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<b>From:</b>	Presidency
<b>To:</b>	Working Party on Financial Services and the Banking Union (Digital Euro Package) Financial Services Attachés
<b>Subject:</b>	Digital euro - Conclusions from Council Working Party November 15th, 2023 – Legal Tender; Privacy and Data Protection and Anti-money Laundering

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# Financial Services and the Banking Union

## Regulation on the establishment of the digital euro



### ***Conclusions from Council Working Party November 15<sup>th</sup>, 2023 – Legal Tender; Privacy and Data Protection and Anti-money Laundering.***

#### **0) Introduction**

On the Council Working Party of November the 15<sup>th</sup>, we had the chance to **discuss three elements from the Digital Euro Proposal**, namely:

- (i) **The legal tender status of the digital euro**, regulated in chapter III of the proposal.
- (ii) **Privacy and Data Protection**, mainly regulated in chapter VIII of the proposal.
- (iii) **Offline digital euro and specific AML/CFT-rules applying to offline digital euro payment transactions** contained in Articles 23 and 37, respectively.

We hereby present the stage of the discussions regarding these elements, taking into account the interventions in the working party and the written comments received by the PCY before elaborating this paper.

#### **1) Legal tender of the digital euro (Chapter III)**

The topic of the legal tender status of the digital euro has been opened up twice during our Presidency. However, **given the importance of having a parallel treatment between cash in the Legal Tender of Cash Regulation (LTCR) and the digital euro in the DER, no final conclusions have been reached on this chapter.**

**The elements that characterize the legal tender status are the same in both regulations:** “mandatory acceptance”, “at full face value”, “with the power to discharge from a payment obligation”.

**The territorial scope of the LT status of the digital euro (Article 8 DER) is not replicated in the LTCR.** One MS has put forward some concerns regarding this article and we encourage further discussion on this matter to analyse possible implications.

**The exceptions to mandatory acceptance of the digital euro** are contained in Articles 9, 10 and 11 DER. Regarding these exceptions:

- There seems to be consensus in the need to introduce within the exceptions in **Article 9(a)**, which only apply to the DER, **self-employed persons.**

- Also, most MS agree with the decision to eliminate the definition of comparable digital means of payment in Article 2.25 and determining separately **what is considered a comparable digital means of payment for the exceptions of acceptance** (Article 9(a)) and for the calculation of fees (Article 17.5.(c)).
  - o For the LT provision (Article 9(a)): There seems to be broad support to the suggestion contained in the ECB's opinion to include as comparable, **digital means of payment initiated in the point of interaction**. This would include direct debits initiated at the point of interaction, credit transfers (also instant) initiated at the point of interaction, debit card payments and credit card payments. The examples could be included in recitals.
  - o For the calculation of fees (Article 17.5.(c)), MS support a narrower approach, excluding, among others, credit card payments.
- **The exception contained in Article 9(b) is also foreseen in the LTCR**. In the last LTCR WP the PCY, after hearing the requests of MS, proposed to eliminate the requirement that the refusal is "temporary". If this change is finally approved in the LTCR, it is possible that MS want to introduce it as well in the DER for consistency reasons. However, MS requested in the November DER WP to be asked for each change in the LTCR if they want an extrapolation to the DER, so if the change is finally accepted for the LTCR, this question would need to be asked to MS for the DER.
- **The exception contained in Article 9(c) "natural persons acting in the course of a purely personal or household activity" has not been contested for the digital euro**. It is being discussed whether to include it as well in the LTCR but MS are not very supportive of this extrapolation, to ensure that at least one form of central bank money is mandatorily accepted.
- **The exception contained in Article 9(d) is also contained in Article 5.1.(b) LTCR: "where prior to the payment, the payee has agreed with the payer on a different means of payment"**. MS broadly agree with this exception.
- **In the case of the DER, the aforementioned exception is subject to Article 10, which contains a "prohibition of unilateral exclusions"**. The idea behind explicitly prohibiting unilateral exclusions in the digital euro is to ensure acceptance and avoid a heterogeneous approach from the start. It also aims to avoid situations where the ex-ante exclusion of payments in digital euro is made part of a package of terms and conditions that the users of, for instance, services of an online merchant, would have to accept. Whereas cash has been around for a longer period of time and this element is more controversial, most MS agree that these practices should be excluded for the digital euro in the DER.
- **Article 11 DER empowers the Commission to adopt, via delegated acts, additional exceptions of monetary law nature to the mandatory acceptance**. In the last WP of LTCR, the Presidency suggested eliminating this article for cash (Article 6 LTCR), following the request of several MS. In any case, it does not seem that MS would like to eliminate it as well in the DER, given the innovative nature of the digital euro, where it is more difficult to foresee the situations that may arise in the future that could require such a provision.

