

# Memorandum of Understanding on Cooperation between the National Competent Authorities of the European Union to monitor compliance with Article 7(1)(a) of the Interchange Fee Regulation and the Delegated Regulation (EU) 2018/72

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# 1. Preamble

- 1.1 This Memorandum of Understanding (MoU) sets out the framework that the Competent Authorities (CAs) who sign it will use to cooperate with one another, in relation to monitoring compliance by payment card schemes which provide services on a cross-border basis (“international payment card schemes”) and their processing entities with Article 7(1)(a) of the Interchange Fee Regulation<sup>1</sup> (IFR) and the IFR Regulatory Technical Standards<sup>2</sup> (RTS).
- 1.2 Article 7 of the IFR requires the separation of payment card schemes and processing entities. Article 7(1)(a) sets out the principle which payment card schemes and processing entities need to follow when organising their separation. It states that payment card schemes and processing entities “shall be independent in terms of accounting, organisation and decision-making processes.”
- 1.3 In addition, under Article 7(6) of the IFR, the European Banking Authority (EBA) was tasked with developing the RTS 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 processes as set out in Article 7(1)(a). The RTS were adopted by the European Commission through the Delegated Regulation (EU) 2018/72 that came into force on 8 February 2018.
- 1.4 The CAs are responsible for monitoring and enforcing compliance with Article 7 of the IFR and the RTS in their respective jurisdictions and recognise for international payment card schemes, the importance of cooperation to monitor the compliance with the requirements in Article 7(1)(a) of the IFR and the RTS.
- 1.5 The CAs see this MoU as an appropriate instrument for setting out the necessary arrangements to facilitate cooperation between them with a view to monitoring and achieving compliance by international payment card schemes and processing entities with the requirements in Article 7(1)(a) of the IFR and the RTS. The CAs will endeavour to cooperate through appropriate procedures for sharing information, views and assessments so as to reach a consensus position on the compliance of international payment card schemes and processing entities with Article 7(1)(a) of the IFR and the RTS.

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1 Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions

2 Commission Delegated Regulation (EU) 2018/72 of 4 October 2017 supplementing Regulation (EU) 2015/751 of the European Parliament and of the Council on interchange fees for card-based payment transactions with regard to regulatory technical standards establishing the requirements to be complied with by payment card schemes and processing entities to ensure the application of independence requirements in terms of accounting, organisation and decision-making process

- 1.6 Assessing the compliance of international payment card schemes and processing entities with the requirements in Article 7(1)(a) of the IFR and the RTS is a necessary starting point for CAs under the IFR. The CAs agree that such assessments should make use of a common analytical framework for compliance in order to limit the risk of divergent assessments.

## 2. Objective

- 2.1 International payment card schemes and processing entities can only implement the separation requirements in Article 7(1)(a) of the IFR and the RTS in the same way across the European Union because these requirements affect the structural organisation of their businesses. There is therefore a need for consistent monitoring and enforcement by the CAs in order to avoid gaps, duplication and inconsistent decisions as well as putting an unnecessary regulatory burden on international payment card schemes and processing entities.
- 2.2 The objective of the MoU is to ensure effective cooperation between the CAs. The CAs commit themselves to open, constructive and timely cooperation which will involve:
- a. exchanging information relevant for the monitoring of compliance with the requirements of Article 7(1)(a) of the IFR and the RTS in a manner consistent with and permitted by applicable laws;
  - b. assessing the compliance of international payment card schemes and processing entities with the requirements of Article 7(1)(a) of the IFR and the RTS;
  - c. agreeing on recommendations to be addressed to international payment card schemes and processing entities to resolve any potential compliance issues identified as a result of the assessments;
  - d. determining the best course of action to implement any agreed recommendations addressed to a international payment card scheme and/or processing entity if necessary and where appropriate; and
  - e. coordinating any public communication where necessary.
- 2.3 The cooperation envisaged in this MoU will enable each CA to benefit from the pooling of resources and expertise from CAs participating in the cooperation. For the avoidance of doubt, each CA remains responsible for monitoring and ensuring compliance with Article 7(1)(a) of the IFR within its jurisdiction in application of Article 13(6) of the IFR.

