



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

## OPINION OF THE EUROPEAN CENTRAL BANK

of 22 May 2017

on limitations to cash payments

(CON/2017/18)

### Introduction and legal basis

On 23 March 2017, the European Central Bank (ECB) received a request from the Portuguese Assembly of the Republic (hereinafter the 'Assembly') for an opinion on two draft laws that aim to introduce limitations to cash payments above certain thresholds (hereinafter the 'draft laws'). The draft laws were submitted to the Assembly by two parliamentary groups, namely the *Bloco de Esquerda* (the Left-Wing Block) and *Partido Socialista* (Socialist Party).

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>1</sup>, as the draft laws relate 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 laws**

- 1.1. The draft law submitted by the Left-Wing Block (hereinafter the 'first draft law') amends the Portuguese General Tax Law, which was adopted by Decree-Law No 398/98, of 17 December 1998<sup>2</sup>. The main purpose of the first draft law is to require the use of payment methods, namely bank transfers, cheques and direct debits, that identify the recipient, for sums equal to or greater than EUR 10 000. This restriction applies to all types of contracts, whether entered into in exchange for payment or free of charge.
- 1.2. As clarified in the explanatory memorandum to the first draft law, the purpose of the first draft law is to combat the use of offshore jurisdictions, which have become havens for tax evasion, tax avoidance and money laundering. Within this context, it is considered essential to limit the accumulation of cash to the extent possible, including its use in payment transactions.
- 1.3. The draft law submitted by the Socialist Party (hereinafter the 'second draft law') introduces a new autonomous framework that aims to prohibit cash payments above or equal to EUR 3 000 or its equivalent in foreign currency. A higher limit of EUR 15 000 (or its equivalent in foreign currency) would apply to payments made by non-residents, if the person making the payment is not acting as

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<sup>1</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).

<sup>2</sup> *Diário da República* No 290, Series I-A, of 17 December 1998.

a business person or commercial dealer. The second draft law also prohibits cash payments for taxes totalling more than EUR 500.

- 1.4. The second draft law introduces three exceptions to the general cash payments prohibition. These relate to (i) transactions with credit institutions and financial companies; (ii) transactions with public entities; and (iii) payments resulting from court orders or decisions. The second draft law also establishes a sanctioning regime, according to which a fine corresponding to 25 % of the amount paid in cash would be applied if the prohibition is not complied with. Furthermore, and in addition to this fine, if the improperly received cash has not been declared for tax purposes, the corresponding payable tax amount would be increased by 5 %.
- 1.5. As clarified in the explanatory memorandum to the second draft law, the purpose of the second draft law is to combat tax fraud, tax evasion and money laundering. Against this backdrop, it proposes limits to the use of cash as a means of payment.
- 1.6. Both of the draft laws explicitly state that they also apply to payments above the respective thresholds laid down in the draft laws, irrespective of whether the transactions in question are made in a single operation or in several related transactions.

## **2. General observations**

- 2.1 The Commission's Recommendation of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins<sup>3</sup> (hereinafter the 'Commission Recommendation') 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 the Commission Recommendation explicitly addresses whether, nor to what extent, it may be permissible to introduce a more general limitation to the obligation to accept euro cash payments. Therefore, Union law must be interpreted in order to ascertain the conditions that a limitation on payments in euro notes and coins should fulfil, including the conditions that should be fulfilled to comply with the legal tender status of euro banknotes and coins when general limitations to the obligation to accept cash payments are introduced.
- 2.2 Without prejudice to the specific considerations in paragraphs 3.1. to 3.8, both draft laws, in their general provisions, must comply with Union law. In this context, recital 19 of Council Regulation (EC) No 974/98<sup>4</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>5</sup>, should be taken into account. The ECB considers that other lawful means for the settlement of monetary debts, which ensure similar benefits to those of cash, are generally available in Portugal for business involving transactions with consumers.

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<sup>3</sup> OJ L 83, 30.3.2010, p 70.

<sup>4</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>5</sup> See, for example, Opinions CON/2013/18, CON/2014/4 and CON/2014/37. All ECB opinions are published on the ECB's website at [www.ecb.europa.eu](http://www.ecb.europa.eu).

- 2.3 In this respect, the ECB notes that Directive 2014/92/EU of the European Parliament and of the Council<sup>6</sup>, has made it easier for Union citizens to obtain payment accounts and related electronic payment services as alternatives to cash<sup>7</sup>. In Portugal, Decree-Law 27-C/2000, of 10 March, also aims to create the conditions for making a minimum set of banking services accessible to all citizens.
- 2.4 The ECB also acknowledges that the draft laws' objectives of combating tax evasion and money laundering may, in general, constitute 'public reasons' justifying the establishment of limitations on cash payments, but any limitation needs to comply with the legal tender status of euro banknotes.
- 2.5 Limitations on cash payments should, therefore, 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 second draft law also affect transactions between natural persons and involve payments for relatively small amounts. Any negative impact of the proposed limitations should therefore be carefully weighed against the anticipated public benefits. When considering whether a limitation is proportionate, the adverse impact of the limitation in question should always be considered, as well as whether alternative measures could be adopted that would fulfil the relevant objective and have a less adverse impact<sup>8</sup>.
- 2.6 Furthermore, it should be borne in mind that the ability to pay in cash remains particularly important for certain groups in society that, for various legitimate reasons, prefer to use cash rather than other payment instruments. Cash is generally also appreciated as a payment instrument because it is widely accepted, fast and facilitates control over the payer's spending. Moreover, it is a means of payment that allows citizens to instantly settle a transaction in central bank money and at face value, without the legal possibility to impose a fee for the use of this means of payment. Additionally, cash payments facilitate the inclusion of the entire population in the economy by allowing it to settle any kind of financial transaction in this way.

