EUROPEAN CENTRAL BANK

EUROSYSTEM

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OPINION OF THE EUROPEAN CENTRAL BANK

of 15 March 2022

on limitations to cash payments

(CON/2022/9)

Introduction and legal basis

On 1 February 2019 the European Central Bank (ECB) adopted an opinion[1] in response to a request from the Banco de España, on behalf of the Spanish State Secretary for Finance, for an opinion on a draft law on measures for the prevention of and fight against fiscal fraud, transposing Council Directive (EU) 2016/1164 of July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market and Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, and on the amendment of specific tax rules (hereinafter the 'draft law'). On 9 July 2021 the Spanish Parliament adopted the Law on measures for the prevention of and fight against fiscal fraud, transposing Council Directive (EU) 2016/1164 of July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, of modification of various tax and gambling regulations (hereinafter the 'Law')[2], which contains significant changes compared to the draft law.

The ECB has decided to deliver an own initiative opinion on the 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 indent of Article 2(1) of Council Decision 98/415/EC[3], as the Law relates to 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 Law

1.1 To reinforce the fight against fiscal fraud, the draft law lowered the cash payment limit set in Law 7/2012 of 29 October 2012 amending tax and budget rules and adapting financial rules for the intensification of action for the prevention of and fight against fraud[4] from EUR 2 500 to EUR 1 000 where a payer acts in a professional or business capacity. However, to minimise the collateral effects

1 Opinion CON/2019/4. All ECB opinions are available on EUR-Lex.

2 Ley 11/2021, de 9 de julio, de medidas de prevención y lucha contra el fraude fiscal, de transposición de la Directiva (UE) 2016/1164, del Consejo, de 12 de julio de 2016, por la que se establecen normas contra las prácticas de elusión fiscal que inciden directamente en el funcionamiento del mercado interior, de modificación de diversas normas tributarias y en materia de regulación del juego, *«BOE»* núm. 164, de 10 de julio de 2021, páginas 82584 a 82676 (93 págs.) .

3 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).

4 Ley 7/2012, de 29 de octubre, de modificación de la normativa tributaria y presupuestaria y de adecuación de la normativa financiera para la intensificación de las actuaciones en la prevención y lucha contra el fraude, *«BOE»* núm. 261, de 30 de octubre de 2012, páginas 76259 a 76289 (31 págs.).

of this measure on households, the draft law maintained a limit of EUR 2 500 for cash payments made by natural persons not acting in a professional or business capacity, who are also tax residents in Spain, to parties acting in a professional or business capacity. Under the draft law, a limit of EUR 10 000 applied to cash payments made by natural persons not acting in a professional or business capacity, who are also not tax residents in Spain, to parties acting in a professional or business capacity. The draft law applied no limit to cash payments in transactions where none of the parties are acting in a professional or business capacity, or to cash payments and deposits made with credit institutions. The draft law also modified certain procedural aspects of the cash payment limitation regime's sanctioning procedure and, in particular, included a fine of 25 % of the amount paid.

1.2 The Law further reinforces the prevention of and fight against fiscal fraud. It sets additional limits on the amounts that may be paid in cash in transactions where at least one of the parties acts in a professional or business capacity. In particular, the existing cash payment limits are lowered as follows: (1) from EUR 2 500 to EUR 1 000 for transactions where at least one of the parties acts in a professional or business capacity; and (2) from EUR 15 000 to EUR 10 000, where the payer is a natural person not having their tax residence in Spain and not acting in a professional or business capacity. For the purpose of calculating the applicable limits, where payment for the delivery of goods or the performance of services that comprise one transaction has been divided into more than one transaction or payment, those transactions or payments will be added together. Moreover, it continues to be the case that these limits do not apply to transactions between parties not acting in a professional or business capacity, such as payments made by and to private parties, or to payments and deposits made with credit institutions. These provisions apply to all payments made after the Law's entry into force on 11 July 2021, including payments that relate to transactions agreed prior to the introduction of the limits.

2. General observations

2.1 The ECB understands that, under the Law: (1) a limit of EUR 1 000 applies to cash payments in transactions where one of the parties acts in a professional or business capacity; (2) a limit of EUR 10 000 applies to cash payments from natural persons not acting in a professional or business capacity, who are also not tax residents in Spain, to parties acting in a professional or business capacity[5]; and (3) no limit applies to cash payments in transactions where none of the parties are acting in a professional or business capacity, or to cash payments and deposits made with credit institutions.

2.2 The European System of Central Banks (ESCB) has the basic task of promoting the smooth operation of payment systems[6], and the ECB has the exclusive right to authorise the issue of euro banknotes within the Union[7]. 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[8].

