

Kluwer Competition Law Blog

Safeguarding The Single Currency, Today and Tomorrow

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Introduction

On 28 June 2023, the European Commission announced the long-awaited [Single Currency Package](#) which consists of two Regulation proposals. The first proposed [Legal Tender Cash Regulation \(Regulation on the legal tender of euro banknotes and coins\)](#) aims to preserve the effectiveness of the legal tender status of euro-denominated cash. The second proposed [Digital Euro Regulation \(Regulation on the establishment of the digital euro\)](#) introduces a legal framework for the digital euro to meet users' needs in the digital age while fostering competition, efficiency and innovation in the EU retail payments market. This Digital Euro Regulation aims to enable the smooth introduction of the digital euro if the European Central Bank (ECB) decides to issue this new, digital form of the single currency.

Legal basis

The Treaty Provision serving as the legal basis for both proposals is Article 133 TFEU, which enables the EU legislature to adopt monetary law provisions on “*the use of the euro as the single currency*”. This competence is to be exercised in accordance with the ordinary legislative procedure and upon consultation with the ECB. Under the former EC Treaty, it was part of a broader provision that assigned various competences to the Council with a view to regulate the introduction of the euro (ex. Article 123 EC Treaty). On the occasion of the adoption of the Lisbon Treaty, these transitional and introductory provisions were no longer deemed necessary.

Although the Union legislature is the competent actor to regulate the single currency, it has, up until now, not made extensive use of this power besides a limited number of more punctual legal instruments, for example in [Regulation \(EU\) No 1210/2010](#). One of the reasons, therefore, lies in the fact that the ECB holds important powers in this field of law as well. This is articulated explicitly in Article 133 TFEU, which prescribes that the Union legislature can only act “[w]ithout prejudice to the powers of the European Central Bank” and that it shall seek the ECB’s advice on its proposals (which also follows from Article 140 TFEU). Both new Proposals touch upon areas that are closely related to the ECB’s competence to authorize the issue of Euro banknotes and coins (Article 128 TFEU).

Proposed Legal Tender Cash Regulation

Context

The concept of legal tender refers to money that has been recognized as an official means of payment by a sovereign state. If a certain form of money has been granted legal tender status, governments and citizens are obliged to accept it as a valid payment method. By virtue of the Treaties, euro banknotes constitute the only form of money holding legal tender status in the Eurozone (Article 128(1) TFEU). [Article 11 of Council Regulation No 974/98](#) has extended the legal tender status to euro coins.

For a long time, these two concise provisions were the only source of law regulating the legal tender status of the euro. In 2010, the European Commission complemented them with a [Recommendation](#) in order to further clarify and explain certain aspects of the legal tender status of the euro. However, four main issues relating to the legal tender status of euro banknotes and coins remained, and this now triggered the Commission to propose the adoption of a fully-fledged Regulation.

First, the interpretation of the concept of legal tender often still differed across the Member States because most of them had national monetary law provisions in place on their respective currencies before the introduction of the euro. Second, during the COVID-19 Pandemic, the Commission observed that the use of cash money was in decline and that access to cash had become more difficult, which put pressure on the legal tender status of the euro. Third, the CJEU issued the [Hessischer Rundfunk judgment in 2021](#), where it drew up a definition of legal tender and clarified its scope. Fourth, the question of legal tender status had also arisen in relation to the digital euro, which prompted the Union legislature to reconsider this concept.

The proposed Legal Tender Cash Regulation aims to thoroughly codify, clarify, and regulate the legal tender status of the euro and deals with all of the above-mentioned issues.

Content

The Legal Tender Cash Regulation proposal has two main objectives: to ensure the *acceptance of* and *access to* cash in the Eurozone. Before addressing these two specific aims in detail, the proposal touches upon a number of general considerations. First, the proposal clarifies its subject matter and scope, applying to the settlement of debts in cash following a payment obligation (Article 2). It also provides for the definitions of several notions which are important in the context of cash payments, such as “cash” and “payer/payee” (Article 3). Article 4 codifies the concept and scope of legal tender as it applies in the Eurozone since the Commission Recommendation and the CJEU *Hessischer Rundfunk* judgment: legal tender of banknotes and coins implies their “mandatory acceptance, at full face value, with the power to discharge from a payment obligation” (point 1 of the Commission’s Recommendation and paras 49-50 of the judgment). The following provisions contain a limited number of exceptions to the mandatory acceptance of cash, for example, if contracting parties have deliberately agreed on a different payment method or if the value of a banknote offered as means of payment is manifestly disproportionate to the amount due (Article 5). The Regulation proposal also empowers the Commission to adopt delegated acts which can foresee additional exceptions (Articles 6 and 10).

