



FACULTES UNIVERSITAIRES
NOTRE-DAME DE LA PAIX



Study on the implementation of Recommendation 97/489/EC concerning transactions carried out by electronic payment instruments and in particular the relationship between holder and issuer

Call for Tender XV/99/01/C

FINAL REPORT – Part a)

20th March 2001

FINAL REPORT – STRUCTURE

Part a) Report

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REPORT – Part a)

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1. Executive summary

1.1. English version

- 1 **This study** has been undertaken under contract to the European Commission in response to Call for Tender XV/99/01/C by a consortium of 10 European partners led by CRID, University of Namur and the IT Law Unit, Centre for Commercial Law Studies, Queen Mary University of London. It assesses the implementation of *Recommendation 97/489/EC of 30 July 1997 concerning transactions carried out by electronic payment instruments and in particular the relationship between issuer and holder* in the 15 Member States of the European Union.
- 2 **The aims of the study** were to investigate how far the Recommendation has been effective in improving the position of EPI holders, both as a matter of substantive law and in actual practice, and:
 - 2.1 to produce a scientific analysis of the implementation of the Recommendation in each Member State;
 - 2.2 to establish the major differences between the terms and conditions on which EPIs are issued and the day-to-day practice of issuers; and
- 3 **Five main tasks** were undertaken by the researchers:
 - 3.1 Desk-based research into the current state of the law, Codes of Practice and self-regulation;
 - 3.2 An analysis of the contracts between holders and issuers;
 - 3.3 Surveys of sample account-opening transactions;
 - 3.4 Surveys of holders of EPIs; and
 - 3.5 Contacts with consumer bodies to identify non-compliance issues reported to them.
- 4 **The findings of the study** are presented in a number of formats:
 - 4.1 Tables (45) providing a summary of the level of compliance in each of the Member States according to EPI.
 - 4.2 Tables (9) providing a statistical analysis of the level of compliance in the Member States.
 - 4.3 Detailed national analyses, set out in the Appendices; and
 - 4.4 An overall assessment of compliance across the Member States which identifies the main problem areas.
- 5 From these findings, the **following problems are identified**:
 - 5.1 The Recommendation's aim to create transparency of conditions for transactions is not achieved in four main respects:
 - 5.1.1 Insufficient information is provided by issuers to holders;
 - 5.1.2 Information is provided in an unclear and/or inaccessible way;
 - 5.1.3 Information is not provided at the appropriate time; and
 - 5.1.4 Levels of compliance on this matter differ according to type of EPI.
 - 5.2 There is a substantial level of non-compliance with the Recommendation in respect of the obligations and liabilities of the parties to the contract in the following respects:
 - 5.2.1 Failure to limit a holder's liability after notification;
 - 5.2.2 Failure to restrict liability when the EPI is used without physical presentation or electronic identification;
 - 5.2.3 Lack of uniformity in relation to what constitutes gross negligence across the Member States;
 - 5.2.4 Notification period for changes to the contract is often less than 1 month;
 - 5.2.5 Countermanding provisions for unspecified sums are very rare;
 - 5.2.6 Failure to provide for the liability of the issuer for defective or non-executed transactions.

- 5.3 Many issuers do not comply with the Recommendation in respect of the procedure for notification of loss or theft and the issuer's liability after notification:
- 5.3.1 Some issuers do not explain the notification procedures;
 - 5.3.2 In many cases no special means are provided to prove that the notification has been made;
 - 5.3.3 Some issuers offer only limited access to notification systems, e.g. by restricting operating hours.
- 5.4 In most Member States the burden of proof is placed on holders, or at best not stated in the EPI contract terms.
- 5.5 The means for settlement of disputes are inadequate in that:
- 5.5.1 Contracts often make no reference to dispute resolution bodies nor provide their contact details;
 - 5.5.2 Dispute resolution bodies are often internal, and thus lack independence;
 - 5.5.3 Costs of judicial action are prohibitively high, and the procedure extremely slow.

1.2. French version

- 1 **Cette étude** est le résultat d'un appel d'offres XV/99/01/C lancé par la Commission européenne. Elle a été réalisée par un consortium de 10 partenaires européens sous la direction du CRID, centre de recherches des Facultés Universitaires Notre-Dame de la Paix de Namur et de l'IT Law Unit, Centre for Commercial Law Studies, Queen Mary University of London. Cette étude vise à évaluer la transposition de la *recommandation 97/489/EC du 30 juillet 1997 concernant les transactions effectuées au moyen d'instrument de paiements électroniques et en particulier la relation entre émetteur et titulaire* dans les 15 pays membres de l'Union Européenne.
- 2 **L'objet de l'étude** consistait à analyser dans quelle mesure la recommandation a contribué légalement et dans la pratique à améliorer la situation des titulaires d'un instrument de paiement électronique, et :
 - 2.1 de réaliser une analyse scientifique sur l'état de la transposition de la recommandation dans chaque Etat membre;
 - 2.2 de montrer les différences fondamentales entre les conditions générales en vertu desquelles les instruments de paiement électroniques sont émis et la pratique journalière des émetteurs.
- 3 **5 tâches** étaient dévolues aux chercheurs:
 - 3.1 Analyse de l'état actuel de la législation, des codes de pratiques et de l'auto réglementation ;
 - 3.2 Analyse des contrats conclus entre émetteurs et titulaires ;
 - 3.3 Etude d'un échantillon de transactions d'ouverture de compte ;
 - 3.4 Etude auprès de titulaires d'un instrument de paiement ; et
 - 3.5 Contacts auprès des organisations de consommateurs afin d'identifier les problèmes dont elles ont eu connaissance, liés à la non transposition de la Recommandation.
- 4 **Les résultats de l'étude** sont présentés de la manière suivante:
 - 4.1 Tableaux (45) présentant un résumé du niveau de conformité dans chaque Etat membre pour chaque instrument de paiement électronique ;
 - 4.2 Tableaux (9) présentant une analyse statistique du niveau de conformité dans les Etats membres ;
 - 4.3 Une analyse détaillée de la situation dans chaque pays (en annexe) ; et
 - 4.4 Une appréciation générale sur le niveau de conformité au sein des Etats membres avec une mise en exergue des principaux problèmes.
- 5 Les résultats de l'étude révèlent les **problèmes suivants** :
 - 5.1 Le but de la Recommandation qui est d'offrir une transparence sur les conditions des transactions n'est pas atteint au moins sur quatre aspects :
 - 5.1.1 Insuffisance de l'information fournie par les émetteurs aux titulaires ;
 - 5.1.2 Mauvaise lisibilité de l'information (manque de clarté ou d'accessibilité) ;
 - 5.1.3 Information fournie en temps inopportun ; et
 - 5.1.4 Le niveau de respect varie suivant le type d'instrument de paiement électronique.
 - 5.2 En ce qui concerne les droits et obligations des parties, la transposition de la recommandation est insuffisante sur les points suivants:
 - 5.2.1 L'obligation de limiter la responsabilité du titulaire après notification n'est pas respectée ;
 - 5.2.2 Non respect de l'obligation de restreindre la responsabilité lorsque l'instrument de paiement électronique est utilisé sans présentation physique ou identification électronique ;
 - 5.2.3 Absence d'uniformité parmi les Etats membres sur la notion de faute grave;
 - 5.2.4 La période de préavis pour les modifications à apporter au contrat est souvent inférieure à un mois ;

- 5.2.5 Les dispositions relatives à l'annulation pour les montants indéterminés sont rares ;
 - 5.2.6 Absence de dispositions relatives à la responsabilité de l'émetteur pour les transactions non exécutées ou mal exécutées.
- 5.3 Beaucoup d'émetteurs ne se conforment pas à la recommandation en ce qui concerne le respect des procédures de notification ou de responsabilité après notification en cas de vol ou perte :
- 5.3.1 Certains émetteurs n'expliquent pas la procédure de notification ;
 - 5.3.2 Dans bien des cas, il n'existe aucune possibilité de prouver que la notification a été faite ;
 - 5.3.3 Certains émetteurs n'offrent que des possibilités d'accès limitées aux systèmes de notification, par exemple en restreignant les heures d'ouverture.
- 5.4 Dans la plupart des Etats Membres, la charge de la preuve est placée sur le titulaire, ou au mieux pas mentionnée dans les dispositions contractuelles.
- 5.5 Les modes de résolution des litiges sont inadéquats :
- 5.5.1 Les contrats ne font souvent pas référence aux organes de résolution des litiges ni ne fournissent d'informations relatives aux personnes à contacter ;
 - 5.5.2 Les organes de résolution des litiges sont souvent internes et il y a donc un manque d'indépendance ;
 - 5.5.3 Les coûts liés à une action judiciaire sont élevés et la procédure d'une lenteur extrême.

2. Introduction

This research project examines the rights and obligations of holders of Electronic Payment Instruments¹ (EPIs) and the relationship between holders and issuers. For many years it has been recognised that there is no consistency between Member States as to the law relating to these matters, and that in practice many holders of EPIs are subjected to obligations and liabilities which ought more properly to be borne by issuers. In 1987 the Commission issued its first Recommendation on this topic², and ten years later issued *Commission Recommendation 97/489/EC of 30 July 1997 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder*³, a substantial revision and extension of the 1987 Recommendation. The general impression of most commentators on this topic is that there is still a substantial degree of non-compliance with the 1997 Recommendation, and that even though the practices of issuers have changed over time, many of the problems identified in these Recommendations still exist.

The aims of the study were to investigate how far the 1997 Recommendation has been effective in improving the position of EPI holders, both as a matter of substantive law and in actual practice. In particular, the research aimed:

- a. to provide the European Commission with a scientific analysis of the way the Recommendation has been implemented in each Member State;
- b. in particular, to establish whether there are any major differences between the terms and conditions on which EPIs are issued and the day-to-day practice of issuers, both on a national basis and in relation to the different types of EPI; and

Thus although this study sets out a theoretical analysis of the law in each Member State and analyses the contractual terms and conditions for a range of EPIs in each country, the most interesting and useful results are probably the analysis of the extent to which issuers in practice comply with national law and the Recommendation, and of the knowledge and experiences of holders of EPIs.

In order to meet these aims, a methodology was adopted which investigated the law and practice in each Member state via five separate routes:

1. Desk-based research into the current state of the law, Codes of Practice and self-regulation relating to these aspects of EPIs.
2. An analysis of the contractual terms and conditions which define and govern the relationship between holders and issuers.

¹ Recommendation 97/489/EC, OJ L208 02/08/1997 p. 0052

Art. 1(1)

‘This Recommendation applies to the following transactions:

- (a) transfers of funds, other than those ordered and executed by financial institutions, effected by means of an electronic payment instrument;
- (b) cash withdrawals by means of an electronic payment instrument and the loading (and unloading) of an electronic money instrument, at devices such as cash dispensing machines and automated teller machines and at the premises of the issuer or an institution who is under contract to accept the payment instrument.’

Art. 2(1):

“‘electronic payment instrument’ means an instrument enabling its holder to effect transactions of the kind specified in Article 1(1). This covers both remote access payment instruments and electronic money instruments’

² Commission Recommendation 87/598/EEC of 8 December 1987 on a European Code of Conduct relating to electronic payment (Relations between financial institutions, traders and service establishments, and consumers) *OJ L365* , 24/12/1987 p. 0072

³ OJ L208 02/08/1997 p. 0052.

3. Surveys of sample account-opening transactions, to determine in particular whether potential holders were provided with the information required by the Recommendation, whether that information was provided at the appropriate time and whether it was provided in a comprehensible form.
4. Surveys of holders of EPIs to determine whether their experiences of the operation of the relationship between themselves and the EPI issuer indicated compliance in practice with the requirements of the Recommendation.
5. Contacts with consumer bodies to identify non-compliance issues reported to them, and the results of any investigations undertaken by those bodies which would add further information to the study.

The Appendices to this study set out the results of these investigations in detail.

From this information the researchers were able to produce two main outputs:

- A substantial series of comparative tables, assessing compliance with the Recommendation by EPI and country; and
- An overall assessment of compliance across the Member States.