### **3. Signatories**

- 3.1 This MoU is concluded between the CAs listed at Annex 1 that signed the MoU (the “signatory/signatories”).
- 3.2 To facilitate cooperation under this MoU, the signatories will each designate two contact persons whose details should be provided to the relevant Lead CAs.
- 3.3 Any CA that is not a signatory of this MoU may request to join at a later date. The request should be sent to one of the Lead CAs who will provide the MoU for signing.

### **4. Scope**

#### **CAs**

- 4.1 The CAs eligible to join this MoU are those designated in their respective Member States pursuant to Article 13 in the IFR as being empowered to ensure enforcement of Article 7(1)(a) of the IFR and the RTS.
- 4.2 There is no obligation on any eligible CA to join this MoU or to participate in any of the cooperation activities envisaged in this MoU.

#### **Payment card schemes and processing entities**

- 4.3 The cooperation arrangements in this MoU relate to monitoring the compliance of international payment card schemes and processing entities which are subject to the requirements in Article 7(1)(a) of the IFR and the RTS.

#### **Monitoring of compliance**

- 4.4 This MoU concerns the cooperation between the signatories to monitor compliance of international payment card schemes and processing entities with Article 7(1)(a) of the IFR and the RTS on an ongoing basis. The MoU does not cover any other provision in the IFR.

## 5. Nature of the MoU

- 5.1 This MoU does not create any legally binding obligations between the signatories. It does not give rise to any legal claim or confer any rights to any CA or third parties. In addition, this MoU is without prejudice to any applicable laws.
- 5.2 Each signatory remains solely and fully responsible for performing its duties under the IFR and under its national applicable laws. The signatories recognise that the cooperation contemplated in this MoU must be compliant with the laws which establish each CA and which govern their powers, functions and responsibilities.
- 5.3 This MoU does not limit the ability of each CA to act unilaterally, as applicable laws permit, in fulfilment of its functions under the IFR. In particular, this MoU does not affect any right of a CA, subject to its national applicable laws, to communicate with or obtain information or documents from a payment card scheme or processing entity subject to its jurisdiction that is located in the jurisdiction of another CA.

## 6. General provisions

- 6.1 This version of the MoU will enter into effect for each CA on the date of its signing as shown in the Annex. It supersedes any previous version. It will remain effective until amended or terminated in writing by the signatories giving each other 30 days written notice. An individual signatory has the right to withdraw from the MoU at any time, by giving 30 days' written notice to the other signatories.
- 6.2 Each signatory will, within the framework provided in this MoU and, subject to applicable laws, use reasonable endeavours to provide the other signatories with the fullest cooperation necessary and permissible.
- 6.3 The signatories will periodically review the functioning and effectiveness of the cooperation arrangements under this MoU with a view to altering the scope or operation of this MoU as necessary. The signatories must mutually agree to any changes in writing to amend this MoU.
- 6.4 The signatories agree that this MoU may be published, for example on the European Commission's website and/or the websites of any of the signatories.
- 6.5 In case of a dispute between the signatories relating to a matter covered by this MoU, the issue will be escalated to their respective senior management and the signatories will use their best efforts to reach a compromise acceptable to all and consistent with each signatory's duties and any applicable laws.

## 7. Cooperation arrangements

- 7.1 Each signatory retains the ability to independently exercise its powers under its applicable national laws to ensure international payment card schemes' and processing entities' compliance with Article 7(1)(a) of the IFR and the RTS. Nevertheless, the signatories will seek to avoid duplication of, or parallel enforcement action. In particular, the signatories will seek to agree on matters including:
- a. compliance by an international payment card scheme and/or processing entity with Article 7(1)(a) of the IFR and the RTS;
  - b. the recommendations to be addressed to an international payment card scheme and/or processing entity; and
  - c. any follow-up actions.
- 7.2 The signatories will attend a kick-off meeting once the MoU has been signed in order to:
- a. confirm the identity of the legal entities subject to the requirements in Article 7(1)(a) of the IFR and the RTS that fall within the scope of this MoU (in accordance with 7.3);
  - b. if appropriate, determine the order of priority for monitoring the compliance of each payment card scheme and processing entity (in accordance with 7.3);
  - c. for those international payment card schemes and processing entities being monitored, agree which signatories will take part in the cooperation to monitor their compliance ("Participating CAs") (in accordance with 7.4);
  - d. designate the signatory that will lead the monitoring work for each payment card scheme and processing entity being monitored ("the Lead CA") (in accordance with 7.5);
  - e. clarify the monitoring process, the common analytical framework for compliance, and the implementation of key concepts in Article 7(1)(a) of the IFR and the RTS.

