



OPINION OF THE EUROPEAN CENTRAL BANK

of 13 October 2023

on a proposal for a regulation on the legal tender of euro banknotes and coins

(CON/2023/31)

(C/2023/1355)

Introduction and legal basis

On 27 July 2023 and 11 September 2023 the European Central Bank (ECB) received requests from the European Parliament and the Council of the European Union, respectively, for an opinion on a proposal for a regulation of the European Parliament and of the Council on the legal tender of euro banknotes and coins ⁽¹⁾ (hereinafter the 'proposed regulation').

The ECB's competence to deliver an opinion is based on Article 133 of the Treaty on the Functioning of the European Union, which provides that, without prejudice to the powers of the ECB, the European Parliament and the Council are to lay down the measures necessary for the use of the euro as the single currency, and that such measures are to be adopted after consultation of the ECB. 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. General observations

1.1. The ECB welcomes the proposed regulation, which will apply in Member States whose currency is the euro. The ECB strongly supports the establishment of rules on the legal tender status of euro banknotes and coins throughout the euro area in secondary Union law. Such rules will promote the necessary legal certainty regarding the concept of 'legal tender' in Union law, which is the status attributed to euro banknotes in primary Union law and euro coins in secondary Union law ⁽²⁾. The rules set out in the proposed regulation will also ensure consistency, while taking into account the differences, with the proposal for a regulation of the European Parliament and of the Council on the establishment of the digital euro ⁽³⁾ (hereinafter the 'proposed regulation on the digital euro'), which includes rules on the legal tender status of the digital euro. The proposed regulation will contribute to ensuring that the digital euro, if it is issued, complements, but does not replace, euro banknotes and coins.

1.2. The ECB particularly welcomes the measures laid down in the proposed regulation regarding the need for Member States whose currency is the euro to ensure sufficient and effective access to cash. The ECB has consistently welcomed draft national legislation aiming to protect the availability of cash ⁽⁴⁾. The ECB fully shares the view that access to cash is necessary to preserve the effectiveness of its legal tender status. If citizens do not have access to cash, they will not be able to use it as a means of payment and store of value ⁽⁵⁾.

⁽¹⁾ COM(2023) 364 final.

⁽²⁾ Article 128(1), third sentence, of the Treaty and Article 16, third sentence, of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'); Article 11 of Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (OJ L 139, 11.5.1998, p. 1).

⁽³⁾ COM(2023) 369 final.

⁽⁴⁾ See, for example, paragraph 3.3 of Opinion CON/2022/40, paragraph 7.2 of Opinion CON/2021/9, paragraph 2.4 of Opinion CON/2020/21 and paragraph 9.2 of Opinion CON/2020/13. All ECB opinions are published on EUR-Lex.

⁽⁵⁾ See section 1, page 1, and section 3, page 5, of the explanatory memorandum of the proposed regulation, and Principle 6 of ELTEG III in the Final report of the Euro Legal Tender Expert Group (ELTEG) of 6 July 2022, available on the Commission's website at www.ec.europa.eu.

