

February 2020

THE CLEARING AND SETTLEMENT OF CARD-BASED PAYMENTS THAT ARE LINKED TO BULGARIA

While one can expect that, in the era of digitalization, the regime for payment transactions across EU Members States would be synchronized and market access would be liberalized, there are still services that are subject to local restrictions. Such are the clearing and settlement of certain card-based payments in Bulgaria, resulting from new amendments to the law.

With effect as of **15 August 2020**, card-based payments that are "linked" to Bulgaria in any of the ways outlined below should be cleared and settled through "system operators of a settlement finality system processing card-based payment transactions, which system operators perform net settlement at a given time in RINGS (i.e. the national system for real-time interbank gross-settlement services)". Hidden behind this vague definition is the local entity Borica, which is currently the only operator that fulfils these requirements.

Card payments have a "link" with Bulgaria when any of the following apply:

- they are in the local currency, the Bulgarian leva ("**BGN**"),
- with cards issued by locally licensed or locally operating PSPs,
- the point of sale is in Bulgaria.

The changes in the Payment Services and Payment Systems Act have been justified by the following: merchants are exposed to high risks of non-payment for services/goods that are already sold, due to processing that is outside of the supervision of the local regulator - the Bulgarian National Bank ("**BNB**"). According to this logic, under the new rules, this will be addressed. The channeling of payments through any of the following are among the examples of "non-controllable" processing types provided by the Bulgarian legislature: the internal systems of the banks, international card schemes or other structures which cannot be supervised by BNB.

Before the new amended rules, similar restrictions already existed in secondary legislation adopted by BNB and provided room to challenge a licensing requirement for clearing and settlement, introduced by a legal act which has not been approved by the Parliament. They were applicable only to cards issued by locally licensed or locally operating banks and now understandably have been expanded to capture the growing number of non-banking card issuers.

The market limitations for the clearing and settlement of card-based payments have been presented in the past by the authorities as an intentional local measure for safeguarding financial stability. This is questionable in the context of the main purpose of PSD I and PSD II that aim to ensure non-discriminatory access of the payment institutions to the payment systems. The European Commission had been addressed with this Bulgarian case at the time when PSD I was applicable.

The Commission has recognized that the Bulgarian regulations have the effect of limitation rather than granting better access to payment infrastructure. However, the Commission has not evaluated such provisions as being non-compliant with PSD I. It has confirmed that many Member States made use of the option to require clearing and settlement through a payment system with settlement finality. Thus, in practice the intended competition between the payment systems has not been achieved. PSD II kept the option for the Member States to give preference of the payment systems with settlement finality, thus leaving the overall context of the previous European Commission's opinion unchanged.

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