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From:	Presidency
To:	Working Party on Financial Services and the Banking Union (Digital Euro Package) Financial Services Attachés

Subject:	Cash Legal Tender Regulation - WP meeting on 20 Nov. 2023 - Presidency Note on Scope and Penalties
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Presidency note for the Council Working Party – 20 November

Scope and Penalties

I. Introduction

The PCY aims to conduct a comprehensive discussion on the LTCR provisions related to scope and penalties. Despite generating comments and suggestions from Member States, these two relevant aspects of the Regulation had not undergone a detailed discussion until now.

A fundamental conclusion drawn from the impact assessment report, which accompanies DER and LTCR, is the importance of coherence and consistency of both regulations. In alignment with this recommendation, the Commission's provisions in both regulations regarding scope and penalties strike a balance between those elements applicable irrespective of the digital or physical nature of the currency and those which necessarily differ.

The PCY proposes a discussion framework on LTCR provisions concerning scope and penalties with a specific focus on aspects intrinsic to cash. However, to ensure a global perspective, essential aspects of DER shared with LTCR will be highlighted. Furthermore, any conclusion or aspect extrapolated to DER identified in this analysis will be duly taken into consideration.

II. Scope

The proposal provides the following rules, definitions, details, and exceptions regarding the scope of the legal tender of cash:

- Article 2(1) states that the Regulation applies to the *“settlement of pecuniary debts ... where a payment obligation exists”*.
- Article 2(2) states that *“payments for goods and services purchased at a distance, including online”* will be out of the scope.
- Article 6 define *“ex ante unilateral exclusions of cash”* as a *“situation when a retailer or service provider unilaterally excludes cash as a payment method”*.
- Article 6 define 'payee' as *“any person who is the intended recipient of funds which have been the subject of a payment transaction in euro cash”*.
- Article 4(1) states that *“The legal tender status of euro banknotes and coins shall entail their mandatory acceptance”*.

- Article 4(2) states that *“In accordance with the mandatory acceptance of cash, the payee shall not refuse euro banknotes and/or coins tendered in payment to comply with that obligation.”*
- Article 5 sets out the exceptions to the principle of mandatory acceptance: when the refusal to accept euro banknotes and coins is based on *“good faith and ... legitimate and temporary grounds”* and when *“prior to the payment, the payee has agreed with the payer on a different means of payment.”*

Given that the proposed Regulation does not exclude specific categories of payers or payees from its scope of application, it must be considered as having broad and general applicability. The same conclusion is drawn from the Explanatory Memorandum of LTCR where emphasis is placed on the objective of ensuring *“that the physical form of central bank money, euro cash, remains present, available and accepted by all euro-area residents and enterprises”*.

Taking into account all these considerations, the scope of the regulation extends beyond C2B transactions. In the following scenarios, the payee would be bound by the principle of mandatory acceptance of cash:

- Payee acting as an enterprise.
- Payee acting as a public entity (payments for goods and services, but also fines or taxes).
- Payee acting as a professional (self-employed).
- Payee acting as a natural person in the course of a purely personal or household activity.

It's important to highlight that DER includes exceptions for the last two scenarios mentioned above:

- Payee acting as an enterprise, when certain thresholds are not surpassed (microenterprise). It has been agreed in the CWP-DER to include in this exception payees acting as professionals (self-employed) under the same conditions set in Article 9(a), also non-profit legal entities. In both cases unless they accept comparable digital means of payment.
- Payee acting as a natural person in the course of a purely personal or household activity benefit from the exclusion under the conditions set in Article 9(c).

Due to the implications of applying the Regulation, as regards monitoring, penalties, and obligations, some MS have expressed concerns and provided comments on this matter:

- A relevant impact on public administrations as they could not exclude cash as a means of payment. Currently, the majority of the payments to the public administration are digitalized, and in many cases, public entities refuse the acceptance of cash. This may carry political implications considering that the unconditional acceptance of cash might impose a disproportionate burden on public administration.
- MS should be able to lay down national exceptions to the principle of mandatory acceptance intended for certain payments to public administration based on public interest objectives, in accordance with the Hessischer Rundfunk judgment and in

full compliance with the criteria set out in that judgment. Public interest objectives may include matters of tax policy, public administration, or criminal law.

