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OPINION OF THE EUROPEAN CENTRAL BANK
of 5 February 2025
on indirect participants in, and access to, payment systems,
and a new exemption from the cash rule
(CON/2025/4)

Introduction and legal basis

On 6 January 2025 the European Central Bank (ECB) received a request from the Danish Financial Supervisory Authority (FSA) for an opinion on a draft proposal amending the Law on financial services, the Law on managers of alternative investment funds, the Law on investment associations, the Law on money laundering, the Law on fund brokers, the Law on capital markets, the Law on payments, the Law on insurance services and various other laws (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, Article 25.1 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB') and Article 2(1), second, third and fifth indents of Council Decision 98/415/EC¹, as certain provisions of the draft law relate to means of payment, Danmarks Nationalbank and payment and settlement systems. In accordance with Article 17.5, first sentence, 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 amends a total of 24 different laws in the financial field. This opinion focuses on three specific proposed amendments to the Law on capital markets² and the Law on payments³.

1.2 *Indirect participants in payments and securities settlement systems*

1.2.1 The draft law amends the definition of 'indirect participant' in payment and securities settlement systems under the Law on capital markets to provide that an indirect participant may be considered to be a participant if this is justified by a systemic risk, without however limiting the liability of the participant through which the indirect participant sends transfer orders to the system⁴. This provision transposes an option under Directive 98/26/EC of the European Parliament and of the Council⁵ (hereinafter the 'SFD') whereby Member States may, for the purposes of this Directive, consider an

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 Lov om kapitalmarkeder, *Lovbekendtgørelse nr. 198 af 26.2.2024*.

³ Lov om betalinger, *Lov nr. 53 af 18.1.2023*.

⁴ See Section 6(9) of the draft law, amending Section 3(23) of the Law on capital markets.

⁵ See Article 2, point (f), third paragraph, of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45).

indirect participant to be a participant where that is justified on the grounds of systemic risk, and on condition that the indirect participant is known to the system.

1.2.2 According to the interpretative notes to the draft law (hereinafter the 'interpretative notes'), Danmarks Nationalbank decided in 2020 to move settlement in Danish kroner from Danmarks Nationalbank's own system, Kronos2, to the ECB's corresponding services, i.e. the Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET)⁶. The move is planned to take place at Easter 2025. As a consequence, it is expected that a number of credit institutions that are today direct participants in Danmarks Nationalbank's systems will proceed to settle their payments as indirect participants in TARGET. This entails a need for clarification of when an indirect participant can be considered to be a participant in a payment system or securities settlement system. So far, participation by indirect participants in either a payment system or a securities settlement system has not constituted a systemic risk, but on the basis of the expected changes in the proportion of indirect participants in payment processing, it is now considered appropriate to implement the relevant provision of the SFD.

1.3 *Access to payment systems*

1.3.1 The Law on payments currently provides that the conditions for access to payment systems for payment service providers (PSPs) must be objective, non-discriminatory and proportional, so that these conditions do not prevent access to a greater extent than necessary to protect against specific risks such as settlement risks, operational risks and business risks and to ensure the financial and operational stability of the payment system⁷.

1.3.2 The draft law proposes to amend this provision to provide that the conditions for access to payment systems for PSPs must be objective, non-discriminatory and proportional, and that these conditions may not prevent access to a greater extent than is necessary to protect against specific risks such as settlement risks, operational risks and business risks and to secure the payment system financial and operational stability⁸.

1.3.3 According to the interpretative notes⁹, the draft law is designed in accordance with a particular provision of the Proposal for a Regulation of the European Parliament and of the Council on payment services in the internal market and amending Regulation (EU) No 1093/2010¹⁰ (hereinafter the 'proposed regulation on payment services') clarifying the duty to provide access to payment systems¹¹. Moreover, this draft amendment is proposed as a part of a package of initiatives that aim to secure efficient competition in the payment area, where amendment of the access to payment systems is seen to secure fair competition terms for the redemption of, for example, Dankort transactions¹². In this respect, the interpretative notes state that the duty to provide access to payment systems includes the party or parties that are responsible for a payment system, where that

6 See pages 206 and 207 of the general comments in the interpretative notes.

7 See Section 64(1), first sentence, of the Law on payments.

8 See Section 10(4) and (5) of the draft law, amending Section 64(1), point (1), and inserting a new sentence after Section 64(1), point (1), of the Law on payments.

