



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 24 March 2016

on payment services

(CON/2016/19)

Introduction and legal basis

On 26 January 2016 the European Central Bank (ECB) received a request from Българска народна банка (Bulgarian National Bank - BNB) for an opinion on a draft law amending and supplementing the law on payment services and payment systems (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, third and sixth indents of Article 2(1) of Council Decision 98/415/EC¹, as the draft law relates to means of payment, a national central bank (NCB) and contains rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets. 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

1.1 The primary purpose of the draft law is to transpose Directive 2014/92/EU of the European Parliament and of the Council² (hereinafter the 'Payment Accounts Directive' or PAD) into Bulgarian law. Under the PAD, Member States must designate a national competent authority to oversee the application and enforcement of its provisions. Such competent authorities must either be public authorities or entities recognised by national law or by public authorities expressly empowered for that purpose under national law. While such competent authorities may not be payment service providers, an exception is made for national central banks. In the draft law, BNB is designated as the competent authority, responsible for the application and enforcement of the rules that implement the PAD into national legislation.

1.2. In addition, the draft law introduces several amendments to the Bulgarian Law on credit institutions, including the following:

- exempting licenced institutions that grant loans as an ancillary service from the requirement to register, provided they have been granted a licence for another type of activity;

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 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).

- establishing a procedure allowing capital instruments to be classified as Additional Tier 1 instruments and Tier 2 instruments in accordance with Regulation (EU) No 575/2013 of the European Parliament and of the Council³;
- introducing a fee for anyone requesting access to information from the central credit register;
- regarding the supervisory powers of BNB;
- repeal of BNB's competence to impose administrative sanctions on persons who communicate false information regarding a bank, which may be detrimental to its reputation and credibility.

2. General observations

2.1 *New NCB task*

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 and in the light of that basic need, the ECB has developed guidance in the form of general and specific considerations on the basis of which the ECB may decide whether the new task conferred on an NCB is to be considered a central banking task or a government task for the purposes of the monetary financing prohibition⁴. This guidance is set out in this paragraph 2.1. The concrete assessment of whether BNB's task of overseeing the application and enforcement of the new rules in the draft law that relate to payment accounts is to be considered a central banking task or a government task is then undertaken in paragraph 3.1.

2.1.1 *General considerations*

First, the systematic categorisation of tasks assigned to NCBs as central banking or government tasks applies to genuinely new tasks that did not exist in the past or did not form an integral part of the central banking tasks already assigned to an NCB. In recognition of the different Member States' legal frameworks, central banking traditions and national set-ups, the tasks currently discharged by an NCB as central banking tasks are not reviewed and re-categorised, but may be reassessed if their substance is amended.

Second, 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.

Third, 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.

³ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

⁴ See paragraph 2 of Opinion CON2015/22. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

Fourth, new tasks conferred on an NCB which 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 to be government tasks.

2.1.2 *Specific considerations*

An important criterion for qualifying a new task as a government task is the impact of the task on the institutional, financial and personal independence of the NCB. In particular, the following issues 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, without necessarily complementing the existing central banking tasks. If a conflict of interest arises between existing and new tasks, there should be sufficient mitigation measures in place to adequately address that conflict. Complementarity between the new task and existing central banking tasks should not, however, be interpreted broadly, as this could lead to the creation of an indefinite chain of ancillary tasks. The assessment of the complementarity of a new task should also take into account the financing of that task.

Second, it should be assessed whether, without new financial resources, the performance of the new task places a disproportionate burden on 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 is aligned with the institutional set-up of the NCB, in particular as regards central bank independence and accountability considerations.

Fourth, it should be assessed whether the performance of the new task entails 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 that are disproportionate and could also impact on their personal independence and, in particular, the guarantee of the Governor's term of office under Article 14.2 of the Statute of the ESCB.

- 2.2 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 government task will be guided by the objective of ensuring the consistent application of the monetary financing prohibition within the Eurosystem and the ESCB.

3. **Specific observations**

3.1 *Conferral of the task relating to the application and enforcement of the new rules*

The ECB notes that the draft law would assign to BNB the application and enforcement of the rules implementing the PAD into national law. To this end, BNB's Governing Council must adopt a regulation on the application of the new rules⁵ and enforce its implementation. Furthermore, BNB is mandated to take the necessary measures to raise public awareness of the availability of payment

⁵ See § 27 of the draft law.

accounts with basic features⁶ and must provide access, free of charge, to a website comparing the fees charged by payment service providers for the relevant payment services⁷.

