



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

## OPINION OF THE EUROPEAN CENTRAL BANK

of 15 February 2017

on payment accounts

(CON/2017/2)

### Introduction and legal basis

On 23 January 2017 the European Central Bank (ECB) received a request from the Cypriot Ministry of Finance for an opinion on a draft law on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (hereinafter the 'draft law').

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 and third indents of Article 2(1) of Council Decision 98/415/EC<sup>1</sup>, as the draft law relates to means of payment and the Central Bank of Cyprus (CBC). 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 purpose of the draft law is to implement Directive 2014/92/EU of the European Parliament and of the Council<sup>2</sup> in Cypriot law. Directive 2014/92/EU requires Member States to designate a national competent authority to oversee the application and enforcement of its provisions<sup>3</sup>. Such competent authorities must be either public authorities or bodies recognised by national law or by public authorities expressly empowered for that purpose by national law. While such competent authorities may not be payment service providers, an exception is made for national central banks.
- 1.2. The draft law designates the CBC as the competent authority responsible for the application and enforcement of the rules implementing Directive 2014/92/EU. As the competent authority, the CBC is required to cooperate and exchange information with the competent authorities of other Member States. In addition, the draft law confers a number of tasks on the CBC related to the protection of consumers. In particular, the CBC is entrusted with the responsibility of carrying out supervisory controls over payment service providers and credit institutions, and any of their representatives or third parties to whom they have delegated any of the tasks conferred by the draft law. Such persons are obliged to make available to the CBC or surrender any books, documents or records

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<sup>1</sup> 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).

<sup>2</sup> Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (OJ L 257, 28.8.2014, p. 214).

<sup>3</sup> Directive 2014/92/EU aims to improve the transparency and comparability of fee information for payment accounts, facilitate consumers switching payment accounts, and ensure that every EU resident has access to a payment account with basic features.

the CBC requests<sup>4</sup>. The CBC is also granted powers to impose sanctions for infringements of the draft law and to require consumers wishing to open a payment account with basic features to show a genuine interest in doing so<sup>5</sup>. The draft law also provides that consumers wishing to complain about credit institutions' refusal to offer payment accounts with basic features or their unilateral termination of framework contracts have the right to contact the CBC and the Consumer Protection Service, which is designated as the alternative dispute resolution body.

- 1.3. Other responsibilities conferred upon the CBC include the establishment of a list of the most representative services linked to a payment account and subject to a fee, the definition of the responsibilities of payment service providers concerning the information they need to provide to the Ministry of Finance for the operation of the website on which the fees charged by payment service providers will be compared, and ensuring that payment accounts with basic features are offered by credit institutions for a reasonable fee.
- 1.4. Finally, the draft law grants the CBC the power (i) to establish an alternative procedure in relation to account switching; (ii) to restrict, after consultation with the Consumer Protection Service and the Commission for the Protection of Competition, the number of credit institutions offering payment accounts with basic features to consumers, provided that access to such accounts by all consumers throughout Cyprus is guaranteed; (iii) to identify limited and specific additional cases in which credit institutions may be required or may choose to refuse an application for a payment account with basic features; and (iv) to identify limited and specific additional cases in which a framework contract for a payment account with basic features may be unilaterally terminated by a credit institution.

## 2. Conferral of new tasks on the CBC

- 2.1. This opinion does not address whether the draft law effectively implements Directive 2014/92/EU into Cypriot law. The ECB will only assess those provisions of the draft law that may impact on the role and tasks of the CBC as a central bank, national supervisory authority and member of the Eurosystem and the European System of Central Banks (ESCB).
- 2.2. As noted in paragraphs 1.2, 1.3 and 1.4, the draft law confers a number of new tasks on the CBC. In the context of a proposed conferral of new tasks on a national central bank (NCB) in the ESCB, it is necessary to assess such conferral against the prohibition on monetary financing under Article 123 of the Treaty. For the purposes of that prohibition, Article 1(1)(b)(ii) of Council Regulation (EC) No 3603/93<sup>6</sup> defines 'other type of credit facility', *inter alia*, as 'any financing of the public sector's obligations vis-à-vis third parties'.