- The proposal should explicitly state that the scope of the Regulation applies to “*payment obligations for goods or services*”, thereby excluding taxes or fines.
- Article 2.2 should be reconsidered, as there are no clear reasons to exclude goods purchased at a distance if they are collected in person.
- Clarify whether payments involving a payee who is a natural person engaged in purely personal or household activities fall within the scope of the Regulation.

The shared view of some MS is that the current provisions within the text of the proposal do not clearly define which payments are part of the scope and consider necessary further clarification.

The ECB’s opinion¹ on this matter is that that ‘*no cash*’ practices followed by public sector entities (e.g. public hospitals and public museums) are not a valid exception to the mandatory acceptance principle and therefore the Regulation should be revised to clarify that ‘*no cash*’ practices followed by public sector entities also fall within the scope of the proposed regulation and are, therefore, prohibited. This opinion is shared by several MS.

Based on the aforementioned context, PCY proposes the following questions to MS:

Q.2.1. Should the proposed Regulation be adjusted to clarify that public sector entities also fall within the scope of the proposed Regulation? Should a provision to exclude taxes or other categories of payments to the public sector be included? What is the view in this respect for the digital euro?

Q.2.2. Should the proposed Regulation be adjusted to refer only to “payee” avoiding the use of other terms such as “enterprise”?

Q.2.3. Should LTCR include exceptions for payments to a payee acting as a natural person in the course of a purely personal or household activity, maintaining consistency with Article 9(c) of DER?

Q.2.4. Should the provision in Article 2.2. be reconsidered to include in the scope the purchase of goods at a distance collected in person in the premises of the payee?

Q.2.5. Do MS wish to point out any other element regarding the scope?

¹ ECB Opinion of the European Central Bank of 13 October 2023 on a proposal for a regulation on the legal tender of euro banknotes and coins

III. Penalties

In order to ensure the enforcement of the Regulation's provisions, Article 12 of LTCR states that MS "*shall lay down the rules on penalties ... applicable to infringements of this Regulation*" and the same Article remarks that "*penalties provided for shall be effective, proportionate and dissuasive*". DER has a similar provision in Article 6(1), where MS are to lay down the rules on penalties applicable to infringements of the legal tender status.

Article 13 of LTCR requires MS to submit an annual report which must include information on implemented penalties. DER has a parallel provision in Article 40(4)(a).

Some Member States consider penalties a crucial tool for law enforcement, acting as a deterrent to discourage individuals or entities from engaging in unlawful activities, such as the non-acceptance of cash. The fear of facing penalties, such as fines or other punitive measures, often influences individuals or entities, dissuading them from engaging in non-compliant behaviours.

Conversely, some MS have concerns on this issue. Some of the reasons argued are:

- There is no empirical evidence to what extent penalties applicable to the non-acceptance of cash by a retailer or service provider would serve the goals of this Regulation.
- Implementing administrative penalties for the non-acceptance of cash would require substantial additional resources and staff to conduct extensive micro-level surveillance.
- Some MS prefer to maintain a certain level of flexibility regarding punitive measures. They are better acquainted with the national context, enabling them to assess if remedial measures, such as imposing penalties, are necessary. The decision on laying down rules on penalties should be left to the discretion of the MS.

While penalties are a valuable tool for law enforcement, it is important that they are proportionate, fair, and applied consistently to be effective.

Based on the aforementioned context, PCY proposes the following question to MS:

Q.3.1. Do Member States consider that LTCR should not mandate the establishment of penalties but rather allow each Member State to decide whether to impose penalties or adopt alternative remedial measures?