



EUROPEAN CENTRAL BANK
EUROSYSTEM

EN

ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 15 February 2018

on conferring new tasks relating to interchange fees for card-based payment transactions to the
Bank of Greece

(CON/2018/11)

Introduction and legal basis

On 3 January 2018 the European Central Bank (ECB) received a request from the Greek Ministry of Finance for an opinion on a draft law on measures implementing Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions¹ (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/EC², as the draft law relates to the Bank of Greece. 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 introduce implementing measures in respect of Regulation (EU) 2015/751, by designating the competent authorities empowered to ensure the application of its provisions and to impose penalties in cases of infringement. Regulation (EU) 2015/751 imposes a maximum cap on interchange fees and lays down technical and business requirements for card-based payment transactions, which primarily aim to promote the use of electronic payment instruments for the benefit of payees and consumers, as well as to create a level playing field and to promote competition among players in the market for card payments.
- 1.2 The draft law designates the Bank of Greece as the main competent authority responsible for ensuring the enforcement of the majority of the provisions of Regulation (EU) 2015/751³, and for imposing penalties on payment service providers in cases of infringement. Furthermore, the draft law designates the General Secretariat for Commerce and Consumer Protection of the Ministry of Economy and Development as the competent authority responsible for ensuring compliance with

¹ 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).

² 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).

³ Articles 3, 4, 6, 7, 8 (except for 8(2)), 9, 10 (except for 10(4)), 11 and 12 of Regulation (EU) 2015/751.

all remaining obligations under Regulation (EU) 2015/751⁴, i.e. those not assigned to the Bank of Greece.

- 1.3 More specifically, under the draft law, the Bank of Greece is responsible for monitoring and ensuring the application of a maximum cap on interchange fees for consumer debit card transactions of no more than 0.20 % of the transaction value, and a cap for consumer credit card transactions of no more than 0.30 % of the transaction value, which are applicable to all domestic or cross-border transactions. In addition, the Bank of Greece is responsible for monitoring the technical and business requirements that will apply to all categories of card-based payment transactions. The most significant of these are: (i) the prohibition of territorial licensing, namely that licences delivered by payment card schemes for issuing or acquiring purposes should cover the entire Union territory; (ii) the separation of the payment card schemes and the processing entities in terms of accounting, organisation and decision-making processes; (iii) the prohibition against applying rules hindering or preventing co-badging two or more different payment brands or payment applications; (iv) changes in respect of the application of the 'Honour All Cards Rule', whereby payees cannot be forced to accept all cards from a given payment card scheme; (v) the prohibition against preventing payees from steering consumers to the use of any payment instrument of their preference. In addition, the Bank of Greece is responsible for monitoring rules which aim at increasing transparency in respect of charges applied to payees, such as: (i) the unblending and breakdown of the total fees charged to payees with respect to each category and brand of payment card; and (ii) the obligation of the payment service provider to provide certain information relating to individual transactions to the payee. Finally, the responsibilities conferred upon the Bank of Greece also include the imposition of penalties on payment service providers in cases of infringement of the abovementioned rules.
- 1.4 The draft law also designates the General Secretariat for Commerce and Consumer Protection as the competent authority responsible for ensuring that consumers may obtain two or more different payment brands on a card-based payment instrument from a payment service provider, as well as for ensuring payees' obligation to display which cards they accept at the entrance of their business and at the till in a clear and unequivocal manner. The General Secretariat for Commerce and Consumer Protection is also empowered to impose penalties in cases of infringement of the abovementioned rules.

2. General observations

In this opinion, the ECB will only assess those provisions of the draft law that may impact on the role and tasks of the Bank of Greece as a national central bank (NCB), national supervisory authority and 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 Greece.

⁴ Articles 8(2) and 10(4) of Regulation (EU) 2015/751.

3. New tasks of the Bank of Greece

- 3.1 The draft law expands the current supervisory functions of the Bank of Greece, by assigning to it the responsibility for 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 Bank of Greece is already the competent authority for supervising payment service providers pursuant to Law No 3862/2010⁵, which transposed Directive 2007/64/EC of the European Parliament and of the Council⁶, Directive 2007/44/EC of the European Parliament and of the Council⁷ and Commission Directive 2010/16/EU⁸ into the Greek legal order. However, the Bank of Greece does not have any statutory powers in the fields of competition and consumer protection, nor does it exercise any supervisory tasks over payment service providers or payment card schemes as regards their compliance with competition and consumer protection rules. Thus, the conferral upon the Bank of Greece under the draft law of the power to monitor and ensure the compliance of payment service providers, payment card schemes and payees with their obligations under Regulation (EU) 2015/751, and to impose penalties in cases of infringement pursuant to Article 59(2) of Law No 4261/2014, are considered to be new tasks of the Bank of Greece.
- 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 3603/93⁹ defines ‘other type of credit facility’ as, *inter alia*, ‘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 circumvented¹⁰. 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 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

⁵ Νόμος υπ’ αριθμ. 3862/2010 «Προσαρμογή της ελληνικής νομοθεσίας στις Οδηγίες 2007/64/EK, 2007/44/EK και 2010/16/ΕΕ που αφορούν υπηρεσίες πληρωμών στην εσωτερική αγορά, προληπτική αξιολόγηση προτάσεων απόκτησης συμμετοχής σε επιχειρήσεις του χρηματοπιστωτικού τομέα και άλλες διατάξεις», [ΦΕΚ Α/113/13.7.2010].

