Council of the European Union
General Secretariat

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Interinstitutional files:
2023/0208 (COD)

Brussels, 25 March 2025

WK 3923/2025 INIT

LIMITE

ECOFIN
EF
UEM
CODEC

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WORKING DOCUMENT

From:	Presidency
To:	Working Party on Financial Services and the Banking Union (Digital Euro Package) Financial Services Attachés
Subject:	Single Currency Package - LTCR - WP meeting on 31 March 2025 - Presidency discussion note - Discussion on drafting proposals

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Legal Tender of Euro Banknotes and Coins Regulation

Brussels, 31 March 2025

Presidency discussion note
Discussion on drafting proposals

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1. **A new standalone Article 4a on the prohibition of ex-ante unilateral exclusions of cash by retailers and service providers**

The issue of ex-ante unilateral exclusions has been discussed several times at recent Council working party (CWP) meetings and is considered the most contentious remaining issue of the discussions among Member States. Some Member States put great emphasis on contractual freedom and have stressed that proportionality should be respected as regards the obligation to accept cash. These Member States argue that there should be the right balance between mandatory cash acceptance in principle on the one hand and contractual freedom on the other, in order to avoid any far-reaching consequences of absolutely mandatory cash acceptance in all situations. On the other hand, many Member States either strongly support, or would support with some clarifications, the HU Presidency's proposal to explicitly prohibit ex-ante unilateral exclusions of cash under Article 4(2). In this way, the legal tender status of cash will be ensured and uniformly interpreted throughout the euro area, in line with the Court's case-law, and there will be greater alignment with the Digital Euro Regulation, which explicitly prohibits unilateral exclusions of the digital euro.

Over the course of the CWP discussions, several attempts have been made by successive presidencies to find a compromise on this issue. Most Member States now favour prohibiting unilateral exclusions of cash, but some concerns remain, notably regarding the scope of such a prohibition and the lack of clarity on the prohibition, as the drafting is dispersed throughout the text. Some Member States have suggested that a prohibition could be acceptable if it was focused on business-to-consumer situations at points of sale.

Against this background, and with a view to facilitating an agreement on this issue among Member States, the Presidency wishes to put forward a new approach on ex-ante unilateral exclusions of cash based on the proposal from the Hungarian Presidency and on Member States' comments. In order to make the proposal clearer and more visible, the idea of this new draft is to combine in one new, standalone article (article 4a) all relevant provisions on ex-ante unilateral exclusions of cash. This new standalone provision would include a clear prohibition of ex-ante unilateral exclusions of cash, which should be applicable only at the point of sale and only to business-to-consumer transactions where retailers or service providers offer goods or services on public premises. The reason for this limited scope is that those are the main situations in which the effectiveness of the legal tender of cash is undermined. The provision would also include a definition of such practices and a caveat that the prohibition does not apply in cases where, prior to the payment, the payee agrees with the payer on a different means of payment.

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The updated draft of the recitals relating to new article 4a (recitals 4c and 5a) aims to better clarify that the prohibition of ex-ante unilateral exclusions of cash is not intended to apply to business-to-business transactions or to recurring payments, for which cash is seldom chosen as the means of payment to settle debts as it is less suited to this kind of payment. The effectiveness of the legal tender status of euro cash is preserved by clearly prohibiting unilateral exclusions of cash focusing on business-to-consumer transactions at the point of sale. Hence, a prohibition with a limited scope is appropriate to the objectives of the Regulation and does not go beyond what is necessary to achieve them, in line with the principle of proportionality. More specifically, recital 4c also outlines some examples of cases where the exclusion of cash would be justified, such as for companies (such as gas, water, electricity and telecom providers) which usually contract with their customers at a distance. At the same time, the proposed new recital 4d references the case-law of the Court of Justice as regards the principle of proportionality and seeks to take account of the fact that, in a number of Member States, such providers have to make provision for customers (especially vulnerable ones) to pay their bills in cash. Changes made to recital 5a also aim to align the wording with the CJEU judgment in the Hessischer Rundfunk case. The expression 'a fundamental obligation stemming from the concept of legal tender' is more in line with that judgment, because the CJEU uses the term 'fundamental obligation' in paragraph 55.

In view of new article 4a it is suggested to remove the definition of '*ex-ante unilateral exclusions of cash*' in article 3(4), and in Article 4(2) it is proposed to delete the last sentence, following the discussion at the CWP meeting. New article 4a was inserted in order to secure the principle of mandatory acceptance and provide more clarity to eliminate any ambiguity in legal interpretation instead of the definition.

Given the Presidency's new approach to have a new standalone article on the prohibition of ex-ante unilateral exclusions of payments in cash, it is worth considering whether the addition of the phrase '*in accordance with applicable national law*' throughout the recitals and the operative provisions should remain, or whether it is appropriate to remove it. It should be noted that the Commission and the ECB consider that there is a risk that this language could be too broadly interpreted by some Member States, that would lead to fragmentation in the approaches taken, and this wording should be removed in light of the new approach to ex-ante unilateral exclusions of the Presidency, at least from the operative provisions.

