OPINION OF THE EUROPEAN CENTRAL BANK

of 14 May 2021

on the obligation to accept cash payments

(CON/2021/18)

Introduction and legal basis

On 21 April 2021 the European Central Bank (ECB) received a request from the President of Narodowy Bank Polski (NBP), acting on behalf of the President of the Republic of Poland, for an opinion on a draft law amending the Law on payment services (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 and second indents of Article 2(1) of Council Decision 98/415/EC[1], as the draft law relates to currency matters and means of payment. 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 purpose of the draft law, which amends the Law on payment services[2], is to make the acceptance of banknotes and coins issued by NBP mandatory in transactions for the provision of services and the sale of goods by merchants to consumers. As noted in the explanatory memorandum accompanying the draft law, the objective of the draft law is to take into consideration the payment habits of all social groups and the need to enable them to use the preferred form of payment, including cash payments, in Poland. In a crisis, such as the current COVID-19 pandemic, the non-acceptance of cash in retail and service outlets could have great repercussions, mainly for elderly and disabled people paying only in cash, who may suffer considerable problems satisfying basic living needs such as the purchase of food and medicine. With the development of the pandemic the non-acceptance of cash by merchants is becoming increasingly commonplace, and a study on payment practices in Poland conducted by NBP in September and October 2020 showed that around 8 % of respondents had encountered a refusal by merchants to accept legal tender cash during the pandemic.

1.2 According to the explanatory memorandum, the Polish legislator has, to date, not obliged commercial entities operating in Poland to accept cash payments. The provisions of the Law on

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 The Law of 19 August 2011 on payment services (Ustawa z dnia 19 sierpnia 2011 r. o usługach płatniczych (*Dziennik Ustaw z 2020 r., poz. 794*).

Narodowy Bank Polski[3], which provide that banknotes and coins issued by NBP are legal tender in Poland, cannot be interpreted as laying down an unconditional obligation to accept banknotes and coins, notwithstanding the fact that they have the status of legal tender[4]. The consequences of a currency being legal tender are not specifically set out by law in Poland. Hence, the principle of freedom of contract laid down in the Polish Civil Code[5] allows merchants to set up their activities in such a way that they conclude contracts with consumers only if the consumers agree to use only cashless payments; this could be achieved, e.g., by simply posting information about their non-acceptance of cash payments in a visible place, such as in the shop window. This is a question of including relevant provisions in a contractual relationship, rather than of the legal status of banknotes and coins[6].

1.3 To achieve the purpose of obligating merchants to accept payments in legal tender cash despite the principle of freedom of contract, the draft law prohibits merchants from making a contract for the provision of services or for the sale of goods dependent on the payment being cashless and from refusing payment from a consumer in legal tender banknotes and coins issued by NBP. For this purpose, the concept of a 'merchant' means a payee other than the consumer to whom the acquirer provides a payment service. The draft law provides the following exemptions in respect of which the obligation to accept cash does not apply: (a) business activities conducted on the internet; (b) at a business establishment where no staff is present; and (c) during a mass event[7] (e.g. a mass entertainment or sporting event) provided that information to that effect is included in the event rules. According to the explanatory memorandum, these exemptions from the obligation to accept cash payments strike a balance between the interests of individual economic agents: on one hand, they offer merchants discretion in specific cases where non-acceptance of cash payments may be necessary, and, on the other hand, they protect consumer interests without distorting the essence of the draft law.

1.5 Finally, the draft law prohibits merchants from making surcharges or charging any additional fees for accepting payment in banknotes and coins issued by NBP or differentiating the price depending on the form of payment. As pointed out in the explanatory memorandum, the aim of this provision is to protect consumers who want to pay in cash against any additional costs of this kind.

2. General observations

Role and importance of cash payments in society

3 Law of 29 August 1997 on Narodowy Bank Polski (Ustawa z dnia 29 sierpnia 1997 r. o Narodowym Banku Polskim (*Dziennik Usta*

4 See Article 32 of the Law of 29 August 1997 on Narodowy Bank Polski (Ustawa z dnia 29 sierpnia 1997 r. o Narodowym Banku Polskim (*Dziennik Ustaw z 2020 r., poz. 2027*)) and the explanatory memorandum to the draft law.

5 Law of 23 April 1964 – the Civil Code (Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny (*Dziennik Ustaw z 2020 r., poz.1740*)).

6 See Article 3531 of the Law of 23 April 1964 – the Civil Code (Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny (*Dziennik Ustaw z 2020 r., poz.1740*)).

7 Within the meaning of Article 3(1) of the Law of 20 March 2009 on Safety at Mass Events (Ustawa z dnia 20 marca 2009 r. o bezpieczeństwie imprez masowych ((*Dziennik Ustaw z 2019 r., poz.2171*)).