In order to ensure a high level of acceptance of and access to cash across the Eurozone, the proposal imposes a monitoring task on the Member States (Articles 7 and 8), who have to designate a national competent authority to this end (Article 9). Among others, the proposal seeks to prevent a too high level of “*ex ante unilateral exclusions of payments in cash*”. Such ex-ante exclusions occur, for instance, when an enterprise displays a “*no cash*” sign at its shop window. With regard to access to cash, the availability and proximity of ATMs and other cash facilities have to be followed up. The national competent authorities have to monitor the availability of cash according to a methodology that will be provided for by the Commission, and they will have to submit their observations to the Commission and the ECB in an annual report (Articles 9(3) and 13). If the acceptance of or access to cash appears to be under pressure, the Member State must indicate the appropriate measures it shall take to remedy this issue. If it fails to do so, the Commission can jump in to adopt an implementing act that sets out the measures a Member State should adopt. Infringements of the Regulation will be sanctioned with financial penalties and non-criminal fines, both to be established on the national level by the Member States (Article 12).

Finally, the Legal Tender Cash Regulation set out two guiding principles governing the relationship between euro cash and digital euros (Article 15). On the one hand, it is confirmed that euro banknotes and coins and the digital euro shall be exchangeable at par, meaning that they will maintain their face value. On the other hand, the Regulation guarantees freedom of choice to a debtor for a preferred means of payment (cash or digital euros), if a payee is obliged to accept both of these forms of money by virtue of their legal tender status.

The Commission’s initiative to issue this proposal can definitely be applauded. It will put an end to the lack of clarity that is currently still surrounding the legal tender status of the euro, and it will spur legal certainty by providing for clear and legally binding rules imposed on the Member States. However, notwithstanding the observation that the Legal Tender Cash Regulation will result in more harmonization, the proposal still leaves considerable room for the Member States to adopt differing national rules on the euro’s legal tender status. The first example concerns the penalties for infringements of the Regulation. Considering that they will be laid down in national law, it logically follows that they will differ across the Member States. A second illustration follows – rather strangely – from the preparatory documents of the Digital Euro Regulation. Here, it is confirmed that the exceptions enlisted in Article 5 of the Legal Tender Cash Regulation are not exhaustive, which means that the Member States remain free to adopt legislation that introduces additional exceptions to the mandatory acceptance of cash (see Digital Euro Regulation proposal, “*Detailed explanation of the specific provisions of the proposal*”). Consequently, the mandatory acceptance of euro banknotes and coins will possibly be more enforceable in some Member States than in others. Although it is probably desirable that a certain margin of discretion is left to the Member States to introduce additional exceptions, which was also confirmed by the CJEU in *Hessischer Rundfunk*, it would have been preferable to have this clearly stated in the Legal Tender Cash Regulation itself.

Digital Euro Regulation

Context

The digital euro would be a retail [Central Bank Digital Currency \(CBDC\)](#) for the euro area, which means that it would be an official form of central bank money directly accessible to the general

public. Currently, central bank money is only accessible to the general public in the form of banknotes and coins. However, the decline in the use of cash threatens the monetary anchor role of banknotes and coins and, by extension, the current hybrid model of payments in which private digital means of payment (such as payment applications on a mobile phone) can be converted into risk-free central bank money at par. This disturbance may diminish trust in commercial bank money and, ultimately, towards the euro itself. In addition, the emergence of third-country CBDCs and stablecoins issued by private entities (also called asset-referenced tokens and e-money tokens in the [Markets in Crypto-Assets Regulation](#)) may put further pressure on central bank money as a monetary anchor and weaken financial stability and monetary sovereignty in the EU. Eventually, these events prompted the ECB and European Commission to investigate the potential of a digital euro to strengthen the monetary anchor role of central bank money and provide for central bank money that is “*fit for the digital age*”.

This does, however, not mean that the digital euro will substitute cash completely (at least, not in the near future). Instead, it is intended to complement cash. In this sense, the convertibility of digital euro with euro banknotes and coins is ensured at par (Article 12). Furthermore, the digital euro will be fully fungible, ruling out any misconception that the digital euro would be “*programmable money*”. Thus, the digital euro will not be used to limit spending or direct it to specific goods or services. Nevertheless, conditional payments with digital euro will be made available (Article 24).

Content

The proposed Digital Euro Regulation is concerned with various key Union policies, such as the protection of personal data, accessibility, and financial exclusion, and lays down rules for the digital euro’s legal tender status, distribution, use and essential technical features. As for the ECB’s power to issue the digital euro, the proposal does not and is not intended to, take a position. It merely states that the ECB has the exclusive right to authorise the issue of the digital euro “*in accordance with the Treaties*”, without specifying from which TFEU provision(s) this competence is derived. The choice for the digital euro’s legal basis, one of the most [hotly debated topics in practice and academia](#), thus, remains in the hands of the ECB, regardless of the involvement of the Commission. Until the ECB adopts its own legal Act on the issuance of the digital euro, we remain in the dark about its specific legal basis.

