

November 2017

## Council Framework Decision 2001/413 on combating fraud and counterfeiting of non-cash means of payment

*This briefing is one in a series of 'implementation appraisals', produced by the European Parliament Research Service (EPRS), on the operation of existing EU legislation in practice. Each briefing focuses on a specific EU law, which is likely to be amended or reviewed, as envisaged in the European Commission's annual work programme. 'Implementation appraisals' aim to provide a succinct overview of publicly available material on the implementation, application and effectiveness to date of an EU law, drawing on input from EU institutions and bodies, as well as external organisations. 'Implementation appraisals' are provided by the EPRS Ex-Post Evaluation Unit, to assist parliamentary committees in their consideration of new European Commission proposals, once tabled.*

### Summary

Council Framework Decision 2001/413 (CFD)<sup>1</sup> on combating fraud and counterfeiting of non-cash means of payment establishes minimum rules concerning the definition of criminal offences and sanctions related to fraud and counterfeiting of non-cash means of payment, as well as the mechanisms for cross-border cooperation and exchange of information.

Adopted in 2001, the CFD is now 16 years old. Evidence collected through the Commission's evaluation and stakeholder consultation confirms the existence of significant challenges related to the implementation of the CFD. Overall, it appears that the CFD has not caught up with the technological developments of payment instruments, nor with the increasingly advanced techniques of non-cash fraud. Many Member States have in the meantime updated their respective legal frameworks individually in an effort to respond to these developments. This has resulted in a patchwork of different frameworks within the EU. It has also potentially opened the door to 'forum shopping' (i.e. criminals exploiting the system by moving to those Member States that have more lenient sanctions).

The challenges identified include outdated/incomplete definitions, different levels of penalties in Member States, differences in criminalisation of preparatory acts in Member States, difficulties in allocating jurisdiction, under-reporting to law enforcement bodies, etc. The Commission evaluation finds that '[a]s a whole, the [CFD] does not appear to have fully met its objectives.'

In the light of the above, in September 2017, the European Commission put forward a proposal for a new directive that would replace the CFD.

## 1. Background

This briefing examines the implementation of [Council Framework Decision 2001/413](#) on combating fraud and counterfeiting of non-cash means of payment (hereafter CFD) in the light of the European Commission's [proposal](#)<sup>2</sup> for a directive replacing the CFD.

<sup>1</sup> Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment, OJ L 149, 2.6.2001, pp. 1-4.

<sup>2</sup> Commission proposal for a directive of the European Parliament and of the Council on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, COM(2017) 489, 13 September 2017.

## 1.1. Historical perspective

Since the adoption of the CFD in 2001, there have been significant changes in the way EU citizens pay for their goods and services. More and more payments are made without cash changing hands. Increasingly, EU citizens use non-cash means of payments, such as credit or debit cards. Moreover, technological developments have brought us new types of non-cash payments: we now shop online, do online transfers, use mobile wallets, virtual currencies, e-money, etc.

In the meantime, criminals have worked hard to adapt to these trends and technological developments. Research shows that card fraud, for example, which is a low risk and high profit activity, is dominated by organised crime groups and brings an estimated €1.5 billion to such groups in the EU.

One important aspect of card fraud is its cross-border nature – there are considerably higher rates of fraud in cross-border transactions than in domestic transactions. Police and judicial authorities are consequently facing new challenges in investigation, prosecution and adjudication of cases of fraud and counterfeiting of non-cash means of payment. A Europol 2013 [report](#)<sup>3</sup> finds that such investigations are complex and expensive, as they require cooperation among police and judicial authorities from multiple jurisdictions. Thus, while investment in investigation is considerable, there are no guarantees that investigation will indeed lead to successful prosecution/adjudication and to seizure of fraud proceeds.

These inherent challenges (online, cross-border, increasingly sophisticated techniques used by criminals such as phishing, skimming or carding), highlight the importance of having an adequate and up-to-date legal framework in place to tackle fraud in the context of non-cash means of payment.

The CFD is 16 years old and it appears that it has not caught up with the technological developments of payment instruments, or with the increasingly advanced techniques of non-cash fraud. Since 2001, many Member States have updated their respective legal frameworks individually, leading to a patchwork of different frameworks within the EU and potentially opening the door to 'forum shopping' (i.e. criminals exploiting the system by moving to those Member States that have more lenient sanctions).

In the light of the above, the European Commission has put forward its proposal for a new directive to replace the CFD, accompanied by an evaluation and an impact assessment. It should be noted that the proposal also has relevance for both security and for the digital market.

The European Commission's communication on the [European Agenda on Security](#) (EAS),<sup>4</sup> adopted in April 2015, identifies the fight against terrorism, organised crime and cybercrime as the three main priorities for European security in the 2015-2020 period. Combating fraud and counterfeiting of non-cash means of payments is included among the measures to fight cybercrime. This was confirmed several months later, first in the [letter of intent](#)<sup>5</sup> from the Commission President and First Vice-President, and then in the [Commission Work Programme 2016](#) (CWP 2016).<sup>6</sup> An [inception impact assessment](#), prepared by the Commission's DG HOME, followed in May 2016.

Apart from being recognised as a security threat, fraud and counterfeiting of non-cash means of payments is identified as a hindrance to the development of the digital single market. The [Digital Single Market Strategy for Europe](#) notes that online payment fraud leads to reduced consumer trust in the security of online activities and, consequently, to economic losses, as citizens may choose not to shop online.

