



OPINION OF THE EUROPEAN CENTRAL BANK

of 30 April 2010

on a draft law on restoring fairness in taxation and addressing tax evasion

(CON/2010/36)

Introduction and legal basis

On 26 March 2010 the European Central Bank (ECB) received a request from the Greek Ministry of Finance for an opinion on a draft law on restoring fairness in taxation and addressing tax evasion (hereinafter the ‘draft law’).

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 and the second and fifth indents of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions¹, as the draft law relates to means of payment and payment and settlement 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.

1. Purpose of the draft law

Among other things, the draft law is intended to progressively establish the use of electronic invoices. Article 20 of the draft law introduces specific restrictions on cash payments in favour of other means of payment, in order to ensure the genuineness of transactions and underlying documents and to enable direct cross-checking of such transactions.

Article 20(2) of the draft law states that, for transactions between businesses, invoices and equivalent documents with a value exceeding EUR 3 000 shall be paid through business bank accounts or by cheques drawn on and paid to such accounts. These accounts will be connected to a secure electronic database held by the Ministry of Finance’s General Secretariat for Information Systems (GSIS). Banking secrecy is lifted for this purpose and banks may not charge fees for the operation of such business accounts.

¹ OJ L 189, 3.7.1998, p. 42.

Under Article 20(3) of the draft law, invoices with a value exceeding EUR 1 500 for the sale of goods or services to consumers shall be paid through a bank with debit cards, credit cards or cheques, and the use of cash will not be allowed.

2. General observations

2.1 Consultation at an appropriate stage

The Government submitted the draft law to the Greek Parliament on 24 March 2010. The Ministry of Finance consulted the ECB on 26 March 2010, requesting that the opinion be given as early as possible. The draft law was adopted by the Greek Parliament on 20 April 2010. In cases of particular urgency that do not allow for a normal consultation period, the consulting authority may indicate urgency in the consultation request and ask for a shorter time limit for the ECB's opinion to be adopted. This does not alter the national authorities' duty under Articles 127(4) and 282(5) of the Treaty to consult the ECB on draft legislative provisions falling within its fields of competence in due course of the legislative process. The second sentence of Article 4 of Decision 98/415/EC, states that the ECB must be consulted 'at an appropriate stage' in the legislative process. This implies that the consultation should take place at a point in the legislative process which affords the ECB sufficient time to examine the draft legislative provisions and to adopt its opinion in all required language versions, and which enables the relevant national authorities to take the ECB's opinion into consideration before the provisions are adopted. Article 3(4) of Decision 98/415/EC also obliges Member States to suspend the adoption process for draft legislative provisions, pending receipt of the ECB's opinion. In the present case, the consulting authority did not give the ECB a specific time limit within which to submit its opinion and referred only to urgency on the grounds that Parliament would probably enact the draft law within two weeks from the date of its submission. As the circumstances invoked by the consulting authority do not constitute sufficient reason to justify extreme urgency, the ECB considers that the minimum consultation period of one month provided for in Article 3(1) of Decision 98/415/EC applies.

2.2 Consistency of the draft law

2.2.1 According to the draft law's explanatory memorandum, from 1 January 2011: (i) invoices for transactions between businesses or between businesses and the State with a value exceeding EUR 3 000 will only be acceptable if submitted electronically, and (ii) cash payments between businesses or between businesses and consumers with a value exceeding EUR 1 500 will be considered illegal. However, the provisions of the draft law, i.e. Articles 20(2)-(3), do not clarify the legal consequences of non-compliance with the rules. In addition, in Article 20(3) it appears that the EUR 1 500 threshold only applies to the sale of goods or services to consumers, and it is not explicitly stated that such transactions will be considered illegal. Moreover, the draft legislative provisions do not give any date for their entry into force.

2.2.2 For reasons of legal certainty, the ECB recommends that the draft law should be consistent with its explanatory memorandum.

2.3 *Limitations on payments in cash*

2.3.1 With regard to restrictions on payments in cash under Union law, recital 19 of Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro² states that ‘limitations on payments in notes and coins, established by Member States for public reasons, are not incompatible with the status of legal tender of euro banknotes and coins, provided that other lawful means for the settlement of monetary debts are available’. The third sentence of Article 11 of Regulation (EC) No 974/98 states: ‘Except for the issuing authority and for those persons specifically designated by the national legislation of the issuing Member State, no party shall be obliged to accept more than 50 coins in any single payment’.

