



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

## OPINION OF THE EUROPEAN CENTRAL BANK

of 11 January 2024

on a constitutional law on cash as legal tender and access to cash

(CON/2024/1)

### Introduction and legal basis

On 15 June 2023 the National Council of the Slovak Republic adopted Constitutional Law No 241/2023 Coll. which supplements the Constitution of the Slovak Republic No 460/1992<sup>1</sup> (hereinafter the 'Constitutional Law'). The European Central Bank (ECB) has not been consulted by the Slovak authorities on the Constitutional Law.

The ECB has decided to deliver an own initiative opinion on the Constitutional 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<sup>2</sup>, as the Constitutional 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 Constitutional Law supplements the Constitution of the Slovak Republic (the 'Constitution') by inserting a new Article 39a in Section Five of Title Two of the Constitution dealing with economic, social and cultural rights.
- 1.2 The aim of the new provision is to guarantee the issuance of cash as legal tender, which the Constitutional Law now expressly establishes in the Constitution<sup>3</sup>. The amendment to the Constitution introduced by the Constitutional Law further specifies that everyone has the right to make a payment for the purchase of goods and the provision of services using cash as legal tender, and that the acceptance of such payment may only be refused for reasonable or generally applicable reasons<sup>4</sup>. The right to perform a cash transaction in a bank or a branch of a foreign bank is guaranteed<sup>5</sup>. Finally, the Constitution, as amended by the Constitutional Law, specifies that the conditions and limitations for the use of cash as specified in Article 39a(2) of the Constitution will be established by law<sup>6</sup>.

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<sup>1</sup> Ústavný zákon č. 241/2023 Z. z. z 15. júna 2023, ktorým sa dopĺňa Ústava Slovenskej republiky č. 460/1992 Zb. v znení neskorších predpisov.

<sup>2</sup> Council Decision 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).

<sup>3</sup> Article 39a(1) of the Constitution.

<sup>4</sup> First sentence of Article 39a(2) of the Constitution.

<sup>5</sup> Second sentence of Article 39a(2) of the Constitution.

<sup>6</sup> Article 39a(3) of the Constitution.

- 1.3 While the explanatory memorandum to the original draft of the Constitutional Law (hereinafter the ‘first explanatory memorandum’) acknowledges that the existing legislation and experience of the tax authorities show that mandatory cashless payments above certain limits in the Slovak legal order could be viewed as a measure to limit tax fraud and to combat money laundering, corruption, criminal activities and terrorist financing, it also expresses the opinion that everyone<sup>7</sup> should have a right to pay in cash if they so wish. The first explanatory memorandum expresses the conviction that the right to pay in cash is a key right that everyone has in their commercial relationships, noting various recent initiatives introducing gradual restrictions on the right to use cash by various acts of general application. Thus, the first explanatory memorandum views the enshrining in the Constitution of the right to make payments in cash as necessary to deal with the various attempts to severely restrict or even ultimately eliminate the right to pay in cash, as well as the related right to privacy. The first explanatory memorandum also expresses the view that a departure from cash could further endanger the right to privacy and lead to further development of cryptocurrencies. It also opines that the full abolition of cash payments in the future would endanger low-income people as well as civil associations which finance their charitable activities by fundraising in cash. In addition, the preservation of the right to pay in cash is considered to contribute to financial literacy among young people. More generally, the right to pay in cash is viewed in the first explanatory memorandum in the context of the freedom of choice.
- 1.4 The Constitutional Law was adopted by the National Council of the Slovak Republic with one amendment compared to the original draft of the Constitutional Law. As set out in the explanatory memorandum accompanying the amendment to the original draft of the Constitutional Law (hereinafter the ‘second explanatory memorandum’), the right to pay in cash as legal tender could be open to abuse if accompanied by a requirement for acceptance of such payment without further limitations. The second explanatory memorandum envisages that there may be reasonable reasons to refuse cash payments, such as security concerns (e.g. the risk of robbery or theft) or technical reasons (e.g. a payee’s automated vending machine not being equipped to accept cash). Therefore, the original draft of the Constitutional Law was amended to provide payees with the right to refuse cash payments for reasonable or generally applicable reasons. Furthermore, based on the understanding expressed in the second explanatory memorandum that the right to cash is almost inseparably linked to the right to conduct cash banking operations, the original draft of the Constitutional Law was also amended to guarantee the right to conduct cash transactions at a bank or a branch of a foreign bank without the restrictions that apply to other payment recipients. The second explanatory memorandum expresses the view that if banks did not dispense cash, for example through ATMs, cash would gradually disappear, thus undermining the proposed constitutional right to cash.

