

EBA/CP/2015/24

08 December 2015

Consultation Paper

Draft Regulatory Technical Standards

on separation of payment card schemes and processing entities
under Article 7 (6) of Regulation (EU) 2015/751

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1. Responding to this consultation

The EBA invites comments on all proposals put forward in this paper and in particular on the specific questions summarised in 5.2. [*The part of the phrase from ‘and in particular’ onwards to be added only if, as the case may be, specific questions are provided in the CP*].

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

Submission of responses

To submit your comments, click on the ‘send your comments’ button on the consultation page by 08.03.2016. Please note that comments submitted after this deadline, or submitted via other means may not be processed.

Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the EBA’s rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the EBA’s Board of Appeal and the European Ombudsman.

Data protection

The protection of individuals with regard to the processing of personal data by the EBA is based on Regulation (EC) N° 45/2001 of the European Parliament and of the Council of 18 December 2000 as implemented by the EBA in its implementing rules adopted by its Management Board. Further information on data protection can be found under the Legal notice section of the EBA website.

2. Executive Summary

On 8 June 2015, the Interchange Fees for Card-Based Payment Transactions Regulation (IFR) entered into force in the European Union. The IFR aims at facilitating the creation of a single market for card payments across the EU, by ensuring a level playing field that will facilitate greater competition. In addition to more widely known provisions such as the capping of the interchange fees for the most frequently used cards, the IFR also foresees the separation of payment card schemes and processing entities.

The provision is aimed at addressing concerns that schemes offering processing services may grant their own processing services beneficial treatment to the detriment of processing competitors, leading to a distortion of competition in this market. In order to address these concerns, and to ensure effective and sustainable competition among processing services providers, Article 7(6) IFR confers on the EBA the mandate to develop draft regulatory technical standards (RTS) establishing the requirements that payment card schemes and processing entities have to comply with for ensuring independence of their accounting, organisation and decision-making process as set out Regulation 71(a).

In June 2015 the EBA convened workshops with a sample of domestic and international four party card schemes, three party schemes, processing entities and card standardisation bodies, to discuss current industry practices and to listen to concerns from market participants. In addition, the EBA received valuable input from national competent authorities and market participants that had not participated in the workshop.

The draft RTS proposed in this Consultation Paper was developed using this input. The RTS introduce specific requirements related to the independence of the organisation and the decision-making process in relation to the development of innovations, while ensuring that external processors are not prevented from having an opportunity to partner with the scheme to develop pilots for new innovative products.

Finally, the CP also provides some clarity to market participants as regards supervisory expectation during the period between the application date of Article 7 IFR on 8 June 2016 and the possibly later application date of the RTS.

Next steps

The consultation period will run from 8 December 2015 to 8 March 2016. The final RTS will be published after consultation.

3. Background and rationale

3.1 Background

1. On 8 June 2015, the Interchange Fees for Card-Based Payment Transactions Regulation (EU) 2015/751 (thereafter referred as IFR) entered into force in the European Union. The IFR aims at facilitating the creation of a single market for card payments across the EU, by ensuring a level playing field that will facilitate greater competition. In addition to more widely known provisions such as the capping of the interchange fees for the most frequently used cards.
2. The IFR foresees an additional measure that is also aimed at achieving this objective: the separation of payment card schemes and processing entities.
3. When initiating a card payment, the payment transaction needs to be processed in order for :
 - a. the transaction to be authorised by the payment service provider of the payer (issuer) and the amount to be deducted from the correct payment account of the payer; and
 - b. the payment to arrive at the right payment account of the payee.
4. For that purpose, the merchant (payee), the acquirer, and the issuer of the card make use of the services of processing providers. This provider manages the communication and IT processes needed to execute the payment transaction, whereas the card scheme is responsible for the single set of rules, practices, standards and/or implementation guidelines for the execution of card-based payment transactions.
5. Currently, card payment schemes often offer their own services for processing card payment transactions, which compete with services offered by other card processing providers. Processing services offered by card payment schemes are usually referred as the default scheme processing infrastructure, ensuring the reachability of all issuers and all acquirers participating in the scheme.
6. This situation has given rise to concerns that schemes offering processing services may grant their own processing services beneficial treatment to the detriment of processing competitors, leading to a distortion of competition in the processing market.
7. One possible form of discrimination is to put processing competitors at a disadvantage when pricing the access to the scheme infrastructures. Discrimination can also be non-pricing related, and takes the form for example of giving preference to the requirements of internal operations compared with those of processing competitors when establishing the conditions of access to the infrastructure.

