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From: General Secretariat of the Council
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Subject: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND
OF THE COUNCIL on cross-border payments in the Union (codification)
- Opinion of the European Central Bank

Delegations will find attached the opinion and the technical working document of the European Central Bank regarding the above mentioned proposal.



OPINION OF THE EUROPEAN CENTRAL BANK
of 25 January 2021
on a proposal for a regulation on cross-border payments in the Union
(CON/2021/3)

Introduction and legal basis

On 15 October 2020 the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on a proposal for a Regulation of the European Parliament and of the Council on cross-border payments in the Union (codification)¹ (hereinafter the 'proposed regulation').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union (TFEU), in conjunction with the fourth indent of Article 127(2) TFEU and the fourth indent of Article 3.1 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank, as the proposed regulation contains provisions concerning the smooth operation of payment systems. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

General observations

The proposed regulation aims to codify Regulation (EC) No 924/2009 of the European Parliament and of the Council², as last amended by Regulation (EU) 2019/518 of the European Parliament and of the Council³. While the ECB generally welcomes the codification exercise, it notes, as outlined in the explanatory memorandum of the proposed regulation, that instruments affected by codification do not contain substantive changes, but only formal amendments as are required by the codification exercise itself. The ECB also adopted an opinion⁴ on the proposal for Regulation (EU) 2019/518⁵. However, certain provisions of Regulation (EU) 2019/518 were introduced in the context of the Union legislative procedure after the submission of the Commission proposal to the ECB and were therefore not part of the Council's consultation request to the ECB. Therefore, in view of the lack of opportunity to opine previously, and given that the proposed regulation will be adopted in accordance with the ordinary legislative procedure, the ECB

1 COM(2020) 323 final.

2 Regulation (EC) No 924/2009 of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) No 2560/2001 (OJ L 266, 9.10.2009, p. 11).

3 Regulation (EU) 2019/518 of the European Parliament and of the Council of 19 March 2019 amending Regulation (EC) No 924/2009 as regards certain charges on cross-border payments in the Union and currency conversion charges (OJ L 91, 29.3.2019, p. 36).

4 See Opinion of the European Central Bank CON/2018/38 of 31 August 2018 on a proposal for a regulation on certain charges on cross-border payments in the version charges (OJ C 382, 23.10.2018, p. 7). All ECB Opinions are published on the ECB's website at www.ecb.europa.eu.

5 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 924/2009 as regards certain charges on cross-border payments in the Union and currency conversion charges, COM(2018) 163 final.

takes this opportunity to opine on one provision of the proposed regulation that was introduced by Regulation (EU) 2019/518.

1. Specific observations

1.1 *Reference to the euro foreign exchange reference rates issued by the ECB*

Article 4(1) of the proposed regulation, which aims to supplement the transparency and information requirements set out in Directive (EU) 2015/2366 of the European Parliament and of the Council⁶ (hereinafter the 'Payment Services Directive') with regard to currency conversion services⁷, requires payment service providers and parties providing currency conversion services at an automated teller machine or at the point of sale to express the total currency conversion charges as a percentage mark-up over the latest available euro foreign exchange reference rates issued by the ECB.

Since 1998 the ECB has published euro foreign exchange reference rates (ECBRRs) on the basis of a framework approved by the ECB Governing Council in 1998 and subsequently amended in 2015⁸ (hereinafter the 'ECBRR Framework'). The ECBRRs are provided as a public good for individual citizens and institutions⁹ and are used by a wide range of institutions. The aim of the ECBRR Framework is to preserve the integrity of the ECBRRs by: (i) discouraging trading on the ECBRR; and (ii) limiting their use to reference purposes. Using the ECBRR for transaction purposes is strongly discouraged and the ECBRRs are published for information purposes only¹⁰. In this regard the ECBRR Framework aims to reinforce the difference between the ECBRR and exchange rate benchmarks which are intended for transaction purposes.

The reference to the ECBRRs in the proposed regulation could, contrary to the objectives of the ECBRRs, create incentives for some market participants to trade at the ECBRRs. Therefore, the ECB recommends that the reference in Article 4 of the proposed regulation to the ECBRRs is removed and replaced by an appropriate reference to a foreign exchange benchmark rate which falls within the scope of the Union benchmark regulation¹¹, and which may be used in the context of the currency conversion charges. The accuracy and integrity of such benchmarks, which is ensured by the regime for benchmark administrators introduced by that regulation, protects the interests of customers of payment service providers and parties providing currency conversion services.

⁶ Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35).

⁷ See Recital 8 of the proposed regulation.

⁸ See the ECB's Framework for the euro foreign exchange reference rates available on the ECB's website at www.ecb.europa.eu.

⁹ See the ECB's press release of 7 December 2015 on the ECB's introduction of changes to euro foreign exchange reference rates.

¹⁰ The ECBRR Framework expressly provides that 'the term "reference rate" is taken to mean an exchange rate that is not intended to be used in any market transactions, whether directly or indirectly (as an underlying benchmark). The rates are intended for information purposes only.'

¹¹ Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (OJ L 171, 29.6.2016, p. 1).

Where the ECB recommends that the proposed regulation is amended, a specific drafting proposal is set out in a separate technical working document accompanied by an explanatory text to this effect. The technical working document is available in English on EUR-Lex.

