

Effects of the Payment Services Act on the Austrian Financial Market

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On November 1, 2009, the Directive on Payment Services in the Internal Market (Payment Services Directive), which defines the legal framework for the establishment of a single market for payment services in the European Economic Area² and introduces a new category of payment service providers (known as “payment institutions”), was implemented in Austrian law by means of the Austrian Payment Services Act (Zahlungsdienstegesetz). The essential areas governed by the Payment Services Act are market access and licensing requirements for payment institutions (including the relevant supervisory provisions) as well as the issues of transparency, liability and recourse in the execution of payment services.

The definition of payment institutions now allows nonbanks to provide payment services (subject to certain licensing and supervisory provisions), which – as classic banking transactions – were previously the exclusive domain of credit institutions in Austria. From the European Commission’s perspective, this change should facilitate access to the financial market for new payment service providers.

Against this backdrop, this article provides an overview of the most important supervisory provisions in the Payment Services Act. The article then assesses the current significance of these newly defined payment institutions for the Austrian financial market and takes a look beyond Austria’s borders to discuss the situation in selected countries.

1 Introduction

In response to legal and technical fragmentation on Europe’s markets for payment services, the European Commission has endeavored since the 1990s to promote the integration of payment systems throughout Europe. While uniform technical standards and processes with regard to credit transfers, direct debits and card payments have been established under the heading of “SEPA” (Single Euro Payments Area),³ the European Commission is also pursuing the “New Legal Framework for Payments in the Internal Market”⁴ initiative in order to harmonize the legal framework for payment services.⁵ The purpose of the new legal framework is to ensure that Member States imple-

ment harmonized supervisory requirements and to eliminate legal barriers to market entry and encourage competition as well as the use of efficient payment systems by introducing a new category of payment service providers (known as “payment institutions”).⁶

In this context, the European Commission cooperated closely with the European System of Central Banks (ESCB), whose fundamental duties under Article 3.1 of the Statute of the ESCB and the European Central Bank include promoting the smooth operation of payment systems. This work was completed (for the time being) with the adoption of Directive 2007/64/EC of the European Parliament and of the Council of 13 Novem-

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² The European Economic Area (EEA) includes the Member States of the EU as well as Liechtenstein, Iceland and Norway.

³ This initiative has been carried out in cooperation with the European Payments Council (EPC), a self-regulatory body of European banks.

⁴ See Consultative Document COM(2003) 718 final.

⁵ For further details, see Abele et al. (2007), pp. 23 ff.

⁶ See recitals 4, 5 and 10 in the PSD.

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ber 2007 (Payment Services Directive – PSD) and its implementation in national law by the Member States.

2 Key Supervisory Provisions

2.1 General Overview of the Austrian Payment Services Act

The Austrian Payment Services Act (*Zahlungsdienstegesetz*) went into effect on November 1, 2009, and essentially reflects the structure introduced in the PSD.⁷ The term “payment institutions” defined in the new EU legislation was also introduced in the Austrian law (*Zahlungsinstitute*) and refers to commercial payment service providers⁸ which offer certain payment services on the basis of a payment institution license issued under the supervisory rules of the Payment Services Act⁹ and not on the basis of a banking license issued under the Austrian Banking Act (*Bankwesengesetz*). Credit institutions have thus lost their previous monopoly position on the market for payment services and will now have to compete with payment institutions in this field.

Like the PSD, the Payment Services Act basically comprises (i) provisions regarding the prudential supervision and authorization of payment institutions, (ii) provisions governing access to payment systems, and (iii) provisions concerning the execution of payment services, including the rights and obligations of providers and users.¹⁰ The

discussion below focuses on the provisions under (i).