Readers of this study should be aware, however, that its findings need to be read subject to the following notes of caution:

- Although the analysis of the substantive law and the contractual terms and conditions for EPIs in each Member State is based on definitive data from published sources, the results of the surveys of EPI holders should not be treated as definitive statements of issuer practice, particularly in relation to any one type of EPI. The sample sizes for these surveys are necessarily small, given the scope of the study, and are best viewed as producing an overall indication of issuer practice for each Member State and some evidence (but no more than that) of the practice in relation to particular types of EPI. Readers should note that an unrepresentative sample for a particular type of EPI could distort the findings for that type in that Member State.
- Regarding the 45 tables provided, the following note of caution should apply: the tables have been set up using the data collected in the frame of the five work packages of the study. They are a summary and an interpretation by the project leaders of the source material and the results contained in the tables may not be taken as such. The consortium therefore strongly encourages reading the tables in parallel with the WP reports, which give a more balanced picture of the result of the study. The information should be taken with care and the consortium suggests to avoid taking any conclusion based only on those tables.
- As indicated at the relevant points of this study, the results of EPI holder surveys identify the knowledge and understanding of holders on a particular issue. Often, holders were ignorant about some aspects of these complex issues - for example, several UK holders of EPIs confused replacement cards with unsolicited EPIs - and thus did not answer some questions. The researchers could identify little difference in ignorance levels between countries where extensive information in compliance with the Recommendation is provided, and those where little information is provided, which indicates that providing information to holders may not be enough in itself.

Summary of the 5 work packages

These consisted of the following:

WP 1: Analysis of the steps taken by the Member States to implement the Recommendation

WP1 consisted in analysis relevant legislation and draft legislation, codes of conducts, case law, arbitration decisions.

WP 2: Analysis of the contracts between issuers and holders

WP2 consisted in analysing sample contracts of EPIs and to check whether the obligations set forth in the recommendation were complied with by issuers.

WP 3: Contacts with consumer panels and interest groups

WP3 consisted in contacting consumer associations and/or consumers groups specifically set up to analyse the implementation of the recommendation (whenever existing) in order to collect information on the complaints from consumers regarding the use of EPIs.

WP 4: Anonymous on-the-spot surveys

WP4 consisted in carrying out surveys, first, beside issuers and their practice regarding the delivery of EPIs, and second, beside holders and the way they use their EPIs.

WP 5: Statistical analysis

WP5 consisted in identifying the provisions of the recommendation that were properly implemented in the countries; in describing the extent of compliance per country, per issuer and per EPI; and in analysing if significant relations exist between characteristics of EPIs, issuers and countries on the one hand, and their “performance” in complying with the recommendation on the other hand.

WP 6: Presentation of results

WP6 consisted in providing to the European Commission an initial progress assessment report, an interim report, and a final report.

WP 7: Management tasks

WP7 consisted in ensuring the co-ordination of the partners and the financial co-ordination; in ensuring the contacts with the European Commission, in ensuring the functioning of the Intranet created between the partners of the study, in following the work performed by each partner.

Information about the way the information was collected

Information for WP 1-3 was collected on a qualitative basis. Documents were acquired by survey personnel posing as customers for the EPIs, with contracts for approximately 12-15 EPIs analysed per country. The issuers were not alerted to the existence of the survey. The surveys for WP4 comprised two separate surveys, completed by members of the public.

- 1) A detailed survey of persons using each of the 12-15 specific issued EPIs analysed in each country (the "Issuers Survey"). This survey aided in the evaluation of the specific EPIs.
- 2) A general survey of people holding EPIs (the "Holders Survey"), a questionnaire on the EPI experiences of approximately 30-50 people per country.

Information about the per country reports

Belgium

Author: Laetitia ROLIN, Researcher, CRID University of Namur, Belgium

Number of pages: 100

Denmark

Author: Susanne KARSTOFT, Ph.D., Associate professor in contract law and computer law, Department of Private Law, School of law, University of Aarhus, Denmark

Number of pages: 164

Germany

Authors: Mey Marianne UNRUH & Ingo BEILMANN, Academic assistants (Co-ordination: Prof. Dr. Thomas HOEREN), ITM Institut für Informations- Telekommunikations- und Medienrecht, University of Münster, Germany

Number of pages: 119

Greece

Author: Dr Zoi KARDASIADOU, Centre of International and European Economic Law, Thessaloniki Greece

Number of pages: 163

Spain

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Number of pages: 157

France

Authors: Pricilla DE LOCHT, Researcher, CRID, University of Namur, Belgium; Stéphanie RODRIGUEZ Post Graduate student, University of Strasbourg, France

Number of pages: 112

Ireland

Authors: Maeve McDONAGH & Mary DONNELLY Lecturers in Law, Law Department University College Cork, Ireland

Number of pages: 94

Italy

Author: Giusella FINOCCHIARO, Assistant Professor, University of Bologna, School of Law, Italy

Number of pages: 123

Luxembourg

Authors: Didier GOBERT, Researcher and Assistant, CRID, University of Namur, Belgium; Etienne WERY, Member of the Brussels Bar, Researcher, CRID, University of Namur, Belgium.

Number of pages: 96

Netherlands

Authors: Ir. A.A.P. SCHUDELARO, Researcher, Centre for Law, Public Administration and informatization, Tilburg University, The Netherlands; Professor J.E.J. PRINS, Professor of Law and Informatization at the Centre for Law, Public Administration and Informatization, Tilburg University, The Netherlands

Number of pages: 83

Austria

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Number of pages: 81

Portugal

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Number of pages: 95

Finland

Author: Prof. Olav TORVUND, Norwegian Research Centre for Computers and Law, University of Oslo, Norway

Number of pages: 84

Sweden

Author: Prof. Olav TORVUND, Norwegian Research Centre for Computers and Law, University of Oslo, Norway

Number of pages: 90

United Kingdom

Author: Dr Simon NEWMAN, Research Assistant, IT Law Unit, Centre for Commercial Law Studies Queen Mary College, University of London, United Kingdom

Number of pages: 104

3. Research findings

3.1. Compliance per EPI in the EC

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DEFINITION OF EACH EPI

Debit card: payment instrument that allows payment by the direct and normally online debit of an account;

Deferred debit card: payment instrument that allows payment by a deferred debit of an account, *i.e.* the account is only debited after a certain period of time defined in the contract between the parties;

Credit card: payment instrument that allows purchases to be made on a credit basis. It enables the holder to make purchases from any retailer accepting the credit card and repay the total sum spent to the credit card issuer at the time and over the period of time specified in the contract;

Company card: payment instrument that allows the client to buy some defined products (like petrol) or to shop in defined shopping places (such as supermarkets of the same group). This instrument works generally under a deferred debit scheme;

Phone banking: service that allows the client to use the phone to carry out various banking operations. This includes the possibility to make payments by making a credit transfer from a banking account;

Home banking: service that allows the client to carry out various banking operations (including payments by credit transfers) using his computer with a point to point connection to the bank using the phone line without using the Internet network;

Internet banking: service that allows the client to carry out various banking operations (including payments by credit transfers) with his computer using the Internet network;

Electronic money instrument: reloadable payment instrument which stores monetary value and from which an amount is deducted each time a payment is made. The reloadable character of the instrument allows it to be reloaded with new monetary units each time it is needed;

Electronic token: monetary value stored on the memory of a computer that allows payment to be made in a digital environment like the Internet.

SUMMARY OF THE TABLES

Debit cards

Main problems identified regarding *debit cards* are:

- lack of information provided to holders,
- cases of non-respect for the limitations of holder's liability in case of loss or fraudulent use of his card (frequently banks and Courts presume holder's negligence),
- sometimes, a 24 hours a day available service for notification does not exist and the holder receive no mean to prove the realization of the notification,
- It happens that holders disclose their Pin codes to third parties
- Surveys also show that some unsolicited EPI were provided to holders;
- in most cases, the burden of proof lies on issuers. However, the practice reveals that issuers often bring their internal records and holders must provide evidence to the contrary
- Denmark is the only country that appears to be fully compliant with the recommendation.

Deferred debit cards

Main problems identified regarding *deferred debit cards* are:

- lack of information provided to holders
- cases of non-respect for the limitations of holder's liability in case of loss or fraudulent use of his card (frequently banks and Courts presume holder's negligence),
- sometimes, a 24 hours a day available service for notification does not exist and the holder receive no mean to prove the realization of the notification,
- It happens that holders disclose their Pin codes to third parties,
- surveys also show that some unsolicited deferred debit cards were provided to the holder,
- in most cases, the burden of proof lies on issuers. However, the practice reveals that issuers often bring their internal records and holders must provide evidence to the contrary,
- misuses in case of remote sales are too easy,
- sometimes surveys show that consumers are not enough informed about the existing dispute resolution mechanisms,
- Denmark is the only country that appears to be fully compliant with the recommendation.

Credit cards

Main problems identified regarding *credit cards* are:

- lack of information provided to holders,
- cases of non-respect for the limitations of holder's liability in case of loss or fraudulent use of his card (banks and Courts presume holder's negligence),
- It happens that holders disclose their Pin codes to third parties,
- misuses in case of remote sales are too easy,
- a case of unsolicited increase of credit card limit was reported,
- a 24 hours a day notification service does not always exist and the holder receives no mean to prove the notification,
- in some cases, insufficient information is given to holders about the notification procedure,
- generally, the burden of proof lies on issuers. However, the practice reveals that issuers often bring their internal records and holders must provide evidence to the contrary,
- sometimes surveys show that consumers are not enough informed about the existing dispute mechanisms,
- Denmark is the only country that appears to be fully compliant with the recommendation.

Company cards

Main problems identified regarding *company cards* are:

- lack of information provided to holders,
- cases of non-respect for the limitations of holder's liability in case of loss or fraudulent use of his card,
- surveys show a case of unsolicited company card,
- It happens that holders disclose their Pin codes to third parties,
- a 24 hours a day notification service does not always exist and the holder receives no mean to prove the notification,
- generally, the burden of proof lies on issuers. However, the practice reveals that issuers often bring their internal records and holders must provide evidence to the contrary,
- compliance is not complete for the settlement of disputes,
- Denmark is the only country that appears to be fully compliant with the recommendation.

Electronic money instrument

Main problems identified regarding *EMI* are:

- lack of information provided to holders,
- limitations of the holder's liability are not always respected in case of loss or fraudulent use,
- a 24 hours a day notification service does not always exist and the holder receives no mean to prove the notification,
- In most cases, the burden of proof lies on issuers,
- compliance is not complete for the settlement disputes,
- Denmark is the only country that appears to be fully compliant with the recommendation.

Phone banking

Main problems identified regarding *phone banking* are:

- when problems with information appear, it is related to: information provided orally only, information provided lately, information not provided or only after request, and lack of clarity;
- often, the holder's liability before notification is higher than stated in the recommendation, or the limit is not stated. In some cases, the holder is fully liable before notification;
- often, there is no 24 hours notification service and no mean to prove the notification;
- very often, the burden of proof is not reversed in favor of the holder;
- Denmark is the only country that appears to be fully compliant with the recommendation.

Home banking

Main problems identified regarding *home banking* are:

- problems regarding the quality of information provided (unclear, lack of understanding);
- in some cases, full liability of the holder before notification; in others, the limit of 150 euros is not complied with;
- often, no 24 hours notification service, no mean to prove the notification;
- often, in the legislation there is no reversal of the proof in favor of the holder, although courts seem to apply the reversal);
- Denmark is the only country that appears to be fully compliant with the recommendation.

Internet banking

Main problems identified regarding *Internet banking* are:

- regarding the information provided, sometimes, late disclosure of information, or only after request. In some cases, lack of quality of the language and format used, and language often too technical;
- in some countries, the limit of 150 euros can be freely exceeded, or there is no limit stated;
- often, no 24 hours notification service, no mean to prove the notification;
- often, in the legislation there is no reversal of the proof in favor of the holder, although courts seem to apply the reversal);
- Denmark is the only country that appears to be fully compliant with the recommendation.

