EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 21 May 2012

on the oversight of retail payment services and systems

(CON/2012/38)

Introduction and legal basis

On 12 March 2012, the European Central Bank (ECB) received a request from the Banca d'Italia for an opinion on a draft regulation concerning the oversight of retail payment services and systems (hereinafter the 'draft regulation').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the second, third, fifth and sixth 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 regulation relates to means of payments, the Banca d'Italia, payment and settlement systems, and rules applicable to financial institutions that materially influence the stability of financial institutions and markets. 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 regulation

The draft regulation concerns the provision of retail payment services by payment service providers and retail payment systems operators whose registered address and/or centre of operations is in Italy.

Under the draft regulation, payment service providers are requested to notify the Banca d'Italia of the name, location and oversight rules of payment systems used for the exchange of payment instructions, clearing and settlement of retail transactions when such systems do not fall within the scope of this draft regulation. Additional requirements are provided for payment systems located outside the euro area.

With reference to retail payment system managers, the draft regulation provides specific requirements concerning governance, effectiveness of controls, outsourcing, business as well as legal and operational risks. It also covers access as well as connections with other retail payment systems and information requirements.

Finally, the draft regulation also contains specific provisions on the retail payment systems operated by the Banca d'Italia. In this context, most of the requirements provided for retail payment system operators

1 OJ L 189, 3.7.1998, p. 42.

also apply to the Banca d'Italia. In particular, the Banca d'Italia is requested to comply with the full cost recovery principle when providing retail payment services in competition with the market.

The draft regulation replaces a regulation adopted by the Banca d'Italia in 2005 on low-importance payments[2].

2. General observations

2.1 The ECB understands that the need for a new regulation in the field of retail payment services and systems has been driven, in particular, by the latest developments in the Single Euro Payments Area project and the new CSSP-IOSCO principles for financial market infrastructures[3] (the 'PFMI principles'). In general, the ECB welcomes the draft regulation's provisions which allow for freer competition in the whole sector of retail payments[4], as well as the measures directly concerning the Banca d'Italia which ensure a level playing field. The ECB also welcomes the reference in Article 15 to the application of the principle of full cost recovery by the Banca d'Italia when directly providing low-value payment services in competition with the market.

2.2 In spite of the overall intention to ensure a level playing field, the ECB understands that the Banca d'Italia, as a retail payment system operator, would still enjoy several derogations from the rules which otherwise apply to other retail payment system operators under the draft regulation. In particular, the ECB notes that the Banca d'Italia is excluded from the scope of application of Article 4 which relates to governance structure. The first sentence of such Article, however, concerns the application of the proportionality principle. While the PFMI principles require 'appropriate and effective regulation, supervision, and oversight' and these principles apply generally to systemically important payments systems, the principle of proportionality is nonetheless a general principle of Union law. For this reason, the Banca d'Italia should not be exempt from the application of the first sentence of Article 4 of the draft regulation.

2.3 The ECB notes that following the citations which set out the legal basis for the draft regulation, the recitals contain a list of factual elements which have been considered by the Banca d'Italia. For the sake of completeness, this list could also include other factual developments considered by the Banca d'Italia in the drafting of this regulation. Such developments include: (a) the ECB's report 'Business continuity oversight expectations for systematically important payment systems (SIPS)' of June 2006, (b) the Eurosystem Oversight Policy Framework of July 2011, and (c) the PFMI of April 2012. The ECB also notes that in the definitions set out in Article 1 of the draft regulation, in

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2 See Opinion CON/2005/41 on this subject. All ECB Opinions are published on the ECB's website at www.ecb.europa.eu.

3 International standards for payment, clearing and settlement systems, which are issued by the Committee on Payment and Settlement Systems (CPSS) and the Technical Committee of the International Organization of Securities Commissions (IOSCO).

4 In the past, due to 'specific legal and operational characteristics', the entire clearing process was operated by the Banca d'Italia. Presidential Decree No. 248 of 13 December 2010 repealed the Royal Decree-Law No. 812 of 6 May 1926, ratified as Law 1262 of 25 June 1926, under which the management of clearing houses in Italy had been exclusively assigned to the Banca d'Italia. For this reason, the ECB understands that any specific legal and operational characteristics precluding the direct intervention of market operators in the field of retail payment have been removed.

some cases reference is made to the 'contractual framework'[5] and in others to the 'rules'[6] governing the payment systems. For the sake of consistency, the ECB suggests that these references should be aligned.

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

Done at Frankfurt am Main, 21 May 2012.

[signed]

The President of the ECB

Mario DRAGHI

5 See Article 1(e) of the draft regulation.

6 See Articles 1(a) and (g) of the draft regulation.