

Digital Euro as Legal Tender

Esineoikeuden instituutiot muutoksessa
Master's thesis

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Tämän tutkimuksen tarkoituksena on tutkia, täyttääkö digitaalinen euro digitaalisena keskuspankkirahana rahan käyppyydelle yleisesti asetetut ehdot. Tutkimuskysymykseen vastaamiseksi työssä tutkitaan ensin digitaalista euroa koskevaa hanketta, erilaisia digitaalisia keskuspankkirahoja muotoavia teknisiä toteutustapoja, rahan käyppyyttä koskevien kysymysten tulkintaeroja Euroopan unionin jäsenvaltioissa, sekä muun muassa oikeusperustaa koskevia kysymyksiä. Sen jälkeen työ tutkii erilaisia rahateorioita, keskuspankkien roolia ja funktiota rahan liikkeellelaskijana sekä selvittää näiden vaikutuksen rahan käyppyyttä koskeviin kysymyksiin. Lopuksi työ saattaa sen mittaan esitetyt elementit yhteen ja pyrkii muodostamaan niistä vastauksia tutkimuskysymyksiin.

Koska tutkimuksen kohteena on yhtäältä digitaalinen euro, joka digitaalisena keskuspankkirahana edustaa verrattain uutta rahan ilmenemismuotoa, ja toisaalta rahan käyppyyden (engl. *legal tender*), joka on sinänsä vakiintunut mutta merkityssisällöltään jossain määrin kiistelty ja tulkinnanvarainen kokonaisuus, mielekkäiden vastauksien tuottaminen tutkimuskysymyksiin edellyttää monipolvista metodikirjoa. Tutkimuksessa käytetyt menetelmät ovatkin siten yhdistelmä muun muassa lainopillista analyysiä, oikeusteoriaa, vertailevaa oikeustiedettä, sekä eräänlaista law in context -analyysiä.

Tutkimuksesta selviää, että rahateorioiden näkökulmasta digitaalisen euron pitäminen käypänä valuuttana on lähtökohtaisesti perusteltua. Eräänlaisina varauksina asialle ovat muun muassa yleistä hyväksyttävyyttä koskevat kysymykset, joiden arviointi on vaikeaa, ellei mahdotonta, ennen kuin digitaalinen euro on otettu käyttöön. Tutkimuksesta selviää lisäksi, että digitaalisia keskuspankkirahoja muotoavat tekniset toteutustavat voivat vaikuttaa sen edellytyksiin tulla tunnistetuksi käyväksi valuutaksi. Tutkimuskysymysten vastaamisen myötä tutkimus osoittaa kuitenkin, että rahan käyppyyttä koskevat kysymykset ovat monilta osin vaikeasti yhteensovittavissa digitaalisiin keskuspankkirahoihin ja digitaaliseen euroon.

Avainsanat: digitaalinen euro, käypä valuutta

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The purpose of this thesis is to examine whether digital euro as a central bank digital currency ('CBDC') fulfils the generally accepted preconditions for legal tender. To answer the research questions in detail, the project for implementing digital euro, different design options for a CBDC, differences in interpretation and application within EU Member States and matters pertaining to legal basis, among other topics, are first examined. Afterwards, the thesis delves into relevant theories of money, function and role of central banks and their influence on questions related to legal tender. Finally, the thesis conjoins the variety of topics and reflects and juxtaposes them against one another to formulate answers to the research questions.

As the subject of research is on one hand digital euro, a CBDC, representing a relatively new manifestation of money, and on the other, legal tender, an already established but somewhat contentious in regard to its significance, relevance, and how the concept is defined, providing meaningful answers to the research questions demands a wide variety of research methods. The main methods used in this thesis are doctrinal analysis, comparative analysis, and contextual approach to law.

The findings made within this thesis illustrate that from the point of view of monetary theories, regarding digital euro as legal tender can be justified. However, the justification may be withheld, for example, on grounds of general acceptance, which is difficult, if not impossible, to assess until after the digital euro has been implemented. The findings of this thesis also suggest that the design options chosen for a CBDC may contribute to its capabilities or likelihood of being recognised as legal tender. However, in formulating the answers to the research questions of this thesis it is shown that the concept of legal tender is in many ways likely too inflexible to capacitate the realities of digital euro, and CBDCs in general.

Key words: digital euro, legal tender

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List of Abbreviations

BoE	Bank of England
B to B	business-to-business
B to C	business-to-customer
BGB	Bürgerliches Gesetzbuch
CBDC	central bank digital currency
rCBDC	retail central bank digital currency
wCBDC	wholesale central bank digital currency
DLT	distributed ledger technology
GDP	gross domestic product
EC	European Community
ECB	European Central Bank
ECJ	Court of Justice of the European Union
EU	European Union
ESCB	European System of Central Banks
LOLR	lender-of-last-resort
NCB	national central bank
PSP	private service provider
Proposal I	Proposal for a Regulation of the European Parliament and of the Council on the legal tender of euro banknotes and coins
Proposal II	Proposal for a Regulation of the European Parliament and of the Council on the establishment of the digital euro
SPACE	Study on the payment attitudes of consumers in the euro area
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

In an ever-expanding part of the world, the use of cash as a means of monetary transaction has been on the decline.¹ The use of cash has been and is being replaced by digital forms of payment, such as debit and credit cards.² In a digitalised world, using cash as a payment option is becoming increasingly more cumbersome and ineffective.³ From the perspective of a consumer, this may not be a problem, as digital means of payment are often widely supported and considered to be easy, fast, and reliable. From the perspective of a central bank, however, it is an entirely different story.

Central banks operate as public authorities in nexus of governments, commercial banks, a plethora of different financial intermediaries and firms. Central banks have traditionally been conferred with the exclusive right to issue banknotes and controlling the amount of coins in circulation.⁴ Furthermore, one of their key responsibilities is safeguarding the effectiveness of payment systems and is generally tied to upholding financial and monetary stability within the sphere of their influence.⁵ In some jurisdictions, central banks are also tasked with different prudential tasks, such as supervising banks and financial firms, combating money laundering and terrorist financing.⁶ Therefore, central banks have also been tasked with the definition and implementation of its monetary policy for the purposes of e.g. achieving specific macroeconomic objectives.⁷ As the monopoly on issuing and controlling the amount of cash in circulation is one of central banks' key tools in reaching their goals, the decline of using

¹ According to the ECB's Study on the payment attitudes of consumers in the euro area (SPACE), while cash appears to still be the main form of payment in the whole euro area, the use of cash is gradually declining in favour of other payment options. See further: (SPACE), p. 5–7.

² Prasad, p. 45.

³ For example, in the context of e-commerce or online public services, using cash as a means of payment is often impossible or at the very least, impractical.

⁴ Gortsos, p. 3.

⁵ Morales-Resendiz et. al, p. 3.

⁶ Gortsos, p. 4.

⁷ Gortsos, p. 4.

physical cash as a form of payment would inevitably mean other, digital forms of currency would take the place of cash.

Currently, as central banks are not generally authorised to issue digital forms of money, digital forms of payment are mostly associated with privately operated commercial banks. In addition to commercial banks, companies such as Meta (formerly Facebook) have tinkered with the idea of creating a *stablecoin* as a ‘simple global currency’.⁸ The increasing demand for digital forms of money in lieu of cash carry the risk of decentralisation of financial and monetary policies. If central banks are not given the possibility to remedy the situation, the lesser demand for cash would inevitably lead to reverberations to, inter alia, both financial and macroeconomical stability, and trust in the financial institutions.⁹

These challenges have generated widespread interest within central banks and governments globally to seek for a fitting solution. Perhaps the most-proposed remedy is to give central banks the right to issue a digital form of currency, most often called a *central bank digital currency* (CBDC). At the time of publishing this thesis, 134 countries, representing 98% of global gross domestic product (GDP), are exploring a CBDC.¹⁰ In the eurozone, the European Central Bank (ECB) is currently researching whether a CBDC, called *digital euro*, should be implemented and if so, how.¹¹ Notwithstanding the challenges on many a front related to the implementation of a CBDC, such a monetary instrument in the euro area would provide the ECB an “anchor of stability for the payment and monetary systems” and “strengthen the monetary sovereignty of the euro area and foster competition and efficiency in the European payment sector”.¹²

However, there exists a plethora of problems and risks related to the implementation of a CBDC. Furthermore, within the eurozone, the EU does not currently have a legal basis for implementing a currency in a digital form. Questions arise, then: would such a currency, digitally issued by the ECB, be *legal tender*, and if so, on what legal basis?

⁸ Ozturkcan – Senel – Ozdinc, p. 6.

⁹ Prasad, p. 11.

¹⁰ <https://www.atlanticcouncil.org/cbdctracker/>, accessed on 4th of April 2024.

¹¹ https://www.ecb.europa.eu/paym/digital_euro/html/index.en.html, accessed on 13th of March 2024.

¹² https://www.ecb.europa.eu/paym/digital_euro/html/index.en.html, accessed on 13th of March 2024.

1.2 The value, methodology, and structure of the thesis

1.2.1 The research questions

The purpose of this thesis is to provide a meaningful contribution to the discussion pertaining to the potential implementation of the digital euro and its proposed legal tender nature, by attempting to systematise and analyse different scenarios, possibilities and risks related to the digital euro project and its outcomes. The primary goal of this text, then, is to give the reader meticulously formulated information on the possibilities of digital euro having the status of legal tender. To understand this question in detail, one must first make sense of the different interpretations of the term ‘legal tender’ within the eurozone and then, if possible, provide the reader with a satisfying definition. Such a definition, or definitions, should then be paired with the aims, goals, and restrictions of implementing the digital euro and analyse them together with the definition of legal tender. The main research questions can be formulated as follows:

- i. How is ‘legal tender’ defined in the EU (and more specifically, in the eurozone)? Additionally, do the interpretations and applications of the concept of legal tender differ within Member States and if so, how?
- ii. How would the digital euro as a CBDC fit with the legal and academic definitions, and the concept of ‘legal tender’? What kind of repercussions would entail if digital euro would not enjoy the status of digital euro?
- iii. What effect does the way digital euro is planned to be implemented as regards its technical design choices have on its capability to function as legal tender?