9 See page 238 of the general comments in the interpretative notes.

10 COM/2023/367 final.

11 See Article 31(1) and (3) of the proposed regulation on payment services.

12 The Dankort is Denmark's national payment card.

party or parties does not itself issue payment cards, but, for example, cooperates with banks to issue cards to bank customers¹³. The interpretative notes go on to state that the draft amendment entails that the payment system cannot reserve the access to sole redemption to itself¹⁴. The Ministry of Business takes the view that the clarification of the legal situation in Denmark will thus correspond to the upcoming change in the Union, if the proposed regulation on payment services is adopted¹⁵.

1.4 *New exemption from the cash rule*

1.4.1 The draft law¹⁶ proposes to amend the ‘cash rule’ under the Law on payments¹⁷, which, as a general rule, obliges payment recipients to accept payments in cash, subject, however, to the Law on money laundering¹⁸, which contains a threshold limit for payments in cash of 15 000 Danish kroner (approximately EUR 2 021). Under the currently applicable cash rule, vendors are obliged to accept payments in cash in respect of physical transactions, except for specifically defined cases. The latter include distance sales – for example, via the internet – and sales via self-service vending machines¹⁹. Moreover, in areas with a particularly high risk of robberies, the cash rule only applies between the hours of 06:00 and 20:00²⁰. Under certain conditions, the cash rule also does not apply for payment recipients taking part in festivals, town celebrations and similar events of a temporary nature²¹. The cash rule can also be deviated from as regards business-to-business payments²². In such cases it is left to the parties’ freedom of contract to agree on the applicable means of payment²³.

1.4.2 The draft law introduces a new exemption to the cash rule, whereby a municipal board can grant an exemption from the obligation to accept payments in cash to companies and institutions that handle tasks in the field of children and youth, which refers to companies and institutions that mainly cater for children and young people including, inter alia, daycare centres, elementary schools and childminding programs, as well as free primary schools and post-secondary schools²⁴. The municipal board must publish information detailing the institutions that have been granted such an exemption. Companies and institutions that have been granted an exemption are required to inform consumers about this in a clear manner. A municipal board may grant such exemptions to companies and institutions in their municipality and on a regional basis. Appeals against decisions on exemptions may be made to the Appeals Board²⁵, which is an agency under the Ministry of Social Affairs and Housing that decides on complaints, coordinates practices and carries out investigations into developments mainly in the social and employment field.

13 The ECB understands that this is the case for the company Nets, which issues the Dankort.

14 See page 239 of the general comments in the interpretative notes.

15 See page 238 of the general comments in the interpretative notes.

16 See Section 10(7) of the draft law, inserting a new Section 81(6) into the Law on payments.

17 See Article 81(1) of the Law on payments.

18 See Article 5(1) of the Law on money laundering, *Lovbekendtgørelse nr. 807 af 21.6.2024*.

19 See Article 81(2) of the Law on payments.

20 See Article 81(3) of the Law on payments.

21 See Article 81(5) of the Law on payments.

22 See Article 81(4) of the Law on payments.

23 See paragraph 1.2 of Opinion CON/2021/32. All ECB opinions are published on EUR-Lex.

24 See page 244 of the general comments in the interpretative notes.

25 See page 146 of the specific comments in the interpretative notes.

1.4.3 The interpretative notes state that the individual municipal boards are responsible for the affairs of the municipalities and therefore have in-depth knowledge of the individual companies and institutions that handle tasks in the field of children and young people, as well as any special needs of the citizens who use them²⁶. Against this background the municipal boards will be suitable to assess the advantages and disadvantages of granting an exemption from the cash rule to such individual companies or institutions. It is argued that such an exemption should be granted to institutions and companies in the field of children and young people, since a number of municipalities have implemented digital payment solutions in this field to ensure that staff and users – i.e. children, young people and their parents – do not need to handle cash. An exemption from the cash rule will ensure that these companies and institutions are not obliged to keep cash boxes etc., which can ease burdens and create greater security for staff and users, who are children, young people and their parents. The interpretative notes also explain that, in order not to treat private institutions in the field of children and young people differently from municipal institutions and companies, the exemption scheme should include such private institutions as they are comparable to those municipal institutions and companies. Moreover, when granting an exemption, the municipal boards will have to weigh up safety and costs considerations against the consideration of citizens' opportunity to access the services provided by the companies and institutions concerned. The municipal boards will thus have to consider that the exemptions do not hinder the citizens' access to the institution or company, for instance because a citizen does not have access to electronic means of payment²⁷.

