



American Express response to the European Commission Consultation on a retail payments strategy for the EU

I. INTRODUCTION

American Express welcomes the opportunity to reply to the Commission consultation on a retail payments strategy that will feed into the upcoming Commission's Communication for an Integrated EU Payments Market outlining the EU's payments policy for the next five years.

Our comments will focus on (i) key principles that a forward-looking strategy should focus on; and (ii) further considerations regarding the implementation of current legislation.

I. KEY PRINCIPLES

In order to build a Retail Payments Strategy for the EU, which can strengthen Europe's influence and consolidate its economic autonomy, we believe there are three key principles where the Commission should focus on:

- Promoting additional competition in the EU payments space and address the shortcomings of IFR;
- Ensuring the success of innovative pan-European solutions; and
- Addressing shortcomings of PSD2.

1) Promoting additional competition in the EU payments space

We have long held that, with more competition comes better services and better prices. Fundamentally we believe consumers, businesses and merchants deserve more choice.

Any forward-looking payments strategy should have competition at its heart. The legislative framework must focus on encouraging real competition to the dominant schemes and other large players, whether from FinTech's, European-led initiatives or alternative models.

In order to do so, policy-makers must first address some of the shortcoming of the current EU Payments Package [i.e. Payments Services Directive (PSD2) and Interchange Fee Regulation (IFR)].

Essentially, policy-makers had three main goals at the time of the adoption of the Package: to reduce costs, stimulate innovation and increase competition.



On costs, price caps under the IFR have reduced costs for merchants; however there seems to be a significant discrepancy on how it has benefitted larger and smaller merchants. On Innovation, PSD2, namely Open Banking, has stimulated innovation, if at lower scale than anticipated. However, on competition, legislation has mostly failed, in particular as far as IFR is concerned. The dominant players are still dominant, and the new rules make it even harder for anyone to compete or even enter the space.

As a concrete example, and as a result of the combined impact of IFR and changes to the **open access rules** under PSD2, which removed the exemption requirement once acknowledged by legislators in PSD1, combined with other onerous and unwarranted regulatory requirements in the IFR led American Express to exit its licensing partnerships across the EU affecting its ability to compete in 16 EU Member States. As a result, approximately 7 million cards were for the most part replaced by cards issued on Visa and Mastercard schemes to the detriment of consumers. The customers and transaction volumes on the American Express network in those countries shifted straight to Visa and Mastercard.

The rules have made it even harder for alternative and innovative fintech players to compete with the dominant four-party schemes and have caused irreversible damage to American Express and our bank partners. In fact, the current rules only make sense for large schemes. Smaller players, including innovative FinTech's simply do not have the scale to provide a compelling offering that would enable them to enter the space. It is therefore clear that this has directly contributed to less competition in the sector and it was acknowledged in EY's IFR Report¹.

Another example to consider are the current **co-brand rules** under IFR. These rules specify that when three-party schemes (3PS) enter into co-brand partnerships, they should be treated as four-party schemes (4PS) and consequently, that all 4PS rules should apply. However, there are fundamental differences that distinguish 3PS from 4PS, which the current rules don't consider, and these differences apply also when 3PS issue co-branded cards.

Smaller players, such as 3PS, FinTech's and alternative payment providers try to offer an important alternative to consumers from the products and services offered by the dominant 4PS schemes and their network of bank partners. In the EU around 90% of consumers report that they simply take the payment product offered by their local bank, offering the dominant 4PS a captive market. However, 3PS and other smaller players don't have branch networks or the ability to work with the thousands of banks that Visa and Mastercard do, so their ability to work with other parties to reach customers is materially more critical, with co-brand partnerships providing such a vital distribution channel.

¹ <https://ec.europa.eu/competition/publications/reports/kd0120161enn.pdf>
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Moreover, co-brand partnerships create value for key EU industries. Securing a co-brand partnership can be an important move for a non-payment brand attempting to compete with peers in its sector. This is especially true for the airlines sector, where European carriers compete with companies based outside the EU, often operating in tough conditions with narrow margins and currently with very real risks of insolvency. This issue has become even more important now, when European airlines are faced with an unprecedented situation due to the COVID-19 pandemic. Restricting the terms of these partnerships for EU-based companies could limit EU companies' ability to compete with rivals based in the U.S., Middle East, or Asia, which are not subject to the ambiguous, arbitrary and indefensible co-brand rules imposed in the EU.

2) Ensuring the success of innovative pan-European solutions

The creation of a European scheme will be a key opportunity for policymakers to provide European consumers, business, merchants and payment service providers with more choice, increase competition and innovation in the payments space.