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<sup>3</sup> Europol Situation Report: Payment Card fraud in the European Union: perspective of law enforcement agencies, 7 January 2013.

<sup>4</sup> Communication from the Commission: The European Agenda on Security, COM(2015) 185, 28 April 2015.

<sup>5</sup> Letter of Intent from Commission President Juncker and First Vice-President Timmermans to the then EP President Schulz and Luxembourg Prime Minister Bettel, 9 September 2015, p. 5.

<sup>6</sup> Commission Communication: Commission Work Programme 2016: No time for business as usual, COM(2015) 610, 27 October 2015, p. 10.

## 1.2. Framework Decision 2001/413: a brief overview of the current legislation

The objective of the CFD is 'to ensure that fraud and counterfeiting involving all forms of non-cash means of payment are recognised as criminal offences and are subject to effective, proportionate and dissuasive sanctions in all Member States...'.<sup>7</sup>

Article 1 defines 'payment instruments' to mean a 'corporeal' (physical) instrument other than cash 'enabling ... the holder or user to transfer money or monetary value'. It provides a non-exhaustive list of payment instruments: 'credit cards, eurocheque cards, other cards issued by financial institutions, travellers' cheques, eurocheques, other cheques and bills of exchange ....'

This definition of payment instrument has become obsolete due to technological developments that have taken place since 2001: it does not include non-corporeal (non-physical) payment instruments such as virtual currencies, e-money, mobile money.

The box below provides definitions from the more recent relevant legislation (and, in the last example, from a Commission proposal from 2016).

### More recent definitions of (or relating to) payment instruments

The **Payment Services Directive 2** defines **payment instrument** as '*a personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used in order to initiate a payment order*' (2015).<sup>8</sup>

The **e-Money Directive** defines **electronic money** as '*electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions ..., and which is accepted by a natural or legal person other than the electronic money issuer*' (2009).<sup>9</sup>

Note also that the Commission's **proposal** for a directive amending Directive 2009/101/EC includes a definition of **virtual currencies**: '*a digital representation of value that is neither issued by a central bank or a public authority, nor necessarily attached to a fiat currency, but is accepted by natural or legal persons as a means of payment and can be transferred, stored or traded electronically.*' (2016).<sup>10</sup>

Criminal offences are defined in Article 2 of the CFD (offences related to payment instruments), Article 3 (offences related to computers) and Article 4 (offences related to specifically adapted devices), while Article 5 covers participation, instigation and attempt.

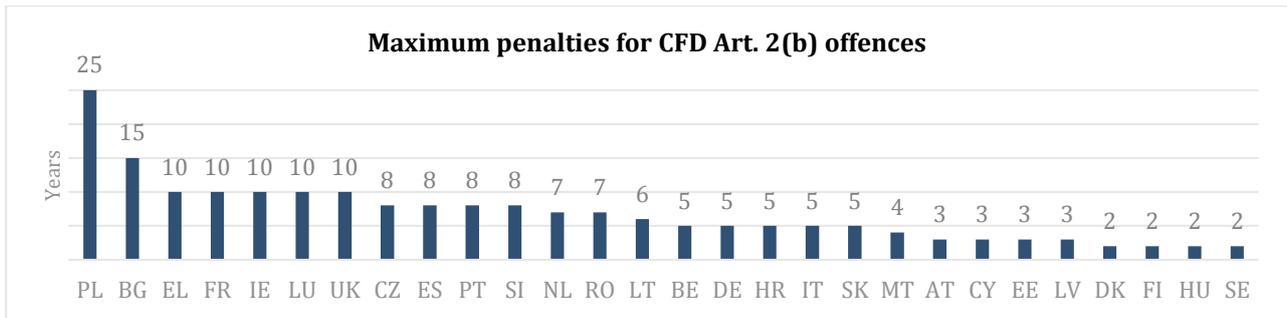
The CFD does not set specific levels of penalties for the above offences. Article 6, which covers penalties, simply requires each Member State to ensure that conduct defined in Articles 2 to 5 is 'punishable by effective, proportionate and dissuasive criminal penalties, including ... penalties involving deprivation of liberty ....' An example of the current differences in penalties among the Member States is given in the figure below.

<sup>7</sup> [CFD 2001/413/JHA](#), recital (4), p. 1.

<sup>8</sup> [Directive \(EU\) 2015/2366](#) of the European Parliament and of the Council of 25 November 2015 on **payment services** in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ L 337, 23.12.2015, Art. 4 (14), p. 57.

<sup>9</sup> [Directive 2009/110/EC](#) of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of **electronic money** institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, OJ L 267, 10.10.2009, Art. 2 (2), p. 11.

