



EUROPEAN CENTRAL BANK
EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK
of 14 February 2018
on conferring new tasks relating to interchange fees for card-based payment transactions
to the Central Bank of Cyprus
(CON/2018/10)

Introduction and legal basis

On 15 January 2018 the European Central Bank (ECB) received a request from the Ministry of Finance of the Republic of Cyprus for an opinion on a draft law on interchange fees for card-based payment transactions (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 third indent of Article 2(1) of Council Decision 98/415/EC¹, as the draft law relates to 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 effectively implement Articles 3(2), 13, 14 and 15 of Regulation (EU) 2015/751² into the Cypriot legal order by designating the CBC and the Commission for the Protection of Competition of the Republic of Cyprus (hereinafter the 'Competition Commission') as the competent authorities for the purposes of Regulation (EU) 2015/751. According to the draft law, the two authorities will be jointly responsible to ensure the enforcement of the provisions of Regulation (EU) 2015/751 and of the draft law, except where responsibility is expressly assigned otherwise.
- 1.2 In relation to the enforcement of Articles 3, 4, 5 and 7 of Regulation (EU) 2015/751, which govern the interchange fee caps that should be imposed by payment service providers in consumer credit and debit card transactions, and the requirement to keep payment card schemes separate from processing entities, the CBC is required to set up and manage a procedure for the regular collection of information and records from all payment services providers and, where appropriate, from all card payment schemes. In addition, where the CBC considers, in the light of the information and records that it may receive from any payment service provider or card payment

¹ 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).

² 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).

scheme, that competition issues arise, it is required to transmit the relevant information to the Competition Commission which may further investigate the matter and proceed with enforcement and administrative sanctions and/or measures.

- 1.3 The Competition Commission is designated as the exclusive competent authority for the enforcement of Articles 6, 8, 9, 10, 11 and 12 of the Regulation (EU) 2015/751 and the Financial Ombudsman of the Republic of Cyprus is entrusted with responsibility for out-of-court resolution of disputes that may arise under Regulation (EU) 2015/751.
- 1.4 Furthermore, for the purposes of enforcing Regulation (EU) 2015/751, and in particular Article 13 which requires competent authorities to effectively monitor compliance with Regulation (EU) 2015/751, both authorities are vested with a number of powers, including the power to collect information, documents and records from any supervised entity, to carry out on-site investigations and to cooperate with the competent authorities of other Member States. In line with Article 14 of Regulation (EU) 2015/751, the competent authorities are also empowered to impose administrative sanctions in cases of infringement of the provisions of the draft law and/or Regulation (EU) 2015/751, and to take any necessary measures in order to ensure the enforcement of the draft law and Regulation (EU) 2015/751. Any decision to impose an administrative sanction or to take other measures in the case of an infringement should be published by each competent authority on its website. The draft law further enables the competent authorities to determine the fees for the performance of their duties and to issue any relevant directives and guidelines.
- 1.5 As far as cooperation between the two authorities is concerned, notwithstanding the more detailed provisions as regards enforcement of Articles 3, 4, 5 and 7 of Regulation (EU) 2015/751 as described in paragraph 1.2 above, the draft law provides that the competent authorities will enter into a memorandum of cooperation and will take all necessary measures to regulate cooperation between them. The draft law also grants the competent authorities the right to exchange information with each other for the purposes of the draft law.
- 1.6 Finally, the draft law limits the liability of the competent authorities and their employees, including, in addition to the CBC, the Governor of the CBC, the board of directors of the CBC and any person who is an advisor or officer of the CBC, in relation to an action, application or other legal proceedings for damages for any act or omission that took place during the performance of their duties and the exercise of their powers pursuant to the draft law and/or Regulation (EU) 2015/751, except where the act or omission was not committed in good faith or was the result of gross negligence.