In an ideal situation, this thesis has meaningful value to those responsible for implementing the digital euro, namely the ECB, but also to private service providers (‘PSP’) that would offer the platform for digital euro services. The findings made within this thesis gives valuable insight into the functions of legal tender in a modern context and therefore contribute to the academic discussion regarding CBDCs and legal tender. Further, this thesis can work as a helpful guide to gauge the effects of implementing a CBDC as legal tender in implementing public policy, but also within commercial banks and other such actors. In addition, the findings within this thesis can prove useful to different financial intermediaries and firms, governments and governmental bodies, non-governmental organisations, and ultimately to

consumers. Through careful analyses can the findings of this thesis contribute to the discussion and help steer the research of implementing digital euro towards a solution that is the best for the common, European good.

This thesis, however, does not seek to answer the question whether digital euro, or some other potential European CBDC, *should* be implemented in the first place. Neither does this thesis attempt to bring forth any conclusions on whether a digital euro, or some other European CBDC, *should* be developed or implemented so as to be considered legal tender. The approach of this thesis is three-pronged: Firstly, this thesis examines the digital euro and CBDCs in general and the different ways a CBDC can be implemented. Secondly, this thesis aims to analyse the current relevant legal framework and compare it with the proposed legal amendments. Thirdly, the thesis seeks to examine and analyse the applicable monetary theories and mirror them against legal tender. To conclude, the thesis aims to conjoin the findings and output meaningful discussion and analyses about digital euro and its compatibility with legal tender. The focus regarding the concept of legal tender within this thesis pertains to the functionalities assumed in the status of legal tender. Unless expressly specified, the scope of this thesis pertains only inside the EU and therefore, themes such as cross-border or cross-currency issues are omitted.

1.2.2 Methodology

Considering that the main research questions relate to the current legal situation related to legal tender, an already established theme, but surrounded by differing opinions, viewpoints and interpretations, this thesis will provide the reader with a dissection of the discussion associated with the topic. By seeking to establish a clear view of the issue, only then can it be contrasted with a highly topical one, that of the digital euro, and CBDCs in general.

To conjoin old with the new – legal tender with digital euro – and extrapolate therefrom meaningful analyses, the subject matter must be approached from a multitude of angles. This variety of viewpoints therefore necessitates an equal variety of methods of legal research. Firstly, this thesis makes use of methods of doctrinal analysis when different questions pertaining to legal basis are considered. Secondly, when examining the plurality of legal heritages and differences in interpretation as regards legal tender within EU Member States, the thesis approaches the subject matter from the lens of comparative law. This is despite the fact that the primary focus of this thesis, nor the chapters in which comparative analyses are

conducted, is not necessarily to practise and adhere to the traditional methodologies of comparative law per se. Instead, comparative analyses are performed in this thesis to showcase, examine, and discuss the variety of opinions and interpretations within the EU. Thirdly, particularly in examining the relevant monetary theories and extending their application to digital euro, but also when, for instance, discussing the effects of currency either possessing or not possessing the status of legal tender, methods of philosophy of law are utilised. Fourthly, this thesis takes a law-in-context approach when discussing the different design options for a CBDC and more specifically, those chosen for the digital euro, but also when discussing the wider functions of legal tender beyond its face-value implications. Finally, this thesis relies on elements of *de lege ferenda* analysis when proposed legislations for legal tender and digital euro are evaluated, even if it refrains from expressing opinions whether digital euro should be implemented so as to be considered legal tender or implemented in the first place.

As regards to the expected results of this thesis and considering that the main research questions relate to requirements or conditions on which a digital euro, or a CBDC in general, can enjoy the status of legal tender and thus work as a generally accepted form of payment *inter partes*, it is expected that answers to how the digital euro should be implemented, that contribute to its capabilities or likelihood of being recognised as legal tender, are found. Secondly, it is expected that within the findings of this thesis, information about the different design options of a CBDC influencing its capabilities to function as legal tender is found. Thirdly, this thesis can provide information on how CBDCs fit with the current European frame of reference and legal situation. Finally, the thesis can illuminate the meaning and relevance of legal tender in digitalised, contemporary societies.

1.2.3 Structure

After the introductory first chapter, the second chapter serves as an overture of the basic questions revolving around the implementation of a digital euro and CBDCs in general, such as advantages, disadvantages, possibilities, and several different technological options of implementation thereof. The reader is also presented with the concept and definition of legal tender and the general problems related to the matter, such as an overview of the plurality of practices and understandings of the concept of legal tender within different EU Member States. Finally, some options for the legal basis for implementing a digital euro are introduced

and juxtaposed with the current legal basis for the ECB's exclusive right to issue banknotes. Answers to the first research question (i) can be found within this chapter.

In the third chapter, the concept of legal tender and the high number of variances in opinions about its nature are examined further. First, the reader is introduced to the many monetary theories against which the digital euro project, and CBDCs in general, can be juxtaposed. Secondly, the role of central banks as a money-issuing and money-validating authority is examined. Thirdly, the crux of the concept of legal tender is explored in depth. The purpose of these topics is to present the reader with information that seeks to answer what gives money its validity, and furthermore, what makes legal tender 'legal tender'. Lastly, some specific and separate issues related to discharging a debt will be examined and analysed. Answers to the second research question (ii) can be found within this and the fourth chapter.

In the fourth chapter, the elements presented within prior chapters are conjoined and reflected upon to formulate analyses about the digital euro project and CBDCs in general, and their correspondence with the concept of legal tender and both the existing and proposed relevant legal frameworks. Answers to the third research question (iii) can be found within this chapter.

In the fifth and final chapter, the most pertinent findings and conclusions made within this thesis are summarised and reflected against the main research questions.

2 Digital euro: the background

In this chapter, many different aspects and facets of the digital euro, and CBDCs in general, will be discussed. In section 2.1, the reader will be first presented with a general overview of the digital euro project by examining motivations, goals, and arguments, among other things, given by the ECB in regard to deciding to begin research on whether a digital euro should be implemented, but a more detailed and thorough examination of them will take place in the fourth chapter.

2.1 Digital euro as a European project

In October 2020, the ECB published a Report on a digital euro. In this 55-page document the ECB seeks to depict present and future challenges related to the ways in which consumers use different payment options. The report is intended to help provide talking points for dialogue with citizens and external stakeholders, and a springboard for public consultation. According to the report, a digital euro would work in synergy with private payment solutions, and enhance innovation, competitiveness, and resiliency of the European payment system. The digital euro would, according to the document, work as a central bank liability in digital form to be used by consumers and businesses in retail payments, and would not replace cash, but rather complement it.¹³ It would be left for the citizens to decide whether to use digital euro or cash, as the opinion of the Eurosystem¹⁴ is that the availability of cash should be ensured.¹⁵ While cash is still considered to be the dominant means of payment, the recent COVID-19 crisis in particular has influenced a change in the ways in which payment options are used, from cash to other, contactless methods.¹⁶

In addition, the report highlights six scenarios for why reasons digital euro could be implemented and what it could achieve.¹⁷ They are:

¹³ Report on a digital euro, pp. 2–3.

¹⁴ The term 'Eurosystem' comprises of the ECB and the national central banks (NCB) whose currency is the euro. See further: Gortsos, p. 34.

¹⁵ Report on a digital euro, p. 11.

¹⁶ Report on a digital euro, p. 7.

¹⁷ Report on a digital euro, p. 9.

- i. supporting the digitalisation of the European economy and the strategic independence of the European Union;
- ii. a response to a significant decline in the role of cash as a means of payment;
- iii. a response in a scenario in which significant potential exists for foreign CBDCs or private digital payments to become widely used in the euro area;
- iv. mitigating the risks to the normal provision of payment services;
- v. fostering the international role of the euro; and
- vi. supporting improvements in the overall costs and ecological footprint of the monetary and payment systems.

Based on the scenarios (i-vi) listed above, the report formulates requirements for what goals, needs or requirements a digital euro should achieve and fulfil.¹⁸ They are:

- i. the digital euro should keep pace with latest technologies so that it could address the needs of the markets, and be made through interoperable front-end solutions that are available to the whole euro area and be interoperable with private payment options;
- ii. the digital euro should have “cash-like features”, such as being usable in offline situations, and be easy for vulnerable groups to use, be free of charge for basic use by payers and give protection to privacy, but also “have a strong European branding”;
- iii. the digital euro should be sufficiently technologically attractive to be able to compete against payment options in foreign currencies or those offered by unregulated entities¹⁹;
- iv. the digital euro should be designed in a way in which it could be remunerated at interest rate(s) that are modifiable by the central bank;

¹⁸ Report on a digital euro, pp. 9–15.

¹⁹ An example of these “unregulated entities” could be large technological firms like Meta, as mentioned earlier in this thesis in Chapter 1.

- v. the digital euro should be an improvement for the overall resiliency of the payment system, and be widely available and transacted via resilient channels that are separate from those of other payment options, and that can tolerate extreme events²⁰;
- vi. the digital euro should potentially be made accessible even outside the euro area, consistent with the objectives of Eurosystem and convenient for non-euro area residents²¹; and
- vii. the digital euro should be designed in a way that would reduce the costs in the current payments ecosystem, and so that it would minimise its ecological footprint and improve that of the current payments ecosystem.