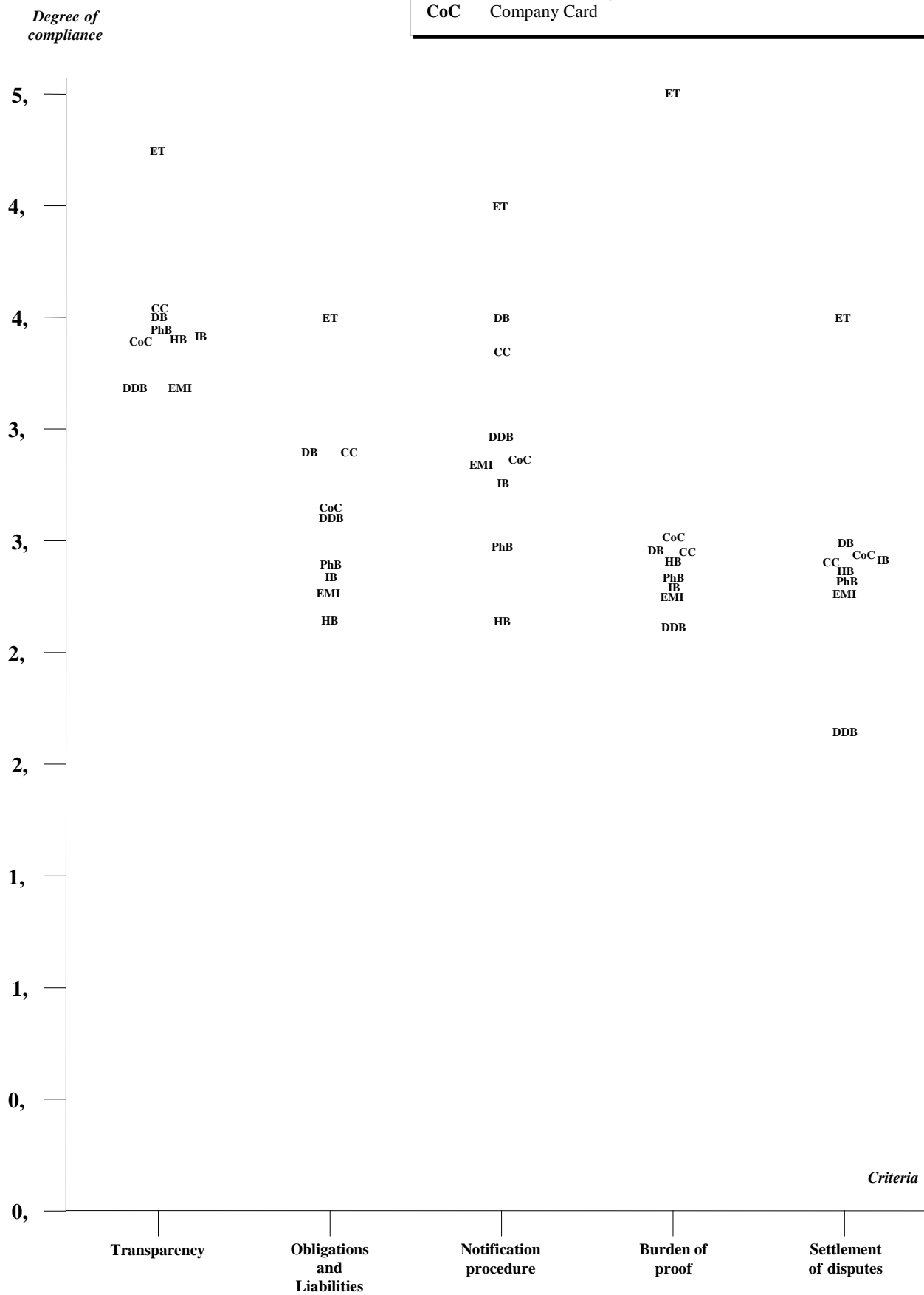
Electronic tokens

Main problems identified regarding *electronic tokens* are: (e-tokens available in 4 countries only)

- no maximum amount of liability (although liability limited itself by the storage limit);
- no requirement regarding the mean to prove the notification;
- no reversal of the burden of proof in favor of the holder.

Compliance per EPI

DC	Debit Card	PhB	Phone Banking
DDC	Deffered Debit Card	HB	Home Banking
CC	Credit Card	IB	Internet Banking
EMI	Electronic Money Instruments	ET	Electronic Tokens
CoC	Company Card		



See, in **appendices 2**, the 45 tables presenting the compliance with the recommendation, for each EPI, each criteria, each country and each work package.

CAUTION WHILE READING THE TABLES:

*“The tables have been set up using the data collected in the frame of the five work packages of the study. Researchers used their knowledge of national law and their experience to treat the information. This sometimes conducts to subjective interpretation. In addition tables are a subjective interpretation by the project leaders of the source material (national work package reports) collected and already treated. **Project leaders assume the sole responsibility of the conclusions set up in the tables. The results contained in those tables may however not be taken as such and the reader should analyse them in parallel with the per country reports.** The work package reports give a more balanced picture of the result of the study and should be read in parallel. The information contained in the tables must be taken with care. Any conclusion based only on those tables should be avoided.”*

3.2. Compliance per country across the EC

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Summary per country

Caution:

As indicated, the following notes are only a summary. This MUST be read in connection with all the other informations provided in the study.

Belgium

In Belgium there is no specific legislation aimed at implementing the Recommendation but a draft law was adopted last July. Although there is general compliance as to the information provided this information is not always provided at the specified time.

Particular problems: the burden of proof is not reversed

Denmark

There is specific legislation in Denmark to implement the Recommendation. Denmark shows a very high level of compliance.

Germany

In Germany there is no specific legislation to implement the Recommendation nor are there codes of conduct. The supervisory body does however publish statements and recommendations from time to time. The contracts are strongly influenced by the framework agreements. There are dispute resolution mechanisms in place.

Particular problem areas include:

- Lack of specific information
- Liability after notification (potential liability for 10% of the damage when the holder has been slightly negligent)
- The burden of proof is reversed but not strictly followed (in practice reversal to the disadvantage of the holder)

Greece

There is no legislation aimed specifically at implementing the Recommendation. The Banking Code includes some provisions. There are dispute resolution mechanisms.

Particular problem areas:

- The terms provided are not always clear and fair
- Liability after notification
- The burden of proof is in practice not reversed
- Notification must be in writing
- The holder is not always informed of the dispute resolution mechanisms

Spain

There is no specific legislation aimed at implementing the Recommendation

Particular problem areas:

- Information is not supplied at the required time or in the form required
- Liability after notification

France

In France there is no specific legislation to adopt the Recommendation. There are several dispute resolution bodies.

Particular problem areas:

- Post transaction information is not always provided
- The burden of proof is not legally reversed.

Ireland

There is no specific legislation aimed at implementing the Recommendation. The ECSA Code of Practice covers credit and debit cards but does not cover other forms of electronic payment instrument.

Particular problem areas:

- Information is often very technical and post transaction information is not always supplied
- The burden of proof is not reversed
- The holder is not always aware of the dispute resolution mechanisms

Italy

There is no specific legislation aimed at implementing the Recommendation.

Particular problem areas:

- Required information is not always provided
- Liability after notification
- Notification must be in writing
- No specific dispute resolution mechanisms
- The burden of proof is not reversed

Luxembourg

There is no specific legislation to implement the Recommendation but the Law of August 14, 2000 on e-commerce contains some provisions implementing the recommendation. There is a dispute resolution body.

Particular problem areas:

- The information is provided in an unclear manner
- Liability after notification
- burden of proof is reversed by the law on e-commerce but efficiency under discussion
- The holder is not always informed of the dispute resolution mechanisms

The Netherlands

There is no specific legislation aimed at implementing the Recommendation nor is there a Code of Conduct. There is a specific dispute resolution mechanism.

Particular problem areas:

- The burden of proof is reversed but in practice, holders are totally dependant on the data logged by the issuer (bring forward counter-proof is almost impossible)
- Liability after notification

Austria

In Austria there is no legislation aimed at specifically implementing the Recommendation. The contracts between issuers and holders are strongly influenced by the issuer's framework agreement. Complaints can be filed with consumer protection organisations.

Particular problems:

- The transparency provisions
- Liability after notification
- The burden of proof is not effectively reversed. There are still circumstances where the holder may be called upon to give evidence that he or she did not act negligently

Portugal

There is no specific legislation aimed at implementing the Recommendation.

Particular problem areas:

- The information provisions often lack clarity
- The liability of the holder is not limited
- Notification must be in writing
- The burden of proof is not reversed (major subject debated on Court)
- The dispute resolution mechanisms do not appear to be adequate
- The holder is not always informed of the dispute resolution mechanisms

Finland

In Finland there is no specific legislation aimed at implementing the Recommendation

Particular problem areas:

- The information is provided in small print
- Liability after notification

Sweden

There is no specific legislation aimed at implementing the Recommendation. There is a dispute resolution mechanism.

Particular problem areas: no limit on holder's liability

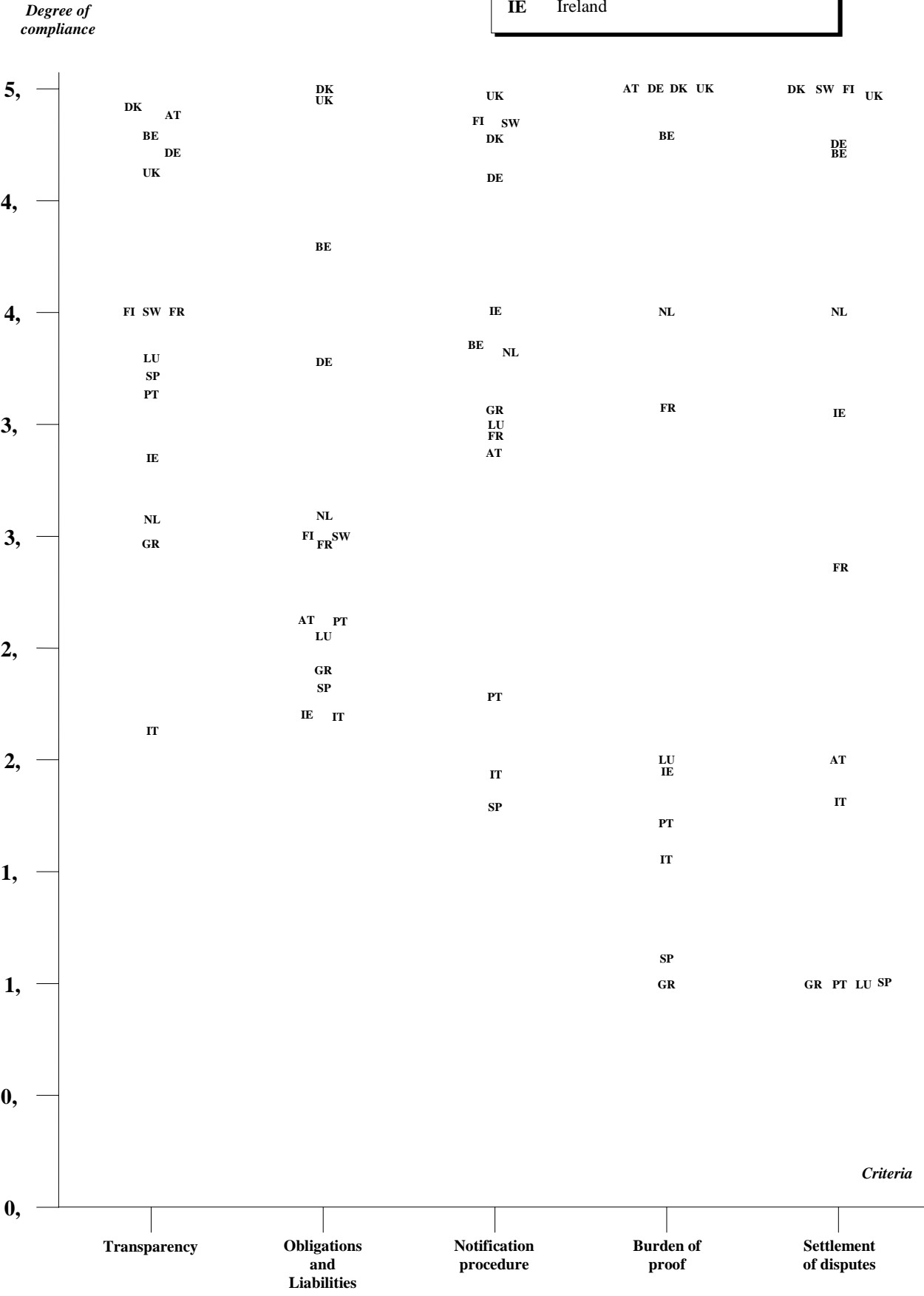
United Kingdom

There is no specific legislation aimed at implementing the Recommendation. Although the Banking Code implements many of the provisions this is a voluntary code which is followed by banks and building societies. It does not therefore apply to commercial issuers. The Banking Ombudsman and internal dispute resolution mechanisms provide a reasonably effective means of dispute resolution.

Particular problem areas: liability provisions in internet/phone banking contracts.