2.1 Although electronic payment instruments are increasingly used as the preferred form for retail payments in a number of Member States, the ECB notes that cash continues to play an important role in society. 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 instruments. Cash is generally also useful as a payment instrument because it is widely accepted, fast and facilitates control over the payer's spending. Moreover, it is the only payment instrument that allows citizens to settle a transaction in central bank money instantly[8].

2.2 The ECB understands that electronic payment instruments are increasingly used as a method of payment in Poland[9]. However, the use of cash in payment transactions remains dominant in Poland, and according to the latest publicly available data the use of cash in retail payments in 2019 accounted for 54 % of the total number of payments made[10]. A part of Polish society can be considered to be outside the banking system, including persons who do not yet, or anymore, have a bank or payment account; this excludes them from access to non-cash payment instruments. As noted in the explanatory memorandum, in line with the initial results of a survey which was carried out by NBP in September and October 2020, this group is currently estimated to be around 14 % of Polish citizens above the age of 15.

2.3 While the ECB holds a positive view of further innovation and development in the field of electronic payment instruments, the ECB also considers that cash has a unique role, as certain groups in society are unable to use electronic payment methods and other innovative payment solutions. As such, cash is a crucial payment method, especially for the elderly, young people, immigrants, the disabled, socially vulnerable citizens and anyone with limited access to digital services[11]. There are other legitimate reasons why consumers might prefer to use cash. It is the only means of payment that can be used to settle a debt immediately and finally without an intermediary, and which is available to anyone at any given time. Additionally, cash facilitates the inclusion of the entire population in the economy by allowing financial transactions to be settled in this way; Furthermore, cash could play an important role in the event of a disturbance in the payment system[12].

2.4 In a crisis situation, such as the ongoing COVID-19 pandemic, the non-acceptance of cash at physical points of sale may indeed be of particular significance to the elderly and people with disabilities, or anyone unable to access cashless means of payment, and who as a consequence could face serious difficulties meeting their essential needs.

2.5 Against this background, the ECB strongly welcomes that the draft law strengthens citizens' right to pay in cash as a rule, especially in those cases where staff is present at the business

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8 See paragraph 2.4 of Opinion CON/2017/8; paragraph 2.1 of Opinion CON/2019/41; paragraph 9.2.1 of Opinion CON/2020/13; paragraph 2.3 of Opinion CON/2020/21; paragraph 7.2.1 of Opinion CON/2021/9. All ECB opinions are published on EUR-Lex.

9 See Narodowy Bank Polski, *System płatniczy w Polsce* (Payment system in Poland), p. 42, available on the NBP website at www.nbp.pl.

10 See Narodowy Bank Polski, *Ocena funkcjonowania polskiego systemu płatniczego w II półroczu 2020 roku System płatniczy w Polsce* (Assessment of the functioning of the Polish payment system in the second half of 2020)Payment system in Poland), p. 145, available on the NBP website at www.nbp.pl.

11 See paragraph 2.4 of Opinion CON/2017/8.

12 See paragraph 2.1 of Opinion CON/2019/41 and 9.2.1 of Opinion CON/2020/13.

establishment, thus preserving the role of cash as a generally accepted means of payment. However, the ECB would like to emphasize that there may be situations, such as in the area of public transportation services or other public services, where citizens should be able to have the option to pay in cash, even if the service would be paid for through automated means. The ECB understands that alternatives to cashless payment are currently offered to a sufficient standard e.g. in case of public transport, by having nearby alternative options for purchasing a ticket in addition to the use of a cashless vending machine. The ECB also welcomes the draft law's introduction of a provision ensuring that, to the extent that a merchant accepts cash, no surcharges may be imposed on cash payments and the monetary debt is to be settled with legal tender notes and coins at nominal value.

Status of euro banknotes and coins as a legal tender

2.6 Poland is a Member State with a derogation from participating in the third stage of economic and monetary union. Although Union law only regulates the legal tender status of euro banknotes and coins, the Union framework applicable to the legal tender status of euro banknotes and coins would become directly applicable in Poland if and when the euro is introduced in Poland. Against this specific institutional backdrop, the ECB has prepared an assessment of the draft law's provisions compared with relevant practices in the euro area, in particular as concerns the legal tender status of euro banknotes.

2.7 Under the Treaty, the European System of Central Banks (ESCB) has the basic task of promoting the smooth operation of payment systems[13], and the ECB has the exclusive right to authorise the issue of euro banknotes within the Union[14]. The euro banknotes issued by the ECB and the national central banks of the euro area are the only banknotes with legal tender status within the euro area[15].

