EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 23 September 2019

on the protection of the euro against counterfeiting and on the authentication of euro coins

(CON/2019/33)

Introduction and legal basis

On 8 August 2019 the European Central Bank (ECB) received a request from the Luxembourg Minister of Finance for an opinion on a draft law on the implementation of Council Regulation (EC) No 44/2009 of 18 December 2008 amending Council Regulation (EC) No 1338/2001 of 28 June 2001 laying down measures necessary for the protection of the euro against counterfeiting and of Regulation (EU) No 1210/2010 of the European Parliament and of the Council of 15 December 2010 concerning authentication of euro coins and handling of euro coins unfit for circulation and amending various laws, including the Law of 23 December 1998 on the monetary status and the Banque centrale du Luxembourg[1] (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 first, second and third indents of Article 2(1) of Council Decision 98/415/EC[2], as the draft law relates to currency matters, means of payment and the Banque centrale du Luxembourg (BCL). 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 draft law aims at aligning the Luxembourg legal framework on the protection of the euro against counterfeiting with the relevant Union legislation in this area[3]. The Luxembourg legal framework consists of: (i) the Law of 13 January 2002 on 1. the approval of the International Convention for the Suppression of Counterfeiting Currency and the Protocol thereto, signed at

1 Projet de loi portant mise en oeuvre du règlement (CE) N° 44/2009 du Conseil du 18 décembre 2008 modifiant le règlement CE N° 1338/2001 du Conseil du 28 juin 2001 définissant des mesures nécessaires à la protection de l'euro contre le faux monnayage et du règlement (UE) N° 1210/2010 du Parlement européen et du Conseil du 15 décembre 2010 concernant l'authentification des pièces en euros et le traitement des pièces en euro impropres à la circulation, et portant modification : 1. du Code pénal ; 2. de la loi modifiée du 20 avril 1977 relative à l'exploitation des jeux de hasard et des paris relatifs aux épreuves sportives ; 3. de la loi modifiée du 5 avril 1993 relative au secteur financier ; 4. de la loi modifiée du 23 décembre 1998 relative au statut monétaire et à la Banque centrale du Luxembourg ; 5. de la loi modifiée du 12 novembre 2002 relative aux activités privées de gardiennage et de surveillance ; 6. de la loi modifiée du 10 novembre 2009 relative aux services de paiement.

2 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).

3 Notably, with: (i) Council Regulation (EC) No 44/2009; of 18 December 2008 amending Regulation (EC) No 1338/2001 laying down measures necessary for the protection of the euro against counterfeiting (OJ L 17, 22.1.2009, p. 1); (ii) Regulation (EU) No 1210/2010 of the European Parliament and of the Council of 15 December 2010 concerning authentication of euro coins and handling of euro coins unfit for circulation (OJ L 339, 22.12.2010, p. 1); and (iii) Decision ECB/2010/14 of the European Central Bank of 16 September 2010 on the authenticity and fitness checking and recirculation of euro banknotes (OJ L 267, 9.10.2010, p. 1).

Geneva on 20 April 1929; 2. the amendment of certain provisions of the Criminal Code and the Code of Criminal Procedure[4]; and (ii) the Grand-Ducal Regulation of 12 July 2002 on the designation of the authorities referred to in Article 8 of the Law of 13 January 2002 on the approval of the International Convention for the Suppression of Counterfeiting Currency and the Protocol thereto, signed at Geneva on 20 April 1929[5].

1.2 The draft law amends five national laws in order to introduce criminal law sanctions for relevant institutions, as well as their managers and responsible staff, who fail to comply with their obligations as set out in Article 6 of Council Regulation (EC) No 1338/2001[6]. Under that Article, relevant institutions are obliged to: (i) ensure that euro banknotes and coins which they have received and which they intend to put back into circulation are checked for authenticity and that counterfeits are detected; (ii) withdraw from circulation all euro banknotes and coins received by them which they know or have sufficient reason to believe to be counterfeit; and (iii) immediately hand over such euro banknotes and coins to the competent authorities. The relevant institutions are the addressees of Article 6(1) of Regulation (EC) No 1338/2001, which are further specified under the draft law as: (i) merchants engaged in the processing and distribution to the public of money via automated bank machines or automated dispensers; (ii) casinos and similar institutions engaged in the processing and distribution to the public of money via automated teller machines or (cash dispensers); (iii) credit institutions, and, within the limits of their payment activity, other professionals of the financial sector; (iv) companies performing private security and surveillance activities; and (v) payment institutions, within the limits of their payment activity. The foreseen criminal law sanctions consist of fines between EUR 1,250 and EUR 125,000.

