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Subject:	Digital Euro Package: working party 25.09.23 Presidency note on Legal tender on euro banknotes, coins and digital euro
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Presidency note 3 for the Council Working Party - 25 September
Legal tender on euro banknotes, coins and digital euro

I. Introduction

This session of legal tender of euro banknotes and coins will focus on the main questions and concerns raised by the Member States regarding the Commission's Regulation proposal.

To achieve this, each topic will have a brief description of the key aspects of the proposal on the subject at hand, followed by a description of the suggestions and comments that MS have commonly presented. The topic will conclude with some questions which address the main problems or issues to be discussed in order to find a solution or agreement among the parties.

II. Legal tender coherence and consistency of euro cash and digital euro

The impact assessment that accompanies the digital euro proposal recommended to regulate the legal tender status of cash in a parallel legislative proposal to ensure coherence in the regulatory treatment of the two forms of central bank money (digital euro and euro cash).

Regulation of the digital euro and legal tender of cash should be consistent, while acknowledging the inherent differences between these two forms of the euro (e.g. some exceptions to the principle of mandatory acceptance may be entirely distinct, justified by the unique characteristics of the digital or physical form of the euro, while others are applicable regardless of the digital/physical nature of the currency and must be kept consistent)

It is essential to maintain coherence between Chapter III of the digital euro proposal and Articles 4, 5, 6, and 15 of the legal tender of cash. Any provisions or distinctions within one of the proposals must be reviewed to ensure it maintains coherence with the other.

In this regard the main concerns raised by MS are mainly related to the following articles of the Regulation on the establishment of a digital euro: Article 8 - *Territorial scope of legal*

tender status, which establishes a territorial limitation for the status of legal tender of the digital euro, and article 10- *Prohibition of the unilateral exclusion of payments in the digital euro*, which sets out the prohibition for payees to use contractual terms that have not been individually negotiated in order not to accept payments in digital euros. Neither of these provisions are foreseen within the proposal for a Regulation on the legal tender of banknotes and coins. Some MS believe this distinction is not justified.

Based on the aforementioned elements, we pose the following questions to MS:

Q.1.1. Do MS consider that article 8 -*Territorial scope of legal tender status* and article 10 - *Prohibition of the unilateral exclusion of payments in the digital euro*, should exclusively apply to Digital Euro or should they be included or excluded in both regulations?

Q.1.2. Do MS consider that other provisions or articles should be included in the framework of legal tender coherence and consistency of euro cash and digital euro?

III. Exceptions to the principle of mandatory acceptance of euro banknotes and coins

The concept of legal tender as interpreted by the Court of Justice for euro banknotes implies: (i) **mandatory acceptance**, (ii) at full face value and (iii) with the effect of discharging payment obligations. Consequently, this proposal ensures that euro cash **must be accepted** by all euro-area residents and enterprises.

Article 5 of the Regulation on legal tender of euro banknotes and coins sets out the conditions under which a refusal to accept euro cash would be legally possible. In general, exceptions must be done in good faith, on legitimate grounds and bearing in mind the principle of proportionality. The Regulation provides two examples: (i) the value of the banknote is disproportionate to the value of the pecuniary debt and (ii) the enterprise has no change available in an exceptional circumstance.

In order to ensure that additional exceptions to the mandatory acceptance of euro cash may be introduced at a later stage if they are required, and in accordance with Article 290 TFEU (adoption of non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act), article 6 empowers the Commission to adopt additional exceptions of a monetary law nature to the principle of mandatory acceptance by means of delegated acts. Some MS consider this wording to be ambiguous and would appreciate a clarification on what this “monetary law nature” means.

Recital 11 states that “The power of the Commission to adopt delegated acts for the introduction of additional exceptions to the mandatory acceptance of accept euro cash should be **without prejudice to the possibility for Member States, pursuant to their own powers in areas of shared competence, to adopt national legislation introducing exceptions to the mandatory acceptance** deriving from the legal tender status in accordance with the conditions laid down by the Court of Justice of the European Union in the judgment in Joined Cases C-422/19 and C-423/19. This Court of Justice case stated that an **obligation to accept euro banknotes and coins may**, in principle, be

restricted by the MS whose currency is the euro for reasons of public interest and pursuant to their competences outside of the area of monetary law and policy and of other exclusive Union competences, provided those restrictions are justified by a public interest objective and proportionate to it.