8. In order to address these issues, and to ensure effective and sustainable competition among processing services providers, Article 7(6) IFR confers on the EBA the mandate to develop draft regulatory technical standards (RTS) establishing the requirements that payment card schemes and processing entities have to comply with for ensuring independence of their accounting, organisation and decision-making process as set out Regulation 71(a).
9. In so doing, the IFR aims to prevent potential discrimination between different processors. As stated in recital (33) IFR, independence should allow all processors to compete for customers of the schemes. It should in particular ensure that payment schemes and their processing entities do “not discriminate, for instance by providing each other with preferential treatment or privileged information which is not available to their competitors on their respective market segment imposing excessive information requirements on their competitor in their respective market segment, cross-subsidising their respective activities or having shared governance arrangements”.
10. In this context, the EBA would like to emphasize that it will develop the RTS as mandated in the IFR. As stated in Article 13(1), Member States shall designate competent authorities that are empowered to ensure enforcement of this Regulation, including compliance with the present RTS. However, the EBA will not be able to ensure the consistent implementation of the RTS across EU Member States or address any other issue of insufficient regulatory or supervisory convergence that may arise in this market segment. This follows because the card payment schemes, processing entities, and overseeing authorities are not included in the scope of action of the EBA.
11. In addition, during the development of this consultation paper, the EBA was approached by several market participants with queries regarding the interplay between the entry into force of the RTS after adoption by the EU Commission and the application date of the IFR. The queries focused in particular on the implications arising for payment card schemes in a scenario where the RTS will be adopted by the EU Commission and enter into force after the application date of Article 7 of the IFR. Such a scenario can arise with any technical standards developed by the EBA, for a number of reasons, including:
 - a. the EBA requires more time than specified in the IFR to deliver the RTS to the Commission. This is the case here, given that the EBA already publicly stated that it will have to deliver the RTS later than the six months foreseen in the IFR, in order to gather necessary input prior to publishing its consultation paper¹.
 - b. the time needed for the EU Commission to review and adopt the RTS and whether it proposes to amend the technical standards; or
 - c. the extent to which the EU Council and EU Parliament exercise their scrutiny rights;
12. The question that arose in case any of the above scenarios were to materialize relates to the requirements with which payment card schemes will be required to comply during the interim

¹ <https://www.eba.europa.eu/-/eba-outlines-its-upcoming-initiatives-for-the-regulation-of-retail-payments>

period, between the application date of Article 7 and the possibly later application date of the RTS. In this regard the following clarification can be provided:

- a. The EBA's final draft RTS will propose the specific requirements with which payment card schemes and processing entities have to comply to ensure the application of Article 7(1)(a). Following consultation, the EBA aims to publish the final draft RTS on its website, and submit them to the Commission, in the second quarter of 2016. It is not possible to determine the precise date from which the final RTS will be adopted, due to the many reasons stated above.
- b. However, Art 7(1)(a) of the IFR will apply to payment card schemes and processing entities from 9 June 2016, as provided in Article 18(2) of the IFR, even if the EBA final RTS do not yet apply on 9 June 2016.
- c. From June 2016 card schemes and processing entities will have to ensure their independence in terms of accounting, organisation and decisions-making processes. In doing so, they may choose to take into account the final draft RTS that should by then be published by the EBA, although this will not be legally binding. Once the final RTS are formally adopted by the Commission, the card schemes and processing entities will be legally bound to comply with the RTS.
- d. Until the RTS are formally adopted by the Commission, in their respective jurisdiction the competent authorities - when designated pursuant to Article 13 IFR – shall ensure compliance with Article 7(1)(a), and when doing so may also take into account the final draft RTS prepared by the EBA. In this case, the authorities are invited to liaise closely with the Commission to ensure a consistent implementation of the obligations deriving from Article 7(1)(a) pending the adoption of the final draft RTSs.

3.2 Rationale

13. Under the SEPA cards framework (SCF) developed in 2005 by the European Payments Council, separating payment card scheme from processing entities was considered to be an important element for increasing competition and efficiency in card payments.
14. However, as underlined in the ECB report on card payments in Europe², following the launch of SEPA for cards 2.1 in December 2009, doubts were raised as to whether all card schemes had effectively separated processing activities from their scheme management functions. Some national banking communities and/or domestic or international card schemes have, based on their own interpretation, put in place some form of separation. The way separation has been implemented had varied in practice and was often subject to criticism from competing schemes and processors.