Furthermore, the report outlines three more considerations on how the digital euro should be designed.²² First, the digital euro should be designed in a way that will not result in the monetary policy, financial stability, and the provision of services by the banking sector, be compromised. Second, the digital euro should not be used as a form of investment in excess so as to mitigate problems related to “sudden large shifts from bank deposits to the digital euro”. Third, the design of the digital euro should allow for comparatively efficient strides towards the Eurosystem’s goals, have conditions on use outside the euro area, and “highly resilient” to cyber threats.

Fabio Panetta, Member of the ECB’s Executive Board, argues that trust in private money, that is money held in privately operated commercial banks, is “largely determined” by its convertibility into public money, or money issued by a central bank, as public money is guaranteed by the state. Because digital euro would not replace cash, but complement it, Panetta argues the digital euro would be similar to cash in that it would offer a safe payment option that is free, easy to use and universally accepted within the euro area. According to Panetta, the digital euro would however be dissimilar to cash in the sense that it would

²⁰ According to the report, such extreme events could mean, for example, cyber incidents, natural disasters, or pandemics. See further: Report on a digital euro, p. 33.

²¹ The report elaborates herein that making digital euro accessible also outside the euro area is preferable, because “otherwise euro cash would continue be preferred abroad”, or foreign users would turn to other currencies or assets instead of the euro, and in turn could negatively affect the international role of the euro. See further: Report on a digital euro, p. 33, footnote 27.

²² Report, p. 16.

provide a better access to electronic payment systems, thus increasing financial inclusion²³, but also make it possible to safely hold money in large quantities.²⁴ As the payment attitudes of consumers slowly change towards electronic means of payments, the digital euro would, according to Panetta, make sure central bank money would continue to have its role as a monetary anchor for the payments ecosystem and to serve as a *means of exchange*, a *store of value* and a *unit of account*.²⁵ These three functions of money, according to Panetta, are not available for “unbacked crypto-assets”.²⁶

Christine Lagarde, President of the ECB, argues that the implementation of a digital euro, amidst the rising number of crypto assets and stablecoins, would help to ensure confidence in people that “one euro is one euro”, meaning private digital money would continue to be convertible at par with central bank money. Furthermore, according to Lagarde, a digital euro would make sure that money continue to be denominated in euros and be based on European infrastructure, therefore strengthening the strategic autonomy of Europe.²⁷

Considering the needs of both private citizens and professionals, privacy is deemed most important a feature of a digital euro, alongside security, availability in the whole euro area, free of additional costs, and usability offline. Furthermore, while both citizens and professionals alike support the mitigation of illicit activities through digital euro, anonymity is favoured only by less than 10 percent of citizens.²⁸

²³ The present and future of money in the digital age, Fabio Panetta, 10 December 2021. According to Gortsos, financial inclusion has an impact on monetary policy and therefore, on financial stability, in that it may help curb poverty by making payments more effortless and providing trustworthy and legal financing options, among other things. See further: Gortsos, pp. 29–30.

²⁴ More than an intellectual game: exploring the monetary policy and financial stability implications of central bank digital currencies, Fabio Panetta, 8 April 2022.

²⁵ Central bank digital currencies: a monetary anchor for digital innovation, Fabio Panetta, 5 November 2021.

²⁶ For a few cryptos more: the Wild West of crypto finance, Fabio Panetta, 25 April 2022.

²⁷ Digital euro: a common European project, Christine Lagarde, 7 November 2022. Lagarde explains therein that “[a]lready now more than two thirds of European card payment transaction are run by companies with headquarters outside the European Union”, arguing that allowing large technology companies to enter the payment sector could “increase the risk of market domination and dependence on foreign payment technologies”.

²⁸ Eurosystem report on the public consultation on a digital euro, April 2021.

2.2 Shapes and forms

2.2.1 Introduction

There is a high number of options on how a CBDC can be designed, specifically from technological and legal standpoints. Implementing a CBDC would almost certainly bring forth many risks or threats that need to be carefully weighed against the potential benefits. These benefits and risks together with the different kinds of technological design options will be examined so as to give the reader a general understanding of the matter. These benefits and risks, paired together with the introduction to the diverse technological design options, are introduced in this section. While the scope of this thesis does not allow for deep analysis of all the different technological design options, examining them on a more general level is useful when analysing whether the chosen design paths influence the capability of a CBDC to function as legal tender. In addition, the reader will also be made aware of different kinds of CBDCs in relation to their intended user base and use cases.

It bears mentioning that while the discussion in this section is divided thematically into three smaller sections (2.2.2–2.2.4), they are not intended to be read and understood to be strictly divided from each other, as if discussing completely separate elements one after another. Rather, the elements are in truth often deeply interwoven into each other, and the dividing of different considerations is merely intended to help the reader get their bearings amongst a variety of viewpoints regarding the CBDC design options.

2.2.2 Technical considerations

As regards the technical design paths that could be taken when implementing a CBDC, perhaps one of the most important considerations to ponder on first is to decide the targeted user base of the currency. There are, in essence, two types of central bank money that, the choice between them fundamentally affects the shape of the rest of the design: *retail* and *wholesale*.²⁹ While the former of the two is traditionally understood to be the tangible money, i.e., banknotes and coins, the latter is used for digital transactions between banks. Seeing as wholesale central bank money is already digital, the potential benefits for designing a wholesale CBDC ('wCBDC'), such as utilising *distributed ledger technologies* ('DLT') or

²⁹ Prasad, p. 194.

similar new innovations, are more limited in comparison to a retail CBDC ('rCBDC'). A rCBDC represents a more fundamental change in the way of thinking about retail central bank money. However, as digital euro is known to be planned to be used by citizens and businesses alike, and not merely for digital transactions between banks, further discussion regarding wCBDCs hereinafter is omitted.

A rCBDC itself can take on a multitude of different shapes and forms. It can be *value-based* (also called *token-based* or a *bearer* CBDC), where the central bank is responsible for a centralised, electronic payment system that is linked to prepaid cards, smartphones, or other electronic devices.³⁰ In such a system, much like with cash transactions, the payer and the payee bear the responsibility of verifying the value of the transfer between them. A rCBDC can also be *account-based*, where this responsibility of verification is given to a tertiary operator, similar to the way major electronic payment solutions function.³¹ A rCBDC can also be based on blockchain or DLT technologies, but rather than using an open decentralised mechanism reliant on public consensus for the verification of transactions, the decentralisation is considered 'closed', as in only accessible by select, approved entities.³²

When designing a rCBDC, it is crucial to carefully consider whether to support the currency through a conventional database, decentralised systems, or both. These alternatives provide different options and characteristics that influence the nature of a rCBDC. Additionally, any one choice in this regard may be dictated or influenced by the legal aspects, but also economic, financial, and institutional considerations of a state implementing the rCBDC.³³ The choice between value-based and account-based CBDC is of particular importance in fourth chapter of this thesis when their implications as regards legal tender are considered.

Furthermore, especially in a value-based rCBDC, where the responsibility of verification falls on the payee and the payer, there might be an incentive to design rCBDC in a way that supports offline-use, for example with a specifically designed physical device, alongside its

³⁰ Prasad, p. 196.

³¹ Report on a digital euro, pp. 29–30.

³² Prasad, p. 197.

³³ Morales-Resendiz et. al, p. 5.

online-use applications.³⁴ An option to use a CBDC offline could be desirable in many instances, for example in situations where access to the internet is impossible or otherwise unnecessary. The possibility of using a CBDC offline is one of the ways of designing a CBDC to have cash-like features and use cases. Of course, even CBDCs that support offline use should have to be connected to online services in some capacity, even if only to add funds to the device. It follows, then, if a rCBDC is given offline-use capabilities, given the electronic nature of the currency, it is considered that the CBDC system should be designed in a way that allows for offline and online types of rCBDC to coexist and be mutually compatible.³⁵ Perhaps surprisingly, the discussion regarding online and/or offline use of CBDCs and particularly to whom the responsibility of verification falls upon will also be important when considering their impact on legal tender.

2.2.3 Policy considerations

While technical design options give CBDCs their shape, it is the considerations regarding policy that give CBDCs their meaning. Policy considerations relate to a multitude of themes, such as the legal basis³⁶ of a CBDC, interest rates, intended use of the CBDC, and cross-border details. It is also necessary to evaluate whether a CBDC would satisfy the three often recognised functions, or roles, of money, with which the concept of money can be shaped: *medium of exchange*, *store of value* and *unit of account*. In this section, policy considerations are examined primarily through the lenses of these three functions or roles of money.

The first role of money, medium of exchange, is often linked to topics surrounding questions such as how easy or efficient a currency is to use in transactions, who or what entities may *de facto* hold said currency and in what form does the currency manifest itself. In the absence of a widely accepted medium of exchange, transactions can only be resolved by barter or credit arrangements.³⁷ Considering CBDCs and their different possibilities of forms of manifestation, a CBDC could, for example, be more akin to cash than a debit card and manifest itself in *CBDC tokens*. In this way, the central bank would be responsible for issuing

³⁴ Report on a digital euro, p. 33.

³⁵ Report on a digital euro, p. 34.

³⁶ Matters pertaining to the legal basis of digital euro will be examined in detail in section 2.5.

