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COMMISSION DELEGATED REGULATION (EU) No .../..

of 4.10.2017

supplementing Regulation (EU) 2015/751 of the European Parliament and of the Council on interchange fees for card-based payment transactions with regard to regulatory technical standards establishing the requirements to be complied with by payment card schemes and processing entities to ensure the application of independence requirements in terms of accounting, organisation and decision-making process

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 7(6) third subparagraph of Regulation (EU) 2015/751 ('the Regulation') empowers the Commission to adopt regulatory technical standards by means of delegated acts establishing the requirements to be complied with by payment card schemes and processing entities in order to ensure their independence in terms of accounting, organisation and decision making processes, following submission of draft standards by the European Banking Authority (EBA), and in accordance with Articles 10 to 14 of Regulation No (EU) 1093/2010.

The EBA submitted draft regulatory technical standards to the Commission on 26 July 2016. On 5 January 2017 the Commission notified the EBA of its intention to endorse the draft subject to the following amendments, to ensure that the regulatory technical standards are in line with the requirement of independence of card schemes and processing entities as stipulated in Article 7(1)(a) of the Regulation:

- (a) removing a derogation from independence of the organisation which would allow for the sharing of staff for the development of new solutions;
- (b) adding a provision that ensures independence of senior managers by controlling their mobility between a payment card scheme and a processing entity;
- (c) removing the proposal to allow for staff to participate in all employee share plans and benefits arrangements as being incompatible with the requirement that remuneration policies shall reflect the performance of either the payment card scheme or the processing entity;
- (d) to ensure effective standards for remuneration, including a requirement that staff remuneration shall not be directly *or indirectly* linked to the performance of the other entity;
- (e) to strengthen the requirement for payment card schemes and processing entities to define a code of conduct, including effective enforcement mechanisms and review by competent authorities;
- (f) to safeguard the independence of management bodies, requiring that, instead of a purely numerical limit to any overlapping directorships in the respective management bodies, payment card schemes and processing entities set clear and objective criteria specifying under which conditions directorships may be held by the same person at the same time in the respective management bodies.

On 16 February 2017 the EBA submitted to the Commission a formal opinion on these requested amendments along with revised draft regulatory technical standards. The EBA accepted with some slight modifications the amendments under b), d) and e). The EBA decided, however, not to include in the revised draft regulatory technical standards the Commission's amendments concerning a), c) and f).

The Commission maintains the view that the amendments explained above under a), c) and f) are necessary for the regulatory technical standards to comply with the Regulation, and therefore adopts the regulatory technical standards with those amendments.

The Commission notes in particular that the Regulation does not allow for a derogation from the independence requirements in terms of accounting, organisation and decision making processes. Excluding the EBA proposal for derogations mentioned under a) and c) above is therefore necessary for the technical standards to comply with the Regulation that requires

functional separation of the payment card schemes and processing entities, without transforming it into a legal separation unlike the EBA has argued.

The derogation proposed by EBA for sharing of staff (item a) for development of new solutions would considerably weaken the independence of card scheme and processing entity. Such derogation would also favour payment card schemes and processing entities belonging to the same legal entity over independent competitors in the market, giving incentives to maintain privileged relationships and information flows with the processors in the same legal entity. Ensuring a proper functional separation of card schemes and processing entities will facilitate a critical part of the value chain in card transactions to be open to effective competition, which ultimately should foster innovation in the payment and processing markets.

The derogation that the EBA had proposed from the independence of staff remuneration plans (item c) would risk raising conflicts of interests between functionally independent entities, which can only be prevented if baskets of shares for the employees of either entity are not weighted for the performance of the other entity (which is what is envisaged by Article 11(1) and (2)) of the technical standards. Derogation in this regard would incentivise staff working for one part of the entity to provide the other part with preferential treatment.