1.3 The draft law also complements the BCL's tasks in respect of euro banknotes and coins, in addition to those laid down in the Law of 23 December 1998 on the monetary status and the Banque centrale du Luxembourg (hereinafter the 'Law on the BCL'). Firstly, the draft law formally designates the BCL as the competent authority for ensuring compliance with Council Regulation (EC) No 1338/2001, Regulation (EU) No 1210/2010 of the European Parliament and of the Council[7] and their implementing measures. Secondly, the draft law enhances the powers and instruments available to the BCL under the Law on the BCL to ensure compliance with the Union legal framework applicable to banknotes and coins recycling activities. In particular, the draft law grants investigatory powers to the BCL, namely the powers to: conduct investigations; to test machinery; to take samples of euro banknotes and coins processed; to examine the procedures concerning the use and control of equipment used to process notes and coins; to obtain copies of any documents, files and recordings; to access any computer system; and to verify the relevant

4 Loi du 13 janvier 2002 portant 1. approbation de la Convention internationale pour la répression du faux-monnayage ainsi que du Protocole y relatif, signés à Genève en date du 20 avril 1929; 2. modification de certaines dispositions du code pénal et du code d'instruction criminelle.

5 Règlement grand-ducal du 12 juillet 2002 portant désignation des autorités visées à l'article 8 de la loi du 13 janvier 2002 portant 1. approbation de la Convention internationale pour la répression du faux-monnayage ainsi que du Protocole y relatif, signés à Genève en date du 20 avril 1929; 2. modification de certaines dispositions du code pénal et du code d'instruction criminelle.

6 Council Regulation (EC) No 1338/2001 of 28 June 2001 laying down measures necessary for the protection of the euro against counterfeiting (OJ L 181, 4.7.2001, p. 6).

7 Regulation (EU) No 1210/2010 of the European Parliament and of the Council of 15 December 2010 concerning authentication of euro coins and handling of euro coins unfit for circulation (OJ L 339, 22.12.2010, p. 1).

institutions' ability to authenticate euro banknotes and coins. The draft law also grants the BCL the power to impose injunctions and financial penalties on the relevant institutions for breaches of the provisions of Council Regulation (EC) No 1338/2001, Regulation (EU) No 1210/2010 and Decision ECB/2010/14 of the European Central Bank[8]. Furthermore, the draft law foresees that the BCL shall establish, by means of a regulation, the terms and conditions of the above-mentioned checks. The relevant institutions are required to notify the BCL of the installation of equipment of any type for the purposes of processing euro banknotes or coins. The relevant institutions must also submit to the BCL all data and statistics required by virtue of Union, ECB and BCL legislation with regard to the recycling of currency in the form of euro banknotes and coins[9]. The BCL is also entitled to impose a financial penalty for breaches of these reporting requirements by the relevant institutions.

1.4 The draft law amends the Law on the BCL regarding the remuneration of the BCL for the above-mentioned tasks relating to coins. To this end, and while reiterating the principle of remuneration and reimbursement for all tasks related to coins on the basis of an agreement between the BCL and the Treasury, the draft law abolishes the existing specification that such remuneration shall be made on the basis of the monetary income resulting from the volume of coins put in circulation[10].

1.5 Finally, the draft law includes decisions among the types of legal acts of the ECB that the BCL shall comply with when issuing banknotes[11].

2. General observations

2.1 The ECB welcomes the draft law which will ensure the preservation of euro banknotes and coins in circulation, resulting in continued public confidence in euro banknotes[12].

2.2 The ECB welcomes the introduction under the draft law of a comprehensive set of powers and instruments at the disposal of the BCL in this area. In particular, the ECB takes positive note that the draft law will enable compliance in Luxembourg with Decision ECB/2010/14. The draft law complements the existing regulatory power conferred on the BCL in 2008 with the necessary investigatory powers and with the power to issue injunctions and impose penalty payments[13]. The draft law also strengthens the financial autonomy of the BCL by amending the provision of the Law on the BCL on the remuneration and reimbursement of the costs incurred for the putting into circulation and protection of coins. Taken together, these provisions equip the BCL with the necessary powers and instruments for the fulfilment by the BCL of its ESCB related and national tasks and in accordance with its functional independence under Article 130 of the Treaty[14].

2.3 The initial designation of the BCL as a competent authority in the field of the protection of the euro

8 Decision ECB/2010/14 of the European Central Bank of 16 September 2010 on the authenticity and fitness checking and recirculation of euro banknotes (OJ L 267, 9.10.2010, p. 1).

9 Article 4.5 of the draft law introducing Article 20-1 of the Law of 23 December 1998 concerning the monetary status and the Banque centrale du Luxembourg.

10 Article 4.3 of the draft law amending Article 18 of the Law on the BCL.

11 Article 4.2 of the draft law amending Article 17 of the Law on the BCL.

12 See paragraph 2.1 of Opinion CON/2010/90 and paragraph 2.1 of Opinion CON/2011/92. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

13 See in this respect, paragraphs 1, 4.1 to 4.5 of Opinion CON/2008/17.

14 See paragraph 4.3 of Opinion CON/2008/17.

against counterfeiting was noted in a previous opinion[15].