- 1.3. Under the Treaty, the ECB has the exclusive right to authorise the issue of euro banknotes within the Union ⁽⁶⁾. Euro banknotes issued by the ECB and the national central banks of the Member States whose currency is the euro are the only banknotes with legal tender status in the euro area ⁽⁷⁾. The legal tender status of euro coins is provided for in secondary Union law ⁽⁸⁾. There is, however, no legally binding definition of the term 'legal tender' in secondary Union law.
- 1.4. The Court of Justice has considered the concept of 'legal tender' in a judgment by reference to Commission Recommendation 2010/191/EU ⁽⁹⁾, which specifies that, where a payment obligation exists, the legal tender of euro banknotes and coins should imply: (a) mandatory acceptance of those banknotes and coins ⁽¹⁰⁾; (b) their acceptance at full face value; and (c) their power to discharge from payment obligations.
- 1.5. The Court also clarified that the concept of 'legal tender' mentioned in Article 128(1) of the Treaty is a concept of Union law that must be given an autonomous and uniform interpretation throughout the Union ⁽¹¹⁾. Article 133 of the Treaty empowers the Union legislature alone to adopt the legal rules governing the legal tender status that is accorded to banknotes and coins denominated in euro, in so far 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 are acting on the basis that they have been empowered by the Union to adopt such rules or where this is necessary for the implementation of Union acts ⁽¹²⁾.
- 1.6. As mentioned in the explanatory memorandum accompanying the proposed regulation ⁽¹³⁾, discussions within the Euro Legal Tender Expert Group (ELTEG) confirmed the existence of legal uncertainty regarding the legal tender status of euro cash and differing application of its principles in the euro area. They also revealed concerns about the impact on access to cash of the reduction in the geographical coverage of automated teller machines (ATMs) and the reduction in cash services at bank branches ⁽¹⁴⁾.
- 1.7. The proposed regulation will contribute to ensuring that euro cash remains available, including in peripheral regions, and accepted in payments throughout the euro area, thereby reinforcing the Eurosystem's cash strategy ⁽¹⁵⁾. Despite the digitalisation of the Union economy and the increasing use of electronic means of payment, cash continues to play an important role in society ⁽¹⁶⁾. The ability to pay in cash remains particularly important for certain groups in

⁽⁶⁾ Article 128(1), first sentence, of the Treaty and Article 16, first sentence, of the Statute of the ESCB.

⁽⁷⁾ Article 128(1), third sentence, of the Treaty and Article 16, third sentence, of the Statute of the ESCB.

⁽⁸⁾ Article 11 of Regulation (EC) No 974/98.

⁽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⁾ The Court further clarified that the status of legal tender calls only for acceptance in principle of euro banknotes and coins, not for absolute acceptance. Member States may introduce restrictions to the obligation to accept euro banknotes and coins if they act within their competences and subject to certain conditions. 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 and 56 and 67 to 70. 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. See, for example, Opinion CON/2023/13, Opinion CON/2022/43, Opinion CON/2020/33 and Opinion CON/2019/39.

⁽¹¹⁾ 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 (hereinafter the 'judgment in Joined Cases C-422/19 and C-423/19'), paragraph 45.

⁽¹²⁾ See the judgment in Joined Cases C-422/19 and C-423/19, paragraphs 50 to 52.

⁽¹³⁾ See section 3, page 4 of the explanatory memorandum of the proposed regulation and the Final report of the Euro Legal Tender Expert Group (ELTEG) of 6 July 2022, available on the Commission's website at www.ec.europa.eu.

⁽¹⁴⁾ See Principle 6 of ELTEG III in the Final report of the Euro Legal Tender Expert Group (ELTEG) of 6 July 2022, available on the Commission's website at www.ec.europa.eu.

⁽¹⁵⁾ See 'The Eurosystem cash strategy', available on the ECB's website at www.ecb.europa.eu.

⁽¹⁶⁾ See, for example, paragraphs 2.4 and 2.7 of Opinion CON/2019/46, paragraphs 2.1 and 2.2 of Opinion CON/2021/18 and paragraph 4.7 of Opinion of the European Central Bank of 16 February 2022 on a proposal for a directive and a regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (CON/2022/5) (OJ C 210, 25.5.2022, p. 15). The ECB has stated its neutrality regarding different means of payment, which means that it does not favour one instrument over another. See paragraph 2.1 of Opinion CON/2015/55.

society, which, for various legitimate reasons, might prefer to use cash rather than other means of payment, or do not have access to bank services and electronic means of payments. These groups include disabled citizens, immigrants, socially vulnerable citizens, elderly people, minors and others with limited or no access to digital payment services ⁽¹⁷⁾.