2.3.2 A prohibition of payments in cash of a certain value does not affect the legal tender status of banknotes³ and is compatible with Union law⁴. However, in view of the legal tender status of euro banknotes, the ECB should be consulted on the proposed adoption of any similar measures, as such prohibitions should be subject to individual examination of the specific requirements and purposes of the legislative provision in each case. In this respect, the ECB, acknowledging that the draft legislative provisions are in principle compatible with Union law, has the following specific observations.

3. **Specific observations**

3.1 As referred to in paragraph 2.3.1 above, limitations on payments in banknotes and coins established by Member States for public reasons are not incompatible with the status of legal tender of euro banknotes and coins, provided other lawful means for the settlement of monetary debts are available. The ECB acknowledges that: (i) lawful means for the settlement of monetary debts, other than cash, are available in Greece; and (ii) ensuring the genuineness of transactions and underlying documents and enabling direct cross-checking of such transactions, as referred to in the explanatory memorandum to the draft law, qualify as public reasons within the meaning of Regulation (EC) No 974/98⁵.

3.2 However, limitations on payments by euro banknotes and coins should be proportionate to the objectives pursued and should not go beyond what is necessary to achieve such objectives. The

2 OJ L 139, 11.5.1998, p. 1.

3 The legal tender status of euro banknotes is laid down by Article 128(1) of the Treaty on the Functioning of the European Union and Article 16 of the Statute of the European System of Central Banks and of the European Central Bank.

4 See paragraph 5 of Opinion CON/2002/24. All ECB opinions are published on the ECB’s website at www.ecb.europa.eu.

5 ‘According to settled case-law, reliance by a national authority on the concept of public policy presupposes the existence ... of a genuine and sufficiently serious threat to a fundamental interest of society’, Case C-349/06 *Polat* [2007] ECR I-167, paragraph 34.

ECB considers that the proposed thresholds of EUR 3 000 for business-to-business transactions (or between businesses and the State) and of EUR 1 500 for transactions for the sale of goods or services by businesses to consumers will effectively be limitations on cash payments. Any impact of the proposed limitations should be carefully weighed against the public benefits expected to be derived from them. The ECB suggests that the competent authorities should assess whether the effects of these measures go beyond what is necessary for achieving the objective of ensuring the genuineness of transactions and underlying documents and the direct cross-checking of such transactions, taking also into consideration the need to ensure an appropriate level of consumer protection⁶.

- 3.3 Finally, the draft law gives rise to a risk of legal uncertainty in the light of Article 452 of the Greek Penal Code on ‘refusal of cash’, according to which ‘Any person who refuses to accept payment in cash legally introduced into circulation within the State shall be punished with a fine’. In this context, the ECB stresses the need to amend the draft law in order to ensure the consistency of the legal provisions governing the restrictions on payments in cash.

This opinion will be published on the ECB’s website.

Done at Frankfurt am Main, 30 April 2010.

[signed]

The President of the ECB

Jean-Claude TRICHET

⁶ As far as consumer protection is concerned, Article 169 of the Treaty requires such a high level of protection to be ensured. It may be argued that restrictions on payments by cash, such as those provided for in the draft law, should differ between those applicable to business-to-business transactions, where the parties are deemed to have equivalent negotiating power, and those applicable to business-to-consumer transactions, where cash should not be refused unless the business can give restrictively defined and objective reasons. In this respect see the Report of the Euro Legal Tender Expert Group (ELTEG) on the definition, scope and effects of legal tender of euro banknotes and coins, Section 2.1.2. Acceptance/refusal of cash, available at: www.ec.europa.eu/economy_finance/articles/euro/documents/elteg_en.pdf. See also Commission recommendation of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins (OJ L 83, 30.3.2010, p. 70), paragraph 2, whereby ‘The acceptance of euro banknotes and coins as means of payments in retail transactions should be the rule. A refusal thereof should be possible only if grounded on reasons related to the “good faith principle” (for example the retailer has no change available)’.