Compliance per country

AT	Austria	IT	Italy
BE	Belgium	LU	Luxemburg
DK	Denmark	NL	Netherlands
FI	Finland	PT	Portugal
FR	France	SP	Spain
DE	Germany	SW	Sweden
GR	Greece	UK	United Kingdom
IE	Ireland		



Reading the nine tables (one per EPI) “Compliance across the EC”

For each EPI studied, a single table presents at country and European level the average compliance of the EPI towards the Recommendation. A compliance mark –between 1 (very weak) and 5 (very strong) is provided for each of the 5 main criteria of the Recommendation: "transparency of conditions for transactions", "obligations and liabilities of the parties to the contract", "notification procedure and liability of the issuers after notification", "burden of proof" and "settlement of disputes".

Each table provides four types of information:

1. The average country marks for each of the 5 criteria considered separately (2d to 6th column)
2. The average country mark for the 5 criterion considered together (7th column “General compliance”)
3. The average marks at European level for each of the 5 criteria considered separately (last line of 2d to 6th column)
4. The average mark at European level for the 5 criterion considered together (last line, 7th column “General compliance”).

For the four types of information, the average corresponds to the sum of all the marks allocated in the statistical questionnaire divided by the total number of those marks al.

" If it occurs that some EPIS are not scored at country level, the reason is that the partners did not collect enough information on the selected EPIs in the frame of WP2, WP3 and WP4 for being able to correctly assess their compliance towards the 5 criteria of the Recommendation. Indeed, this is justified by the fact that a certain leeway was given to the partners in the selection of the sample of EPIs analysed, as well as in the selection of the contract analysed that can lead to a variable quantity of information collected for each EPI. In such a case, no scores have been integrated for any of the 5 criterias."

"If it occurs that the compliance of one EPI is not scored towards at least one single criteria of the Recommendation, no score of general compliance is given in order to avoid to insert a mark not valid from a statistical point of view as it does not represent the average country mark for the 5 criteria considered all together".

When reading the tables, we can see that there is a lack of scoring for the criteria "burden of proof" in Sweden and in Finland. This lack of scoring is justified by the national reporter as follows: "The burden of proof is not regulated in any of the contracts, and is in our opinion not suited for contractual regulation. The art 7(2)e is the only part of the recommendation that deals with some kind of evidential questions, but it is not a provision regulating burden of proof - at least not according to our understanding of the concept. This means that it is not possible to answer if the contracts are in compliance with the recommendation on these issues."

COMPLIANCE ACROSS THE EC **CONSIDERED EPI :** **DEBIT CARD**

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Belgium (BE)	5	4,25	4,25	5	5	4,7
Denmark	5	5	4,8	5	5	4,97
Germany	5	5	5	5	5	5
Greece	3	2,6	4	1	1	2,3
Spain	3,8	2,6	2,3	1,2	1	2,2
France	4	3	4	4	2,8	3,6
Ireland	3,4	2,2	4,8	1,8	4,2	3,3
Italy	1	2	2	1	2	1,6
Luxembourg	3,3	2,7	4	2	1	2,5
The Netherlands	2	4	3	4	4	3,2
Austria	5	4	4	5	2	4
Portugal	4	3,4	3,5	2,25	1	2,8
Finland	4	3	5		5	
Sweden	4	3	5		5	
UK	5	5	5	5	5	5
Europe 15	4	3,39	4	2,97	2,99	3,48

For each country the marks indicated in the 2d to 6th columns correspond to the average value of all marks given at country level to the EPI in the statistical questionnaire for the criterion considered.

The line "Europe 15" gives the average value of all marks at country level to the EPI for each criterion considered.

The "general compliance" represents the average value of all marks given at country level to the EPI in the statistical questionnaire, for all criteria considered together.

**COMPLIANCE ACROSS CONSIDERED EPI : DEFFERED DEBIT
THE EC CARD**

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Belgium (BE)	5	4	5	5	5	4,8
Denmark	5	5	5	5	5	5
Germany	5	5	5	5	5	5
Greece	3,4	2,7	3,9	1	1	2,4
Spain	3,75	2,6	2,2	1,2	1	2,1
France	4	3	4	4	2,8	3,6
Ireland	1	1	3	1,5	1	1,5
Italy	2,2	2,8	2,8	2	2	2,4
Luxembourg						
The Netherlands	2,5	3,5	4,5	4	4	3,7
Austria	5	4	4	5	2	4
Portugal	3,7	3	2,9	2	1	2,5
Finland	4	3	5		5	
Sweden						
UK						
Europe 15	3,71	3,1	3,47	2,61	2,13	3

For each country the marks indicated in the 2d to 6th columns correspond to the average value of all marks given at country level to the EPI in the statistical questionnaire for the criterion considered.

The line "Europe 15" gives the average value of all marks at country level to the EPI for each criterion considered.

The "general compliance" represents the average value of all marks given at country level to the EPI in the statistical questionnaire, for all criteria considered together.

**COMPLIANCE ACROSS THE CONSIDERED EPI : CREDIT CARD
EC**

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Belgium (BE)	3	5	5	2	1	3,2
Denmark	4,9	5	4,8	5	5	4,9
Germany	5	5	5	5	5	5
Greece	3,25	2,8	4	1	1	2,4
Spain	3,75	2,6	2,2	1,2	1	2,1
France	4	3	4	4	2,8	3,6
Ireland	3,1	2,4	3,9	2,6	3,9	3,2
Italy	2	2,5	2	2	2	2,1
Luxembourg	4	3	4	2	1	2,8
The Netherlands	4	3	4	4	4	3,8
Austria	5	3	3	5	2	3,6
Portugal	4	3	2,9	2	1	2,6
Finland	4	3	5		5	
Sweden	4	3	5		5	
UK	5	5	5	5	5	5
Europe 15	4,02	3,39	3,85	2,96	2,91	3,43

For each country the marks indicated in the 2d to 6th columns correspond to the average value of all marks given at country level to the EPI in the statistical questionnaire for the criterion considered.

The line "Europe 15" gives the average value of all marks at country level to the EPI for each criterion considered.

The "general compliance" represents the average value of all marks given at country level to the EPI in the statistical questionnaire, for all criteria considered together.

**COMPLIANCE ACROSS THE CONSIDERED EPI : E-MONEY
EC INSTRUMENT**

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Belgium (BE)	4,7	4,3	4,3	5	5	4,7
Denmark						
Germany	4	4	5	5	5	4,6
Greece						
Spain	3	3	2	1,2	1	2
France						
Ireland						
Italy	2,5	2	2,5	1	1,5	1,9
Luxembourg	4	2,3	4	2	1	2,6
The Netherlands	4	4	4	4	4	4
Austria	5	2	3	5	2	3,4
Portugal	3	2	1	1	1	1,6
Finland	4	3	5		5	
Sweden	4	3	5		5	
UK						
Europe 15	3,71	2,77	3,33	2,75	2,77	3,19

For each country the marks indicated in the 2d to 6th columns correspond to the average value of all marks given at country level to the EPI in the statistical questionnaire for the criterion considered.

The line "Europe 15" gives the average value of all marks at country level to the EPI for each criterion considered.

The "general compliance" represents the average value of all marks given at country level to the EPI in the statistical questionnaire, for all criteria considered together.

**COMPLIANCE ACROSS THE CONSIDERED EPI : COMPANY CARD
EC**

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Belgium (BE)						
Denmark	5	5	4,5	5	5	4,9
Germany	4,3	3	4,3	5	4	4,2
Greece	4	2	3	1	1	2,2
Spain	2,7	1,7	1,3	1	1	1,5
France						
Ireland	4,5	3	3	1,5	1	2,6
Italy	3	3	3	2	1	2,4
Luxembourg	3,5	3	3,5	2	1	2,6
The Netherlands						
Austria	4	4	3	5	2	3,7
Portugal	2,5	2	1	1	1	1,5
Finland	4	3	3,5		5	
Sweden	4	3	4,25		5	
UK	5	5	5	5	5	5
Europe 15	3,89	3,15	3,36	3,1	2,93	3,29

For each country the marks indicated in the 2d to 6th columns correspond to the average value of all marks given at country level to the EPI in the statistical questionnaire for the criterion considered.

The line "Europe 15" gives the average value of all marks at country level to the EPI for each criterion considered.

The "general compliance" represents the average value of all marks given at country level to the EPI in the statistical questionnaire, for all criteria considered together.

**COMPLIANCE ACROSS THE CONSIDERED EPI : PHONE BANKING
EC**

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Belgium (BE)	5	4	3	5	5	4,4
Denmark	4,8	5	4,5	5	5	4,9
Germany	5	3	5	5	5	4,3
Greece	2	1,75	3	1	1	1,75
Spain	4	1,8	1	1	1	1,75
France	4	3	2	3,2	3	3
Ireland	4	2	5	2	5	3,6
Italy	2	2,5	1,5	1,5	2	1,9
Luxembourg	4	2	3	2	1	2,4
The Netherlands	3,5	3	4	4	4	3,7
Austria	5	2,3	3	5	2	3,5
Portugal	3,7	2,1	1,6	1,3	1	1,9
Finland	4	3	5		5	
Sweden						
UK	4,2	5	5	5	5	4,8
Europe 15	3,94	2,9	2,98	2,83	2,82	3,1

For each country the marks indicated in the 2d to 6th columns correspond to the average value of all marks given at country level to the EPI in the statistical questionnaire for the criterion considered.

The line "Europe 15" gives the average value of all marks at country level to the EPI for each criterion considered.

The "general compliance" represents the average value of all marks given at country level to the EPI in the statistical questionnaire, for all criteria considered together.

**COMPLIANCE ACROSS THE CONSIDERED EPI : HOME BANKING
EC**

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Belgium (BE)						
Denmark	4,7	5	4,7	5	5	4,9
Germany	5	3	3	5	5	3,8
Greece	2	1	1	1	1	1,2
Spain	4	2	1	1	1	1,8
France	4	2,9	2,25	2,6	2,6	2,9
Ireland	5	2	5	1	5	3,6
Italy	1	2	1	1	2	1,4
Luxembourg	4	2	2	2	1	2,2
The Netherlands	3,3	2,7	3,3	4	4	3,5
Austria	5	2	3	5	2	3,4
Portugal	3,3	1,7	1	1	1	1,6
Finland						
Sweden						
UK	4	5	5	5	5	4,8
Europe 15	3,91	2,65	2,63	2,91	2,87	2,98

For each country the marks indicated in the 2d to 6th columns correspond to the average value of all marks given at country level to the EPI in the statistical questionnaire for the criterion considered. The line "Europe 15" gives the average value of all marks at country level to the EPI for each criterion considered.

The "general compliance" represents the average value of all marks given at country level to the EPI in the statistical questionnaire, for all criteria considered together.

**COMPLIANCE
THE EC**

**ACROSS CONSIDERED EPI : INTERNET
BANKING**

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Belgium (BE)	5	3,7	3	5	5	4,3
Denmark	5	5	5	5	5	5
Germany	5	3	5	5	5	4,3
Greece	2,5	2	3	1	1	1,9
Spain	4	1,75	1	1	1	1,75
France	4	2,8	2,5	2,7	3	3
Ireland	4	2	5	1,5	5	3,5
Italy	2,6	1,8	1,4	1,6	1,8	1,8
Luxembourg	4	2,75	3,5	2	1	2,7
The Netherlands	3	2	4	4	4	3,4
Austria	5	2	4	5	2	3,6
Portugal	3,4	2,1	1,6	1,3	1	1,9
Finland	4	3	5		5	
Sweden	4	3	5		5	
UK	4,1	5	5	5	5	4,8
Europe 15	3,92	2,83	3,27	2,79	2,92	3,15

For each country the marks indicated in the 2d to 6th columns correspond to the average value of all marks given at country level to the EPI in the statistical questionnaire for the criterion considered.

The line "Europe 15" gives the average value of all marks at country level to the EPI for each criterion considered.

The "general compliance" represents the average value of all marks given at country level to the EPI in the statistical questionnaire, for all criteria considered together.

**COMPLIANCE ACROSS THE CONSIDERED EPI : ELECTRONIC
EC TOKENS**

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Belgium (BE)						
Denmark						
Germany	5	5	5	5	5	5
Greece						
Spain						
France						
Ireland						
Italy						
Luxembourg						
The Netherlands						
Austria	5	2	4	5	2	3,6
Portugal						
Finland						
Sweden						
UK	4	4	4	5	4	4,2
Europe 15	4,75	4	4,5	5	4	4,45

For each country the marks indicated in the 2d to 6th columns correspond to the average value of all marks given at country level to the EPI in the statistical questionnaire for the criterion considered.

