EN

EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 26 November 2008

at the request of Българска народна банка (Bulgarian National Bank)

on a draft law on payment services and payment systems

(CON/2008/78)

Introduction and legal basis

On 22 October 2008 the European Central Bank (ECB) received a request from the Governor of Българска народна банка (Bulgarian National Bank) (BNB) for an opinion on a draft law on payment services and payment systems (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Article 105(4) of the Treaty establishing the European Community and the third and fifth indents of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions[1], as the draft law relates to the BNB and to payment and settlement systems. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft law

1.1 The main purpose of the draft law is to transpose the following directives into Bulgarian legislation: (a) Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (hereinafter the 'Payment Services Directive')[2]; (b) Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (hereinafter the 'Settlement Finality Directive')[3]; and (c) Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions (hereinafter the 'E-money Directive')[4]. The draft law also contains provisions relating to: (a) the licensing and supervision of payment

1 OJ L 189, 3.7.1998, p. 42.

2 OJ L 319, 5.12.2007, p. 1.

3 OJ L 166, 11.6.1998, p. 45. The Settlement Finality Directive has already been transposed into Bulgarian legislation by several legal acts. The current transposition largely covers payment systems, whereas final settlement in securities settlement systems is provided for in the Law on the public offering of securities published in *Darjaven Vestnik* No 114 on 30 December 1999, as last amended on 5.8.2008.

4 OJ L 275, 27.10.2000, p. 39. The E-money Directive is already partly transposed by the Law on credit institutions published in *Darjaven Vestnik* No 59 on 21 July 2006, as last amended on 5.8.2008.

system operators by the BNB; (b) the operation and oversight of payment systems in Bulgaria; and (c) the functioning of the national real time gross settlement system (RINGS). In the light of the above, the scope of the draft law goes beyond the mere implementation of the abovementioned Community directives.

1.2 On the basis of Article 1(2) of Council Decision 98/415/EC and in accordance with the BNB's consultation request, this opinion only covers the provisions of the draft law that relate to licensing and supervising payment institutions and payment system operators by the BNB, the operation and oversight of payment systems in Bulgaria and the functioning of RINGS. Most provisions of the draft law relate to establishing a legal regime for the transposition of the Payment Services Directive. While acknowledging the importance of the Payment Services Directive for the realisation of the Single European Payments Area, the ECB provides no assessment in this opinion of the overall implementation of the Payment Services Directive, the Settlement Finality Directive and the E-money Directive in Bulgaria.

2. General observations

2.1 The ECB understands that the draft law will entrust the BNB new tasks, in particular, the licensing and supervision of payment institutions, payment system operators and oversight of payment systems. The ECB welcomes this widening of the BNB's powers and recommends that the BNB should be provided with sufficient financial and personnel resources to implement them.

2.2 Furthermore, the ECB notes that a proposal of the Commission relating to the review of the E-money directive (hereinafter the 'proposal')[5] is currently under discussion. However, given that such legislative initiative is only at an early stage, the ECB recommends that the Bulgarian authorities should abide by the provisions of the E-money Directive currently in force and consult the ECB on any further draft legislative provisions having regard to ongoing work at Community level concerning the finalisation of the proposal.

3. Specific observations

3.1 *Supervision of payment institutions*

Article 122(1) of the draft law provides that the BNB's supervisory powers will cover 'branches and agents of payment service providers having their head office in a Member State and operating on the territory of the Republic of Bulgaria by exercising the right of establishment'. Pursuant to Article 82(2) of the Payment Services Directive, the competent authorities of the host Member States only have the power to supervise foreign branches and agents as regards the application of Titles III and IV of the Payment Services Directive. For reasons of legal certainty, therefore, Article 122 (1) of the draft law could be amended to limit the BNB's proposed powers over

5 See the Proposal for a Directive of the European Parliament and of the Council of 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 (Text with EEA relevance) (COM(2008)627 final).

branches and agents of payment service providers established in other Member States to the supervision of their compliance with the national law transposing Titles III and IV of the Payment Services Directive.

3.2 *Payment systems*

Irrevocability of transfer orders

3.2.1 Article 83 of the draft law fixes the moment of irrevocability of a transfer order at 'the point in time set in the rules of the system for accepting a transfer order'. The ECB presumes that the moment of acceptance of an order by a payment system means the same as the 'entry of a transfer order' under the Settlement Finality Directive[6]. However, for reasons of legal certainty, the ECB strongly recommends that the draft law should be aligned with regard to this point by replacing the words 'for accepting a transfer order' and 'accepted by the system' with the words 'for entering a transfer order' and 'entered in the system', respectively.

RINGS

3.2.2 The ECB notes that on adoption of the euro in Bulgaria, RINGS will have to be assessed against the rules of the Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2)[7] and that the BNB may also be an operator of a TARGET2 component system. The ECB therefore welcomes the confirmation in the draft law that participation in TARGET2 will be effectuated in accordance with the rules of the system adopted by the ECB[8]. The ECB's comments in this opinion are, however, without prejudice to a future detailed assessment of RINGS against the rules of TARGET2.

Card fees

3.2.3 Article 49(4) of the draft law forbids merchants to charge for card transactions. The ECB acknowledges that pursuant to Article 52(3) of the Payment Services Directive, Member States are allowed to forbid or limit the right to charge, if it is considered necessary to encourage competition and promote the use of efficient payment instruments. However the ECB notes that charging is a way to balance the high costs (interchange fees) of card transactions and should therefore be allowed. If merchants are not allowed to charge, cardholders tend to use the card which gives them the most benefits (miles, rebates, points etc.). Such cards usually have the highest interchange fees to enable cardholder benefits to be financed, which means the highest costs for merchants. Ultimately, such costs are passed on to all customers via higher prices on merchants' goods or services.

6 See Article 3 of the Settlement Finality Directive.

7 Article 111(1) of the draft law.

8 Article 111(2) of the draft law.

3.3 *Alignment of legislation*

The draft law provides for amendments to Articles 2 and 3 of the Law on credit institutions. On 22 October 2008 the ECB received another request from the Governor of the BNB for an opinion on a draft law amending the Law on credit institutions, which also provides for amendments to Articles 2 and 3 of the Law on credit institutions. As both draft laws provide for entry into force at different points in time, the ECB recommends that they should be properly aligned to eliminate any inconsistencies between them.

This opinion will be published on the ECB's website.

Done at Frankfurt am Main, 26 November 2008.

[signed]

The Vice-President of the ECB

Lucas D. PAPADEMOS