

Yves Mersch  
Member of the Executive Board

[COURTESY TRANSLATION<sup>1</sup>]

Mr Roberto Gualtieri  
Minister for Economy and Finance  
Cabinet of the Minister  
Via XX Settembre,  
00100 Rome  
Italy

14 December 2020

Dear Minister,

Many thanks for your letter of 24 November 2020, and the attached Ministry of Economy and Finance (MEF) draft decree establishing the conditions, criteria and cases that would allow taxpayers to benefit from a cashback program (hereinafter the 'draft MEF Decree'). It has come to the attention of the European Central Bank (ECB) that the draft MEF Decree has now been adopted and published in the Italian Official Gazette dated 28 November 2020, and entered into force on the day of publication (hereinafter the 'MEF Decree').

The ECB understands that the cashback mechanism, as established under the MEF Decree, entered into force, at least on an experimental basis, on 8 December 2020.

The MEF Decree establishes that participation in the cashback program is exclusively on a voluntary basis<sup>2</sup>. Anyone wishing to join the cashback program should register in the app provided by PagoPA S.p.A. (hereinafter the 'APP IO'), or in the systems made available by an affiliated issuer, providing their tax code and the identification details of one or more electronic payment instruments that they intend to use to make purchases<sup>3</sup>.

The MEF Decree provides that the cashback program is restricted to natural persons who are at least 18 years old and resident in Italy. The program applies to purchases made outside the exercise of business, artistic or professional activities<sup>4</sup>. Participation in the cashback program begins when the first transaction is made using the registered electronic payment instrument<sup>5</sup>.

The MEF Decree provides that the cashback amount is determined with reference to the following periods: a) 1 January 2021 – 30 June 2021; b) 1 July 2021 – 31 December 2021; c) 1 January 2022 –

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<sup>1</sup> The official ECB letter is addressed in the official language of the Member State concerned.

<sup>2</sup> Article 3(1) of the MEF Decree.

<sup>3</sup> Article 3(2) of the MEF Decree.

<sup>4</sup> Article 3(3) of the MEF Decree.

<sup>5</sup> Article 3(4) of the MEF Decree.

30 June 2022<sup>6</sup>. For each of these reference periods, only participants having settled at least 50 transactions by electronic payment instruments are eligible for reimbursement. For each period, the cashback is 10 % of the amount of any transaction with a maximum value of EUR 150 per single transaction, i.e. maximum EUR 15 per transaction. Transactions of over EUR 150 contribute up to the amount of EUR 150<sup>7</sup>.

The MEF Decree provides that the calculation of the cashback amount takes into account the overall value of the transactions carried out in any period. The total cashback for any reference period may not exceed EUR 150<sup>8</sup>. The cashback is paid to the participant within 60 days of the end of each reference period<sup>9</sup>.

The MEF Decree also provides for an experimental period, which would start on a certain date (to be indicated on the MEF's website) and would last until 31 December 2020<sup>10</sup>. During the experimental period, only cashback participants having settled a minimum number of 10 transactions by electronic payment instruments will be eligible for reimbursement. For the experimental period, the refund is equal to 10 % of the amount of any transaction with a maximum value of EUR 150 per single transaction, i.e. maximum EUR 15 per transaction. Transactions over EUR 150 contribute up to the amount of EUR 150<sup>11</sup>. During the experimental period the quantification of the cashback takes into account the overall value of the transactions carried out. The total cashback paid to an individual for the experimental period may not exceed EUR 150. The reimbursement for the experimental period will be paid out in February 2021<sup>12</sup>.

Furthermore, the MEF Decree introduces a 'special cashback' to award a restricted number of participants in the cashback program. Specifically, without prejudice to the ordinary cashback, the first 100 000 participants who, for each of the reference periods, settle the highest number of transactions by electronic payment instruments will receive a special reimbursement of EUR 1 500<sup>13</sup>.