2. General observations

- 2.1 In this opinion, the ECB will only assess those provisions of the draft law that may impact on the role and tasks of the CBC as a national central bank (NCB), national supervisory authority, member of the Eurosystem and the European System of Central Banks (ESCB). Consequently, this opinion will not address the question of whether the draft law, if adopted as proposed, would represent an effective means of implementing Regulation (EU) 2015/751 in Cyprus.

2.2 The ECB understands that the draft law does not intend to confer competition-related tasks on the CBC as these tasks are intended to be conferred on the Competition Commission. The ECB welcomes this, and invites the Ministry of Finance, for the avoidance of doubt, to make it explicitly clear that the CBC has not been conferred competition-related tasks under the draft law.

3. New tasks of the CBC

3.1 The draft law expands the current supervisory functions of the CBC, by granting it the responsibility of supervising interchange fees in respect of payment service providers and payment card schemes and other technical and business requirements relating to card-based payment transactions. It should be noted that the CBC is already the competent authority for supervising payment service providers pursuant to Law 128(I)/2009 on payment services³. It should also be noted that the CBC has been granted responsibility for tasks related to consumer protection, as it has been designated as the competent authority responsible for the application and enforcement of the rules implementing Directive 2014/92/EU⁴, and as one of the competent authorities, together with the Consumer Protection Service of the Republic of Cyprus, responsible for the application and enforcement of the rules implementing Directive 2014/17/EU⁵. However, the tasks attributed to the CBC under the draft law appear to go beyond the scope of its current tasks. Thus, the conferral upon the CBC under the draft law of the power to monitor and ensure compliance of payment service providers, payment card schemes and payees with their obligations under Regulation (EU) 2015/751, and to impose administrative sanctions in cases of infringement, are considered to be new tasks of the CBC.

3.2 The ECB underlines that a proposed conferral of tasks on an NCB in the ESCB must be assessed 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 3603/93⁶ defines ‘other type of credit facility’, inter alia, as ‘any financing of the public sector’s obligations vis-à-vis third parties’.

Ensuring that Member States implement a sound budgetary policy is one of the key objectives of the monetary financing prohibition, which may not be circumvented⁷. Therefore, the task of financing measures, which are normally the responsibility of the Member States, and which are financed from their budgetary sources rather than by the NCBs, must not be entrusted to NCBs. To decide what constitutes 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, it is necessary to carry out, on a case-by-case basis, an assessment of whether the task to be

³ Ο περί Υπηρεσιών Πληρωμών Νόμος του 2009 (Ν. 128(I)/2009).

⁴ 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).

⁵ Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34).

⁶ 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).

⁷ Article 123 of the Treaty also serves the objective of maintaining price stability and reinforces central bank independence.

undertaken by an NCB is a central bank task or a government task, i.e. a task within the responsibility of the Member States. In other words, adequate 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.

- 3.3 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, what constitutes 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 have a negative 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 the 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 have an 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.

3.4 On the basis of the criteria set out above, the following paragraphs assess whether the new tasks of the CBC are in line with the monetary financing prohibition.

3.4.1 *Tasks related to the tasks conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB*

The tasks conferred on the CBC in relation to ensuring enforcement of interchange fee caps between the issuing and the acquiring banks of card-based payment instruments as well as compliance with the requirements of Regulation (EU) 2015/751 by payment service providers, card payment schemes and payees, are not among the central banking tasks listed in Article 127(2) and (5) of the Treaty, or otherwise conferred upon the NCBs by the Statute of the ESCB. Furthermore, these tasks appear to go beyond the scope of the CBC's existing tasks as supervisory authority of payment service providers.