2.8 The concept of 'legal tender' has been considered by the Court of Justice of the European Union. In particular, the Court has clarified that the concept of 'legal tender' of a means of payment denominated in a currency unit signifies that this means of payment cannot generally be refused in settlement of a debt denominated in the same currency unit, at its full face value, with the effect of discharging the debt. In clarifying the concept of 'legal tender' under Union law, the Court has taken into consideration Commission Recommendation 2010/191 of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins[16], which provides useful guidance for the interpretation of the relevant provisions of EU law. Point 1 of Recommendation 2010/191 states that, where a payment obligation exists, the legal tender of euro banknotes and coins should imply, (a) mandatory acceptance of those banknotes and coins; (b) their acceptance at full face value; and (c) their power to discharge from payment obligations. According to the Court, this

13 Article 127(2) of the Treaty and Article 3.1 of the Statute of the ESCB.

14 First sentence of Article 128(1) of the Treaty and first sentence of Article 16 of the Statute of the ESCB.

15 Third sentence of Article 128(1) of the Treaty and third sentence of Article 16, of the Statute of the ESCB.

16 OJ L 83, 30.3.2010, p. 70.

shows that the concept of 'legal tender' encompasses, inter alia, an obligation in principle to accept banknotes and coins denominated in euro for payment purposes[17].

2.9 Insofar as it allows the EU legislature to lay down the measures necessary for the use of the euro as the single currency, the Court clarified that Article 133 of the Treaty empowers the EU legislature alone to specify the legal rules governing the status of legal tender accorded to banknotes and coins denominated in euro, insofar as that is necessary for the use of the euro as the single currency. Such exclusive competence precludes any competence on the part of the Member States in the matter, unless they have been empowered by the European Union to do so or for the implementation of Union acts[18].

2.10 However, the Court further clarified that the status of legal tender calls only for acceptance in principle of banknotes and coins denominated in euro as a means of payment, not for absolute acceptance. The European Union's exclusive competence in matters of monetary policy is without prejudice to the competence of the Member States whose currency is the euro to regulate the procedures for settling pecuniary obligations, which do not affect the principle that, as a general rule, it must be possible to discharge a payment obligation in cash. Thus, that exclusive competence does not prevent a Member State from adopting a measure which supports the legal tender status of cash payment instruments; for instance, a Member State can oblige the public administration to accept cash payments from citizens. Neither does it prevent a Member State, in the exercise of its own powers, from introducing, on legitimate public interest grounds, a derogation from that obligation for statutorily imposed payments, subject to compliance with certain conditions. In particular, the obligation to accept euro banknotes and coins could, in principle, be restricted by the Member States for reasons of public interest and subject to the principle of proportionality. This means that any such restrictions need to be proportionate to the public interest objective pursued. When limiting the possibility, recognised by EU law, of generally discharging a payment obligation in banknotes and coins denominated in euro, Member States must ensure that any measures comply with the principle of proportionality, which requires in particular that they are appropriate for achieving the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives[19].

2.11 The ECB has provided additional guidance in its opinions with respect to whether limitations may be considered to be proportionate. In particular, the ECB has noted that the broader and more general a limitation is, the stricter should be the interpretation of the requirement for the limitation to be proportionate to the objective pursued. When considering whether a limitation is proportionate, the adverse impact of the limitation in question and whether alternative measures

17 See judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, joint cases C-422/19 and C-423/19, ECLI:EU:C:2021:63, paragraphs 46 to 49.

18 See judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, joint cases C-422/19 and C-423/19, ECLI:EU:C:2021:63, paragraphs 50 to 52.

19 See judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, joint cases C-422/19 and C-423/19, ECLI:EU:C:2021:63, paragraphs 55 to 56 and 67 to 70.

could be adopted that would fulfil the relevant objective with a less adverse impact should always be considered[20].

2.12 Finally, Recommendation 2010/191, as referenced by the Court, states that no surcharges should be imposed on payments with euro banknotes and coins[21].

2.13 Taking into account the foregoing considerations, the ECB considers the draft law to be in line with the legal tender status of euro banknotes and coins under Union law. Moreover, the ECB considers that the exceptions provided under the draft law to the general rule requiring merchants to accept payments in banknotes and coins issued by the NBP are clearly defined, not excessive and in general proportionate in view of the overall assessment of the situation, provided that the citizens in Poland are in general able to pay for basic public services, such as public transportation, with cash e.g. by using a nearby alternative point of sale in addition to a cashless vending machine. The draft law's prohibition on surcharges on payments with banknotes and coins is also consistent with the legal tender status of euro banknotes and coins under Union law.

This opinion will be published on EUR-Lex.

Done at Frankfurt am Main, 14 May 2021.

[signed]

The President of the ECB

Christine LAGARDE

20 See paragraph 2.7 of Opinion CON/2017/8.

21 See judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, joint cases C-422/19 and C-423/19, ECLI:EU:C:2021:63, paragraph 8.