

# Response to the public consultation on draft ECB Decision under Article 21 of the revised SIPS Regulation

August 2019

## 1 Introduction

In November 2017 the Governing Council adopted Regulation (EU) 2017/2094<sup>1</sup> of the European Central Bank amending Regulation (EU) No 795/2014 on systemically important payment systems ("the SIPS Regulation")<sup>2</sup>. On that occasion, Article 21 of the SIPS Regulation was amended to empower the competent authority to a) obtain information and documents from a systemically important payment system (SIPS) operator, b) require a SIPS operator to appoint an independent expert to perform an investigation or independent review on the operation of the SIPS and c) conduct on-site inspections or delegate the carrying-out thereof. Paragraph 2 of the same Article requires the ECB to "adopt a decision on the procedure and conditions for exercising the powers referred to in paragraph 1".

In this context, the ECB launched a public consultation on a draft decision on the procedure and conditions for exercising the powers envisaged by Article 21 of the amended SIPS Regulation ("the Decision"). The consultation took place between 8 March and 12 April 2019 and the ECB received three responses from interested entities. The ECB wishes to thank all respondents for their valuable feedback, questions and proposals for amendments.

The following section summarises the responses received in the public consultation, outlines the amendments that were made as a result and provides clarification where necessary. In accordance with EU data protection law, individual responses have not been made public at the request of the respondents.

## 2 Summary of comments received in the public consultation

The comments received mainly focused on the following aspects:

- the need for coordination so as to avoid duplication of effort owing to different authorities performing on-site inspections of the same entity;

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<sup>1</sup> Regulation (EU) 2017/2094 of the European Central Bank of 3 November 2017 amending Regulation (EU) No 795/2014 on oversight requirements for systemically important payment systems (ECB/2017/32) (OJ L 299, 16.11.2017).

<sup>2</sup> 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) (OJ L 217, 23.7.2014).

- the costs and responsibilities assumed by the different parties when appointing an independent expert;
- the notification period for informing an entity of an upcoming on-site inspection; the level of detail in terms of the scope of investigations, independent reviews and on-site inspections;
- definitions and terminology.

## 2.1 Coordination among relevant authorities

The respondents asked for clarifications on and amendments to the Decision in light of the fact that the overseer already has the means to gain assurance that risks to a SIPS stemming from third parties are being managed. This assurance can be obtained by asking (i) the SIPS to apply Annex F of the Principles for financial market infrastructures (PFMI) issued by Committee on Payments and Market Infrastructures (CPMI) and the International Organisation of Securities Commissions (IOSCO) for its critical service providers (CSPs), and (ii) the overseer of the SIPS' CSPs to provide information on the CSPs' involvement in the SIPS' operations. In addition, one respondent asked for a SIPS interacting with overseen CSPs to be exempted from their obligation to include provisions in their contractual arrangements with these overseen CSPs "for the sharing of information, documents and written or oral explanations between the representatives or members of staff of the critical service provider and the competent authority, the independent expert and the on-site inspection team, as the case may be, and for the conducting of on-site inspections at the location of the critical service provider".

To clarify, the Decision was drafted taking into account that (i) not all CSPs of a SIPS are overseen by an authority, and (ii) even if a CSP is overseen by an authority, the scope of such oversight does not always include the services provided by that CSP to the SIPS. The above exemption would not be feasible as the Eurosystem strives to ensure a level playing field between the entities it oversees and thus needs to make sure that entities are subject to the same requirements when performing similar activities. However, the Decision was drafted taking into consideration that the CSPs that may be asked for information in the context of reviews, investigations or on-site inspections of the SIPS they serve may indeed already be overseen for the services provided to these SIPS. Some of these CSPs may be overseen subject to requirements that ensure they can provide services to a SIPS without compromising the smooth functioning of the SIPS. In such cases, the SIPS' overseer can cooperate with the overseer of the SIPS' CSP as provided in Article 9 of the Decision and, where relevant, it may even rely on the findings of on-site inspections already conducted on the CSP rather than conducting one of its own.

