



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

OPINION OF THE EUROPEAN CENTRAL BANK

of 25 May 2020

on cash limitations concerning postal payments and anti-money
laundering measures

(CON/2020/17)

Introduction and legal basis

On 8 April 2020 the European Central Bank (ECB) received a request from the Nationale Bank van België/Banque Nationale de Belgique ('NBB') on a draft law implementing Directive (EU) 2018/843 of the European Parliament and of the Council¹ ('AMLD V') under Belgian law (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 and the second and third indents of Article 2(1) of Council Decision 98/415/EC², as the draft law relates to means of payment, the NBB and the ECB's tasks concerning the prudential supervision of credit institutions conferred on them pursuant to Article 127(6) of the Treaty. 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 draft law mainly amends the Belgian Law of 18 September 2017 on the prevention of money laundering and terrorist financing and on the restriction of the use of cash ('Law on AML/CFT')³. The main purpose of the draft law is to prevent money laundering and terrorist financing.
- 1.2 The draft law modifies the cash limitation system applicable to postal payments. According to the explanatory memorandum of the draft law, postal payments serve the same purpose as cash payments. Moreover, it appears that dishonest natural or legal persons have been able to circumvent limitations that apply to cash payments by using the postal payments system. Therefore, the Belgian government considers that restrictions similar to those that apply to cash payments should be applied to postal payments. To achieve this objective, the draft law introduces two new elements. First, the draft law confines the use of postal payments to consumers, thus excluding the use of such payments by professionals. According to the explanatory memorandum,

¹ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (OJ L 156, 19.06.2018, p. 43).

² 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).

³ *Loi du 18 septembre 2017 relative à la prévention du blanchiment de capitaux et du financement du terrorisme et à la limitation de l'utilisation des espèces/ Wet van 18 september 2017 tot voorkoming van het witwassen van geld en de financiering van terrorisme en tot beperking van het gebruik van contanten, telle que modifiée/zoals nader gewijzigd, Moniteur Belge/Belgisch Staatsblad, 06.10.2017, p. 90839.*

the exclusion of professionals is justified because it is safe to assume that anyone who is a legal person, a self-employed person or a member of a liberal profession, has a bank account that allows them to respect their financial obligations, and have broad access to other lawful means for settling monetary debts. Second, the draft law introduces a maximum limit of € 3,000 for postal payments to bank accounts and postal current accounts made by consumers. The draft law makes it clear that payments of lower amounts that appear to be linked will be grouped together when assessing compliance with the € 3,000 limit.

- 1.3 The draft law establishes an exchange of information regime between (among others) foreign prudential supervisory authorities responsible for supervision of credit or financial institutions, which includes the ECB, and the Belgian authorities responsible for supervising credit or financial institutions as regards anti-money laundering and countering the financing of terrorism (hereinafter the 'Belgian AML/CFT supervisory authorities in the financial field'). In that respect, the draft law implements Article 57a of Directive (EU) 2015/849 of the European Parliament and of the Council⁴ ('AML Directive'). Furthermore, the draft law sets out several conditions applicable to the exchange of information regime. Notably, the draft law requires that foreign prudential supervisory authorities that supervise entities in the financial field, who are defined as including the prudential supervisory authorities of a Member State, the ECB and the prudential supervisory authorities of a third State, be subject to a regime of professional secrecy that is at least equivalent to the one that applies to the Belgian AML/CFT supervisory authorities in the financial field concerned.
- 1.4 The draft law strengthens the legal basis for the NBB's injunctive powers with regard to an obliged entity's duty to comply with requirements set by the NBB pursuant to, or as conditions for a decision made pursuant to, the Belgian law of 18 September 2017, the implementing measures under the AML Directive and Regulation (EU) 2015/847 of the European Parliament and of the Council⁵, and the duty of care under the binding provisions on financial embargoes. The explanatory memorandum points out that the purpose of the draft law in this respect is, insofar as necessary, to clarify the legal basis of the NBB's injunctive power based on a non-compliance with the NBB's requirements, even if the rationale for these decisions can be deduced from a reasonable interpretation of existing legislation.
- 1.5 The draft law also specifies that the NBB is entitled to ask the statutory auditor of an obliged entity to draft a special report on the entity's compliance with the Belgian law of 18 September 2017 and the measures implementing Directive (EU) 2015/849 and Regulation (EU) 2015/847, and the duty of care under the binding provisions on financial embargoes. If the relevant obliged entity does not have a statutory auditor, the NBB is entitled to appoint an auditor in order to draft the special report. The explanatory memorandum clarifies that the purpose of this measure is to improve the NBB's control over obliged entities by ensuring a closer collaboration with statutory auditors.