The line "Europe 15" gives the average value of all marks at country level to the EPI for each criterion considered.

The "general compliance" represents the average value of all marks given at country level to the EPI in the statistical questionnaire, for all criteria considered together.

Reading the fifteen tables (one per country) **“Compliance per country across the EC”**

For each country studied, a single table presents at national level the average compliance of the 9 EPIs towards the Recommendation. A compliance mark –between 1 (very weak) and 5 (very strong) is provided for each of the 5 main criteria of the Recommendation: "transparency of conditions for transactions", "obligations and liabilities of the parties to the contract", "notification procedure and liability of the issuers after notification", "burden of proof" and "settlement of disputes".

Each table provides three types of information:

1. The average mark for each EPI and each criteria considered separately (column B to F)
2. The average mark of each EPI for the 5 criteria considered together (column H “General compliance”)
3. The average marks of the 9 EPIs considered together for each of the 5 criteria considered separately (last line of column B to F “Criteria Compliance”).

For the three types of information, the average corresponds to the sum of all the marks allocated in the statistical questionnaire divided by the total number of those marks.

" If it occurs that some EPIs are not scored at country level, the reason is that the partners did not collect enough information on the selected EPIs in the frame of WP2, WP3 and WP4 for being able to correctly assess their compliance towards the 5 criteria of the Recommendation. Indeed, this is justified by the fact that a certain leeway was given to the partners in the selection of the sample of EPIs analysed, as well as in the selection of the contract analysed that can lead to a variable quantity of information collected for each EPI. In such a case, no scores have been integrated for any of the 5 criterias."

"If it occurs that the compliance of one EPI is not scored towards at least one single criteria of the Recommendation, no score of general compliance is given in order to avoid to insert a mark not valid from a statistical point of view as it does not represent the average country mark for the 5 criteria considered all together".

When reading the tables for Sweden and Finland, we can see that there is a lack of scoring for the criteria "burden of proof". This lack of scoring is justified by the national reporter as follows: "The burden of proof is not regulated in any of the contracts, and is in our opinion not suited for contractual regulation. The art 7(2)e is the only part of the recommendation that deals with some kind of evidential questions, but it is not a provision regulating burden of proof - at least not according to our understanding of the concept. This means that it is not possible to answer if the contracts are in compliance with the recommendation on these issues."

COUNTRY COMPLIANCE : BELGIUM						
	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Debit card	5	4,25	4,25	5	5	4,7
Deffered debit card	5	4	5	5	5	4,8
Credit card	3	5	5	2	1	3,2
E-Money instrument	4,7	4,3	4,3	5	5	4,7
Company card						
Phone banking	5	4	3	5	5	4,4
Home banking						
Internet banking	5	3,7	3	5	5	4,3
Electronic tokens						
Criteria Compliance	4,79	4,29	3,86	4,79	4,71	

COUNTRY COMPLIANCE : DENMARK

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Debit card	5	5	4,8	5	5	4,97
Deffered debit card	5	5	5	5	5	5
Credit card	4,9	5	4,8	5	5	4,9
E-Money instrument						
Company card	5	5	4,5	5	5	4,9
Phone banking	4,8	5	4,5	5	5	4,9
Home banking	4,7	5	4,7	5	5	4,9
Internet banking	5	5	5	5	5	5
Electronic tokens						
Criteria Compliance	4,92	5	4,78	5	5	

COUNTRY COMPLIANCE : GERMANY

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Debit card	5	5	5	5	5	5
Deffered debit card	5	5	5	5	5	5
Credit card	5	5	5	5	5	5
E-Money instrument	4	4	5	5	5	4,6
Company card	4,3	3	4,3	5	4	4,2
Phone banking	5	3	5	5	5	4,3
Home banking	5	3	3	5	5	3,8
Internet banking	5	3	5	5	5	4,3
Electronic tokens	5	5	5	5	5	5
Criteria Compliance	4,71	3,78	4,6	5	4,77	

COUNTRY COMPLIANCE : GREECE

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Debit card	3	2,6	4	1	1	2,3
Deffered debit card	3,4	2,7	3,9	1	1	2,4
Credit card	3,25	2,8	4	1	1	2,4
E-Money instrument						
Company card	4	2	3	1	1	2,2
Phone banking	2	1,75	3	1	1	1,75
Home banking	2	1	1	1	1	1,2
Internet banking	2,5	2	3	1	1	1,9
Electronic tokens						
Criteria Compliance	2,98	2,4	3,57	1	1	

COUNTRY COMPLIANCE : SPAIN

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Debit card	3,8	2,6	2,3	1,2	1	2,2
Deffered debit card	3,75	2,6	2,2	1,2	1	2,1
Credit card	3,75	2,6	2,2	1,2	1	2,1
E-Money instrument	3	3	2	1,2	1	2
Company card	2,7	1,7	1,3	1	1	1,5
Phone banking	4	1,8	1	1	1	1,75
Home banking	4	2	1	1	1	1,8
Internet banking	4	1,75	1	1	1	1,75
Electronic tokens						
Criteria Compliance	3,71	2,32	1,79	1,11	1,02	

COUNTRY COMPLIANCE : FRANCE

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Debit card	4	3	4	4	2,8	3,6
Deffered debit card	4	3	4	4	2,8	3,6
Credit card	4	3	4	4	2,8	3,6
E-Money instrument						
Company card						
Phone banking	4	3	2	3,2	3	3
Home banking	4	2,9	2,25	2,6	2,6	2,9
Internet banking	4	2,8	2,5	2,7	3	3
Electronic tokens						
Criteria Compliance	4	2,97	3,45	3,58	2,87	

COUNTRY COMPLIANCE : IRELAND

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Debit card	3,4	2,2	4,8	1,8	4,2	3,3
Deffered debit card	1	1	3	1,5	1	1,5
Credit card	3,1	2,4	3,9	2,6	3,9	3,2
E-Money instrument						
Company card	4,5	3	3	1,5	1	2,6
Phone banking	4	2	5	2	5	3,6
Home banking	5	2	5	1	5	3,6
Internet banking	4	2	5	1,5	5	3,5
Electronic tokens						
Criteria Compliance	3,35	2,2	4,1	1,95	3,55	

COUNTRY COMPLIANCE : ITALY

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Debit card	1	2	2	1	2	1,6
Deffered debit card	2,2	2,8	2,8	2	2	2,4
Credit card	2	2,5	2	2	2	2,1
E-Money instrument	2,5	2	2,5	1	1,5	1,9
Company card	3	3	3	2	1	2,4
Phone banking	2	2,5	1,5	1,5	2	1,9
Home banking	1	2	1	1	2	1,4
Internet banking	2,6	1,8	1,4	1,6	1,8	1,8
Electronic tokens						
Criteria Compliance	2,13	2,19	1,94	1,56	1,81	

COUNTRY COMPLIANCE : LUXEMBURG

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Debit card	3,3	2,7	4	2	1	2,5
Deffered debit card						
Credit card	4	3	4	2	1	2,8
E-Money instrument	4	2,3	4	2	1	2,6
Company card	3,5	3	3,5	2	1	2,6
Phone banking	4	2	3	2	1	2,4
Home banking	4	2	2	2	1	2,2
Internet banking	4	2,75	3,5	2	1	2,7
Electronic tokens						
Criteria Compliance	3,8	2,56	3,5	2	1	

COUNTRY COMPLIANCE : THE NETHERLANDS

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Debit card	2	4	3	4	4	3,2
Deffered debit card	2,5	3,5	4,5	4	4	3,7
Credit card	4	3	4	4	4	3,8
E-Money instrument	4	4	4	4	4	4
Company card						
Phone banking	3,5	3	4	4	4	3,7
Home banking	3,3	2,7	3,3	4	4	3,5
Internet banking	3	2	4	4	4	3,4
Electronic tokens						
Criteria Compliance	3,08	3,09	3,82	4	4	

COUNTRY COMPLIANCE : AUSTRIA

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Debit card	5	4	4	5	2	4
Deffered debit card	5	4	4	5	2	4
Credit card	5	3	3	5	2	3,6
E-Money instrument	5	2	3	5	2	3,4
Company card	4	4	3	5	2	3,7
Phone banking	5	2,3	3	5	2	3,5
Home banking	5	2	3	5	2	3,4
Internet banking	5	2	4	5	2	3,6
Electronic tokens	5	2	4	5	2	3,6
Criteria Compliance	4,87	2,62	3,37	5	2	

COUNTRY COMPLIANCE : PORTUGAL

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Debit card	4	3,4	3,5	2,25	1	2,8
Deffered debit card	3,7	3	2,9	2	1	2,5
Credit card	4	3	2,9	2	1	2,6
E-Money instrument	3	2	1	1	1	1,6
Company card	2,5	2	1	1	1	1,5
Phone banking	3,7	2,1	1,6	1,3	1	1,9
Home banking	3,3	1,7	1	1	1	1,6
Internet banking	3,4	2,1	1,6	1,3	1	1,9
Electronic tokens						
Criteria Compliance	3,64	2,61	2,28	1,72	1	

COUNTRY COMPLIANCE : FINLAND

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Debit card	4	3	5		5	
Deffered debit card	4	3	5		5	
Credit card	4	3	5		5	
E-Money instrument	4	3	5		5	
Company card	4	3	3,5		5	
Phone banking	4	3	5		5	
Home banking						
Internet banking	4	3	5		5	
Electronic tokens						
Criteria Compliance	4	3	4,86		5	

The burden of proof is not regulated in any of the contracts, and is in our opinion not suited for contractual regulation. The art 7 (2)e is the only part of the Recommendation that deals with some kind of evidential questions, but it is not a provision regulating burden of proof - at least not according to our understanding of the concept. This means that it is not possible to answer if the contracts are in compliance with the directive on these issues.

COUNTRY COMPLIANCE : SWEDEN

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Debit card	4	3	5		5	
Deffered debit card						
Credit card	4	3	5		5	
E-Money instrument	4	3	5		5	
Company card	4	3	4,25		5	
Phone banking						
Home banking						
Internet banking	4	3	5		5	
Electronic tokens						
Criteria Compliance	4	3	4,85		5	

The burden of proof is not regulated in any of the contracts, and is in our opinion not suited for contractual regulation. The art 7 (2)e is the only part of the Recommendation that deals with some kind of evidential questions, but it is not a provision regulating burden of proof - at least not according to our understanding of the concept. This means that it is not possible to answer if the contracts are in compliance with the directive on these issues.

COUNTRY COMPLIANCE : UK

	Transparency	Obligation & liabilities	Notification & liability	Burden of proof	Settlement of dispute	General compliance
Debit card	5	5	5	5	5	5
Deffered debit card						
Credit card	5	5	5	5	5	5
E-Money instrument						
Company card	5	5	5	5	5	5
Phone banking	4,2	5	5	5	5	4,8
Home banking	4	5	5	5	5	4,8
Internet banking	4,1	5	5	5	5	4,8
Electronic tokens	4	4	4	5	4	4,2
Criteria Compliance	4,63	4,94	4,97	5	4,97	

3.3. Overall compliance

Introduction

The study shows that a specific legislation devoted to electronic payment instruments does exist only in Denmark, with the Payment Cards Act (since 1984).

In other countries, either some instruments are regulated by legislation (such as Credit Act in some countries), or the matter is regulated by various pieces of national legislation (such as Consumer Protection Act, Civil Code, Unfair Contract Terms Act, Electronic Commerce Act, *etc.*). This situation leads to a lack of clarity since often several pieces of national legislation should be referred to when one wishes to have a general picture of the legal regime.

The following conclusions attempt to sum up the results gathered during the study in all Member States. It is presented according to the five main criteria of the recommendation, namely:

1. transparency of conditions for transactions;
2. obligations and liabilities of the parties to the contract;
3. the notification procedure and liability of the issuers after notification;
4. the burden of proof; and
5. the settlement of disputes.

In each subdivision, the results obtained in the five work packages are presented.