Furthermore, respondents flagged that: (i) there is a risk of overlap or of several requests for reviews or investigations being made to a single CSP providing services to multiple SIPSs; (ii) a lack of information sharing between the independent expert and the competent authority of a SIPS' CSP results in more resources being required

on the part of the independent expert and the SIPS; and (iii) there is a need for close coordination with the competent authority of a CSP.

It was acknowledged that there may be occasions when, for example, a CSP may be asked for information on the services provided to several SIPSs in the context of an investigation by one or more independent experts. However, those requests refer to individual services provided by that CSP to each SIPS operator and these services may be completely different. With respect to reviews and investigations, it may not be feasible for an independent expert hired by a SIPS operator to request information from the central bank overseeing or supervising the SIPS' CSP instead of requesting it from the CSP itself. As regards on-site inspections of CSPs carried out by the competent authority of a SIPS, cooperation between the competent authority and the central bank overseeing or supervising the CSP is foreseen in Article 9 of the Decision.

## 2.2

### Costs and responsibilities when appointing an independent expert

A number of respondents highlighted that the costs of hiring an independent expert could be high and suggested a few ways to improve this process and to lower the costs, such as maintaining lists of recognised experts and the services they provide.

While the SIPS operator and its CSP are encouraged to cooperate, find ways to lower costs and ensure the best available expertise when hiring an independent expert, no further amendment to the Decision was deemed necessary.

In addition one respondent mentioned that, when activities are performed by a CSP, the CSP itself should bear the costs of appointing an independent expert.

The Decision only specifies that costs are to be borne by the SIPS operator (as opposed to the competent authority requesting the appointment), as it is the SIPS operator that is subject to direct Eurosystem oversight.

Moreover, one respondent flagged a potential conflict of interest that could arise when an independent expert is appointed by the SIPS operator without the involvement of the CSP.

In this respect, the Decision was amended to allow for consultation of the CSP where relevant (e.g. when the scope of the review or investigation to be performed on a SIPS involves requesting information from the SIPS' CSP).

## 2.3

### Notification period for on-site inspections

Some respondents remarked that the notification period of five working days for on-site inspection is too short, particularly when the SIPS' CSPs are involved.

To acknowledge this, and given that the Decision foresees the possibility for the competent authority overseeing a SIPS to perform unannounced on-site inspections

in urgent cases, the Decision was revised to prescribe a minimum of ten working days as a notification period.

## 2.4 Level of detail

One respondent remarked that the Decision focuses more on the process of and conditions for performing a review, investigation or on-site inspection than on defining in more granular terms its scope and content or the risks that may trigger the exercise of these powers.

This was the deliberate intention of the Eurosystem. Given that risks evolve, a requirement stipulating that the powers can only be triggered if a specifically listed risk materialises would be too restrictive for the powers of the Eurosystem when conducting oversight “to promote the smooth operation of payment systems”<sup>3</sup>.

## 2.5 Definitions and terminology

One respondent perceived the definition of the term “critical service provider” as being oriented towards IT security only, without covering operational aspects such as IT performance, capacity planning, etc.

The definition provided in the Decision covers both IT security and operational aspects. The operational aspects are mainly considered in the part of the definition that makes reference to “service availability, as well as the smooth functioning of the core operations of the SIPS”.

One respondent also requested a glossary of risks, a guide for oversight expectations, and to stress the importance of systemic risk and the specific expectations to address this risk within the Decision.

A comprehensive overview of potential risks to payment systems is provided in the CPMI-IOSCO PFMI and in Article 2 of the revised SIPS Regulation. The SIPS Regulation already sets out requirements for SIPS and extending or replicating such requirements or expectations in the Decision under Article 21 is not within the scope of this legal act.

Clarification was also requested to confirm that information requested from the SIPS’ CSPs will be in relation to the services provided by the CSPs to the SIPS, and not to the CSPs’ overall business activity.

This is indeed the intention, and the Decision has been redrafted accordingly.

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<sup>3</sup> Article 3 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank.

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For specific terminology please refer to the [ECB glossary](#) (available in English only).