- **In the LTCR proposal a new paragraph has been introduced within the exceptions to emphasize the MS’s capability to adopt additional exceptions to the principle of mandatory acceptance in areas of their own competence, as long as they are adopted for reasons of public interest and are objective and proportionate.** This statement is of declaratory nature and, from a legal perspective should be included in recitals and not in the actual text of the regulation, however, MS requested to have the reminder of their competence clearly stated within the text of the proposal. If this is in the end adopted in the LTCR, MS should be asked if they want to include an equivalent paragraph in the DER.
- **Article 6 DER foresees that MS “shall lay down the rules on penalties applicable to infringements of Chapter III”.** This provision is contained as well in Article 12 LTCR, where the PCY, again following the request of several MS, has suggested to turn this from a “shall” to a “may” provision, given that the effectiveness of these penalties has been questioned. Even if it is changed in the LTCR, extrapolating the change to the DER could be questioned not only because it could render the legal tender inefficient, but also for proportionality reasons. Not sanctioning a single online merchant could potentially affect a much larger number of transactions as compared to not sanctioning a single physical shop. These elements should be taken into account when assessing if the Council wishes a parallel treatment in this respect for the DER.

#### Other concerns regarding the LT of the digital euro

**Some MS would like to have more knowledge on the practical application of the LT to the digital euro.** For instance, if the payment of digital euros at the POS is available through different technological methods (QR code, NFC...), are merchants obliged to accept all methods, or just one? Some MS ask for transition periods before the acceptance is mandatory at the POS.

#### Narrative

**Several MS are willing to keep both files in parallel** even if the LTCR advances faster than the DER **to effectively convey the message that the purpose of the digital euro is to complement but not to substitute cash**, which is here to stay, and its access and acceptance should be protected.

## 2) Privacy and data protection (Chapter VIII)

**Privacy is considered one of the most important features of the digital euro for all stakeholders.** The text of the regulation contains safeguards to ensure privacy and data protection. Only three types of entities can process personal data for the provision of digital euro payment services (PSPs, ECB/NCBs and PoSSs). To perform tasks in the public interest, each of these entities can access only specific types of personal information contained in Annexes III, IV and V and for specific purposes that are stated in Articles 34, 35 and 36 of the Regulation. Also, the Proposal allocates pseudonyms to digital euro users and accounts to contribute to the privacy and data protection objectives.

## Drafting suggestions related to definitions

**During the CWP the ES PCY presented a series of modifications to certain definitions in Article 2 to better clarify the functioning of privacy and data protection.** These clarifications help better understand the proposal providing an important step forward. However, MS are still wary about some of the provisions, where they wish further clarifications or changes. The drafting suggestions put forward by the PCY do not preclude from introducing further finetuning or modifications to better suit MS' needs.

- Regarding the definition of switching, some MS would appreciate further clarifications on the information that needs to be transferred in both the normal and emergency switching.
- Regarding the user alias, one MS questions the need for them to be created by the Eurosystem. Further clarifications on this matter could be useful.
- Regarding the definition of “digital euro payment account number” (DEAN) and the use of the term throughout the text:
  - o A few MS believe that, due to the different nature of digital euro payment accounts compared to traditional accounts, other wording should be used to refer to digital euro payment accounts and therefore, also to refer to the DEAN.
  - o Even if progress has been made in explaining the functioning of the DEAN, some MS wish to have a deeper understanding of the features and functionalities of the DEAN.
  - o The consideration of the DEAN as an alias is also put into question by one MS stating that it is not a compulsory alias but rather the original piece of information.
  - o Some MSs are concerned about the fact that the DEAN does not contain references to country and PSP code and the implications this could have for AML/CFT purposes.