- 7.3 The signatories will agree which international payment card schemes and processing entities are within the scope of this MoU and the order of priority in which they will monitor compliance by the different international payment card schemes and processing entities with Article 7(1)(a) of the IFR and the RTS. If the signatories agree to postpone monitoring the compliance of certain international payment card schemes and processing entities, the signatories will periodically review when to include those international payment card schemes and processing entities in the cooperation. The signatories will inform the European Commission of any decisions made pursuant to this clause.
- 7.4 Any signatory wishing to be a Participating CA, in relation to particular international payment card scheme(s) and processing entity(ies) should indicate their interest to other signatories at the kick-off meeting giving reasons, for example by reference to whether or not the international payment card scheme operates in that CA's jurisdiction. Any CA joining the cooperation after the kick-off meeting can become a Participating CA to a particular international card scheme by contacting the relevant Lead CA, giving reasons.
- 7.5 In order to take account of the cross-border nature of activities performed by international payment card schemes and processing entities, the signatories agree to designate a Lead CA in relation to each international payment card scheme and processing entity subject to Article 7(1)(a) of the IFR and the RTS. The Lead CA will be designated in accordance with the process set out in 7.6.
- 7.6 The Participating CAs for a particular international payment card scheme and processing entity will agree which Participating CA should be the Lead CA for that payment card scheme and processing entity.
- 7.7 The Lead CA will be designated for a two-year renewable term. The Lead CA can resign at any time by giving at least six months' written notice to the Participating CAs.
- 7.8 The monitoring envisaged in this MoU is divided into two phases (see sections 8.2 and 8.3) corresponding to the first monitoring exercise and subsequent monitoring by the Participating CAs that will be carried out on an annual basis. The two phases of monitoring will cover:
- a. in the first phase of monitoring, the Participating CAs will gather information from the international payment card schemes and processing entities being monitored in order to assess compliance with Article 7(1)(a) and the RTS; and
  - b. in the second phase of monitoring, international payment card schemes and processing entities will be required to submit an annual self-declaration of compliance.

7.9 The monitoring work in the first phase may include the following activities:

- a. the Lead CA, in consultation with Participating CAs, will determine what information to collect from the payment card scheme and processing entity regarding their compliance with Article 7(1)(a) of the IFR and the RTS;
- b. following receipt of the information from the payment card scheme and processing entity, the Lead CA, in consultation with Participating CAs, will reach a view on compliance by the payment card scheme and processing entity with Article 7(1)(a) of the IFR and the RTS;
- c. where potential compliance issues are identified, the Lead CA, in consultation with Participating CAs, will develop recommendations to be addressed to the payment card scheme and/or processing entity to address those potential compliance issues and the Lead CA will inform the European Commission of any recommendations before these are sent to the payment card scheme and/or processing entity;
- d. once any recommendations have been sent to the payment card scheme and/or processing entity, the Lead CA will coordinate work to monitor the implementation of the recommendations by the payment card scheme and/or processing entity.

7.10 The annual monitoring work in the second phase may include the following activities:

- a. the Participating CAs will determine what information international payment card schemes and processing entities need to include in the self-declaration of compliance and the deadline for submitting to the Lead CA;
- b. following receipt of the self-declaration from the payment card scheme and processing entity, the Participating CAs will agree on the continued compliance by the payment card scheme and processing entity with Article 7(1)(a) of the IFR and the RTS;
- c. if the Participating CAs determine that there are any potential new compliance issues, they will consider any follow-up actions that may need to be taken.

