



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 30 May 2017

on the limitation of cash payments

(CON/2017/20)

Introduction and legal basis

On 3 April 2017 the European Central Bank (ECB) received a request from the Belgian Ministry of Finance for an opinion on a draft law on the prevention of money laundering and terrorist financing, and the limitation of cash payments (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 third indents of Article 2(1) of Council Decision 98/415/EC¹, as the draft law contains provisions concerning means of payments and the Nationale Bank van België/Banque Nationale de Belgique ('NBB'). 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

- 1.1. The main purpose of the draft law is to implement into Belgian law Directive (EU) 2015/849 of the European Parliament and of the Council². The Belgian legislator has taken this opportunity to consolidate in the draft law, and if necessary amend, provisions of relevance in this field, including the limitation of cash payments and the provisions defining the NBB's powers in this field.
- 1.2. In particular, all rules on the limitation of cash payments, which are currently set out in the Law of 11 January 1993 on the prevention of the use of the financial system for money laundering and terrorist financing and the Law of 29 December 2010 laying down various measures, are now moved into the draft law.
- 1.3. Under these rules, which were last amended by the Law of 15 July 2013 containing urgent provisions on the fight against fraud³, merchants may currently receive in cash up to 10 % and not more than EUR 3 000 of the sale price of goods or services, whether the sale takes place in one operation or in separate operations which appear linked. The same limitation of cash payments

¹ Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

² Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

³ See Opinion CON/2013/18.

applies to the sale and purchase by traders of precious metals (defined as gold, silver or platinum, with the exclusion of coins). Furthermore, to curb the increasing theft of copper wire, the abovementioned Law of 29 December 2010 specifically prohibits payment in cash for copper cables, whether recycled or used or presented as such, by natural or legal persons active in the recuperation and recycling of and trade in old or precious metals. Finally, natural and legal persons active in the recuperation, recycling and trade in old or precious metals are required, if they sell such metals to natural or legal persons, to identify and register the person who buys them if those purchases are paid for in cash in an amount over EUR 500.

- 1.4. The draft law expands the limitations on cash payments to all cash payments made by any person, without distinction as to the (contractual or extracontractual) nature of the obligations that give rise to such payments, the existence (or not) of consideration, the persons carrying out such payments or the capacity (merchant, trader or other) in which such persons act. According to the explanatory memorandum to the draft law, the purpose of this amendment is to capture various situations in which cash payments are sometimes substantial (exchange transactions with a supplement, specifically involving gold).
- 1.5. Exceptions are, however, made in respect of (1) real estate transactions, which involve notaries and real estate agents, to whom the draft law applies; (2) transactions between consumers, to whom the draft law does not apply, and who rarely conduct operations relating to high value goods and who may, in any case, not be subject to systematic monitoring; and (3) payment in cash or gifts effected by or with financial institutions, including credit institutions, the NBB, Bpost, payment institutions, issuers of electronic money, exchange offices, stock market companies and bureaux de change, as operations involving cash are inherent to their activities.
- 1.6. The draft law also redefines the thresholds for the limitation of cash payments which may now be made up to EUR 3 000. In particular, the draft law waives the criterion of 10 % of the price of goods or services. Furthermore, the cap of EUR 3 000 no longer relates to the amount to be paid, but to the amount effectively paid or given in cash. Thus, a payment or gift of EUR 5 000 may be effected and received in cash up to EUR 3 000, provided that the remaining balance is effected or received in another way. This relaxation of the rule is justified by the low threshold of EUR 3 000 and the complexity of the current rule, which is disadvantageous for any low-value advance payment effected in cash.
- 1.7. The draft law also reviews the limitations of cash payments applicable to the sale of gold by consumers to professionals. To remedy the lack of clarity as to the applicability of the limitation of cash payments to the purchase of gold ingots by professionals, the draft law substitutes the new concept of 'precious substances', which is broadly defined and refers to gold, platinum, silver and palladium, for the current concept of 'precious metals', which excludes investment gold, such as ingots and coins. Furthermore, except in the case of an open sale under the supervision of a bailiff, if a purchaser is not a consumer they may not pay in cash for old metals, copper cables or goods containing precious substances, unless they are present only in small quantities and only because of the physical properties they provide. According to the explanatory memorandum⁴, this prohibition

⁴ Explanatory memorandum, p. 255.

is justified based on the increased risk of money laundering and the handling of stolen goods, especially by travelling criminal groups. The existing obligation to record such cash payments has not prevented the handling of such goods, and this requirement is regularly circumvented by traders overvaluing the quantity purchased from some consumers, and not recording the data of others who sell jewels with dubious origins. The draft law introduces, nevertheless, an exception to the prohibition for low cash payments of up to EUR 500, to allow occasional sales by a consumer of goods made out of gold, such as an old ring. The existing obligation regarding identification is retained in those instances.