² https://www.ecb.europa.eu/pub/pdf/other/cardpaymineu_renfoconsepaforcards201404en.pdf

15. A mandate has therefore been conferred on the EBA in the IFR to develop draft RTS establishing the requirements to be complied with by payment card schemes and processing entities, to ensure their accounting, organisation and decision-making process independence shall therefore help to address these concerns.
16. In order to assess the status quo and to collect industry's views before developing these RTS, the EBA organised a workshop with market participants in June 2015, so as to gather a sample of domestic and international four party card schemes, three party schemes, processing entities and card standardisation bodies in the EU. In addition, the EBA received valuable input from national competent authorities and market participants that had not participated in the workshop.
17. In the process, the EBA has been made aware of several concerns of market participants, many of which the EBA has taken into account for the development of the RTS that is being proposed in this Consultation Paper. For example, with regard to accounting separation, some market participants raised concerns that such accounting separation may not be able to prevent schemes from applying other forms of price discrimination, such as applying high inter-regional interchange fees³ or high inter-regional processing fees, both of which are not explicitly mentioned in the IFR.
18. However, the EBA has not investigated the merits of these potential concerns because even if they were found to be valid, the EBA would not be able to address them for the reasons explained above: the EBA has been mandated to develop the RTS, but the Interchange Fee Regulation has brought neither the financial institutions nor the overseeing authorities into the scope of action of the EBA. Until this is done, the EBA is unable to issue any of its legal instruments, such as Guidelines, to address the discrimination concerns raised by market participants.
19. Furthermore, when considering the independence between the payment card schemes and processing entities in terms of organisation and decision-making process, referred to thereafter as functional separation, market participants raised a number of potential issues, some of which the EBA was able to take into account.
20. First, market participants underlined that the greater the degree of independence, the higher the potential level of costs involved by such separation. The implementation of a functional separation may require the duplication of staff in some areas and the potential splitting up of various activities or support services that had presented a certain degree of synergy. This could result in increased scheme access costs for all scheme participants.
21. Against this background, the EBA has carefully considered the potential impacts on costs when developing the proposed draft RTS, by defining for example specific conditions under which a payment card scheme and a processing entity can rely on common support services or IT infrastructure.

³ These fees are paid by an acquiring bank for transactions made in the EU by cards issued in other regions of the world.

22. Second, the EBA received views from three party payment card schemes that operate in a limited number of EU Member States under a four party scheme model that any measure requiring a functional separation would be too complex and costly to implement, because such transactions represent only a small percentage of their total overall business in Europe.
23. However, having considered the mandate conferred on the EBA by the IFR, and particularly the fact that Article 7 IFR does not apply to three party payment card schemes unless they operate under a four party scheme model⁴, the EBA cannot consider any exemption to the draft RTS for such operations. Against this background, three-party payment card scheme operating under a four party scheme model will have to comply with the RTS as proposed in this Consultation Paper, unless they decide to migrate the limited number and amount of transactions processed under a four party scheme model to a three party scheme model as defined by the IFR.
24. Third, functional separation requires identifying which services should be qualified as falling under the scope of processing. Article 2 IFR defines processing as the “performance of payment transaction processing services in terms of the actions required for the handling of a payment instruction between the acquirer and the issuer”. Feedback received during the EBA workshop showed that market participants have divergent views about the list of services that should fall under the scope of “processing” as defined by the IFR.
25. This diversity can be explained by the fact that processing services can occur in three different domains of the card payment chain⁵ and that the drafting of the IFR does not specify to which processing domain, if any, the definition applies. Market participants were of the view that, as a minimum, all actions required for the authorisation, clearing and settlement of card-based payment transactions should be included in the scope of “processing” for the purpose of these RTS.
26. Given the definition of “processing” provided in the IFR, the EBA is of the view that there is no possibility to further define the list of processing services falling under the scope of these RTS. Although EBA recognizes that the current definition may allow for different interpretations and may therefore undermine a consistent implementation of the RTS by competent authorities and market participants, the EBA would not be able to provide that clarity until card schemes and overseeing authorities have been brought into its scope of action.
27. Lastly, market participants were concerned that functional separation might undermine the ability of card schemes and processing entities to innovate. Participants explained that, in the context of emerging innovations, schemes currently rely on privileged relationships with one processor (usually the internal one) which will commit to developing new services in the initial phase (pilot) even though the return on its investment may be uncertain. This specific issue has been in particular identified in the SEPA Cards Processing Framework Book 7, which states that: “In the context of emerging solutions, e.g. wallet, mobile payment solutions, it is expected that in the initial phases, specific solutions will be developed with non-standard features, which

⁴ See footnote 1.

⁵ Acquiring domain (the acquirer and the acquirer processor), issuing domain (between the issuer and the issuer processor) and inter Payment Services Providers (the issuing and acquiring processors) domain as defined in the SEPA cards standardization Volume Book 7.

ideally would be aligned to SEPA-wide (scheme independent) standards once the new service becomes mature”⁶. Workshop participants confirmed this concern, referring to national markets in the EU where legal separation between the scheme and processors is already a requirement, and which appeared to show that processing providers were less inclined to invest in the early stages of new innovations.