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<sup>7</sup> It is noted that the first explanatory memorandum uses the term ‘citizens’, while the text of the Constitutional Law uses the term ‘everyone’. This opinion assumes that the first explanatory memorandum means to refer to everyone when using the term ‘citizens’.

## 2. General observations

- 2.1 Although electronic payment instruments are increasingly used for retail payments in a number of Member States, cash continues to play an important role in society and is still widely used throughout the entire population. The ability to pay in cash remains particularly important for those who, for various legitimate reasons, prefer to use physical money rather than other payment instruments, or do not have access to the banking system and electronic means of payment. These groups include not only elderly people but also people with disabilities, immigrants, socially vulnerable people, minors and others with limited or no access to digital payment services<sup>8</sup>. Cash is generally also 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 everyone to settle a payment transaction in central bank money, which is also settled instantly while, importantly, ensuring privacy. Furthermore, cash could play an important role in the event of a disturbance in the payment system<sup>9</sup> and it is robust against cyber-crime<sup>10</sup>. Against this backdrop, the ECB welcomes that the Constitutional Law aimed at strengthening the availability of cash in Slovakia.
- 2.2 The ECB has the exclusive right to authorise the issue of euro banknotes within the Union, and 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<sup>11</sup>. The legal tender status of euro coins is provided for in secondary Union law<sup>12</sup>.
- 2.3 The concept of 'legal tender' as 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/EU<sup>13</sup>, which provides useful guidance for the interpretation of the relevant provisions of Union law. Point 1 of Recommendation 2010/191/EU 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,

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<sup>8</sup> See, for example, 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, paragraph 2.1 of Opinion CON/2023/13 and paragraph 1.7 of Opinion CON/2023/31.

<sup>9</sup> See, for example, paragraph 2.1 of Opinion CON/2019/41, paragraph 9.2.1 of Opinion CON/2020/13 and paragraph 2.3 of Opinion CON/2021/18.

<sup>10</sup> See paragraph 2.2 of Opinion CON/2021/32.

<sup>11</sup> First and third sentences of Article 128(1) of the Treaty and first and third sentence of Article 16 of the Statute of the European System of Central Banks and of the European Central Bank.

<sup>12</sup> 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).

<sup>13</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).

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<sup>14</sup>.

- 2.4 The Court has clarified that the concept of ‘legal tender’ is a concept of Union law that must be given an autonomous and uniform interpretation throughout the Union<sup>15</sup>. 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. Furthermore, the Union legislature’s exclusive competence precludes any competence on the part of the Member States in the matter, unless they have been empowered by the Union to do so or for the implementation of Union acts<sup>16</sup>. In this respect, the ECB notes that, on 28 June 2023, the Commission published a proposal for a Regulation of the European Parliament and of the Council on the legal tender of euro banknotes and coins (hereinafter the ‘proposed regulation on the legal tender of euro cash’), which will establish rules on the legal tender of euro banknotes and coins in binding Union secondary law<sup>17</sup>. The explanatory memorandum of the proposed regulation on the legal tender of euro cash states that discussions within the Euro Legal Tender Expert Group (ELTEG) confirmed the existence of uncertainty and important differences regarding the practical application of the concept of legal tender across the euro area<sup>18</sup>. These differences would justify establishing rules on the legal tender of euro cash in a regulation adopted under Article 133 of the Treaty.

### 3. Specific observations

#### 3.1 *Constitutional guarantee of the issuance of cash as legal tender*

Article 39a(1) of the Constitution, introduced by the Constitutional Law, guarantees the issuance of cash as legal tender. It thus establishes legal rules governing the status of legal tender accorded to banknotes and coins in a Member State which has adopted the euro. This is a competence that has been exclusively given to the Union legislature. Therefore, the ECB respectfully suggests that the provision of Article 39a(1) of the Constitution is outside of the competence of a Member State whose currency is the euro. By specifically guaranteeing the issuance of cash as legal tender, Article 39a(1) of the Constitution is, furthermore, not in line with Article 128 of the Treaty, pursuant to which, among

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<sup>14</sup> See judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, C-422/19 and C-423/19, EU:C:2021:63, paragraphs 46 to 49.