It is also necessary to consider the need to establish uniform principles for all MS whose currency is the euro, in order to safeguard the overall interests of the Economic and Monetary Union and of the euro as the single currency. Unilateral adoption by MS of national exceptions to the mandatory acceptance could undermine this fundamental legal tender principle.

Some MS consider that it should be made explicit in the Regulation that MS have the power to adopt additional exceptions, pursuant to *Hessischer Rundfunk* and in full compliance with the criteria set out in that judgment.

Q.2.1. Do MS consider that national exceptions to acceptance of euro cash could endanger the need to establish uniform principles for all MS whose currency is the euro?

Q.2.2. Should article 6 include the possibility for MS to adopt national exceptions to the mandatory acceptance, pursuant to their own powers in areas of shared competence?

Q.2.3. Do MS agree on empowering the Commission to adopt delegated acts to set out new exceptions to mandatory acceptance? Do MS believe that, in this respect, the term “exceptions of a monetary law nature” should be clarified within the legal texts or in recitals of the Regulation? Should this clarification also be included in the digital euro Regulation to ensure coherence?

Q.2.4. Given that the principle of legal tender of cash is being extrapolated to the digital euro, with the intention to ensure coherence, do MS believe that, if the ability to include national exceptions is included for cash, it should be extended to digital euro with the same requisites?

IV. Procedural aspects. Monitoring process, "common indicators", and Commission provision of implementing acts to be adopted by the Member State.

The proposal includes a general plan for monitoring and reviewing the impact of the Regulation on the legal tender of euro banknotes and coins.

Article 7 and 8, establish that MS will have the responsibility to monitor the acceptance and the access to cash and will take remedial measures in case they consider that sufficient and effective level of access and acceptance to cash is not ensured.

A designated competent authority should (i) monitor the level of ex ante unilateral exclusions of cash payments; and (ii) the level of access to cash throughout the territory. The assessment will be based on a set of **common indicators** adopted by the Commission by way of **implementing acts**.

The impact assessment that accompanies this proposal identified two options for addressing the access to cash matters: 1) a soft law instrument (e.g. a Commission Recommendation), or 2) a legally binding obligation on MS in the proposed Regulation on legal tender of cash to be implemented by Member States. Choosing the first option would not allow for a uniform interpretation of the key principles of legal tender of cash. The impact assessment concludes that the preferred option on access to cash is the second option. This option therefore ensures that the legal tender status of euro cash would be effectively and coherently protected across the euro area.

The proposal leaves flexibility for MS to choose the most suitable approaches based on common indicators specified by the Commission and to only take measures where they are needed and to tailor the measures to their particular national circumstances. Nevertheless Article 9.5 establishes that if the Commission considers that national actions are insufficient or absent, despite existence of a problem in acceptance or access to cash, **Commission is empowered to adopt implementing acts providing for adequate and proportionate measures that should be adopted by the Member State concerned.**

Article 11 indicates that the Commission will be assisted by a committee in relation to the implementing act procedure stipulated in article 9 (common indicators and remedial measures).

Regarding the common indicators to be used for the monitoring process, some MS ask for a more open and flexible approach. The regulation should take into due account the heterogeneity of national situations, this could be achieved through a set of common indicators sufficiently broad and the possibility of two level indicators (high-level common indicators and national-level indicators)

There is a common concern among MS regarding the Commission's power to enforce implementing acts upon them and want to explore other options.

MS also ask for more detailed clarifications about the process and concept of “common indicators” and voiced concerns about the short time (1 year) to be ready for submission of the first annual report and to apply penalties to infringements of this Regulation.

Q.3.1. Should monitoring and assessment of acceptance/access to cash be based solely on common indicators or should national-level indicators or a broad set of indicators also be taken into account?

Q.3.2. Should be conferred on the Commission the power to adopt implementing acts that must be applied by MS in order to ensure uniform conditions on the acceptance and access to cash?

Q.3.3. Is it advisable to extend the deadlines in order to ensure readiness for submitting the initial annual report and establishing the rules on penalties?