2. General observations

- 2.1 In view of the notice given to the Council by the Danish Government on 3 November 1993, Denmark has an exemption from participating in the third stage of economic and monetary union. The effect of this exemption is that all articles and provisions of the Treaties and the Statute of the ESCB referring to a derogation are applicable to Denmark. As for the abrogation of the exemption, the procedure referred to in Article 140 of the Treaty on the abrogation of derogations of the Member States fulfilling the necessary conditions regarding the achievement of economic and monetary union are only to be initiated at the request of Denmark²⁸.
- 2.2 In accordance with Article 42.2 of the Statute of the ESCB, Danmarks Nationalbank retains its powers in the field of monetary policy according to national law. However, Article 131 of the Treaty and Article 14.1 of the Statute of the ESCB, in accordance with Article 139(2) of the Treaty and Article 42.1 of the Statute of the ESCB, also apply to Denmark, so that Denmark is required to ensure that its national legislation, including Danmarks Nationalbank's statutes, is compatible with the Treaties and the Statute of the ESCB. Furthermore, as Article 130 of the Treaty, and Article 7 and Article 14.2 of the Statute of the ESCB, in accordance with Article 139(2) of the Treaty and Articles 42.1 and 42.4 of the Statute of the ESCB, also apply to Denmark, Danish legislation must also fulfil the requirements of central bank independence²⁹.

26 See page 245 of the general comments in the interpretative notes.

27 See page 245 of the general comments in the interpretative notes.

28 See paragraphs 1 and 2 of Protocol (No 16) to the Treaty on certain provisions relating to Denmark.

29 See page 17 of the ECB Convergence Report (June 2022), available on the ECB's website at www.ecb.europa.eu.

- 2.3 Article 127(2), fourth indent, of the Treaty, which provides that a basic task to be carried out through the ESCB is to promote the smooth operation of payment systems, does not apply to Member States with a derogation³⁰. In addition, Article 22 of the Statute of the ESCB, which provides that the ECB and the national central banks (NCBs) may provide facilities, and the ECB may make regulations, to ensure efficient and sound systems, does not apply to Member States with a derogation or to NCBs whose currency is not the euro³¹. Consequently, according to Article 4 of Guideline (EU) 2022/912 (ECB/2022/8)³², the NCBs of Member States whose currency is not the euro may only connect to TARGET, which encompasses the real-time gross settlement (RTGS) service T2, owned and operated by the Eurosystem, if they conclude an agreement with the Eurosystem central banks. Danmarks Nationalbank has concluded such an agreement, on the basis of which TARGET-Danmark has been established as Danmarks Nationalbank's TARGET component system³³.
- 2.4 On 21 March 2024 the ECB and Danmarks Nationalbank announced³⁴ that the ECB and Danmarks Nationalbank had signed an agreement for Denmark to join the Eurosystem's T2 wholesale payments service and the TARGET Instant Payment Settlement (TIPS) service, which are part of TARGET. This will facilitate the settlement of high-value payments in euro and Danish kroner in the T2 service and will make the Danish krone the third currency available for settlement in TIPS after the Swedish krona was included earlier in 2024. Danish financial market participants are concluding the testing of both services in preparation for the launch in April 2025. Danmarks Nationalbank already uses the T2 service for settling payments in euro and has been using the TARGET2-Securities (T2S) platform for settlement of securities in both euro and kroner since October 2018. The inclusion of the Danish krone in the Eurosystem's payment services will enable market participants in Denmark to use all three TARGET services to settle all payments and securities transactions in their national currency and to benefit from optimised liquidity management.
- 2.5 The ECB takes due account in this opinion of the legal culture and legislative technique in Denmark, according to which legislative proposals on draft laws are accompanied by interpretative notes. The ECB understands that once a draft law has been adopted, the interpretative notes are of essential importance for the practical application of the adopted law, representing a very important tool for the courts to understand the intention of the legislator with respect to the adopted law, allowing the courts to apply the law in accordance therewith³⁵.