28. Against this background, the RTS proposed in this Consultation Paper introduces specific requirements related to the independence of the organisation and the decision-making process in relation to the development of innovations, while ensuring that external processors are not prevented from having an opportunity to partner with the scheme to develop pilots for new innovative products.
29. By way of conclusion, the EBA would like to point out that the draft RTS define how payment card schemes and processing entities should implement separate financial information in their regulatory accounts. They clarify conditions under which payment card schemes should be independent from the processing entities in terms of organisation and decision-making process, by defining in particular operational rules to follow in order to establish Chinese walls between processing entities and payment card schemes. These operational rules aim in particular at controlling the flow of information between processing entities and payment card schemes, the behaviour of employees, and the mode of corporate governance and at ensuring that payment card scheme design approve and amend the single set of rules, practices, standards and/or implementation guidelines for the execution of card-based payment transactions on a non-discriminatory basis for all processing entities participating in the scheme.
30. Furthermore, these draft RTS must not be read as implying that payment card schemes and processing entities are required to implement a legal separation.⁷ However, if a scheme decides to implement a legal separation with a processing entity on a voluntary basis, it should do so in a way that ensures compliance with these draft RTS.
31. Similarly, these draft RTS must also not be read as preventing payment card schemes from offering processing services via an independent processing entity, which can be used as the default payment card scheme processing infrastructure. However, such default scheme processing entity must not benefit from any preferential treatment that would be to the disadvantage of alternative processors.
32. The National Competent Authorities will apply the final RTS in a proportionate manner as a general principle of Union law. Therefore, where these draft RTS indicate an outcome, the outcome may be achieved by the payment card schemes and processing entities through different means. The appropriateness of the means used by the payment card schemes and processing entities will be assessed by competent authorities, according to the business model, scale and complexity of the relevant entity.

⁶ <http://www.europeanpaymentscouncil.eu/index.cfm/knowledge-bank/epc-documents/book-7-cards-processing-framework-sepa-cards-standardisation-volume-version-705/epc020-08-book-7-cards-processing-framework-scs-volume-v705pdf/>

⁷ A legal separation means that the scheme offering processing services would be required to create a separate subsidiary to offer the processing services.

33. However all payment card schemes and processing entities shall comply with the final RTS and should ensure at all times their independence in terms of accounting, organisation and decision-making processes.

4. Draft regulatory technical standards

In between the text of the draft RTS/ITS/Guidelines/advice that follows, further explanations on specific aspects of the proposed text are occasionally provided, which either offer examples or provide the rationale behind a provision, or set out specific questions for the consultation process. Where this is the case, this explanatory text appears in a framed text box.

COMMISSION IMPLEMENTING REGULATION (EU) No .../... laying down implementing technical standards with regard to [text describing the subject matter of the standards required by the basic act] according to [Directive xxxx/xx/xx/ Regulation (..) No xx/xxxx] of the European Parliament and of the Council

of XXX

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 on⁸ and in particular Article x[(y)] ... thereof, [*provision conferring powers to the Commission*]

Whereas:

- (1) An efficient functioning of the single market for card payments across the E.U can only be achieved by ensuring a level playing field environment between market participants that will allow for more effective competition.
- (2) Regulation (EU) 2015/751 of 29 April 2015 provides in particular that a separation of payment card scheme and processing entities should allow all processors to compete for customers of the schemes.
- (3) On the basis of the separation of scheme and infrastructure set forth in Article 7(1) a of Regulation (EU) 2015/751, card schemes and processing entities should be independent in terms of accounting, organisation and decision-making process.
- (4) Article 7(6) of Regulation (EU) 2015/751 mandates the EBA to develop draft regulatory technical standards establishing the requirements to be complied with by payment card schemes and processing entities to ensure the application of point (a) of Article 7(1) a of this Regulation.
- (5) This Regulation specifies that for accounting independence, payment card schemes and processing entities shall have accounting processes in place that enable them to produce, as a minimum, financial information related to separated balance sheets, profit and loss accounts and explanatory notes to this financial information. These requirements are not meant to replace or amend accounting principles and standards or the annual financial statements that apply to payment card schemes and processing entities.
- (6) To that purpose, this regulation specifies how expenses and revenues, as well as assets and liabilities, shall be allocated under these accounting processes. It requires that payment card schemes and processing entities produce this financial information at least annually and that the financial information is reviewed by an independent auditor. Such financial information as well as the review by the independent auditor shall be made available to competent authority when requested.

⁸ OJ L [...], [xx.xx.XXXX, p...].