³⁷ Ahnert et. al, p. 9.

such tokens and determining their supply, circulation, and value. With a token-based model, anonymity towards the central bank could be achieved, if desired.³⁸ Alternatively, a CBDC could be made to resemble more debit cards than cash, and CBDC users would hold accounts at the central bank or at supervised intermediaries.³⁹ One of the key issues recognised regarding CBDCs and their nature as a medium of exchange is their interoperability. To be considered as an effective medium of exchange, a CBDC should be designed in a way which allows for smooth and appropriate flow of funds to and from other payment systems and currencies.⁴⁰

The second role of money, store of value, ensures that over time, money carries over its value and does not perish under normal circumstances, unlike, for example, the goods or services the money can be used for buying or selling. During times of high inflation, however, money may lose, to lesser or higher extent, its role as an effective store of value, and other assets may prove more desirable.⁴¹ Interestingly, in the euro area, but also other parts of the world, a peculiar phenomenon has been noticed: the demand for banknotes is on the rise at the same time as the use of them in retail transactions appears to have decreased.⁴² This is suggested to mean that cash is increasingly used as a store of value rather than as a means of payment.⁴³

Inextricably linked to the theme of store of value as a concept is what purposes CBDCs can or should be used for: as a means of payment or a form of investment? As regards digital euro, the ECB has outlined a course of conduct where the use of digital euro as a form of investment in excess should be avoided to prevent “sudden large shifts from bank deposits to the digital euro”. In the ECB’s view, using digital euro as a form of investment may, depending on its characteristics, give rise to banks increasing their funding costs, thereby making it less profitable for banks to operate, and thus leading to decrease in the amount of bank credit available. This may in turn have various negative effects on the economy and

³⁸ An ECB Digital Currency – A Flight of Fancy? Yves Mersch, 11 May 2020.

³⁹ Bordo – Levin, pp. 5–6.

⁴⁰ Ozturkcan – Senel – Ozdinc, p. 2.

⁴¹ Ozturkcan – Senel – Ozdinc, p. 2.

⁴² The paradox of banknotes: understanding the demand for cash beyond transactional use.

⁴³ The present and future of money in the digital age, Fabio Panetta, 10 December 2021. Similarly: Siekmann (2020), pp. 43–44.

financial stability in general.⁴⁴ To prevent digital euro being excessively used as a form of investment, two design options have been suggested.

One design option in this regard is to set *holding limits*, a ceiling or otherwise limit the amount of CBDC that can be held by individual users or at any given time or, for example, on a weekly or monthly basis. The second option is to discourage, rather than limit altogether, the holding of CBDC above a certain threshold.⁴⁵ However, setting the threshold(s) to an appropriate level might prove a delicate operation. Evaluating the correct limit to the holding limits is essential, considering that they should allow for large enough retail payment needs but not too large, lest goals of making digital euro an unattractive form of investment be hampered.⁴⁶ Moreover, as will turn out, discussion pertaining to holding limits will be of high importance when its implications to issues regarding legal tender are considered in chapter 4.

The third role of money, unit of account, refers to the ability of money to work as a universally recognised yardstick of sorts, to which other measurements or comparisons are judged.⁴⁷ The unit of account then serves as a way to distinguish it from preceding units of account, such as national currencies in EU Member States before the euro was implemented as a common currency, but it is also used to distinguish a currency from other monetary systems.⁴⁸ For money to be an effective unit of account, stability of prices is required. In times of recession, a central bank might consider, for example, that offering a negative interest rate is desirable to stimulate the economy. With a CBDC that could be possible, but considering that cash pays no interest, in an economic downturn the presence of cash might dilute the efforts, as CBDC influenced by negative interest rates might make cash more favourable again.⁴⁹ Ultimately, a central bank issuing a CBDC is not a perfect solution in this

⁴⁴ Report on a digital euro, pp. 16–17.

⁴⁵ The present and future of money in the digital age, Fabio Panetta, 10 December 2021; Stocktake on a digital euro, pp. 12–13.

⁴⁶ Eurosystem report on the public consultation on a digital euro, April 2021, p. 4.

⁴⁷ Ozturkcan – Senel – Ozdinc, p. 2.

⁴⁸ Proctor (2012), margin number 2.55.

⁴⁹ Mancini-Griffoli et. al, pp. 9; 15.

regard, and will not fix root causes regarding central bank credibility or other factors that affect the value of central bank money.⁵⁰

Questions regarding privacy of CBDCs have sparked a lot of debate. As pointed out earlier in this thesis, privacy is given a lot of importance by citizens and professionals alike. This is in spite of evidence that consumers do not think much about privacy when making payments and are often willing to share their personal information either for free or for in exchange for small rewards.⁵¹ However, complementing cash with a digital counterpart brings forth undeniable consequences to privacy and anonymity, as they have to be balanced with acts related to preventing illicit activities, such as money-laundering.⁵² However, as matters pertaining to the privacy of CBDCs are not within the scope or purpose of this thesis, further discussion about them are omitted.

2.2.4 Other considerations

With the onset of decline of cash and the fear of foreign private actors filling the void, the role of the ECB⁵³ to balance the meticulously nurtured equilibria of financial stability, monetary policy and ensuring the provision of services by the banking sector is becoming harder by the day. The digital euro is envisaged to be a medicine to this condition, and at the same time, fulfil and advance other European goals. Among other needs and requirements mentioned earlier in this thesis, there are other, potentially desirable use-cases, in which a CBDC could prove very useful.

One of such advantages are “helicopter drops”. These could be used to for example, stimulus checks in times of crisis, like the recent COVID-19 pandemic⁵⁴, or in other situations to easily stimulate the economy in a way that would be “far more accurate and direct method” than conventional methods of monetary policy, such as adjusting interest rates, as helicopter drops could be implemented by directly paying a sum of money to each citizen with a CBDC

⁵⁰ Prasad, p. 13.

⁵¹ Chen et. al, p. 1.

⁵² See f.ex. Report 2 of the Riksbank’s e-krona project.

⁵³ Likely also pertaining to other central banks around the world within their respective regions.

⁵⁴ Ozturkcan – Senel – Ozdinc, p. 4.

account.⁵⁵ One of the benefits of using a CBDC for such purposes is that a time limitation could be imposed to the spending of a stimulus check, so as to ensure that the intended goal of stimulating the economy is met.⁵⁶ Another, somewhat similar, use case for a CBDC would be distributing basic income, that could also be incentivised to be used within a set timeframe by utilising negative interest rates.⁵⁷

Cross-border use of a CBDC contains a lot of inherent risks, but also possibilities, to consider. Risks include, for example, effects for capital flows and exchange rate of the currency, potential facilitation of international criminal activities, and currency substitution in third countries, especially those that do not themselves have a particularly strong currency or otherwise a stable economy.⁵⁸ Additionally, in a situation where non-euro area residents shifted a considerable portion of their portfolios to digital euro to the extent that it increases the size of the balance sheet of the Eurosystem, it would have to acquire loans or securities that it would hold against the digital euro.⁵⁹

Possibilities with cross-border CBDC, and digital euro in particular, include increasing the suitability of euro as a “global invoicing currency”, thereby increasing the international role of the euro and strengthening the strategic autonomy of Europe, among other things.⁶⁰ Furthermore, introducing a CBDC to the world of international financial transactions would make the settlement of them more rapid and secure.⁶¹ The risks and possibilities of CBDCs within a cross-border context undermine the importance of coordinating technical or regulatory standards, so as to make, for example, CBDCs interoperable with each other to allow for cross-currency payments, but also limit the impact cross-border or cross-currency payments might have on the monetary system(s).⁶²

⁵⁵ Dyson – Hodgson, pp. 2; 22–23.

⁵⁶ Ozturkcan – Senel – Ozdinc, p. 4.

⁵⁷ Ozturkcan – Senel – Ozdinc, p. 15.

⁵⁸ Report on a digital euro, pp. 21–22.

⁵⁹ Report on a digital euro, p. 18.

⁶⁰ The present and future of money in the digital age, Fabio Panetta, 10 December 2021.

⁶¹ Bordo – Levin, p. 3.

⁶² “Hic sunt leones” – open research questions on the international dimension of central bank digital currencies, Fabio Panetta, 19 October 2021.

If it sounds as if the digital euro, and CBDCs in general, could be a versatile problem-solver, it is because they indeed could.⁶³ But it is the very nature of their problem-solving capabilities that could create new problems.⁶⁴ One of those is the risk of *bank disintermediation*. In this context, the term bank disintermediation means that, for example, by offering better and better services, the central bank can improve its public appeal, inadvertently or otherwise, over commercial banks, thus giving commercial banks less to work and maintain their business operations with. A central bank might therefore make its CBDC very appealing to the public, thus giving an incentive in itself, or in the event of loss of confidence to commercial banks (warranted or otherwise), to move bank deposits to the central bank. In this day and age, where many of the monetary transactions are carried out using (commercial) money in a digital form, CBDCs are not (yet) widely available and the only retail central bank money is cash, the switch from commercial bank money to central bank money might be disincentivising, as holding large sums of physical money might be unappealing to many. However, the risk of bank disintermediation related to the implementation of CBDCs can be mitigated, such as with holding limits systems described earlier in this thesis.⁶⁵ With holding limits to CBDC, the central bank can make it impossible to transfer large amounts of money to CBDC, thus reducing the risk or effect of bank runs.⁶⁶ With holding limits can the role of commercial banks be seen as preserving the balance between central banks and commercial banks, as the holding limits could be designed in a way where the excess of the limits would be redirected to or from the users commercial bank accounts, through *waterfall*

⁶³ Lemke describes the introduction of CBDCs to be “almost (...) like a panacea for all types of ailments”. See further: Lemke, p. 213. Waller, in *CBDC – A Solution in Search of a Problem?*, disagrees with such an assessment, arguing that they are not convinced a CBDC would solve “any existing problem that is not being addressed more promptly and efficiently by other initiatives”.

⁶⁴ According to Waller, the government should only ever intervene into the economy when significant market failures need addressing, and that the introduction of a CBDC “could disintermediate commercial banks and threaten a division of labor in the financial system that works well” added with heightened risks regarding cybersecurity “and other potential risks”. See further: Waller, *CBDC – A Solution in Search of a Problem?*.

⁶⁵ Bindseil, p. 26.