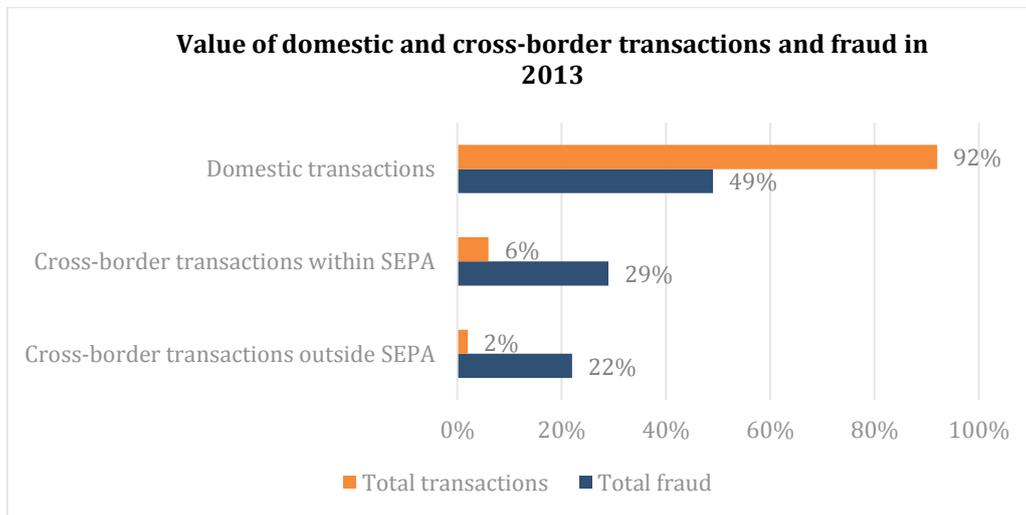
<sup>10</sup> [Proposal](#) for a directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of **money laundering or terrorist financing** and amending Directive 2009/101/EC, COM(2016) 450, Art. 1 (2) (c), p. 30.



Source: EY, as presented in the European Commission [Evaluation](#), Annex 5, SWD(2017) 298, p. 208.

Articles 7 and 8 establish liability of and sanctions for legal persons. Article 9 sets criteria for establishing jurisdiction; Article 10 covers extradition and prosecution; while Articles 11 and 12 cover cooperation between Member States and exchange of information (designation of national contact points).

These articles are especially relevant in view of the strong cross-border dimension of fraud and counterfeiting of non-cash means of payment. The figure below shows considerably higher rates of fraud in cross-border transactions than in domestic transactions.



Adapted from the [European Central Bank fourth report on card fraud](#), July 2015, p. 17.<sup>11</sup>

Finally, the CFD contains no evaluation or review provision. It does contain a reporting obligation via Article 14, which states that the Council shall, by 2 September 2003, assess the extent to which Member States have taken the necessary measures in order to comply with the CFD. This assessment was to be based on the written report by the Commission and the Member States' input.

## 2. EU-level reports, evaluations and studies

This section summarises findings of the European Commission's 2017 [evaluation](#)<sup>12</sup> of the CFD, as well as of two earlier Commission reports on the implementation of the CFD from [2004](#) and [2006](#). The section also includes findings of several other relevant studies: a 2014 external [study on criminal sanction](#) legislation and practice in 11 EU Member States, as well as reports on card fraud from the [European Central Bank](#) (2015) and from [Europol](#) (2013).

Among these publicly available sources on (or related to) the implementation of the CFD, the 2017 evaluation provides by far the most comprehensive and up to date overview and is therefore examined in some detail

<sup>11</sup> SEPA – [single euro payments area](#).

<sup>12</sup> Evaluation of the existing policy and legislative framework, Annex 5, SWD(2017) 298, pp. 194-234.

below.<sup>13</sup> Finally, it should be noted that the 2017 external study, which helped inform the Commission's evaluation (and related impact assessment) is not publicly available.

## 2.1. European Commission evaluation, reports and studies

### European Commission evaluation, 13 September 2017

The European Commission published the **evaluation** of the current legislation on 13 September 2017, together with the **impact assessment** and the **proposal** for a new directive to replace CFD 2001/413. The evaluation is not a self-standing document but is presented as **Annex 5** of the impact assessment.<sup>14</sup>

The ex-post evaluation of the current legislation and the ex-ante impact assessment that fed into the proposal for new legislation were conducted simultaneously. While this is not in line with the 'evaluate first' principle (whereby, ideally, the evaluation is performed before the impact assessment to enable the results of the evaluation to feed into the impact assessment), the European Commission's Better Regulation Toolbox allows for what are known as '**back-to-back**' evaluations, i.e., those undertaken in parallel with impact assessments.<sup>15</sup>

The Commission's evaluation (and impact assessment) were partly informed by an external study<sup>16</sup> to which the Commission refers on several occasions.<sup>17</sup> While it would have been useful if the SWD had provided a working link to this external study that informed the Commission's evaluation and impact assessment, it does not appear to be the case here.<sup>18</sup> For more on the external study, see its [terms of reference](#).

The Commission's evaluation consists of eight sub-sections: 1. executive summary (pp. 194-196), 2. introduction (pp. 196-198), 3. background (pp. 198-203), 4. evaluation questions (pp. 203-205), 5. methodological approach (pp. 205-206), 6. implementation state of play / results (pp. 206-211), 7. answers to evaluation questions (pp. 211-231), and 8. conclusions (pp. 231-234).

A total of eighteen evaluation questions and answers to those questions are clustered around the five usual evaluation criteria: **relevance, effectiveness, efficiency, coherence and EU added value**.

In terms of **relevance**, the evaluation finds that the definition of a payment instrument is not fully relevant in view of the many developments in payment technologies that have taken place since 2001 when the CFD was adopted. These new forms of payment instruments (e.g. mobile payments, virtual currencies) are not included under the current definitions (which define the payment instrument as 'corporeal' i.e. physical) while other payment instruments included in the CFD definitions have become obsolete (e.g. euro cheques).