<sup>15</sup> See judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, C-422/19 and C-423/19, EU:C:2021:63, paragraph 45.

<sup>16</sup> See judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, C-422/19 and C-423/19, EU:C:2021:63, paragraphs 50 to 52.

<sup>17</sup> COM(2023) 364 final. See also Opinion CON/2023/31.

<sup>18</sup> See section 3, page 4 of the explanatory memorandum of the proposed regulation on the legal tender of euro cash 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](http://www.ec.europa.eu). See also Opinion CON/2023/31.

others, the issue of euro banknotes by the ECB and national central banks is subject to the ECB's exercise of its exclusive competence to authorise the issue of banknotes within the Union.

### 3.2 *Constitutional right to make payments in cash*

3.2.1 The first sentence of Article 39a(2) of the Constitution, introduced by the Constitutional Law, specifies that everyone has the right to make a payment for the purchase of goods and the provision of services using cash as legal tender, and that the acceptance of such payment may only be refused for reasonable or generally applicable reasons.

3.2.2 In this respect, the Court of Justice has held 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<sup>19</sup>. The Court of Justice held that 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 in the exercise of their own powers, to regulate the procedures for settling pecuniary obligations, whether under public law or private law, provided, in particular, that the legislation does not affect the principle that, as a general rule, it must be possible to discharge a payment obligation in cash<sup>20</sup>. The Court has also held that one must assess the objective and content of a national law measure that provides for an obligation to accept euro cash to determine whether that has been adopted within the framework of the Member States' own competences<sup>21</sup>.

3.2.3 It must therefore be considered whether Article 39a(2) of the Constitution, in the light of its objective and content, establishes legal rules governing the status of legal tender of euro banknotes, an area of exclusive competence of the Union under Article 133 of the Treaty, or is a measure taken in the exercise of a competence of the Member States.

3.2.4 The first sentence of Article 39a(2) of the Constitution sets out a general principle of mandatory acceptance and a framework for exemptions, which are to be further specified by law. In this regard, this general principle is connected with the constitutional enshrinement of the issuance of legal tender under Article 39a(1) of the Constitution. This can be seen from the wording of the provision<sup>22</sup>, from the first explanatory memorandum<sup>23</sup>, and from the fact that this right is recognised in respect of everyone. It therefore appears that the content and objective of the first sentence of Article 39a(2) of the Constitution, as also specified in the first explanatory memorandum, is to ensure the acceptance of cash as legal tender as a right of general application, with the exemptions phrased only on the basis of general principles of reasonableness and generally applicable reasons. The ECB thus understands that Article 39a(2) of the Constitution, in the light of its objective and content, does not

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<sup>19</sup> See judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, C-422/19 and C-423/19, EU:C:2021:63, paragraph 55.

<sup>20</sup> It is noted that Member States may introduce stricter rules in the exercise of their own powers.

<sup>21</sup> See judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, C-422/19 and C-423/19, EU:C:2021:63, paragraphs 56 to 58.

<sup>22</sup> Article 39a(2) expressly mentions the right to pay using cash as *legal tender*.

<sup>23</sup> The explanatory memorandum explains that the proposal enshrines the right to make payments for the purchase of goods and the provision of services in cash as legal tender in subpart five of Title two of the Constitution, which covers economic, social, and cultural rights as part of fundamental rights and freedoms. It is proposed that a constitutional guarantee should be given to the issuance of cash as legal tender, which will ensure the practical implementation of this right in the abovementioned financial transactions.

regulate the procedures for settling pecuniary obligations in the exercise of national powers<sup>24</sup> but rather appears to regulate the status of euro cash as legal tender.

### 3.3 *Direct applicability of provisions of Union law*

3.3.1 The ECB underlines that the reproduction in national law of a provision of Union law that is directly applicable in the legal order of the Member State may create uncertainty both as to the legal nature of the applicable provision and as to the date of its entry into force. This would not align with the uniform application and interpretation of Union law throughout the Union<sup>25</sup>.