30 See Article 139(2), point (c), of the Treaty; see also Article 42.1, in conjunction with Article 3.1, fourth indent, of the Statute of the ESCB.

31 See Articles 42.1 and 42.4 of the Statute of the ESCB.

32 Guideline (EU) 2022/912 of the European Central Bank of 24 February 2022 on a new-generation Trans-European Automated Real-time Gross Settlement Express Transfer system (TARGET) and repealing Guideline ECB/2012/27 (ECB/2022/8) (OJ L 163, 17.6.2022, p. 84).

33 See 'New payment systems in the pipeline' under 'Safe payments' on Danmarks Nationalbank's website at www.nationalbanken.dk/en/what-we-do.

34 See ECB press release of 21 March 2024, 'Denmark joins T2 and TIPS to fully integrate Danish krone in Eurosystem's payment services', available on the ECB's website at www.ecb.europa.eu.

35 See Justitsministeriets vejledning om lov kvalitet (Guide on Law Quality), p. 130, by the Ministry of Justice, available at www.lovkvalitet.dk (in Danish only).

3. Specific observations regarding the draft law's provisions concerning payment and securities settlement systems

3.1 *Indirect participants in payments and securities settlement systems*

3.1.1 The ECB understands that the draft law's amendment of the definition of 'indirect participants' in payment and securities settlement systems under the Law on capital markets is motivated by the imminent migration from Kronos2 to T2 and TIPS of settlement of Danish currency transactions. While the specific accounts for such non-euro currencies are technically established and function on an underlying technical central liquidity management, RTGS and common components for Eurosystem TARGET services, they remain within the legal perimeter of the payment system operated by Danmarks Nationalbank, which is connected to T2 and TIPS via agreements concluded with the Eurosystem central banks in March 2024. In this respect, the migration does not have legal implications for the Danish participants in Danmarks Nationalbank's systems, which will continue to maintain their legal relationship with Danmarks Nationalbank.

3.1.2 However, with the requirements for direct participants to connect to the European Single Market Infrastructure Gateway (ESMIG), which is the Eurosystem Single Market infrastructure gateway for all users who want to access and communicate with TARGET Services, Danmarks Nationalbank expects that a number of its current direct participants will request to become indirect participants in Danmarks Nationalbank's systems. Against this backdrop, the ECB agrees that it is justified on the grounds of systemic risk that indirect participants are considered to be participants under the Danish legislation transposing the SFD. The ECB therefore welcomes the draft law's amendment of the definition of 'indirect participants' in payment and securities settlement systems and the enhanced legal clarity that this amendment will bring upon its adoption.

3.1.3 The ECB understands that this provision in the draft law is without prejudice to the definitions and requirements for participation in TARGET, as set out in Guideline (EU) 2022/912 (ECB/2022/8).

3.2 *Access to payment systems*

3.2.1 Although the draft law's amendment concerning access to payment systems purports to transpose certain provisions of the proposed regulation on payment services, there are, in fact, a number of discrepancies between the draft law and the proposed regulation on payment services.

3.2.2 First, the proposed regulation on payment services does not apply to payment services provided within the Union by NCBs, including Danmarks Nationalbank, when acting in their capacity as monetary authority³⁶. This provision is, however, not replicated in the draft law, with the consequence that the draft law appears to apply to Danmarks Nationalbank³⁷, including in connection with

³⁶ See Article 2(1), point (d), of the proposed regulation on payment services.

³⁷ According to the currently applicable Section 64(2), point 1, of the Law on payments, the requirements for access conditions do not apply to payment systems designated under the SFD, which includes TARGET-Danmark. However, the exemption is to be repealed with effect from 9 April 2025, cf. Section 18(3) of the Law on payments, no. 1666 of 30 December 2024, in line with the amendment to Article 35 of 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) made by Regulation (EU) 2024/886 Regulation (EU) 2024/886 of the European Parliament and of the Council of 13 March 2024 amending Regulations (EU) No 260/2012 and (EU) 2021/1230 and Directives 98/26/EC and (EU) 2015/2366 as regards instant credit transfers in euro (OJ L, 2024/886, 19.3.2024, ELI: <http://data.europa.eu/eli/reg/2024/886/oj>).