- (7) For organisation independence, this Regulation lays down that as a minimum, payment card schemes and processing entities should be organised in two different business units.
- (8) It furthermore specifies that staff of the payment card scheme and staff of the processing entity, including senior management, should be independent and, as a minimum, accommodated in separated workspaces equipped with restricted controlled access.
- (9) The regulation also requires that remuneration frameworks for staff of the payment card scheme and staff of the processing entity are not set on the economic performance of respectively a processing entity or a payment card scheme to avoid any incentives for staff of the payment card scheme or processing entity to provide each other with preferential treatment or privileged information not available to their competitors.
- (10) When the payment card scheme and the processing entity are part of the same legal entity or group, compliance of staff with the current regulation shall be defined in a code of conduct that should be made available to all staff.
- (11) The regulation however foresees that payment card schemes and processing entities can use shared services under the conditions that this sharing do not result in disclosing sensitive information between themselves and that the conditions for sharing these services are duly documented in a single document available to competent authorities. The regulation also set specific conditions for the sharing of information management system if applicable.
- (12) This regulation also prohibits the sharing of sensitive information between payment card schemes and processing entities which may provide either the payment scheme or the processing entity at a competitive advantage compared to other competitors.
- (13) For decision making independence, the regulation sets conditions for the composition of the management bodies of the payments card schemes and processing entities to ensure that potential conflicts of interest for the decision making process between the payments card schemes and processing entities are appropriately mitigated.
- (14) The regulation furthermore requires that payments card schemes and processing entities have separated annual operating plans approved by their relevant management bodies.
- (15) This Regulation is based on the draft implementing technical standards submitted by the European Supervisory Authority (European Banking Authority) (EBA) to the Commission.
- (16) EBA has conducted open public consultations on the draft implementing 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.**HAS ADOPTED THIS REGULATION:**

Section 1

General provisions

Article 1

Definitions

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

- (1) “management body” means an entity's body or bodies, which are appointed in accordance with national laws, which are empowered to set the entity's strategy, objectives and overall direction, and which oversee and monitor management decision-making, and include the persons who effectively direct the business of the entity;
- (2) “senior management” means those natural persons who exercise executive functions within an entity or business unit and who are responsible, and accountable to the management body, for the day-to-day management of the entity or the business unit;
- (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 entity to employees;
- (4) “shared services” means any activity, function or service performed by either an internal unit within an entity or a separate legal entity and executed to the benefit of both the payment card scheme and the processing entity.

Article 2

Independence requirements

For the purposes of Article 7(1), letter (a) of Regulation (EU) 2015/751, payment card schemes and processing entities shall apply the requirements specified in this Regulation as follows:

- (a) Section 2, to ensure independence in terms of accounting;
- (b) Section 3, to ensure independence in terms of organisation;
- (c) Section 4, to ensure independence in terms of decision-making process.

Section 2

Accounting

Article 3

Financial information

1. Payment card schemes and processing entities shall have accounting processes in place that enable them to produce, as a minimum, financial information related to separated balance sheets, profit and loss accounts and explanatory notes to this financial information for the payment card scheme and the processing entity respectively.
2. The accounting processes referred under paragraph 1 shall enable payment card schemes and processing entities to allocate all relevant expenses, revenues, assets and liabilities in accordance with the provisions of Article 4.
3. The resulting financial information referred to in paragraph 1 shall be consistent with the payment card schemes and processing entities applicable accounting framework for preparing financial statements.

Article 4

Allocation of expenses, revenues, assets and liabilities

1. The separated 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.
 2. Payment card schemes and processing entities shall allocate expenses according to the following:
 - (a) where expenses are directly attributable to the provision of processing services, they shall be allocated to the processing entity;
 - (b) where expenses are directly attributable to the payment card scheme, they shall be allocated to the payment card scheme;
 - (c) where expenses are not directly attributable to the provision of processing services or to the payment card scheme, they shall be allocated, where practicable, on an activity-based costing (ABC), which involves allocating indirect costs according to the actual consumption by the processing services entity or by the payment card scheme,
 - (d) where expenses are not directly attributable and cannot be allocated on an activity-based costing (ABC), they shall be allocated according to an accounting methodology documented in a supporting note. The supporting note shall indicate for each allocated costs under that methodology :
 - i. the basis for allocation; and
 - ii. the rationale for that basis.
 3. Payment card schemes and processing entities shall allocate revenues in accordance with the criteria set out in paragraph 2.
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4. Payment card schemes and processing entities shall allocate assets and liabilities in accordance with the criteria of paragraph 2, letters (a), (b), (c) and (d). Where assets and liabilities cannot be directly attributed to the processing entity or to the payment card scheme, they shall be allocated using the method that most appropriately reflects the causal correlation with the underlying activity.

Article 5

Audit of financial information

1. The financial information produced in accordance with Articles 3 and 4 shall be reviewed by an independent auditor.
2. The review in accordance with paragraph 1 shall be provided in the form of a report ensuring, at minimum:
 - (a) trustworthy and fair view of the separation of the financial information produced by payment card schemes and processing entities;
 - (b) consistency and comparability with the accounting frameworks and policies used by payment card schemes and processing entities or, if not, the rationale for this.
 - (c) consistency with previous years' allocation policies or, if not, any change to the allocation policy must be explained and prior year figures restated accordingly.