⁶⁶ *An ECB Digital Currency – A Flight of Fancy?* Yves Mersch, 11 May 2020.

functionalities.⁶⁷ This could in turn increase the attractiveness of CBDCs, as large payments could still be made, even with holding limits.⁶⁸

Ultimately, the argument for a digital euro being implemented and the prospect of the gains and benefits it can bring forth might sound convincing to many, but according to Panetta, therein lies a paradox: to be considered a success, the digital euro should be designed in a way that is attractive to its targeted user base, but the digital euro cannot be *too* successful, either.⁶⁹ The ECB, in its CBDC implementation, has to balance its way to not, for example, inadvertently threaten bank disintermediation, or create other adverse effects on matters such as credit supply or financial stability⁷⁰ by designing the digital euro *too desirable*. Simultaneously, the ECB also has to make it *desirable enough* by making it a convenient, everyday solution similar to cash for both consumers and merchants.⁷¹ Related to this careful act of funambulism also lies a ‘CBDC trilemma’, it is argued that a central bank may only accomplish any two of the three following goals: (payment) efficiency, financial stability (also referred to as the absence of runs) and price stability, but not all three at once.⁷²

2.3 Introduction to legal tender

The concept of legal tender builds upon the three roles of money, those being medium of exchange, store of value and unit of account, introduced earlier in this thesis. However, when it comes to the meaning of ‘legal tender’, there is no single, agreed-upon definition that is recognised globally. Not even in the EU is the concept of legal tender interpreted similarly across its Member States. It is, however, typically understood to mean that by using money that is considered legal tender is an obligor able to successfully discharge themselves of

⁶⁷ Report on a digital euro, p. 28; See further regarding the possible waterfall functionalities of digital euro on A stocktake on the digital euro, p. 23.

⁶⁸ More than an intellectual game: exploring the monetary policy and financial stability implications of central bank digital currencies, Fabio Panetta, 8 April 2022.

⁶⁹ Evolution or revolution? The impact of a digital euro on the financial system, Fabio Panetta, 10 February 2021.

⁷⁰ Bindseil, p. 36.

⁷¹ Morales-Resendiz et. al, p. 8; Central bank digital currencies: a monetary anchor for digital innovation, Fabio Panetta, 5 November 2021.

⁷² Schilling – Fernández-Villaverde – Uhlig, pp. 2–3; 36. The authors Schilling, Fernández-Villaverde, and Uhlig argue in a detailed rundown of the CBDC trilemma therein that when prioritising any one of the three objectives, at least one of the objectives must be sacrificed.

monetary obligations, such as debts.⁷³ This definition can be reduced to a three-part abstraction, as detailed by the ECJ⁷⁴:

- i. mandatory acceptance;
- ii. acceptance at full face value; and
- iii. power to discharge from payment obligations.

Mandatory acceptance is explained by the ECJ to mean that the creditor to a payment obligation is not able to refuse money that is considered legal tender, unless the parties have agreed that other means of payment will be used to fulfil the obligation. *Acceptance at full face value* means that the “monetary value of banknotes and coins is equal to the amount indicated on the banknotes and coins”. *Power to discharge from payment obligations* means that by using legal tender money, the obligor can satisfy the requirements of the obligation and thus rid themselves of it.⁷⁵

The concept of legal tender is closely related to that of *fiat currency*. It is defined as money that by a government decree constitutes as legal tender. The basic idea of fiat currency and the concept of legal tender is that parties to monetary obligations are able to trust that the money they, for example, receive upon when offering their goods or services, is generally accepted in the economy.⁷⁶

The ECB has deemed legal tender to be a “desirable feature” of the digital euro.⁷⁷ Giving the digital euro the status of legal tender would mean that, unlike current (private) electronic payment solutions, digital euro should be accepted everywhere “in any place and under all conditions”. Additionally, a legal tender digital euro would be more easily accepted as a

⁷³ See f.ex., Ozturkcan – Senel – Ozdinc, p. 6, and Prasad, p. 241.

⁷⁴ *Dietrich and Häring v Hessischer Rundfunk*, 26 January 2021 (Joint cases C-422/19 and C-423/19). The case in question is about two individuals wanting to pay their radio and television license fee in cash to Hessischer Rundfunk, the company responsible for collecting such payments within the geographically relevant area, and it refusing to accept payments made in cash. While offering meaningful tools with which matters of legal tender can be discussed, any further details regarding the dispute in question are deemed unimportant as regards the scope of this thesis and therefore omitted from discussion.

⁷⁵ *Dietrich and Häring v Hessischer Rundfunk*, 26 January 2021 (Joint cases C-422/19 and C-423/19).

⁷⁶ See f.ex., Keskitalo, p. 38, and Prasad, p. 25.

⁷⁷ Report on a digital euro, p. 33.

currency to be used in common or interoperable end-user solutions.⁷⁸ Furthermore, in the ECB's report, it is said that "EU primary law does not exclude the possibility of issuing digital euro as legal tender (...)"⁷⁹ In April 2023, Panetta stated that giving the digital euro the status of legal tender would be "convenient for all users".⁸⁰

As shown above, the definition of legal tender is typically related to legal and effective means of resolving debt obligations, rather than in retail transactions or those between businesses. But the concept of legal tender touches upon other matters as well, such as whether merchants are compelled to accept cash. For example, in the United States, the "United States coins and currency (...) are legal tender for all debts, public and private, public charges, taxes, duties, and dues".⁸¹ Elsewhere, such as the ECB and the Bank of England (BoE) for example, a distinction is made where they consider their respective legal tender laws to apply in discharging debt obligations but do not constitute to compel merchants to accept cash as payment for goods or services.⁸² The ECB, however, elaborates its stance and offers further examples. The ECB explains that in its view, a retailer should not refuse cash unless the refusal is based on good faith reasons. According to the ECB, this *good faith principle* is applicable in situations where "the retailer does not have enough cash to give the change back, or when there is a disproportion between the amount to be paid and the face value of the banknote." As is evident from these examples, these refusals are evaluated on a case-by-case basis, and correspondingly, a retailer cannot establish a permanent refusal of cash.⁸³

Legal tender laws can also be justified as a means of solving a "coordination problem". As argued by Gillette, the mere existence of "*some* rules" governing the creation of legal tender money either alleviates or completely cancels out risks in transactions of monetary nature that might arise from the use of goods or chattels of which the value might not be attributed similarly by the parties. In similar fashion, Desan argues that the government is "a freely available coordinating device, a technical service that costlessly provides the platform for

⁷⁸ Report on a digital euro, p. 33.

⁷⁹ Report on a digital euro, p. 24.

⁸⁰ A digital euro: widely available and easy to use, Fabio Panetta, 24 April 2023.

⁸¹ 31 USC § 5103.

⁸² Prasad, p. 241.

⁸³ Legal tender of the euro: Q&A on the new Commission recommendation, MEMO/10/92, 2010.

individuated action”. According to Gillette’s coordination justification, existence of legal tender laws offers a default rule from which parties should be able to deviate freely whenever they see another form of payment more fitting to their purposes.⁸⁴

2.4 Jus monetae

In chapter 2.4, the reader will first be introduced to matters pertaining to *jus monetae*, i.e. the competency and sovereignty to legislate monetary policy, against which different interpretations and applications of the concept of legal tender in different EU Member States are then contrasted.

2.4.1 The plurality of interpretations and legal heritages between Member States

Within the euro area, the competence and thus the sovereignty thereof, to legislate monetary policy or *jus monetae* within the Member States has, at least in large part if not completely, been transferred to the EU with the introduction of a single currency.⁸⁵

Between the Member States of EU, there appears to exist a rather high number of variance regarding the definition of ‘legal tender’ and the significance thereof that has given rise to uncertainty whether issues regarding legal tender are interpreted and dealt with similarly under a common currency. Siekmann has argued that while it appears to be obvious that euro banknotes and coins are considered to be legal tender in the euro area, a commonly understood concept of legal tender within the euro area is not easily derivable from the plurality of legal heritages within the respective Member States.⁸⁶

In order to paint a complete and detailed picture of the issues and differences in interpretation, but also strive for a common understanding within the aforementioned themes, a special

⁸⁴ See further: Gillette, pp. 108–109. See also: Lagerspetz on games of coordination in *The Opposite Mirrors*, p. 43–50; Desan (2014), p. 31.

⁸⁵ Proctor (2012), margin number 31.01. Proctor considers that monetary sovereignty is “not a single and indivisible concept”, consisting of both internal and external aspects, and if it can be divided, it can also be partly transferred and partly retained, and points to the fact that Member States had already been subject to limitations regarding monetary policy even before the introduction of a common currency. Regardless, Siekmann argues that in the euro area, *jus monetae* has now been “completely transferred to the EU”, while Proctor is of the opinion that Member States (or their respective central banks) still retain some competence over their monetary functions, albeit to a “very minor extent”, namely the ability to replace the currency system of a single Member State. See further: Proctor (2012), margin numbers 31.03 – 31.10, Siekmann (2018), p. 24.