Finally, as explained above under point f), to safeguard independence of the management bodies, the payment card schemes and processing entities should set clear and objective criteria specifying under which conditions directorships may be held by the same person at the same time in the respective entities' management bodies. Those criteria should be subject to a review by competent authorities. The purely numerical limit proposed by the EBA to any overlapping directorships in the respective management bodies did not include any substantive assessment and therefore would not have been an effective means for achieving independence of management bodies, and for mitigating conflicts of interest.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with the third subparagraph of Article 10(1) of Regulation No (EU) 1093/2010, the EBA has carried out a public consultation on the draft technical standards submitted to the Commission in accordance with Article 7(6) of Regulation (EU) 2015/751. A consultation paper was published on the EBA internet site on 8 December 2015 and the consultation closed on 8 March 2016. Moreover, the EBA worked in close cooperation with the ECB and invited the EBA's Banking Stakeholder Group set up in accordance with Article 37 of Regulation No (EU) 1093/2010 to provide advice. Together with the draft technical standards, the EBA has submitted an explanation on how the outcome of these consultations has been taken into account in the development of the final draft technical standards submitted to the Commission.

In addition, and in accordance with the third subparagraph of Article 10(1) of Regulation No (EU) 1093/2010, the EBA has submitted an Impact Assessment, including its analysis of the costs and benefits related to the draft technical standards submitted to the Commission. This analysis is available at <https://www.eba.europa.eu/regulation-and-policy/payment-services-and-electronic-money/regulatory-technical-standards-on-payment-card-schemes-and-processing-entities-under-the-ifr>, pages 21-25 of the Final Draft Regulatory Technical Standards package.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

These regulatory technical standards specify the requirements with which payment card schemes and processing entities must comply to ensure the independence of their accounting, organisation, and decision-making processes.

This act requires payment card schemes and processing entities to (i) have accounting processes in place to produce annual information related to separated profit and loss accounts reviewed by an independent and certified auditor; (ii) have separate workspaces; and (iii) ensure the independence of senior management, management bodies and staff.

This act also lays down requirements related to the use of shared services and a shared information management system, the treatment of sensitive information, a code of conduct, and the separation of annual operating plans.

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2015/751 of 29 April 2015 of the European Parliament and of the Council on interchange fees for card-based payment transactions¹ and in particular Article 7(6) thereof,

Whereas:

- (1) In order to specify the requirements ensuring separation of payment card schemes and processing entities, it is appropriate to define certain terms in relation to the accounting, organisation and the decision making process of payment card schemes and processing entities, irrespective of the legal form adopted by those entities.
- (2) Payment card schemes and processing entities should have accounting processes in place that enable them to produce financial information on separated profit and loss accounts and explanatory notes to that financial information. Those requirements should not replace or amend accounting principles and standards or requirements concerning the annual financial statements that already apply to payment card schemes and processing entities.
- (3) For that purpose, it is appropriate to specify how expenses and revenues should be allocated under those accounting processes. Those accounting processes should be duly documented, in particular in relation to transfers of funds between payment card schemes and processing entities.
- (4) In order to ensure independence, payment card schemes and participating processing entities should produce financial information at least annually and that information should be reviewed by an independent auditor. That information as well as its review should be made available to competent authorities upon their request to enable them to ensure enforcement of independence requirements.
- (5) Payment card schemes and processing entities that are not separate legal persons should at least be organised as different internal business units. Staff of payment card

¹ OJ L 123, 19.5.2015, p. 1.

schemes and staff of the processing entities, including senior management, should be independent and accommodated in separated workspaces equipped with restricted controlled access. To promote the independence of senior managers when two entities are part of the same group and to prevent the practice of 'revolving doors', senior managers should be prohibited from taking on work for the other side of the business for a minimum duration of one year after they have left the entity they were working for.