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5 It follows from limits a) and b) that cash payments from natural persons not acting in a professional or business capacity who are tax residents in Spain to parties acting in a professional or business capacity are subject to a limit of EUR 1 000.

6 See the fourth indent of Article 127(2) of the Treaty and the fourth indent of Article 3.1 of the Statute of the ESCB.

7 See the first sentence of Article 128(1) of the Treaty and first sentence of Article 16 of the Statute of the ESCB.

8 See the third sentence of Article 128(1) of the Treaty and third sentence of Article 16 of the Statute of the ESCB.

2.3 The Court of Justice of the European Union has considered the concept of 'legal tender'. In particular, the Court of Justice has referred to point 1 of Commission Recommendation 2010/191/EU[9], which states that, where a payment obligation exists, the legal tender of euro banknotes and coin 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 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[10]. The Court has ruled that the status as legal tender calls only for acceptance in principle of banknotes denominated in euro as a means of payment, not for absolute acceptance[11].

2.4 According to the Court, it is for the Union 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[12]. However, the Union's exclusive competence does not prevent a Member State, in the exercise of its own powers, such as the organisation of its public administration, from adopting a measure that obliges that administration to accept cash payments from citizens or introduces, on public interest grounds, a derogation from that obligation for statutorily imposed payments, subject to compliance with certain conditions[13].

2.5 The conditions established by the Court for restrictions on the legal tender status of euro banknotes in particular require (a) that the legislation does not have the object or effect of establishing legal rules governing the status of legal tender of euro banknotes; (b) that it does not lead, in law or in fact, to the abolition of those banknotes, in particular by calling into question the possibility, as a general rule, of discharging a payment obligation in cash; (c) that it has been adopted for reasons of public interest; (d) that the limitation on payments in cash which the legislation entails is appropriate for attaining the public interest objective pursued; and (e) that it does not go beyond what is necessary in order to achieve that objective.

2.6 The ECB considers that the Law's objective of preventing and combating tax evasion may, in general, constitute a 'public reason' justifying the establishment of limitations on cash payments.

2.7 The ECB also notes that other lawful means for the settlement of monetary debts are available in Spain[14]. However, these other means typically have different characteristics compared to cash and are not fully equivalent alternatives to cash payments.

2.8 When limiting the possibility, recognised by Union law, of generally discharging a payment obligation in banknotes and coins denominated in euro, Member States must ensure that any measures taken comply with the principle of proportionality, which, in particular, requires them to be appropriate for achieving the legitimate objective(s) pursued by the legislation at issue and not to go beyond what is

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9 Commission Recommendation 2010/191/EU 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).

10 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.

11 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 and 56.

12 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.

13 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 56.

14 See paragraph 2.1 of Opinion CON/2012/33.

necessary in order to achieve those objectives[15]. The ECB has provided additional guidance on whether limitations are proportionate in its opinions. 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[16]. In addition, when considering whether a limitation is proportionate, the adverse impact of the limitation in question and whether alternative measures could be adopted that would fulfil the relevant objective with a less adverse impact should always be considered[17].

2.9 For a limitation to comply with the legal tender status of euro banknotes, it is not only necessary to demonstrate that the cash payment limitation would be effective as regards the achievement of the public objectives pursued, but there should be clear evidence that such limitation is likely, in fact, to achieve the stated public goal[18].

In view of the fact that the measures set out in the Law affect transactions involving natural persons and payments of relatively small amounts in various segments of the economy, any negative impact of the limitations must be carefully weighed against the anticipated public benefits. When considering whether a limitation is proportionate, the adverse impact of the limitation in question as well as whether alternative measures could be adopted that would fulfil the relevant objective and have a less adverse impact should always be considered [19].

2.10 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 instruments. Cash is generally also appreciated as a payment instrument because it is widely accepted, fast and facilitates control over the payer's spending. Cash is a means of payment that allows citizens to instantly settle a transaction and is the only method of settlement in central bank money and, at face value, that does not carry the legal possibility of imposing a fee for the use of this means of payment. In addition, cash payments are always available as they do not require a functional technical infrastructure or related investment. These considerations would be of particular relevance, for example, in the event of a power outage or should electronic payment systems fail. Furthermore, cash payments are not subject to daily or weekly payment limits set by entities providing underlying payment services. Additionally, 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[20]. Cash is a crucial payment method for the elderly, immigrants, the disabled, socially vulnerable citizens and anyone with limited access to digital services, and, as such, serves inclusion.

3. Specific observations

3.1 The EUR 1 000 limit on cash payments set by the Law and to which the explanatory memorandum

15 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 and 56 and 67 to 70.

