



EUROPEAN CENTRAL BANK  
EUROSYSTEM

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ECB-PUBLIC

**OPINION OF THE EUROPEAN CENTRAL BANK**  
**of 28 December 2016**  
**on a Belgian draft law on the oversight of payment transaction processors**  
**(CON/2016/61)**

**Introduction and legal basis**

On 18 November 2016, the European Central Bank (ECB) received a request from the Governor of the Nationale Bank van België/Banque Nationale de Belgique (NBB), on behalf of the Minister of Finance, for an opinion on a draft law on the oversight of payment transaction processors (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 fifth indents of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions<sup>1</sup>, since the draft law concerns means of payment, the NBB and payment and settlement systems. 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 main objective of the draft law is to equip the NBB with hard-law tools in order to facilitate the application of the oversight policy framework to systemically important payment transaction processors. The preparatory text regarding the draft law explains that the soft-law approach implemented to date by the NBB in this area has limitations, as demonstrated by the recent adoption of Regulation (EU) No 795/2014 of the European Central Bank (ECB/2014/28)<sup>2</sup>.
- 1.2. The draft law defines the concept of 'payment transaction processors' as referring to any natural or legal person who implements technical processes that are necessary and specifically intended to execute payment transactions. As a consequence, general support service providers, including financial messaging companies, would be excluded from the scope of the draft law as their services are not specific to payment transactions. The draft law defines payment transactions as actions initiated by the payer or the payee, which involve the transfer of scriptural money, irrespective of any underlying obligation between the payer and the payee, during the course of which the payment transaction is executed between different payment service providers, with both the payer's and the payee's payment service providers operating in Belgium. The draft law further excludes from its scope the processing of certain paper-based documents drawn on the payment

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<sup>1</sup> OJ L 189, 3.7.1998, p. 42.

<sup>2</sup> 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).

service provider with a view to placing scriptural money at the disposal of the payee, these documents include paper cheques and paper-based bills, vouchers, paper-based traveller's cheques and postal money orders. The draft law also excludes from its scope the processing of payment transactions within a payment or securities settlement system and the processing of direct debit or credit transfer schemes.

- 1.3. The draft law defines a payment processor that is considered to be systemically important in the Belgian payment transactions market as a processor providing processing services for a minimum of 125 million payment transactions in the previous calendar year using a specific payment scheme, regardless of whether the processor has its registered office in Belgium. Systemically important processors are to be subject to a comprehensive legal framework, composed of the following building blocks. First, mergers and acquisitions involving systemically important processors must be submitted for prior authorisation by the NBB, which may impose specific conditions on them or reject them if such mergers or acquisitions undermine the sound and prudent management of processors of systemic importance and the continuity and stability of payments in Belgium. Second, systemically important processors must comply with the following conditions in order to outsource important operational tasks for processing payment transactions: (a) the processor must obtain prior authorisation from the NBB for the outsourcing; (b) the outsourcing must not result in the delegation by senior management of its responsibilities; (c) the outsourcing must not modify the relationship and obligations of the processor with or towards payment service providers and payment schemes; (d) the outsourcing must comply with the draft law and (e) the outsourcing must not undermine the quality of any internal control that would prevent the NBB from controlling the compliance, by the processor, with its obligations. Third, the draft law imposes various obligations on systemically important processors that aim to equip them with a sound risk-management framework for comprehensively identifying sources of operational risks, both internal and external, and minimising their impact by deploying appropriate controls, systems and procedures. Fourth, the draft law contains specific requirements as regards the confidentiality and integrity of information as well as the continuous provision of services. In particular, systemically important processors must inform the NBB of any temporary unavailability of their services.
- 1.4. The draft law subjects payment transaction processors to some of the hard-law components of the oversight framework currently applicable to payment and securities settlement systems. To ensure their compliance with the above-mentioned oversight framework, processors must provide the NBB with regular information on their organisation, functioning, financial situation and operations. The NBB will have the power to conduct on-site inspections to gather additional information, and may impose remedial measures in the event of breaches of the oversight framework requirements. The NBB's sanctioning committee may also impose fines, while the NBB may, *in extremis*, prevent payment schemes from using the services of a processor or prevent a processor from outsourcing its activities if the above-mentioned requirements are not complied with.
- 1.5. The draft law also includes specific requirements applicable to payment schemes that operate in Belgium. The definition of payment schemes under the draft law is drawn from Regulation (EU)