The evaluation also finds shortcomings in the way offences are defined. Namely, it finds that the CFD does not criminalise preparatory acts when they do not *result* in a transfer of money or monetary value. Given

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<sup>13</sup> The fact that the evaluation was published on the same day as the proposal affected the timing of this briefing. EPRS strives to publish implementation appraisals shortly before the Commission comes out with a proposal. Exceptionally, this implementation appraisal is published after the proposal because the European Commission reports available prior to the proposal/impact assessment/evaluation publishing date of 13 September 2017 did not include relevant developments over the past decade (the two earlier European Commission reports date as far back as 2004 and 2006). In this context, it was deemed important to wait for and to include the results of the latest evaluation in this briefing, in order to ensure a comprehensive and updated overview of the operation of the legislation in practice.

<sup>14</sup> Commission Staff Working Document SWD(2017) 298 presents the impact assessment report accompanying the proposal for a directive replacing the CFD (pp. 4-79). For an initial appraisal of the impact assessment, see V. Vikolainen, Combating fraud and counterfeiting of non-cash means of payment, EPRS, European Parliament (forthcoming).

<sup>15</sup> For more on this, see in particular tool #52 of the Commission's Better Regulation Toolbox ([Better Regulation internal guidelines and toolbox](#), as updated in July 2017).

<sup>16</sup> The Commission notes that its work is 'partly informed by external expertise' and that an external study on both evaluation and impact assessment was launched in August 2016 and delivered in June 2017 (SWD(2017)298, p.81).

<sup>17</sup> See, for example, footnotes 100 on p. 52, 113 on p. 80, 163 on p. 206, 213 on p. 228, 218 on p. 231. These footnotes, however, either do not contain a working link to the external study or contain only a general link to the EU Bookshop, where the study in question could not be retrieved at the time of writing.

<sup>18</sup> On a more general note, the difficulty in accessing the external study does not appear to be an isolated case. A 2016 EPRS study makes this observation and notes that '*it would be more helpful for the co-legislators to have the original studies as an annex to the Commission staff working documents and, where possible, the underlying data, so as to allow them to profit as well from the work already done and to be in a position to base their own judgment on the overall finding of the evaluation process.*' (see L. Schrefler, [Evaluation in the European Commission](#), EPRS, 2016, p.7).

that non-cash payment fraud involves two phases – 1) preparatory acts: collection/trade/making available/possession of payer information, and 2) the actual use of payer information – the evaluation warns that the ‘preparatory acts that precede fraud without being directly linked to it are excluded from Article 3 on offences related to computers.’<sup>19</sup> The evaluation notes further shortcomings (e.g. identity theft, or failure to provide services or goods after the payment has been made, neither of which is included in the current CFD) while pointing the continued relevance for several CFD provisions (e.g. liability of legal persons, the principles for establishing jurisdiction).

As regards **effectiveness**, the evaluation finds that the CFD has only partially met its three **specific objectives**. These objectives are:

1. ensuring that fraud and counterfeiting of non-cash means of payment are **recognised as criminal offences**,
2. ensuring that these offences are subject to effective, proportionate and dissuasive **sanctions**, and
3. enhancing **cross-border cooperation**.

On the first point, the evaluation notes the difficulty in assessing the role of the CFD in establishment of relevant national legislation, given that CFD provisions have been complemented in the meantime (since 2001) by various related EU and international legislation, leading the Member States to modify their legislation accordingly. Technological developments related to non-cash payments have also led many Member States to further amend their legislation.

On the second point, the evaluation finds that the CFD ‘did not bring about a satisfactory level of approximation of sanctions across the Member States’.<sup>20</sup> Given the differences in penalties in different Member States, criminals are in a position to exploit the system by moving to those states that have more lenient sanctions (known as ‘forum shopping’). Furthermore, differences in sanctions might have negative impact on judicial cooperation or on the application of the related legislation on the European Arrest Warrant (EAW).<sup>21</sup>

As to the third objective of enhancing cross-border cooperation, the evaluation notes the importance of the CFD in view of the cross-border nature of card fraud: while less than 10 % of transactions are cross-border transactions, these account for more than half of total fraud.<sup>22</sup> The evaluation finds that the cross-border nature of card fraud leads to complications in investigations and prosecutions (in general, it takes a long time to receive the information requested from another Member State, or to produce such information), as well as to difficulties for victims to access their rights.

The evaluation notes several important **additional matters that are not fully, or at all, included in the scope of the CFD**, but are nonetheless relevant in the wider context. These relate to allocating jurisdiction, victims, and the lack of public-private cooperation.<sup>23</sup>

The evaluation notes in particular problems related to allocating **jurisdiction**. ‘The main risk is that the crimes might not be investigated because no country claims jurisdiction or that the lack of judicial cooperation makes the cross-border investigation process impossible in practice.’<sup>24</sup>

In relation to **victims** of fraud, the evaluation notes that the current CFD does not contain any provisions on victims and that criminal networks frequently exploit lack of awareness of victims in matters related to fraud. The evaluation further notes that lack of provisions for **public-private cooperation** (i.e. between law enforcement agencies and financial institutions) stands in the way of effective investigations and prosecutions. It points to several positive examples of public-private cooperation initiatives at national level.

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<sup>19</sup> SWD(2017) 298, p. 213.

<sup>20</sup> SWD(2017) 298, p. 232.

<sup>21</sup> The EAW requires that the person whose surrender is sought be charged with an offence for which the maximum period of the penalty is at least one year in prison or that he or she has been sentenced to a prison term of at least four months.

<sup>22</sup> See more on cross-border nature of card fraud in section 2.2 below. An example of cross-border card fraud is given in SWD(2017) 298, pp. 219-220.