⁸⁶ Siekmann (2020), page V.

working group called Euro Legal Tender Expert Group (ELTEG) was founded in 2009. This group was co-chaired by the European Commission Services and the ECB services and including representatives from finance ministries and national central banks of Member States.⁸⁷

Despite the current legal framework, according to ELTEG, there appears to be two trains of thought: a majority of the ELTEG members believe that the EU has exclusive competence over matters pertaining legal tender but has not yet acted upon it, whereas a minority are of the opinion that the EU has successfully defined ‘legal tender’ and created an adequate framework for Member States to fill the gaps by means of their respective national laws.⁸⁸ Regardless, the European Commission services and the ECB services maintain that a having common understanding among euro Member States of what ‘legal tender’ means is necessary in order to protect it.⁸⁹

Indeed, the information ELTEG managed to amass as background information or such arising from discussions within its meetings, is that while there does not appear to be any problem as regards euro banknotes or coins being recognised as legal tender in Union and relevant national legislations, the concept is seldomly defined. Rather, the concept is considered to be “generally accepted”.⁹⁰

While all Member States agree that euro banknotes and coins are endowed with the status of legal tender and that it consequently means that cash can be used to discharge monetary obligations unless the parties have decided on other means of payment, perhaps one of the

⁸⁷ Report of the Euro Legal Tender Expert Group on the definition, scope and effects of legal tender of euro banknotes and coins, p. 3. In addition to tackling questions regarding the definition and interpretation of legal tender, the scope of issues addressed by ELTEG also include themes regarding “acceptance of high denomination banknotes, validity of surcharges, acceptance of stained banknotes, the protection of banknotes as regards IPR and the protection of legal tender banknotes and coins from destruction and mutilation.”

⁸⁸ Regarding this question, the report does not define which countries do the majority and minority consist of, or the relative sizes of the respective groups.

⁸⁹ Report of the Euro Legal Tender Expert Group on the definition, scope and effects of legal tender of euro banknotes and coins, pp. 2–3.

⁹⁰ Report of the Euro Legal Tender Expert Group on the definition, scope and effects of legal tender of euro banknotes and coins, p. 3. Siekmann has come to a similar conclusion, opining that a common understanding of ‘legal tender’ is difficult to achieve due to the plurality of legal heritages, but that in actuality it is even more cumbersome because national concepts regarding legal tender were almost never laid down in statutory law. Therefore, even figuring out a single Member State’s legal understanding of ‘legal tender’ may prove difficult in itself. See further: Siekmann (2020), p. V.

more important conundrums arising from the differences in viewpoints regarding the concept and reach of legal tender is that of whether it prevails over contractual freedom, especially as regards business-to-customer ('B to C') relationships. In such relationships, the Commission services and ECB services argued that if a customer wants to pay with euro banknotes and coins, and no agreement has been made as regards the means of payment, such cash in principle ought to not be rejected, unless the business has "restrictively defined objective reasons" to not accept cash as payment. Such reasons were suggested by the Chair to be:

- i. accepting cash is a risk to the safety of the people and the business;
- ii. the per unit value of the goods sold is so high that payment in cash would be seriously impractical and/or unsafe for the retailer;
- iii. the location of the shop is remote and far away from a bank to which the retailer could deposit their money to regularly; and
- iv. the purchase takes place remotely, without physical contact between the parties to the contract.

Regarding B to C relationships, the ELTEG members could not come to an agreement, as according to a minority⁹¹, contractual freedom could prevail over public law provisions regarding legal tender, and according to the majority, contractual freedom cannot prevail over public law. The report explains that according to the members part of this minority, "the legal tender provisions refer to the fulfilment of an essential part of a contract already concluded and do not amount to an obligation to conclude a contract allowing for cash payments". However, it is important to note that these restrictively defined objective reasons for refusing cash are related to the physical nature of cash. In this light, it becomes noteworthy to mention that of the participating ELTEG members, only in the Netherlands could legal tender be considered to be something more than merely restricted to cash. According to the Dutch representative of the ELTEG, the Dutch Civil Code allows payments via the banking system

⁹¹ The report specifically names such countries to be Ireland, Germany, Finland, and the Netherlands.

as valid means of discharging a monetary obligation, unless the creditor has “validly excluded the payment on a bank account”.⁹²

Business-to-business (‘B to B’) relationships, however, were considered to be different by the ELTEG at least in two ways. Firstly, the parties to a contract in such relationships were regarded as having equal bargaining capacity and secondly, they might operate under generally agreed customary rules and conditions, although it was emphasised that in such relationships contractual freedom is also more prominent.⁹³

In conclusion, despite dividing the question of legal tender and acceptance of cash to two distinct scenarios based on the relationship between the parties to a contract (B to B, B to C), the ELTEG members could not reach an agreement. While a majority of the members did approve of the principle of general acceptance of cash in B to C relationships, a minority insisted on the prevailment of contractual freedom over legal tender provisions.⁹⁴

Ultimately, “a clear majority” of the ELTEG members were of the opinion that a definition of legal tender could be included in Regulation 974/88 [sic]⁹⁵. However, they did not

⁹² Report of the Euro Legal Tender Expert Group on the definition, scope and effects of legal tender of euro banknotes and coins, pp. 4–6; Regarding the refusal of cash, according to De Stasio and Boatto, in Italy, Article 693 of the Italian Criminal Code punitively sanctions persons that reject coins or banknotes that are legal tender within the State. See further: De Stasio and Boatto, p. 62, footnote 28. In France, according to Bonneau, “creditors have to accept coins and bank notes with legal tender” or risk being punished by its criminal law. Furthermore, accepting, holding, or using “unauthorized monetary supports with the objective of replacing coins and bank notes having legal tender in France” is also punishable by a fine. See further: Bonneau, pp. 84; 87. In Germany, according to Kriese, deviation from the obligation to accept legal tender is sanctioned by the BGB, but only with purely civil consequences. See further, Kriese, p. 70. In Austria, Perner posits that parties to a monetary obligation “are free to agree on payments in foreign currency”, although even when the debt is expressed in foreign currency, the debtor has within their rights to discharge the monetary obligation in Euro, unless the payment in a foreign currency is agreed upon by the parties. See further: Perner, p. 132. In the UK, the Bank of England argues that, for instance, a merchant may choose what payment they accept, even if not legal tender (the example given here is Pokémon cards). See further: <https://www.bankofengland.co.uk/explainers/what-is-legal-tender>, accessed on 27th March 2024.

⁹³ Report of the Euro Legal Tender Expert Group on the definition, scope and effects of legal tender of euro banknotes and coins, pp. 4–6.

⁹⁴ Report of the Euro Legal Tender Expert Group on the definition, scope and effects of legal tender of euro banknotes and coins, pp. 4–6. The minority in question was once again Ireland, Germany, Finland, and the Netherlands.

⁹⁵ It is the Council Regulation (EC) No 974/98 of 3 May 1998 that pertains to the introduction of the euro, whereas the Commission Regulation (EEC) No 974/88 of 14 April 1988 concerns the import levies on cereals and on wheat or rye flour, groats and meal.

recommend any legislative action be taken in the field of legal tender but rather, a soft law approach in the form of a Commission recommendation, for instance.⁹⁶

The ELTEG was re-established for the last time in 2021 to discuss topics related to the acceptance and availability of euro cash, to provide information and legal expertise to the Commission and to further efforts of the Commission to assess a possible EU legislative or policy initiative regarding legal tender of euro banknotes and coins. In addition, the ELTEG could be consulted by the Commission on digital euro.⁹⁷

Regarding different legal frameworks for the definition of legal tender, while none of the responding Member States note that they have a distinct national provision for legal tender status *per se*, there appears to be a wide variety of ways Member States have elements of the definition for legal tender in their respective national legislations. According to the report, in Austria, Cyprus, Germany and Greece, elements of a definition for legal tender can be found in their respective Central Bank Acts or Statutes. In Finland, such a reference can be found in its Tax Code, and in the Netherlands, its Civil Code. Some other Member States, such as Germany, Malta, and Portugal, however, point directly to EU legislation, such as the Council Regulation (EC) No 974/98 on the introduction of the euro or the Commission Recommendation EU/2010/191 on the scope and effects of legal tender of euro banknotes and coins.⁹⁸

Concerning the acceptance of cash in Member States, the report shines light on further nuance regarding the situations and preconditions in which cash may be rejected than merely whether contractual freedom prevails or not in a given Member State. The practices of individual Member States vary in regards of whether customers have to be informed in advance of their accepted payment options and if so, in which way. According to the report, a customary duty of retailers to provide the customer with “pre-contractual information” exists in Member States such as Austria, Belgium, Germany, and Ireland. Elsewhere, such as in Greece, the Netherlands, and Latvia, retailers are obliged to hold a label at the entrance door that informs the customer of the accepted payment options. In some Member States, such as France,

⁹⁶ Report of the Euro Legal Tender Expert Group on the definition, scope and effects of legal tender of euro banknotes and coins, p. 18.

⁹⁷ Final report of the Euro Legal Tender Expert Group (ELTEG) of 6 July 2022, p. 1.

⁹⁸ Final report of the Euro Legal Tender Expert Group (ELTEG) of 6 July 2022, pp. 1–2.

Estonia, and Italy, a refusal of payment with legal tender banknotes or coins is penalised by a national provision. Other Member States refer to the principle of contractual freedom, but agree that in a situation in which no alternative means of payment is agreed upon, the refusal of cash can lead to a breach of contract.⁹⁹

While in the first ELTEG report it was claimed that only in the Netherlands could other forms of payment be considered legal tender than just coins or banknotes, in the final ELTEG report it is stated that in addition to the Netherlands, such may be the case also in Greece and Italy. Greece explains its views that accepting electronic payments has become mandatory for certain public authorities. In Italy, however, the use of “traceable means of payment” are expected to be carried out when the payment exceeds a certain limit. Additionally, Belgium and Cyprus are considering introducing an obligation for select retailers or businesses to offer at least one electronic means of payment.¹⁰⁰

Regarding the aftermath of the recent preliminary judgment of the ECJ (*Dietrich and Häring v Hessischer Rundfunk*), according to the final ELTEG report, none of the Member States noted any consequences that would need to be addressed within their national legislation. Furthermore, only five Member States were of the opinion that in the risk of legal gaps or legal uncertainty arising from the judgment, they would need to be addressed at the EU level, whereas thirteen Member States rejected this proposition. Furthermore, a potential need for communication measures at the EU level was raised by Austria, and supported by Belgium, Slovenia, and Spain, to clarify the definition of legal tender at the EU level and not merely at national level. However, ELTEG considered that were the digital euro be implemented with the status of legal tender, the Commission ought to, in parallel, consider regulating the legal tender status of euro cash, so as to ward off further incoherency within EU legislation.¹⁰¹

2.5 Legal basis for a digital euro

In this section, an overview of the current legal basis is presented to the reader, with an introduction to different options for on what legal basis the digital euro could be implemented

⁹⁹ Final report of the Euro Legal Tender Expert Group (ELTEG) of 6 July 2022, p. 2.