At the same time, the new tasks, notwithstanding their consumer protection dimension, are similar to CBC's existing tasks and appear to complement them given that the CBC is already responsible for authorising, supervising and withdrawing the authorisation of payment institutions providing payment services⁸, with the ultimate objective of safeguarding the smooth and efficient functioning of the payment systems. In this sense, CBC's new tasks can be regarded as related to the task conferred upon the ESCB in the fourth indent of Article 127(2) of the Treaty, as well as in the fourth indent of Article 3.1 of the Statute, based on the understanding that these tasks are ancillary to the promotion of the smooth operation of payment systems⁹. In addition, the consumer protection objectives of Regulation (EU) 2015/751 are closely interrelated with the objective of safeguarding the smooth functioning of payment systems. Taking this into account, the tasks to be conferred on the CBC can be seen as ultimately reinforcing the smooth operation of payment systems.

3.4.2 *Tasks which are atypical of NCB tasks*

Regulation (EU) 2015/751 grants Member States a wide discretionary power in determining the competent authorities which are responsible for monitoring compliance with its provisions, provided that the designated authorities have adequate resources for the performance of the duties assigned to them. A number of Member States¹⁰ have already designated their NCBs as the sole competent authorities to ensure compliance with the provisions of Regulation (EU) 2015/751, while

⁸ Pursuant to Law 128(I)/2009 on payment services. See also paragraph 1.1 of Opinion CON/2009/36. Under Law 128(I)/2009 on payment services, the CBC is also responsible for supervising the compliance of credit institutions and other payment service providers with the conduct of business rules under Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35), such as the requirement to provide information to payment service users, the time limits for the execution of payment orders, etc.

⁹ See paragraph 3.1.3 of Opinion CON/2016/19 and paragraph 2.4.1 of Opinion CON/2017/2.

¹⁰ This is the case in Bulgaria (Article 122(2) and Articles 124 and 139 of the Law on Payment Services and Payment Systems), Hungary (Article 41(19) of the Act CXXXIX of 2013 on the Magyar Nemzeti Bank and Act LXXXV of 2009), Lithuania (Article 62 of Law No XII-2561 of 30 June 2016 on Payments), Malta (Regulation 2 of Legal Notice 326 of 2015), Spain (Law 18/2014 of 15 October 2014), and Slovenia (based on the list of competent authorities available on the European Commission's website http://ec.europa.eu/competition/sectors/financial_services/national_competent_authorities.pdf).

many other Member States¹¹ have allocated these tasks between their NCBs and other public authorities with competences in the fields of competition and/or consumer protection. There are also Member States that have not assigned any of these tasks to their NCBs. As the majority of the Member States have allocated at least some of the tasks relating to the application of Regulation (EU) 2015/751 to their NCBs, the new tasks conferred upon the CBC would thus not be regarded as atypical of NCB tasks.

In addition, the ECB has consistently expressed the view that consumer protection tasks discharged by an NCB (and, in particular, by the CBC) may be regarded as central banking tasks provided that such tasks do not interfere with the performance of the NCB's ESCB-related tasks, and to the extent that those tasks complement existing supervisory powers and thus contribute to the soundness of the financial market and the preservation of confidence in the marketplace¹². It therefore follows that the new tasks which are conferred upon the CBC by the draft law cannot be regarded as atypical of an NCB, nor as being discharged in the exclusive interest of the government.

3.4.3 *Extent to which performance of the new task creates conflicts of interest with existing central bank tasks*

The new task conferred upon the CBC by the draft law does not appear to create any conflicts of interest with other central bank tasks performed by the CBC. As with other consumer protection tasks, sufficient mitigation measures must be put in place to ensure that in the event of a conflict of interest supervisory considerations prevail¹³.