Danmarks Nationalbank's function, as monetary authority, to operate its component of the TARGET system, TARGET-Danmark.

- 3.2.3 Second, the draft law has been formulated in a different manner from the proposed regulation on payment services, giving rise to some ambiguity as to how it is to be interpreted. In particular, while the proposed regulation requires payment system operators to have in place objective, non-discriminatory, transparent and proportionate rules on access to a payment system by authorised or registered PSPs that are legal persons³⁸, the draft law requires payment systems to provide PSPs access to their payment systems on objective, non-discriminatory and proportional conditions. It is unclear whether the draft law, so formulated, would require Danmarks Nationalbank and other payment system operators in Denmark not only to have in place objective, non-discriminatory and proportional conditions governing access to their systems, but would also place them under an obligation to provide PSPs with access to their payment systems. In this context, it is also noted that the draft law does not replicate the provisions of the proposed regulation on payment services³⁹ whereby (1) upon receiving an application for participation by a payment service provider, a payment system operator is to assess the relevant risks of granting the applicant payment service provider access to the system, (2) a payment system operator should only refuse participation to an applicant payment service provider where the applicant poses risks to the system, and (3) the payment system operator is to notify that applicant payment service provider in writing as to whether the request for participation is granted or refused and must provide full reasons for any refusal.
- 3.2.4 As noted above, the proposed regulation on payment services has not yet been adopted by the Union legislator. The proposed regulation will have primacy over the draft law (once enacted) and therefore the draft law must be read and applied in conjunction with the regulation on payment services when the latter is adopted⁴⁰. Following the adoption of the proposed regulation on payment services, the draft law should be subject to a detailed review to ensure its compliance with the regulation⁴¹. In this respect, legislating in advance of the adoption of Union legislation entails the risk that the Danish legislator may need to further adapt national legislation in the event of discrepancies between Union and national legislation, taking account of the supremacy of Union law over national law. It is also noted that the proposed regulation on payment services states that the Union rules on payment services should be further harmonised, by incorporating rules governing the conduct of the payment services activity, including the rights and obligations of the parties involved, in a Regulation. Such rules should be clarified and more detailed, thus minimising margins of interpretation⁴². With this in mind, it is questionable whether there is any national possibility for Member States to transpose provisions of the proposed regulation.
- 3.2.5 In its opinion on the proposed regulation on payment services, the ECB welcomed, in principle, the intention of the Union legislator that payment system operators should ensure a level playing field for all PSPs accessing payment systems. The ECB particularly welcomed the requirement for payment system operators across the Union to have in place objective, non-discriminatory,

38 See Article 31(1) of the proposed regulation on payment services.

39 See Article 31(3) of the proposed regulation on payment services.

40 See paragraph 2 of Opinion CON/2014/40 and paragraph 6.4 of Opinion CON/2014/60.

41 See paragraph 3 of Opinion CON/2014/40.

42 See recital 4 of the proposed regulation on payment services.

transparent and proportionate rules on access to a payment system, coupled with clarifications on admission and risk assessment procedures. However, as regards the euro area, the ECB noted that it should be for the ECB to adopt the access criteria in respect of Eurosystem-operated payment systems, as well as the relevant conditions, including remuneration, and limits. Moreover, the ECB considers that, in view of the ESCB's independent performance of its basic monetary policy and payment system tasks under Article 130 of the Treaty, the proposed requirements should not apply to payment systems overseen by ESCB central banks. The reason for this is that the oversight frameworks of ESCB central banks, which are currently applicable to payment systems, already cater, *inter alia*, for non-discriminatory access to payment systems.⁴³