- (6) Staff of payment card schemes should only be allowed to perform tasks related to the design, update or implementation of processing services where specific conditions ensuring compliance with independence requirements are met.
- (7) To avoid any incentives for payment card schemes or for processing entities to provide each other, via their staff, with preferential treatment or privileged information not available to their competitors, remuneration frameworks for staff of payment card schemes and of processing entities should not be based directly or indirectly on the economic performance of the processing entities or the payment card schemes. Remuneration policies should be made fully available to competent authorities upon their request.
- (8) It is appropriate to specify that when the payment card scheme and the processing entity are part of the same legal entity or group, rules for ensuring compliance of staff with the current Regulation should be laid down in a code of conduct with effective sanctions and enforcement mechanisms that should be made public.
- (9) Payment card schemes and processing entities should be allowed to use shared services provided that this usage does not result in sharing sensitive information between them and that the conditions for sharing the services, including the financial conditions under which those services are offered, are duly documented in a single document. That document should be made available to competent authorities upon their request to enable them to ensure the application of independence requirements. Specific conditions for the sharing of the information management system should be introduced. Sharing of sensitive information between payment card schemes and processing entities which may give either the payment scheme or the processing entity a competitive advantage should however be prohibited.
- (10) It is appropriate to set out conditions for the composition of the management bodies of the payments card schemes and processing entities, irrespective of their legal form and organisational arrangements, to ensure that potential conflicts of interest for the decision making process between the payment card schemes and processing entities are appropriately mitigated. Those conditions should be made public and subject to review by competent authorities. Furthermore, payment card schemes and processing entities should have separated annual operating plans approved by their relevant management bodies. Those separated annual operating plans should be made fully available to competent authorities upon their request, to enable them to ensure enforcement of independence requirements.
- (11) This Regulation is based on the draft regulatory technical standards submitted by the European Banking Authority ('EBA') to the Commission.
- (12) EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in

accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council²,

HAS ADOPTED THIS REGULATION:

CHAPTER I GENERAL PROVISIONS

Article 1 Subject matter

This Regulation establishes the requirements to be complied with by payment card schemes and processing entities to ensure the application of Article 7(1) (a) of Regulation (EU) 2015/751.

Article 2 Definitions

For the purposes of this Regulation, the following definitions shall apply:

- (1) ‘management body’ means a payment card scheme’s or processing entity's body appointed in accordance with national law, which is empowered to set the entity's strategy, objectives and overall direction and which oversees and monitors management decision-making, and includes the persons who effectively direct the business of the entity;
- (2) ‘senior management’ means those natural persons within a payment card scheme or processing entity who exercise executive functions and who are responsible and accountable to the management body for the day-to-day management of the payment card scheme or processing entity;
- (3) ‘remuneration’ means all forms of fixed and variable remuneration, including payments made or benefits, monetary or non-monetary, awarded directly by or on behalf of the payment card scheme or processing entity to employees;
- (4) ‘shared services’ means any activity, function or service performed by either an internal unit within a payment card scheme or processing entity or a separate legal entity and executed to the benefit of both the payment card scheme and the processing entity;
- (5) ‘group’ means a parent undertaking and all its subsidiary undertakings as defined in Article 2(11) of Directive (EU) 2013/34 of the European Parliament and of the Council³.

² Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

³ Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.06.2013, p. 19).

CHAPTER II ACCOUNTING

Article 3 Financial information

1. Payment card schemes and participating processing entities, shall have accounting processes in place that enable them to produce financial information on separated profit and loss accounts and explanatory notes to that financial information.
2. The financial information referred to in paragraph 1 shall comply with the applicable accounting framework for preparing financial statements of payment card schemes and processing entities.