Article 6

Frequency and availability of the financial information

The financial information produced in accordance with Articles 3 and 4 shall be prepared at least annually.

The financial information, as well as the review by the independent auditor in accordance with article 5 shall be made fully available to competent authorities designated according to Article 13 of Regulation (EU) 2015/751 upon their request.

Section 3

Organisation

Article 7

Functional separation

Payment card schemes and processing entities shall be, at a minimum, organised in two separate business units.

Article 8
Separation of workspaces

Where payment card schemes and the processing entities are located in the same premises, they shall be organised in separate workspaces equipped with restricted controlled access in order to ensure the compliance of staff with the requirements set out in Sections 3 and 4 of this Regulation.

Article 9
Senior management independence

The senior management of payment card schemes, or where relevant of the payment card scheme business unit, shall be different from the senior management of processing entities, or where relevant of the processing entity business unit, and act autonomously from one another.

Article 10
Staff independence

1. The staff of payment card schemes shall be different from the staff of processing entities.
2. With no prejudice to paragraph 1, the staff of payment card schemes may perform tasks related to the provision of processing services limited to the following circumstances:
 - (a) the provision of shared services in accordance with Article 12;
 - (b) the design, update or implementation of any processing services in the initial phase of development of new solutions, if necessary for an innovation purpose.
3. Where, in accordance with paragraph 2, letter (b), the staff of the payment card scheme performs tasks related to the provision of processing services, the payment card scheme shall inform all processing entities participating in the payment card scheme at the same time and under the same conditions about the development of a new solution, ensuring a selection of the processing entities tasked with the further development of a new solution on a non discriminatory basis.
4. With no prejudice to paragraph 1, the staff of a processing entity may perform tasks related to the design of the single set of rules, practices, standards and/or implementation guidelines for the execution of card-based payment transactions limited to the following circumstances:
 - (a) the provision of shared services in accordance with Article 12;
 - (b) the tasks related to the design of the single set of rules may be performed by other processing entities on a non-discriminatory basis and where the design of those rules involves a representative sample of all processing entities participating in the payment card scheme.

Article 11
Remuneration

1. Remuneration of the staff of processing entities shall reflect solely the objectives 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. Remuneration of the staff of payment card schemes shall reflect solely the objectives of the payment card schemes and shall not be directly or indirectly linked to the performance of a processing entity.

Article 12
Use of shared services

1. The use of shared services between payment card schemes and processing entities shall not imply the disclosure of sensitive information, as referred in Article 14, between payment card schemes and processing entities.
2. Payment card schemes and processing entities shall define in a single document the list of shared services and the conditions under which they are provided.
3. The document mentioned in paragraph 2 shall be made available to competent authorities upon their request.

Article 13
Use of a shared information management system

1. Where payment card schemes and processing entities rely on a shared information management system, the shared information management system shall ensure that:
 - (a) The staff of payment card schemes and processing entities staff are separately identified via the authentication procedure to access the information management system;
 - (b) users shall only have access to information to which they are entitled and in compliance with this Regulation. In particular, any sensitive information referred to in Article 14 of processing entities shall not be accessed by payment card schemes staff and any sensitive information of payment card schemes shall not be accessed by processing entities staff.
2. The maintenance of the shared information system shall be performed in a way that ensures that no sensitive information referred to in Article 14 is shared between payment card schemes and the processing entities.

Article 14
Sensitive information

Payment card schemes and processing entities shall not share information of a sensitive nature which may provide either the payment scheme or the processing entity at a competitive advantage compared to other competitors.

Article 15
Code of conduct

1. Payment card schemes and processing entities which are part of a same legal entity or group shall define and disclose publicly a code of conduct, setting out how their respective staff shall act to ensure compliance with this Regulation.
2. The code of conduct shall, in particular, define rules to prevent the sharing of sensitive information referred to in Article 14 between payment card schemes and the processing entities.

Section 4
Decision-making process

Article 16
Management bodies' independence

1. The composition of the payment card scheme and processing entity management bodies shall ensure that potential conflicts of interest for the decision making process between the payment card scheme and processing entity participating in the scheme are appropriately mitigated.
 2. Where part of the same group, the payment card scheme and processing entity management bodies shall approve and periodically review conflict of interest policies for managing and monitoring the compliance with the current RTS, such as the code of conduct referred to in Article 15.
 3. Where the payment card scheme and processing entity have the same management body, the management body of the payment card scheme and processing entity shall establish:
 - (a) a dedicated composition responsible for decisions related to the payment card scheme activities, with the exemption of shared services as defined in Article 12, composed of members of the management body who do not perform any executive function in the processing entity. The 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 dedicated composition responsible for decisions related to the processing entity, with the exemption of shared services as defined in Article 12, composed of members of the management body who do not perform any executive function in the payment card scheme. The 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 senior management of the payment card scheme business unit and the processing entity business unit respectively to the management body.
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4. With no prejudice to paragraph 3 (a) and (b), the management body shall retain overall responsibility for compliance with the current RTS.

