



OPINION OF THE EUROPEAN CENTRAL BANK
of 21 March 2017
on limiting the obligation to receive cash payments
(CON/2017/8)

Introduction and legal basis

On 10 February 2017, the European Central Bank (ECB) received a request from the Danish Financial Supervisory Authority for an opinion on a draft law on payments (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 indent of Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions¹, as the draft law relates, inter alia, 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. Description of the proposed limitation

- 1.1 The main purpose of the draft law is to implement into Danish law Directive (EU) 2015/2366 of the European Parliament and of the Council². However, in addition to this, the draft law also proposes certain other amendments to current Danish legislation, including one that is of relevance to this opinion since it establishes a new limitation to the current Danish legislation that obliges payees to accept cash payments³.
- 1.2 The legal tender status of Danish krone banknotes⁴ and coins⁵ is generally interpreted under Danish law to mean that Danish krone banknotes and coins are legal tender unless otherwise agreed, or unless other statutory provisions apply⁶. Under the currently applicable Act on Payment Services and Electronic Money⁷, a payee is obliged to accept cash payment if the payee accepts payment by other payment instruments, such as payment cards. The obligation to accept cash payment in these circumstances is mandatory and prevails over a payee's contractual freedom to make an agreement conditional on payment being made by a payment instrument rather than by

¹ OJ L 189, 3.7.1998, p. 42.

² Directive (EU) 2015/2366 of 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).

³ See Section 81 of the draft law.

⁴ See Section 8(2) of Act no. 116 of 7 April 1936, as amended.

⁵ See Section 4(1) of Act no. 817 of 21 December 1988, as amended

⁶ See pages 29 and 33 of the Danish Payments Council, Report on the Role of Cash in Society, August 2016 and the explanatory notes to Section 81(3) of the draft law.

⁷ See Section 56 of Consolidation Act no. 613 of 24 April 2015, as amended.

cash. A payee is therefore not currently able to avoid the obligation to accept cash by placing a clearly visible sign stating that cash is not accepted, as that would be a breach of the obligation to accept cash in these circumstances. This obligation to accept cash under the Act on Payment Services and Electronic Money is not based on the legal tender status of Danish krone banknotes and coins, which is regulated by the Danmarks Nationalbank Act and the Coinage Act, but is considered a separate statutory obligation for payees covered by the Act on Payment Services and Electronic Money.

- 1.3 The statutory obligation to accept cash payment, which is currently set out in the Act on Payment Services and Electronic Money, is repeated in the draft law. However, the draft law introduces a new exemption from the obligation to accept cash payment by providing that this obligation does not apply from 10 p.m. to 6 a.m. Therefore, during these hours, payees who accept payment by payment instruments will have the contractual freedom to choose whether they want to accept cash payments or not.
- 1.4 As is also currently the case, the obligation to accept cash payment pursuant to the draft law does not apply to remote sales, in unstaffed self-service environments or where cash payment is prohibited pursuant to the Act on Measures to Prevent Money Laundering of Proceeds and Financing of Terrorism⁸. The draft law also authorises the Minister for Industry, Business and Financial Affairs to adopt further rules setting out specific payees or types of payees who will not be covered by the exemption applicable between the hours of 10 p.m. and 6 a.m. According to the explanatory notes to the draft law⁹, the aim of authorising the Minister to adopt such further rules is to ensure that payees that perform duties that are vital to the society, e.g. emergency treatment services and twenty-four hour pharmacies, must continue to have to accept cash payment at all times.
- 1.5 The explanatory notes to the draft law state that the proposal is intended to strike a balance between trying to deter robberies, for which the risk is considered higher after dark, and trying to ensure that a broad right to pay by cash will remain in place. Although it is not stated as an objective of the limitation to the obligation to receive cash payments, the explanatory notes to the draft law state that it is expected that businesses' cash handling costs will be reduced because of the limitation¹⁰.

2. General observations

- 2.1 The ECB notes that Denmark has an exemption from participating in the third stage of economic and monetary union¹¹. Against this specific institutional backdrop, the ECB has prepared an assessment of the draft law's provisions against relevant practices in the euro area, in particular the legal requirements for the euro and the legal tender status of euro banknotes.

⁸ Consolidation Act no. 1022 of 13 August 2013, as amended.

⁹ See the explanatory notes to Section 81 of the draft law.

¹⁰ See the explanatory notes to Section 81 of the draft law.

¹¹ See Protocol (No 16) to the Treaty on certain provisions relating to Denmark.