⁴ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 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, 05.06.2015, p. 73).

⁵ Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006 (OJ, L 141, 05.06.2015, p.1).

2. General observations

2.1 Limitation of the use of postal payments

- 2.1.1 The ECB understands that a Belgian postal payment is a financial transaction whereby an order is given to the postal service to credit a sum of money to a postal current account or a bank account registered with a financial institution established in Belgium, and that such payments generally involve cash. Under the current Belgian Law on AML/CFT professionals, whether legal or natural persons, may only make cash payments up to an amount of € 3,000 per payment, this limit does not currently apply to postal payments⁶. However, the ECB understands that legal persons are only entitled to make postal payments if the payment is made to a postal current account held by the Belgian State or a public institution⁷. The ECB also understands that a limit of € 3,000 is applicable in practice for postal payments made by natural persons to bank accounts registered with a financial institution established in Belgium, based on the general conditions applicable to postal payments, which is more restrictive than under applicable law⁸. Given these constraints the ECB understands that, in practice, the postal payments system is rarely used in Belgium, and that most natural persons and companies make payments using cash or bank accounts.
- 2.1.2 The ECB understands that, following the adoption of the draft law, professionals will have to make payments either from their bank accounts or, subject to the € 3,000 limit, in cash. As far as concerns postal payments made by natural persons, while there is currently no legal limit on the amount of such payments, the ECB understands that, in order to strengthen the Belgian AML/CFT framework, the draft law merely confirms the restriction currently imposed by bpost's terms and conditions to limit postal payments made by customers to bank accounts registered with a financial institution established in Belgium to € 3,000, and extends this € 3,000 limit to postal payments made to postal current accounts.
- 2.1.3 The ECB understands that the qualification of postal payments is a matter of Belgian law, but that it could be considered that the restrictions inserted by the draft law have an impact on cash payments. In this respect, the ECB recalls that Commission Recommendation 2010/191/EU⁹ states that the acceptance of cash payments should be the rule, however it also 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. In considering whether, or to what extent, it may be permissible to introduce a more general limitation of the obligation to accept cash payments in euro, regard must be had to Article 63(2) of the Treaty, which provides that, within the framework of the provisions set out in Chapter 4 (Capital and payments) of Title IV (Free Movement of Persons, Services and Capital) of the Treaty, all restrictions on payments between Member States and between Member States and third countries shall be prohibited. Under Article 65(1) of the Treaty, the provisions of

⁶ Article 67, § 2, *Loi du 18 septembre 2017 relative à la prévention du blanchiment de capitaux et du financement du terrorisme et à la limitation de l'utilisation des espèces/ Wet van 18 september 2017 tot voorkoming van het witwassen van geld en de financiering van terrorisme en tot beperking van het gebruik van contanten, telle que modifiée/zoals nader gewijzigd, Moniteur Belge/Belgisch Staatsblad, 06.10.2017, p. 90839.*

⁷ Article 3 of the General Terms and Conditions of the Belgian post office ('bpost') which applies to postal payments, available at: https://www.bpost.be/sites/default/files/free_form/GTC_versement_2019_FR.pdf.

⁸ Article 9, § 1 of the General Terms and Conditions of bpost which applied to postal payments, available at: https://www.bpost.be/sites/default/files/free_form/GTC_versement_2019_FR.pdf.

⁹ Commission Recommendation 2010/191/EU of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins (OJ L 83, 30.3.2010, p. 70).