3.3.2 Furthermore, the ECB also underlines that the incorporation of some elements of Union law into national law is warranted only in exceptional circumstances for the sake of coherence and to make them comprehensible to the persons to whom they apply<sup>26</sup>. If such exceptional circumstances do exist, the reproduction of elements of directly applicable provisions of Union law should be done precisely, by incorporation or reference<sup>27</sup>, and only to the extent warranted by the exceptional circumstances. However, such exceptional circumstances do not exist if the directly applicable provisions of Union law are sufficiently coherent and comprehensive, making it unnecessary to repeat or reflect them in national law<sup>28</sup>.

3.3.3 Article 39a(1) of the Constitution can be said to reiterate provisions of Union law, namely Article 128 of the Treaty and Article 11 of Regulation (EC) No 974/98. It does this, however, in an inaccurate manner, as explained in paragraph 3.1. Article 39a(2) establishes the *right for everyone* to make payments in cash. It accordingly appears to regulate the status of euro cash as legal tender, as explained in paragraph 3.2.4. However, the mandatory acceptance of euro banknotes and coins, which the right to make payments in cash seems to protect, is laid down in significantly different terms than those used in Union law. According to Recommendation 2010/191/EU, on which the Court of Justice relied when interpreting Article 128(1) of the Treaty and Article 11 of Regulation (EC) No 974/98<sup>29</sup>, the first defining element of the concept of legal tender is the mandatory acceptance of euro banknotes and coins where a payment obligation exists<sup>30</sup>. In the same vein, the proposed regulation

<sup>24</sup> See paragraph 3.2.2 of this Opinion.

<sup>25</sup> See judgment of the Court of Justice of 7 February 1973, *Commission v Italy*, C-39/72, EU:C:1973:13, paragraphs 16 and 17; judgment of the Court of Justice of 10 October 1973, *Variola*, C-34/73, EU:C:1973:101, paragraphs 9 to 11; and judgment of the Court of Justice of 2 February 1977, *Amsterdam Bulb*, C-50/76, EU:C:1977:13, paragraphs 5 to 8. See also paragraph 12 of Opinion CON/2005/21, paragraph 2.1 of Opinion CON/2006/10, paragraph 2.4 of Opinion CON/2006/29, paragraph 2.1 of Opinion CON/2007/1, paragraph 2.2 of Opinion CON/2007/43, paragraph 2.3 of Opinion CON/2022/15, paragraph 2.3 of Opinion CON/2023/27 and paragraph 2.2.5 of Opinion CON/2023/33.

<sup>26</sup> See paragraph 12 of Opinion CON/2005/21 with reference to the judgment of the Court of Justice of 28 March 1985, *Commission v Italian Republic*, C-272/83, EU:C:1985:147, paragraph 2.4 of Opinion CON/2022/15 and paragraph 2.2.6 of Opinion CON/2023/33. See a *contrario* also paragraph 2.2 of Opinion CON/2006/10.

<sup>27</sup> See paragraph 2.2 (footnote 6) of Opinion CON/2007/43, paragraph 2.4 of Opinion CON/2022/15 and paragraph 2.2.6 of Opinion CON/2023/33.

<sup>28</sup> See paragraph 13 of Opinion CON/2005/21, paragraphs 2.2 and 3.2 of Opinion CON/2006/10, paragraph 2.4 of Opinion CON/2022/15 and paragraph 2.2.6 of Opinion CON/2023/33.

<sup>29</sup> In Joined Cases C-422/19 and C-423/19 the Court established that the concept of legal tender is a concept of Union law that must be given autonomous and uniform interpretation throughout the Union. When referring to the concept of legal tender the Court considered Recommendation 2010/191/EU. The Court recalled that, although recommendations are not intended to be binding, they are among the legal acts of the Union and the Court may therefore take them into consideration where they provide useful guidance for the interpretation of the relevant provisions of Union law. See judgment of the Court of Justice of 26 January 2021, *Hessischer Rundfunk*, C-422/19 and C-423/19, EU:C:2021:63, paragraphs 45 and 48.