<sup>23</sup> Note that the evaluation of the CFD analysed also other EU legislative instruments adopted after the CFD, which are relevant in addressing non-cash payment fraud, given that the legislative context changed considerably since the adoption of the CFD in 2001. For a list of relevant legislation, as well as wider related EU policies, see SWD(2017) 298, pp. 5-10.

<sup>24</sup> SWD(2017) 298, p. 223.

Finally, the evaluation notes the tendency of under-reporting of suspected non-cash payment fraud, often due to victims not being familiar with how to report (in case of private persons) or due to reputational concerns (in case of businesses).

With regard to **efficiency**, the evaluation provides little information.<sup>25</sup> It refrains from making estimates of costs or benefits of the CFD, and instead explains that any attempt to calculate costs and benefits linked to the CFD is 'impossible', 'given the lack of relevant data and the impossibility to understand to which extent the [CFD] is the underlying cause for new national legislation: many of the provisions of the [CFD] have been supplemented by other (more effective) mechanism[s].'<sup>26</sup>

The evaluation examines the CFD's **coherence** with relevant EU legislation. It finds that the CFD is coherent with the main EU and international legislation, while it identifies several pending issues. One notable example is the difference in the definition of 'payment instrument' between the CFD, the Payment Service Directive (PSD2)<sup>27</sup> and the e-Money Directive.<sup>28</sup> The PSD2 Directive, for example, covers new, non-corporeal payment technologies, such as virtual cards, e-money, electronic wire transfers, while the CFD limits the definition to physical, 'corporeal', payment instruments. In a similar vein, the directive on attacks against information systems<sup>29</sup> includes a broader concept of 'information system' than the one in the CFD ('computer system'). The evaluation also examines the coherence of the CFD in relation to the European Arrest Warrant legislation<sup>30</sup> and finds that the CFD's provisions on extradition are 'partially made redundant' by the latter.<sup>31</sup>

Finally, the evaluation finds that the CFD **added value** by 'setting common criminal law framework of reference for Member States.'<sup>32</sup> It notes however that this is likely the result, not only of the CFD, but also of other related EU pieces of legislation that entered into force after 2001, 'which partially overlap and complement the scope of the [CFD].'<sup>33</sup>

In summary, the evaluation found that '[a]s a whole, the [CFD] does not appear to have fully met its objectives.'<sup>34</sup>

The evaluation presents a list of specific 'problem drivers' linked to the policy/legal framework in place, or to its implementation.<sup>35</sup>

Overall, the evaluation identified **three main 'problem drivers'**:

1. Some crimes cannot be effectively investigated and prosecuted under the current legal framework;
2. Some crimes cannot be effectively investigated and prosecuted due to operational obstacles;
3. Criminals take advantage of gaps in prevention to commit fraud.

**Problems linked to the policy/legal framework:**

- a) Certain crimes cannot be prosecuted effectively because offences committed with certain payment instruments (in particular **non-corporeal**) are criminalised differently in Member States or not criminalised;
- b) **Preparatory acts** for non-cash payment fraud cannot be prosecuted effectively because they are criminalised differently in Member States or not criminalised;
- c) Deficiencies in allocating **jurisdiction** can hinder effective cross-border investigation and prosecution.
- d) **Under reporting to law enforcement** due to constraints in public-private cooperation hampers effective investigations and prosecutions;
- e) **Information sharing gaps** in **public-private cooperation** hamper prevention;

<sup>25</sup> The sub-section on efficiency consists of four short paragraphs spanning less than a page, see SWD(2017) 298, pp. 228-229.

<sup>26</sup> SWD(2017) 298, p. 233. For more information on methodological limitations that are of particular relevance here, see SWD(2017) 298, section 5 on methodological approach, pp. 205-206.

<sup>27</sup> [Directive \(EU\) 2015/2366](#) on **payment services** in the internal market, pp. 35-127.

<sup>28</sup> [Directive 2009/110/EC](#) on the taking up, pursuit and prudential supervision of the business of **electronic money** institutions, OJ L 267, 10.10.2009, pp. 7-17.

<sup>29</sup> [Directive 2013/40/EU](#) on **attacks against information systems**, OJ L 218, 14.8.2013, pp. 8-14.

<sup>30</sup> [2002/584/JHA: Council Framework Decision](#) of 13 June 2002 on the **European arrest warrant** and the surrender procedures between Member States, OJ L 190, 18.7.2002, pp. 1-20.

<sup>31</sup> See [2002/584/JHA: Council Framework Decision](#) on the European arrest warrant, Article 2(2), which includes the following offences that give rise to surrender: forgery of means of payment, fraud, computer-related crime, participation in a criminal organisation.

<sup>32</sup> SWD(2017) 298, p. 230.

<sup>33</sup> *Ibid.*

<sup>34</sup> SWD(2017) 298, p. 233.

<sup>35</sup> SWD(2017) 298, p. 234.

f) Criminals exploit the **lack of awareness** of victims.

**Problems linked to the implementation of the policy/legal framework:**

- g) Cross-border investigations can be hampered because the same offences are sanctioned with **different levels of penalties** across Member States;
- h) It can take too much time to provide information in **cross-border cooperation** requests, hampering investigation and prosecution.