1.8. In addition, cash is useful as a payment instrument because it is widely accepted, fast and facilitates control over the payer's spending. Moreover, it is currently the only payment instrument that allows citizens to settle a transaction in central bank money, which is also settled instantly, while ensuring privacy ⁽¹⁸⁾. As central bank money, euro cash ensures the convertibility of commercial bank money, thus reassuring citizens as to the usability of commercial bank money as a means of payment and as to its function as a store of value. Hence, euro cash plays its role in maintaining financial stability and the transmission of monetary policy.

2. Clear prohibition of ex ante unilateral exclusions of cash

2.1. The ECB shares the concerns set down in the proposed regulation regarding 'ex ante unilateral exclusions of cash' by retailers or service providers. The spread of such situations would seriously undermine the legal tender status of euro banknotes and coins ⁽¹⁹⁾. A new provision should be included in the proposed regulation to clearly indicate that ex ante unilateral exclusions of cash are prohibited.

2.2. The ECB also suggests amending the definition of ex ante unilateral exclusions of cash in the proposed regulation ⁽²⁰⁾ to clarify that it includes 'no cash' practices (e.g. 'no cash' signs at shop entrances or points of sale) as well as contractual terms that have not been individually negotiated (e.g. pre-formulated standard form contracts). Furthermore, the proposed regulation's provision on the exceptions to the principle of mandatory acceptance of euro banknotes and coins ⁽²¹⁾ should specify that the burden of proof to establish that a prior agreement existed between the payer and the payee on a means of payment other than cash is on the payee.

2.3. The proposed regulation states that ex ante unilateral exclusions of cash fall within its scope ⁽²²⁾. It defines 'ex ante unilateral exclusions of cash' as situations in which retailers and service providers unilaterally exclude cash as a payment method, and the payer and the payee do not freely agree to a means of payment for a purchase ⁽²³⁾. Thus, ex ante unilateral exclusions of cash are not cases in which there is a prior, individually negotiated, agreement between the payer and the payee on a means of payment other than cash, which would constitute a valid exception to the principle of mandatory acceptance ⁽²⁴⁾. While previously *agreed* exclusions of cash would require a real negotiation, ex ante *unilateral* exclusions of cash involve a non-negotiable condition for the payer to settle a pecuniary debt with the payee.

2.4. However, the proposed regulation also provides that Member States are to monitor the level of ex ante unilateral exclusions of payments in cash throughout their territory ⁽²⁵⁾. The recitals of the proposed regulation state that, if a Member State concludes that ex ante unilateral exclusions of cash undermine the principle of mandatory acceptance of euro banknotes and coins, it should take measures to remedy the situation. Such measures can include a prohibition on ex ante unilateral exclusions of cash in all or parts of its territory ⁽²⁶⁾.

⁽¹⁷⁾ See, for example, paragraph 2.10 of Opinion CON/2022/9.

⁽¹⁸⁾ 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 and paragraph 2.1 of Opinion CON/2021/18.

⁽¹⁹⁾ See the Letter from the ECB President to Mr Chris MacManus, Member of the European Parliament, on the legality of merchants' unilateral refusal to accept cash payments in a business-to-customer context (L/CL/23/130), 23 June 2023, available on the ECB's website at www.ecb.europa.eu.

⁽²⁰⁾ See Article 3, point 4, of the proposed regulation.

⁽²¹⁾ See Article 5(1) of the proposed regulation.

⁽²²⁾ See Article 2(1) of the proposed regulation.

⁽²³⁾ See Article 3, point 4, of the proposed regulation.

⁽²⁴⁾ See Article 5(1), point (b), of the proposed regulation.

⁽²⁵⁾ See Article 7 of the proposed regulation.

⁽²⁶⁾ See recital 6 of the proposed regulation.