## Clarifications on the processing of personal data

**MS ask for further clarifications regarding the legal basis for the processing of personal data under GDPR.**

**The DER dedicates an entire chapter, Chapter VIII, to list activities that need the processing of personal data to perform a task in the public interest.** These activities relate to the essential functioning of the digital euro. The digital euro is a public good: It has legal tender status and will be a liability of the Eurosystem (towards digital euro users) as the digital form of the single currency. Some PSPs may be obliged to provide basic digital euro payment services, which also reflects the nature of the digital euro as a public good. The processing of personal data related to essential activities would be a task in the public interest under Article 6.1.(e) GDPR insofar as it relates to the functioning of the digital euro. The DER lays down a specific chapter to list the legal basis. This is not necessary since the law itself gives tasks in the articles acting as legal basis. However, in the DER there is an added value in listing the specific activities considered of public interest in a chapter, since it provides for a place to lay down data protection specifications for those activities (e.g. Annexes III to V laying down the types of personal data to be processed).

Beyond the activities listed in chapter VIII where the processing is carried out to perform public tasks, **other processing of personal data will be needed to comply other legal obligations that stem from other Union acts** such as fraud prevention under PSD2, tax law, operational resilience, etc. that would also apply in the context of providing the digital euro (as stated in Articles 5.3., 5.5. and recital 73 of the Proposal). This may include for instance the obligation to allow users to rely on the European Digital Identity Wallet (Article 25).

- Regarding the processing of data for AML purposes, some MS argue that, since Article 43 AMLD explicitly qualifies data processing of AML purposes as a matter of public interest, the processing of personal data with regards the digital euro for AML purposes would as well qualify as processing for public interest reasons. The same with the processing of personal data to comply with Union sanctions laid down in Article 29. Clarifications in this respect from the Commission would be welcomed.

**In addition, commercial relationships between digital euro users and PSPs may rely on other basis of processing**, such as processing for the performance of a contract under Article 6.1.(b) GDPR, processing based on consent under Article 6.1.(a) or on legitimate interest under Article 6.1.(f) GDPR. The lawful grounds for these activities do not require a specific mentioning in the text if the Proposal does not create a legal obligation or gives a public task, because GDPR applies (see recitals 12 and 70).

**There can also be a combination of legal obligation and other legal basis**, for example enabling digital euro users to switch their digital euro payment accounts to another PSP at the request of a user. The relation with the PSP would be governed by a contract under Article 6.1.(b) GDPR but switching itself would be in compliance with a legal obligation in the sense of Article 6.1.(c) GDPR.

**There seems to be certain degree of agreement to replace the term update by “supplement, amend or both” in Articles 34.3, 35.3. and 36.3.** to be clearer on the activity that the Commission is empowered to carry out and to align with the wording in Article 290 TFEU and ECJ case law.

### General remarks

**MS ask for further work on privacy and data protection taking into account the concerns raised by the EDPB and the EDPS joint opinion, the question of data processing as a task of public interest, and joint controllership.** This further work should focus on assessing any concrete drafting suggestions made by MS.

Some MS wish to have a deeper understanding on the **processing of personal data by the Eurosystem and on the functioning of the “single access point”**.

Also, MS would appreciate further clarifications on the **data processing in offline digital euro transactions**.

### 3) Offline digital euro and specific AML/CFT-rules to offline digital euro payment transactions (Articles 23 and 37)

#### Offline digital euro (Article 23)

##### Availability of the offline digital euro as of the first issuance

**The offline digital euro would constitute an important innovation in the payments market** offering a distinctive functionality in digital payments, providing for a greater parallelism with euro cash and contributing to financial inclusion (if provided in different formats, like cards) and resilience purposes (as a backup solution in case of e.g. cyberattacks).

