applies unconditionally for all users.

Article 61(1) sets out a derogation, according to which payers, and not payment service providers, bear the losses relating to any unauthorized payment transactions. Such liability is based upon the use of lost or stolen payment instruments or their misappropriation. The PSD provision also sets an amount up to a maximum of EUR 150. The implementation shows different approaches: wherein not all the aspects provided for in the PSD provision are repeated, in some Member States consumers or users' liability is set below 150 Euros, in others they continue to bear the whole loss.

3.4.3. Refund right

According to Article 62 and following, payers can request refunds of an authorised payment transaction during a period of eight weeks under certain conditions and notably when the payer disagrees with the payee on the amount charged. As announced in a Commission declaration to the SEPA End Date Regulation, the Commission assessed whether the harmonised refund rule has proven adequate for the purpose. The rules are conceived to offer a broad protection to payers. At the same time, the current rules are sometimes considered to be less favourable than some pre-existing national rules. This led a number of Member States to extend the refund right to all direct debits without imposing any condition. As the current SEPA Core Direct Debit Rulebook too provides for an unconditional refund right for direct debits, certain providers also apply an unconditional right on a voluntary basis. Some providers expressed substantial concerns with regard to the application of refund rights. While the 10-day timeframe for the refund was generally seen as appropriate for direct debits, such a timeframe is considered problematic for card transactions since the provider is usually unable to decide on the merits of a request for refund within 10 working days[43].

3.4.4. Execution time

Providers did not report any major difficulties in fulfilling the execution time or in implementing the value dates for payment transactions envisaged by the PSD[44]. Most Member States properly implemented the PSD regarding the rule on the time limit for crediting and the possible derogations upon agreement between the payers and their providers, as well as those regarding paper-initiated payment transactions. However, not all the Member States seem to have adopted these 2 derogations.

42 Tipik– p 44

43 iff, London Economics and PaySys –p 267

44 iff, London Economics and PaySys –p 270

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. This notion is interpreted differently. This may therefore have an effect about the actual execution time of payments.

3.4.5. Non-execution or defective execution

According to Article 75, the payer's payment service provider liability shall refund without undue delay to the payer the amount resulting from a non-executed or defective payment transaction.

Providers reported concerns about their strict liability in certain areas, in particular regarding transparency of conditions and information provision. 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. Interpreted literally the PSD rule could mean that defective execution would also cover late execution. In this regard, 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.

4. THE REVIEW OF THE OPERATION OF THE PSD : EMERGING ISSUES

The PSD has already allowed for significant progress regarding the overall integration of the retail payments market. However, this market is very dynamic and experienced significant innovation in the last few years. Important areas of this market, especially card payments and new means of payments, such as internet and mobile payments, are often still fragmented along national borders making it difficult for innovative and easy-to-use digital payment services to develop efficiently and to provide consumers and retailers with effective, convenient and secure payment methods (with the possible exception of credit cards) at pan-European level to purchase an expanding variety of goods and services. The latest developments in these markets have also highlighted certain regulatory gaps and market failures in the markets for card, internet and mobile payments. To properly tackle these issues a harmonized approach at European level should be envisaged.

5. CONCLUSIONS

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 and production costs. The expected benefits have not yet been fully realised because of differences in other applicable laws and regulations (anti-money laundering, data protection, consumer protection) across the EU. On the consumer side, the main issues concern the different approaches used by the payment service providers and Member States when the Directive gave them margin of manoeuvre and discretion with regard to implementation[45].

II REGULATION (EC) NO. 924/2009

1. Introduction

Regulation (EC) No. 924/2009 eliminates the differences in charges for cross-border and national payments in euro. It applies to payments in euro in all EU Member States. Its basic principle is that the charges for payment transactions offered by any payment service provider in the EU have to be the same, for the payment of the same value, whether the payment is national or cross-border. The Regulation applies to all electronically processed payments,

45 iff, London Economics and PaySys –p 288

including credit transfers, direct debits, cash withdrawals, payments by means of debit and credit cards and money remittance.

Regulation (EC) 924/2009 and its precursor, Regulation 2560/2001, brought about a massive reduction of charges paid by consumers (and other payment service users) for regulated payment services. For example, charges for 100 EUR credit transfer fell from an EU average of 23.60 EUR in 2001 to 2.46 EUR in 2005. Similarly, charges for cross-border ATM withdrawals in euro fell to the levels experienced by cardholders in their own country. Thus, the Regulation brought important savings for millions of EU citizens.

2. The review clause

Article 15 of the Regulation requests two reports. The first report should aim to discuss the appropriateness of removing settlement-based national reporting obligations for statistical purposes and is linked to Article 5 of the Regulation.

The second should aim to assess the general application of the Regulation and review in more detail three specific issues:

– the use of the IBAN and the BIC in relation to the automation of payments;
– the appropriateness of the ceiling provided for in Article 3(1) i.e. the ceiling of 50.000 EUR up to which the Regulation applies;
– market developments in relation to the application of Articles 6, 7 and 8 i.e. on interchange fees for direct debit transactions and on reachability for direct debits.

The issues identified by the co-legislators as requiring the reports have been addressed in the meantime in the new Commission proposal for the Regulation, tabled in December 2010.

3. Amendments introduced by Regulation (EU) 260/2012 (SEPA migration Regulation)

The SEPA migration Regulation, which entered into force on 31 March 2012, introduces several changes to the text of the cross-border payments Regulation. In particular:

– The settlement-based national reporting obligations are removed for payments of any value as of 1 February 2016;
– The use of IBAN and BIC in relation to the automation of payments is subject to the general rules of the SEPA migration Regulation;
– The application ceiling of EUR 50000, provided in Article 3(1) is removed;
– The legal situation of interchange fees for direct debit transactions (Article 6 and 7 of cross-border payments Regulation) is addressed;
– The reachability for direct debit transactions (Article 8 of cross-border payments Regulation) is confirmed.