As a complement to cash, the digital euro shall have legal tender status and will be available for online and offline payments, which will be settled instantaneously (Articles 7, 8 and 30). Analogous to what is stated in the proposed Legal Tender Cash Regulation, the legal tender status of the digital euro implies that payees are obliged to accept the digital euro. However, the Digital Euro Regulation provides two additional exceptions to this principle. Microenterprises (i.e., firms with less than 10 people employed or annual turnover or with an annual balance sheet not exceeding 2 million euro) and non-profit legal entities may refuse digital euro unless they accept comparable digital means of payment. Furthermore, natural persons acting in the course of a purely personal activity are not obliged to accept digital euro either. (Article 9). In addition, to safeguard the effective use of the digital euro, payees may not use standard terms or commercial practices that have the object or effect to exclude the use of the digital euro as a means of payment (Article 10).

Credit institutions and other payment service providers will distribute the digital euro and enter into a contractual relationship with end-users to provide digital euro payment services. Although the Eurosystem will be solely responsible for the issuance of the digital euro, neither the ECB nor national central banks will enter into a contractual relationship with end-users. End-users may hold one or more digital euro accounts with one or more payment service providers and may not be obliged to open a non-digital euro account to access a digital euro account (Articles 13 and 22). Basic digital euro payment services, including funding, defunding and the execution of digital euro payment transactions, will be free of charge for natural persons (Article 17). In addition, surcharges are prohibited for payments with digital euro (Article 7).

While using the digital euro, end-users enjoy a varying level of privacy depending on whether they use the digital euro online or offline. The offline usage guarantees a greater level of privacy as payment service providers may only process funding and defunding data, similar to cash withdrawals at an ATM, without tracking individual transaction data (Articles 34 and 37). Nobody would be able to see what people are paying for when using the digital euro offline.

However, the use of the digital euro will not be unlimited. To avoid the scenario where end-users convert all their commercial bank money into a risk-free digital euro in times of distress and, thereby, threaten financial stability, the ECB is allowed to develop instruments to limit the use of the digital euro as a store of value (Article 16). These instruments may for instance consist of limiting the conversion into digital euro in a specified timeframe or quantitative holding limits. In this regard, holding limits between 3000 to 4000 digital euro per capita have been [suggested](#) already. Importantly, the digital euro will not bear interest (Article 16): neither negative nor positive rates can be applied. The latter is certainly good news for commercial banks, as the lack of interest rates on digital euros will limit competition with commercial bank money. After all, the primary function of the digital euro is its usability as a means of payment and not as a store of value.

What's up next?

As mentioned, Article 133 TFEU is the legal basis of both Regulation proposals. This means that they have to be adopted in accordance with the ordinary legislative proposal, and, thus, be considered and amended by the European Parliament and the Council.

The Legal Tender Cash Regulation proposal can – at least theoretically – enter into force quite soon once it is officially adopted. It is then up to the Member States to adopt appropriate penalties and establish a designated national competent authority or assign the monitoring tasks to an already existing Authority. With regard to the Digital Euro Regulation, however, matters are more complex. Even when this Regulation proposal is officially adopted by the Union legislature, this does not yet mark the end of the story. The final decision will be up to the ECB, considering that the Frankfurt-based institution will be the actual issuer of the digital euro. In its proposal, the Commission, therefore, estimates that it will still take a couple years for the digital euro to be officially launched and become publicly available.

Conclusion

With the Single Currency Package, the Commission has shown itself determined to get the euro ready for the future. On the one hand, the use of euro banknotes and coins will be preserved and protected in the Eurozone by establishing a more elaborate and legally binding legal framework governing the legal tender status of cash. This Regulation will mainly codify and clarify the concept of legal tender and enhance harmonization across the Member States, thus, ensuring that Eurozone citizens will remain able to carry out cash payments. On the other hand, the Digital Euro Regulation has a more ambitious aim, namely, to extend the euro's existence to the digital reality with a CBDC version. As a safe method to digitally execute payments, the digital euro is to counterweight the use of cryptocurrencies, and it has to safeguard the function of the euro as a monetary anchor, also in a digital environment.

For now, it is hard to predict if and when the proposals will be adopted by the Parliament and the Council, and even whether or not a digital euro will eventually be issued by the ECB. In this regard, the ECB [clarified](#) that the potential decision to issue a digital euro would be taken only after the Digital Euro Regulation is adopted. With next year's EU elections looming, the issue of the digital euro in 2026-2027, [as hoped for by the ECB](#), seems very ambitious. Moreover, we think it is important not to rush the digital euro project. Experience in other countries has shown that CBDCs that have been adopted rather hastily, [do not have the best chance to become a great success](#).

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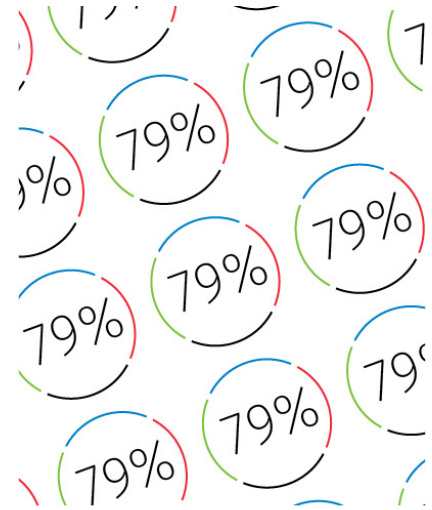
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