<sup>30</sup> See point 1(a) of 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).

on the legal tender of euro cash, which is currently being negotiated by the co-legislators, states that the mandatory acceptance of euro banknotes and coins is one of the key elements of the legal tender status of euro banknotes and coins<sup>31</sup>. Thus, to the extent that Article 39a(1) and (2) of the Constitution use wording different from their legal sources in Union law they potentially create regulatory content of their own, which would not be in line with the Union's exclusive competence in matters of monetary policy for the Member States whose currency is the euro<sup>32</sup>. In the light of the above, the ECB recommends that the provisions of Article 39a(1) and (2) of the Constitution guaranteeing the issuance of cash as legal tender and the right to make a payments in cash should either be deleted or, alternatively, amended to merely refer to the relevant provisions of Union law.

### 3.4 *Constitutional right to perform cash transactions at a bank*

3.4.1 The second sentence of Article 39a(2) of the Constitution<sup>33</sup> provides for a more targeted obligation of banks and branches of foreign banks to ensure that they perform cash transactions. The explanatory memorandum justifies this obligation *inter alia* based on the need to ensure access to cash as a precondition to be able to use cash as a means of payment<sup>34</sup>.

3.4.2 The ECB welcomes that the Constitutional Law aims to strengthen the availability of cash in Slovakia. Sufficient and effective access to cash is necessary to preserve the effectiveness of the legal tender status of cash. If there is neither sufficient nor effective access to cash, it will not be available as a means of payment. In this regard, the proposed regulation on the legal tender of euro cash includes an obligation for Member States to ensure sufficient and effective access to cash throughout their territory<sup>35</sup>.

3.4.3 However, the ECB is of the view that the scope and extent of the strengthened constitutional protection of the right to perform cash transactions at banks and branches of foreign banks should be further clarified. For example, it is not fully clear which operations would fall under the scope of the cash transactions, whether under the new constitutional regime banks have to perform cash transactions for anyone or for their clients only, or whether there are further conditions and limitations on the right to perform cash transactions in a bank or branch of a foreign bank<sup>36</sup>. The ECB therefore recommends that the laws adopted pursuant to Article 39a(3) of the Constitution clearly specify the

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<sup>31</sup> See Article 4(1) of the proposed regulation on the legal tender of euro cash.

<sup>32</sup> See paragraph 2.4 of Opinion CON/2022/15, paragraph 2.3 of Opinion CON/2023/27 and paragraph 2.2.6 of Opinion CON/2023/33. See also principle 16 of the final report of the Euro Legal Tender Expert Group (ELTEG) of 6 July 2022: 'The Member States should check thoroughly their national legislation for references to legal tender and repeal them or else, make sure that they are a) purely declaratory, referring to the applicable Union provisions as the applicable legal source, b) make no change to the wording of Article 128(1) TFEU or of other applicable EU provisions on the legal tender status of euro cash.'

<sup>33</sup> The second sentence of Article 39a(2) states as follows: 'The right to perform a financial transaction using cash in a bank or branch of a foreign bank is guaranteed.'

<sup>34</sup> The second explanatory memorandum states as follows: 'Given that the right to cash is almost inseparably linked to the right to conduct cash banking operations, the amending proposal further guarantees the right to conduct cash transactions at a bank or a branch of a foreign bank without restrictions that apply to other payment recipients. If banks did not dispense cash, for example, through ATMs, cash would gradually disappear, undermining the proposed constitutional right to cash.'

<sup>35</sup> The ECB has consistently welcomed legislative proposals aimed at ensuring access to cash in euro area Member States. See, for example, Opinion CON/2022/40 and Opinion CON/2023/25. See also paragraph 1.2 of Opinion CON/2023/31, in which the ECB particularly welcomes the measures laid down in the proposed regulation on the legal tender of euro cash regarding the need for Member States whose currency is the euro to ensure sufficient and effective access to cash.

<sup>36</sup> See also, in this respect, paragraphs 2.5 to 2.7 of Opinion CON/2023/25.

conditions and limitations applicable to the right to perform cash transactions in a bank or branch of a foreign bank.

This opinion will be published on EUR-Lex.

Done at Frankfurt am Main, 11 January 2023.

[signed]

*The President of the ECB*

Christine LAGARDE