



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

## OPINION OF THE EUROPEAN CENTRAL BANK

of 20 November 2015

on oversight of the smooth operation of payment traffic (*'betalingsverkeer'*)

(CON/2015/49)

### Introduction and legal basis

On 20 October 2015, the European Central Bank (ECB) received a request from De Nederlandsche Bank (DNB) for an opinion on a draft regulation on the oversight of the smooth operation of payment traffic (*'betalingsverkeer'*) (hereinafter the 'draft regulation').

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 indent of Article 2(1) of Council Decision 98/415/EC<sup>1</sup>, as the draft regulation concerns means of payment. 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 regulation**

- 1.1 The draft regulation lays down rules aimed at promoting the smooth operation of payment traffic within the Netherlands. The draft regulation applies to banks, payment institutions and electronic money institutions that have their registered office in the Netherlands and individually process 60 million or more non-cash payment transactions every year, which brings institutions representing about 95% of total domestic transaction volume within the scope of the draft regulation.
- 1.2 Pursuant to Dutch law, payment processing service providers, banks, payment institutions and electronic money institutions, when structuring their operational management, must comply with DNB regulations implementing international standards that promote the smooth operation of the payment systems. The draft regulation is intended to ensure public confidence in mass retail payment traffic and to minimize social unrest.
- 1.3 According to the draft regulation, an institution will be required to, inter alia, (a) have a sound, clear and enforceable legal basis for its activities in all jurisdictions relevant to its activities; (b) have a transparent, balanced and adequate governance structure that takes into account the importance for society of smoothly operating payment traffic; (c) clearly arrange responsibilities in respect of payment traffic and standards used, covering at least availability and security, which should be assigned at a sufficiently senior level; (d) have a sound risk management framework relating to payments.

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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).

- 1.4 Regarding operational risks, the draft regulation requires an institution to adequately identify, monitor and control operational risks related to payment traffic. This requires an institution to use systems, policies and control measures that identify risks and mitigate their impact. An institution must aim for continuous operation or timely recovery in the event of disruption of its business operations and service provision. The systems must be set up so as to ensure high availability and security levels.
- 1.5 The draft regulation contains a number of specific operational requirements. From the end of 2016, time-critical payment orders must meet an availability standard of at least 99.64%, to be increased to 99.76% from the end of 2017 and 99.88% from the end of 2018, in the peak demand period measured on a quarterly basis, and 98.5% outside the peak demand period. Institutions must ensure timely recovery of service provision for non-time-critical payment orders, implying that it may not take more than two hours before a payment order can be initiated. For the parts of the transaction processes that are carried out by third-party service providers, the availability standards must be laid down in contractual arrangements.
- 1.6 The ECB understands that the sanctions regime in respect of the draft regulation is provided for in the Law on financial supervision. The Law on financial supervision is streamlined with the Law on administrative law<sup>2</sup>, which contains instruments available for oversight and/or supervision, for instance, orders for incremental penalty payments or administrative penalties.

## 2. General observation

The ECB understands that the draft regulation is exclusively concerned with payment traffic within the Netherlands involving institutions that have their registered office in the Netherlands and that it does not interfere with the implementation of the ECB's and Eurosystem's oversight policy for payment systems and payment instruments, as set out in Article 127(2) of Treaty, Article 3.1 and Article 22 of the Statute of the European System of Central Banks and of the European Central Bank, the Regulation of the European Central Bank (EU) No 795/2014 of 3 July 2014 on oversight requirements for systemically important payment systems (ECB/2014/28)<sup>3</sup> (the 'SIPS Regulation') and the respective Eurosystem oversight policy frameworks.

## 3. Specific observations

- 3.1 The ECB notes that the definition of payment traffic (*'betalingsverkeer'*) under the draft regulation includes the set of payment instruments, payment services, payment transactions, procedures and funds transfer systems to facilitate the circulation of money. The ECB understands that this regulation does not apply to systemically important payment systems, nor to interbank retail payment systems (*"retailbetaalsystemen"*) within the meaning of the SIPS Regulation and the revised Eurosystem oversight framework for retail payment systems.<sup>4</sup> The ECB understands that the draft regulation is not meant to regulate the area of interbank transactions. The ECB also

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<sup>2</sup> *Algemene wet bestuursrecht.*

<sup>3</sup> OJ L 217, 23.7.2014, p. 16.

<sup>4</sup> [https://www.ecb.europa.eu/pub/pdf/other/Revised\\_oversight\\_framework\\_for\\_retail\\_payment\\_systems.pdf](https://www.ecb.europa.eu/pub/pdf/other/Revised_oversight_framework_for_retail_payment_systems.pdf).

- understands that the aim of the draft regulation is to ensure the smooth functioning of mass retail payments, by addressing the providers of retail payment services, whereas their underlying payment systems (interbank funds transfer systems) are subject to other regulation.
- 3.2 The ECB notes that that it should be ensured by the regulator that the requirements on risk controls in the institutions are in line with the applicable national, European and international rules, regulations and principles, including the current and future applicable European Banking Authority guidelines and regulatory technical standards.
- 3.3 The ECB welcomes the introduction of availability requirements for time-critical payment orders, as well as timely recovery, introduced by the draft regulation to further strengthen public confidence in retail payment instruments, especially in those cases where the instant notification of the successful payment initiation is vital in the context of the underlying transaction (such as in-store payments or certain categories of e-commerce payments, like the purchase of digital services). In this respect, the ECB notes that national regulation in this area would be greatly enhanced by the emergence of a truly European approach, avoiding fragmentation of regulatory approaches across Member States. The ECB also welcomes that this requirement will be phased in gradually from 99.65% from the end of 2016 to reach an availability standard of at least 99.88% in the peak demand period from the end of 2018 to allow for the institutions to adapt their business practice accordingly.

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

Done at Frankfurt am Main, 20 November 2015.

[signed]

*The President of the ECB*

Mario DRAGHI