- 2.5. Hence, certain provisions of the proposed regulation seem to indicate that an ex ante unilateral exclusion of cash does not constitute a prior agreement between a payer and payee to utilise a means of payment other than cash, such that the principle of mandatory acceptance would apply ⁽²⁷⁾. One of these provisions ⁽²⁸⁾ clearly states that when a retailer or service provider unilaterally excludes cash as a payment method, for example by introducing a 'no cash' sign, the payer and the payee do not freely agree to a means of payment. This suggests that ex ante unilateral exclusions of cash would not be exempted from the principle of mandatory acceptance of euro banknotes and coins. Therefore, they would constitute infringements of the proposed regulation.
- 2.6. This interpretation is, however, hard to reconcile with the obligation for Member States to monitor the level of ex ante unilateral exclusions of cash throughout their territory, and prohibit them, in all or parts of its territory, if the level of acceptance of payments in cash in their territory or parts thereof undermines the principle of mandatory acceptance of euro cash. If ex ante unilateral exclusions of cash infringe the proposed regulation, the response of Member States should be to enforce compliance with the proposed regulation, including by laying down rules on penalties and imposing penalties against these exclusions of euro cash ⁽²⁹⁾, rather than to monitor how widespread these unlawful situations are in their territory.
- 2.7. The clear prohibition of ex ante unilateral exclusions of cash would then replace the obligation imposed on Member States to monitor the level of ex ante unilateral exclusions of payments in cash in their territory and provide for a clear definition of the scope and effects of the legal tender status of euro cash ⁽³⁰⁾.

3. Ex ante unilateral exclusions of cash by public sector entities

- 3.1. The proposed regulation does not exclude specific categories of payers or payees from its scope of application ⁽³¹⁾. At the same time, its recitals acknowledge that Member States may, in principle, restrict the mandatory acceptance of cash, acting pursuant to their competences and if certain conditions (e.g. public interest grounds, proportionality) are met ⁽³²⁾, as stated by the Court of Justice ⁽³³⁾. In this respect the ECB understands that 'no cash' practices followed by public sector entities (e.g. public hospitals and public museums) are not as such valid exceptions to the mandatory acceptance of euro banknotes and coins introduced by Member States acting within their field of competence. In so far as these practices are not regulated procedures for the settlement of pecuniary obligations ⁽³⁴⁾ provided for in the legislation of a Member State, but rather unilateral practices, 'no cash' practices followed by public sector entities constitute ex ante unilateral exclusions of cash as defined in the proposed regulation ⁽³⁵⁾. Therefore, the recitals of the proposed regulation ⁽³⁶⁾ should be adjusted to clarify that 'no cash' practices followed by public sector entities also fall within the scope of the proposed regulation and are, therefore, prohibited.

4. Miscellaneous

- 4.1. The proposed regulation applies to 'the settlement of pecuniary debts in so far as they are to be settled in cash, in whole or in part, where a payment obligation exists' ⁽³⁷⁾. The ECB understands that the phrase 'in so far as they are to be settled in cash' refers to the payer's entitlement to choose to pay in cash when other means of payment are

⁽²⁷⁾ See Article 3, point 4, and Article 5(1), point (b), of the proposed regulation.

⁽²⁸⁾ See Article 3, point 4, of the proposed regulation.

⁽²⁹⁾ See Article 12 and Article 13(1), point (b), of the proposed regulation.

⁽³⁰⁾ See Articles 7 and 9 of the proposed regulation.

⁽³¹⁾ See Article 2 of the proposed regulation.

⁽³²⁾ See recitals 4 and 11 of the proposed regulation.

⁽³³⁾ See the judgment in Joined Cases C-422/19 and C-423/19, paragraphs 55 and 56 and 67 to 70.

⁽³⁴⁾ See the judgment in Joined Cases C-422/19 and C-423/19, paragraphs 56 and 58.

⁽³⁵⁾ See Article 3, point 4, of the proposed regulation.

⁽³⁶⁾ See, in particular, recital 11 of the proposed regulation.