- 2.2 Under the Treaty, the European System of Central Banks (ESCB) is required to act, inter alia, in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources¹². The ESCB has the basic task of promoting the smooth operation of payment systems¹³, and the ECB has the exclusive right to authorise the issue of euro banknotes within the Union¹⁴. 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 Union¹⁵.
- 2.3 The scope and effects of the legal tender status of euro banknotes and coins has not yet been defined in Union law. Therefore, the legislators of the euro area Member States remain competent to implement the scope and effects of legal tender in their national laws. According to the Commission Recommendation of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins¹⁶ (hereinafter the 'Commission Recommendation'), the concept of legal tender of the euro should rely on three main elements. First, there should be a mandatory acceptance of banknotes and coins unless the parties have agreed on other means of payment. The acceptance of euro banknotes and coins as a means of payment in retail transactions should be the rule. A refusal to accept cash should be possible only if it is based on reasons related to the 'good faith principle'. Second, banknotes and coins should be accepted at full face value. Third, banknotes and coins should have the power to discharge debts.
- 2.4 Although electronic payment instruments are increasingly used as the preferred form for retail payments in a number of Member States, including Denmark, the ECB notes that cash continues to play an important role in society. While in 1991 cash payments accounted for some 60% of the value of all retail turnover in Denmark, the figure in 2015 was around 20%¹⁷. 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. These groups include the disabled, senior citizens, socially vulnerable citizens and minors¹⁸. 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 the only payment instrument that allows citizens to settle a transaction in central bank money instantly.
- 2.5 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 being a breach of the legal tender status of cash. Neither Union law nor the Commission Recommendation explicitly addresses if and to what extent it may be permissible to introduce a more general limitation to the obligation to accept euro cash payments. Therefore,

12 See Article 127(1) of the Treaty and Article 2 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB').

13 Article 127(2) of the Treaty and Article 3.1 of the Statute of the ESCB.

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

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

16 OJ L 83, 30.3.2010, p 70.

17 See also Denmark's Nationalbank's Opinion on the draft law, available at www.nationalbanken.dk and page 5 of the Danish Payments Council's Report on the Role of Cash in Society, August 2016. The Danish population also has the highest use of payment cards among the populations of the European Union according to the 2015 statistics on non-cash payments. See European Central Bank, Press Release: Payment Statistics for 2015 (26 September 2016), Annex (Relative importance of the main payment instruments in the EU (2015)).

18 See pages 37-41 of the Danish Payments Council's Report on the Role of Cash in Society, August 2016.

Union law has to be interpreted in order to establish the conditions that a limitation on payments in euro notes and coins must fulfil, including which conditions should be fulfilled to comply with the legal tender status of euro banknotes and coins when introducing general limitations to the obligation to accept cash payments. In particular, with respect to limiting cash payments, recital 19 of Council Regulation (EC) No 974/98¹⁹ should be taken into consideration. This recital 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.

- 2.6 Limitations on cash payments should also be effective and proportionate to the objectives pursued and should not go beyond what is necessary to achieve such objectives²⁰. This requires, inter alia, that, for the settlement of monetary debts other lawful means of payment are available. These other lawful means of payment should be readily accessible to all citizens in the respective Member State. Any negative impact of the proposed limitations should be carefully weighed against the anticipated public benefits.
- 2.7 With respect to the requirement for limitations to be proportionate, the ECB notes 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 pursued. When considering whether a limitation is proportionate, the adverse impact of the limitation in question should always be considered and it should also be considered whether alternative measures could be adopted that would fulfil the relevant objective with a less adverse impact.
- 2.8 Finally, it is of relevance to note that Directive 2014/92/EU of the European Parliament and of the Council²¹ has made it easier for Union citizens to obtain payment accounts and related electronic payment services as an alternative to cash²².

3. Specific observations

- 3.1 The ECB welcomes the fact that the draft law maintains the right for citizens to pay in cash in most circumstances, thereby preserving the role of cash as a generally accepted means of payment.
- 3.2 The ECB understands that the Danish authorities have carefully considered and weighed, on the one hand, the anticipated benefits of the proposed limitation and, on the other hand, the potential adverse impact of the proposed limitation. In considering whether the conditions for introducing the limitation are fulfilled, the ECB notes that other lawful means for the settlement of monetary debts are generally available in Denmark and that the limitation's objective of combating crime may qualify as a public reason that justifies such a limitation, provided the anticipated benefits of the limitation outweigh its potentially adverse impact. With regard to the condition that the limitation should be effective and proportionate, the ECB notes that it is not specifically described in the

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

20 See Opinion CON/2014/37. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

21 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).

22 Directive 2014/92/EU has been implemented in Denmark by Act no. 375 of 27 April 2016.

explanatory notes to the draft law to what extent alternative, and equally or more effective measures could be adopted that would also fulfil the objective of the draft law²³. Against this background, it is difficult for the ECB to assess whether or not the limitation could be considered proportionate to the objective pursued.

- 3.3 The ECB notes that it should be ensured that, to the extent that a payee accepts cash, no surcharges are imposed on cash payments.

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

Done at Frankfurt am Main, 21 March 2017.

[signed]

The President of the ECB

Mario DRAGHI

²³ The ECB is aware that three different models for a limitation of the obligation to receive cash payments were considered in the Danish Payments Council's Report on the Role of Cash in Society of August 2016. However, the explanatory notes to the draft law do not mention any other models nor do they explain why the model set out in the draft law was chosen.