¹⁰⁰ Final report of the Euro Legal Tender Expert Group (ELTEG) of 6 July 2022, pp. 2–3.

¹⁰¹ Final report of the Euro Legal Tender Expert Group (ELTEG) of 6 July 2022, pp. 3–10.

upon. Closer analysis about the different options for a legal basis will take place in the fourth chapter.

In the aforementioned ECB's Report on a digital euro, different options for the legal basis for digital euro are considered. According to the report, the design, and the purpose for which the digital euro is used, dictate the preferred legal basis.¹⁰² The report then outlines four different scenarios and their respective preferred legal bases.

First, if digital euro were to be issued as a monetary instrument, similar to central bank reserves, intended and accessible only for central bank counterparties, then the invocable legal basis for this design and purpose could, according to the report, be Article 127(2) of the Treaty on the Functioning of the European Union ('TFEU')¹⁰³ in conjunction with the first sentence of Article 20 of the Statute of the European System of Central Banks ('ESCB').¹⁰⁴

Second, if the digital euro were to be made available to households and other private entities, the suitable legal basis would be Article 127(2) TFEU in conjunction with Article 17 of the Statute of the ESCB.¹⁰⁵

Third, in a scenario where the digital euro would only be used as a medium for settlements for predetermined types of payment and accessible to only those deemed eligible, the most suitable legal basis would be Article 127(2) TFEU in conjunction with Article 22 of the Statute of the ESCB.¹⁰⁶

¹⁰² Report on a digital euro, p. 24.

¹⁰³ Article 127(2) TFEU lists the basic tasks to be carried out through the ESCB, them being defining and implementing the monetary policy of the Union, conducting foreign-exchange operations consistent with the provisions of Article 219, holding and managing the official foreign reserves of the Member States, and promoting the smooth operation of payment systems.

¹⁰⁴ The first sentence of Article 20 of the Statute of the European System of Central banks declares that "[t]he Governing Council may, by a majority of two thirds of the votes cast, decide upon the use of such other operational methods of monetary control as it sees fit, respecting Article 2".

¹⁰⁵ The Article 17 of the Statute of the ESCB gives the ECB and national central banks the jurisdiction to "open accounts for credit institutions, public entities and other market participants and accept assets, including book entry securities, as collateral".

¹⁰⁶ The Article 22 of the Statute of the ESCB gives the ECB and national central banks the jurisdiction to "provide facilities, and the ECB to make regulations, to ensure efficient and sound clearing and payment systems within the Community and with other countries".

Fourth, if the digital euro would be issued to resemble that of a banknote, then the optimal choice for the legal basis would be, according to the report, be Article 128¹⁰⁷ of the TFEU in conjunction with the first sentence of Article 16 of the Statute of the ESCB¹⁰⁸. The report concludes that the invocation of Article 128(1) of the TFEU, in conjunction with Article 16 of the Statute of the ESCB would “afford the Eurosystem the amplest margin of discretion for the issuance of a digital euro with the status of legal tender”. Furthermore, the report assesses that reliance on Article 127(2) TFEU in conjunction with Articles 17, 20 or 22 of the Statute of the ESCB are more suitable for other use cases where the status of legal tender is not needed.

The report concludes by pointing out that a secondary law act could be implemented to “regulate the conditions for the issuance of a digital euro with the status of legal tender by the Eurosystem”, based on Article 133 TFEU.¹⁰⁹ As it turns out, this is exactly what might transpire. On 28th June 2023, the European Commission put forward “two proposals within a ‘single currency package’” to, on one hand, ensure the access and possibility to pay with euro banknotes and coins across the euro area, and on the other, to implement a framework for a potentially new digital manifestation of the euro.¹¹⁰ The proposal package specifically names Article 133 TFEU as its legal basis.¹¹¹

¹⁰⁷ Article 128(1) TFEU gives the ECB the exclusive right to authorise the issue of euro banknotes within the Union and gives the ECB and the national central banks the right to issue such banknotes. Furthermore, Article 128(1) TFEU declares these banknotes issued by the ECB and/or national central banks the only notes to have the status of legal tender within the Union. Article 128(2) TFEU gives the Member States the jurisdiction to issue euro coins “subject to approval by the European Central Bank of the volume of the issue. Additionally, Article 128(2) gives the Council, after meeting certain prerequisite conditions, to adopt measures to “harmonise the denominations and technical specifications of all coins intended for circulation to the extent necessary to permit their smooth circulation within the Union.”

¹⁰⁸ Article 16 of the Statute of the ESCB largely mirrors Article 128(1) TFEU and gives the Governing Council the exclusive right for the authorisation the issuing of banknotes within the Community (=Union) and the ECB and national central banks the option to issue such notes, and also adding that such notes issued by the ECB and national central banks shall be the only notes to have the status of legal tender within the Community.

¹⁰⁹ Article 133 TFEU gives the European Parliament and the Council, under certain limitations, the jurisdiction to “lay down the measures necessary for the use of the euro as the single currency”.

¹¹⁰ https://finance.ec.europa.eu/publications/digital-euro-package_en, accessed 13th March 2024.

¹¹¹ Proposal for a Regulation of the European Parliament and of the Council on the legal tender of euro banknotes and coins, 28.6.2023, p. 3 and Proposal for a Regulation of the European Parliament and of the Council on the establishment of the digital euro, p. 5; The final ELTEG Report (2022) reports that from Germany’s point of view, such a proposal could only contain provisions in the field of monetary law, and provisions that would extend beyond, such as those seeking to regulate and harmonise private law would require another legal basis, such as Article 114 TFEU. See further: Final report of the Euro Legal Tender Expert Group

2.5.1 The two proposals

When it comes to the nature of issues that relate to the status of legal tender, the proposal on the legal tender of euro banknotes and coins ('Proposal I') recognises two that it names "the main aspects to the legal tender of cash", those being the acceptance, and access to cash.¹¹²

As regards the subject matter and scope of this thesis, the most pertinent Articles of the Proposal I are Articles 4–7, and 15.¹¹³ Article 4 reaffirms firstly, that the legal tender status of euro banknotes and coins shall entail their mandatory acceptance, so that the payee shall not refuse euro banknotes and/or coins tendered in payment to comply with that obligation. Secondly, Article 4 states that euro banknotes and coins must be accepted at full face value, so that the monetary value of cash shall be equal to the amount indicated on the banknotes and coins, and that surcharges on the use of cash as settlement of a debt shall be prohibited. Thirdly, Article 4 asserts that a payer shall be able to discharge from a monetary obligation by using euro banknotes and/or coins to the payee.

Article 5(1) then presents exceptions to the aforementioned principle of mandatory acceptance. Derogations, in which such a refusal is given full entitlement to, are those made in 'good faith' and that are based on legitimate and temporary grounds in line with the principle of proportionality and outside the control of the payee, or, if the parties to a monetary obligation have agreed to the use of a different means of payment. Article 5(2) then elaborates on the definition of 'legitimate grounds', positing that those may include situations in which the banknote used is "manifestly disproportionate" in relation to the value of the settlement, or situations in which the payee has no change available, or not enough change to carry out its usual daily business transactions as a result of that payment.

Article 6 allows the Commission to adopt delegated acts to further limit the principle of mandatory acceptance, in situations in which an objective of public interest is identified and if

(ELTEG) of July 6, 2022, p. 9, footnote 12; Additionally, Proctor appears to conform with this approach and legal basis, arguing that "EU institutions would appear to possess the competence to legislate for legal tender status throughout the EU" and specifically refers therein to Article 133 TFEU. See further: Proctor (2020), p. 95.

¹¹² Proposal for a Regulation of the European Parliament and of the Council on the legal tender of euro banknotes and coins, 28th June 2023, p. 5.

¹¹³ Articles 1–3 of Proposal I concern the general subject matter, scope, and definitions of the Regulation, respectively. Articles 8–14 relate to access to cash, procedural aspects, exercise of the delegation, committee procedure, penalties, annual reports, and duty of Member States to inform about remedies, respectively. Finally, Articles 16–17 concern review and entry into force, respectively.

such an exception to the principle is considered proportionate to that objective, without undermining the effectiveness of legal tender status of euro cash and provided that other means of settling monetary debts remain available.

Article 7(1) compels Member States to monitor and assess the acceptance of cash in all their regions, Article 7(2) sets out an obligation to the Member States to notify the Commission and the ECB of such results annually, and finally Article 7(3) sets forth a duty for the Member State to take remedial measures in situations in which the degree of acceptance of payments in cash compromises mandatory acceptance of euro banknotes and coins.

Finally, Article 15 establishes firstly, that euro banknotes and coins shall be convertible to each other at par, and secondly, that payees to a monetary obligation denominated in euro shall accept banknotes and coins regardless of whether they accept digital euro or not.

Furthermore, in a situation where the use of both euro cash and digital euro are considered mandatory according to the provisions of Proposal I and the Proposal for a Regulation of the European Parliament and of the Council on the establishment of the digital euro ('Proposal II'), the payer is given entitlement to choose their preferred means of payment.