Article 63 shall be without prejudice to the right of Member States to, inter alia, take all requisite measures to prevent infringements of national laws and regulations, in particular in the field of, inter alia, taxation, or to take measures which are justified on grounds of public policy or public security. Under Article 65(3) of the Treaty, these measures shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of payments as defined in Article 63. The draft law's purpose of reinforcing the measures taken to prevent money laundering and terrorist financing may, in general, constitute 'grounds of public policy or public security' that justifies the establishment of limitations on cash payments.

- 2.1.4 Also, Union law must be interpreted in order to ascertain the conditions that a limitation on payments in euro banknotes and coins should fulfil in order to comply with the legal tender status of euro banknotes and coins when general limitations to the obligation to accept cash payments are introduced¹⁰. In this respect, Recital 19 of Council Regulation (EC) No 974/98¹¹ 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'¹². Other lawful means for the settlement of monetary debts, ensuring similar benefits to those of cash, are generally available in Belgium for the transactions that are subject to the limits on cash postal payments under the draft law. The draft law's purpose of reinforcing the measures taken to prevent money laundering and terrorist financing may, in general, constitute a 'public reason' that justifies the establishment of limitations on cash payments¹³.
- 2.1.5 Moreover, limitations on cash payments should be proportionate to the objectives pursued and should not go beyond what is necessary to achieve such objectives. This condition is particularly relevant in the present case as one of the two limitations introduced by the draft law applies to consumers. Any negative impact of the proposed limitations should therefore be carefully weighed against the anticipated public benefits. When considering whether a limitation is proportionate attention should also be given to whether any alternative measures could be adopted that would fulfil the relevant objective and have a less adverse impact¹⁴.
- 2.1.6 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 methods. Cash is generally also appreciated as a payment instrument because it is widely accepted, fast and facilitates control over the payer's spending. Cash is also a convenient fall-back solution in case the technical infrastructure for wireless payments is unavailable, e.g. due to power failures or natural disasters. In addition, cash is the only means of payment that allows citizens to instantly settle a transaction in central bank money and at face value, without the legal

¹⁰ 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, paragraph 2.2 of Opinion CON/2019/4 and paragraph 2.1 of Opinion CON/2019/46. All ECB opinions are available on the ECB's website at www.ecb.europa.eu.

¹¹ Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (OJ L 139, 11.5.1998, p. 1).

¹² See for example paragraph 2.1 of Opinion CON/2013/18, paragraph 2.2 of Opinion CON/2014/4 and paragraph 2.2 of Opinion CON/2014/37.

¹³ See, for example, paragraph 2.5 of Opinion CON/2017/40 and paragraph 2.3 of Opinion CON/2019/46.

¹⁴ 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 and paragraph 3.3 of Opinion CON/2017/20.

possibility of imposing a fee for the payment in question. Moreover, cash payments facilitate the inclusion of the entire population in the economy since it may be used to settle any kind of financial transaction.

- 2.1.7 The ECB welcomes that the complete prohibition to proceed with postal payments does not apply to consumers. In addition, the ECB understands, as noted above, that the € 3,000 euro limit is already applicable if consumers want to make a postal payment to a bank account. Furthermore, the ECB understands, that the practical impact of the extension of this limitation to postal cash payments made to postal current accounts would be rather limited.
- 2.1.8 As regards the complete prohibition on professionals using postal payment services, the ECB understands that this measure has in practice a marginal effect on professionals' use of this particular means of payment. As noted in paragraph 2.1.1, professionals who are legal persons currently have limited access to postal payment services, as they may only make postal payments to certain postal current accounts. It also seems that the number of professionals who are legal persons or natural persons who use postal payment services is quite limited in Belgium.