- 3.2.6 As previously noted by the ECB to the Danish authorities, in order for TARGET-Danmark to continue settling payments in TARGET, Danmarks Nationalbank must be able to abide at all times by the access criteria defined by the Eurosystem⁴⁴. In addition, as concerns Danmarks Nationalbank's oversight competence in respect of national payment systems⁴⁵, Danmarks Nationalbank is the only authority that oversees Danish payment systems – a task which includes ensuring that there is fair and open access to such systems. Danmarks Nationalbank performs the oversight task based on the international standards set out in the Principles for Financial Market Infrastructures⁴⁶. Thus, Danmarks Nationalbank ensures objective, non-discriminatory and proportionate access to KRONOS2, TARGET-Danmark and the other payment systems established in Denmark, such as the retail payment system operated by Finans Danmark, the Danish Bankers' Association. The ECB notes that as the oversight of payment systems is typically a central bank task, Danmarks Nationalbank should be able to continue exercising this task in an independent manner.
- 3.2.7 Against this backdrop, the Danish authorities are invited to further reflect on whether and how to regulate access to payment systems, taking account of the competences of Danmarks Nationalbank.

4. Specific observations regarding the draft law's provisions concerning the cash rule

- 4.1 Cash continues to play an important role in society irrespective of the fact that electronic payment instruments are increasingly used for retail payments in Member States, including Denmark⁴⁷. Cash is generally appreciated as a payment instrument because it is widely accepted, fast and facilitates control over the payer's spending. It is currently the only payment instrument that allows citizens to settle a transaction in central bank money, which is also settled instantly⁴⁸, while, importantly,

43 See paragraph 2.1.6 of Opinion CON/2024/13 of the European Central Bank of 30 April 2024 on a proposed Regulation and Directive on payment and electronic money services (OJ C, C/2024/3869, 19.6.2024, ELI: <http://data.europa.eu/eli/C/2024/3869/oj>).

44 See paragraph 4.5 of Opinion CON/2024/28.

45 See Article 1 of the Law on Danmarks Nationalbank, according to which Danmarks Nationalbank must maintain a safe and secure currency system and facilitate and regulate the traffic in money. See also Article 212(3) of the Law on capital markets.

46 Principles for Financial Market Infrastructures, April 2012, available on the Bank for International Settlements' website at www.bis.org.

47 See paragraph 2.4 of Opinion CON/2017/8, paragraph 2.4 of Opinion CON/2020/33 and paragraph 2.4 of Opinion CON/2024/2.

48 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 Opinion CON/2021/18, paragraph 2.1 of Opinion CON/2023/7, paragraph 2.1 of Opinion CON/2023/13 and paragraph 2.1 of Opinion CON/2023/39.

ensuring privacy. Moreover, it does not carry the legal possibility of imposing a fee for the use thereof. Furthermore, cash payments are not subject to daily or weekly payment limits set by entities providing underlying payment services⁴⁹. In addition, cash payments also facilitate the inclusion of the entire population in the economy by allowing citizens to settle a wide range of payment transactions in this way, thus ensuring freedom of choice as to the method of payment for all citizens⁵⁰. The ability to pay in cash remains particularly important for all those citizens who, for various legitimate reasons, prefer to use cash due to its unique features, rather than other payment instruments. Also, cash remains important especially for those who 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 services⁵¹. The practical use of and handling of cash by children and young people could be a part of their financial education enabling them to be better equipped for their adult life, recalling that financial literacy means the knowledge and skills needed to make important financial decisions⁵². The ECB surveys payment habits in the euro area biennially. The latest of these surveys revealed that around 60 % of the euro area citizens want to have the freedom to use cash at the point of sale⁵³. Finally, a critical mass of cash in circulation is necessary to maintain the business case for third parties involved in the cash cycle. Thus, the imposition of limitations on cash payment or the discontinuance of a denomination could lead to a situation in which the unit costs of cash deter third parties from continuing to supply cash. This would have the consequence of endangering the contingency feature of cash if the cash infrastructure and cash suppliers were to disappear altogether or were insufficient to cater for an unexpected surge in cash demand.

- 4.2 These characteristics of cash are also acknowledged by the European Commission in its Retail Payments Strategy, which, while promoting the emergence of digital payments to offer more options to consumers, will continue to safeguard the legal tender of euro cash and the availability of central bank money⁵⁴.
- 4.3 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 cash⁵⁵.
- 4.4 *New exemption from the cash rule*
- 4.4.1 The purpose of the proposal for a new exemption from the cash rule under the draft law is to empower municipal boards to exempt companies and institutions that handle tasks in the field of children and youth from the obligation to accept payments in cash.