2.2 Scope of the Payment Services Act

The Payment Services Act applies to the provision of payment services as a regular occupation or business activity in Austria. According to the explanatory memorandum on Article 1 paragraph 1 of the Payment Services Act, Article 2 paragraph 1 of the Value-Added Tax Act 1994 (*Umsatzsteuergesetz 1994*) is applicable to the identification of such commercial activities, as is the case with institutions under the Austrian Banking Act. Therefore, the provision of payment services free of charge – unless it is a service provider’s main activity – is not within the law’s scope of application (as stipulated in recital 6 of the PSD). For example, three-party transactions such as leasing or cash on delivery consignments are not subject to the Payment Services Act because the provision of payment services is not the main purpose of those activities.¹¹ This also generally applies to payment services such as those provided by collection agencies, attorneys, notaries and the like. The client is not charged separately for these funds transfers, which only constitute an ancillary service to the actual main service provided.¹²

Likewise, the European Central Bank, the central banks of other EU

⁷ The Austrian Act on Cross-Border Credit Transfers (*Überweisungsgesetz*) was repealed when the Payment Services Act went into effect. At the EU level, Regulation (EC) 924/2009 on cross-border payments in the Community replaced Regulation (EC) 2560/2001 on cross-border payments in euro and Directive 97/5/EC on cross-border credit transfers.

⁸ Apart from payment institutions, credit institutions, electronic money institutions, post office giro institutions, the OeNB as well as Austria’s central, regional and local authorities (when not acting in their capacity as public authorities) are allowed to provide payment services (see Article 1 paragraph 3 ZaDiG).

⁹ See Koch (2009), p. 869.

¹⁰ For a more detailed discussion, see Gapp and Landschützer (2009), pp. 170 ff. or Haghofner (2009), pp. 747 ff.

¹¹ See Annex 207, XXIVth legislative period, explanatory remarks on Article 1 paragraph 1.

¹² See Explanatory Memorandum on the German Payment Services Oversight Act (*Zahlungsdienstenaufsichtsgesetz – ZAG*), General Part, pp. 32 ff.

Member States, and the Oesterreichische Nationalbank (when acting in their capacity as monetary authorities), Austria's central, regional and local authorities (when acting in their capacity as public authorities) as well as the Oesterreichische Kontrollbank are explicitly excluded from the scope of the Payment Services Act (see Article 2 paragraph 1 Payment Services Act).

2.3 Supervisory Powers

In Austrian legislature's view, the licensing arrangements applied under financial market supervisory law to date have proven to be an effective means of ensuring the proper functioning of the market as well as customer protection.¹³ With regard to supervisory powers (and licensing provisions), the Payment Services Act therefore mirrors the system set forth in the Austrian Banking Act, providing for joint responsibility and a clear division of powers between the Financial Market Authority (FMA) and OeNB in this regard. In addition to its macroprudential tasks, which involve analyzing the overall economic situation and systemic risks in banking and payments, the OeNB also performs a microprudential function; these activities include analyzing the economic situation of individual institutions, including the periodic receipt and processing of supervisory reporting data, as well as performing regular on-site inspections of individual institutions. The primary duty of the FMA is to consider the results of the OeNB's analyses and inspections as the responsible public au-

thority; the FMA is an independent, integrated financial supervisor,¹⁴ that has the power to issue official orders and take official measures, meaning that the authority decides whether licenses are issued and can conduct official investigations, order supervisory measures and impose administrative fines. In a very broad sense, the FMA's supervisory activities also include monitoring compliance with organizational and anti-money laundering regulations, which are ultimately designed not only to mitigate systemic risks and ensure the solvency and integrity of payment institutions, but also to support the smooth and legally compliant provision of payment services (based on rules of conduct).¹⁵

Within the FMA, supervisory duties (i.e., licensing and ongoing supervision) are assigned to Department I, Banking Supervision; at the OeNB, the Financial Stability and Bank Inspections Department is responsible for the supervision of payment institutions. With the introduction of the "single point of contact" (SPOC) scheme, one contact person each at the OeNB and FMA was appointed for each individual institution.

2.4 Licensing Procedure and Ongoing Supervision

In order to take up activities as a payment institution, it is necessary to obtain a license pursuant to Article 5 Payment Services Act. The licensing procedure set forth in this act borrows heavily from the procedure defined in the Austrian Banking Act. This is espe-

¹³ See Annex 207, XXIVth legislative period, explanatory remarks on General Part; Leixner (2009) comment 2 on Article 1.

¹⁴ The FMA is responsible for supervising payment institutions as well as credit institutions, insurance companies, financial conglomerates and pension funds. Likewise, the FMA is also in charge of securities market and securities supervision.

