

# EBA Questionnaire in preparation of the EBA draft RTS on Central Contact Points under Art. 29 (5) of PSD2

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## Background

1. Article 29(4) of the Revised Payment Services Directive (PSD2) introduces the possibility for host Member States to require payment institutions headquartered in another Member State (MS) that provide payment services on their territory via agents under the right of establishment to appoint a central contact point (CCP) in their territory, in order to:
  - ensure adequate communication and information reporting on compliance with Titles III and IV in the host Member State; and
  - facilitate the supervision by the competent authorities of the home and host Member States.
2. According to Article 3 of Directive 2009/110/EC, as amended by Article 111 of PSD2, these provisions shall also apply *mutatis mutandis* to electronic money institutions when providing payment services in a host Member State through agents under the right of establishment.
3. These provisions are closely linked to Article 29(2) of the PSD2, according to which the competent authorities of the host Member States will be able to require PIs having agents or branches within their territories to report to them periodically on the activities carried out in their territories. Such reports shall be required for information or statistical purposes and, as far as the agents and branches conduct the payment service business under the right of establishment, to monitor compliance with the provisions of national law transposing Titles III and IV. Pursuant to Art. 111 of the PSD2 these provisions shall also apply *mutatis mutandis* to EMIs.
4. Article 29 (5) of PSD2 confers a mandate on the EBA to develop draft RTS specifying the functions of such CCPs and the criteria to determine when the appointment of a CCP is appropriate, in accordance with the principle of proportionality. According to PSD2, the draft RTS shall, in particular, take account of: “(i) the total volume and value of transactions carried out by the payment institution in host Member States; (ii) the type of payment services provided; and (iii) the total number of agents established in the host Member State”.
5. A consultation paper with draft RTS will be published later in 2017 and publicly consulted on.
6. In preparation of the Consultation Paper, the EBA is interested in receiving input regarding the issues that payment institutions and e-money institutions that provide payment services in other MS have experienced in their relationship with the Competent Authorities in the home

and/or the host MS under the PSD1, that could be addressed by the appointment of a central contact point in the host MS's territory.

7. This questionnaire is addressed to EU trade associations representing payment institutions (PIs) or, as applicable, PIs and electronic money institutions (EMIs), that provide payment services cross-border in other MS via agents under the right of establishment.
8. The questions are stated below and respondents are kindly asked to provide feedback by **13 April 2017, COB**, by emailing the completed questionnaire to [Larisa.TUGUI@eba.europa.eu](mailto:Larisa.TUGUI@eba.europa.eu).

## Questionnaire

To your knowledge, what issues do PIs and EMIs that are providing payment services in other MS via agents under the right of establishment experience in their relationship with the competent authorities of their home MS and/or the competent authorities of the host MS, that you believe could be addressed by the appointment of a CCP in the host MS' territory pursuant to Art. 29(4) of the PSD2?

For example, do you consider that a CCP could facilitate:

- the on-site inspection of the agents established in the host MS, and/or
- the communication of the PI/EMI with the competent authorities of the home and/or the host MS and the reporting under Art. 29(2) of the PSD2?

Please limit your response to the issues experienced in the application of the PSD1 (not the AMLD or other regulations).

- We would welcome EBA recommendations as to the form of the CCP, to avoid lack of harmonisation across the MS. The form the CCP will take is critical as it determines the scope and costs associated with compliance. There is a danger that the fundamental right to provide services cross border is undermined if MS have unfettered freedom as to how the CCP should be set up. For example, some in-country requirements would risk triggering tax liabilities and consequently would not only damage the single market concept but could deter cross border provision of services. As with the EBA RTS on SCA, a results orientated approach would be preferable, whereby the PI is tasked with regulatory compliance but can decide on how to best to achieve this, as explained further below.
- **Level playing field:** If a MS chooses to have CCPs, it shall oblige all issuers of electronic money and payment service providers ('obliged entities') established in its territory so as not to distort competition between the obliged entities in that market and to avoid regulatory arbitrage.  
Also, FinTech companies providing services on a cross border digital basis should be brought within the provisions. Otherwise, PIs with an agent structure are discriminated against. It would act as a significant disincentive to provide cross-border services with physical locations. It is recognised by FATF and the UN that it is desirable to have a regulated remittance sector

rather than to drive monies under-ground, and the measures should reflect this overall goal.

- **Geographical flexibility:** As long as the obliged entities provide a contact person/point which possesses the necessary qualifications (e.g. experience) and knowledge of local prudential and regulatory requirements to each host country competent authority, the intended purpose of Article 29 has been addressed. From an EU Single Market and proportionality perspective, it should not be made mandatory to have the CCP physically located in the host country, as long as it is ensured that the CCP is available to meet with local authorities upon request at a reasonable notice. The CCP for a given host country could for instance be physically located in a neighbouring Member State and thus serve as CCP for more than one country (eg regional centres of excellence).
- **Language flexibility:** the CCP should be allowed to communicate with home and host state regulators in English in order to facilitate information sharing within the EU supervisory community. Passporting notifications and other PSD related communication (e.g. agent notifications) between supervisory authorities are already done in English, so there is an established practice to be built upon.
- **Affiliation:** the CCP should not be required to be directly employed by the obliged entity as this would stand in conflict with market practices of EU wide operating groups whereby certain functions are being outsourced to affiliated group entities or third parties (such as temporary personnel placement providers, unaffiliated agents, professional service firms, etc.). Again, we would recommend a results orientated approach, with companies having the ability to achieve the result in the most efficient way possible.
- **Personal liability:** The CCP should not have any personal liability under PSD as this a contact point facilitating supervision. Liability should remain with the entity's directors and senior management. It is also clear under PSD2 that any RTS obligation imposing personal liability would be disproportionate and *ultra vires*

*“Art. 29 PSD2: to **ensure adequate communication and information** reporting on compliance with Titles III and IV, without prejudice to any provisions on anti-money laundering and countering terrorist financing provisions **and to facilitate** supervision by competent authorities of home Member State and host Member States, including by providing competent authorities with documents and information on request.”*

*“Recital 44: The requirement to appoint a central contact point should be **proportionate** to achieving **the aim of adequate communication and information reporting** on compliance with Titles III and IV in the host Member State.”*

- **On-site inspection** of the agents established in the host MS:
  - the PI itself, as part of its authorisation and license conditions, will manage offsite and onsite audits. PSD2 Art 5(1)(l) says that as part of the authorisation process the PI must provide a *“description of the applicant’s structural organisation, including, where applicable, a description of the intended use of agents and branches and **of the off-site and on-site checks that the applicant undertakes to perform on them at least annually, as well as a description of outsourcing arrangements, and of its participation in a national or***

*international payment system”.*

- The CCP should be able to manage country level reporting to the regulator but it is not necessary for the CCP to conduct its own additional offsite or onsite audits or investigations. An attempt to impose an on-site inspection requirement would realistically lead to host country structures involving teams of people – again deviating significantly from the single market goal and fundamentally changing the cost structure of business (and therefore the incentives to conduct business cross border). It would also stop the PI from developing centres of excellence whose task it is to conduct the annual checks.
- The thresholds for appointing the CCP should reflect those set out in the AMLD RTS on CCP, that is to say graded to take account of size or limited servicing activities within a host Member State.
- EPIF would welcome confirmation as to whether agents who are not acting on behalf of a PI in providing payment services (i.e. common law agents or agents that do not fall within the definition of “agent” under PSD2) are out of scope of the CCP requirement.