1. Transparency of conditions for transactions

From a legislative point of view, only Danish law fully complies with all the provisions of the Recommendation. In some way, some provisions are even judged more onerous than those of the recommendation. Portugal is judged as being in general in compliance with the obligations set by the Recommendation. In Belgium, although currently not complying with the Recommendation (nothing specific in the law for other instruments than credit cards and opening of credit, code of conduct not enough specific), there is a draft legislation aimed at fully transposing the recommendation. In Luxembourg, the draft law does not implement this part of the Recommendation. For other countries, only some of the obligations are met thanks to general legislation such as civil codes (see e.g. Germany and The Netherlands), or consumer protection laws (Greece, Finland, Ireland, Spain). The provisions generally implemented are the obligation to communicate the terms and conditions in a readily, written (see however The Netherlands) and comprehensive form and to provide information on interest rates. Greece and Italy have different set of legislation where we can find different obligations that together with Codes of conduct reach the most important provisions of the Recommendation. The Code of conduct of the Italian bank is in general close to the Recommendation. Ireland, The Netherlands and Austria have adopted the Code of best practice of the European Credit Sector Associations. The scope of this act is however limited (credit and debit cards and no other form of payment). In France, civil code, consummation code and banking law taken together impose transparency for the following obligations:

- general conditions for the banking operations the credit institutions accomplish;
- conditions of the use of the bank account and costs of the various services it gives access to, mutual obligations between the institution and the customer;
- conditions written down in a clear and understandable way;
- The modifications to the contract are valid only if they have been communicated previously to the customer, the customer has accept them deliberately and the fees and commissions are the real and exact compensation of the service used by the customer;
- Obligation not to dispatch an unsolicited EPI.

In UK, the Banking Code of Conduct only covers general information and is not fully in compliance with all the provisions of the Recommendation. In Sweden, Codes of conduct have no tradition and the law in general is not in compliance with article 3 and 4 of the Recommendation.

An analysis of **the contracts** in the different Member States demonstrates that it is clear that they only provide some of the information required but most do not fully comply with the Recommendation. In general Denmark has a higher standard of protection for consumers and complies with the requirements. This clearly follows the trends identified in the legislative analysis. However the obligation to provide information to the holder is less extensive than the obligation in the Recommendation but this might be due to the fact that the electronic payment instrument act (EPIA) only entered into force on July 1, 2000. The Austrian and the UK contracts are generally in compliance with the information requirements. However in the Austrian contracts for company cards information on the holder's obligations and the period of time during which transactions can be contested is omitted. But for those countries, the relatively good level of compliance of the contracts is not due to a national binding legislation. In France, Belgium, Portugal, Sweden, Finland and Germany most of the information is provided in the contracts. However the obligations of the holder

are not always clearly defined. In Portugal the terms are not always clear because of the technical language used and in Sweden and Finland the small print often makes contracts difficult to read. In Greece there is no reference to costs and the terms are not always clear. A particular problem appears to exist for phone, home and internet banking where the obligations of the holder and the costs are not clear. In The Netherlands the terms relating to liability are unclear and complicated and the holder's obligations are not clear. Fees and charges are not mentioned nor is the period during which the holder's account will be debited. In fact many terms had to be specifically requested. In Ireland the contracts provide only some of the information. The information which is provided is not clear because of the small print, poor spacing and technical language. This is also a problem for Luxembourg where the technical language and physical appearance make the contracts less than clear. In Spain there is no clear information on the types of activities which the EPI can be used for and some of the terms are technical. In Italy the issuers do not always supply information on the obligations of the parties and the terms are not always clear as technical terms are used by some issuers.

An **analysis of disputes brought to the attention of consumer organisations** show that although holders have not been forthcoming with complaints relating to the transparency of the terms and conditions issuers do not always provide this information in a suitable form:

- Whether, because the information is not easily comprehensible (by ex.: Portugal : technical vocabulary used, small written types, too light ink used, etc.; Italy : complexity of the contractual terms).
- Whether, because the information is not complete or sufficient (by ex.: lack of information about the financial limits of the card and about the termination of the contract). To provide another example, in Portugal, the information related to the interest rates, to the commission fees, etc., is only delivered on request.

In Germany the consumer organisation, AgV, found in its study of online banking that most of the banks failed to disclose all of their standard terms and price lists.

The **anonymous surveys** conducted by customers demonstrate the following;

1. As far as the supply of terms and conditions is concerned:

Problems arise in two main areas:

- The required information is supplied, but only after the holder has signed up to the EPI;
- In the case of on-line bank accounts, the information may be in theory available to the holder but is not easily accessible or brought expressly to the holder's attention.

In general, Austria, Denmark, Germany, Greece⁴, Luxembourg, Portugal (for bank-issued payment cards) and the UK are judged as being substantially in compliance with the Recommendation. In Ireland and in the Netherlands, the content of the piece of information generally comply but is lately supplied.

Belgium, Portugal (for Internet accounts and non-bank-issued payment cards), and Spain (much information provided only after request and/or in oral form) have been judged as substantially failing to comply with the Recommendation.

⁴ But a minority of substantial issuers in Greece are non-compliant.

2. As far as the Comprehensibility of information is concerned:

Each country's general level of compliance on this point has been analysed as Good, Moderate or Poor in respect of both the language used and the format in which the information was supplied.

With the exception of Portugal, most jurisdictions comply adequately with this part of the Recommendation. However, there is a general view that that the layout and presentation of EPI terms and conditions often hinders the comprehensibility of the information.

Language			Format		
Good	Moderate	Poor	Good	Moderate	Poor
Austria	Greece	Portugal	Austria	Germany	Portugal
Belgium	Ireland		Belgium	Greece	
Denmark			Denmark ⁶	Ireland	
Germany			Luxembourg	Netherlands	
Netherlands ⁵					
Luxembourg					
UK					

[*Note:* Not every country surveyed is represented in this table for one of two reasons: either holders were unable to answer the question because most information is provided verbally (e.g. Spain); or too small a minority of holders chose to answer the question so that no compliance assessment was possible from the surveys alone (e.g. Finland).]

3. As far as the information provided after the transaction is concerned:

Surprisingly, the surveys reveal that almost all EPI holders received a good quality of information after each payment transaction. However (with the exception of Austria, France and the UK) it is not generally reported that users of electronic money EPIs are able to review their most recent transactions.

4. As far as the optional information is concerned:

The survey shows that optional information is rarely provided, except where ATMs are used where a range of optional information is generally available. The exception is Denmark, where much optional information is provided prior to signing up to the EPI.

The **statistical analysis** shows a *strong and uniform level of compliance for all EPI's*, except for Electronic Tokens that has a very strong but little significant (too few marks) level of compliance. On the other hand, the difference between countries is moderate, except for Italy that has a weak level of compliance.

Summary

For most of the Member States, articles 3 and 4 of the Recommendation are not fully implemented in the law and only some of the provisions are found in different binding and non-binding instruments. Generally, there is no explicit obligations to describe the holder's and issuer's respective obligations

⁵ Except that liability clauses are difficult for holders to understand.

⁶ Although the quantity of compulsory information makes comprehension difficult - this is under review.

and liabilities, to set the normal period within which the holder's account will be debited or credited, to precise the period during which a given transaction can be contested by the holder. According to the study, obligations of information subsequent to a transaction are also rare.

These trends are confirmed by the analysis of the contracts. The form in which the information is provided is also problematic because of the technical language used. The information is also often provided too lately and in case of on-line bank accounts, the information is not easily accessible. In addition, there is a general view that the layout and presentation of EPI terms and conditions often hinders the comprehensibility of the information. The study further shows a different level of compliance between the different types of instruments.

2. Obligations and liabilities of the parties to the contract

From a legislative point of view, the study again shows that Denmark is the best scholar in the implementation of those provisions. This country is almost in compliance with the Recommendation except for articles 5a (but according to the authors the compliance is implicit) and 7.2 (a) (disclosure of pin). Belgium and Luxembourg are the two others countries that intend to implement the Recommendation having a draft regulation. In Luxembourg, article 5a (obligation of the holder to take reasonable steps to keep the instrument safe), 7.1 (possibility to alter contractual terms) and 7.2 b (obligation not to dispatch an unsolicited instrument, and article 8 (liabilities of the issuer) are however not included in the draft law.

For other countries (except for Austria):

- there is no maximum amount of liability for the holder (except for UK). In Germany, the amount will be fixed by the Courts depending on the extent of the holder's fault. In other countries, this is in general a purely contractual matter.
- article 6.3 (non liability of the holder when the instrument is used without physical presentation or electronic identification) would only be transposed in the Spanish and Portuguese law.
- the spirit (distinction between notification and non notification, fraudulent acts or negligence,...) of the liability system is generally the same in all of those countries but the notion of negligence or obligations of the holders and issuers are not explicitly defined in any of those law.
- In Ireland, except of the provisions of the Code of Practice of the European Credit Sector association there is nothing in this country that regulates obligations and liabilities of the parties. But the author of the report pointed out the fact that the Code of Practice of the European Credit Sector association urgently requires expansion to take account of the other forms of EPI covered by the Recommendation.
- France and The Netherlands (except for 7.2 e) are identified as having a lack of regulation.
- In UK, the amount of the holder's liability before notification is fixed to £50 in the Banking code and existing legislation and common law. In principle the holder is not liable after notification but obligations and liabilities of the parties are not clearly defined. In addition article 6.3 is not transposed in any law or code of practice. No right to countermand an order.

An analysis of **the contracts** in the different Member States demonstrates that the majority do not comply with all of the provisions of Articles 5 & 6.

In Austria the obligations of the holder are in compliance but the liabilities of the holder are far higher than the limits specified in the Recommendation in certain circumstances. In particular if the EPI is left in a car, or where the PIN has been misused with a credit card. It is also clear that the terms for company cards and phone banking are not in compliance. In Belgium the holder's obligations are defined but in some contracts the limit of a holder's liabilities are not mentioned. Where the holder has been seriously negligent the liability is higher than the limit specified in the Recommendation. The contracts relating to phone banking do not mention the holders liability before notification and for internet banking the holder is liable for wrongful use of the code or password. The notification period set in article 7-1. (one month) is generally complied with. The Danish contracts are generally in compliance with the Recommendation. In Finland, the contracts do not specify a limit to the holder's liability prior to notification though they do place an obligation on the holder to take reasonable care of the EPI and report any loss or theft. The contracts generally provide for at least 1 month's notice when there has been a change to the terms. In France, the contracts do not comply with the limited

liability provision for holders. In particular there is liability where a confidential code is used or where there is late notification. The issuer will only accept liability for non-execution or defective execution of equipment under his control. The contracts do generally comply with the notification periods when the contract is changed. In Germany, the liability of the holder will depend on the extent of the holder's fault. For example a holder will be liable according to some contracts if she did not inform the issuer without delay in case of loss of the EPI or if the PIN code was kept together with the card. In Greece, the contracts fail to comply with the notification period specified. If the holder has not notified the issuer of the loss or theft of an EPI this is considered to be gross negligence. The contracts do not comply with the Recommendation as they place all liability on the holder prior to notification due to the presumption of gross negligence if not immediately notified. The issuer does not accept liability for the malfunctioning or inaccuracy of information provided by the system. In the Dutch contracts the liability provisions do not comply with the Recommendation. In particular internet/home/phone banking contracts place full liability on the holder up until the moment of notification. The notification period is also often less than 1 month. In Ireland, the contracts do not comply with the liability provisions there is also no mention of a right to countermand or provision where there is no electronic identification of an EPI. In Italy, the majority of the contracts make no provisions on the obligations and liabilities of the parties. Where they do the holder is liable for any use of the EPI. In Luxembourg, the contracts for debit cards often comply with the holder liability requirements but for credit cards, internet and phone banking there is a lack of compliance and the holder is generally fully liable until notification. In Portugal the liability of the holder is not consistently limited in all contracts. Often there is no limit particularly for home/internet/phone banking contracts. The issuer is generally only liable for any deflection execution of his own equipment. In Spain the holder is obliged to inform the issuer without delay. Although in many cases the holder's liability is often limited to 120 or 150 euros except in cases of fraud or extreme negligence this is sometimes limited to the 24 hours prior to notification. For phone/home banking there is no limit on a holder's liability. In Sweden there is no limit on a holder's liability prior to notification though the holder's obligation to take care of the EPI is clearly stated. Changes to the contract take effect in some contracts in less than 1 month. And finally, in the UK there is an obligation on the holder to take care of the EPI and the holder's liability is limited to £50 or less prior to notification. Again there are problems for internet contracts where liability is not always limited.