¹⁵ Leixner (2009) comment 31 on Article 1.

cially true with regard to information requirements and the evidence to be submitted to the FMA in the course of the licensing process. Due to their limited scope of activity and the lower resulting risk propensity,¹⁶ payment institutions are subject to less extensive supervisory requirements compared to credit institutions.¹⁷

The prerequisites for licenses are set forth in Article 6 paragraph 1 in conjunction with Article 7 paragraph 1 Payment Services Act and call for the following in particular:

- A program of operations which shows the type of transactions envisaged. The license application must refer to specific payment services.¹⁸
- A business plan including a forecast budget calculation for the first three years. The practice of breaking these budget calculations down into worst-case and best-case scenarios has proven useful for licenses pursuant to the Austrian Banking Act, but to date this has not been required for applications pursuant to the Payment Services Act.
- Evidence that the license applicant holds the necessary initial capital (see below for details).
- A description of measures designed to safeguard client funds, for which two options are possible: a fiduciary solution or insurance coverage (see below for details).
- A description of the applicant's governance arrangements and internal control system, especially in connection with measures designed to prevent money laundering and terrorism financing.
- Information which demonstrates the reliability of the owners. In this

regard, Article 11 paragraph 2 Payment Services Act refers to the corresponding provisions in the Austrian Banking Act (Articles 20 et seq. in conjunction with the FMA regulation on ownership monitoring (Eigentümerkontrollverordnung));

- A description of the organizational structure of the undertaking and information on its management, legal status, articles of association, and the location of its head office.

In addition, payment institutions are required to hold sufficient own funds at all times (Article 16 paragraph 1 Payment Services Act). As for the definition of items which constitute own funds, the Payment Services Act refers to the corresponding provisions in the Austrian Banking Act (Article 23 paragraph 1 nos. 1 and 2). However, in contrast to the requirements imposed on credit institutions, the minimum own funds requirement for payment institutions is not defined as an absolute value (see Article 5 paragraph 1 Austrian Banking Act), but ranges from EUR 20,000 to EUR 125,000 depending on the payment services the institution intends to provide (see Article 15 paragraph 1 Payment Services Act). Moreover, Article 16 Payment Services Act requires payment institutions to hold additional own funds commensurate to their business activities. To this end, the Payment Services Act defines three calculation methods of varying complexity based on the risk involved. In the course of the licensing process, payment institutions are required to submit a proposal regarding the method chosen; however, the FMA may also prescribe a different method by way of

¹⁶ See Annex 207, XXIVth legislative period, preceding Article 1; Abele et al. (2007), p. 30.

¹⁷ Especially with regard to own funds requirements and liquidity requirements.

¹⁸ See Wagner and Eigner (2008), p. 644.

an administrative ruling (Article 16 paragraph 3 Payment Services Act).¹⁹

As for the measures to safeguard client funds, it is important to note that client funds received for the purpose of providing payment services and credit balances in the accounts of payment institutions do not constitute deposits, as is explicitly stipulated in Article 5 paragraph 3 Payment Services Act. Moreover, client funds received by payment institutions must not be remunerated and are not covered by deposit insurance.²⁰ However, the Payment Services Act stipulates different requirements for the safeguarding of client funds, and compliance with those rules is to be verified in ongoing supervisory activities (analysis of reporting data and financial statements, management and supervisory interviews, and on-site inspections as necessary). Payment institutions can choose one of two options for safeguarding client funds: Option A offers a fiduciary solution for client funds which are still in the payment institution's possession at the end of the day following their receipt by the payment institution, while option B provides for insurance or a similar guarantee from an insurance company or credit institution to secure client funds. Furthermore, the client funds paid to payment institutions must not be used to finance payment services.

Under Article 6 paragraph 2 Payment Services Act, the FMA is required to review license applications along with the enclosed documentation and issue an administrative ruling either granting the applicant a license or re-

jecting the license application within three months of the date on which the application is deemed complete. In this regard, the licensing procedure for payment institutions differs from the procedure applied to credit institutions in that licensing decisions under the Austrian Banking Act must be issued within six months after receipt of the complete application (general obligation of authorities to issue decisions pursuant to Article 73 paragraph 1 of the General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz*)).