Finally, the evaluation finds that the above ‘problem drivers indicate that the issue at hand is mostly a **regulatory failure**, where the [CFD] has become partially obsolete, due mainly to **technological developments**. The evaluation indicated that this regulatory gap has not been sufficiently covered by more recent legislation.’<sup>36</sup>

A closer look at the evaluation methodology and the presentation of the findings reveals several inherent obstacles faced by the evaluators:

- **Complex policy and legislative context** of the CFD, including inter linkages with legal acts adopted after the CFD. In this context, uncovering the causal path to a change is bound to be difficult and the evaluation often refers to this limitation: ‘... it is difficult to establish whether the current level of harmonisation is the result of the Framework Decision only. [...] [T]here have been a number of relevant pieces of EU legislation that entered into force after 2001, which partially overlap and complement the scope of the [CFD] that may have brought to changes in the national legislative frameworks.’<sup>37</sup>
- **The time that has lapsed since the adoption of the CFD** (16 years). The evaluation notes that ‘... stakeholders involved in the study hardly recall the [CFD] and make reference today to other and more recent EU level legislation.’<sup>38</sup>

#### European Commission reports from 2004 and 2006

The two reports from [2004](#)<sup>39</sup> and [2006](#)<sup>40</sup> stem from Article 14 provisions which oblige the Member States to ‘bring into force the measures necessary to comply with [CFD] by 2 June 2003’ and to report those measures to the Council and the Commission by the same date.<sup>41</sup> However, none of the then 15 Member States reported to the Commission within the deadline. Consequently, the publication of the Commission report was delayed for almost a year, by which time the contributions of a majority of the Member States (and follow-up clarifications where necessary) had been received. However, even this late, the Commission report failed to provide a comprehensive picture on the functioning of the CFD because information from the Member States ‘varied considerably especially as far as the degree of completeness is concerned.’ This prompted the Commission to submit a second report in 2006, which included information that was missing or was incomplete in 2004, as well as information from several Member States that acceded in 2004. However, even this second report was incomplete since information was still missing from as many as seven Member States.

<sup>36</sup> SWD(2017) 298, p. 19.

<sup>37</sup> SWD(2017) 298, p. 230.

<sup>38</sup> SWD(2017) 298, p. 231.

<sup>39</sup> [Report](#) from the Commission based on Article 14 of the Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, COM(2004) 346, 30 April 2004. See also [Annex II](#) to the aforementioned report, SEC(2004) 532.

<sup>40</sup> [Report](#) from the Commission: Second report based on Article 13 of the Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, COM(2006) 65, 20 February 2006. See also [Annex II](#) to the report SEC(2006) 188.

<sup>41</sup> Framework decisions are fairly similar to directives – both are binding upon the Member States as to the results to be achieved but leave to the Member States the choice of form and methods. See ex Article 34(2)(b) TEU, which states that the Council may ‘adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.’

The reports show that several Member States initiated new legislation specifically designed to comply with the provisions of the CFD although, in some instances, these new provisions were yet to come into force. The other Member States informed the Commission that their existing legislation was already in line with the provisions of the Framework Decision and therefore did not require legislative changes. For example, in several instances, Member States made reference to **more general (pre-existing) offences** (e.g. theft, fraud, fraudulent use) in implementing CFD provisions in their national legislation (e.g. in Articles 2, 3, 4). As to the **penalties**, the reports find that measures chosen by the Member States to comply with Article 6 have led to **'far from uniform'** results across Member States.

### Study on criminal sanction legislation and practice in representative Member States, November 2013

The 2013 [study](#), prepared for the European Commission, outlines criminal offences and sanctions in 11 Member States, including those related to frauds with no cash means of payment.<sup>42</sup> The key relevant findings are the following:

- Most Member States rely on the general offence of theft and fraud to implement Article 2(a) (theft or other unlawful appropriation of payment instrument) and 2(d) (fraudulent use of a stolen/counterfeited payment instrument) offences respectively;
- The exact and complete wording of Article 2(c) is not found in the legislation of all countries (receiving/obtaining/transporting/sale/transfer/possession of stolen/counterfeited payment instrument);
- In different ways, all the conducts concerning computer frauds are covered in all countries;
- The CFD does not provide for minimum maximum penalties, which may explain the disparity between Member States, which for some conducts are significant;
- Where specified the lowest minimum penalty for counterfeiting ranges from 6 months (Germany) to 4 years (Spain). The maximum penalties also vary greatly between states;
- Aggravating and mitigating circumstances are not specified in the CFD;
- Some progress has been made towards consistency, but complete harmonisation does not exist.

## 2.2. Other EU level reports

### European Central Bank fourth report on card fraud, July 2015

This [fourth report](#)<sup>43</sup> of the European Central Bank presents and analyses the situation in card payment schemes in the Single European Payments Area (SEPA) in 2013 and compares it with earlier data.

The key findings include:

In absolute terms, **total value of card fraud** rose from €1.33 billion in 2012 to **€1.44 billion in 2013** (an increase of 8 %). However, the value of all card transactions continued to increase, which means that in relative terms (card fraud value as a share of total card transactions value), increase in card fraud value was much lower and represented a 0.001 percentage point increase (from 0.038 % in 2012 to 0.039 % in 2013).

In 2013, CNP fraud (Card Not Present, i.e. payments via the internet, post or telephone) accounted for 66 % of total value of card fraud, while the value of card fraud with card present (POS/Points of Sale and ATM) accounted for 20 % and 14 % respectively.