## 8. Role of the Lead CA

- 8.1 The Lead CA will act as the main point of contact between the Participating CAs and the payment card scheme and processing entity that are being monitored.
- 8.2 The Lead CA will be responsible for coordinating the cooperation between Participating CAs as envisaged under this MoU. In the first phase of monitoring, this will include:
- a. collating views from the Participating CAs on what information the payment card scheme and processing entity should provide and assessing whether the requests fall within the cooperation mechanism in this MoU;
  - b. managing the collection of information from the payment card scheme and processing entity in relation to their compliance with Article 7(1)(a) of the IFR and the RTS;
  - c. where necessary, seeking clarification or more detailed evidence in respect of any information provided by the payment card scheme and processing entity;
  - d. distributing the information received from the payment card scheme and processing entity to the other Participating CAs as soon as reasonably possible after receiving such information, subject to any applicable legal restrictions;
  - e. communicating with the payment card scheme and processing entity on behalf of the Participating CAs on a day-to-day basis (including by attending any meetings in person);
  - f. coordinating the analysis of the information provided by the payment card scheme and processing entity and the assessment of compliance according to the agreed procedures and standards;
  - g. developing with the Participating CAs any recommendations to be addressed to the payment card scheme and/or processing entity to address any potential compliance issues with Article 7(1)(a) of the IFR and the RTS identified during the assessment;
  - h. keeping the European Commission informed of any recommendations before these are sent to the payment card scheme and/or processing entity.

- 8.3 In the second phase of monitoring, the Lead CA will be responsible for:
- a. collating views from the Participating CAs on what information international payment card schemes and processing entities need to include in the self-declaration of compliance and the deadline for submitting;
  - b. managing the collection of the self-declaration of compliance from the payment card scheme and processing entity;
  - c. distributing the self-declaration of compliance to the Participating CAs as soon as reasonably possible after receiving it, subject to any applicable legal restrictions;
  - d. communicating with the payment card scheme and processing entity in relation to the self-declaration of compliance where necessary;
  - e. discussing with the Participating CAs any follow-up actions that may need to be taken.
- 8.4 The Lead CA may use any means available to communicate with the other Participating CAs for the purposes of the cooperation pursuant to this MoU, including conference calls, emails, other correspondence and physical meetings.
- 8.5 The Lead CA will work with the Lead CA(s) responsible for monitoring compliance by other international payment card schemes and processing entities under this MoU in order to ensure a consistent approach to monitoring compliance with Article 7(1)(a) of the IFR and the RTS and to handling any potential compliance issues that may be identified.
- 8.6 The Lead CA will collect any complaints from interested third parties regarding potential failures by a payment card scheme and/or processing entity to comply with Article 7(1)(a) of the IFR and the RTS and disseminate the information, either to the Participating CAs or to the Lead CA responsible for monitoring another payment card scheme and processing entity as appropriate.

## 9. Role of Participating CAs

9.1 Each Participating CA agrees:

- a. to cooperate with the Lead CA and other Participating CAs to monitor the compliance with Article 7(1)(a) of the IFR and the RTS by the payment card scheme and processing entity with a view to reaching a common view on compliance;
- b. in the event that the Participating CA disagrees with the views of other Participating CAs, to explain the reasons and arguments supporting its position to the other Participating CAs and the Lead CA with a view to convincing them or reaching a compromise;
- c. to share with the Lead CA and other Participating CAs any documents or information it receives relating to the compliance of the payment card scheme and processing entity with Article 7(1)(a) of the IFR and the RTS to the extent permitted under applicable national laws;
- d. to inform the Lead CA and other Participating CAs if it decides to proceed with its own monitoring of the payment card scheme and/or processing entity outside the scope of the cooperation mechanism in this MoU;
- e. in the event that the Participating CA proceeds with its own monitoring outside the cooperation mechanism, to keep the Lead CA and Participating CAs updated on its monitoring work and any final conclusions, in order to help avoid any inconsistent approaches or decisions.