(No) 260/2012 of the European Parliament and of the Council<sup>3</sup> and Regulation (EU) 2015/751 of the European Parliament and of the Council<sup>4</sup> and refers to ‘a single set of rules, practices, standards and/or guidelines, operating in Belgium, agreed between the payment service providers for the execution of payment transactions, which is separate from any infrastructure or payment system that supports its operation and which comprises a specific decision-making body, organisation or entity responsible for the operation of the payment scheme’. The draft law requires the a payment scheme: (a) to transmit information on the payment transaction processor that it uses; (b) to ensure that any of its systemically important processors are able to comply with the requirements imposed by the draft law and (c) to provide, at the NBB’s request, information on its organisation, operations and financial standing and the payment transactions it processes. The NBB may impose administrative fines on payment schemes in breach of any of these requirements.

- 1.6. Taking note of the judgment of the European Court of Justice’s case T-496/11<sup>5</sup>, the draft law also amends Article 8 of the Organic Statute of the NBB relating to the oversight of payment and clearing systems, in order to expressly refer to securities settlement systems that are subject to the NBB’s oversight. The draft law also formally empowers NBB to enact regulations in this field. Finally, under the draft law, the NBB and its agents may only be held civilly liable for decisions taken regarding market infrastructures’ oversight in the event of fraud or gross negligence.

## **2. Hard-law oversight framework for systemically important payment transaction processors**

- 2.1. The draft law equips the NBB with hard-law tools to facilitate the implementation of its oversight framework, as previously extended to payment transaction processors. Hence, the draft law does not confer genuinely new tasks on the NBB.
- 2.2. The ECB understands that the draft law relates to service providers involved in the technical support of the payment services chain and who do not directly fall within the ambit of any existing Union legal framework. On the one hand, such payment transaction processors may not be assimilated to payment service providers under Directive (EU) 2015/2366 of the European Parliament and the Council<sup>6</sup>, as such processors facilitate the operational execution of payment services without providing payment services as such. On the other hand, the draft law explicitly excludes from its scope the treatment of payment transactions carried out within a payment or securities settlement system. Finally, although under the draft law payment transaction processors provide the technical infrastructure supporting the functioning of a ‘payment scheme’ within the meaning of Regulation (EU) 2015/751, they are not regarded as constituting a payment scheme.

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<sup>3</sup> Regulation (EU) No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EU) No 924/2009 (OJ L 94, 30.3.2012, p. 22).

<sup>4</sup> 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. 123).

<sup>5</sup> *United Kingdom of Great Britain and Northern Ireland v European Central Bank*, T-496/11. ECLI:EU:T:2015:133.

<sup>6</sup> Directive (EU) 2015/2366 of the European Parliament and the Council 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).

