OPINION OF THE EUROPEAN CENTRAL BANK
of 28 July 2016
on the oversight of payment schemes
(CON/2016/38)

Introduction and legal basis

On 24 May 2016 the European Central Bank (ECB) received a request from the Polish Ministry of Finance for an opinion on a draft law amending the Law on Payment Services[1] and certain other laws (hereinafter the 'draft law'). The ECB understands that since the draft law was sent to the ECB for consultation a more recent version thereof has become available on the Polish Parliament's website.

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 third and fifth indents of Article 2(1) of Council Decision 98/415/EC[2], as the draft law relates to Narodowy Bank Polski (NBP) and 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 adapt the national legal framework governing card-based payment transactions to Regulation (EU) 2015/751 of the European Parliament and of the Council[3], which requires the Member States to designate competent authorities that are empowered to ensure enforcement of the Regulation and to lay down rules on penalties applicable to infringements thereof. Accordingly, the draft law, by way of an amendment to the Law on Payment Services, designates the President of NBP (hereinafter the 'President') as the competent authority for the enforcement of Regulation (EU) 2015/751 in respect of payment card schemes.

1.2 In addition, the draft law aims at strengthening NBP's oversight role in the area of payment schemes by extending its oversight powers not only to card-based payment schemes but to all payment schemes active in Poland. The draft law also extends the scope of the prudential supervision function of Komisja Nadzoru Finansowego (KNF, The Polish Financial Supervisory Authority) in accordance with the Regulation.

1.3 The draft law introduces a new chapter in the Law on Payment Services which includes provisions prescribing the type of action that may be undertaken by the President in carrying out the new

1 Published in Dziennik Ustaw (Dz. U.) of 2014, item 872.

2 Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

3 Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions (OJ L 123, 19.5.2015, p.1).

tasks as the competent authority for the oversight of payment schemes. In particular, the President will be responsible for: (i) issuing an operating licence and approving any changes to the rules governing the functioning of payment schemes; (ii) assessing the functioning of payment schemes; (iii) collecting and requesting information and documents necessary to perform such assessment; (iv) issuing recommendations; and (v) suspension or revocation of the licence. The new chapter includes the rules on payment schemes and the licensing process relating to them. The draft law also provides that the Minister responsible for financial institutions, after consulting the President, must specify by regulation the criteria for the assessment of a payment scheme and the information and documents required for an application for a licence.

1.4 Furthermore, the draft law introduces provisions that complement the rules on cooperation between NBP and KNF in the field of supervision of national payment institutions providing acquiring services. In particular, KNF will be obliged to inform the President of any changes that may have an impact on the accuracy of the information and documents to be included in a licence application submitted by such a payment institution, to the extent that they may have an impact on the manner in which an acquiring service is provided. In addition, if the President becomes aware that the activities of a payment institution could threaten the stability of the payment system they will have to inform KNF thereof.

1.5 The draft law specifies the scope of the opinion that the President has to provide before KNF issues a licence to a national payment institution. The opinion must include an assessment of the application as it relates to the legality, safety and efficiency of the payment service. The draft law also prescribes that the opinion must be provided within one month of delivery of the application by KNF.

1.6 The draft law provides that a licence for the operation of a payment scheme or the consent of the President to a change in the rules of a payment scheme will not be required (i) in the case of three-party payment schemes (i.e. schemes where the governance authority is an issuer of a payment instrument and the only provider of acquiring services) and (ii) if the rules of a payment scheme operating on Polish territory have been assessed by the appropriate oversight authority of another Member State or of the Union. In the latter case, the draft law requires the payment scheme's governance authority to provide specified information to the President before operating the scheme on Polish territory. However, if the President finds that the rules of the payment scheme do not ensure the sufficient safety or efficiency of the payment scheme or the infrastructure, payment systems and/or payment schemes with which the payment scheme is affiliated, the payment organisation may be required by the President to apply for the above-mentioned licence/consent. The draft law also provides that in both cases where the payment scheme is a payment card scheme (as defined in Regulation (EU) 2015/751) then the payment card scheme's governance authority is required to provide the President with information confirming that the payment card scheme is compliant with the requirements laid down in Regulation (EU) 2015/751, at least two months before the planned commencement date for the operation of the payment card scheme on Polish territory. A payment card scheme may start operating on Polish territory unless the President finds that the payment card scheme does not comply with the requirements set out in Regulation (EU) 2015/751, within two months of the abovementioned information being sent. In

respect of payment schemes already operating in Poland on the day of the entry into force of the draft law, there is a grace period of six months to submit the application for a licence to the President for the operation of the payment scheme or, in the case of a scheme previously assessed by the appropriate oversight authority of another Member State or of the Union, to submit the documentation confirming the results of the previous assessment. Such a scheme is permitted to continue its operation until the application is assessed or the documentation is reviewed, as applicable.