Finally, and although this does not enter within the scope of application of the Recommendation, the reader will note that it was reported that article 8 of the distance contracts directive has generally been implemented into national law or draft law with a few exceptions (such as the Netherlands and Ireland). With regard to the irrevocability principle, it is generally affirmed at a contractual level (Denmark, Austria, Germany, Belgium, Greece). Spain and Luxembourg would have affirmed it in their legislation. In Ireland and in Italy the irrevocability principle is not affirmed.

An **analysis of disputes brought to the attention of consumer organisations** show that most of the complaints relate to the liabilities of the holder or those of the issuer in case of loss or theft of cards. It generally appears that holders do not take all the reasonable required steps to keep safe their EPI and the means which enable it to be used. In Luxembourg, the ULC (Union Luxembourgeoise des Consommateurs) considers that magnetic cards are not safe enough (it is for example too easy to duplicate or to copy the signature of a card that has been lost and to re-use it). In other respects the UCL also remarks that, due to the lack of case law related to the notions of acting with extreme negligence or fraudulently, issuers in Luxembourg can easily deny their liabilities putting forward the extreme negligence of the holder or his fraud. In the UK few disputes have been brought to the attention of consumer associations on the use of EPIs. Where complaints have been brought the Ombudsman's complaints data indicate that the bank's own internal dispute resolution mechanisms deal with most problems concerning EPI. It seems that the majority of cases that reach them are successfully conciliated, while very few go on to reach the law courts. Surveys show several instances of an EPI being issued when it was not requested by the consumer. The following problems were also identified. For example, in Greece, issuers do not always comply with the obligation to inform correctly the holder about the alteration of the contractual terms. In Italy, holders may not countermand an order where the amount was not determined when the order was given. In The

Netherlands, it was reported that, in 1996, the practice has demonstrated that more cash could be withdrawn from the machine than the amount normally permitted by the bank. It was also reported that foreign money could be withdrawn without using any personal identification number. In Austria the VKI, the main consumer association, has commented on the standard terms for debit cards and their use at cash dispensers. It criticises the following provisions:

- There are no uniform limits for daily cash withdraws anymore. The banks can change these limits at any time by simply displaying new conditions in the bank building. So the holder has no overview as far as his risk is concerned.
- The issuers state in their terms that they might need six hours after notification in order to block the account. The VKI does not see any technical reason for this right to reserve. The VKI does not understand why the holder has to notify the loss in writing or in person during the issuer’s opening hours whereas outside the opening hours there is a telephone-service.

Their reports also show that customers are unaware of the extent of their liability and often underestimate the amount. There is no information given after a transaction which makes it – according to a customer survey of the VKI – more difficult to keep an overview of the financial situation. Therefore holders wished to receive a receipt after a transaction.

In Germany a study by the AgV concluded that the customer generally has to bear the risk of defective transactions in online banking. In online banking contracts there are no regulations about technical malfunctions of the access instruments and equipment and the banks do not generally accept liability for mistakes on their part. Furthermore there are no regulations concerning liability before blocking notification.

The anonymous surveys conducted by customers demonstrate the following:

1. From the Liability provisions point of view:

In general holders are not well-informed on their liability position. This may partly be explained by the fact that in a surprisingly large number of instances the holder was not charged for pre-notification losses, even where the account terms permitted the holder to charge. In Denmark and UK⁷ (except fraud or gross negligence), the liability is limited in all cases. In Ireland, Belgium, The Netherlands, Luxembourg, and in Portugal (but not properly explained in many contracts), the liability is only limited in some cases. In Greece, there is an unlimited liability in most cases.

2. From the Safety of EPI and PIN provisions point of view:

All the jurisdictions surveyed made it clear to holders that there is an obligation to keep the EPI and PIN safe.

On the question whether holders (in general) comply with this obligation, it is clear from the table below that the PIN is commonly disclosed, though this is usually to a family member for use in an emergency.

EPI kept safe		PIN kept safe	
Yes	No	Yes	No
Denmark	Greece	Denmark	Belgium (about 67%)
France	Portugal	Germany	France (about 30%)
Germany			Greece

⁷ In one case only was there potential unlimited liability.

Ireland			Ireland (50%)
Luxembourg			Luxembourg
Spain			Portugal
			Spain (about 30%)

[Note: Countries are omitted from this table if there were insufficient holder responses to enable the researchers to evaluate compliance in that country].

3. From the Exemption of liability for “not present” transactions point of view⁸

This is more a matter of substantive law than account terms, but some information was discoverable. In Denmark, Luxembourg and UK, the survey reveals an explicit exemption of liability. This seems not to be the case in Belgium, Greece and Portugal although the Belgian law is however clear on that point. The approach is not consistent for Ireland and The Netherlands.

4. From the Countermand of payment point of view:

There was little information from holders on this issue, largely because the facts are so uncommon. The most likely case where an EPI is used to make a payment of an uncertain amount is in cross-border mail order, where the supplier adds postage costs to the ascertained price. The results here should therefore be treated with caution. As a rule, account terms are either silent on this point or expressly prohibit countermand. In practice, some issuers occasionally permit countermand as a concession to particular customers.

In Belgium⁹, The Netherlands¹⁰, Luxembourg¹¹ and Portugal, the countermand is expressly prohibited. The approach in Denmark and Greece is not consistent.

5. From the Alteration of terms point of view:

This is not an issue of which holders are usually aware, and so the surveys did not elicit much information. The results of the contract analysis are more reliable on this point. For Ireland and UK, it seems however clear that issuer must notify new terms. In Belgium and in The Netherlands, issuer must at least give a one month notice. In Luxembourg, it is permitted to change the terms without having to give a notice.

6. From the Unsolicited EPIs point of view:

Unsolicited EPIs clearly remain a problem. Even in those countries which comply substantially with the Recommendation (Austria¹², Belgium, Denmark, France, Germany¹³, Ireland¹⁴ and Luxembourg (Non-compliance in 2 of 40 surveys) or mostly complies (Greece and The Netherlands), occasional unsolicited EPIs are sent (though this may represent the inevitable error rate). Perhaps more worrying

⁸ The charge issue is not analysed within this reports since it falls outside the scope of application of the recommendation.

⁹ The question is however only mentioned in a few contract.

¹⁰ Except in one case; and in another the terms did not address the issue.

¹¹ Though issuers may allow countermand as a concession, not a right, in some cases.

¹² Except that debit cards automatically include electronic money facilities.

¹³ Except that debit cards automatically include electronic money facilities.

¹⁴ Except for unsolicited extension of credit limits.

is that in the UK, where the sending of unsolicited EPIs is expressly prohibited by law, 12.5% of those surveyed had received an unsolicited EPI. A more comforting matter is that if those to whom unsolicited EPIs were sent complained, they were not charged and the EPIs were cancelled. For Portugal (14% of surveys) and Spain (20% of surveys), the study shows a substantial level of non-compliance.

Here, the **statistical analysis** reveals a *moderate level of compliance of all EPIs*, with minor differences between EPIs (with the exception of Electronic Tokens that has a very strong level of compliance). On the other hand, the difference between countries is moderate to contrasted; most of the countries show a weak to moderate level of compliance, excepted Germany and Belgium that have a strong level of compliance and Denmark and United Kingdom that have a very strong level of compliance.

Summary

*In most of the countries, it appears that, if the general philosophy of the Recommendation can be found, the obligations and liabilities of the parties in a contract are certainly not clearly defined by regulation and that the Recommendation **has poorly been transposed**.*

In the contracts, the provisions of the Recommendation have not been fully incorporated between the issuer and the customer. Areas where there appear to be particular problems are the liability of the holder, notification of changes, countermanding (for unspecified sums) and exemption of liability where no electronic identification (where there was no physical presentation of instruments). In particular the phone/home/internet banking contracts often contain no provision to limit a holder's liability before notification. It is also unclear what constitutes gross negligence – does the failure to immediately inform the issuer of the loss of an EPI fall within this category? The contracts often include a far shorter period for notification of changes than the month specified in the Recommendation. There is often no provision for the liability of the issuer for defective or non-executed transactions. However the obligations of the holder to keep the EPI safe are included within the majority of the contracts.

In general there are no provisions prohibiting the countermanding of an order except where the amount was not determined at the time. There is also rarely a provision exempting a holder from liability when the payment instrument has not been used without physical presentation or electronic identification. The anonymous survey also reveals and confirms that holders are not well informed on their liability position but all jurisdiction surveyed made it clear to holders that there is an obligation to keep the EPI and PIN safe.

It is therefore not surprising if the majority of disputes brought to the attention of consumer organisations relate to the liability of the holder or those of the issuer in case of loss or theft of cards.

3. The notification procedure and liability of the issuer after notification

As far as legislation is concerned, the Danish EPIA on notification and liability is in compliance with the Recommendation, since the Danish rules are in general more favourable towards the holder. In Belgium, the Recommendation is partly implemented in the law implementing the distance contracts directive. However, a draft legislation transposes fully the Recommendation as to the notification procedure and the rules on liability. In general, the system of notification working in Belgium fulfils the requirements of the Recommendation.

In Luxembourg, the issuer has an obligation to provide means to notify and to take all reasonable actions to stop the use of the EPI.

Other countries have nothing specific with this regards in their legislation. In France, case law is however in general in conformance with the recommendation, except for the maximum amount of liability before the notification. In Portugal, the law only imposes issuers to have a 24-hour phone or fax service. In the UK, the banking code has an implied requirement with regards to the means available to enable the holder to notify the lost or theft of the EPI. For credit cards, both Sweden and the UK laws foresee a joint liability between issuers and holders.

Regarding the contracts, Denmark is, again, the only country which fully complies with the Recommendation. In Austria there is often no means of notifying an issuer 24 hours a day. Often, notification periods are limited to office hours and suspension of the EPI may be effective only 6 hours after being received. Belgium and Germany often have 24 hour notification procedures but this is not consistent for all contracts. Also in Germany in certain contracts notification must be made by fax which may not be available 24 hours a day.

In France, Finland and the UK, the issuer bears the loss after notification. There are notification facilities available 24 hours a day except for internet banking. In Greece, notification is always in writing so there is potential for delays, while in The Netherlands and Italy there is no mention of notification facilities in most contracts. In Spain there is not always a phone number for notification.

In Ireland notification is generally by phone and there is sometimes a requirement for written verification. In Luxembourg there is a phone number contact but this is not always available 24 hours a day. There is no obligation for an issuer to cancel an EPI within a specific time frame. And sometimes there is a requirement for written verification.

In Portugal, although there is 24 hour phone notification service, the notification must be confirmed in writing and sometimes issuers will only assume responsibility after verification has been received in writing. In Sweden the notification is done by phone.

The contact with consumer associations shows that:

- Issuers *do not always provide* the means that enable holders to notify the loss or theft of his EPI at any time of the day or the night;
- In most of the countries, issuers *do not provide the holder with any evidence* of the notification of lost made to the holder. This is why some consumer associations suggest that issuers confirm the notification by sending a fax or a letter and recommend the holder to keep proof of this.

For instance, in Belgium, an issuer refused to take into account the notification the holder made to *Card Stop* (the notification service set up by banks), arguing that its contractual terms specified that the notification had to be addressed to the issuer first. After the intervention of the Ombudsman, the issuer recognised that it was difficult to refuse a notification addressed to an organisation such as *Card Stop* whose number is mentioned on every ATM.

In Austria, the issuers state in their terms that they might need *six hours after notification* before blocking the account. In Germany, it is a contractual rule that the holder is no longer liable after the notification, but although this is a clear rule, the holder often has to dispute with the bank and to assert his right.

In the frame of anonymous on-the-spot surveys, the following assessments were made:

- *clear procedures in case of loss or theft exist in all countries but Greece* (where procedures are inadequate for non-banks EPIs, home banking and internet banking instruments), and Spain;
- a special *identification procedure* (mean to prove the notification) *exists only in Belgium and Ireland*.

The **statistical analysis** shows a *moderate to strong level of compliance of all EPIs*, with some differences between EPIs: debit and credit cards comply strongly while home banking comply rather weakly. On the other hand, the difference between countries is contrasted; three countries have a weak level of compliance (Spain, Italy, Portugal) and all others have a strong to very strong level of compliance.

Summary

As far as the notification procedure is concerned, the following assessments can be made:

Few existing national legislation contain provisions on the notification procedure, which explain why most of the contracts make no mention of the obligation to provide the holder with a mean to prove the notification (a special identification procedure exists only in two countries). Moreover, although clear procedures of notification exist in the majority of the countries, those procedures fail to provide a system available at any time of the day or night: either the system is not available 24h a day, and/or a confirmation must be sent in writing and the notification becomes effective only when the written form is received.

