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)

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)*

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 127(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular Article 3.1, Article 22 and the first indent of Article 34.1 thereof,

Whereas:

(1) The Committee on Payment and Settlement Systems (CPSS) of the Bank for International Settlements and the Technical Committee of the International Organization of Securities Commissions (IOSCO) published the Principles for financial market infrastructures in April 2012[(1)]. The Committee on Payments and Market Infrastructures (CPMI), the successor of the CPSS, and IOSCO subsequently published guidance on these principles. The European Central Bank (ECB) has decided to implement the CPMI-IOSCO principles and subsequent guidance insofar as they apply to systemically important payment systems (SIPS) by means of Regulation (EU) No 795/2014 of the European Central Bank (ECB/2014/28)[(2)].

(2) The Governing Council has reviewed the general application of Regulation (EU) No 795/2014 (ECB/2014/28), pursuant to Article 24 thereof. That review took account of the findings of the first comprehensive assessment of SIPS. The assessment found that certain matters required improvement or clarification and, in a few cases, a need for more substantial amendments seeking to ensure the application of the highest oversight standards.

(3) For the purposes of this Regulation, payment institutions and e-money institutions that have access to SIPS via direct participants, pursuant to Article 35(2) of Directive (EU) 2015/2366 of the European Parliament and of the Council[(3)], should be treated as indirect participants.

(4) To ensure effective risk mitigation, it is important to maintain a clear separation between operational, risk management and internal audit functions, including through mandating the carrying out of these functions by different persons. Furthermore, for non-Eurosystem SIPS operators, it should be ensured, subject to national law, that there is an independent member on their Board to enhance its effectiveness. As the Eurosystem has public policy objectives and responsibilities and an institutional set-up

Changes to legislation: *There are currently no known outstanding effects for the Regulation (EU) 2017/2094 of the European Central Bank. (See end of Document for details)*

defined in the Treaty and the Statute of the European System of Central Banks and of the European Central Bank, Eurosystem SIPS operators should be granted an exemption from this requirement.

(5) Furthermore, the Governing Council identified a need to provide further clarity on the responsibilities of a SIPS operator's Board which include the approval of decisions that have a significant impact on the risk profile of a SIPS or SIPS operator and of the key risk documents governing the operation of the SIPS.

(6) The Governing Council generally agreed that there is a need to substantially improve the mitigation of liquidity risk generated in deferred net settlement (DNS) systems through ensuring effective liquidity risk mitigation for all cycles from the moment a transfer order has been included in the calculation of net settlement positions and the position is visible to the participant.

(7) To allow for the smooth functioning of a SIPS, participants need to have adequate tools to effectively manage their liquidity. The SIPS operator has to monitor and facilitate the smooth flow of liquidity at a system level, taking into account the liquidity exposure of each participant.

(8) A SIPS operator settling one-sided payments in euro has to ensure that final settlement takes place in central bank money. Because this requirement also applies where a SIPS offering settlement in central bank money is in an emergency situation, SIPS operators settling payments for other SIPS should endeavour to allow final settlement even in such a situation.

(9) To ensure that SIPS funds are protected against possible business losses, the assets held by a SIPS operator to cover general business risk should be segregated from the assets held for daily business operations. In addition, a distinction should be drawn between a SIPS recovery and orderly wind-down plan, on the one hand, and a SIPS capital plan, on the other. While the latter needs to reflect the possibility of raising capital, the former should ensure that, within the normal course of business, funds available for the recovery and orderly wind-down plan do not fall below the amount required to implement them.

(10) Ensuring effective operational risk management is a continuous process which requires that operational policies and procedures are periodically, and whenever necessary, tested and reviewed, especially following significant changes to the system. This is particularly true for the management of cyber risks which has grown in importance since the publication of Regulation (EU) No 795/2014 (ECB/2014/28). This Regulation sets out specific requirements that are important in order to mitigate cyber risks.

(11) In order for a competent authority to exercise its oversight powers effectively, these powers should be complemented with two additional tools. First, the competent authority should have the power to require a SIPS operator to appoint an independent expert to perform an investigation or independent review of the SIPS's operation. In addition, it should be able to impose requirements concerning the type of expert to be appointed, the content and scope of the report to be produced, the treatment of the report, including disclosure and publication, and timing for the production of the

report. Second, in line with Responsibility B of the abovementioned Principles for financial market infrastructures, a competent authority should be able to conduct on-site inspections or delegate this task.

(12) While corrective measures may only be imposed for infringements of Regulation (EU) No 795/2014 (ECB/2014/28), there could be situations that merit initiating the procedure for the imposition of such measures on the grounds of suspected non-compliance, giving a SIPS operator the opportunity to be heard and to provide explanations before an infringement is established. The procedure for the imposition of corrective measures should be set out in a decision. Moreover, a competent authority other than the ECB should notify the ECB of its intention to impose corrective measures without undue delay.