The administrative ruling by which the license is granted is to be issued for the provision of specific payment services. In cases where a payment institution later wishes to expand its business activities to include additional payment services, it is necessary to apply for an expansion of the license and to fulfill the licensing requirements applicable to those services.²¹ In reviewing the application, the FMA is required to consult the OeNB in accordance with Article 7 paragraph 2 no. 1 Payment Services Act. In addition, the OeNB is responsible for performing a business analysis of the license application. Such analyses are performed by the OeNB's Off-Site Banking Analysis Division with due consideration of insights from payment systems oversight activities, which are handled by the OeNB's Financial Markets Analysis and Surveillance Division.²² The OeNB passes the results of its analysis on to the FMA, which then issues a decision on the license application with due consideration of other legal requirements.

¹⁹ For detailed information, see Gapp and Landschützer (2009), p. 116.

²⁰ For detailed information, see Leixner (2009), comment no. 9 on Article 5.

²¹ See Leixner (2009), comment no. 1 on Article 5.

²² In this context, it is important to note that the supervisory duties defined in the Payment Services Act are without prejudice to the oversight of payment systems, which, in line with the fourth indent of Article 105(2) of the Treaty on European Union, is a task to be carried out by the European System of Central Banks. In Austria, this duty has been assigned to the OeNB under Article 44a Nationalbank Act since the year 2002.

In formal terms, the licensing procedure for payment institutions therefore does not differ substantially from the procedure defined under the Austrian Banking Act. However, given the narrower scope of business activities and lower documentation requirements, the licensing procedure will generally be easier for payment institutions compared to credit institutions. The fees charged for licenses under the Payment Services Act are also lower than those applicable to banking licenses. According to the FMA Fee Regulation (Section 2 no. 33a), the fee for a license pursuant to the Payment Services Act is EUR 3,000. In contrast to the fees charged in e.g. Germany or the United Kingdom, this fee is not based on the scope of the license application (i.e. the number of different payment services envisaged in the application). Likewise, license applications under the Austrian Banking Act are liable to a flat fee of EUR 4,000 (part 2 chapter 2 no. 6 FMA Fee Regulation). Practical experience to date has shown that the EUR 3,000 fee has a deterrent effect on potential license applications and is criticized as excessively high.²³ Critics have also found fault in the fact that the FMA recommends the appointment of two directors at payment institutions on the basis of its interpretation of Article 7 paragraph 1 nos. 9 to 15 Payment Services Act. This interpretation is based on the wording of the act, which consistently mentions multiple directors, and on an analogy to the Austrian Banking Act (see Article 5 Austrian Banking Act). From a business perspective, this is certainly a welcome

recommendation, as it ensures that the four-eye principle is upheld.

2.5 European Passport, Freedom of Establishment and Freedom of Cross-Border Service Provision

Under Article 25 PSD, payment institutions licensed in one Member State of the European Economic Area (the home Member State as defined in Article 3 no. 1 Payment Services Act) may operate in a host Member State (as defined in Article 3 no. 2) on the basis of the freedom of establishment and of cross-border service provision. Payment institutions which wish to exercise this right pursuant to Article 12 Payment Services Act are to communicate their intentions to the competent authorities in their home Member State; in turn, the authorities in the home Member State are required to inform the competent authorities in the host Member State accordingly within one month of receiving such a notification. This is known as the notification procedure or the “European passport,” which has created uniform requirements for market entry and thus a level playing field for all providers of payment services in the EEA.²⁴

The supervisory requirements imposed on such a payment institution are the responsibility of the competent authorities in the institution’s home Member State, while responsibility for monitoring compliance with obligations in the interest of the client is assigned to the host Member State. Under the freedom of cross-border service provision, responsibility for supervision of the payment institution is assigned

²³ This criticism is largely underpinned by comparisons to the fee for a full banking license, which is not markedly higher.

²⁴ See Hohensinn (2008), p. 189; Karasu (2009).

entirely to the competent authority in the home Member State.²⁵

The Member States are required to maintain publicly available registers of authorized payment institutions. In Austria, the FMA maintains this public register, in which all payment institutions established in Austria must be entered and which is available on the FMA's website.²⁶ The register is updated on a regular basis and also contains a directory of payment institutions authorized to provide payment services in Austria on the basis of the European passport (see Article 10 Payment Services Act).