Regarding the provisions on liability of the issuer after notification, a similar statement can be made: the legislation contain rarely provisions on liability, as well as the contracts.

4. The burden of proof

As far as legislation is concerned, Denmark is the only country that has an existing legislation in compliance with the recommendation. Two countries are provided with a draft legislation that implement the recommendation: Belgium and Luxembourg. In Finland, the consumer is exempted from bringing any proof if he disputes a transaction before the National Consumer Complaint Board. In the UK, the burden of proof falls on the issuer.

In The Netherlands, the requirement put forward by the recommendation is fulfilled but the authors of the report point out the fact that *in fine*, it is almost impossible for consumers to bring forward counter-proof. They are totally dependant on the data logged by the issuer.

In Germany, the matter is regulated by traditional proof law.

Regarding the contracts, in most countries it is clear that the burden of proof is not reversed.

Indeed, no provisions on the burden of proof can be found in Austria, Sweden, Finland and Germany.

In Denmark and in the UK, the burden of proof is reversed in favour of the consumer.

In the Belgian, French, Greek, Irish, Italian, Luxembourg, Spanish and Dutch contracts there is a failure to fully comply with the Recommendation. For instance, in some Belgian contracts the records will be considered accurate unless the holder proves the contrary. In France and Greece, the records are considered to be evidence of the transaction, while in Ireland the holder must bring proof to establish that the records are inaccurate. In Italy, some contracts state that recording of the messages will be considered conclusive evidence of the transactions. In Portugal, some contracts impose the burden of proof on the issuer and some on the holder.

Contacts with consumer associations show that for the majority of the countries, it seems that the burden of proof falls on the issuer.

The effectiveness of this principle must however be attenuated. In practice, it appears that the issuer brings its internal records as evidence and therefore the holder must bring proof of the failing of the electronic system or fraud in order to succeed.

In Luxembourg, most of the issuers put on the holder the burden to prove the moment and circumstances of the loss or theft. In other respects, some consumer associations (in the Netherlands about *ghost transaction*, and in a certain way in Belgium) emphasise that the main problem is the weakness of the position of the holder in order to produce the contrary evidence.

But in Ireland, it appears that the Ombudsman focused on the question of whether there was any evidence of machine malfunction and made his decision accordingly – the doubt should accrue the complaint.

In Germany, it is still the courts prevailing opinion that there is *prima facie* evidence for the fact that the holder acted in gross negligence, if his card has been used fraudulently. It is clear that the holder is only liable for gross negligence. But it is the holder who has to set forth the facts that lead to her/his discharge. If there are doubts he also has to prove them.

The anonymous on-the-spot surveys show that the position as to burden of proof is unclear in many countries. In some countries, the account terms provide clearly that the burden of proof falls on the issuer. In others, the terms stipulate that the issuer's records are the primary evidence, and it is for the holder to disprove them. However, the holder is not prevented from adducing additional evidence on this point. Because there are no reported court decisions, it is unclear whether those terms which are unfavourable to the holder on this point would be upheld.

It is worth mentioning that account terms are particularly unfavourable to the holder in Greece.

The surveys did reveal some information about how commonly an issuer argues holder liability in case of loss or theft, although there were few instances of loss, theft or misuse:

- issuers argue holders liability in some cases in Germany and Portugal;
- while issuer accepts liability in France (only in one case), Ireland, Luxembourg, Spain and the UK.

The **statistical analysis** shows a *moderate and uniform level of compliance of all EPIs* (electronic tokens being the exception (that has a very strong level of compliance)). On the other hand, the difference between countries is very contrasted. In fact, there are two groups of countries; a first group that have a weak to very weak level of compliance (Greece, Spain, Italy, Portugal, Ireland and Luxembourg) and a second group that have a strong to very strong level of compliance (The Netherlands, Belgium, United Kingdom, Austria, Germany and Denmark).

Summary

Since two countries only are provided with a law containing provisions on the burden of proof in compliance with the recommendation, the contracts quite always contain no provisions on this matter. Therefore, in practice, there is no reversal of the burden of proof and the holder has to bring the proof himself.

5. Settlement of disputes

Analysis of the legislation: most of the reports insist on the fact that article 10 is not really specific. The reports are therefore quite subjective and most authors conclude that their country is in compliance with the Recommendation.

The Danish EPIA does not contain any specific rules on that question. However, the goal of article 10 of the Recommendation is reached by other sets of rules.

In Ireland, authors estimate that the Irish system is subjected to limitations which limits its effectiveness. According to them, there is also potential for the independence of the scheme to be compromised through withdrawal or restriction of funding. In Austria, there is no specific dispute mechanism, while in Italy and Portugal, there are only ordinary judicial actions. The authors of the Portugal report estimate therefore that their country is not compliant with the recommendation.

In the majority of the contracts there are no specific provisions on the settlement of disputes.

In Belgium, only one bank mentions the Ombudsman in its contract. The Danish contracts analysed make reference to the issuer, the Consumer Complaints Board, The Appeal Committee for Credit Institutions and the Consumer Ombudsman.

In the Netherlands, the contract terms mention a dispute settlement body but provide no address. In Italy, one contract mentions submission of disputes to an arbitration board. In Portugal, most contracts impose a judicial procedure for the settlement of disputes and also impose the specific court competent to judge those disputes. In the UK, most contracts mention the internal dispute resolution system and the ombudsman. In Sweden contracts generally provide information on the Consumers Banking Office and National Consumer Complaints Board. In Finland, the contracts usually include reference to the industry's advisory service and the Consumer Complaints Board

We learn from consumer associations that complaints related to EPI are generally brought before extra-judicial authorities - in most cases before the Ombudsmen created by financial institutions. Indeed, holders are reluctant to solve their disputes before a judicial court owing to the cost and slowness of this kind of procedure.

In Portugal, it seems that there is no adequate and effective means for the settlement of disputes between a holder and an issuer, except the intervention of consumer associations. In The Netherlands, complaints are brought before the Disputes Settlement Committee. It seems that this procedure seldom lead to a satisfactory solution for the holder. In Luxembourg, whether holder and issuer reach a gentlemen agreement owing to the intervention of ULC and CETREL, whether the holder brings the case before the CSSF (Conseil de Surveillance du Secteur Financier) that apply an indistinct or unknown procedure.

In the UK, the Banking Ombudsman's Report shows that more cases were settled by conciliation rather than formal decision and that only a minority of cases had to go on to formal decision.

The majority of disputes in Germany deal with negligence as regards PINs, TANs and other means of security. In Austria the VKI has asked for the creation of an independent arbitration body as at present there are no redress procedures available.

The anonymous surveys show that on some issues the surveys elicited little information, e.g. on limits for the holder's liability in practice (as opposed to theory).

The **statistical analysis** shows a *moderate and uniform level of compliance of all EPIs*, with the exceptions of electronic tokens (strong level of compliance) and of deferred debit cards (weak compliance). On the other hand, the difference between countries is very contrasted. In fact, there are three groups of countries; a first group that have a weak to very weak level of compliance (Austria, Italy, Portugal, Spain and Luxembourg and Greece), a second intermediary group (France, Ireland, The Netherlands) and a third group that have a very strong level of compliance (Finland, Sweden, Denmark, United Kingdom, Germany and Belgium).

Summary

Remark: *It should be underlined that article 10 of the recommendation gave rise to subjective interpretations from the countries. Therefore, it is difficult to assess the compliance or non compliance of a country, as no objective criteria are defined.*

Some specific settlement bodies exist in some countries, although few contracts make reference to them. In other countries, either an internal dispute system exist, or traditional courts are referred to. The tendency is however to bring disputes before an extra-judicial body, rather than the judicial one, due to slowness and cost of the judicial procedure.

4. General conclusion

1. Transparency of conditions for transactions

From the research it has been possible to identify four main problem areas:

1) The lack of information provided by issuers to holders, particularly as regards the following:

- the holder's and issuer's respective obligations and liabilities
- the normal period within which the holder's account will be debited or credited
- the period during which a transaction can be contested by the holder.

2) The unclear and/or inaccessible way in which information is provided:

- technical language makes the information less accessible
- poor spacing and small print make it difficult to read
- online information is not always easily accessible
- too much information is sometimes given which may lead to confusion and a failure to take note of the more important terms and conditions

3) The time at which the information is provided does not always comply with the Recommendation

- the information is sometimes only provided on or after the conclusion of the contract

4) The levels of compliance differ according to the types of EPI concerned

Whichever solution is adopted, it is clear from the research that the following points need to be incorporated if the solution is to be effective:

- The implementation of the solution should make it clear that technical language should be avoided in customer documentation and that the format of the terms and conditions should be easily accessible to the customer.
- To address the problem of too much information being given to the detriment of the prominence of important terms, the issuer should be required to provide a plain language summary of the most important provisions of the contract, in addition to the full terms and conditions. Although it is the terms and conditions themselves which will govern the legal relationship between holder and issuer, this plain language summary of the important provisions would achieve the Recommendation's aims that the holder should be aware of his or her rights and responsibilities.

The findings of the study indicate that holders are likely to be unaware, or not properly informed about, the following matters, which should therefore form the basis of this summary:

- a) the obligations and liabilities of the parties in relation to liability;
- b) notification procedures in case of loss;
- c) clarification of the existence of reversal of burden of proof in simple terms - in other words that it will be the issuer who has to prove that a transaction took place should a dispute arise;

- d) contact details of the dispute resolution bodies and an explanation of how they can help resolve disputes; and
- e) any applicable charges.

2. Obligations and Liabilities

From the research it has been possible to identify six main problem areas:

1) No limit to a holder's liability after notification

- in some countries such as Germany the amount is variable
- there is often no provision restricting liability in the contracts for phone banking, home banking and internet banking even in countries where the contracts for other EPIs comply

2) No provision restricting liability when the EPI is used without physical presentation or electronic identification.

- it is rare to find a contractual provision which restricts liability for EPIs used without physical presence or electronic identification. Although this contravenes the Recommendation, there is an argument that this requirement could be omitted from any future measures. The issue arises because of the distinction between transactions where payment card information can be used by someone who does not physically possess the EPI and transactions where payment can only be made when in possession of the EPI (e.g. a stored value card). In the latter case there is no requirement for such a provision. In the former the issue of liability for fraudulent transactions arising from the use of a payment card in distance sales has already been provided for in the Distance Selling Directive Art. 8. The question of how EPIs other than payment cards should be treated has not however been resolved. It may be clearer to clarify this issue in the Distance Selling Directive in the definition or use of the term 'payment card'.

3) Lack of uniformity in relation to what constitutes gross negligence across the Member States

- in some countries, such as Austria, if the EPI is left in a car then the liability of the holder will be higher than the limit set by the Recommendation
- does the failure to immediately notify the issuer of the loss of an EPI fall within this category?

4) Notification period for changes to the contract is often less than 1 month

5) Countermanding provisions for unspecified sums are very rare

- it should be noted, however, that there are very limited circumstances in which countermand would be necessary. The Distance Selling Directive deals with most of the circumstances through its requirement in Art. 4(1)(c) that the total costs including the amount of VAT and costs of post and packaging (the most likely uncertain sums) must be provided to the customer. For this reason this element of the Recommendation could be omitted from any future measures.

6) No provision on the liability of the issuer for defective or non-executed transactions

3. The notification procedure and liability of the issuer after notification

From the research it has been possible to identify three main problem areas:

1) No mention of notification procedures

- National law in many Member States does not require this

2) No special means to prove that the notification has been made

- However, it should be noted that in some Member States, such as the UK and Denmark, notification systems which do not offer special means to prove the notification have been in operation for some years without any problems being reported. It is thus questionable whether this provision is essential.

3) Limited accessibility to notification systems

- Some contracts require notification to be followed up in writing. Notification is only deemed to have taken place when the letter is received.

4. Burden of Proof

There is one problem here:

Only two countries comply with the provision reversing the burden of proof.

5. Settlement of Disputes

The study reveals that the problems identified are mainly due to a lack of clarity of article 10 of the Recommendation.

1) Contracts often make no reference to dispute resolution bodies and their contact details

2) Dispute resolution bodies are often internal

- This may result in a lack of independence

3) Costs of judicial action are prohibitively high, and the procedure extremely slow

There is clearly no community solution to the costs of litigation.