1.7 The draft law further provides that the President may, in particular, issue a decision on a temporary, partial or total suspension of a payment scheme, including a three-party payment scheme and a card payment scheme operating on Polish territory which has been assessed by the appropriate oversight authority of another Member State or of the Union, or withdraw the consent for the functioning of such payment schemes. The President must inform the relevant oversight authority about such a decision.

1.8 Finally, the draft law also amends certain other laws which govern the oversight of other segments of the financial market infrastructure, such as payment systems, securities settlement systems and providers of acquiring services. The changes mainly reflect recent Union and international oversight standards and provide the President with stronger oversight tools (e.g. the introduction of additional requirements regarding provision of information for the entities operating financial market infrastructures).

2. Scope of the opinion

This opinion focuses on the oversight of payment schemes by NBP (Section 3) and the new oversight tasks conferred on NBP in relation to the prohibition of monetary financing under Article 123 of the Treaty (Section 4).

3. Oversight of payment schemes

3.1 The ECB understands and welcomes that the draft law aims to strengthen and provide a sound regulatory basis for NBP's oversight role in the area of payment schemes, to ensure a safer and more efficient functioning of these schemes.

3.2 It is noted that the definition of 'payment scheme'[4] in the draft law appears to include not only card-based payment schemes, but covers a wider set of payment schemes. The ECB understands that the main aim of the legislator is to focus on the issuing and acquiring aspect of payment instruments, such as cards and mobile payments. The ECB also understands that it is not intended for the definition of 'payment scheme' to be interpreted as also covering the Single Euro Payments

4 'Payment scheme' is defined as a set of rules for the execution of payment transactions, the rules for issuing and acquiring of payment instruments by payment service providers and the rules for the processing of payment transactions carried out using payment instruments, in particular a payment card scheme.

Area (SEPA) schemes for direct debits (SDD) and credit transfers (SCT), as well as national (non-SEPA) credit transfer and direct debit schemes[5].

3.3 The ECB notes that the draft law only exempts three-party payment schemes from the requirement to obtain a licence from or the consent of the President, but that the other powers of the President still apply, including the power to issue recommendations on such a payment scheme and to suspend it from operation in Poland. However, in the case of payment service providers from other Member States, such powers may conflict with the actions of the national competent authorities of the home Member State responsible for the supervision of providers of issuing and acquiring services within a payment scheme. They may also conflict with the right of establishment and the freedom to provide services which payment institutions, e-money institutions or credit institutions should enjoy when providing issuing and acquiring services in a host Member State.

3.4 The Eurosystem oversight policy framework[6] provides that for the purpose of overseeing individual systems, it will assign a leading role to the central bank that is best placed to fulfil this function. For systems with a clear national anchor in Poland, NBP will perform this role and the draft law would provide a sound legal basis to support NBP's role as lead overseer. However, where there is no national anchor, the ECB Governing Council may assign the primary oversight responsibilities to the ECB, with participation of other interested national central banks (NCBs) in the Eurosystem as part of a cooperative oversight arrangement. This is the case for the SCT and SDD schemes, as well as the Visa and American Express card payment schemes. There are also cooperative oversight arrangements in place in relation to the MasterCard card payment scheme, where the Nationale Bank van België/Banque Nationale de Belgique has been assigned as the lead oversight authority (with the ECB and some volunteering NCBs also involved in the arrangement). The ECB welcomes that the draft law aims to also exempt a payment scheme operating on Polish territory, which has been assessed by the appropriate oversight authority of another Member State or of the Union, from the requirement to obtain a licence from the President for the operation of a payment scheme or to obtain the President's consent to a change in the rules of a payment scheme. The ECB understands that the President's power to nevertheless require such a payment scheme to obtain the relevant licence/consent would, in practice, only be exercised in cases where the final assessment by the appropriate oversight authority of another Member State or of the Union was negative and that, in any event, NBP would cooperate with the relevant oversight authority until the conclusion of an oversight assessment and not take any unilateral action based on preliminary assessment findings. However, the draft law would benefit from making it clear that the President's power will not conflict with any action taken by the Eurosystem. Similarly, the provisions of the draft law providing for the possibility that the President may suspend a payment scheme or withdraw consent for its functioning could be clarified to ensure that the exercise of the President's oversight powers, in relation to payment schemes that are already subject to Eurosystem oversight, will not conflict with action taken by the NCBs as part of a cooperative oversight arrangement. The ECB

5 The ECB's interpretation is based on the understanding that the different elements of the definition of 'payment scheme' apply cumulatively.