2.2 *Exchange of information*

- 2.2.1 The ECB welcomes the provisions of the draft law which establish an obligation for the Belgian AML/CFT supervisory authorities in the financial field to cooperate and exchange information with the prudential supervisory authorities of Member States and the ECB¹⁵. The task of supervising credit institutions in relation to the prevention of the use of the financial system for the purposes of money laundering and the financing of terrorism has not been conferred upon the ECB. However, the outcome of AML/CFT supervision is important to consider for discharging the specific tasks conferred upon the ECB concerning the prudential supervision of credit institutions under Article 127(6) of the Treaty and Council Regulation (EU) No 1024/2013¹⁶. It is therefore of the utmost importance that the ECB, as well as other prudential supervisors, receive timely and reliable information from AML/CFT supervisors about risks relating to money laundering or the financing of terrorism that concern the entities under their supervision, as well as any breaches of AML/CFT requirements by these supervised entities¹⁷.
- 2.2.2 The ECB notes that the draft law also imposes an obligation on the Belgian prudential supervisory authorities to cooperate and exchange information with AML/CFT supervisory authorities in the financial field¹⁸. This requirement does not appear to be based on the new Article 57a of the AML Directive, as the cooperation requirement for prudential supervisory authorities in this respect is covered by Directive 2013/36/EU of the European Parliament and of the Council¹⁹ ('CRD IV') (as

¹⁵ Article 131/1, § 1 al. 1 of the Law on AML/CFT, as amended by the draft law.

¹⁶ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

¹⁷ See paragraph 1.2 of Opinion CON/2018/55 and paragraph 4.1 of Opinion CON/2019/5.

¹⁸ Article 131/1, § 2 of the Law on AML/CFT, as amended by the draft law.

¹⁹ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC Text with EEA relevance (OJ L 176, 27.06.2013, p. 338).

amended by Directive (EU) 2019/878 of the European Parliament and of the Council²⁰ ('CRD V')²¹ and not by the AML Directive. The ECB therefore understands that the requirement set out in the draft law is a national obligation imposed on Belgian prudential supervisory authorities, which will later be adapted in line with the CRD V requirements in the course of transposing the CRD V in Belgium. The ECB would recommend clarifying this in the explanatory memorandum.

2.2.3 Regarding the conditions applicable to the exchange of information in the context of the cooperation regime, the draft law requires that foreign prudential supervisory authorities, which according to the draft law includes the ECB, must apply a regime of professional secrecy that is at least equivalent to the one that applies to the Belgian AML/CFT supervisory authorities concerned. The ECB understands that the draft law aims, inter alia, to align the professional secrecy regime that applies to the Belgian AML/CFT supervisory authorities in the financial field with the harmonised regime set out in the AML Directive. In its Article 57a(2)(b) the AML Directive notes that the exchange of information between the AML/CFT supervisory authorities and the prudential supervisory authorities, including the ECB, 'shall be subject to the conditions of professional secrecy indicated in Article 57a(1)'. The explanatory memorandum of the draft law specifies that the professional secrecy regime applicable to certain prudential supervisory authorities is harmonised under Union law, notably citing Directive 2013/36/EU. In the present case, the professional secrecy regime applicable to prudential supervisory authorities pursuant to Article 53(1) of Directive 2013/36/EU is similar to the regime provided for by Article 57a(1) of the AML Directive. Therefore, the ECB understands that the equivalence of professional secrecy regimes required by the draft law, interpreted together with the AML Directive, would be automatically met for prudential supervisory authorities subject to Article 53(1) of Directive 2013/36/EU, including the ECB²². It would be helpful if the draft law or the explanatory memorandum could confirm this interpretation.

2.2.4 Another condition laid down by the draft law is that of reciprocity as regards the exchange of information. According to the AML Directive, the condition of reciprocity only applies to cooperation with the AML/CFT supervisory authorities of third countries. The draft law imposes a general reciprocity condition, which would seem to apply not only to the AML/CFT supervisory authorities of third countries but also to the exchange of information with authorities of other Member States and with the ECB when acting in its prudential supervisory capacity. In the context of the European

²⁰ Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (OJ L 150, 7.6.2019, p. 253).

