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Introductory statement on the EBA Opinion on the RTS on scheme separation under the IFR

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Honourable Chair and Members of this Committee,

We would like to express our thanks to you for giving the EBA an opportunity to explain its view in respect of the Regulatory Technical Standards (RTS) on the separation of card payment schemes and processing entities under the Interchange Free Regulation (IFR). I would like to point out upfront that throughout the process that led to the finalisation of these RTS we have had a very close, positive and fruitful collaboration with the Commission services, notwithstanding some remaining differences in views on some sensitive points.

As you will recall, the EBA had submitted the RTS a year ago, on 27 July 2016. On 5 January 2017, the EU Commission sent us a letter in which it stated its intention to endorse the RTS with amendments, via six specific proposals. Having assessed these proposals, we concluded that we would agree on only some of them and submitted, six weeks later, an Opinion on this proposal to the EU Commission, which also constituted the final step in the process for the EBA

In our Opinion, we expressed our agreement with three of the Commission's proposals, albeit in a slightly modified form, and our disagreement with three others. My brief introductory statement today focuses on the reasoning behind our disagreement with these three proposals, and we would like to thank you for giving us the opportunity to do so.

As you will be aware, the Inter-change Fee Regulations (IFR) aims at enhancing competition in the internal market for card-based payments. One of the means by which it tries to achieve this objective is to require the separation of payment card schemes from their processing entities. It does so, not by requiring a legal separation, but a separation in terms of organisation, accounting and decision making processes, and has conferred on the EBA the task to develop RTS specifying how the separation shall be conceived along these three criteria.

The EBA developed the RTS with a clear understanding that the mandates conferred on the EBA will have to be drafted such that they assume neither a legal separation nor a legal integration and that they are equally applicable in both scenarios. The EBA deemed such an approach to be appropriate for a number of reasons. First, we considered it legally required in order not to prejudge the choices made by market actors. Second, we considered it functionally desirable, because the absence of the imposition of specific legal structures retains a degree of proportionality that facilitates the development of smaller and innovative players in what is currently a concentrated market for card-based payments. Third, the IFR itself foresees in Article 17(j) a review, by June 2019, on whether a legal separation should be reconsidered. And finally, the feedback we received from both market incumbents and market challengers during the consultation phase of these RTS and the associated workshops suggested that this is an appropriate approach to take.

It is against this background that the EBA decided to suggest a reconsideration of three of the amendments proposed by the Commission. We consider that the Commission's proposals might result in a disproportionate, difficult, and/or ambiguous application of the RTS for those payment card schemes and processing entities that are not legally separated, or that are organised in separate undertakings within the same group of relatively small dimension with limited availability of staff and resources. The cumulative effect of the Commission's proposals might, therefore, adversely affect the ability of small undertakings to compete. Please allow me to address each of them at a time.

To start with the first amendment, the Commission proposed that staff of card schemes and processing entities should never be shared. The EBA is of the view that not allowing staff to be shared for the purpose of innovation may lead to an unfair competitive advantage for the larger processing entities and payment schemes, given that they have easier access to more diverse and numerous in-house resources than smaller entities. The problem is further exacerbated by the significant degree of international competition beyond the borders of the EU, as international payment card schemes and international processors will still have the possibility to develop new market solutions outside of the European Union, without any restrictions.

In its Opinion, the EBA, therefore, suggested re-introducing the paragraph that had been deleted by the Commission. However, in order to address the Commission's concern, we also proposed to clarify the link to the requirements applied to entities in Article 12 of the RTS, including the obligations not to divulge confidential information and to specify the ethics guidelines of such cooperation in the code of conduct.

In its second amendment, the Commission proposed preventing the practice of 'revolving doors' by imposing a two-year ban before senior managers can move from one entity to another. In our Opinion, we expressed the view that this proposal on staff mobility for senior managers was unduly restrictive. By way of comparison, Directive 2014/56/EU on statutory audits, for example, imposes only a minimum one-year ban on a statutory auditor or a key audit partner to carry out a statutory audit on behalf of an audit firm.

Similarly, practices in the financial services industry and beyond suggest that, with regard to the ability for an employer to restrict a former employee to compete for a specific period of time, the period tends to vary from three months to a maximum of two years, but the latter is applied only if there is a substantiated justification for such a lengthy period to be imposed. The EBA also notes that such an obligation may not be easily enforceable in cases where the entities are not legally separated, which in turn may give an incentive for entities not to legally separate. Finally, if this requirement were to be maintained, our advice is that it should be restricted to a period of one year and should be subject to an additional impact assessment.

In its third amendment, the Commission was concerned that the requirement for general benefits arrangements through appropriate weighted basket, which the EBA included in Article 11(3) of the RTS. The Commission considered it incompatible with the objective of neutral remuneration frameworks, on the grounds that a proportion of the benefits to the employee might be related to the performance of an entity for which he or she is not working.

By contrast, the EBA is of the view that the origin of the benefits does not necessarily imply a lack of objectivity as long as any potential conflicts are identified and documented. In addition, the EBA is of the view that deleting the reference to the share plans and benefits arrangements could lead to unintended consequences, such as difficulties in hiring or retaining qualified personnel in an integrated group; and that, without this provision, the RTS would make sense only if card schemes and processing entities were required to be legally separated, which is not what the IFR requires, and is not the only type of separation that the RTS have to address.

By way of conclusion, the EBA's suggested changes to the RTS would in our view allow to properly address the concerns raised by the Commission and at the same time strike an appropriate balance between the requirement for the separation between card schemes and processing entities in terms or organisation, accounting and decision-making and the objectives of the IFR to promote innovation and competition in a concentrated market.

Thank you very much for your attention.