6 Eurosystem oversight policy framework, September 2015, available on the ECB's website at: http://www.ecb.europa.eu.

therefore suggests that payment schemes in respect of which a leading oversight role has already been assigned to the ECB and/or one or more NCBs, be excluded from the scope of the President's oversight powers, so that the draft law essentially relies on cooperative oversight arrangements with the ECB and the NCBs. In this respect, it is noted that NBP is entitled to participate in the Eurosystem assessment groups on the basis of the contractual arrangements in place with the Eurosystem oversight authorities for international card payment schemes. If such an approach is followed, this would mean increased pan-European harmonisation and efficiency in the provision of card payments.

3.5 As a general matter, the Polish authorities may also wish to further consider whether the imposition of the abovementioned specific requirements on payment schemes established and legally operating in other Member States is compliant with the Treaty provisions on the free movement of services and other applicable provisions of EU law.

3.6 In relation to the SCT and SDD schemes, whilst the ECB understands that the draft law intends to exclude credit transfer and direct debit schemes from the scope of NBP's oversight, the drafting of the relevant exclusion[7] could be more accurately formulated. In particular, the relevant provision of the draft law provides that the chapter dealing with NBP oversight does not apply to payment schemes in so far as they are subject to the rules of assessment under Regulation (EU) No 260/2012 of the European Parliament and of the Council (hereinafter the 'SEPA Regulation')[8]. However, the rules applicable to oversight assessment at Eurosystem level are set out in the oversight policy framework and related guides[9], not in the SEPA Regulation. The latter requires Member States to establish competent authorities responsible for ensuring compliance with the SEPA Regulation, but the key role of these authorities is to monitor compliance by the payment service providers rather than carry out assessments of payment schemes. In these circumstances, the ECB invites the consulting authority to consider reformulating the relevant exclusion by providing that the chapter dealing with NBP oversight does not apply to payment schemes for the execution of payment transactions regulated by the SEPA Regulation.

3.7 Regarding the exercise of the President's oversight powers over domestic payment schemes, the ECB notes that the regulations to be issued by the Minister responsible for financial institutions will specify the criteria for the assessment of a payment scheme. In the interests of harmonisation, the ECB suggests that these criteria should be aligned with the criteria established under the Eurosystem oversight policy framework.

4. Conferral of new tasks on NBP

4.1 *General observations*

7 Proposed new Art. 132zu of the Law on Payment Services.

8 Regulation (EU) No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009 (OJ L 94, 30.3.2012, p. 22).

9 See the relevant guides for the assessment of direct debit schemes and credit transfer schemes against the oversight standards, November 2014, available on the ECB's website at www.ecb.europa.eu.

4.1.1 The draft law assigns the new oversight task to the President, since the President is the only NBP organ that may, under the Law on Narodowy Bank Polski, issue administrative decisions. The ECB understands that this new oversight task is, in effect, to be conferred on NBP and that the President will act on behalf of NBP.

4.1.2 The ECB would like to recall that when new tasks are conferred on a member of the European System of Central Banks (ESCB), it is necessary to assess these tasks against the prohibition of monetary financing under Article 123 of the Treaty. For this purpose, the ECB has developed guidance, in the form of general and specific considerations as set out in paragraph 4.2, on the basis of which the ECB may decide whether the new task conferred on an ESCB national central bank (NCB) is to be considered a central banking task or a governmental task for the purposes of assessing the conferral of such a task against the prohibition of monetary financing[10]. This guidance applies to genuinely new tasks that either did not exist in the past or did not form an integral part of the central banking tasks previously assigned to the NCB in question. The tasks currently discharged by an NCB as central banking tasks are not reviewed and re-categorised, but may be reassessed if they are subject to substantive legislative amendments. In this regard, the ECB notes that the President already exercises oversight in respect of certain segments of the financial market infrastructure. The draft law, however, extends NBP's oversight powers to include payment schemes and the new tasks should therefore be assessed for compliance against the monetary financing prohibition. The concrete assessment of whether NBP's tasks as the authority responsible for oversight of payment schemes is to be considered a central banking task or a governmental task is undertaken in paragraph 4.3.

4.2 *Guidance on conferral of new tasks*

4.2.1 First, the principle of financial independence requires that the Member States may not put their NCBs in a position where they have insufficient financial resources to carry out their ESCB- or Eurosystem-related tasks, as applicable.

