



Brussels, **XXX**
[...](2016) **XXX** draft

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

of **XXX**

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

DRAFT

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 7(6) of Regulation (EU) 2015/751 ('the Regulation') empowers the Commission to adopt, 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, delegated acts specifying the requirements ensuring separation of payment card schemes and processing entities.

In accordance with Article 10(1) of Regulation No (EU) 1093/2010 establishing the EBA, the Commission shall decide within three months of receipt of the draft standards whether to endorse the drafts submitted. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

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 ('the Regulation'). 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 on them. 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.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation No (EU) 1093/2010, the EBA has submitted its 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 (RTS) 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.

They require payment card schemes and processing entities to (i) have accounting processes in place to produce annual information related to separated profit & 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.

They lay 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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DRAFT

(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, independently 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) Payment card schemes and participating processing entities should produce financial information in compliance with the requirements of this Regulation at least annually and the information should be subject to the review of an independent auditor. That financial information as well as its review by the independent auditor should be made available to competent authorities upon their request in order to allow them to ensure enforcement of independence requirements.

¹ OJ L 123, 29.4.2015, p. 1.

- (5) Payment card schemes and processing entities that are not established as two separate legal persons should at least be organised as two different internal business units. Staff of the payment card scheme and staff of the processing entity, 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 prevent the practice of '*revolving doors*', senior managers will be prohibited from taking on work for the other side of the business for a minimum duration of two years after they have left the entity they are working for. These provisions will ensure the compliance of staff with independence requirements for the organisation and the decision-making process of those payment card schemes and processing entities.
- (6) The staff of payment card schemes should be able to perform tasks related to the design, update or implementation of processing services only where specific conditions ensuring compliance with independence requirements are met.
- (7) Remuneration frameworks for staff of the payment card scheme and of the processing entity should not be based directly or indirectly on the economic performance of the processing entity or the payment card scheme respectively to avoid any incentives for staff of the payment card scheme or of the processing entity to provide each other with preferential treatment or privileged information not available to their competitors. Remuneration policies and related plans and benefits 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 disclosing sensitive information between them and that the conditions for sharing the services, including the financial conditions under which these services are offered, are duly documented in a single document. Such document should be made available to competent authorities upon their request in order to allow 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 provide either the payment scheme or the processing entity a competitive advantage compared to other competitors 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. These conditions shall 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. Such separated annual operating plans should be made fully available to competent authorities upon their request, in order to allow 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 point (a) of Article 7(1) 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 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 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.

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 287, 29.10.2013, p. 5).

- (5) ‘group’ means a parent undertaking and all its subsidiary undertakings as defined in point (11) of Article 2 of Directive (EU) 2013/34 of the European Parliament and of the Council³;

CHAPTER II ACCOUNTING

Article 3 Financial information

1. Payment card schemes and participating processing entities, irrespective of the underlying obligations and organisational arrangements between them, 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 point (d) shall indicate for each allocated costs and revenues under that methodology:
 - (a) the basis for the allocation;
 - (b) the rationale for that basis.

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 331, 15.12.2010, p. 12).

Article 5
*Documentation of transfer of funds between
payment card schemes and processing entities*

1. Payment card schemes and processing entities shall produce specific explanatory notes for any transfer of funds between them, including the provision of services or the use of shared services referred to in Article 12, specifying the prices and fees of those services, irrespective of any underlying obligations and organisational arrangements 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 same or, in absence, comparable services charged between payment card schemes and processing entities not belonging 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 together with the review by the independent auditor to the competent authorities upon their request.

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. They shall not be allowed to take on work for the other side of the business for a minimum duration of two years after they have left the entity for which they are 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 paragraph 1 and 2 shall be made fully available to competent authorities upon their request.

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 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 they are provided.
3. The single document referred to in paragraph 2 shall be made available to competent authorities upon their request.

Article 13
Use of a shared information management system

1. 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 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.
2. The shared information management system shall be maintained in a way that ensures that no sensitive information, as 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 that provide 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 referred to in Article 14 between payment card schemes and the 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 participating 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 participating processing entity. These criteria shall be made public and shall be subject to review by competent authorities.
2. The management bodies of payment card schemes and the 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, such as the code of conduct referred to in Article 15.
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 participating processing entity, payment card schemes and processing entities shall establish:
 - (a) a dedicated composition of the 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 dedicated composition of the 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) where part of the same legal entity, independent reporting lines from senior management of the payment card scheme business unit and the processing entity business unit respectively 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 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 such 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,

For the Commission
The President