Article 17

Annual operating plan independence

Payment card schemes and processing entities shall have separated annual operating plans determining the budget, including capital and operating expenditures and possible authority delegations to engage such expenditures, which shall be submitted for approval to their respective management body or, where relevant, to the management body of the payment card scheme and processing entity under the conditions defined in article 16.

Section 5

Final provisions

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,

For the Commission
The President

On behalf of the President

[Position]

5. Accompanying documents

5.1 Draft cost-benefit analysis / impact assessment

Article 10(1) of the EBA Regulation provides that when any regulatory technical standards (RTS) developed by the EBA are submitted to the Commission for adoption, they should be accompanied by an analysis of ‘the potential related costs and benefits’. This analysis should provide an overview of the findings regarding the problem to be dealt with, the solutions proposed and the potential impact of these options.

A. Problem identification and baseline scenario

The migration from cash and paper to efficient electronic payment instruments is found to stimulate the overall economy, consumption and trade in European retail markets⁹. Card payments are an increasingly important segment of the EU financial services market and constitute the most important and fastest growing non-cash payment instrument in the EU¹⁰.

Evidence indicates, however, that there are market imperfections and barriers to competition in the market for card payments in the European Union¹¹, particularly regarding the relationship between payment card schemes and entities in charge of processing payment transactions¹².

When initiating a card payment, the payment transaction needs to be processed in order for:

- a. the transaction to be authorised by the payment service provider of the payer (issuer) and the amount to be deducted from the correct payment account of the payer; and
- b. the payment to arrive at the right payment account of the payee.

For that purpose, the merchant (payee) makes use of the services of a processing provider. This provider manages the communication and IT processes needed to execute the payment transaction, whereas the card scheme is responsible for the commercial and contractual framework applying to the payment transaction, i.e. rules, practices and standards for the execution of card payments.

Currently, card payment schemes often offer their own services for processing card payment transactions, which compete with services offered by other external independent card processing providers. Processing services offered by card payment schemes are usually referred as the

⁹ ECB: Retail payments and the real economy (2013)

¹⁰ ECB: Payment statistics

¹¹ European Competition Network: Information Paper on competition enforcement in the payments sector (2012); COM DG Competition: Competition policy brief on the interchange fees regulation (2015);

¹² ECB: Card payments in Europe – A renewed focus on SEPA for cards (2014)

default scheme processing infrastructure, ensuring the reachability of all issuers and all acquirers participating in the scheme.

This situation has given rise to concerns that schemes offering processing services grant their own processing services beneficial treatment to the detriment of processing competitors, leading to a distortion of competition in the processing market.

One possible form of discrimination is to put processing competitors at disadvantage when pricing the access to the scheme infrastructures. Discrimination can also be non-pricing related, and takes the form for example of giving preference to the requirements of internal operations compared with those of competing operators when establishing the conditions of access to the infrastructure.

Without regulatory intervention, the problems and distortions described above would persist.

B. Policy objectives

These standards are intended to help create a single market for card payments across the EU¹³, by ensuring a level playing field environment that will allow for more competition, in particular increase competition in the card processing business area and protect consumers in Europe¹⁴ (general objectives). In order to address the above issues, and to ensure effective and sustainable competition among processing services providers, the Article 7(6) IFR confers on the EBA the mandate to develop draft RTS establishing the requirements that payment card schemes and processing entities have to comply with for ensuring independence of their accounting, organisation and decision-making process (operational objectives) as set out Regulation 7.1 (a).

In so doing, the IF Regulation aims to prevent potential discrimination between different processors, allowing the processing market to become more competitive. As stated in recital (33) IFR, independence should allow all processors to compete for customers of the schemes. It should in particular ensure that payment schemes and their processing entities do not discriminate, for instance by providing each other with preferential treatment or privileged information (specific objectives) that is not available to their competitors in their respective market segment. For this would impose excessive information requirements on their competitor in their respective market segment, cross-subsidising their respective activities or having shared governance arrangements.