As the objective of the monetary financing prohibition of maintaining a sound budgetary policy of Member States may not be circumvented, the task of financing measures which are normally the responsibility of the Member States, and financed from their budgetary sources and not by the

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<sup>4</sup> In exercising this power the CBC acts as the overseer of the enforcement of the draft law for the benefit of consumers.

<sup>5</sup> See Article 16(2) of Directive 2014/92/EU.

<sup>6</sup> Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty (OJ L 332, 31.12.1993, p. 1).

NCBs, must not be entrusted to NCBs by law. In order to decide what constitutes a form of financing of the public sector's obligations vis-à-vis third parties – which can be translated as the provision of central bank financing outside the scope of central bank tasks – an assessment of whether the task to be undertaken by an NCB is a central bank task or a government task, i.e. a task within the responsibility of the Member States, needs to be carried out on a case-by-case basis. In other words, sufficient safeguards must be in place to ensure that circumventions of the objective of the monetary financing prohibition of maintaining a sound budgetary policy of Member States do not take place.

- 2.3. As part of its discretion in the exercise of its duty, on the basis of Article 271(d) of the Treaty and Article 35.6 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'), to ensure that NCBs honour the obligations laid down by the Treaty, the Governing Council has endorsed safeguards of that kind in the form of criteria for determining what may be seen as falling within the scope of a public sector's obligation within the meaning of Article 1(1)(b)(ii) of Regulation (EC) No 3603/93 or, in other words, constitute a government task as follows:

*First*, central bank tasks are in particular those tasks that are related to the tasks that have been conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB. These tasks are mainly defined in Article 127(2), (5) and (6) and Article 128(1) of the Treaty, as well as Article 22 and Article 25.1 of the Statute of the ESCB.

*Second*, as Article 14.4 of the Statute of the ESCB allows NCBs to perform 'other functions', new tasks, i.e. tasks that are not related to tasks that have been conferred upon the ECB and the NCBs, are not precluded per se. However, new tasks that are undertaken by an NCB and which are atypical of NCB tasks or which are clearly discharged on behalf of and in the exclusive interest of the government or of other public sector entities should be considered government tasks.

*Third*, an important criterion for qualifying a new task as atypical of an NCB task or as being clearly discharged on behalf of and in the exclusive interest of the government or other public sector entities is the impact of the task on the institutional, financial and personal independence of that NCB.

In particular, the following aspects should be taken into account:

- (a) Whether the performance of the new task creates conflicts of interest with existing central bank tasks which are not adequately addressed and does not necessarily complement those existing central bank tasks. If a conflict of interest arises between existing and new tasks, sufficient safeguards to mitigate that conflict should be in place. The complementarity between a new task and the existing central bank tasks should not be interpreted broadly, so as to lead to the creation of an indefinite chain of ancillary tasks. Such complementarity should be examined also in relation to the financing of those tasks.
- (b) Whether without new financial resources the performance of the new task is disproportionate to the NCB's financial or organisational capacity and may negatively impact on the capacity to perform properly the existing central bank tasks.

- (c) Whether the performance of the new task fits into the institutional set-up of the NCB in light of central bank independence and accountability considerations.
- (d) Whether the performance of the new task harbours substantial financial risks.
- (e) Whether the performance of the new task exposes the members of the NCB decision-making bodies to political risks which are disproportionate and may also impact on their personal independence and, in particular, on the guarantee of term of office set out in Article 14.2 of the Statute of the ESCB.
- 2.4. On the basis of the criteria set out above, the following paragraphs assess whether the CBC's new tasks are in line with the monetary financing prohibition.
- 2.4.1. *New tasks related to the tasks conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB*
- The application and enforcement of the rules implementing Directive 2014/92/EU is a new task for national authorities in the Union<sup>7</sup> and is related to the task 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<sup>8</sup>.
- 2.4.2. *Tasks which are atypical of NCB tasks*
- The application and enforcement of the rules implementing Directive 2014/92/EU is a new task for national authorities in the Union. Directive 2014/92/EU permits Member States to designate their central banks as competent authorities, and a number of Member States have done so<sup>9</sup>.
- 2.4.3. *Impact of the tasks on the independence of the CBC*
- Consideration should be given to the impact of the new tasks to be conferred on the CBC on the institutional, financial and personal independence of the CBC.
- 2.4.3.1. *Extent to which performance of the new task creates conflicts of interest with existing central bank tasks*
- The new rules in the draft law apply to payment service providers, among them credit institutions. The CBC is already the competent authority responsible for the authorisation and prudential supervision of payment institutions pursuant to the Law on payment services<sup>10</sup>. The CBC's new task of being the competent authority for the implementation and enforcement of the draft law therefore seems to complement its existing tasks.
- 2.4.3.2. *Extent to which performance of the new task is disproportionate to the CBC's financial or organisational capacity*
- 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. Furthermore, when allocating specific new tasks to NCBs, each NCB concerned