Questions for the Member States:

Q1. Do you agree with the proposed approach of new standalone article 4a and its accompanying recitals prohibiting ex-ante unilateral exclusions of cash for business-to-

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consumer transactions at the point of sale as outlined above and in the suggested drafting?

Q2. Do you deem it necessary to retain the phrase 'in accordance with applicable national law' or do you consider that this wording should be removed in the light of the Presidency's approach?

2. Suggestions regarding the framework of indicators

At previous meetings of the CWP, several Member States have stated that the framework of common indicators to be used for measuring acceptance of and access to cash needs to be further clarified. In this spirit, at the third CWP meeting on 25 October 2023, the Commission shared a non-paper on the framework for common indicators, setting out the conditions that such indicators should fulfil and providing a non-exhaustive list of examples of such indicators.

The Presidency proposal takes inspiration from these previous discussions and the input received, as well as from the non-paper, and seeks to incorporate some of the items clarified in the non-paper into the legislative proposal. In particular, it seeks to clarify, both in recital 6 on acceptance of cash and in recital 7 on access to cash, a common understanding of what is envisaged is a framework of common indicators used for individual reporting by the Member States. It clarifies that common indicators should allow for comparisons between Member States where appropriate, but could be complemented by specific national indicators to capture different country-specific situations, in response to the request from several Member States to have such national indicators. The collected data should enable the Commission and the ECB to have a clear euro-area overview based on objective data. The recitals on both access to and acceptance of cash have been updated in a harmonised way to ensure clarity. Further drafting suggestions in Article 9(3), which complement those made in the recitals, clarify that the specific national indicators are to complement the common indicators, allowing for comparability of data and comparisons between Member States where appropriate, and that under no circumstances are the specific national indicators to substitute or undermine the common indicators.

At the Commission's suggestion, both updated recitals clarify that the primary responsibility for assessment in a Member State's national territory lies with the Member State, subject to a possible dialogue with the Commission and the ECB. This is in line with the changes made by the Spanish Presidency to Article 9(5), which provides that if the Commission, in consultation with the European Central Bank, concludes that the

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remedial measures set out by the Member State concerned are insufficient, the Commission may open a dialogue with the Member State concerned for the purpose of reaching a common view and assist the Member State in designing remedial measures to ensure acceptance of cash and sufficient and effective access to cash. The existence of this dialogue should at least be signalled in the recitals, hence the '*primary*' nature of the responsibility of Member States.

The Member States have also made several requests to clarify the type of indicators that might be adopted through implementing acts, by including examples of such indicators in the legislative proposal. Whereas examples of common indicators for monitoring access to cash were already included in recital 7 of the original Commission proposal, the drafting suggestions now also introduce such examples for acceptance of cash in recital 6, building on the Commission's non-paper on indicators. In particular, the drafting suggestions state that common indicators could include the percentages of retailers and service providers that do not accept cash at their physical premises in any circumstances or that have set up no-cash signs in their window, the percentage of citizens who perceive their ability to pay with cash to be low, the number of complaints received from citizens, and qualitative assessments of key sectors or areas, socio-economic variations and urban-rural differences.

Questions for the Member States:

Q3. Do you agree with the changes made in recitals 6 and 7 and Article 9(3)?

Q4. In order to provide further clarity on the indicators for cash acceptance do you support including some examples of indicators in a recital, as was already done for access to cash indicators?

3. Other changes

- An analysis of the recitals and the language used revealed that it was necessary to standardise the terms used. In recital 4b, the adjectives *'unjustified*' and '*proportionate*' have been substituted with '*widespread*' and '*structural*', reflecting the wording of recital 10 and Article 9(4). The change is linguistic and intended solely to make the wording clearer. A similar adjustment has been made in Article 7.

- The adjusted wording of Article 2(3) is intended to be more coherent with the Treaty. Regulation (EC) No 974/98 has been added because it concerns coins. The change from the adjective '*monetary'* to '*pecuniary'* aims to make this provision consistent

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with the terms used in Article 2(1) of the Regulation.

- As requested by several Member States, it is proposed to add a new paragraph 9 in Article 3, containing a definition of a retailer.

- The provision in Article 5(1), point (c), has been contested in CWP discussions, and therefore it is proposed to delete it. (This modification will also be analysed in the discussion on aligning the provisions on cash and digital euro legal tender.)

- At the request of Member States, the Presidency proposes modifying the obligation to submit a report in Article 13 to make it every two years instead of annually. It should be noted that the Commission and the ECB remain of the view that annual reporting would be more appropriate given that access to and acceptance of cash can deteriorate rapidly and there is a degree of urgency to address the situation in a number of Member States.

- At the request of one Member State, the changes to Article 13(4) also include adding references to Articles 7(1) and 8(1), to the notification under Articles 7(2) and 8(2), and to the reporting under Article 13(1), along with a reference to the GDPR in Article 13(4), point (b). The newly added Article 13(5) would allow national competent authorities performing cash-related tasks to grant scientific research bodies access to non-personal data. This is to boost academic research in that regard across the European Union.

Questions for the Member States:

Q5. Do you deem the drafting proposals appropriate?