⁶ Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ L 319, 5.12.2007, p. 1).

⁷ Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector (OJ L 247, 21.9.2007, p. 1).

⁸ Commission Directive 2010/16/EU of 9 March 2010 amending Directive 2006/48/EC of the European Parliament and of the Council as regards the exclusion of a certain institution from the scope of application (OJ L 60, 10.3.2010, p. 15).

⁹ 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).

¹⁰ Article 123 of the Treaty also serves the objective of maintaining price stability and reinforces central bank independence.

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, 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 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 the 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 also be examined 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 Bank of Greece 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 upon the Bank of Greece 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 (they have not, in other words, been conferred upon the NCBs under primary Union law). In addition, the tasks in question appear to go beyond the scope of the existing tasks of the Bank of Greece as supervisory authority of payment service providers, to the extent that there is no Greek law empowering the Bank of Greece to exercise supervision of payment card schemes, or which grants any competences in the fields of competition and consumer protection. In Greece, competences in the field of competition lie with the Hellenic Competition Commission¹¹, whereas competences in the field of consumer protection lie with the General Secretariat of Commerce and Consumer Protection¹². The General Secretariat for Commerce and Consumer Protection is the competent authority under national law¹³ to receive complaints from consumers and impose penalties on merchants where they violate their obligation to display which cards they accept at the entrance of their business and at the till in a clear and unequivocal manner. The conferral of further tasks related to consumer protection on the General Secretariat for Commerce and Consumer Protection is within the abovementioned division of competences between the national authorities.

At the same time, the new tasks complement existing supervisory tasks as the Bank of Greece already supervises payment institutions as payment service providers. These existing supervisory tasks must not be viewed in isolation from the objective of safeguarding the smooth and efficient functioning of the payment systems¹⁴. In this respect, pursuant to Law No 3862/2010, the Bank of Greece is responsible for authorising, supervising and withdrawing the authorisation of payment institutions providing payment services after assessing their programme of operations, business plan, the holding of initial capital and own funds, their governance arrangements, internal control mechanisms, structural organisation, and the identity of the directors and persons responsible for their management. In this sense, the Bank of Greece's new tasks could be regarded, in the particular context of this Regulation, as also related to the task conferred upon the ESCB in the

11 The Hellenic Competition Commission is responsible for the enforcement of Law 3959/2011 on competition (as amended) and Union law on competition, applied on the basis of Articles 101 and 102 TFEU in accordance with Article 5 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, (OJ L 1, 4.1.2003, p. 1).

12 The General Secretariat for Commerce and Consumer Protection is responsible for consumer protection under Article 1 of Presidential Decree 147/2017 (Οργανισμός του Υπουργείου Οικονομίας και Ανάπτυξης, ΦΕΚ (Α 192/13.12.2017)).

13 By virtue of Article 66(3) of Law No 4446/2016 «Πτωχευτικός Κώδικας, Διοικητική Δικαιοσύνη, Τέλη-Παράβολα, Οικειοθελής αποκάλυψη φορολογητέας ύλης παρελθόντων ετών, Ηλεκτρονικές συναλλαγές, Τροποποιήσεις του ν. 4270/2014 και λοιπές διατάξεις», (ΦΕΚ Α' 240/22.12.2016).

14 See Article 2(e) of the Statute of Bank of Greece.

fourth indent of Article 127(2) of the Treaty, as well as in the fourth indent of Article 3.1 of the Statute of the ESCB, based on the understanding that these tasks are ancillary to the promotion of the smooth operation of payment systems¹⁵.

3.4.2 *Tasks which are atypical of NCB tasks*

Regulation (EU) 2015/751 grants Member States 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 States¹⁶ have already designated their NCBs as the sole competent authorities to ensure compliance with the provisions of Regulation (EU) 2017/751, while many other Member States¹⁷ 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 the Regulation to their NCBs, the new tasks conferred upon the Bank of Greece 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 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 marketplace¹⁸. Without prejudice to the ECB's expressed reservations as regards the assignment of pure competition related tasks to NCBs¹⁹, the new tasks assigned to the Bank of Greece by the draft law could, as further explained under 3.4.1 above, be regarded as ancillary to the promotion of the smooth operation of payment systems, and, as such, they cannot be regarded as atypical of an NCB, nor being discharged in the exclusive interest of the government.