2.6 Reporting Requirements for Payment Institutions

The PSD generally does not stipulate any ongoing reporting obligations regarding the business activities of payment institutions. In the interest of financial stability, however, the Austrian legislature empowered the FMA to issue regulations on reporting requirements in Article 5 paragraph 5 no. 4 and Article 20 paragraph 5 Payment Services Act. On this basis, the FMA issued the Payment Institution Reporting Regulation (*Zahlungsinstitute-Meldevordnung*) and the Regulation on the Annex to the Audit Report for Payment Institutions (*Verordnung über die Anlage zum Prüfbericht für Zahlungsinstitute*). According to those regulations, payment institutions – like credit institutions – are required to submit data from their balance sheets and income statements as well as information for the assessment and monitoring of risks to payment institutions, information for the verification of compliance with own funds requirements, company

master data, financial statements and an annex to the audit report. Moreover, payment institutions are required to report statistical information on the payment services provided (e.g. number of payment cards issued, number and values of transactions, availability, etc.) on a quarterly basis. This information is necessary in order to enable a comprehensive survey of payment institutions' risks; in this respect, they represent a risk statement of sorts. In practice, these reports are submitted in standardized electronic form to the OeNB, which provides the FMA with access to the data by way of a joint database.

3 Current Significance of Payment Institutions on the Austrian Financial Market

3.1 Situation in Austria

In Austria, no licenses have been issued to payment institutions since the Payment Services Act went into effect on November 1, 2009. Up to now,²⁷ only one license application has been submitted to the FMA, and that application concerned payment remittance services as defined in Article 1 paragraph 1 no. 5 Payment Services Act.

In addition, the FMA has received three license applications in connection with the transitional provision under Article 75 paragraph 2 Payment Services Act. The provision in question stipulates that undertakings which already began providing payment services pursuant to Article 1 paragraph 2 no. 4 or 6 Payment Services Act prior to December 25, 2007, will be allowed to continue those business activities without a license for the time being. As certain forms of payment instruments (no. 4) as well as digital payments (no. 6)

²⁵ See Annex 207, XXIVth legislative period, explanatory remarks on section 2.

²⁶ www.fma.gv.at/cms/site/EN/einzel.html?channel=CH0531

²⁷ As at April 11, 2010.

were not entirely covered by licensing obligations in Austria before November 1, 2009 – and in order to prevent companies which already pursue such activities from operating without a license – the act provides for a transition period of 18 months (i.e. until April 30, 2011). During the transition period, however, the authorization to provide these services is limited to Austria and does not allow cross-border activities based on the European passport. This is subject to the requirement that the undertakings in question demonstrate compliance with the applicable provisions for the prevention of money laundering and terrorism financing.²⁸ In order to exercise this privilege under the transitional provision in Article 75 paragraph 2 Payment Services Act, providers were required to submit a license application to the FMA by October 31, 2009, at the latest. The licensing procedures concerning those three providers are currently underway.

Furthermore, under Article 75 para. 1 Payment Services Act, credit institutions which are only authorized to provide payment remittance services pursuant to Article 1 paragraph 1 no. 23 Austrian Banking Act and which will lose that license on May 1, 2011 due to the implementation of the Payment Services Act may also submit license applications to the FMA. The explanatory remarks on the legislative bill indicate that those credit institutions will undergo a more lenient licensing procedure,²⁹ but in practice this can only refer to the use of data previously reported under the reporting regulations issued in connection with the Austrian

Banking Act).³⁰ As providers already licensed under the Austrian Banking Act also have to fulfill the licensing requirements under Articles 6 and 7 Payment Services Act ex lege, the FMA is also obliged to request and review all legally required documents and information in those licensing procedures. To date, no license applications based on Article 75 paragraph 1 Payment Services Act have been submitted in Austria. However, in contrast to the deadline stipulated under Article 75 paragraph 2 Payment Services Act, the credit institutions in question are allowed to submit applications until April 30, 2011. Therefore, it is conceivable that one or more of the five credit institutions which currently only hold a license pursuant to Article 1 paragraph 1 no. 23 Austrian Banking Act may still exercise their privileges under this transitional provision.

Strictly speaking, however, it is not possible to describe cases subject to the transitional provisions as “new licenses” given the requirement of prior operations in the relevant business areas. Under a strict definition of new license applicants (i.e. companies which plan to provide financial services for the first time), only one such application has been submitted to the FMA. However, the FMA has received numerous inquiries from potential applicants, indicating that more applications can be expected in the future.