49 See paragraph 2.1 of Opinion CON/2023/39.

50 See paragraphs 2.4 and 3.1 of Opinion CON/2017/8, paragraph 2.7 of Opinion CON/2017/40, paragraph 2.6 of Opinion CON/2019/4, paragraph 7.2.1 of Opinion CON/2021/9, paragraphs 2.1 to 2.3 of Opinion CON/2021/18, paragraph 2.3 of Opinion CON/2021/38, paragraph 2.1 of Opinion CON/2023/13 and paragraph 2.1 of Opinion CON/2023/39.

51 See paragraph 1.5 of Opinion CON/2019/41 and paragraph 2.1 of Opinion CON/2023/39.

52 See page headed 'Financial literacy' on the Commission's website at www.commission.europa.eu. The Organisation for Economic Co-operation and Development (OECD) has made recommendations as to the importance of financial literacy skills for current and future generations of youth to help them face contemporary financial challenges, see 'Recommendation of the Council on Financial Literacy', available on the OECD's website at www.oecd.org.

53 See European Central Bank, Study on the payment attitudes of consumers in the euro area (SPACE), available on the ECB's website at www.ecb.europa.eu.

54 See COM(2020) 592 final.

55 See paragraph 2.6 of Opinion CON/2024/2.

- 4.4.2 Under the Treaty, the ECB has the exclusive right to authorise the issue of euro banknotes within the Union⁵⁶. The euro banknotes issued by the ECB and the NCBs of the euro area are the only banknotes with legal tender status within the euro area⁵⁷.
- 4.4.3 If Denmark were to initiate an abrogation of its exemption status in accordance with Protocol (No 16) of the Treaty on certain provisions relating to Denmark, the draft law would enable the introduction of restrictions to the obligation to accept euro banknotes as a means of payment, which would be assessed against the relevant Union law, as set out below⁵⁸.
- 4.4.4 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 2010/191⁵⁹, 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 purposes⁶⁰.
- 4.4.5 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 Union⁶¹. 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. 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 coins⁶² (hereinafter the 'proposed regulation on the legal tender of euro cash'), which would establish rules on the legal tender of euro banknotes and coins in binding Union secondary law. The explanatory memorandum to the proposed regulation on the legal tender of euro cash states that discussions within the Euro 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 area⁶³. These

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

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

58 See paragraph 3.1 of Opinion CON/2023/39.

59 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).

60 See judgment of 26 January 2021, *Hessischer Rundfunk*, joined cases C-422/19 and C-423/19, ECLI:EU:C:2021:63, paragraphs 46 to 49.

61 See judgment of 26 January 2021, *Hessischer Rundfunk*, joined cases C-422/19 and C-423/19, ECLI:EU:C:2021:63, paragraph 45.

62 COM(2023) 364 final.

63 See Section 3 of the explanatory memorandum to 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.

differences would justify establishing rules on the legal tender of euro cash in a regulation adopted under Article 133 of the Treaty⁶⁴.

- 4.4.6 The Union legislature's exclusive competence precludes any competence on the part of the Member States in this matter, unless they are acting on the basis that they have been empowered by the Union to do so or for the implementation of Union acts⁶⁵.
- 4.4.7 However, the Court further clarified that the status of legal tender calls 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 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 measures falling within one of the Member State's competences; for instance, a Member State may, based on its competence to organise its public administration, 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 objectives⁶⁶.
- 4.4.8 The Court has established that restrictions of the obligation to accept euro banknotes as a means of payment in particular require that the legislation (1) does not have the object or effect of establishing legal rules governing the status of legal tender of euro banknotes; (2) 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; (3) has been adopted for reasons of public interest; (4) only entails a limitation in on payments in cash that does not go beyond what is necessary in order to achieve the public interest objective⁶⁷. More specifically regarding criterion number (3), on public interest, the Court specified that 'the limitations on payments in notes and coins denominated in euro

64 The ECB has welcomed the proposed regulation and strongly supported the establishment of rules on the legal tender status of euro banknotes and coins in secondary Union law, as well as the measures laid down in the proposed regulation regarding access to cash. See paragraphs 1.1 and 1.2 of Opinion CON/2023/31 of the European Central Bank of 13 October 2023 on a proposal for a regulation on the legal tender of euro banknotes and coins (OJ C, C/2023/1355, 1.12.2023, ELI: <http://data.europa.eu/eli/C/2023/1355/oj>).