²¹ The explanatory memorandum of the draft law does not refer to the implementation of the CRD V, however, for the sake of completeness, the ECB notes that the draft law does not contain all the requirements set out in Article 117(5) of the CRD IV. Indeed, Article 117(5) of the CRD IV establishes a cooperation regime and information exchange between prudential and AML/CFT supervisory authorities, provided that such exchange does 'not impinge on an on-going inquiry, investigation or proceedings in accordance with the criminal or administrative law' of the relevant Member State. This condition is not set out in the draft law. At the same time, Article 131/1, § 2 of the Law on AML/CFT, as amended by the draft law which makes reference to § 1, also imposes on Belgian prudential supervisory authorities a requirement to make use of their statutory prerogatives in order to lend their support to the AML/CFT supervisory authorities of other Member States in the context of investigations. This requirement does not appear to be based on the AML Directive and is also not a part of Article 117(5) of the CRD IV.

²² The professional secrecy regime applicable to the ECB with regard to the tasks conferred on it by Regulation (EU) No 1024/2013 is set out in Article 27 of the Regulation and refers to the Statute of the ESCB and of the ECB and to the relevant acts of Union law. In this context the term 'relevant acts of the Union law' should mainly be understood as referring to Directive 2013/36/EU.

Economic Area (EEA), however, reciprocity already appears to be ensured by the requirements laid down in Union law. Pursuant to Article 117(5) of Directive 2013/36/EU the AML/CFT supervisory authorities of credit and financial institutions, the financial intelligence units and the prudential supervisory authorities in the Member States are subject to cooperation and information exchange obligations. In addition, as regards information exchange between the ECB and the AML/CFT supervisory authorities of credit and financial institutions in the EEA, mutual information exchange is ensured by the multilateral agreement on the practical modalities of exchange of information in line with Article 57a(2) of Directive (EU) 2015/849. This condition of the draft law should therefore not affect the exchange of information between prudential supervisory authorities in the EEA, including the ECB in its supervisory role. The ECB would recommend that this aspect be clarified in the explanatory memorandum or the draft law.

2.2.5 The ECB also notes that Article 132 of the draft law states that cooperation and the exchange of information is subject to a prohibition to communicate the received information to a third party without prior written authorisation from the authority that originally provided the information. Article 132 of the draft law further introduces an exception to this principle: in the event of cooperation between: (i) a Belgian AML/CFT supervisory authority supervising entities in the financial field and a prudential supervisory authority of a Member State, which, according to the draft law includes the ECB; or (ii) a Belgian prudential supervisory authority and another Member State's AML/CFT supervisory authority supervising entities in the financial field, the consent of the authority that originally provided the information is not required if the subsequent communication by the authority that has received the information from the Belgian AML/CFT supervisory authority in the financial field is made to: (i) a Member State's AML/CFT supervisory authorities; or (ii) a Member State's prudential supervisory authorities. The ECB notes that under the applicable Union law, in particular Article 56 of Directive 2013/36/EU, prudential supervisory authorities may transmit information they have received to a set of subsequent recipient authorities in Member States, which is broader than that envisaged by the draft law, without having to obtain the prior consent of the originating authorities. The ECB would recommend clarifying that these existing information exchange procedures and permissions set out in the Directive 2013/36/EU are not affected by the draft law.

2.3 *Powers of the NBB*

2.3.1 The draft law addresses the NBB's powers to sanction violations of the Belgian Law on AML/CFT, the measures implementing the AML Directive and Regulation (EU) 2015/847, and the duty of care imposed by the binding provisions on financial embargoes. Insofar as necessary the draft law elaborates the legal basis for the NBB to issue injunctions in the event that an obliged entity breaches its duty to comply with requirements set by the NBB pursuant to, or as conditions for a decision made pursuant to, these legal acts. The draft law also strengthens the collaboration of the NBB with the statutory auditors of the concerned obliged entities. The ECB welcomes the fact that insofar as is necessary the draft law specifies the legal basis of the NBB's powers, and therefore strengthens the NBB's role as an AML/CFT supervisory authority. The ECB understands that the draft law only clarifies the NBB's role in this respect, and does not materially alter the NBB's mandate or tasks. Therefore, the need to assess whether the conferral of new tasks on a national

central bank complies with the prohibition of monetary financing does not arise in the present case.

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

Done at Frankfurt am Main, 25 May 2020.

[signed]

The President of the ECB

Christine LAGARDE