- 2.3. Currently, and without prejudice to initiatives taken at the domestic level by some Union Member States in this area<sup>7</sup>, payment transaction processors are only indirectly included in the ECB's oversight framework for payment schemes, insofar as such schemes are expected to ensure, through contractual arrangements, that the payment transaction processors used by the schemes respect any relevant requirements, including operational requirements. The ECB's oversight framework for payment schemes assigns a leading role to the central bank that is best placed to fulfil the required oversight duties. Where there is no national anchor, the ECB's Governing Council may assign primary oversight responsibilities to the ECB, with the participation of other interested Eurosystem NCBs as part of a cooperative oversight arrangement. According to this framework, the NBB is the single overseer of the Bancontact card payment scheme and the lead oversight authority of the MasterCard card payment scheme. The oversight of the MasterCard card payment scheme is implemented, according to cooperative oversight arrangements enjoying the participation of the ECB and a number of volunteer NCBs. The ECB is the lead overseer of the VISA payment scheme and the SEPA Credit Transfer and Directive Debit payment schemes of the European Payments Council. The oversight of other payment schemes has been assigned to the respective NCBs of the Member States where the schemes are established.
- 2.4. As emphasised in the preparatory text regarding the draft law, the approach described in paragraph 2.3 may no longer be sufficient. This is because, as a consequence of the gradual cross-border consolidation in the payment processing industry, which is not regulated as such at the European level, payment transaction processors may operate in a jurisdiction other than the jurisdiction where the payment scheme is located, without being necessarily subject to direct supervision or oversight in any jurisdiction. As these processors play a growing role in the build-up of operational risks connected to payment schemes, it is appreciated that the Belgian legislator wishes to set up a framework intended to facilitate the monitoring of operational risks posed by the gradual consolidation of payment transaction processors. However, the ECB considers that this framework needs to be designed in a way that fully takes into account the close interdependencies of these services with existing Union legislation, with which consistency should be ensured, and the cross-border dimension of these services.
- 2.5. In defining the concept of 'payment scheme' along the lines of the Regulations (EU) No 260/2012 and (EU) 2015/751 and excluding the treatment of payment transactions carried out within payment and securities settlement systems from the draft law's scope, whether they are of systemic importance under Regulation (EU) No 795/2014 (ECB/2014/28) or not, the draft law is sufficiently aligned with the definitions in current Union law.
- 2.6. The draft law has a clear cross-border impact, as it may relate to a systemically important payment transaction processor established in another Member State that is used by one or more payment schemes in Belgium. As a consequence, the draft law must be drafted in such a way that it avoids both any possible breach of Union law as regards the freedom to provide services under the Treaty and any potential conflict with the actions of the authorities in the Member State where the

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<sup>7</sup> See the Regulation on the oversight of the smooth operation of payment traffic ('betalingsverkeer') adopted by the Netherlands, in respect of which the ECB issued its Opinion CON/2015/49, all ECB opinions are published on the ECB's website [www.ecb.europa.eu](http://www.ecb.europa.eu).

payment transaction processor has its registered office. The ECB notes, in this respect, that, according to the preparatory text regarding the draft law, the restriction on the free provision of services introduced by the draft law is regarded as being compatible with the freedom to provide services across the Union as it ensures the stability, reliability and continuity of those services that are essential for the proper functioning of retail payment systems.

- 2.7. Although the draft law contains no formal mechanism for avoiding potential conflicts with the authorities of the Member State where the payment transaction processor has its registered office, the ECB assumes that the NBB will enter into a cooperative arrangement with any such authorities, in order to coordinate the oversight of a processor. From this perspective, the draft law could introduce an amendment to Article 36/16 of the Organic Statute of the NBB in order to enable the NBB to enter into cooperative arrangements with foreign authorities as regards payment transaction processors. It is acknowledged, however, that a cooperative cross-border regulatory approach in this area may be challenging insofar as the laws applicable in the jurisdiction in which a payment transaction processor is incorporated may not subject a processor to its regulatory and/or oversight frameworks, and may not contain similar tools and requirements as those contained in the draft law.
- 2.8. Whilst the ECB welcomes the draft law, which adequately equips NBB with hard-law tools facilitating the implementation of the oversight framework for payment schemes operated in Belgium, a truly European approach would be desirable in this field, in order to avoid fragmentation and the possible counterproductive effects of solutions designed solely at the national level. In the meantime the ECB assumes that the NBB will leverage the existing Eurosystem oversight framework for payment schemes when considering implementing these new hard-law tools, be it as the lead overseer of payment schemes operating in Belgium or as a participating NCB in a cooperative oversight arrangement for which another NCB or the ECB acts as the lead overseer.

### **3. Amendments made to the NBB Organic Law as regards its oversight framework**

The ECB welcomes the clarification that the draft law brings to Article 8 of the NBB Organic law by stating that the oversight of securities settlement systems is conducted in Belgium not only in accordance with the applicable Union rules, but also in accordance with the relevant Belgian laws.

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

Done at Frankfurt am Main, 28 December 2016.

[signed]

*The President of the ECB*

Mario DRAGHI