EUROPEAN CENTRAL BANK

EUROSYSTEM

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OPINION OF THE EUROPEAN CENTRAL BANK

of 5 December 2022

on the prohibition of cash payments in real estate transactions and on the presumption of unreliability of persons affected by the Union restrictive measures regime

(CON/2022/43)

Introduction and legal basis

On 11 November 2022 the European Central Bank (ECB) received a request from the German Ministry of Finance for an opinion on a draft of a second Law on the effective enforcement of restrictive measures (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 (the 'Treaty') and the second indent of Article 2(1) of Council Decision 98/415/EC[1], as the draft law relates to means of payment and to the specific tasks conferred upon the ECB concerning the prudential supervision of credit institutions pursuant to Article 127(6) of the Treaty. 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 introduce structural improvements in the enforcement of restrictive measures and the fight against money laundering in Germany. Among other things, the draft law introduces: (a) a prohibition of cash payments in real estate transactions[2], and (b) an automatic finding and rebuttable presumption of unreliability of natural and legal persons that are affected by the Union restrictive measures regime[3].

1.2 As regards the prohibition of cash payments the draft law provides that real estate and certain share purchase transactions may only be executed by means other than payment in cash, crypto assets and raw materials. In particular, the prohibition applies to the purchase of immovable property and the acquisition of shares in companies whose assets directly or indirectly include real estate located in Germany. Under the draft law, the parties to a real estate transaction must demonstrate to the notary who is to file the transaction with the land registry that the payment was

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 Under Article 4(5) of the draft law, a new section 16a is inserted into the Law on money laundering (Geldwäschegesetz vom 23. Juni 2017 (BGBl. I S. 1822), das zuletzt durch Artikel 2 des Gesetzes vom 23. Mai 2022 (BGBl. I S. 754) geändert worden ist).

3 Under Article 5(2) of the draft law a new section 1b is inserted into the Law on banking (Kreditwesengesetz in der Fassung der Bekanntmachung vom 9. September 1998 (BGBl. I S. 2776), das zuletzt durch Artikel 4 des Gesetzes vom 20. Juli 2022 (BGBl. I S. 1166) geändert worden ist).

made by means other than cash, crypto assets or raw materials. The notary must verify the plausibility of the evidence provided before filing the transaction with the land registry. Where the consideration due for the real estate transaction does not exceed the amount of EUR 10 000 the notary is under no obligation to verify that the payment was made by means other than cash, crypto assets or raw materials. As a consequence, the prohibition against settling real estate transactions in cash, crypto assets and raw materials applies in respect of all real estate and share purchase transactions, regardless of the transaction value. The draft law envisages the enforcement of the prohibition only for real estate transactions (and not for share purchase transactions) where the consideration due exceeds the amount of EUR 10 000.

1.3 As regards the automatic finding of unreliability, the draft law provides that a natural or legal person or a partnership is to be considered unreliable if a directly applicable European Communities or Union act implementing an economic restrictive measure adopted by the Council of the European Union in the field of the Common Foreign and Security Policy, published in the *Official Journal of the European Communities* or the *Official Journal of the European Union*, provides that their funds and economic resources are to be frozen or that no funds or economic resources are to be made available to them, directly or indirectly.

1.4 As regards the presumption of unreliability, as a general rule, a natural person is to be considered unreliable (as a rebuttable presumption) if he or she works as an executive director, supervisory board member or in a comparable position for a legal person or partnership subject to a restrictive measure (hereinafter a 'sanctioned entity'). As a general rule, a natural person is also to be considered unreliable (as a rebuttable presumption) if he or she serves the interests of a sanctioned entity as a member of a supervisory or management board or similar supervisory body in an institution that is not a sanctioned entity. According to the explanatory memorandum accompanying the draft law, in order to rebut the presumption that he or she is unreliable, a natural person has to prove that: (a) his or her involvement with the sanctioned entity is especially minor; (b) the termination of the natural person's contract is initiated; or (c) he or she cannot influence the undertaking in question.

1.5 The draft law introduces the concept 'unreliability of persons' by way of inserting a definition into the Law on banking so that the concept applies to any kind of reliability assessment under the Law on banking. In addition, the draft law introduces the concept in various other German supervisory laws, including the Law on the supervision of payment services[4], the Law on the supervision of insurance companies[5], and the Law on the supervision of securities institutions[6].

2. Prohibition of cash payments in real estate and related share purchase transactions

2.1 Cash continues to play an important role in society. Cash is generally useful as a payment instrument because it is widely accepted, fast and facilitates control over the payer's spending.

4 Zahlungsdiensteaufsichtsgesetz vom 17. Juli 2017 (BGBl. I S. 2446; 2019 I S. 1113), das zuletzt durch Artikel 5 des Gesetzes vom 25. Juni 2021 (BGBl. I S. 2083) geändert worden ist.