3.2 EEA Payment Institutions Operating in Austria

At present, 29 EEA payment institutions have notified services in Austria pursuant to Article 12 Payment Ser-

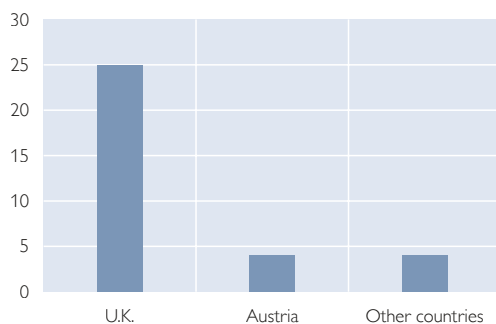
²⁸ See Annex 207, XXIVth legislative period, explanatory remarks on Article 75 paragraph 2.

²⁹ See Annex 207, XXIVth legislative period, explanatory remarks on Article 75 paragraph 1.

³⁰ FMA Regulation on Asset, Income and Risk Statements (*Vermögens-, Erfolgs- und Risikoausweis-Verordnung*); FMA Regulation on Proof of Compliance with Regulatory Standards (*Ordnungsnormenausweis-Verordnung*); FMA Regulation on Financial Statements and Consolidated Financial Statements (*Jahres- und Konzernabschluss-Verordnung*).

Chart 1

Payment Institutions Operating in Austria¹



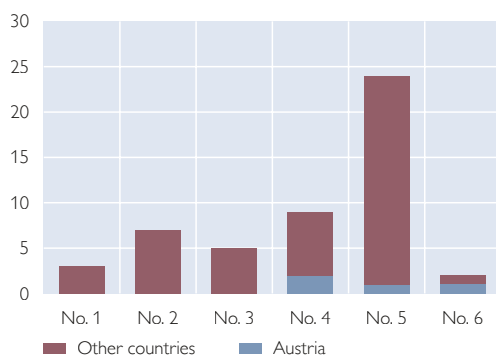
Source: OeNB.

¹ Including license applications pending FMA approval.

(no. 2) and for payment instruments (no. 4), with seven licensed institutions each, while only one payment institution is authorized to provide digital payment services (no. 6). It is striking that 20 out of the 29 payment institutions only offer one payment service each; none of them are authorized to provide all of the payment services defined (nos. 1 to 6). This can probably be attributed to the fact that the individual payment services defined in the Payment Services Act are rather diverse and thus require very different technical infrastructures.

Chart 2

Types of Payment Services Offered by Payment Institutions from Austria and Other EEA Countries



Source: OeNB.

vices Act and are listed in the FMA's public register of payment institutions. 25 of those institutions are established in the United Kingdom, 2 in Ireland, 1 in Denmark and 1 in Slovakia (see chart 1). A vast majority (23 in total) of those payment institutions hold licenses to provide payment remittance services as defined in Article 1 paragraph 2 no. 5 Payment Services Act. This is followed by licenses for payment transactions

3.3 Austrian Payment Institutions Operating in EEA Member States

As mentioned above, the FMA has not yet issued a license to a payment institution with its place of establishment and head office in Austria. Accordingly, no Austrian payment institutions are currently operating in other EEA Member States.