Article 4 Allocation of expenses and revenues

1. The financial information referred to in Article 3(1) shall be based on an allocation of expenses and revenues between the payment card scheme and the processing entity in accordance with the following rules:
 - (a) expenses and revenues that are directly attributable to the provision of processing services shall be allocated to the processing entity;
 - (b) expenses and revenues that are directly attributable to the payment card scheme shall be allocated to the payment card scheme;
 - (c) expenses and revenues that are not directly attributable to the provision of processing services or to the payment card scheme shall be allocated on an activity-based costing ('ABC'), which involves allocating indirect costs and revenues according to the actual consumption by the processing services entity or by the payment card scheme;
 - (d) expenses and revenues that are not directly attributable and cannot be allocated on ABC shall be allocated according to an accounting methodology documented in a supporting note.
2. The supporting note referred to in paragraph 1(d) shall indicate for each allocated cost and revenue under that methodology:
 - (a) the basis for the allocation;
 - (b) the rationale for that basis.

Article 5 Documentation of transfer of financial resources between payment card schemes and processing entities

1. Payment card schemes and processing entities shall produce specific explanatory notes for any transfer of financial resources between them for the provision of services or the use of shared services as referred to in Article 12. Those explanatory notes shall specify the prices of and fees for those services, irrespective of any underlying obligations and organisational arrangements that may exist between them. Those explanatory notes shall be included in the financial information referred to in Article 3(1).

2. Where payment card schemes and processing entities belong to the same legal entity or group, the specific explanatory notes referred to in paragraph 1 shall provide evidence that the prices and fees for the provision of services between them or the use of shared services do not differ from prices and fees for the same or, in absence thereof, comparable services charged between payment card schemes and processing entities that do not belong to the same legal entity or group.

Article 6

Review and frequency of financial information

1. The financial information produced in accordance with Articles 3, 4 and 5 shall be reviewed by an independent and certified auditor.
2. The review referred to in paragraph 1 shall be provided in the form of a report ensuring:
 - (a) a trustworthy and fair view of the financial information produced by payment card schemes and processing entities;
 - (b) consistency and comparability of the financial information with the accounting frameworks for preparing financial statements of payment card schemes and processing entities;
 - (c) consistency of the financial information with previous years' allocation policies or, where such consistency is lacking, an explanation as to why the allocation policy has been changed and a restatement of previous years' figures.
3. The financial information referred to in Articles 3, 4 and 5 shall be submitted to the auditor referred to in paragraph 1 annually and shall be made fully available to competent authorities upon their request, together with the review by the independent auditor.

CHAPTER III ORGANISATION

Article 7

Functional separation

Payment card schemes and processing entities that are not established as two separate legal entities shall be organised in two separate internal business units.

Article 8

Separation of workspaces

Payment card schemes and the processing entities that are located in the same premises shall be organised in separate workspaces equipped with restricted and controlled access.

Article 9

Independence of senior management

The senior management of payment card schemes or of the payment card scheme business unit shall be different from the senior management of processing entities or of the processing entity business unit, and act autonomously. The senior management of payment card schemes or payment card scheme business units shall not be allowed to take on work for processing

entities or processing entity business units, and vice versa, for a minimum duration of one year after that senior management left the entity for which they have been working.

Article 10
Independence of staff

1. The staff of payment card schemes shall be different from the staff of processing entities.
2. The staff of payment card schemes and of processing entities may perform tasks related to the provision of shared services as referred to in Article 12.
3. The staff of a processing entity may perform tasks related to the design of the single set of rules, practices, standards and implementation guidelines for the execution of card-based payment transactions, provided that:
 - (a) the tasks related to the design of the single set of rules may be performed by other processing entities on a non-discriminatory basis;
 - (b) the design of those rules involves a representative sample of all processing entities participating in the payment card scheme.

Article 11
Remuneration

1. Processing entities shall adopt remuneration policies that do not create incentives for their staff to provide a payment card scheme with preferential treatment or privileged information which is not available to other competitors. Remuneration of their staff shall therefore reflect the performance of the processing entity and shall not be directly or indirectly linked to the performance of the payment card scheme to which the processing entity provides services.
2. Payment card schemes shall adopt remuneration policies that do not create incentives for their staff to provide a processing entity with preferential treatment or privileged information which is not available to other competitors. Remuneration of their staff shall therefore reflect the performance of the payment card schemes and shall not be directly or indirectly linked to the performance of a processing entity.
3. Remuneration policies referred to in paragraphs 1 and 2 shall be made fully available to competent authorities upon their request.