Done at Frankfurt am Main, 25 January 2021.



The President of the ECB

Christine LAGARDE



Technical working document
produced in connection with ECB Opinion CON/2021/3
on a proposal for a regulation on cross-border payments in the Union
Drafting proposal

Text proposed by the Commission	Amendments proposed by the ECB ¹
Amendment 1 Recital 10	
<p>'(10) To achieve comparability, currency conversion charges for all card-based payments should be expressed in the same way, namely as percentage mark-ups over the latest available euro foreign exchange reference rates issued by the European Central Bank (ECB). A mark-up might have to be based on a rate derived from two ECB rates in the case of a conversion between two non-euro currencies.'</p>	<p>'(10) To achieve comparability, currency conversion charges for all card-based payments should be expressed in the same way, namely as percentage mark-ups over the latest available rate of the selected benchmark. Benchmarks should be selected from the benchmarks provided by an administrator located in the Union and included in the register referred to in Article 36 of Regulation (EU) 2016/1011* and the benchmarks which are included in that register euro foreign exchange reference rates issued by the European Central Bank (ECB). A mark-up might have to be based on a rate derived from two ECB rates in the case of a conversion between two non-euro currencies. Payment service providers and parties providing currency conversion services should consistently use the single benchmark administrator that they have selected.</p>

¹ Bold in the body of the text indicates where the ECB proposes inserting new text. Strikethrough in the body of the text indicates where the ECB proposes deleting text.

Text proposed by the Commission	Amendments proposed by the ECB ¹
	<p>* Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 (OJ L 171, 29.6.2016, p. 1.)’</p>
<p><u>Explanation</u></p> <p><i>It is suggested to align Recital 10 to the amendments proposed to Article 4 so as to remove reference to the euro foreign exchange reference rates issues by the ECB. In addition, given that the amendments to Article 4 would give payment service providers and parties providing currency conversion services a choice among different benchmark administrators, it is important that that choice is made taking into account the best interest of their customers. The selected benchmark administrator should therefore be used consistently and payment service providers should avoid, to the extent possible, using various benchmark administrators, e.g. in the case of a conversion between two non-euro currencies, which might require the calculation of a rate derived from two other rates.</i></p>	
<p><u>Amendment 2</u></p> <p><u>Article 4(1) and (2)</u></p>	
<p>‘1. With regard to the information requirements on currency conversion charges and the applicable exchange rate, as set out in Articles 45(1), 52(3) and 59(2) of Directive (EU) 2015/2366, payment service providers, and parties providing currency conversion services at an automated teller machine (ATM) or at the point of sale, as referred to in Article 59(2) of that Directive, shall express the total currency conversion charges as a percentage mark-up over the latest available euro foreign exchange reference rates issued by the European Central Bank (ECB). That mark-up shall be disclosed to the payer prior to the initiation of the payment transaction.</p> <p>2. Payment service providers shall also make the mark-ups referred to in paragraph 1 public in a</p>	<p>‘1. With regard to the information requirements on currency conversion charges and the applicable exchange rate, as set out in Articles 45(1), 52(3) and 59(2) of Directive (EU) 2015/2366, payment service providers, and parties providing currency conversion services at an automated teller machine (ATM) or at the point of sale, as referred to in Article 59(2) of that Directive, shall express the total currency conversion charges as a percentage mark-up over a the latest available euro—foreign exchange reference benchmark rates which is either included in the register referred to in Article 36 of Regulation (EU) 2016/1011 of the European Parliament and of the Council* or which is provided by an administrator who is located in the Union and</p>

Text proposed by the Commission	Amendments proposed by the ECB ¹
<p>comprehensible and easily accessible manner on a broadly available and easily accessible electronic platform.’</p>	<p>included in that register. The payment service provider or party providing the currency conversion services, as applicable, shall use the most up to date rate made available under the benchmark that it has selected. issued by the European Central Bank (ECB). That mark-up, and the foreign exchange benchmark rate used, shall be disclosed to the payer prior to the initiation of the payment transaction.</p> <p>2. Payment service providers shall also make the mark-ups referred to in paragraph 1, and the foreign exchange benchmark rate used, including the provider of that rate, public in a comprehensible and easily accessible manner on a broadly available and easily accessible electronic platform.’</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>The foreign exchange reference rates issued by the ECB are published exclusively for information purposes and are not intended for transaction purposes. Therefore, it is recommended to remove the reference to such rates from Article 4(1) and to replace them by the appropriate benchmark rates, which fall under the scope of Regulation (EU) 2016/1011. These include (i) benchmarks provided by administrators located in the Union which have been authorised or registered pursuant to Article 34 of Regulation (EU) 2016/1011, (ii) benchmarks which are listed on the register maintained by ESMA in accordance with Article 36 of that Regulation and which are provided by administrators located outside the Union that comply with the conditions laid down in Article 30(1) of the same Regulation, (iii) benchmarks which are listed on the register maintained by ESMA in accordance with Article 36 of that Regulation and are provided by administrators located outside the Union that acquired recognition in accordance with Article 32 of the same Regulation and (iv) benchmarks provided by administrators located outside the Union, which are endorsed in accordance with the procedure laid down in Article 33 of the same Regulation.</i></p>	