<sup>7</sup> See paragraph 3.1.4 of Opinion CON/2016/19. All ECB opinions are published on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

<sup>8</sup> See paragraph 3.1.3 of Opinion CON/2016/19.

<sup>9</sup> See, e.g., paragraph 3.1.4 of Opinion CON/2016/19.

<sup>10</sup> See section 80 of the Law on payment services of 2009 (128(I)/2009).

should be able to avail itself of additional financial resources so that these tasks may be carried out in a manner that will not affect the NCB's operational or financial capacity (including sufficient human resources) to perform their ESCB tasks. In this regard, the ECB notes that Directive 2014/92/EU requires Member States to ensure that the national authorities in charge of the application and enforcement of its rules are granted adequate resources for the efficient and effective performance of their duties<sup>11</sup>. The draft law entrusts CBC with the potentially resource and personnel-intensive task of applying and enforcing the new rules under Directive 2014/92/EU, including the tasks and responsibilities listed in paragraphs 1.2 to 1.4 above. The Cypriot authorities must ensure that the CBC can avail itself of sufficient resources, including personnel, for the performance of the new duties relating to the protection of consumers conferred under the draft law, so that the CBC's capacity to perform its ESCB-related tasks is not affected. The draft law contains a provision permitting the CBC to determine all the costs it bears in relation to the carrying out of the tasks conferred on the CBC under the draft law and to demand the repayment of these costs from payment service providers. The draft law therefore provides for the reimbursement of the CBC of the costs incurred in relation to the performance of its new tasks.

*2.4.3.3. Extent to which performance of the new task fits into the CBC's institutional set-up, in light of central bank independence and accountability considerations*

The performance of the new tasks appears to be aligned with the institutional set-up of the CBC. As mentioned in paragraph 2.4.3.1, the CBC is already responsible for the application of provisions regarding payment services and systems, in the context of which the new tasks under the draft law are conferred.

*2.4.3.4. Extent to which the performance of tasks harbours substantial financial risks*

The draft law provides that the CBC and its advisors, officers and employees shall not be subject to any liability in case of any legal action, application or other legal proceeding for damages in relation to any act or omission in the performance of their duties related to the tasks conferred by the draft law, unless it is proven that such act or omission was done in bad faith or is a result of gross negligence.

*2.4.3.5. Extent to which performance of the new task exposes members of the CBC's decision-making bodies to disproportionate political risks and impacts on their personal independence*

The performance of the tasks conferred under the draft law does not appear to expose the CBC's decision-making bodies to any disproportionate political risk or impact on their personal independence. As mentioned in paragraph 2.4.3.1, the CBC is already responsible for the application of provisions regarding payment services and systems.

### **3. Conclusion**

The ECB considers that, given their link to the ESCB task of promoting the smooth operation of payment systems, the tasks conferred on the CBC under the draft law can be considered as central banking tasks.

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<sup>11</sup> Article 21(1) of Directive 2014/92/EU.

Their financing by the CBC is in principle in compliance with the prohibition of monetary financing under Article 123 of the Treaty. In line with the requirement of Directive 2014/92/EU that the national competent authorities must be granted adequate resources necessary for the efficient and effective performance of their duties, the Cypriot authorities must ensure that, in addition to the reimbursement of the CBC for the costs that it incurs as a result of the draft law, the CBC can avail itself of sufficient resources, including personnel, for the performance of the new duties relating to the protection of consumers conferred under the draft law, so that the CBC's capacity to perform its ESCB-related tasks is not affected.

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

Done at Frankfurt am Main, 15 February 2017.

*[signed]*

*The President of the ECB*

Mario DRAGHI