- 1.8. The draft law also contains provisions intended to clarify the powers and tools of the NBB with regard to the prevention of money laundering and terrorist financing. To this end, the draft law amends the Organic Law of the NBB to confer the task on the NBB, as part of its supervisory powers, of ensuring that financial institutions comply with legal and regulatory provisions including European law aimed at preventing the use of the financial system for the purpose of money laundering and terrorist financing and the financing of the proliferation of weapons of mass destruction. The draft law lists all of the supervisory powers, control measures and sanctions available to the NBB to discharge this task. The draft law furthermore authorises the NBB to exchange with other competent authorities of Union Member States or third countries information relevant to the discharge of this task under rules ensuring the respect of the confidentiality of such information. Finally, the draft law authorises the Treasury to demand information from the Central Point of Contact at the NBB for the purpose of the application of the financial penalties set out in Union Council regulations on financial sanctions set out in resolutions adopted by the United Nations Security Council.

2. General observations

- 2.1. Although the draft law amends the Organic Law to empower the NBB to ensure that financial institutions comply with legal requirements aimed at preventing the use of the financial system for the purposes of money laundering and terrorist financing and the financing of the proliferation of weapons of mass destruction, the ECB understands that the NBB, as part of its current supervisory powers, already discharges this task and uses the powers, measures and tools set out in the draft law. Against this backdrop, the draft law does not confer any genuinely new task on the NBB.
- 2.2. This opinion does not address the issue of the draft law's effective transposition of Directive (EU) 2015/849 into Belgian law. The focus of this opinion is on the limitation of cash payments and the NBB's tasks under the draft law.

3. Limitation of cash payments

- 3.1. The Commission's Recommendation of 22 March 2010 on the scope and effect of legal tender of euro banknotes and coins⁵ (hereinafter "the Commission' Recommendation") states that the

⁵ 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).

acceptance of payments in cash should be the rule, but acknowledges that cash may be refused for reasons related to the ‘good faith principle’, without this constituting a breach of the legal tender status of cash. Neither the Commission Recommendation nor other Union law explicitly addresses whether, nor to what extent, it may be permissible to introduce a more general limitation to the obligation to accept cash payments. Therefore, Union law must be interpreted in order to ascertain the conditions that a limitation on payments in euro banknotes and coins should fulfil, including the conditions that should be fulfilled to comply with the legal tender status of euro banknotes and coins when general limitations on the obligation to accept cash payments are introduced⁶.

- 3.2. Without prejudice to the specific considerations in paragraphs 3.5 to 3.8, the draft law must comply with Union law. In this context, recital 19 of Council Regulation (EC) No 974/98⁷, which states that 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 that other lawful means for the settlement of monetary debts are available, should be taken into account⁸. The ECB considers that other lawful means for the settlement of monetary debts, which ensure similar benefits to those of cash, are generally available in Belgium for all transactions that are subject to the limitation of cash under the draft law.
- 3.3. Limitations on payments in cash should, however, be effective and proportionate to the objectives pursued and should not go beyond what is necessary to achieve such objectives. Any negative impact of the proposed limitations should therefore be carefully weighed against the anticipated public benefits. When considering whether a limitation is proportionate, the adverse impact of the limitation in question should always be considered, as well as whether any alternative measures could be adopted that would fulfil the relevant objective and have less adverse impact⁹.
- 3.4. Furthermore, it should be borne in mind that the ability to pay in cash remains particularly important for certain groups in society that, for various legitimate reasons, prefer to use cash rather than other payment methods. Cash is generally also appreciated as a payment instrument because it is widely accepted, fast and facilitates control over the payer’s spending. Moreover, it is the only means of payment that allows citizens to instantly settle a transaction in central bank money and at face value, without the legal possibility to impose a fee for the use of this means of payment. Moreover, cash payments facilitate the inclusion of the entire population in the economy by allowing it to settle any kind of financial transaction in this way.
- 3.5. The ECB understands that the Belgian legislator proposes to take advantage of the implementation of Directive (EU) 2015/849 to review the limitations on cash payments, which are relaxed in certain respects and bolstered in others. On the one hand, the draft law adapts the threshold for cash payments, which is to EUR 3 000 of the amount effectively paid, without being combined with the criterion of 10 % of the price of the goods or services. On the other hand, the limitation on cash

6 CON/2017/18.

7 Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (OJ L 139, 11.5.1998, p. 1).