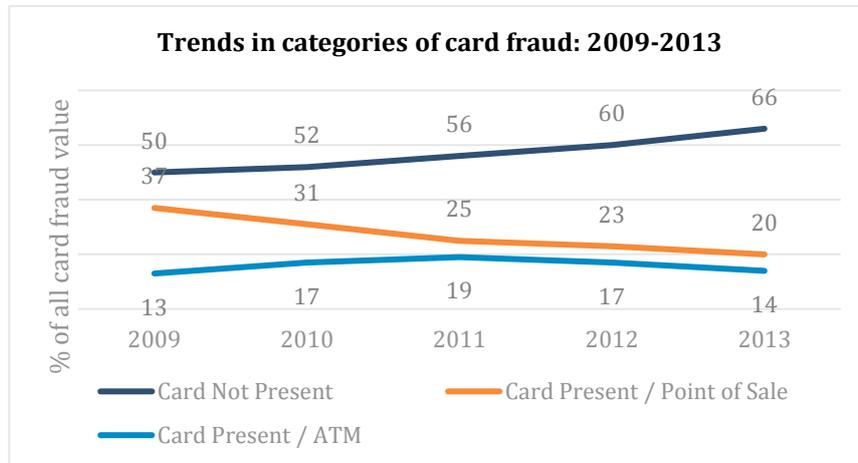
The chart below presents the developments from 2009 to 2013, showing a clear increase in card fraud in CNP transactions and a decrease in fraud in POS and ATM transactions.

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<sup>42</sup> Study on criminal sanction legislation and practice in representative Member States, by Thomson Reuters Aranzadi for the European Commission, November 2013. The relevant section is 2.4 on frauds with no cash means of payment, pp. 178-232, with the above key findings presented on p. 180. The 11 selected Member States are: CY, FR, DE, HU, IT, LV, PL, RO, ES, SE, UK (p. 6).

<sup>43</sup> There are four European Central Bank reports on card fraud so far: the [first report](#) from July 2012, the [second report](#) from July 2013, the [third report](#) from February 2014 and the most recent [fourth report](#) from July 2015.

As to cross-border elements in payment card fraud, the report finds **considerably higher rates of fraud in cross-border transactions** than in domestic transactions. By way of example, in 2013, domestic transactions accounted for around 92 % of value of all transactions, but for a much lower share of fraudulent transaction



Adapted from [ECB fourth report on card fraud](#), July 2015, p. 9.

value (49 %). On the other hand, cross-border transactions within SEPA accounted for 6 % of total transaction value, but for as much as 29 % of fraud value. Finally, payments made cross-border outside SEPA accounted for only 2 % of transaction value, but at the same time for as much as 22 % of fraud value.<sup>44</sup>

Finally, the report notes higher rates of card fraud in the more mature card markets (such as France, United Kingdom, Germany, Luxembourg, Denmark and Ireland).

### Europol report on payment card fraud in the EU, 7 January 2013

This 2013 Europol [situation report](#)<sup>45</sup> provides information on the general situation and the most important trends, and makes several key points:

- Criminal market of payment card fraud is **dominated by organised crime groups**.
- Payment card fraud is a **low risk and highly profitable** activity, resulting in an estimated **€1.5 billion** to EU organised crime groups.
- These groups are globally active. The report shows that majority of payment card fraud has a **cross-border dimension**.
- Consequently, **investigations** of payment card fraud are **complex and expensive**, as they require cooperation among police and judicial authorities from **multiple jurisdictions**. Thus, investment into investigation is considerable while there are no guarantees that investigation will indeed lead to successful prosecution/adjudication and to seizure of fraud proceeds.
- These legal constrains benefit organised criminal groups. In the EU context in particular, charges are brought forward for mainly preparatory acts carried out within the EU, leading to relatively lenient sentences given that there is no proven financial loss.
- Furthermore, there appears to be a **lack of incentive** for the **private financial services** actors. When faced with a payment card fraud, they tend to use the lessons learned to improve security measures rather than to pursue the investigation into an identified security breach. The logic here is simple: ‘since losses caused by payment card fraud can be easily covered by private industry, there is no point in investing resources on investigation.’<sup>46</sup>
- Payment card fraud is significantly reduced when the **EMV standard**<sup>47</sup> is implemented, for both card-present fraud and card-not-present fraud. The majority of payment card frauds takes place in countries that have not implemented the EMV standard. Thus, the report calls for the implementation of the EMV standard globally.

<sup>44</sup> See figure on value of domestic and cross-border transactions and fraud in 2013, p. 4 of this briefing.

<sup>45</sup> Europol Situation Report: Payment Card fraud in the European Union: perspective of law enforcement agencies, 7 January 2013. For a more recent but less detailed overview, see [Europol Internet Organised Crime Threat Assessment \(IOCTA\) 2016](#), especially pp. 28-31.

<sup>46</sup> *Ibid*, p. 12.

<sup>47</sup> EMV is a global standard for credit and debit payment cards based on secure chip card technology (replacing magnetic stripe). For more information, see [European Payments Council](#) website.

