

II

(Non-legislative acts)

REGULATIONS

REGULATION (EU) 2021/728 OF THE EUROPEAN CENTRAL BANK

of 29 April 2021

amending Regulation (EU) No 795/2014 on oversight requirements for systemically important payment systems (ECB/2021/17)

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 127(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular Article 3.1, Article 22 and the first indent of Article 34.1 thereof,

Whereas:

- (1) Operators of systemically important payment systems (SIPs) established in euro area Member States must ensure compliance of the SIPs they operate with the highest applicable standards as laid down in Regulation (EU) No 795/2014 of the European Central Bank (ECB/2014/28) ⁽¹⁾. That compliance is, in the case of each SIP, overseen by a single Eurosystem central bank which is designated as the competent authority for that purpose. In the case of SIPs that meet the criteria set out in Article 1(3)(iii) of Regulation (EU) No 795/2014 (ECB/2014/28), oversight should be carried out by the European Central Bank (ECB) as the designated competent authority. However, in relation to such SIPs, it may be beneficial in specific and exceptional circumstances that compliance is overseen by two Eurosystem central banks, i.e. a national central bank and the ECB, that are designated as competent authorities, in order to benefit from the relevant national central bank's knowledge of and previously established relationship with the overseen entity, as well as to recognise the ECB's role in overseeing such SIPs.
- (2) Payment systems are identified as SIPs if they fulfil identification criteria related to size, market share, cross-border activity and the provision of settlement to other financial market infrastructures, as specified in Regulation (EU) No 795/2014 (ECB/2014/28). However, fast moving technological trends coupled with changing consumer preferences may give rise to fundamental changes in the way payments are made. Against this background, it is important that all potentially relevant factors of systemic importance be taken into account and therefore an additional, flexible and forward-looking methodology for the identification of payment systems as SIPs should be put in place to ensure that such payment systems are subject to the highest applicable oversight standards as laid down in Regulation (EU) No 795/2014 (ECB/2014/28).
- (3) To ensure that due process guarantees are respected both before and after the Governing Council adopts a decision identifying a payment system as a SIP, due process procedures should be laid down in Regulation (EU) No 795/2014 (ECB/2014/28). These procedures include the ECB issuing a written notice when initiating the identification process and stating the reasons for its decision to identify a payment system as SIP. Regulation (EU) No 795/2014 (ECB/2014/28) should also specify the system operator's right of access to files, right to be heard and right to request an internal review of the decision that identifies a payment system as a SIP.

⁽¹⁾ Regulation (EU) No 795/2014 of the European Central Bank of 3 July 2014 on oversight requirements for systemically important payment systems (ECB/2014/28) (OJ L 217 23.7.2014, p. 16).

- (4) The business activity of SIPSs may fluctuate over time. In order to ensure the integrity of the SIPS identification framework, while as far as possible maintaining continuity and avoiding frequent reclassifications of payment systems, a payment system should cease to be identified as a SIPS if it does not meet the criteria for identification as a SIPS in two consecutive verification reviews. However, maintaining the SIPS status over such a period of time may not be appropriate if it is unlikely that the system would fulfil the criteria qualifying it as a SIPS in the next verification exercise. Consequently, the possibility of an earlier reclassification based on a case-by-case evaluation should also be possible.
- (5) Therefore, Regulation (EU) No 795/2014 (ECB/2014/28) should be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Amendments

Regulation (EU) No 795/2014 (ECB/2014/28) is amended as follows:

1. Article 1 is amended as follows:

(a) paragraph 2 is replaced by the following:

'2. The Governing Council shall adopt a reasoned decision identifying the payment systems that are subject to this Regulation, their respective operators and competent authorities. This list shall be maintained on the ECB's website and updated after each change.';

(b) the following paragraph 3-a is inserted:

'3-a. Notwithstanding paragraph 3, the Governing Council, exercising sound and reasoned judgement, may also decide under paragraph 2 that a payment system shall be identified as a SIPS in either of the following cases:

(a) where such a decision would be appropriate taking into account the nature, size and complexity of the payment system; the nature and importance of its participants; the substitutability of the payment system and the availability of alternatives to it; and the relationship, interdependencies, and other interactions the system has with the wider financial system;

(b) where a payment system does not meet the criteria set out in paragraph 3 solely because the criteria established in point (b) of paragraph 3 occur over a period of less than a calendar year and it is plausible that the payment system will continue to meet the criteria when assessed in the next verification review.';

(c) paragraph 3a is replaced by the following:

'3a. A decision adopted under paragraph 2 shall remain in force until it has been repealed. Verification reviews of payment systems that have been identified as SIPS shall be carried out on an annual basis to verify that the payment systems continue to meet the criteria for being identified as SIPS. A decision adopted pursuant to paragraph 2 shall be repealed if:

(a) in two consecutive verification reviews it is verified that a SIPS has not met the criteria set out in paragraph 3 and/or paragraph 3-a; or

(b) in one verification review it is verified that a SIPS has not met the criteria set out in paragraph 3 and/or paragraph 3-a and the SIPS operator demonstrates, to the satisfaction of the Governing Council, that the SIPS is unlikely to meet those criteria prior to the next verification review.';

(d) the following paragraph 3b is inserted:

'3b. The payment system operator shall have the right to request a review by the Governing Council of the decision identifying the payment system concerned as a SIPS within 30 days of receipt of that decision. The request shall include all supporting information and shall be addressed in writing to the Governing Council. A reasoned decision by the Governing Council in response to such request shall be notified in writing to the payment system operator. The written notice shall inform that operator of its right of judicial review in accordance with the Treaty. If no decision has been taken by the Governing Council within two months of the request, the review shall be deemed rejected.'

2. Article 2 is amended as follows:

(a) point (5) is replaced by the following:

'(5) "competent authority" means:

- (a) the Eurosystem national central bank with primary oversight responsibility identified as such pursuant to Article 1(2); or
- (b) in relation to a payment system which is a SIPS that meets the criteria in Article 1(3)(iii) 'competent authority' means either:
 - (i) the ECB; or
 - (ii) where a Eurosystem national central bank was entrusted with primary oversight responsibility for a period of five or more years immediately before the decision referred to in Article 1(2) was taken, both the ECB and that national central bank;'

3. The following Articles 2a to 2d are inserted:

Article 2a

Written notice of the initiation of the process to identify a payment system as a SIPS

The ECB shall notify the payment system operator of its intention to initiate a process under Article 1 in view of the identification of that payment system as a SIPS. The written notice shall state all material facts and legal grounds regarding a possible identification of the payment system concerned as a SIPS.

Article 2b

Right of access to files during the process to identify a payment system as a SIPS

Upon receipt of the written notice referred to in Article 2a, the payment system operator shall be entitled to access the ECB's files, documents or other material that serve as a basis for the identification of that payment system as a SIPS. This right shall not extend to information deemed to be confidential in relation to the ECB, a national central bank, or other third parties, including other Union institutions or bodies.

Article 2c

Right to be heard during the process to identify a payment system as a SIPS

1. In the written notice sent by the ECB in accordance with Article 2a, the payment system operator shall be given a fixed time limit within which it may express in writing any objections, views and comments regarding the facts and legal grounds presented in the written notice. This time limit shall be no less than 30 working days starting from the receipt of the written notice by the payment system operator.

2. The ECB may give the opportunity to the payment system operator, upon its request, to express its views in an oral meeting. Written minutes of the meeting shall be prepared and signed by all parties. A copy of the minutes shall be provided to all parties.

3. Notwithstanding paragraph 2, the ECB may issue a decision identifying a payment system as a SIPS without giving the payment system operator the opportunity to express its views, objections or comments on the facts and legal grounds presented in the written notice sent by the ECB, provided this is considered necessary to prevent significant damage to the financial system.

Article 2d

Motivation of the decision identifying a payment system as a SIPS

1. The ECB decision that identifies a payment system as a SIPS shall be accompanied by a statement of the reasons for that decision. The statement of reasons shall contain the material facts and legal grounds on which the ECB's decision is based.

2. Subject to Article 2c, paragraph 3, the ECB shall base the decision referred to in paragraph 1 of this Article only on facts and legal grounds on which the payment system operator has been able to comment;'

4. in Article 21, paragraph 2 is replaced by the following:

‘2. The ECB shall adopt a decision on the procedure and conditions for exercising the powers referred to in paragraph 1. The decision shall clearly state how these powers are to be exercised and the procedural aspects that are to be complied with where the competent authority is both the ECB and a national central bank pursuant to Article 2(5)(b)(ii).’;

5. in Article 22, paragraph 6 is replaced by the following:

‘6. The ECB shall adopt a decision on the procedure to be followed if corrective measures are to be imposed. The decision shall clearly state how this procedure is to be complied with where the competent authority is both the ECB and a national central bank pursuant to Article 2(5)(b)(ii).’.

Article 2

Final provision

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Frankfurt am Main, 29 April 2021.

For the Governing Council of the ECB
The President of the ECB
Christine LAGARDE