The ECB would like to recall that under the Treaty on the Functioning of the European Union, the European System of Central Banks (ESCB) is required to act, inter alia, in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources<sup>14</sup>. The ESCB has the basic task of promoting the smooth operation of payment systems<sup>15</sup>, and the ECB has the exclusive right to authorise the issue of euro banknotes within the Union<sup>16</sup>. The euro banknotes issued by

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<sup>6</sup> Article 6(2) of the MEF Decree.

<sup>7</sup> Article 6(3) of the MEF Decree.

<sup>8</sup> Article 6(4) of the MEF Decree.

<sup>9</sup> Article 6(5) of the MEF Decree.

<sup>10</sup> Article 7(4) of the MEF Decree.

<sup>11</sup> Article 7(2) of the MEF Decree.

<sup>12</sup> Article 7(3) of the MEF Decree.

<sup>13</sup> Article 8(1) of the MEF Decree.

<sup>14</sup> See Article 127(1) of the Treaty and Article 2 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB').

<sup>15</sup> 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.

<sup>16</sup> See the first sentence of Article 128(1) of the Treaty and the first sentence of Article 16 of the Statute of the ESCB.

the ECB and the national central banks of the euro area are the only banknotes to have the status of legal tender status within the euro area<sup>17</sup>.

Commission Recommendation 2010/191/EU<sup>18</sup> 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, or the extent to which, 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 on the obligation to accept cash payments are introduced<sup>19</sup>.

The MEF Decree must comply with Union law<sup>20</sup>; in particular, any, direct or indirect, limitation or disincentive to use cash payments must comply with the requirements regarding the legal tender status of euro banknotes<sup>21</sup>. In this context, Recital 19 of Council Regulation (EC) No 974/98<sup>22</sup>, which 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'<sup>23</sup>, has been taken into account in previous ECB opinions on the introduction of cash limitations under draft national laws. While the ECB acknowledges that lawful means for the settlement of monetary debts other than cash payments, are generally available in Italy<sup>24</sup>, their availability across all parts of society, at comparable costs to cash payments, should be closely verified by the Italian authorities. Such verification is particularly important because these other means may have different characteristics, compared with cash payments, and as a result may not be fully equivalent alternatives.

In this respect, the ECB notes that Directive 2014/92/EU of the European Parliament and of the Council<sup>25</sup> has made it easier for Union consumers to obtain payment accounts and related electronic payment services as alternatives to cash<sup>26</sup>. In Italy, Directive 2014/92/EU has been transposed by Legislative

<sup>17</sup> See the third sentence of Article 128(1) and the second sentence of Article 282(3) of the Treaty and the third sentence of Article 16 of the Statute of the ESCB.

<sup>18</sup> 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).

<sup>19</sup> 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, paragraph 2.2 of Opinion CON/2017/40 and paragraph 2.2 of Opinion CON/2019/4. All ECB opinions are published on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

<sup>20</sup> The same applies to Law No 126 of 13 October 2020, which converts, with some modifications, Decree Law No 104 of 14 August 2020 on urgent measures to support and revive the economy, published in the Italian Official Gazette No 203 dated 14 August 2020 and entered into force on 15 August 2020.

<sup>21</sup> See paragraph 2.4 of Opinion CON/2017/18, paragraph 2.5 of Opinion CON/2017/40 and paragraph 2.3 of Opinion CON/2019/4.

<sup>22</sup> Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (OJ L 139, 11.5.1998, p. 1).

<sup>23</sup> See, for example, Opinions CON/2013/18, CON/2014/4, CON/2014/37 and CON/2019/39.

<sup>24</sup> See paragraph 2.1 of Opinion CON/2012/33 and paragraph 3.1 of Opinion CON/2010/36.

<sup>25</sup> Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (OJ L 257, 28.8.2014, p. 214).

