EUROPEAN CENTRAL BANK

EUROSYSTEM

OPINION OF THE EUROPEAN CENTRAL BANK

of 11 November 2011

on protection against counterfeiting and on the preservation of the quality of cash circulation

(CON/2011/92)

Introduction and legal basis

On 17 October 2011, the European Central Bank (ECB) received a request from the German Ministry of Finance for an opinion on a draft law amending the Law on the Deutsche Bundesbank (hereinafter the 'draft Bundesbank Law') and a draft law amending the Law on coins (hereinafter the 'draft Law on coins').

The ECB's competence to deliver an opinion is based on Article 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 of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions[1], as the draft legislation concerns currency matters, means of payment and the Deutsche Bundesbank. 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 legislation

1.1 The draft legislation aims to bring the German legal framework for protection against counterfeiting in line with recent Union legislation in this area[2].

1.2 The draft Bundesbank Law foresees, inter alia, widening of the institutions subject to duties regarding the detainment and submission of counterfeit banknotes in order to comply with Regulation (EC) No 1338/2001. In that context, the new Section 36(4a) provides that parties not ensuring that euro banknotes and coins are checked for authenticity or that counterfeits are detected, as specified in the relevant Union legislation, are deemed to have committed an administrative offence. The new Section 36a empowers the Ministry of Finance to issue more detailed provisions concerning submission duties, including the possibility of notifying transactions

1 OJ L 189, 3.7.1998, p. 42.

2 Notably, with: (a) Article 6 of 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); (b) Decision ECB/2010/14 of 16 September 2010 on the authenticity and fitness checking and recirculation of euro banknotes (OJ L 267, 9.10.2010, p. 1); and (c) Regulation (EU) No 1210/2010 of the European Parliament and 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).

with banknote handling systems to the Bundesbank. The new Section 37a concerns provision of information and checks, according to which parties subject to the detention obligation under Section 36(1) seeking to recirculate banknotes have to inform the Bundesbank on request on the origin of the banknotes, their processing and the handling machines used. Section 37a(2) provides that the Bundesbank may carry out checks on such parties. According to Section 37a(3), the Bundesbank should prohibit parties contravening the obligation to check required by Decision ECB/2010/14 from recirculating banknotes or certain denominations thereof or from performing checks using certain banknote handling systems. In addition, some editorial changes are made.

1.3 The draft Law on coins states that the Bundesbank exercises the responsibilities provided for in Regulation (EU) No 1210/2010, and provides that an administrative offence is deemed to have occurred by not ensuring that coins are subject to an authentication procedure, and by failing to submit or failing to submit on time the relevant coins to the Bundesbank. The latter duty also applies to information requests.

2. General observations

2.1 The ECB welcomes the draft legislation and it is confident that its provisions will ensure the preservation of euro banknotes in circulation, resulting in continued public confidence in euro banknotes[3].

2.2 As Decision ECB/2010/14 applies to cash handlers by virtue of Article 6(1) of Regulation (EC) No 1338/2001, which refers to procedures defined by the ECB for checking euro banknotes, there is no strict need to implement Decision ECB/2010/14 into German law.

2.3 The ECB considers it essential that any draft legislation implementing Decision ECB/2010/14 does not deviate from its common provisions, unless this is explicitly provided for in Decision ECB/2010/14. Any national implementing measures should clarify the primacy and direct application of Union law on the authenticity and fitness checking and recirculation of euro banknotes with which cash handlers must comply. In this context and for consistency reasons, the ECB favours the use of direct references to Decision ECB/2010/14 or, alternatively, reproduction of its provisions without any alterations or additions[4].

2.4 In addition, although national authorities are not formally obliged to consult the ECB on the implementation of the Member States' obligation to take the necessary measures to ensure that breaches of Article 6(1) of Regulation (EC) No 1338/2001 are subject to effective, proportionate and deterrent sanctions, the ECB believes it is beneficial to harmonise throughout the Union the national measures implementing this obligation to the extent possible, subject to national peculiarities[5].

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3 Paragraph 2.1 of Opinion CON/2010/90. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

4 Paragraphs 2.1 and 2.3 of Opinion CON/2011/19.

5 Paragraph 1.1 of Opinion CON/2010/87.

3. Administrative fines and corrective measures

3.1 Where cash handlers breach the obligations set out in the Union legislation to which the draft Law on coins refers, this results in an administrative fine, in some cases of up to EUR 20 000, in other cases of up to EUR 5 000. In the case of banknotes, the Law on the Deutsche Bundesbank provides for a fine of up to 100 000 EUR. In addition, Article 37a of the draft Bundesbank law introduces the possibility for the Bundesbank to impose corrective measures on cash handlers that breach these obligations regarding banknotes. According to this provision, the Bundesbank should prohibit parties contravening the obligation to check required by Decision 2010/14 from recirculating banknotes or certain denominations thereof or from performing checks using certain banknote handling systems.

3.2 The ECB notes the importance of effective, proportionate and deterrent sanctions[6]. To ensure the deterrent effect of the administrative fines, the maximum amount should be a fine which effectively deters cash handlers from breach of their obligations. While it is up to the Member States' legislators to define the particular amounts of the administrative fines, they should aim for a certain degree of harmonisation across the Member States to contribute to the establishment of a level playing field among cash handlers within the euro area without prejudice to: (a) the particularities of the cash cycle and the organisation of cash handlers at national level; and (b) the consistency of the levels of financial sanctions available in their legal orders[7].

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

Done at Frankfurt am Main, 11 November 2011.

[signed]

The President of the ECB

Mario DRAGHI

6 Article 6(2) of Regulation (EC) No 1338/2001.

7 Paragraph 3.4 of Opinion CON/2010/87.