65 See judgment of 26 January 2021, *Hessischer Rundfunk*, joined cases C-422/19 and C-423/19, ECLI:EU:C:2021:63, paragraphs 50 to 52.

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

67 See judgment of 26 January 2021, *Hessischer Rundfunk*, joined cases C-422/19 and C-423/19, ECLI:EU:C:2021:63, paragraph 78.

may, in practice, be justified just as much on grounds of public policy relating to security or the fight against crime as by the public interest in ensuring the efficient organisation of payments in society'⁶⁸.

4.4.9 Regarding the proportionality of a restriction of the obligation to accept euro banknotes, the Court requires not only that the measure is appropriate for attaining the public interest objective pursued, but also that it does not go beyond what is necessary in order to achieve that objective. The ECB has opined on whether limitations may be considered appropriate⁶⁹. In particular, the ECB has noted that the broader and more general a limitation is, the stricter should be the interpretation of the requirement for the limitation to be proportionate to the objective pursued⁷⁰. 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 considered⁷¹.

4.4.10 The ECB notes that the draft law does not establish a cash restriction. Rather, it authorises municipal councils to introduce cash restrictions by granting exemptions from the cash rule to individual companies or institutions. Consequently, it remains difficult to assess the draft law against the criteria defined by the Court and summarised in the previous paragraphs, as these criteria are designed to apply to specific cash restrictions. Given that the exemptions to be granted by the municipal councils specifically focus on payments to be made to companies and institutions that handle tasks in the field of children and youth, the draft law cannot be said to have the objective or the effect of amending the legal rules governing the status of legal tender of euro banknotes or coins. Moreover, the draft law does not lead, in law or in fact, to the abolition of banknotes in Denmark, in particular by calling into question the possibility, as a general rule, of discharging a payment obligation in cash⁷².

4.4.11 According to the explanatory notes, the draft law is proposed in order to ease burdens and create greater security for staff and users⁷³. The public policy grounds relating to security and the public interest in ensuring the efficient organisation of payments in society are in principle amongst the legitimate public interest reasons that the Court has identified as justifying a limitation on the obligation to accept cash. The Court has also established that, for a cash restriction to be proportionate, the measure must be appropriate for attaining the public interest objective pursued and not go beyond what is necessary to achieve that objective. Whether a specific exemption from the cash rule granted by a municipal council to certain companies and institutions pursues a public interest objective and is proportionate to that objective depends on the justification provided by the municipal council in the decision by which it will grant the exemption. In other words, given that the discretion under the draft law to impose concrete limitations on the use of cash payments lies, in

68 See judgment of 26 January 2021, *Hessischer Rundfunk*, joined cases C-422/19 and C-423/19, ECLI:EU:C:2021:63, paragraph 66.

69 See paragraph 4 of Opinion CON/2022/5 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 (OJ C 210, 25.5.2022, p. 15).

70 See paragraph 2.7 of Opinion CON/2017/8, paragraph 2.11 of Opinion CON/2021/18 and paragraph 2.8 of Opinion CON/2023/39.

71 See paragraph 2.7 of Opinion CON/2017/8, paragraph 2.7 of Opinion CON/2019/39 and paragraph 2.8 of Opinion CON/2023/39.

72 See paragraph 4.6 of Opinion CON/2022/5 and paragraph 3.2 of Opinion CON/2023/39.

73 See page 245 of the general comments to the interpretative notes.

practice, with the municipal boards, it is not feasible, at this time, to make any definitive conclusions regarding the limitations to be imposed by the municipal boards.

This opinion will be published on EUR-Lex.

Done at Frankfurt am Main, 5 February 2025.

[signed]

The President of the ECB

Christine LAGARDE