(13) In view of the findings of the Governing Council's review and to implement the CPMI-IOSCO guidance insofar as they apply to SIPS, Regulation (EU) No 795/2014 (ECB/2014/28) should be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Amendments

Regulation (EU) No 795/2014 (ECB/2014/28) is amended as follows:

1. Article 1 is amended as follows:

(a) in paragraph 3, point (ii) is replaced by the following:

(ii) the total euro-denominated payments processed represent at least one of the following:

— 15 % of the total volume of euro-denominated payments in the Union,

— 5 % of the total volume of euro-denominated cross-border payments in the Union,

— a market share of 75 % of the total volume of euro-denominated payments at the level of a Member State whose currency is the euro;;

(b) in paragraph 3, the following subparagraph is added:

An identification exercise shall be performed on an annual basis.;

(c) the following paragraph 3a is inserted:

3a. A decision adopted under paragraph 2 shall remain in force until it has been repealed. Verification reviews of payment systems that have been identified as SIPS shall be carried out on an annual basis in order to verify that they continue to meet the criteria on the basis of which such identification was made.;

(d) paragraph 4 is replaced by the following:

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4. SIPS operators shall cooperate, on a continuous basis, with the competent authority, and ensure compliance of the SIPS they operate with the requirements set out in Articles 3 to 21, including in terms of the overall effectiveness of their rules, procedures, processes and frameworks. SIPS operators shall further cooperate with the competent authority to facilitate the broader objective of promoting the smooth operation of payment systems at systemic level.;

2. Article 2 is amended as follows:

(a) point (14) is replaced by the following:

(14) "deferred net settlement system" (DNS system) means a system in relation to which settlement in central bank money takes place on a net basis at the end of a predefined settlement cycle, e.g. at the end of, or during, a business day;;

(b) point (18) is replaced by the following:

(18) "direct participant" means a legal entity that has a contractual relationship with a SIPS operator, is bound by the relevant SIPS's rules, is allowed to send transfer orders to that system and is capable of receiving transfer orders from it;;

(c) the following point (18a) is inserted:

(18a) "indirect participant" means a legal entity that does not have direct access to a SIPS's services and is typically not directly bound by the relevant SIPS's rules, and whose transfer orders are cleared, settled and recorded by the SIPS through a direct participant. An indirect participant has a contractual relationship with a direct participant. The relevant legal entities are limited to:

(i) credit institutions as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council[(4)],

(ii) investment firms as defined in point (1) of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council[(5)],

(iii) any undertaking whose head office is outside the Union and whose functions correspond to those of a Union credit institution or investment firm, as defined in points (i) and (ii),

(iv) public authorities and publicly guaranteed undertakings, and central counterparties, settlement agents, clearing houses and system operators as defined in Article 2(c), (d), (e) and (p) of Directive 98/26/EC,

(v) payment institutions and e-money institutions as defined in point (4) of Article 4 of Directive (EU) 2015/2366 of the European Parliament and of the Council[(6)] and point (1) of Article 2 of Directive 2009/110/EC of the European Parliament and of the Council[(7)].;

(d) the following points (40) to (44) are added:

(40) "independent director" means a non-executive member of the Board who has no business, family or other relationship that raises a conflict of interests regarding the SIPS or SIPS operator, their controlling shareholders, their management or their participants, and who has had no such relationship during the two years preceding their membership of the Board;

(41) "affiliate" means a company that controls, or is controlled by, or is under control with, the participant. Control of a company is defined as (a) ownership, control or holding of 20 % or more of a class of voting securities of the company; or (b) consolidation of the company for financial reporting purposes;

(42) "emergency situation" means an event, occurrence or circumstance that has the capacity to lead to the loss of or disruption to a SIPS's operations, services, or functions, including interfering with or preventing final settlement;

(43) "financial obligations" means legal obligations arising, within the SIPS, between participants or between participants and the SIPS operator, as a consequence of transfer orders being entered into that SIPS;

(44) "corrective measure" means a specific measure or action, regardless of its form, duration or gravity, that is imposed on a SIPS operator by a competent authority to remedy, or avoid a repetition of, non-compliance with the requirements of Articles 3 to 21.;

3. Article 4 is amended as follows:

(a) paragraph 2 is replaced by the following:

2. A SIPS operator shall have effective and documented governance arrangements that provide clear and direct lines of responsibility and accountability. These arrangements shall be made available to the competent authority, owners and participants. The SIPS operator shall make abridged versions thereof available to the public.;

(b) paragraph 5 is replaced by the following:

5. The Board's composition shall ensure integrity and, except for Eurosystem SIPS, an appropriate mix of technical skills, knowledge and experience both of SIPS and of the financial market in general, allowing the Board to fulfil its roles and responsibilities. The composition shall also take into account the allocation of competences in accordance with national law. Except for Eurosystem SIPS, and if permitted by national law, the Board shall include non-executive board members, including at least one independent director.;

(c) the second subparagraph of paragraph 7 is replaced by the following:

The Board shall ensure that there are three clear and effective lines of defence (operations, risk management and internal audit), which are separate from each other and have sufficient authority, independence, resources and access to the Board.;