American Express believes that such a pan-European scheme could help achieve one of the bloc's major policy objectives: to increase competition in the payments market, providing both consumers and merchants with greater choice in payments.

We have long held that, with more competition comes better services and better prices. Fundamentally we believe consumers, businesses, merchants and payment service providers deserve more choice. We support efforts such as the European Payments Initiative (EPI) that are focused on encouraging real competition to the dominant schemes – whether from FinTech's, European-led initiatives or alternative models such as American Express and Diners.

We support these efforts and recommend additional attention on two key areas, to ensure the future success of EPI.

- These efforts must be underpinned by a regulatory framework that ensures the proper economic incentives are guaranteed. The optimal functioning of any market must necessarily promote the creation of value, and participants in EPI must be expected to obtain enough compensation for their services; and
- The final product must be as secure, convenient and fast as card payments or it will fail to get consumers support and traction, which it also needs.

3) Addressing shortcomings of PSD2



While considering the development of pan-European solutions, we believe there are also other paths the EU could, and should, consider as to increase competition even further, namely by changing the rules on (i) surcharging; and (ii) passporting of credit services under PSD2.

i. Surcharging

The current partial ban on surcharging, where IFR-regulated products issued by dominant schemes cannot be surcharged but non-IFR regulated products issued by much smaller schemes (that are a choice for merchants) can be surcharged up to the cost of acceptance, coupled with divergent approaches between Member States on whether to exercise the option to prohibit surcharging altogether, causes significant confusion among consumers and merchants alike and forces consumers to “pay for paying” and misleads them as to the true price of goods and services. Moreover, this is asymmetric regulation that tilts the market towards the dominant schemes, while quashing competition from any other much smaller schemes.

Surveys commissioned by American Express in several EU countries show that a clear majority of European consumers strongly dislike surcharging and are in favor of implementing a full ban. A full EU-wide ban on surcharging for all card transactions (i.e. consumer and business transactions) would help protect consumer rights, ensure a better customer experience, encourage merchant transparency, create a level playing field among payment service providers, and end widespread abusive practices that are very difficult to oversee and enforce by authorities. Regulatory harmony across the EU with a full ban will also help ensure that cards issued by three-party schemes or alternative payment providers are no longer discriminated against at the point of sale.

ii. Passporting of credit services/ cross-border credit market

There is currently a disadvantage and unlevel playing field caused to non-bank PSPs by the restriction in PSD2 Article 18(4)(b), which stipulates that PIs can issue credit only up to 12 months outside their home member state and cannot operate on a passported basis if issuing credit for any longer period. This severely restricts competition, is harmful to the EU’s single market objectives and places PIs at a serious disadvantage compared to banks when offering personal loans and credit cards, and further limits customer choice. Furthermore, consumers tend only to seek credit in their home market and not shop cross-border for credit. The lack of a cross-border credit market also undermines one of the Consumer Credit Directive’s main goals and EU’s vision. We think the EC should assess the reasons for the lack of credit across borders and try to address this to ensure a true single market.



II. FURTHER CONSIDERATIONS

In the last decade, Europe has been a global pioneer and a standard-setter in terms of payments. The second Payment Services Directive (“PSD2”) has been one of the most revolutionary pieces of legislation in decades, especially when it comes to boosting innovation. Implementing all its estimable objectives, however, has proven harder to achieve than many would have thought, and provides valuable lessons for the future, namely with regards to (i) strong customer authentication; and (ii) open banking.

i. Strong Customer Authentication

The Commission questionnaire seems to indicate that perhaps “additional mitigating measures” could be introduced to lessen the risk of fraud and unauthorized electronic payments. However, we do not believe that additional measures need to be laid down.

We would rather emphasize the massive and well documented impact that SCA implementation has had on the entire industry. At the time of the adoption of PSD2, policy-makers did not adequately anticipate the scale of the changes PSD2 required or the disruption implementation would cause, and so lessons must be learned if further rules are to be laid down.

For example:

- **Industry participants must be better consulted:** the impact of the PSD2 SCA reforms were hugely underestimated and any future consultation on similar technical issues need to involve the industry at an earlier stage. There is an inherent level of sensitivity in rules that affect a PSP’s customer journey which would require more consideration in the future.
- **Ambiguity in the text must be removed:** both the level 1 and level 2 texts left a raft of unanswered questions with which industry participants had to grapple, even after the lengthy consultation process was completed. These ambiguities, coupled with the delay to meaningful guidance, served to exacerbate confusion within the industry, and which ultimately led to increased costs and a delay of the implementation deadline.
- **Regulatory guidance must be released quicker:** once the final RTS were published, it was several months before any EBA guidance/opinions were forthcoming. Further, the EBA Q&A Tool could be improved to provide clarity to the industry in a more expedient way.
- **EU agencies and NCAs must speak with one voice:** the divergence in views on SCA issues between the Commission and EBA, as well as between individual NCAs themselves, must be avoided in future to ensure clarity in the industry. When national implementation plans clash with other national plans from different NCAs or have impact beyond the very borders of a Member State, it negatively affects the EU internal market. Coherence and harmonization are therefore needed.