## 10. Confidentiality and information exchange

- 10.1 The signatories stand ready to share available information (including assessments) necessary to fulfil their respective roles in the monitoring of compliance by the international payment card schemes and processing entities covered by this MoU with Article 7(1)(a) of the IFR and the RTS subject to any legal restrictions on the disclosure of confidential information under any applicable laws.
- 10.2 Where a signatory proposes to share information with other signatories (the “disclosing party”), it may as a prerequisite for sharing information require them to:
- a. confirm that the laws applicable in their respective jurisdictions include guarantees of professional secrecy or confidentiality protections that cover non-public information shared under this MoU; and
  - b. notify it of any changes to such laws, guarantees or protections.
- 10.3 The Lead CA will ensure that information it receives from the payment card scheme and processing entity or from one of the Participating CAs will be shared among the Participating CAs subject to any applicable laws on the disclosure of confidential information. Where the Lead CA is unable to share information with other Participating CAs for legal reasons, it will communicate this to the Participating CAs and take reasonable steps to overcome the issues. The Lead CA and Participating CAs will agree on at least one encrypted communication tool and at least one alternative information sharing tool to be used when sharing confidential information.
- 10.4 Each signatory will treat all non-public information shared under this MoU (including any information requests, the contents of such requests, information received from international payment card schemes and processing entities and any matters arising in the course of the cooperation under this MoU) as confidential information and will protect the information against unauthorised use or disclosure. The signatories will ensure that all persons dealing with, or having access to, such information are bound by the obligation of professional secrecy.
- 10.5 The signatories may use non-public information or documents obtained under this MoU for the purposes of monitoring the compliance by international payment card schemes and processing entities with the IFR and the RTS. If a signatory intends to use information received from a disclosing party for any other purpose, it must obtain the consent of the disclosing party.

- 10.6 Subject to 10.7 and 10.8, a signatory will not disclose any confidential information received from a disclosing party to any third party for any purpose unless it has obtained the prior written consent of the disclosing party. For the avoidance of doubt, any disclosure of confidential information by a Lead CA to a Participating CA will not be deemed as a breach of confidentiality under this MoU.
- 10.7 A signatory may share confidential information received under this MoU with another public authority within its own jurisdiction where this is permitted under its national laws. If a signatory proposes to share any confidential information in this way, that signatory will:
- a. inform the disclosing party before sending the information about: what non-public information it intends to share, the identity of the recipient authority and the function in respect of which the signatory will provide the information to the recipient authority; and
  - b. take all reasonable steps to ensure that the recipient authority is also subject to equivalent professional secrecy requirements and does not share the information with others without prior written consent.
- 10.8 Where a signatory receives a legally enforceable demand for non-public information received under this MoU:
- a. the signatory should notify the disclosing party (and the Lead CA, if different) as soon as reasonably practicable and give the disclosing party a reasonable opportunity to react to the demand prior to complying;
  - b. the disclosing party should not unreasonably withhold its consent to disclosure; and
  - c. where consent of the disclosing party is reasonably withheld, the signatory will use all legal means available to it to resist disclosure, including asserting available legal exemptions or privileges.
- 10.9 The restrictions in this section do not apply to a signatory's use and disclosure of information it obtains directly from a payment card scheme and processing entity pursuant to the exercise of its functions under the IFR or other national applicable laws.
- 10.10 Subject to 10.11, the Lead CA will be responsible for managing any communication to the public resulting from the cooperation work covered by this MoU. If a document is to be published, it should be limited to high level observations only and should not set out any assessment of compliance by a payment card scheme and processing entity with Article 7(1)(a) of the IFR and the RTS.

- 10.11 Where a signatory is under an obligation under its national laws to publish conclusions as a result of the compliance monitoring exercise covered by this MoU, it will remain free to do so but the signatory will share any proposed public statement with the other Participating CAs, before releasing, and give Participating CAs the opportunity to raise any objections on the grounds of a possible breach of confidentiality.
- 10.12 In the event of a signatory's withdrawal from this MoU, the information obtained under this MoU will continue to be treated confidentially by that signatory according to this section.

## Annex 1: Signatories to the MoU

	<u>Signatory</u>	<u>Date of signing</u>
1	<b>United Kingdom</b> Payment Systems Regulator Hannah Nixon Managing Director	15 October 2018
2	<b>Netherlands</b> De Nederlandsche Bank Petra Hielkema Division Director Payments and Market Infrastructures	22 October 2018
3	<b>Denmark</b> Danish Competition and Consumer Authority Jacob Schaumburg-Müller Deputy Director General	22 October 2018
4	<b>Finland</b> Financial Supervisory Authority, Finland Anneli Tuominen Director General	26 October 2018
5	<b>Czech Republic</b> Office for the Protection of Competition Hynek Brom First Vice-Chairman	31 October 2018
6	<b>Belgium</b> National Bank of Belgium Tim Hermans Director	31 October 2018
7	<b>Lithuania</b> Bank of Lithuania Vitas Vasiliauskas Chairman of the Board	6 November 2018
8	<b>Italy</b> Bank of Italy Claudio Impenna Head of the Market and Payment Systems Oversight Directorate	21 November 2018