**Member States are aware of the value added offered by this feature and of its importance for the narrative of the digital euro project.** Some MS agree with the Commission on having an obligation to have the offline digital euro from day one. However, given the technical complexities that the development of this feature would entail, other MS are open to allow a staggered approach, where the offline digital euro is not launched from day one, with the commitment of the ECB to launch the feature as soon as possible (best efforts provision) which could be accompanied by ECB reports showing development of the different stages to increase transparency. This staggered approach should guarantee that the offline payment instrument is safe, works properly and enables the development of new features, and, at the same time, would avoid slowing down the launch of the digital euro project.

##### The offline feature as a basic service and for free

**Most MS agree** that PSPs should be obliged to convert online into offline digital euros at the request of the user, **including the offline feature within the basic services.** However, MS believe that the **provision for free of this service should be further assessed** when dealing with the compensation model to ensure that the cost that PSPs would have to incur for the provision of these services is covered.

##### Calls for clarification from MS

Even if the Regulation is technologically neutral and does therefore not prescribe a specific payment instrument (or secure device) to record offline holdings and perform offline digital transactions, **various MS have shown interest in having a deeper understanding on how offline digital euro physical cards could work** and what the safeguards would be in those cases.

Also, MS would like to have a deeper understanding of how **security to the data access infrastructure** would work for the offline feature of the digital euro.

The Presidency notes the suggestions of the COM/ECB in organising thematic technical seminar on these questions, among others.

#### Specific AML/CFT-rules for offline digital euro payment transactions (Article 37)

##### MS's views on the more lenient rules for offline digital euro transactions

**Various MS consider that the processing and retainment of transaction data by PSPs is important even in low-risk transactions,** in order to identify and assess ML/TF and other illicit activities **and are therefore wary of the provision in Article 37.2,** which foresees that transaction data shall not be retained by PSPs, ECB or NCBs. These



MS suggest a higher control, at least to ensure that suspicious transaction reporting obligations also apply to offline digital euro transactions.

**On the contrary, other MS agree with the proposed regime for offline transactions, where PSPs retain the data and do AML checks when funding and defunding but not with transactions.** This regime is similar to cash where AML checks only take place in deposit and cash withdrawals, contributing to a higher degree of privacy. Also, the need to have a digital euro payment account in order to be able to make offline payments implies that a user of offline digital euros has already been onboarded by a PSP with a customer due diligence.

In any case, MS suggest clarifications regarding the involvement of the PSP in the funding and defunding of offline devices with cash.

In any case, **a definition in recitals of what is meant with “transaction data”** in Article 37.2 and an **explanation of the word “retained”** instead of “processed” would be appreciated by MS.

**A few MS consider that the more lenient AML/CFT rules foreseen in Article 37, justified by the lower risk, should not apply to offline transactions but to proximity transactions both online and offline, considering that the lower risk derives from the proximity and not from the lack of internet connection.** This approach has a practical problem, namely the difficulty to determine when there is proximity, since adding geolocation would imply increasing the data needed for the payments, thereby affecting privacy. Offline is a good proxy for proximity and does not entail geolocation of the payer and payee. It is easy for users to understand when they are using the offline vs the online functionality, and both functionalities are treated differently regarding settlement (different moments of final settlement according to Article 30) and funding (the offline version does not allow automated funding).

### Offline digital euro cap

**MS agree on the need to introduce a cap** to reduce ML/FT risks in offline digital euro transactions.

**MS seem to support the use of implementing acts adopted through an examination procedure (adopted by the Commission with a qualified majority of MS) as legislative tool to determine the cap**, since it provides flexibility and at the same time requires support from MS. Some MS consider that the adoption of these acts should not be an empowerment but rather an obligation of the Commission, to ensure that they are adopted.

**Most MS support to introduce both a holding and transaction cap/limits to the offline digital euro.** More information on how these limits would work in practice, especially transaction limits taking into account the limited access to transaction data for offline payments, would be appreciated by MS. The introduction of holding limits in offline transactions should be without prejudice to the adoption of overall holding limits according to Article 16 of DER. In any case, certain MS support only the introduction of transaction limits. Cash is subject to transaction limits due to its nature, but in the case of the offline digital euro these limits would need to be established. However, as the ECB explained during the working party, having only transaction limits could lead to circumvention through multiple transactions. Therefore, complementing transaction limits with holding limits and precluding automated funding in offline payments contributes to effectively enforce transaction limits.