Article 12
Use of shared services

1. Payment card schemes and processing entities making use of shared services shall describe in a single document the list of shared services and the conditions, including the financial conditions, under which those services are provided.
2. The single document referred to in paragraph 1 shall be made available to competent authorities upon their request.

Article 13
Use of a shared information management system

An information management system that is shared by a payment card scheme and a processing entity shall ensure that:

- (a) the staff of the payment card scheme and of the processing entity are separately identified via the authentication procedure to access the information management system;
- (b) users only have access to information which they are entitled to in compliance with this Regulation. In particular, any sensitive information, as referred to in Article 14, of a processing entity shall not be accessed by the staff of the payment card scheme and any sensitive information of a payment card scheme shall not be accessed by the staff of the processing entity.

Article 14
Sensitive information

Payment card schemes and processing entities shall not share information of a sensitive nature that provides a competitive advantage to either the payment scheme or the processing entity where such information is not shared with other competitors.

Article 15
Code of conduct

1. Payment card schemes and processing entities which belong to the same legal entity or group shall define and disclose publicly on their website a code of conduct, setting out how their respective staff shall act to ensure compliance with this Regulation. The code of conduct shall also set effective enforcement mechanisms.
2. The code of conduct shall, in particular, define rules to prevent the sharing of sensitive information, as referred to in Article 14 between payment card schemes and processing entities. The code of conduct shall be subject to review by competent authorities.

CHAPTER IV
DECISION-MAKING PROCESS

Article 16
Independence of the management bodies

1. Payment card schemes and processing entities shall ensure that the composition of their management bodies mitigates conflicts of interest for the decision making process between the payment card scheme and the processing entity, including by setting clear and objective criteria under which directorships may be held by the same person at the same time in the management body of the payment card scheme and of the processing entity. Those criteria shall be made public and shall be subject to review by competent authorities.
2. The management bodies of payment card schemes and processing entities that belong to the same legal entity or group shall approve and periodically review conflict of interest policies for managing and monitoring the compliance with this Regulation.
3. For the purposes of paragraph 2 and where directorships may be held by the same person in the management body of the payment card scheme and of the processing entity, payment card schemes and processing entities shall establish:
 - (a) a separate management body responsible for decisions related to the payment card scheme activities, with the exemption of shared services referred to in

Article 12, and which shall be composed of members of the management body that do not perform any executive function in relation to processing activities. Those members shall advise the management body on the payment card scheme strategy in compliance with this Regulation and assist the management body in overseeing the implementation of that strategy by senior management;

- (b) a separate management body responsible for decisions related to the processing activities, with the exemption of shared services referred to in Article 12, and which shall be composed of members of the management body that do not perform any executive function in relation to payment card scheme activities. Those members shall advise the management body on the processing entity strategy in compliance with this Regulation and assist the management body in overseeing the implementation of that strategy by senior management;
 - (c) independent reporting lines from the senior management of either the payment card scheme business unit or of the processing entity business unit, as applicable, to the management body.
4. The organisational arrangements established in accordance with paragraph 3 shall be made available to competent authorities upon their request.
 5. The management body shall retain overall responsibility for ensuring compliance with this Regulation.

Article 17

Annual operating plan independence

1. Payment card schemes and processing entities shall have separate annual operating plans determining the budget, including capital and operating expenditures and possible authority delegations to engage those expenditures, which shall be submitted to their respective management body for approval or, where relevant, to the management body referred to in Article 16.
2. The separated annual operating plans shall be made fully available to competent authorities upon their request.

CHAPTER V FINAL PROVISIONS

Article 18

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4.10.2017

*For the Commission
The President
Jean-Claude JUNCKER*