¹⁵ See paragraph 3.1.3 of Opinion CON/2016/19 and paragraph 2.4.1 of Opinion CON/2017/2.

¹⁶ 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 Law CXXXIX of 2013 on the Magyar Nemzeti Bank and Law 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).

¹⁷ 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).

¹⁸ See paragraphs 3.2 and 4.4 of Opinion CON/2016/34 and paragraph 2.3.2 of Opinion CON/2017/3.

¹⁹ See paragraphs 3.3.4.1, 3.3.4.2 and 3.3.4.3.1 of Opinion CON/2016/54.

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

While the new tasks broadly appear to be of the same nature as the supervisory tasks of the Bank of Greece, conflicts of interest may arise in the course of the discharge of these new tasks. As with other consumer protection tasks, sufficient mitigation measures should be in place to ensure that in the event of a conflict of interest supervisory considerations prevail. Also, the Bank of Greece would need to mitigate any potential conflicts of interest between its new tasks and its financial stability mandate by ensuring that financial stability considerations are not compromised when imposing penalties for a breach of an obligation under Regulation (EU) 2015/751.

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

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 ESCB-related tasks, 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 out without impacting on the NCB's operational or financial capacity to perform its ESCB-related tasks. In order to ensure that the Bank of Greece has the capacity to perform its ESCB-related tasks, the Bank of Greece must be in a position to avail itself of the necessary resources for the performance of its new tasks, which is also required under Article 13(5) of Regulation (EU) 2015/751. For instance, the Bank of Greece will be required to impose additional reporting obligations on payment service providers and payment card schemes²⁰, and will need to allocate additional human resources and IT infrastructure in order to collect, process and analyse the relevant data. Further costs may be incurred in the context of imposing penalties. Nevertheless, the draft law does not specify the resources to be used by the Bank of Greece for the discharge of its new tasks, nor does it provide an estimate of the direct costs likely to be incurred in the performance of these tasks. Thus, it cannot be excluded that the new tasks will impact on the regular budget of the Bank of Greece. The ECB therefore notes that it is important that adequate resources are available to the Bank of Greece in order to ensure that it can properly perform its tasks, while maintaining, at all times, sufficient financial means to carry out its ESCB-related tasks and national tasks and to meet its administrative and operational expenses.

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

Given the complementarity of the new tasks with the existing tasks of the Bank of Greece, as further explained under section 3.4.1 above, in particular in the field of supervision of payment institutions, they appear to broadly fit into the institutional set-up of the Bank of Greece. That said, it is most likely that additional organisational units may need to be established to accommodate the new tasks. Also, it should be noted that the assignment of the new tasks to the Bank of Greece

²⁰ See Recital 24 of Regulation (EU) 2015/751.

deviates from the well-established national allocation of competencies under the current legal and institutional framework in the fields of competition and consumer protection.

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

In the absence of any provision in the draft law excluding the liability of the Bank of Greece in the discharge of its new tasks, the Bank of Greece could potentially be held liable for damages in accordance with the rules of Greek law on liability applicable to the Bank of Greece.

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

The performance of the new tasks does not appear to expose the decision-making bodies of the Bank of Greece to any disproportionate political risk or to have an impact on their personal independence

3.4.8 *Conclusion*

Without prejudice to the ECB's expressed reservations with regard to the assignment of pure competition tasks to the NCBs, the new tasks conferred upon the Bank of Greece could, as further explained under section 3.4.1 above, be regarded as central banking tasks based on the understanding that they are complementary to the Bank of Greece'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. These tasks have been conferred on many NCBs in the ESCB and therefore cannot generally be regarded as being atypical of an NCB or as being discharged in the exclusive interest of the government. On the other hand, some Member States have chosen to allocate these tasks between their NCBs and other competent authorities. In this respect, it is noted that the performance of these tasks under Regulation (EU) 2015/751 requires expertise in the fields of competition and consumer protection, neither of which falls within the exclusive competence of the Bank of Greece under Greek law.

Additionally, it is essential that the new tasks assigned to the Bank of Greece do not have a negative impact on the institutional and financial independence of the Bank of Greece and do not adversely affect its capacity to carry out its ESCB-related tasks or central bank tasks. To this end, it must be ensured that the Bank of Greece can avail itself of the necessary resources for the performance of its new tasks. Moreover, sufficient mitigation measures should be in place to adequately address any potential conflicts of interest between the new tasks of the Bank of Greece and its existing supervision and financial stability mandates.

The ECB recommends that the Greek Ministry of Finance take the above considerations into

account in deciding on whether to confer the new tasks on the Bank of Greece.

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

Done at Frankfurt am Main, 15 February 2018.

[signed]

The President of the ECB

Mario DRAGHI