16 See paragraph 2.7 of Opinion CON/2017/8 and paragraph 2.11 of Opinion CON/2021/18.

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

18 See paragraph 2.6 of Opinion CON/2017/27.

19 See, for example, paragraph 2.3 of Opinion CON/2014/4, paragraph 2.3 of Opinion CON/2014/37, paragraphs 2.6 and 2.7 of Opinion CON/2017/8 and paragraphs 2.5 and 2.6 of Opinion CON/2017/18.

20 See paragraph 2.6 of Opinion CON/2017/18, paragraph 3.4 of Opinion CON/2017/20, paragraph 2.8 of Opinion CON/2017/27 and paragraph 2.7 of Opinion CON/2017/40.

accompanying the Law refers as 'the general limit for cash payments' should take into account the advantages of having limits on cash payments in place and the potential inconvenience thereof for regular transactions in certain market segments. In this regard, it should be noted that Directive (EU) 2015/849 of the European Parliament and of the Council[21], while confirming the vulnerability of large cash payments to money laundering and terrorist financing, requires persons trading in goods who are otherwise not obliged entities under that Directive to be classified as obliged entities and to apply customer due diligence measures only where payments are made or received in cash in amounts of EUR 10 000 or more. This implies that the Law should establish a proportionate threshold for limits on cash payments, taking into account the objectives of such limits[22].

3.2 The Law's explanatory memorandum does not address the social impact and risk of financial exclusion that would result from the substantial lowering of the previously existing and low limit of EUR 2 500 for cash payments. The explanatory memorandum does not provide clear evidence that such a limit is, in fact, likely to achieve its stated public goal. Moreover, the Spanish legislator has not indicated whether alternative measures could have been adopted that would fulfil the relevant objective and have a less adverse impact.

3.3 The Law's cash payment limit makes it significantly more difficult to settle legitimate transactions using cash as a means of payment, thus endangering the concept of legal tender enshrined in the Treaty[23]. Moreover, as experience within the Union has shown, certain cashless payment instruments may be temporarily unavailable as they depend on the underlying technical infrastructure operated by payment service providers. In such contingencies, transactions in cash above the cash payment limits may be required.

3.4 As the Law's explanatory memorandum indicates, a proposal for a regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing[24] proposes a Union-wide cash payment limit of EUR 10 000. In this respect, the ECB notes that 'the threshold for the intended prohibition of consumer-to-business and business-to-business transactions is to be set sufficiently high to avoid a factual impact leading to the abolition of euro banknotes. The de facto abolition of euro banknotes may occur, inter alia, if thresholds were set so low as to threaten the economic viability of cash as a general and widely accepted means of payment and endanger the functioning of the cash cycle, ultimately also affecting transactions below the threshold.'[25]

3.5 Against this background, the ECB considers the lowering of the limit on cash payments in transactions where any of the parties acts in a professional or business capacity to EUR 1 000 to be disproportionate. It will have an adverse and undesired impact on the legal tender status of euro banknotes. In addition, this cash payment limit significantly reduces the ability of payers to use euro banknotes and the freedom of citizens to choose how to pay.

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21 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).

22 See paragraph 3.2 of Opinion CON/2017/18 and paragraph 2.10 of Opinion CON/2017/27.

23 See paragraph 3.1 of Opinion CON/2017/18 and paragraph 2.9 of Opinion CON/2017/27.

24 COM(2021) 420 final.

25 See paragraph 4.6 of Opinion CON/2022/5.

3.6 As previously noted by the ECB regarding the limit of EUR 10 000 for cash payments made by natural persons not acting in a professional or business capacity, who are also not tax residents in Spain, to parties acting in a professional or business capacity, there seems to be no justification as to why a different standard should be established for payments made by non-residents; this discriminates against payments made by residents as opposed to those made by non-residents[26].

3.7 The sanctioning regime established by the Law seems excessive and, in particular, the fine of 25 % of the amount paid, appears to be disproportionately high. The ECB reiterates that limitations on cash payments should not go beyond what is necessary to achieve their objectives, and that any negative impact of the limitations should 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. A sanction that would apply to any breach, regardless of the underlying situation, does not seem to comply with the proportionality requirement[27].

This opinion will be published on EUR-Lex.

Done at Frankfurt am Main,15 March 2022.

[signed]

The President of the ECB

Christine LAGARDE

26 See paragraph 3.3 of Opinion CON/2019/4 and paragraph 3.2 of Opinion CON/2017/18.

27 See paragraph 3.4 of Opinion CON/2019/4 and paragraph 3.6 of Opinion CON/2017/18.