5 Versicherungsaufsichtsgesetz vom 1. April 2015 (BGBl. I S. 434), das zuletzt durch Artikel 5 des Gesetzes vom 20. Juli 2022 (BGBl. I S. 1166) geändert worden ist.

6 Wertpapierinstitutsgesetz vom 12. Mai 2021 (BGBl. I S. 990), das zuletzt durch Artikel 9 des Gesetzes vom 3. Juni 2021 (BGBl. I S. 1568) geändert worden ist.

Moreover, it is the only payment instrument that allows citizens to settle a transaction in central bank money, which is also settled instantly, while ensuring privacy[7]. In addition, 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, or do not have access to the banking system and electronic means of payments. These groups include not only elderly people, but also some disabled citizens, immigrants, socially vulnerable citizens, minors and others with limited or no access to digital payment services[8]. Against this backdrop, the ECB closely monitors any national law developments that aim to limit cash payment possibilities and thereby interfere with citizens' right to pay in cash.

2.2 Under the Treaty, the European System of Central Banks (ESCB) has the basic task of promoting the smooth operation of payment systems[9], and the ECB has the exclusive right to authorise the issue of euro banknotes within the Union[10]. 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[11].

2.3 The concept of 'legal tender' of a means of payment denominated in a currency unit has been considered by the Court of Justice of the European Union. In particular, the Court has clarified that the concept of 'legal tender' signifies that this specific 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[12], which provides useful guidance for the interpretation of the relevant provisions of Union 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 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[13].

2.4 Insofar as it allows the Union 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 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. Such exclusive competence precludes any competence on the part of the

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7 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; paragraph 2.1 of CON/2021/18. All ECB opinions are published on EUR-Lex.

8 See paragraph 1.5 of Opinion CON/2019/41.

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

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

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

12 OJ L 83, 30.3.2010, p. 70.

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

Member States in the matter, unless they have been empowered by the Union to do so or for the implementation of Union acts[14].

2.5 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 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 falling within one of the Member State's competences; for instance, a Member State may, based on its competence to regulate administrative procedures, 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 may, 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 must be proportionate to the public interest objective pursued. 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 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.[15]

2.6 The Court has established that restrictions of the legal tender status of euro banknotes in particular require that the legislation: (i) does not have the object or effect of establishing legal rules governing the status of legal tender of euro banknotes; (ii) does not lead, in law or in fact, to abolition of those banknotes, in particular by calling into question the possibility, as a general rule, of discharging a payment obligation in cash; (iii) has been adopted for reasons of public interest; (iv) only entails a limitation on payments in cash that is appropriate for attaining the public interest objective pursued; and (v) only entails a limitation on payments in cash that does not go beyond what is necessary in order to achieve the public interest objective[16].

2.7 Regarding the proportionality of a restriction of the legal tender status of euro banknotes, the Court requires not only that the measure is appropriate for attaining the public interest objective pursued, but also that it must not go beyond what is necessary in order to achieve that objective. The ECB has undertaken additional reflexion in its opinions with respect to whether limitations may be considered proportionate[17]. In particular, the ECB has noted that the broader and more general a

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

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

16 See judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, C-422/19 and C-423/19, ECLI:EU:C:2021:63, paragraph 78.

17 See paragraph 4 of Opinion CON/2022/5.

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 could be adopted that would fulfil the relevant objective with a less adverse impact should always be considered[18].

2.8 The scope of the draft law's proposed prohibition of cash payments appears to be broader than it might seem at first sight. The prohibition applies to the purchase of real estate as well as the acquisition of shares in a company whose assets directly or indirectly include immovable real estate located in Germany. Considering that many companies indirectly have assets that include real estate located in Germany, the draft law therefore seems to impose a strict prohibition of cash payments for the acquisition of shares in most companies, in addition to a strict prohibition of cash payments in real estate transactions.

2.9 The ECB underlines that the explanatory memorandum accompanying the draft law explains that the proposed prohibition of cash payments is a response to the findings of the first National Risk Analysis in the fight against money laundering and terrorist financing, which identified specific money laundering risks in the area of cash and anonymous payments and in the real estate sector.

2.10 In the light of the foregoing, the ECB considers that the draft law's proposed prohibition of cash payments in real estate and share purchase transactions neither has the object nor the effect of amending the legal rules governing the status of legal tender of euro banknotes or coins. Since the draft law's objective is it to fight money laundering and the financing of terrorism, it can be said to pursue public interest objectives[19].