8 See for example Opinions CON/2013/18, CON/2014/4 and CON/2014/37. All ECB opinions are published on the ECB’s website at www.ecb.europa.eu.

9 See for example paragraph 2.3. of Opinion CON/2014/4, paragraph 2.3. of Opinion CON/2014/37 and paragraphs 2.6 and 2.7 of Opinion CON/2017/8.

payments now applies to all kind of payments, without distinction as to the contractual or non-contractual nature of the payment, the existence (or not) of any consideration or the capacity in which natural or legal persons act. Transactions between consumers are, however, excluded from the scope of these limitations. Furthermore, the strict prohibition on cash payments which applies now to the purchase of copper cables by non-consumers is extended to purchases by non-consumers of all types of old metals, copper cables or goods containing precious materials. The only exceptions are where an open sale takes place under the supervision of a bailiff, where the purchaser is not a consumer, and for low cash payments of up to EUR 500.

- 3.6. Although other lawful means for the settlement of monetary debts are available in Belgium and the draft law's objectives of combating money laundering and the handling of stolen goods, especially by travelling criminal groups, qualify as public reasons outweighing any impact of the limitations on cash payments the ECB would, nevertheless, recommend a careful weighting of the measures proposed in the draft law that bolster the limitation on cash payments against the public benefits expected to be derived from them, especially as regards the strict prohibition on cash payment for goods containing precious metals.
- 3.7. The ECB welcomes that the threshold for cash payments is now defined without reference to the criterion of 10 % of the price of the goods or services. Not only does this amendment clarify the limitations on cash payments – which are currently poorly understood and implemented – but it also contributes to greater circulation of cash. As a matter of fact, the envisaged EUR 3 000 threshold – which is quite low considering that Directive (EU) 2015/849 applies customer due diligence measures only to cash payments of EUR 10 000 or more – would now relate to the amount effectively paid, and no longer to the total purchase price of the goods or services. The ECB also welcomes that such limitations do not apply to transactions between consumers, as for such transactions there might be difficulties involved in replacing cash due, inter alia, to the insolvency risk of the counterparty, the lack of possibility of immediate settlement, and the absence of an infrastructure for cashless means of payment which ensure similar benefits to those of cash for private persons.
- 3.8. The ECB recommends, however, raising the threshold of EUR 500 for purchases by non-consumers of all types of old metals, copper cables or goods containing precious materials, as this threshold is disproportionately low, despite the intention of combatting money laundering and the handling of stolen goods, especially by travelling criminal groups. In the case of vendors selling jewels with dubious origins traders are, in any case, not supposed to enter into such transactions, irrespective of their amount, as this would give rise to a breach of criminal law on account of concealment.

4. The NBB's tasks, powers and tools available for the prevention of money laundering and terrorist financing

- 4.1. The ECB welcomes that the draft law and the Organic Law separate the NBB's powers and tools for the prevention of money laundering and terrorist financing from those available to it as part of its

supervisory competences. This facilitates the exercise of supervisory powers within the framework of the Single Supervisory Mechanism.

- 4.2. The ECB notes that the Central Point of Contact at the NBB referred to in the draft law, from which the Treasury may request information for the purpose of the application of the financial penalties set out in Council regulations on financial sanctions set out in resolutions adopted by the United Nations Security Council, corresponds to the central register of bank accounts, regarding which the ECB issued Opinion CON/2016/35. The ECB understands that the Belgian legislator is currently drafting a law setting out the principles according to which the development and functioning costs of this register will be fully covered ex ante by its users (including the Minister for Finance, when the request emanates from the Treasury) and that a royal decree will further detail the accounting mechanisms to this end. The prohibition of monetary financing is therefore complied with and this issue does not call for further comments from the ECB.

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

Done at Frankfurt am Main, 30 May 2017.

[signed]

The President of the ECB

Mario DRAGHI