3.4.4 *Extent to which performance of the new task is disproportionate to the financial or organisational capacity of the CBC*

The principle of financial independence requires that Member States do not put their NCBs in a position where they have insufficient financial resources to carry out their national and their ESCB-related tasks, both from an operational and financial perspective. Furthermore, each NCB concerned should have additional financial and human resources at its disposal to ensure that the new tasks can be carried without impacting on the NCBs' operational or financial capacity to perform its ESCB-related tasks¹⁴. It is noted that the draft law provides that each competent authority may set reasonable cost-oriented fees for the performance of its duties pursuant to the draft law and/or the Regulation (EU) 2015/751 and demand payment of such fees by the

11 This is the case in Belgium (Article XV.18/4 of the Code of Economic Law), Croatia (Article 4 paragraphs 1, 2, 5 and 6, and Article 6 of the Law NN 50/2016 on Implementation of EU Regulations Governing Payment Systems), Ireland (Regulation 6 of Statutory Instrument No 550 of 2015 and of Statutory Instrument No 292 of 2016), Italy (Article 3 of legislative Decree No 218 of 15 December 2017 and Article 34-quater of the Law on payment services), Netherlands (Article 2(r) and Article 5 and Annex 2 of the Administrative Order of 17 March 2017 amending the Administrative Order implementing EU Regulations on Financial Markets), Poland (Article 14 of the Law on Payment Services of 19 August 2011 (Dz.U. 2017, item 2003)), Slovakia (Article 2(3) of Law 492/2009 Coll., Law 747/2004 Coll., Article 2b of Law No 291/2002 Coll., Article 36(1) of Law No 80/1997 Coll., Law No 514/2003 Coll., Article 90 of Law No 492/2009 Coll.), and the Czech Republic (based on the list of competent authorities available on the European Commission's website http://ec.europa.eu/competition/sectors/financial_services/national_competent_authorities.pdf).

12 See paragraphs 3.2 and 4.4 of Opinion CON/2016/34 and paragraph 2.3.2 of Opinion CON/2017/3.

13 See paragraph 3.1 of Opinion CON/2015/21.

14 See paragraphs 2.1 and 2.2 of Opinion CON/2011/30.

supervised entities¹⁵. Each competent authority is also entitled to issue directives on the determination and payment of these fees¹⁶. The ECB notes that the CBC must be in a position to avail itself of the necessary resources, including personnel, in view of the need to ensure that it has the capacity to perform its ESCB-related tasks and that existing supervisory functions are not affected by these new tasks¹⁷.

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

Given the complementarity of the new tasks with the CBC's existing functions, in particular in the field of supervision of payment institutions and other payment service providers, the performance of the new tasks does not appear to be problematic as regards the institutional set-up of the CBC or raise accountability or personal and institutional independence concerns.

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

The draft law provides that the CBC, the Governor of the CBC, the board of directors of the CBC and any person who is an advisor or officer of the CBC, will not be liable in the event of an action, application or other legal proceedings for damages in relation to any act or omission that took place during the performance of their duties and the exercise of their powers and responsibilities pursuant to the draft law and/or Regulation (EU) 2015/751, except where the act or omission was not committed in good faith or was the result of gross negligence¹⁸. The performance of the new tasks would not, therefore, appear to harbour undue financial risks for the CBC.

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

The performance of the new tasks conferred under the draft law does not appear to expose the decision-making bodies of the CBC to any disproportionate political risk or to impact their personal independence.

3.4.8 *Conclusion*

The new tasks conferred upon the CBC can be regarded as central banking tasks based on the understanding that they are complementary to the CBC's existing tasks in the area of supervision of payment service providers and, ultimately, ancillary to the task of promoting the smooth operation of payment systems. This understanding is supported by the fact that the consumer protection objectives of Regulation (EU) 2015/751 are closely interrelated with the objective of promoting the smooth operation of payment systems. It is, however, important that the CBC can avail itself of the necessary resources for the performance of its new tasks, so that the CBC's

15 See Article 22(1) of the draft law.

16 See Article 22(2) of the draft law.

17 See paragraphs 2.1 and 2.2 of Opinion CON/2011/30.

18 See Article 23 of the draft law.

capacity to perform its ESCB-related tasks and existing supervisory functions is not affected.

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

Done at Frankfurt am Main, 14 February 2018.

[signed]

The President of the ECB

Mario DRAGHI