3.1.1 *New task*

The application and enforcement of the rules implementing the PAD is a new task, which no public authority in Bulgaria has previously performed. In the light of the guidance set out in paragraph 2.1 it must therefore be assessed carefully whether this new task and the associated responsibilities for BNB could constitute a breach of the monetary financing prohibition.

3.1.2 *The 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 perspective⁸. Furthermore, when allocating specific non-ESCB-related tasks to the NCBs, additional personnel and financial resources must also be allocated so that these tasks may be carried out in a manner that will not affect the NCBs' operational or financial capacity to perform their ESCB-related tasks⁹. In this regard, the ECB also notes that the PAD 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. However, the draft law does not specify whether the State would reimburse BNB for the costs related to the performance of this new task.

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

The application and enforcement of the rules implementing the PAD is a task 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.

3.1.4 *Atypical tasks*

The application and enforcement of the rules implementing the PAD is a new task for national authorities in the Union. The PAD provides that Member States may designate their central banks as competent authorities, and the ECB understands that a number of Member States intend to do so¹⁰.

3.1.5 *Complementarity of the new task with existing BNB tasks*

BNB is already in charge of the application of the provisions of the Law on payment services and payment systems¹¹. The new rules in the draft law apply to payment service providers licenced by

⁶ See § 24 of the draft law.

⁷ See new Article 73и as set out in § 3 of the draft law.

⁸ See the ECB's 2014 Convergence Report, p. 25.

⁹ See, for example, paragraph 3.1.2 of Opinion CON/2016/6.

¹⁰ At the time of the adoption of this opinion, there were indications that Member States were roughly split in equal proportion: while many did not intend to designate their NCBs as the competent authority under the PAD, many others did intend to do so. This is consistent with the existing allocation of consumer protection tasks exercised by NCBs in those Member States.

¹¹ See Article 112 of the Law on payment services and payment systems.

BNB, as well as to the branches and agents of payment service providers that conduct business on Bulgarian territory¹². BNB's new task therefore seems to complement BNB's existing tasks.

3.1.6 *Extent to which the performance of the new task is aligned with the institutional set-up of BNB*

The performance of the new task appears to be aligned with the institutional set-up of BNB. As mentioned in paragraph 3.1.4, BNB is already in charge of the application of provisions regarding payment services and systems. Furthermore, BNB's Governing Council is entrusted with the adoption of a regulation on the application of the draft law's new rules, thus allowing it to decide on the approach that best suits its own institutional set-up.

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

The draft law entrusts BNB with the potentially resource-intensive task of applying and enforcing the new rules. Moreover, the draft law mandates BNB to take the necessary measures to raise public awareness of the availability of payment accounts with basic features. More importantly, the ECB understands that the draft law requires BNB to establish and operate a website comparing the fees charged by payment service providers¹³. The ECB therefore understands that BNB will bear the cost of establishing such a website at its own expense. All such costs go beyond those relating to the issuance of licences, which BNB currently recovers under the existing law.

3.1.8 *Conclusion*

The ECB considers that, given their link to the ESCB task of promoting the smooth operation of payment systems, the tasks conferred on BNB under the draft law can be considered as central banking tasks. As such, their financing by BNB is – in principle – in compliance with the prohibition of monetary financing under Article 123 TFEU. Nonetheless, given that the PAD requires that the national competent authorities be granted adequate resources necessary for the efficient and effective performance of their duties¹⁴, the absence of any clear commitment from the State to reimburse BNB for the costs that it incurs as a result of the draft law raises some concerns as regards BNB's financial independence. Adequate provisions to implement the full extent of the PAD requirements should therefore be taken into account by the draft law.

3.2 *Amendments to the Law on credit institutions*

3.2.1 The ECB welcomes the amendments to the Law on credit institutions, especially insofar as they contain a clarification regarding the fees charged for accessing the central credit register, which is also consistent with the ECB's previous stance¹⁵.

3.2.2 As regards the provision exempting licenced institutions that grant loans as an ancillary service from the requirement to register¹⁶, the ECB notes that it should be ensured that the credit risk associated with such loans is mitigated appropriately.

12 See new Article 73a(2) as provided in § 3 of the draft law.

13 See new Article 73и(2) as provided in § 3 of the draft law.

14 Article 21(1) of PAD.

15 See paragraph 3.1.6 of Opinion CON/2015/46.

16 See Article 3a(9) of the draft law.

3.2.3 The ECB considers that any BNB regulation specifying the procedure for allowing capital instruments to be classified as Additional Tier 1 instruments and Tier 2 instruments, should be consistent with the relevant rules of Regulation (EU) No 575/2013.

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

Done at Frankfurt am Main, 24 March 2016.

[signed]

The President of the ECB

Mario DRAGHI