



OPINION OF THE EUROPEAN CENTRAL BANK

of 18 August 2011

on the protection against counterfeiting and on the preservation of the quality of the cash circulation

(CON/2011/64)

Introduction and legal basis

On 18 July 2011, the European Central Bank (ECB) received a request from the Nationale Bank van België/Banque Nationale de Belgique (NBB), acting on behalf the Belgian Ministry of Finance, for an opinion on a draft law on the protection against counterfeiting and on the preservation of the quality of the cash in circulation (hereinafter the ‘draft law’), accompanied by a draft law concerning certain appeal provisions (hereinafter the ‘draft law amending the Law of 12 May 2004’)¹, and a draft royal decree implementing the draft law (hereinafter the ‘draft royal decree’) (the draft law, the draft law amending the Law of 12 May 2004 and the draft royal decree are hereinafter collectively referred to as the ‘draft legislation’).

The ECB’s competence to deliver an opinion is based on Article 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the first, second and third indents 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 provisions², as the draft legislation concerns currency matters, means of payment and the NBB. 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 legislation

1.1 The draft legislation aims to bring the Belgian legal framework for the protection against counterfeiting in line with recent Union legislation adopted in this area³.

¹ Draft law amending the Law of 12 May 2004 organising the appeal proceedings in the context of the protection against counterfeiting.

² OJ L 189, 3.7.1998, p. 42.

³ Notably, with: (a) Article 6 of Council Regulation (EC) No 1338/2001 of 28 June 2001 laying down measures necessary for the protection of the euro against counterfeiting (OJ L 181, 4.7.2001, p. 6); (b) Decision ECB/2010/14 of 16 September 2010 on the authenticity and fitness of checking and recirculation of euro banknotes (OJ L 267, 9.10.2010, p. 1); and (c) Regulation (EU) No 1210/2010 of the European Parliament and the Council of 15 December 2010 concerning authentication of euro coins and handling of euro coins unfit for circulation (OJ L 339, 22.12.2010, p. 1).

- 1.2 The draft law⁴ defines a set of monitoring and corrective measures, as well as administrative fines, aimed at ensuring the proper execution of the Union legislation relating to protection against counterfeiting which is to be identified in a draft royal decree⁵. The draft law contains provisions for banknotes and for coins. The monitoring and corrective measures and the administrative fines provided for in the draft law apply to institutions within the scope of the abovementioned Union legislation⁶, i.e. all institutions referred to in Article 6(1) of Regulation (EC) No 1338/2001⁷. In addition, the draft law empowers the King, upon receiving a proposal from the NBB as far as banknotes are concerned, to define in a royal decree the additional rules that institutions must observe with a view to the application of the abovementioned Union legislation⁸. Compliance with these additional rules is also subject to the monitoring and corrective measures, and the administrative fines provided for in the draft law.
- 1.3 Under the empowering clause in the draft law, the draft royal decree⁹ will impose on institutions certain internal organisational requirements, including internal control measures, instructions, regular awareness campaigns and training for their agents involved in the processing of notes and coins¹⁰. It also subjects institutions to information obligations and to specific actions to be taken in the event of presumed counterfeited notes and coins being detected.

2. General observations

- 2.1 The ECB generally welcomes the draft legislation, which contains a direct reference to the Union legislation of which it aims to ensure the proper execution, and it is confident that its provisions will ensure the preservation of euro banknotes in circulation, resulting in continued public confidence in euro banknotes¹¹.
- 2.2 As Decision ECB/2010/14 applies to cash handlers by virtue of Article 6(1) of Regulation (EC) No 1338/2001, which refers to procedures defined by the ECB for checking euro banknotes, there is no strict need to implement Decision ECB/2010/14 into Belgian law. However, the ECB understands that the draft legislation goes beyond mere implementation because it further enhances the monitoring and corrective measures established for banknotes in accordance with Decision ECB/2010/14. The draft legislation also contains provisions concerning the application of administrative fines.

4 The draft law will replace the Law of 12 May 2004 on the protection against counterfeiting.

5 Article 2 of the draft law, implemented by Article 2 of the draft royal decree which contains the list of the Union legislation defining the scope of the draft legislation, i.e. (a) Article 6 of Regulation (EC) No 1338/2001, (b) Decision ECB/2010/14, and (c) Regulation (EU) No 1210/2010.

6 Article 3 of the draft law.

7 With the exception, as far as coins are concerned, of the institutions referred to in the third indent of Article 6(1) of Regulation (EC) No 1338/2001 (see Article 2(d) of Regulation (EU) No 1210/2010).

8 Article 4 of the draft law.

9 The draft royal decree will replace the Royal Decree of 5 April 2006 implementing the Law of 12 May 2004 on the protection against counterfeiting.