### **3. Specific observations**

- 3.1 The explanatory memoranda to the draft laws do not mention the social impact of the proposed limitations on cash payments. Given that limitations are to be placed on transactions between natural persons, an impact assessment might be useful to assess any negative impact of the proposed limitations against the anticipated public benefits. Furthermore, establishing a cash limit for all transactions between private individuals (as opposed to only sector-specific cash limitations over taxable transactions) does not mitigate the risk of tax evasion as in many circumstances such transactions are not taxable. Instead, it only makes it more difficult to settle legitimate private

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<sup>6</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>7</sup> Within the framework previously created by Directive 2007/64/EU, 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, which introduced the legal basis for the creation of an internal market for payments within the Union and allowed for the creation of the Single Euro Payments Area – "SEPA").

<sup>8</sup> See, for example, paragraph 2.3 of Opinion CON/2014/4, paragraph 2.3 of Opinion CON/2014/37 and paragraphs 2.6 and 2.7 of Opinion CON/2017/8.

- transactions using cash as a means of payment, thus endangering the concept of legal tender enshrined in the Treaty.
- 3.2 In particular, the EUR 3 000 limit on cash payments proposed by the second draft law needs to take into account the advantages of having limits on cash payments in place and the potential inconvenience thereof for citizens' regular transactions in certain market segments. Setting the limitation at this level may make it difficult to implement the limit in practice. In this regard, it should be noted that Directive (EU) 2015/849 of the European Parliament and of the Council<sup>9</sup>, whilst confirming the vulnerability of large cash payments to money laundering and terrorist financing, nevertheless applied customer due diligence measures to cash payments of EUR 10 000 or more. This implies that the draft laws should establish a proportionate threshold for limits to cash payments, taking into account the objectives of such limits. Regarding the second draft law, there seems to be no justification as to why a different standard should be established for payments made by non-residents, which seems to discriminate against payments made by residents.
- 3.3 The ECB considers that a degree of flexibility should be introduced in the draft laws by, for example, allowing the delivery and receipt of cash payments for compelling reasons or for reasons that are outside the individual's control<sup>10</sup>, such as where no payment service provider is available at the place or time of the payment. It might also be advisable to allow cash transactions above the defined thresholds as long as the parties are able to ensure that the payment is traceable by identifying the amount, the reason for the transaction and the parties involved.
- 3.4 It is suggested that the concepts of 'several apparently related operations' under the first draft law and of 'all payments associated with the sale of goods or provision of services' being 'considered on a joint basis, even when they do not exceed the limit when considered separately' under the second draft law<sup>11</sup>, should be further elaborated in order to provide clearer criteria for identifying precisely which operations and payments fall within the scope of the draft laws.
- 3.5 The prohibition under Article 1(4) of the second draft law regarding cash payments for taxes totalling over more than EUR 500 does not seem to be aligned with the exemption from the prohibition of cash payments under Article 2(b) of the second draft law for transactions with public entities<sup>12</sup>, since tax payments are typically made to public entities.
- 3.6 The sanctioning regime established by the second draft law seems excessive and, in particular, the fine of 25 % of the amount paid<sup>13</sup> appears disproportionately high. The ECB would reiterate that limitations on cash payments should not go beyond what is necessary to achieve their objectives, and that any negative impact of the proposed limitations should be carefully weighed against the anticipated public benefits. When considering whether a limitation is proportionate, the adverse impact of the limitation in question should always be considered. A sanction that would apply to any

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<sup>9</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 29 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

<sup>10</sup> See Opinions CON/2013/18 and CON/2014/37.

<sup>11</sup> Article 2 of the first draft law and Article 1, paragraph 2, of the second draft law.

<sup>12</sup> See Articles 1(4) and 2(b) of the second draft law.

<sup>13</sup> See Article 3(1) of the second draft law.

- breach, regardless of the underlying situation, does not seem to comply with the proportionality requirement.
- 3.7 Furthermore, the parties' joint liability for the fine imposed if they have improperly issued or received a payment only refers to the fine 'in the previous paragraph', namely the 5 % increase in the corresponding payable tax amount whenever sums improperly received in cash have not been declared for tax purposes<sup>14</sup>. Presumably it was intended that this joint liability should also apply in respect of the fine equal to 25 % of the amount paid.
- 3.8 Finally, it is noted that Article 63-C(3) of the Portuguese General Tax Law already provides that for commercial transactions any payments equal to or above EUR 1 000 should be made by means that allow the identification of the receiver, e.g. by bank transfer, bank debit or by a cheque made out to the recipient. Unlike for commercial transactions, it might be difficult to replace cash in transactions between two private individuals due to, inter alia, the risk of insolvency of the counterparty, the lack of possibility of immediate settlement, and the absence of infrastructure for cashless means of payment, that ensure similar benefits to those that exist in the case of cash payments made between two individuals. The interaction of the draft laws with the existing cash limitation for commercial transactions should be clarified.

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

Done at Frankfurt am Main, 22 May 2017.

*[signed]*

*The President of the ECB*

Mario DRAGHI

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<sup>14</sup> See Article 3(3) of the second draft law.