3.4 Excursus: Current Situation in Selected EEA Member States

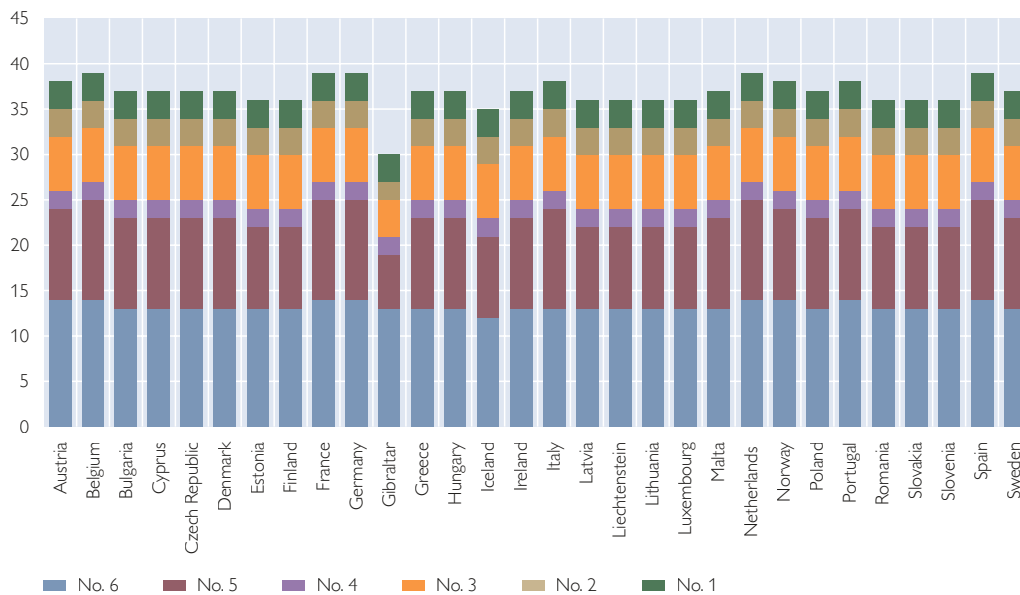
In light of the situation in Austria – namely the absence of domestic payment institutions coupled with a large number of EEA payment institutions operating under a European passport – this section provides an overview of the corresponding situation in selected EEA Member States (Germany, France, Netherlands).

In Germany, the PSD was implemented by way of the Payment Services Oversight Act (*Zahlungsdiensteaufsichtsgesetz*),³¹ which entered into effect on October 31, 2009. To date,³² seven payment institutions established in Germany have received authorizations

³¹ *Payment Services Oversight Act as published in Federal Law Gazette I of July 25, 2009, p. 1506.*

³² *As at April 11, 2010.*

Chart 3

Cross-Border Activities of U.K. Payment Institutions Notified in Austria

Source: OeNB.

from the Federal Financial Supervisory Authority³³ (BaFin) to provide payment services pursuant to section 8 of the Payment Services Oversight Act. The authorizations issued to those payment institutions cover all of the payment services defined in the Payment Services Oversight Act.³⁴ In addition, 32 EEA payment institutions have notified their services in Germany on the basis of the European passport.

The situation in France and the Netherlands is similar to that in Austria. To date, no payment institutions established and headquartered in France have been issued a license by the Commission bancaire (which will be renamed Autorité de contrôle prudentiel).³⁵ At the same time, 22 payment institutions from EEA Member States

have notified services in France on the basis of the European passport; 19 of those institutions are also authorized to provide payment services in Austria based on the European passport. Similarly, De Nederlandsche Bank has not yet licensed any Dutch payment institutions. All 14 of the EEA payment institutions notified in the Netherlands are also authorized to provide payment services in Austria on the basis of the European passport.

4 Conclusions

4.1 Summary

The PSD (and its transposition into national law) was expected to contribute to the opening of payment services markets. The definition of payment institutions as new market participants

³³ Germany's public register of payment institutions can be found at www.bafin.de/clin_152/nn_722764/SharedDocs/Artikel/DE/Verbraucher/Recherche/db___register___zag.html

³⁴ The payment services defined in section 1 (2) of the Payment Services Oversight Act basically match those defined in Article 1 paragraph 2 of the Austrian Payment Services Act; only the order is reversed in the case of nos. 5 and 6.

³⁵ France's public register of payment institutions is available at www.banque-france.fr/fr/supervi/agrement/popetscred/li.htm

was meant to create a level playing field between nonbanks and banks in the competitive provision of payment services. Moreover, the new legislation was designed to create a uniform legal framework for all payment services, regardless of whether they are provided domestically or across EEA borders. The motive for standardizing the regulations applicable to functionally equivalent products and services was to mitigate distortions of competition between various products and providers.³⁶

The Austrian market, too, was expected to benefit from increased dynamics and more competition between payment institutions and credit institutions in the payment services segment, which had been highly lucrative for credit institutions.³⁷ In addition, new players were expected to enter the market,³⁸ especially as Article 5 paragraph 2 no. 3 Payment Services Act allows payment institutions to act as hybrid institutions which also offer other products or services in addition to financial services. In this regard, the PSD was mainly designed to account for telecommunications companies³⁹ which can handle payments between their customers (consumer to consumer or business to consumer). Furthermore, the new legal framework was intended to enable small and medium-sized banks in particular to focus on their core business areas and to outsource payment-related activities to payment institutions at the national as well as the European level.⁴⁰