In terms of substantive comments on SCA and any future proposals:

- **Corporate products need to be carved out:** While an exemption for certain electronically-initiated corporate payments was included in the final RTS, the application of all SCA rules to corporate products needs to be reviewed. In our view prescriptive authentication requirements are not necessary or relevant in the context of corporate products in the same way as they might be for consumer products. PSPs ought to have greater flexibility to design authentication and security processes for corporate customers that effectively mitigate risk, but which don't necessarily follow prescriptive rules. These corporate products carry less risk given that they already observe specifically designed protocols and standards developed by the industry.
- **An outcomes-based approach should be favored:** PSD2 focuses on the process of authentication (i.e. g. requiring the use of two independent factors from designated categories), rather than the outcome (i.e. reducing fraud). Any future rules should favor an outcome-based approach which allows PSPs to take their own steps and design their own authentication process. Technological neutrality and the TRA exemption are steps in the right direction.

ii. Open Banking

We believe that further action at EU level is needed in order to fully implement Open Banking under PSD2. Some of the elements that should be considered include:

- **Authentication measures:** delegation of SCA to the TPP as suggested in the questionnaire is interesting and should be further explored, provided liability is similarly apportioned from the ASPSP to the TPP. Another issue that could be revisited is the 90-day reauthentication requirement for AISPs, and SCA in the context of modified customer interface access;
- **Definition of "payment account":** this definition needs to be further detailed and clarified, as the broadness of the definition in the EU regulations causes divergence in views and implementations among NCAs, as to the types of products included within the scope of this definition and by extension, within the scope of the PSD2 open banking regime. Even though CJEU's judgements (Case C-191/17) and EC's responses to the PSD Q&As shed some light on when an account is considered as a payment account (providing some criteria thereto); not having a clear and harmonized regulatory criteria on this has led to diverse approaches among MS, thus entailing relevant divergencies on requirements applied to the same service when provided by an entity in different MS, e.g. account servicing obligations, granting access to third parties providers, etc. For example, some Member States regard credit cards and charge cards as within the scope of AIS, however other Member States do not share this view on the basis that funds may not be placed on the account in the sense



contemplated within the Payment Accounts Directive. Where products are offered cross-border between two countries with a divergence of views on this point, it is very difficult for PSPs to navigate a clear course of action. In an environment in which the cross-border component of payment services is exponentially increasing and hence the cross-border business structures providing those services, it becomes even more relevant to have a uniform regulation on the payment services basic concepts.

- **Use of the eIDAS regime for identification:** we welcome the eIDAS regime for identification, however it has proved to be a stumbling block for the industry during implementation. There is a need to reflect what changes could be introduced to further introduce a cross-sector online identification;
- **EU regulatory guidance:** there is a clear need for guidance similar in nature to that produced by the UK Open Banking Implementation Entity, which sets out best practice and explains some of the more nuanced parts of the RTS with reference to common use cases. While the various Opinions and Guidelines produced by the EBA have been helpful, the industry would welcome more practical and consistent guidance;
- **API Standardization:** We recognize that a prescribed API specification gives clear requirements and a consistent developer experience. We welcome the European Data regime defining a recommended sector agnostic API specification and consulting industry groups on the desirability. This process would be enhanced with further prescription to the data fields that are in / out scope of regulation and would reduce ambiguity and excessive API iterations. Without API standardization, further developments into Open Banking / Finance / Data could lead to inconsistent customer experiences that differ across products and providers, and cause delays to FIs updating and enhancing their external APIs, thus leading to unstable data and payments environment.
- **PSD2 and GDPR:** further clarity is needed in understanding the interplay between PSD2 and data protection laws, namely about TPPs provisions (e.g. whether one customer can grant consent to a TPP to access data on a joint account).

CONCLUSION

The upcoming Commission Communication for an Integrated EU Payments Market is set to become a crucial milestone for the future of European payments policy. American Express reiterates its commitment to remain fully engaged and actively work alongside policy-makers to ensure that the EU payments market remains open, competitive and with a consumer-first policy at its heart.