EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 5 December 2013

on means of payment and payment systems

(CON/2013/84)

Introduction and legal basis

On 24 October 2013, the European Central Bank (ECB) received a request from the French Ministry of Economic Affairs and Finance for an opinion on draft amendments to the Monetary and Financial Code (COMOFI) regarding means of payment and payment systems (hereinafter the 'draft provisions').

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 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 means of payment, the Banque de France and payment 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 provisions

1.1 The main purpose of the draft provisions is to make it possible for the Banque de France to use third parties, e.g. auditing bodies, external auditors, experts registered on a list of judicial experts, or competent persons or authorities, to carry out the checks necessary for the performance of some of the Banque de France's tasks, in accordance with the conditions laid down by a decree of the Conseil d'État. Such third parties may receive remuneration from the Banque de France.

1.2 First, one provision will be inserted in Article L.141-4 of COMOFI relating to the Banque de France's task pertaining to the oversight of payment systems, and its task of maintaining the security of clearing houses, the means of payment and the systems used to clear, settle and deliver financial instruments. These tasks are referred to in COMOFI as tasks related to the European System of Central Banks (ESCB).

1 OJ L 189, 3.7.1998, p. 42.

1.3 Second, another similar provision will be inserted in Article L.525-4 of COMOFI, which relates to special electronic payment vouchers that are only to be used for purchasing a limited and defined number of categories of goods or services or to be used within a limited network of providers, and that are not considered electronic money. The Banque de France ensures the security of such special electronic payment vouchers.

2. General observations

2.1 *Legal basis for the Eurosystem's oversight function concerning clearing and payment systems*

2.1.1 Under the fourth indent of Article 127(2) of the Treaty and the fourth indent of Article 3.1 and Article 22 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'), the Eurosystem has the task of promoting the smooth operation of payment systems and is responsible for the oversight of clearing and payment systems. The aims of such oversight are to maintain systemic stability, promote efficiency and safeguard the transmission channel for monetary policy.

2.1.2 In general, within the Eurosystem, oversight activities are performed by the national central banks (NCBs), in line with the Governing Council's common oversight policy. This prohibits interference with the Eurosystem's oversight role by any Union or national body other than central banks acting within the framework of the Eurosystem.

2.2 *Limits on and conditions for entrusting certain activities related to Eurosystem tasks to third parties*

2.2.1 As noted in previous ECB opinions[2], the ECB emphasises the general principle that the tasks assigned to the Eurosystem by the Treaty and the Statute of the ESCB have to be fulfilled exclusively by the ECB and the NCBs. It is the NCBs that are responsible for fulfilling the obligations arising from the Treaty and the Statute of the ESCB or from guidelines and instructions issued by the ECB. Member States cannot, therefore, entitle their NCBs to delegate competencies in Eurosystem-related tasks to third parties. An entity other than an NCB, even if entirely controlled by it, could only be entrusted with the performance of ancillary and preparatory activities related to Eurosystem tasks of the NCBs, whilst the legal responsibility for the implementation of ECB legal instruments should be retained at the NCB[3].

2.2.2 The tasks that have been assigned by the Treaty and the Statute of the ESCB to the Eurosystem central banks and require the exercise of discretionary powers, including taking Eurosystem policy decisions, and the exercise of public authority, cannot be delegated. Furthermore, activities that are directly related to the execution of core tasks, as well as any critical functions related to Eurosystem tasks, must not be delegated.

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2 See Opinions CON/98/12, CON/98/35 and CON/99/20. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

3 See footnote 1.

2.2.3 Third parties could be entrusted by an NCB with the conduct of activities that offer limited room for discretion, provided that the activities are of an ancillary and preparatory nature, the assessment of any discretionary elements remains with the commissioning NCB, and certain additional conditions are fulfilled.

2.2.4 The key criteria developed from the principles of Union law, the case-law of the European courts and previous ECB opinions in assessing whether activities of a ancillary and preparatory nature can be entrusted by an NCB to third parties are the following: (a) the activities entrusted to third parties must relate to the pure implementation of public tasks, in such a way that they are ancillary or preparatory in nature, and must not confer any decision-making power (discretion) to the third party/external service provider; (b) legal responsibility for the public task must remain with the NCB; (c) the entrusting of activities to third parties by the NCB must not jeopardise the application of any relevant ECB legal instruments or policies and the third party/external service provider must implement equivalent legal instruments and policies to those the NCB must fulfil; (d) the possibility of entrusting such activities to third parties must be provided for in law, or at least not specifically prohibited by the law; (e) the entrusting of activities to third parties must not prevent the exercise of supervisory and oversight functions by the NCB over those activities and must not result in depriving the NCB of the necessary systems and controls to manage the risks it faces; (f) the NCB must have direct access to the relevant information of those activities; (g) the NCB must evaluate the quality of the services provided and retain the necessary expertise and resources to do so; (h) appropriate measures for the management and avoidance of conflicts of interest pertaining to the NCB and the third party to which the activity was entrusted must be put in place by the NCB; (i) the NCB must take appropriate measures to ensure that the third party/external service provider complies with the applicable confidentiality regime, including any ESCB confidentiality rules and minimum standards, and the service provider must protect any confidential information relating to the NCB.

3. Specific observations

3.1 The draft provisions refer to a decree of the Conseil d'État intended to lay down the conditions for recourse to third parties by the Banque de France. In this respect, the provision to be introduced in Article L.141-4 of COMOFI should be distinguished from the one to be inserted in Article L.525-4 of COMOFI.

3.2 As regards the provision to be introduced in Article L.141-4 of COMOFI, it is not clear what kinds of activities the Banque de France may entrust to third parties and whether the Banque de France remains responsible for the task in question. Since the tasks conferred upon the Banque de France in Article L.141-4 of COMOFI are Eurosystem tasks, if the Banque de France uses third parties in relation to them, this should only take place in relation to activities of an ancillary and preparatory nature that meet all of the conditions laid down above.

3.3 Special electronic payment vouchers, which the Banque de France oversees pursuant to Article L.525-4 of COMOFI, are not considered to be part of the Eurosystem's tasks. Therefore, the entrusting to third parties of activities related to special electronic payment vouchers is subject to the conditions stipulated under French law.

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

Done at Frankfurt am Main, 5 December 2013.

[signed]

The President of the ECB

Mario DRAGHI