3. Specific observations

3.1 Tasks of the BCL

Under the existing Luxembourg legal framework, the BCL is currently designated as the competent authority within the meaning of Article 2(b) of Council Regulation (EC) No 1338/2001, as the National Analysis Centre (NAC) within the meaning of Article 4 of Council Regulation (EC) No 1338/2001 and as the Coin National Analysis Centre (CNAC) within the meaning of Article 5 of Council Regulation (EC) No 1338/2001[16]. By formally appointing the BCL as the competent authority for ensuring compliance with Regulation (EU) No 1210/2010, the draft law complements the BCL's existing tasks in this area. Therefore, the draft law does not confer genuinely new tasks on the BCL in this respect. Furthermore, regarding the BCL's tasks in relation to the issuance and circulation of euro coins, Article 128(2) of the Treaty provides that the right to issue euro coins rests with the Member States. Consequently, it is up to each Member State to specify the legal issuer of the euro coins[17]. In Luxembourg, the BCL has already been entrusted with these tasks and exercises them as an agent acting in the name and on behalf of the Treasury[18]. Consequently, the draft law does not confer genuinely new tasks on the BCL in this respect.

3.2 Monetary financing prohibition

The monetary financing prohibition laid down in Article 123(1) of the Treaty prohibits overdraft facilities or any other type of credit facility with the ECB or the national central banks (NCBs) in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States[19]. In view of the fact that the tasks conferred on the BCL by the draft law complement existing tasks of the BCL, which do not form part of the functions of the Eurosystem, the ECB welcomes the confirmation in the draft law that the BCL shall be reimbursed and remunerated for its tasks insofar as they relate to euro coins, both for its tasks in relation to the issuance and circulation of euro coins and its tasks in relation to the protection of the euro against counterfeiting, in accordance with an agreement between the BCL and the Treasury[20]. The ECB takes positive note of the removal from the Law on the BCL of the link previously established between the amount of the remuneration and the monetary income resulting from the volume of coins in circulation, as there is no clear correlation between these two amounts. The ECB nevertheless suggests stipulating in the draft law the principles governing the agreement to be entered into between the

15 See Opinion CON/2002/17.

16 See the Grand-Ducal Regulation of 12 July 2002. See also Opinion CON/2002/17.

17 See paragraph 2 of Opinion CON/2014/56, paragraph 2.1 of Opinion CON/2016/4 and paragraph 3.2.2 of Opinion CON/2016/58.

18 See current Article 18 of the Law on the BCL and paragraph 2.1 of Opinion CON/2016/4.

19 The precise scope of application of the monetary financing prohibition is further clarified by Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty (OJ 332, 31.12.1993, p. 1–3).

20 See the draft amended Article 18(3) of the Law of 23 December 1998 concerning the monetary status and the Banque centrale du Luxembourg.

BCL and the Treasury. Reference should be made to a full and adequate payment of all costs incurred in performing the relevant tasks on the basis of "arm's length" commercial terms. Such payment should either occur in advance of costs being incurred or on a regular and prompt basis as the costs arise[21]. For the time being, the ECB is not in a position to assess the way in which the abovementioned reimbursement will be agreed upon. The ECB would therefore appreciate receiving a copy of the draft agreement between the Treasury and the BCL prior to its execution and entry into effect[22].

3.3. Sanctions

The ECB noted in previous opinions that even though national authorities are not required to consult the ECB on measures taken to ensure that breaches of Article 6(1) of Regulation (EC) No 1338/2001 are subject to effective, proportionate and deterrent sanctions, it is nonetheless beneficial to address this issue in order to encourage a harmonised approach across the Union to the extent possible, subject to national peculiarities[23]. In the same context, the ECB also stresses that the power to impose criminal law sanctions, issue injunctions and impose financial penalties at the national level would be without prejudice to the ECB's sanctioning power[24].

3.4. The ECB takes note of the original approach taken by the Luxembourg legislator, combining criminal law sanctions (ranging from EUR 1,250 to EUR 125,000) with the possible imposition by the BCL of injunctions and financial penalties not exceeding EUR 1,250 per day and a total of EUR 25,000. The ECB welcomes this pragmatic approach, whereby the BCL may promptly and autonomously resort to preventive measures contributing to compliance with Union law. In this manner, the draft law achieves an effective system of deterrent (criminal law) sanctions in relation to the protection of the euro against counterfeiting and thus contributes to maintaining public confidence in euro banknotes and coins in circulation.

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

Done at Frankfurt am Main, 23 September 2019.

[signed]

The President of the ECB

Mario DRAGHI

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21 See paragraph 2.2 of Opinion CON/2018/57, paragraph 3.2.2 of Opinion CON/2016/58, and paragraph 2.2 of Opinion CON/2016/57.

22 See paragraph 3.2.3 of Opinion CON/2016/58 and paragraph 2.3 of Opinion CON/2016/57.

23 See paragraph 1.1 of Opinion CON/2010/87, paragraph 2.4 of Opinion CON/2011/64, paragraph 2 of Opinion CON/2011/78, paragraph 2.4 of Opinion CON/2011/92 and paragraph 2.4 of Opinion CON/2011/94.

24 See paragraph 4.2 Opinion CON/2008/17 and recital 6 of Decision ECB/2010/14 entitling the ECB to take appropriate administrative measures.