¹³ COM: Green Paper towards an integrated European market for card, internet and mobile payments (2012);

¹⁴ EBA: Consumer trends report (2015)

C. Options considered

In pursuit of the above objectives, a few sets of technical specifications are discussed, relating to

- General

- Develop and publish a list of services covered by the definition of processing (Option 1.1)
- Abstain from developing a list of services covered by the term processing (Option 1.2)

- Accounting

- To only disclose separated financial statements to competent authorities (Option 2.1)
- To in addition disclose separated financial statements to the public (Option 2.2)

- Organisation and decision-making¹⁵

- Require the processing function to be performed by a separate business unit (Option 3.1)
- Abstain from requiring separate business unit for the processing function (Option 3.2)
- Allow payment card schemes and processing entity use of shared services (Option 4.1)
- Prohibit use of shared services by payment card scheme and processing entity (Option 4.2)
- Allow for derogation of requirements to facilitate innovation in card payment services (Option 5.1)
- Not to take any specific measures to encourage innovation in card payment services (Option 5.2)
- To prohibit any sharing of sensitive information between payment card scheme and processing entity (Option 6.1)
- To allow payment card scheme requesting from processing entity financial information for risk management purposes (Option 6.2)

¹⁵ For reference see EBA: GL on internal governance (2011)

D. Cost-Benefit Analysis¹⁶ and preferred options

These RTS are expected to mainly affect the payment card schemes, entities processing card payment transactions, acquirers and issuers, payees (merchants), payers (consumers), and the Internal Market for card payment services, particularly its competition characteristics.

Regarding the need to identify a list of services falling under the scope of processing, article 2(27) IFR provides that “processing’ means the performance of payment transaction processing services in terms of the actions required for the handling of a payment instruction between the acquirer and the issuer”. As explained in the draft background and rationale of this consultation paper, inputs provided during the workshop EBA conducted with market participants showed that there are different views about the list of services that should fall under the scope of “processing” as defined by the IFR.

Given the definition of “processing” provided in the IFR, the EBA is of the view that there is no possibility to further define the list of processing services falling under the scope of these RTS. Although EBA recognizes that the current definition may allow for different interpretations and may therefore hinder a consistent implementation of the RTS by competent authorities and market participants, the EBA would not be able to provide that clarity until card schemes and overseeing authorities have been brought into its scope of action.

Furthermore, defining a specific list of services that would fall under the scope of processing would be too static and need to be updated in regular intervals to adequately take market developments and innovations in card payment services into account. Instead relying on the definition of processing included in the IFR facilitates the adaptability of these RTS to future developments and addressing of specific circumstances at national level. Consequently, abstention from developing a list of in-scope payment card services is preferred (Option 1.2).

Regarding accounting independence of payment card scheme and processing entity, disclosure of information is commonly associated with costs for payment card schemes and processing entities. Additional disclosure of financial statements to the public would only increase the information available on processing entities which are related to a card payment scheme. Such a requirement could have unintended consequences and lead to an uneven playing field between competing processing entities. Consequently, it cannot be expected to be proportionate and sufficiently beneficial to the functioning, in particular the intensity of competition in the Internal Market for card payment services, leaving Option 2.1 as the preferred one.

While the mandate given to the EBA is to develop draft RTS establishing the requirements to be complied with by payment card schemes and processing entities to ensure their accounting, organisation and decision-making process independence, the EBA is of the view that the setting up of an independent business unit as a minimum would be proportionate and should indeed be

¹⁶ As a reference see also COM: Impact Assessment accompanying the proposals for a Payment Services Directive and an Interchange Fees Regulation (2013);

required (Option 3.1). This requirement is essential for ensuring independence in terms of accounting, organisation and decision making process. In addition, it will give a clear signal to the market of the expectations of NCAs and thus has benefits for the consistency of supervision.

Regarding shared services, allowing their use by payment card scheme and processing entity is expected to limit the costs of the implementation of these technical standards for payment service providers. As the policy objectives would be sufficiently achieved, Option 4.1 is preferred.

Regarding innovation, it is acknowledged that the market for payment services is dynamic in the sense of its innovative potential. Those innovations, however, are usually associated with high initial investments by leading payment service providers. Often, innovation is facilitated by support (including financial) of a related large card payment service provider. To not excessively impede innovation in the payment services market, the derogation of certain requirement of these technical standards (such as on staff independence) is proposed (Option 5.1).

Regarding organisation independence, sharing of sensitive information between payment card scheme and processing entity can impact competition in the European payment cards market. The prohibition of any sharing of sensitive information between payment card scheme and processing entity is expected to prevent competitive distortions due to asymmetric distribution of information. It could prove challenging to define eligible purposes for the sharing of information in a sufficiently clear manner, rendering it difficult to be implemented and supervised in a harmonised way. The supposed benefits of sharing of sensitive information to the functioning of the Internal Market for payment card services and the protection of its consumers are less obvious. Consequently, the prohibition of any sharing of sensitive information between payment card schemes and processing entities is the preferred choice (Option 6.1).

5.2 Overview of questions for consultation

1. Do you agree with the proposals outlined in Section 1 of the draft RTS regarding general provisions?
2. Do you agree with the proposals outlined in Section 2 of the draft RTS regarding accounting?
3. Do you agree with the proposals outlined in Section 3 of the draft RTS regarding organisation?
4. Do you agree with the proposals outlined in Section 4 of the draft RTS regarding independence of decision making process?
5. Do you have any other comments?