<sup>26</sup> Within the framework previously created by Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ L 319, 5.12.2007, p. 1), which introduced the legal basis for the

Decree No. 37 of 15 March 2017, which establishes the legal framework for creating the conditions to establish a minimum set of banking services accessible to all consumers. However, such banking services and electronic payment services offered by commercial entities may be subject to charges.

The ECB acknowledges that incentivising transactions by electronic means of payment when purchasing goods and services for the purpose of combating tax evasion may, in general, constitute ‘public reasons’ justifying the dis-incentivisation, and the resulting limitation on, the use of cash payments. However, any such limitation or disincentive needs to comply with the legal tender status of euro banknotes enshrined in Articles 128(1) and 282(3) of the Treaty. Therefore, it would need to be demonstrated that the limitation affecting the legal tender status of euro banknotes would be effective to achieve the public objectives that are being legitimately pursued by the limitations. Hence, there should be clear evidence that the cashback mechanism is, in fact, capable of achieving the stated public goal of combating tax evasion.

Direct or indirect limitations on cash payments should also be proportionate to the objectives pursued and should not go beyond what is necessary to achieve such objectives, especially in view of the fact that the measures set out in the MEF Decree could push participants to compete for the highest number of transactions carried out, which would ultimately favour participants settling a large number of transactions for small amounts (i.e. amounts that could otherwise be paid in coins). In particular, the ‘special cashback’ reimbursement of EUR 1 500 appears to be designed to incentivise the use of electronic payments for small amounts. Any adverse impact of the proposed cashback should therefore be carefully weighed against the anticipated public benefits. When considering whether a limitation is proportionate, the adverse impact of the incentive 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 impact<sup>27</sup>.

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, as legal tender, 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 for which there is no legal possibility of imposing a fee for its use. In addition, cash payments do not require a functional technical infrastructure and related investment, and are always available; this is of particular relevance in the event of a power outage rendering electronic payments unavailable. Finally, cash payments facilitate the inclusion of the entire population in the economy by allowing any individual to settle any kind of financial transaction in cash<sup>28</sup>.

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creation of an internal market for payments within the Union and allowed for the creation of the Single Euro Payments Area (SEPA) (hereinafter the ‘First Payment Services Directive’). The First Payment Services Directive has been replaced by Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35) (hereinafter the ‘Second Payment Services Directive’).

<sup>27</sup> 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, paragraphs 2.5 and 2.6 of Opinion CON/2017/18, paragraph 3.3 of Opinion CON/2017/20, paragraph 2.7 of Opinion CON/2017/27, paragraph 2.6 of Opinion CON/2017/40 and paragraph 2.5 of Opinion CON/2019/04.

<sup>28</sup> 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, paragraph 2.7 of Opinion CON/2017/40, paragraph 2.6 of Opinion CON/2019/04. See also the Opinion of Advocate General Pitruzzella of 29 September 2020 in *Dietrich and Häring v Hessischer Rundfunk*, C-422/19 and C-423/19, EU:C:2020:756, paragraphs 135 and 138.

Against this background, the ECB considers that introducing a cashback program for electronic means of payment is disproportionate in the light of the potentially adverse impact on the cash payment system that such a mechanism could have and because it undermines the objective of having a neutral approach to the different means of payment available.

In accordance with Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union, Recital 19 of Regulation (EC) No 974/98 and the second indent of Article 2(1) of Council Decision 98/415/EC<sup>29</sup>, national authorities are required to consult the ECB on draft legislative provisions in its fields of competence, including, in particular, on means of payment.

The ECB would appreciate that the Italian authorities give due consideration to the above observations by honouring the obligation to consult the ECB in the future where applicable.

Yours sincerely,

[signed]

Cc: Mr. Ignazio Visco, Governor, Banca d'Italia  
Mr. P. Gentiloni, Commissioner for Economy  
Mr. D. Calleja Crespo, Director-General Legal Service, European Commission

Encl. Guide to consultation of the ECB by national authorities regarding draft legislative provisions

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<sup>29</sup> 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).