



EUROPEAN CENTRAL BANK

EUROSYSTEM

EN

ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 1 February 2019

on limitations to cash payments

(CON/2019/4)

Introduction and legal basis

On 28 November 2018 the European Central Bank (ECB) received 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').

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/EC¹, as the draft 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 draft law

- 1.1 The draft law intends to reinforce the prevention of and fight against fiscal fraud. One of the measures it provides for is an amendment to Law 7/2012² further limiting the amounts that can be paid in cash in transactions where at least one of the parties acts in a professional or business capacity.
- 1.2 It is proposed that the existing cash payment limit be lowered from EUR 2 500 to EUR 1 000 in the case of transactions where at least one of the parties acts in a professional or business capacity. The existing cash payment limit is also lowered 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. The existing limit of EUR 2 500 for payments made by natural persons not acting in a professional or business capacity and having their tax residence in Spain will not be modified, to minimise the draft law's collateral effects on households. For the purpose of calculating the applicable limits, where payment for the delivery of goods or the performance of services which comprise one transaction has been divided into more than one transaction or payment, those transactions or payments will be added together. Moreover, it will continue to be the case that these

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 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. See also Opinion CON/2012/33. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

limitations do not apply to transactions between parties not acting in a professional or business capacity, or to payments and deposits made with credit institutions. The draft law also modifies certain procedural aspects of the cash payment limitation regime's sanctioning procedure.

These provisions are intended to apply to all payments made following the entry into force of the draft law, including payments which relate to transactions agreed prior to the introduction of the proposed limitations.

2. General observations

- 2.1 The ECB understands that, under the draft law, a) a limit of EUR 1 000 applies to cash payments in transactions where the payer acts in a professional or business capacity, regardless of the location of the parties' tax residence; b) a limit of EUR 2 500 applies to 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; c) a limit of EUR 10 000 applies to cash payments from natural persons not acting in a professional or business capacity who are not tax residents in Spain to parties acting in a professional or business capacity; d) no limit applies to cash payments in transactions where none of the parties are acting in a professional or business capacity; and e) no limit applies to cash payments and deposits made with credit institutions.
- 2.2 Commission Recommendation 2010/191/EU³ states that the acceptance of payments in cash should be the rule, but acknowledges that cash may be refused for reasons related to the 'good faith principle', without this constituting a breach of the legal tender status of cash. Neither Union law nor Recommendation 2010/191/EU explicitly addresses whether, nor to what extent, it may be permissible to introduce a more general limitation to the obligation to accept euro cash payments. Therefore, Union law must be interpreted in order to ascertain the conditions that a limitation on payments in euro notes and coins should fulfil, including the conditions that should be fulfilled to comply with the legal tender status of euro banknotes and coins when general limitations to the obligation to accept cash payments are introduced⁴.
- 2.3 Without prejudice to the specific considerations in paragraphs 3.1 to 3.4, the draft law, in its general provisions, must comply with Union law; in particular, any limitation to cash payments needs to comply with the legal tender status of euro banknotes⁵. In this context, recital 19 of Council Regulation (EC) No 974/98⁶ states that 'limitations on payments in notes and coins, established by Member States for public reasons, are not incompatible with the status of legal tender of euro banknotes and coins, provided that other lawful means for the settlement of monetary debts are available'⁷. Additionally, these limitations should also be effective and proportionate to the objectives pursued and not go beyond what is necessary to achieve such objectives, in order to comply with

³ 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).

⁴ See paragraph 2.1 of Opinion CON/2017/18, paragraph 3.1 of Opinion CON/2017/20, paragraph 2.3 of Opinion CON/2017/27, and paragraph 2.2 of Opinion CON/2017/40.

⁵ See paragraph 2.4 of Opinion CON/2017/18 and paragraph 2.5 of Opinion CON/2017/40.

⁶ Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (OJ L 139, 11.5.1998, p. 1).

⁷ See, for example, Opinions CON/2013/18, CON/2014/4 and CON/2014/37.

the legal tender status of euro banknotes.

- 2.4 The ECB acknowledges that the draft law's objective of preventing and combating tax evasion may, in general, constitute a 'public reason' justifying the establishment of limitations on cash payments. The ECB also considers that other lawful means for the settlement of monetary debts are available in Spain⁸. However, these other means may have different characteristics compared to cash and are not in all cases fully equivalent alternatives to cash payments.
- 2.5 Limitations on cash payments should, additionally, fulfil the proportionality requirement described in paragraph 2.3 above, especially in view of the fact that the measures set out in the draft law affect transactions between natural persons and involve payments of relatively small amounts. Any negative impact of the proposed limitations should therefore 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, as well as whether alternative measures could be adopted that would fulfil the relevant objective and have a less adverse impact⁹.
- 2.6 Furthermore, 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. Moreover, it 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 which does not carry the legal possibility of imposing a fee for the use of this means of payment. Also, cash payments do not require a functional technical infrastructure and related investment, and are always available; this is of particular relevance in the case of outage of electronic payments. 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 way¹⁰.

3. Specific observations

- 3.1 The explanatory memorandum to the draft law mentions that for transactions where the payer is a natural person (not acting in a professional or business capacity) with a tax residence in Spain, no change in the threshold of EUR 2 500 is proposed in order to minimise the draft law's collateral effects on households. Apart from this one exception, the explanatory memorandum does not address the social impact of the proposed substantial lowering of the limits on cash payments.
- 3.2 The proposed EUR 1 000 limit on cash payments needs to 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 Council¹¹, while confirming the vulnerability of large

⁸ See paragraph 2.1 of Opinion CON/2012/33.

⁹ 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.

¹⁰ 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.

¹¹ Directive (EU) 2015/849 of the European Parliament and of the Council of 29 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

cash payments to money laundering and terrorist financing, requires that persons trading in goods, who are otherwise not obliged entities under that Directive, be classified as obliged entities and apply customer due diligence measures only to the extent that payments are made or received in cash in amounts of EUR 10 000 or more. This implies that the draft law should establish a proportionate threshold for limits on cash payments, taking into account the objectives of such limits¹². Against this background, the ECB considers the lowering of the limit on cash payments in transactions where the payer is acting in a professional or business capacity to EUR 1 000 to be disproportionate, in the light of the potentially adverse impact on the cash payment system. Indeed, this limit makes it more difficult to settle legitimate transactions using cash as a means of payment, thus endangering the concept of legal tender enshrined in the Treaty¹³. 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.

- 3.3 Regarding the limit of EUR 10 000 for cash payments made by natural persons not acting in a professional or business capacity who are 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 seems to discriminate against payments made by residents¹⁴.
- 3.4 The sanctioning regime established by the draft law seems excessive and, in particular, the fine of 25% of the amount paid¹⁵ appears 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 proposed 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 requirement¹⁶.

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

Done at Frankfurt am Main, 1 February 2019.

[signed]

The President of the ECB

Mario DRAGHI

Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

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

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

14 See paragraph 3.2 of Opinion CON/2017/18.

15 See Article 16 of the draft law.

16 See paragraph 3.6 of Opinion CON/2017/18.