⁽³⁷⁾ See Article 2(1) of the proposed regulation.

available. However, this phrase could also be read as an undetermined limitation on the principle of mandatory acceptance ⁽³⁸⁾. It could be seen as implying that only certain pecuniary debts can be settled in cash. For reasons of legal clarity, the ECB would therefore suggest amending the proposed regulation in this respect.

- 4.2. Moreover, in respect of the exceptions to the principle of mandatory acceptance of euro banknotes and coins, the proposed regulation provides that a payee will be entitled to refuse euro cash 'where a refusal is made in good faith and where such refusal is based on legitimate and temporary grounds in line with the principle of proportionality in view of concrete circumstances beyond the control of the payee' ⁽³⁹⁾. The ECB understands that several cumulative conditions have been imposed for the application of the 'good faith' exception to set the bar high for a payee relying on this exception to justify a refusal to accept cash. The ECB welcomes this approach.
- 4.3. The ECB understands that having no change available ⁽⁴⁰⁾ is a very specific 'legitimate ground' on which to refuse euro banknotes and coins that does not inform the general understanding of the good faith exception. However, this specific ground cannot be used to determine what constitutes 'concrete circumstances beyond the control of the payee' in other situations. In fact, it is questionable whether such circumstance is beyond the control of the payee, and treating it as an indicative example would contradict the overall intention of the legislator to set the bar high for resorting to the good faith exception to the principle of mandatory acceptance set out in the proposed regulation.
- 4.4. Furthermore, the proposed regulation empowers the Commission to adopt implementing acts of general application on a set of common indicators that Member States must use to monitor the acceptance of payments in cash and access to cash throughout their territory ⁽⁴¹⁾. It explicitly states that the Commission will consult the ECB when preparing the relevant implementing acts. As far as possible, the Eurosystem's existing work in this area should serve as a reference in defining common indicators. The proposed regulation also empowers the Commission to adopt implementing acts addressed to a Member State if it considers that the remedial measures proposed by the Member State are insufficient or that the acceptance of payments in cash or access to cash are not appropriately ensured ⁽⁴²⁾. However, a similar reference to consultation of the ECB is missing in the latter case. The duty to consult the ECB derives from the fact that the relevant acts, in so far as they implement the proposed regulation, would be based on Article 133 of the Treaty, which specifically refers to the need to consult the ECB. To ensure legal certainty, the proposed regulation should explicitly refer to the duty to consult the ECB before the Commission adopts implementing acts addressed to a specific Member State.
- 4.5. Lastly, the ECB welcomes the reference to convertibility at par between euro banknotes and coins and the digital euro in the proposed regulation ⁽⁴³⁾. Such convertibility is a natural consequence of the legal tender status of euro cash and the digital euro. The ECB would, however, propose to use the term 'fungibility' instead of 'convertibility', as it better reflects the idea that euro cash and the digital euro are the same currency (i.e. the euro), albeit in two different forms. The ECB takes note of the fact that the relevant article in the proposed regulation on the digital euro mirrors the corresponding one in the proposed regulation in this respect ⁽⁴⁴⁾, and draws the co-legislators' attention to the need to maintain these two provisions aligned throughout the legislative process.

⁽³⁸⁾ See Article 4 of the proposed regulation.

⁽³⁹⁾ See Article 5(1), point (a), of the proposed regulation.

⁽⁴⁰⁾ See Article 5(2), point (ii), of the proposed regulation.

⁽⁴¹⁾ See Article 9(2) of the proposed regulation.

⁽⁴²⁾ See Article 9(5) of the proposed regulation.

⁽⁴³⁾ See Article 15 of the proposed regulation.

⁽⁴⁴⁾ See Article 12 of the proposed regulation on the digital euro and Article 15 of the proposed regulation.

Where the ECB recommends that the proposed regulation is amended, specific drafting proposals are set out in a separate technical working document accompanied by an explanatory text to this effect. The technical working document is available in English on EUR-Lex.

Done at Frankfurt am Main, 13 October 2023.

The President of the ECB
Christine LAGARDE