4. Conclusions

The adoption of the SEPA migration Regulation was accompanied by a complete revision of the issues indicated in the Article 15 of the cross-border payments Regulation. Consequently, there is no need to revise the Regulation on these points. It should be underlined that the removal of the 50.000 EUR represents a major and welcomed progress for the European integration of the retail payments market.

Whilst a number of questions on the application of the Regulation have been raised in the context of the economic study, the results of this exercise broadly confirmed that the Regulation appears to be functioning well. For example, charges for 100 EUR transfers followed a further downward trend to 0.50 EUR euro-area average for transfers initiated online and remained low, at 3.10 EUR for transfers initiated at the bank counter[46].

As a result, the Commission came to the conclusion that no changes to the text of Regulation (EC) 924/2009 are necessary or recommended at this time.

III FINAL CONCLUSIONS

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"[47]. The PSD globally fits its purpose and any future possible changes should follow an evolutional and not a revolutionary approach.

The analysis of the PSD and its impacts suggest that a number of changes could be envisaged to the PSD to enhance its effect, clarify a number of its aspects[48], provide a level playing field and to take into account technological developments. In this regard, the PSD only applies to payments where both end-providers are located in the EEA but not e.g. to transactions to or from third countries (so-called "one-leg transactions"). At the time of its adoption, a number of payment (related) activities were exempted from the scope of the PSD. This has led to a situation where payment services users do not enjoy the protection of the PSD for increasingly large volume of transactions, has given rise to uncertainties as to actual scope of the Directive and created an uneven level playing field. The flexibility offered by the PSDin enabling merchants to charge a fee or give a rebate to steer the consumer towards the most efficient payment means, combined with the option for Member States to forbid or limit any such surcharging on their territory, has led to extreme heterogeneity in the market. In order to enhance consumer protection and to promote legal certainty, a further harmonisation of refund rules regarding direct debits could be considered to avoid the current European disparities in this respect.. A reduction of the scope of the "simplified regime" for so-called "small payment institutions" and few adjustment to the liability provisions could be envisaged as well.

There also is a need to accommodate technological business development. New players have emerged in the market (the so-called "third party payment service providers") offering basically low cost payment solutions on the internet using the customers' home online banking application, with their agreement, and informing merchants that the money is on its way, thereby facilitating online shopping. Some players also offer consolidated information on different accounts of a payments service user ('account information services'). Whilst these new actors bring undeniable benefits for payments users in general –merchants and consumers alike- and competition in the market, a series of issues about security, access to information on payment accounts or data privacy need to be addressed at EU level, alongside their possible licensing and supervision as payment institutions under the PSD.

As far as Regulation 924/2009 is concerned, as already outlined above, it does not require further scope revision or fine-tuning.

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46 September 2012 data.

47 Recital 4 of the PSD

48 iff, London Economics and PaySys –p 275

Annex 1
Amendments to Regulation (EC) 924/2009 introduced by Regulation (EU) 260/2012

Regulation on cross-border payments	Original provision	Regulation on SEPA migration	Amended provision
Art. 3(1)	Charges levied for euro payments **up to 50.000 EUR** should be the same for cross-border payments and corresponding national payments of the same value	Art. 17(2)	Charges levied for euro payments **of any value** should be the same for cross-border payments and corresponding national payments of the same value
Art. 5	Member States to remove settlement-based statistical reporting obligations on payments **up to 50.000 EUR**	Art. 17(4)	Member States to remove settlement-based statistical reporting obligations on payments **of any value as of 1 February 2016.**
Art. 6	**Multilateral interchange fee of 0.088 EUR** shall apply for cross-border direct debit transactions **until 1 November 2012**, unless lower interchange fee has been agreed	Art. 6(3) and Art. 8	**Multilateral interchange fee** shall apply for cross-border direct debit transactions **until 1 November 2012. As of 1 February 2014 a multilateral interchange fee** for cross-border direct debit transactions **may apply for R-transactions,** under strictly defined criteria (cost-based approach)
Art. 7	**Multilateral interchange fee** shall apply for national direct debit transactions **until 1 November 2012,** but only if it existed in that Member State before 1 November 2009.	Art. 6(3), Art. 8 and Article 17(5)	**Multilateral interchange fee** shall apply for national direct debit transactions **until 1 February 2017,** but only if it existed in that Member State before 1 November 2009. **As of 1 February 2014 it may apply for R-transactions,** under strictly defined criteria

			(cost-based approach)
Art. 8	**Reachability** for direct debit transactions shall be assured **by 1 November 2010** by PSPs in euro area Member States. It shall be assured **by 1 November 2014** by PSPs in non-euro area Member States.	Art. 3, Art. 16(2) and Art. 17(6)	**Reachability** for (credit transfer and) direct debit transactions shall be **immediately** assured by PSPs in euro area Member States. It shall be assured **by 31 October 2016** by PSPs in non-euro area Member States.
Art. 15(2)	The use of (IBAN and) **BIC** in relation to the automation of payments	Article 5(4), 5(5) and Article 17(3) + Annex	PSUs are obliged to use BIC, but only where necessary, until 1 February 2014 for national payments and until 1 February 2016 for cross-border payments. **As of 1 February 2016 only IBAN is required.**