2.11 With regard to the condition that a cash restriction should be proportionate, it is not specifically described in the explanatory memorandum to the draft law to what extent alternative and equally or more effective measures, other than the strict prohibition of cash payments in the real estate sector, could be adopted that would also fulfil the objective of the draft law. The fact that the prohibition of cash payments is only enforced for real estate transactions (and not for share purchase transactions) with a value exceeding EUR 10 000 may suggest that the prohibition is proportionate as regards those real estate transactions. This would be in line with previous assessments by the ECB that a prohibition on the receipt or payment of cash exceeding EUR 3 000 and EUR 2 700, respectively, which is applicable to transactions where one of the parties is trading in goods in the course of their business or professional activities, could be deemed proportionate to the objectives pursued[20]. However, in this instance the prohibition of cash payments applies in respect of all real estate and share purchase transactions, regardless of their value (i.e. it is not a cash restriction but a cash prohibition). Against this background, it is difficult for the ECB to assess whether or not the prohibition could be considered proportionate to the objective pursued.

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

19 The ECB has repeatedly recognised combatting money laundering as being in the public interest. See Opinion CON/2014/37; Opinion CON/2017/18; Opinion CON/2019/4; and Opinion CON/2022/5.

20 See paragraph 2.5 of Opinion CON/2019/46 and paragraph 2.10 of Opinion CON/2020/33.

3. Automatic finding or presumption of unreliability of persons affected by the Union restrictive measures regime

3.1 The ECB understands that the automatic finding or presumption of unreliability introduced by the draft law would apply to any kind of reliability assessment in respect of any credit or financial institutions or insurance undertakings under applicable German banking or financial supervisory laws. As concerns credit institutions in particular, the ECB understands that this automatic finding or presumption of unreliability would apply to any kind of reliability assessment under the Law on banking, including, inter alia, assessments in the context of the acquisition of qualifying holdings in credit institutions[21], the authorisation of financial holding companies and mixed financial holding companies[22], the appointment of an administrator of the refinancing register[23], the appointment of members of the management body of a credit institution[24], and the authorisation to conduct banking business or to provide financial services in Germany[25].

3.2 As regards credit institutions established in Germany, the ECB is responsible for exercising the prudential supervisory tasks conferred on it by Council Regulation (EU) No 1024/2013[26]. When carrying out its prudential supervisory tasks in respect of German credit institutions, the ECB applies the national legislation transposing all relevant Union law[27], including the Law on banking and any amendments made to it by the draft law.

3.3 The ECB takes note of the draft amendments and sets out in this opinion for the consideration of the legislator several areas where the draft law could benefit from clarifications.

3.4 As concerns the proposed rebuttable presumption of unreliability of a natural person working as an executive director, supervisory board member or in a comparable position for a sanctioned entity, or serving the interests of a sanctioned entity, while the explanatory memorandum accompanying the draft law contains some examples of possible reasons for such rebuttal, the draft law itself does not specify which assessment criteria for a reliability assessment (e.g. reputation and conflict of interest) are exactly affected by a natural person's exposure to a sanctioned entity and have to be assessed. Specifying reasons for such rebuttal in the draft law could positively contribute to legal certainty for the natural persons that are affected and of the supervisory authorities assessing their submissions. The ECB further understands that the presumption of unreliability would cease to apply as soon as the relevant sanction ceases to exist, whether by virtue of the removal of a sanctioned entity from a sanctions list, or a final judicial decision ordering such removal, or upon termination of the function of the concerned natural person in a sanctioned entity, or otherwise.

3.5 Furthermore, it may be useful to clarify, in the draft law or the explanatory memorandum accompanying it, how notification requirements for supervised entities established in Germany vis-à-vis their respective supervisory authorities will be affected once the draft law enters into force.

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21 See Section 2c(1) Law on banking.

22 See Section 2f(1) Law on banking.

23 See Section 22e(2) Law on banking.

24 See Section 25c(1) and 25d(1) Law on banking.

25 See Section 32(1) Law on banking.

26 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

27 See Article 4(3) of Regulation (EU) No 1024/2013.

The ECB understands that the presumption of unreliability has an immediate effect on, for example, persons holding positions as members of a credit institution's management body. The ECB understands that the affected supervised entities and individuals would need to treat the new presumption of unreliability as a new fact affecting the suitability of the persons who meet the criteria established in the draft law[28] for the exercise of their functions within supervised entities, or as their shareholders. As such, the fulfilment of the conditions would have to be notified by the affected supervised entities to the respective supervisory authority, which would then assess the impact of these new facts on the suitability of respective persons in accordance with the relevant legal provisions.

3.6 It would also be useful to clarify whether or how Article 5(2) of the draft law would apply to persons associated with the persons who are explicitly listed by name in the Union regulations setting out the respective restrictive measures. Such associated persons are typically referred to in the Council regulations that establish Union restrictive measures in the form of asset freezes[29].

This opinion will be published on EUR-Lex.

Done at Frankfurt am Main, 5 December 2022.

[signed]

The President of the ECB

Christine LAGARDE

28 See Article 5(2) of the draft law (which inserts a new Article 1b in the Law on banking).

29 See, for example, Article 2 of Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ L 78, 17.3.2014, p. 6).