Second, central banking tasks comprise in particular those tasks that are related to the tasks listed in Article 127(2), (5) and (6) of the Treaty.

Third, new tasks conferred on an NCB that are atypical of NCBs' tasks, or which are clearly discharged on behalf of and in the exclusive interest of the government or of other public entities, should be considered as governmental tasks.

4.2.2 An important criterion for qualifying a new task as a governmental task is therefore the impact of the task on the institutional, financial and personal independence of the NCB. In particular, the following should be taken into account.

First, it should be assessed whether the performance of the new task creates inadequately addressed conflicts of interests with existing central banking tasks, and does not necessarily complement those existing central banking tasks. If a conflict of interest arises between existing and new tasks, there should be sufficient mitigation in place to adequately address that conflict.

10 See paragraph 2.3 of Opinion CON/2015/22. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

Complementarity between the new task and existing central banking tasks should not, however, be interpreted extensively, so as to lead to the creation of an indefinite chain of ancillary tasks. Complementarity should also be examined from the point of view of the financing of those tasks.

Second, it should be assessed whether without new financial resources the performance of the new task is disproportionate to the financial or organisational capacity of the NCB and may negatively impact on its capacity to properly perform existing central banking tasks.

Third, it should be assessed whether the performance of the new task fits into the institutional set-up of the NCB in the light of central bank independence and accountability considerations.

Fourth, it should be assessed whether the performance of the new task would entail substantial financial risks.

Fifth, it should be assessed whether the performance of the new task exposes the members of the NCB's decision-making bodies to political risks which are disproportionate and may also impact on their personal independence and, in particular, the guarantee of the term of office under Article 14.2 of the Statute of the European System of Central Banks and of the European Central Bank.

Any final assessment on the qualification of a task given to an NCB as either falling within the scope of a central banking task or a governmental task will be guided by the objective of ensuring the consistent application of the prohibition of monetary financing within the Eurosystem and the ESCB to the extent that it applies to its members.

4.3 *Specific observations*

4.3.1 *Principle of financial independence*

The principle of financial independence requires that the Member States may not put their NCBs in a position where they have insufficient financial resources to carry out not only their ESCB-related tasks, but also their national tasks, both from an operational and financial perspective[11].

4.3.2 *Links to tasks listed in Article 127(2), (5) and (6) of the Treaty*

The oversight of payment schemes is a task related to the tasks conferred in the fourth indent of Article 127(2) of the Treaty, as this task is ancillary to the promotion of the smooth operation of payment systems.

4.3.3 *Atypical tasks*

Central banks have always had an interest in the safety and efficiency of payment and settlement systems. In particular, as noted in Section 3 above, the ECB together with the Eurosystem NCBs carries out oversight activities in relation to payment schemes. In addition, the President already exercises oversight in respect of certain financial market infrastructures. The extension of NBP's oversight powers to payment schemes can therefore be regarded as not atypical of a central bank.

4.3.4 *Extent to which conflicts of interest with existing tasks are addressed*

Given that the President already exercises oversight in respect of certain segments of the financial market infrastructure, the extension of NBP's oversight powers to payment schemes appears to

11 See the ECB's 2016 Convergence Report, p.25.

complement NBP's existing powers and there should be no conflict of interest between the new and existing tasks of NBP.

4.3.5 *Extent to which the performance of the new task is proportional with NBP's financial and operational capacity and its ability to perform ESCB-related tasks*

The ECB understands that the extension of the scope of the oversight to payment schemes should not entail a substantial additional operational or financial burden for NBP. The ECB also understands that NBP already undertook necessary measures to ensure resources for the performance of the extended oversight duties.

4.3.6 *Extent to which the performance of the new task fits into the institutional set-up of NBP in the light of central bank independence and accountability considerations*

Given the complementarity of the new tasks with NBP's existing oversight powers in respect of other segments of the financial market infrastructure, the new tasks appear to fit into the current institutional set-up of NBP.

4.3.7 *Extent to which the performance of the new task entails financial risks*

The draft law does not contain any specific provisions on liability. The ECB understands that the performance of the new task does not involve the risk of any additional liability other than that to which NBP is already subject to in performance of its other duties, according to which damage resulting from NBP's unlawful act would need to be established in order to hold NBP liable.

4.3.8 *Conclusion*

Given the close link to and complementarity with one of the principal functions of central banks of promoting the smooth operation of payment systems, the new tasks conferred on NBP are regarded as central banking tasks for the purposes of assessing their compliance with the monetary financing prohibition.

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

Done at Frankfurt am Main, 28 July 2016.

[signed]

The President of the ECB

Mario DRAGHI