However, as mentioned above, new (Austrian) payment service providers have not entered the market as expected, nor have we observed an increasing number of providers from other industries entering the market (e.g. tax consultants, Internet service providers, technical service providers or retail businesses which may decide to offer payment services themselves). Moreover, none of the credit institutions in Austria have opted to outsource or restructure their activities in this field. Since the Payment Services Act went into effect, no Austrian banks have relinquished their licenses or outsourced payment-related activities to payment institutions.

Only those Austrian service providers which had previously operated in the field of payment services and did not have a banking license (e.g. operators of terminals,⁴¹ data processing services, acquirers, telecommunication service providers, etc.) have applied for the relevant license under the transitional provision pursuant to Article 75 paragraph 2 Payment Services Act.

Although numerous inquiries have been received from potential license applicants, the Austrian market has shown only limited interest in obtaining licenses under the Payment Services Act; strictly speaking, only one new license has been requested. At the same time, 29 payment institutions from other EEA countries are now operating in Austria on the basis of the freedom to provide services. The vast majority

³⁶ See Annex 207, XXIVth legislative period, preceding Article 1; Schrank and Marx-Rajal (2009), p. 808.

³⁷ See Elsenhuber and Schimka (2005), pp. 73 f., Peintner (2009) or Zuffer (2009).

³⁸ See Elsenhuber and Schimka (2005), pp. 73 f. or Peintner (2005), p. 377.

³⁹ See Annex 207, XXIVth legislative period, explanatory remarks on Article 5 paragraph 2 no. 3; Leixner (2009), comment no. 3 on Article 5.

⁴⁰ See Karasu (2009).

⁴¹ Independent cash dispenser service providers which only provide customers with cash and usually do not belong to a banking network (e.g., cash dispensers in supermarkets or nightclubs) are exempt from the Payment Services Act. See Annex 207, XXIVth legislative period, explanatory remarks on Article 2 paragraph 3 no. 15.

of those cross-border payment institutions are established in the United Kingdom and have notified services in nearly all EEA Member States (see chart 3). It therefore appears that only U.K. service providers have shown interest in operating as payment institutions. Furthermore, the public registers maintained by EEA Member States show that it is almost exclusively the same 25 U.K. service providers which offer cross-border services in each country. Information on the economic weight (transaction volumes, market shares, etc.) of those providers is not yet available, but their significance in Austria currently appears to be rather low. Therefore, it seems that those companies have simply registered throughout the EU as a matter of routine and do not constitute serious, sizable competitors on the Austrian market.

4.2 Assessment and Outlook

At least as far as the Austrian market is concerned, the European legislature's expectations with regard to the opening of the market and increased competition have not yet been fulfilled. In the six months or so since the Payment Services Act went into effect, no fundamental structural changes have arisen

on the Austrian payment services market. New domestic competitors to the banking sector have not emerged on the market, but 29 cross-border payment institutions, mostly from the U.K., have been authorized to provide payment services in Austria.

The development of new payment products, services and infrastructures expected from the PSD⁴² is still advancing, especially with regard to the relatively new innovations in the field of payment instruments (such as pre-paid cards and contactless payments⁴³ as well as overlay payments⁴⁴) but these advances have not primarily been driven by newly established payment institutions. However, the implementation of the PSD did achieve one of the European legislature's objectives: Financial service providers are now required to comply with uniform standards throughout the Community. However, this also gives rise to the fundamental question of whether the mere standardization of the legal framework is sufficient to bolster competition in the payments industry. There are probably other fundamental economic barriers which stand in the way of enhancing cross-border competition and which can hardly be dismantled by legislative means alone.⁴⁵

⁴² See Karasu (2009).

⁴³ This technology allows users to transfer small amounts "in passing" by means of radio frequency identification (RFID) technology.

⁴⁴ In overlay payment services, independent service providers act as intermediaries between consumers and banks in online shopping transactions. This business model relies on security features such as secret PINs and TANs which customers must enter in order to use payment services online.

⁴⁵ See Schaefer (2008, pp. 23 f.).

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