### 3. European Parliament activities

A European Parliament [resolution](#) of 23 October 2013 called for strengthening judicial and police cooperation at European (and international) level ‘with a view to improving systems for gathering evidence and to enabling data and information relevant to the investigation of offences [...] to be processed and exchanged effectively with increased accuracy and speed of exchange.’ The resolution further noted that ‘often the lack of synergy between law enforcement and legislative bodies, delays in judicial response, and deficient legislation enable criminals to exploit loopholes.’ The resolution called for common definitions for electronic (e.g. prepaid cards, virtual currencies, etc.) and mobile money products.<sup>48</sup>

A more recent European Parliament [resolution](#) of 3 October 2017 stresses the importance of harmonisation at the EU level of the definition of offences linked to attacks against information systems and the need for the Member States to set up systems for the ‘recording, production and provision of statistical data on [related] offences, in order to fight against ... crime more effectively.’<sup>49</sup>

### 4. Eurobarometer, European Commission public and stakeholder consultations

#### Special Eurobarometer on Europeans’ attitudes towards cyber security, September 2017

This is the fourth special Eurobarometer [report](#) on cyber security.<sup>50</sup> It describes the findings of the public opinion survey of more than 28 000 respondents in the 28 Member States during June 2017 and looks into changes observed since the previous surveys.

With regards to respondents’ concerns about the **security of internet transactions**, it finds that security of online transactions is the second most commonly mentioned concern (42 %), closely following personal data misuse (45 %). Overall, the proportion of respondents concerned about security of online payments remained the same as in 2014 (42 %). This figure hides a difference, however, since there has been an increase in the proportion of respondents who reported concern about the security of online payments in as many as 15 Member States.

EU citizens are **increasingly worried about being a victim of bank card or online bank fraud**. The report finds that as many as 66 % of respondents are very or fairly concerned about being a victim of bank card or online banking fraud. This represents an increase compared to the situation in 2014 (63 %) and in 2013 (49 %).<sup>51</sup> Finally, in 2017, 11 % of respondents report that they have been a victim of bank card or online banking fraud, an increase when compared to 2014 (8 %) and 2013 (7 %).<sup>52</sup>

#### Public and stakeholder consultation

In preparing the impact assessment report and evaluation, the European Commission carried out an **open public consultation** from 1 March 2017 to 24 May 2017 via two online questionnaires: one for the general public and the other for ‘practitioners’ in the area of non-cash payment fraud. Furthermore, the European Commission (and the external contractor) organised more **targeted stakeholder consultations**, via several expert meetings as well as via surveys/interviews/focus groups. The stakeholders consulted included, among others, private sector, law enforcement, victims’ and consumers’ associations, national banking federations, and judicial representatives.

The **main results** of the consultation<sup>53</sup> can be summarised as follows:

- Increasing importance of **new forms of cyber-related crimes**, mainly related to card-not-present fraud, social engineering and virtual currencies;

<sup>48</sup> [European Parliament resolution](#) of 23 October 2013 on **organised crime, corruption and money laundering**: recommendations on action and initiatives to be taken (final report) (2013/2107 INI), points 50, 51, 99.

<sup>49</sup> [European Parliament resolution](#) of 3 October 2017 on the **fight against cybercrime** (2017/2068 INI), point 4.

<sup>50</sup> There have been four European Commission Special Eurobarometer reports on cyber security so far – report no 390 published in [July 2012](#) (fieldwork March 2012), report no 404 published in [November 2013](#) (fieldwork May/June 2013), report no 423, published in [February 2015](#) (fieldwork October 2014) and the most recent one, no. 464a, published in [September 2017](#) (fieldwork June 2017).

<sup>51</sup> See p. 75 of 2017 report (QB11.8), p. 71 of 2015 report (QB7.8), and p. 69 of 2013 report (QC10.8).

<sup>52</sup> See p. 75 of 2017 report (QB12.8), p. 72 of 2015 report (QB8.8), and p. 68 of 2013 report (QC9.7).

<sup>53</sup> SWD(2017) 298, pp. 83-93.

- **CFD contribution unclear:** It is unclear whether prosecutions and convictions related to non-cash means of payment have increased following the adoption of the CFD (many stakeholders found it difficult to identify the contribution of the CFD to their national legal frameworks);
- **Definition of payment instruments** is no longer appropriate 'in so far as it does not cover all newer forms of electronic payments such as online banking payments, mobile payments, electronic wallets, bitcoin, and more generally internet payments';<sup>54</sup>
- Provisions on **criminal offences** are not comprehensive, emerging trends should be better covered in these provisions;
- More coherent level of **penalties** for offences related to non-cash means of payment is needed.

<b>Council Framework Decision 2001/413/JHA combating fraud and counterfeiting of non-cash means of payment (details)</b>
<b>EP committee responsible</b> at time of adoption of the EU legislation: Citizens' Freedoms and Rights, Justice and Home Affairs (LIBE) under the consultation procedure (CNS).
<b>Date of adoption of original legislation:</b> 28 May 2001.
<b>Entry into force:</b> 2 June 2001 (Article 15). Article 14 obliges the Member States to bring into force measures necessary to comply with the Framework Decision by 2 June 2003. By the same date, the Member States are obliged to forward the text of the provisions transposing into their national law the obligations imposed upon them under the Framework Decision to the General Secretariat of the Council and to the Commission.
<b>Planned date for review</b> of legislation: The Framework Decision does not contain any specific review clause. It does contain a reporting obligation via Article 14, which states that the Council shall, by 2 September 2003, assess the extent to which Member States have taken the necessary measures in order to comply with the Framework Decision. This assessment was to be based on a report established on the basis of Member States' information and the written report by the Commission.
<b>Timeline for new amending legislation:</b> Proposal <b>originally announced for 2016, but adopted on 13 September 2017.</b>

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Manuscript completed in November 2017. Brussels © European Union, 2017.

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<sup>54</sup> SWD(2017) 298, p. 88.