10 Article 3 of the draft royal decree, taking over Article 5 of the Royal Decree of 5 April 2006.

11 Paragraph 2.1 of Opinion CON/2010/90. All ECB opinions are published on the ECB's website at www.ecb.europa.eu.

- 2.3 The ECB considers it essential that any draft legislation implementing Decision ECB/2010/14 does not deviate from its common provisions, unless this is otherwise explicitly provided for in Decision ECB/2010/14. Any national implementing measures should clarify the primacy and direct application of Union law on the authenticity and fitness checking and recirculation of euro banknotes with which cash handlers must comply. In this context and for consistency reasons, the ECB favours the use of direct references to Decision ECB/2010/14 or, alternatively, reproduction of its provisions without any alterations or additions¹².
- 2.4 In addition, although national authorities are not formally obliged to consult the ECB on the implementation of the Member States' obligation to take the necessary measures to ensure that breaches of Article 6(1) of Regulation (EC) No 1338/2001 are subject to effective, proportionate and deterrent sanctions, the ECB believes it is beneficial to harmonise throughout the Union the national measures implementing the abovementioned obligation to the extent possible, subject to national peculiarities¹³.

3. Specific observations

3.1 *Monitoring measures*

To fully implement Decision ECB/2010/14, the ECB recommends aligning the powers of the NBB under Article 5 of the draft law with Article 10(1)(ii) of Decision ECB/2010/14. In particular, the NBB should also be allowed to verify the instructions and procedures that cash handlers (i.e. 'institutions' in the sense of the draft legislation) are required to establish under Article 3 of the draft royal decree¹⁴. In addition, beside the proportionality requirement in Article 6(2) of Regulation (EC) No 1338/2001, also the administrative measures aimed at ensuring compliance with the rules and procedures established under Decision ECB/2010/14 (including the monitoring measures) must have an adequate character¹⁵ and, thus, may not go beyond what is necessary¹⁶. In this respect, the ECB would welcome a clarification that the monitoring measures in Article 5(1)(3) and Article 5(1)(4) of the draft law cover the right to access only to such types of documents, data files and records, as well as such information technology system which the NBB considers necessary for the purpose of its monitoring tasks.

3.2 *Additional obligations imposed on cash handlers*

The ECB notes that Article 3 of the draft royal decree imposes additional obligations on cash handlers. The ECB understands that the cash handlers' obligations to draft instructions and procedures under Article 3(1) and (2) of the draft royal decree concern 'the procedures governing

12 Paragraphs 2.1 and 2.3 of Opinion CON/2011/19.

13 Paragraph 1.1 of Opinion CON/2010/87.

14 Concerning the measures in Article 3 of the draft royal decree, see also paragraph 3.2 of this Opinion.

15 Decision ECB/2010/14, recital 6.

16 Paragraph 3.2 of Opinion CON/2010/87, concerning the proportionality of corrective measures.

the operation and control of the banknote handling machines, the treatment of checked euro banknotes and any manual authenticity and fitness checking' referred to in Article 10(1)(ii) of Decision ECB/2010/14. Hence, the ECB considers that these provisions of the draft royal decree contribute to the adequate implementation of Decision ECB/2010/14 into Belgian law and accordingly welcomes these provisions.

3.3 *Administrative fines and corrective measures*

3.3.1 Where cash handlers breach the obligations set out in the Union legislation to which the draft law refers, the Minister for Finance may, following receipt of a proposal from the NBB as far as banknotes are concerned, impose an administrative fine¹⁷. The amount of the administrative fine must be set by the Minister to be between EUR 250 and EUR 50 000. In addition, the draft law introduces the possibility for the NBB to impose corrective measures on cash handlers who fail to fulfil these obligations, as far as banknotes are concerned¹⁸. The specific measures are not specified in the draft legislation, which 'leaves it up to the NBB to impose the measure which is the most adequate considering the seriousness and the needs of each specific case'¹⁹. The ECB generally welcomes these provisions of the draft law, subject to the following observations.

3.3.2 The ECB recalls the importance of effective, proportionate and deterrent sanctions²⁰. To ensure the deterrent effect of the administrative fines, the maximum amount should allow **setting the fine at an amount which effectively deters cash handlers from non-compliance with their obligations**. While it is up to the Member States' legislators to define the particular amounts of the administrative fines, they should aim at achieving a certain **degree of harmonisation across the Member States** to contribute to the establishment of a level playing field among cash handlers within the euro area without prejudice to: (a) the particularities of the cash cycle and the organisation of cash handlers at a national level; and (b) the consistency of the levels of financial sanctions available in their legal orders²¹.

3.3.3 The provision introduced by Article 9 of the draft law, allowing the NBB to impose corrective measures on cash handlers, is in line with Article 10(3) of Decision ECB/2010/14. Nevertheless, for reasons of legal certainty and proportionality, the ECB expresses its concern that these measures are not generally defined in advance. In addition, the ECB notes that under the first sentence of Article 10(3) of Decision ECB/2010/14, **NCBs do not enjoy discretion in imposing corrective measures**. Therefore, the ECB recommends that in Article 9(1), first sentence, of the draft law, the words 'may ... impose measures' are replaced by the words 'shall ... impose measures', thus clarifying that the NBB has the mandatory duty to impose corrective measures in any such case.

17 Articles 6 and 7 of the draft law.

18 Article 9 of the draft law.

19 Comments on Article 9 in the explanatory memorandum.

20 Article 6(2) of Regulation (EC) No 1338/2001.

21 Paragraph 3.4 of Opinion CON/2010/87.

ECB-PUBLIC

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

Done at Frankfurt am Main, 18 August 2011.

[signed]

The President of the ECB

Jean-Claude TRICHET