Within Proposal II, Articles 7–12 and 16 are the most important from the point of view of this thesis, as they regulate on the legal tender features of digital euro.¹¹⁴ More or less mirroring the wording of Article 4 of Proposal I, Article 7 of Proposal II establishes the principles of legal tender status to the digital euro, thereby denoting their equal footing as regards their acceptance, value, and power to discharge from a monetary obligation. Article 8 then establishes the legal tender status to the digital euro in both offline and online payments of a monetary debt denominated in euro, if such *offline* payments take place within the euro area, and if such *online* payments are made to a payee residing or established in the euro area.

Similarly to Article 5 of Proposal I, Article 9 of Proposal II introduces exceptions to the principles of accepting digital euro. Subparagraphs *b* and *d* largely cover the same ground as those established in Article 5 of Proposal I, those being reasons of good faith and situations where parties to a monetary obligation have agreed on the use of a different payment modality

¹¹⁴ Articles 1–6 cover the general subject matter, definitions, the establishment of the digital euro as a single currency, and competent authorities, respectively. Articles 13–42 legislate on distribution, the use of digital euro as a store of value and as a means of payment, technical features, privacy and data protection, anti-money laundering efforts and other ancillary provisions.

respectively, but the subparagraph *a* is unique to the Proposal II and is an important addition, according to which a payee is entitled to refuse digital euro in three scenarios. Firstly, such refusal may occur where the payee is an enterprise which employs fewer than 10 persons, or secondly, its annual turnover or balance sheet does not exceed two million euros. Thirdly, such a refusal can be justified if the payee is considered to be a non-profit legal entity. Interestingly, such grounds for refusal are however nullified by the Proposal if the payee accepts “comparable digital means of payment”. Additionally, in subparagraph *c*, natural persons “acting in the course of a purely personal or household activity” are given entitlement to refuse digital euro.

Furthermore, in Article 10, contractual terms that “have the object or the effect” of excluding the use of digital euro as a means of discharging a debt denominated in euro are prohibited and are considered not binding on the payer in situations where payees are obliged to accept digital euro.

Paralleling Article 6 of Proposal I, Article 11 of Proposal II empowers the Commission to adopt delegated acts that allow for additional exceptions to the principle of monetary acceptance if public interests and requirements of proportionality are met and if such exceptions do not undermine the effectiveness of legal tender status of the digital euro, and as long as other means for discharging from monetary obligations remain available.

Similarly to Article 15 of Proposal I, in Article 12 of Proposal II the convertibility between digital euro and euro banknotes and coins are once again established and the freedom of the payer to choose their preferred means of payment in cases where, according to both Proposals, both the acceptance of euro banknotes and coins, and the digital euro, are considered mandatory.

Finally, in Article 16 of Proposal II, it is suggested that the ECB ought to establish certain thresholds and parameters that regulate the use of digital euro as a store of value. Such limits would be applied both to offline and online holdings of digital euro, and “in a non-discriminatory manner and uniformly across the euro area”. Additionally, digital euro, in either of its forms, would not bear interest.

As presented above with the findings of the ELTEG reports, while there does appear to be some sort of consensus upon the nature of the term and the contents that it holds within, the vagueness of the term, mixed with the plurality of legal heritages in the EU, results in a state

where the interpretation of legal tender rules within Member States is highly varied and perhaps unpredictable.¹¹⁵ Furthermore, the discourse about legal tender in this thesis hitherto has been based on many real-world examples and technicalities that, while illuminating, may not offer much insight beyond their surface-level interactions. Considering that this thesis seeks to conjoin the somewhat nebulous concept of legal tender with CBDCs, a relatively new and modern concept of money, it will be worthwhile to first delve deeper to the underlying legal structures giving ‘legal tender’ and money its value and standing, and for what reason would such concepts come to be in the first place. Consequently, this may help in understanding why the Commission and the ECB are interested in the digital euro having the status of legal tender.

¹¹⁵ Proctor describes the situation as “a slightly untidy state”, where the euro as a currency is identified by EU treaties and relevant EU legislation, but yet the status of legal tender is left for the participating Member States to be separately governed. See further: Proctor (2020), pp. 101–102 .

3 Legal tender and monetary theories

3.1 How does money gain its validity?

The nature of money can be seen as a simple, even mundane, topic of discussion. Money is, after all, an asset we use on an everyday basis, and a concept that is often taught to children of very young age. However, this seemingly unassuming concept holds an exceptionally wide variety of viewpoints and themes.¹¹⁶ Boiled down to its very essence, money can ultimately be seen as a rule-based system and as a means of alleviating and preventing issues in interaction between humans in communities, akin to language and law.¹¹⁷ The main function of money is often thought to have come into being to alleviate problems of trade created by barter. However, scholars such as Alfred Mitchell-Innes and David Graeber have shown evidence to the contrary, showing that the origin story of money is “precisely backwards”.¹¹⁸ Nevertheless, by being able to trade something non-perishable and having a commonly agreed predetermined value, money has become a commodity as the ‘universal equivalent’ and thus an emancipatory vehicle towards more developed and widespread economic activity.¹¹⁹ Therefore, money can be seen as carrying within itself an element of contractual agreement between economic agents, as they must both acknowledge the value of money.¹²⁰ How does money then become a commonly accepted *institution*?¹²¹

Within the next sections, a wide variety of theories about the nature of money, and the role and functions of central banks, are presented and discussed. Monetary theories may not be able to provide the full answer to whether a type of money is, ought to, or will be considered legal tender, but they will help consider the legitimacy of adhering the status of legal tender on digital euro and CBDCs in general. Moreover, the examination of the functions and roles

¹¹⁶ Omlor describes the definition of money as “contentious”, conveying the idea that different groups, such as economists and lawyers, may view money differently from one another. See further: Omlor, p. 619.

¹¹⁷ Lagerspetz, p. 50.

¹¹⁸ See further: Graeber, pp. 21–40.

¹¹⁹ Desan (2016), pp. 19–20.

¹²⁰ Lagerspetz, p. 51; On the origin and definition of coins, see Siekmann (2018), pp. 20–23.

¹²¹ Lagerspetz describes institutions as “artificial islands of predictability in the stormy sea of unpredictability” and their functions as 1) shaping peoples’ preferences by educating, manipulating, coercing, and rewarding them – by exercising power over them and 2) resolving ambiguities by providing people with *conventional solutions*. See further: Lagerspetz, pp. 38–39.

of central banks allows for CBDCs to be examined in the light of the State's commitment to uphold the value and legitimacy of its currency. While they do not purport to necessarily cover all facets and details of any one topic, their function within this thesis is to illustrate and guide the discussion of money and its nature closer to the topic of legal tender.

After examining the relevant monetary theories and the role and functions of central banks, it is timely to turn back to matters pertaining to legal tender. However, whereas in the first two chapters legal tender was examined on a more surface-level and largely from the point of view of the lawmaker, Member States, and case law, in this chapter the concept of legal tender is viewed through more academic lenses. For example, the mechanics of discharging monetary obligations are scrutinised thoroughly. It is however worthwhile to disclose that when examining the stances and opinions of legal scholars on matters regarding the topic of legal tender, the scope of this thesis may not allow for the extent of their views to be fully exhausted. Rather, they are examined to the extent that is necessary for the purposes of this thesis.

3.1.1 Theories of money

The first theory to be examined, the *State theory of money*, suggests that money gains its validity by the will of the State. According to this theory (also known as *Chartalist* or *Statist* theory), as introduced by G.F. Knapp¹²², the acceptance of the State is an essential part of working monetary systems in modern societies. This theory has been summarised by Howard S. Ellis into two theses:

- 1) "Money comes into being when the State selects a certain unit of value, describes its physical embodiments (coins and notes) carefully, gives it a name, and proclaims its validity in terms of the historically preceding unit.
- 2) The proclaimed validity is secured in trade by a State's accepting all its money at face value; legal tender in private trade is a complementary measure, not a universal one.

¹²² Siekmann acknowledges and agrees with Knapp's findings but wishes to remind that "a now almost forgotten German law professor" Gustav Hartmann had made the same discoveries decades prior to Knapp, using even partially same wording. Therefore, Siekmann argues that it should be Hartmann to whom the State theory of money should be credited to. See further: f.ex. Siekmann (2020), p. 29.

The State makes its money a standard by forcing it out in payments to private persons.”¹²³

In Knapp’s view, the State (or, to be more precise, the legal system¹²⁴) is the sole creator of money.¹²⁵ Knapp therefore argued that only chattels issued by the State could be considered money.¹²⁶ In addition, the value of such money is to be fixed by law, rather than in reference to their production materials, an idea of the principle of *nominalism*.¹²⁷ Therefore, Knapp opines that the corporeal manifestation of a chattel has no direct implications to its nature as money.¹²⁸ Ascarelli, inspired by Knapp’s findings, saw money as a creature of society, and the concepts of currency, and especially that of legal tender, as creatures of the State. In this way, Ascarelli therefore combined the role of people as propagators of the idea to use “metallic or paper tokens” in settling their (monetary) obligations, and the role of the State to recognise such tokens “enjoy the necessary legitimacy not to be rejected or refused by creditors when used by debtors for the performance of monetary obligations”.¹²⁹ In light of this, Ascarelli concluded that money must be seen as equal to cash, which in turn is the only legal unit that values can be measured against and the one and only manifestation of legal tender.¹³⁰

Since the value of money is not, under the principle of nominalism, related to its intrinsic value, the question arises then, to what is it related to instead? In a nominalist system, it is

¹²³ Ellis, citation in the source Lagerspetz, p. 52.

¹²⁴ Knapp, citation in the source Siekmann (2018), p. 6. For the sake of simplicity, in this thesis, the term ‘State’ will be used.

¹²⁵ Knapp, citation in the source Keskitalo, p. 34.

¹²⁶ According to the principle of *lex monetae*, this view concerns only money in the issuing State. According to Proctor, *lex monetae* refers to the law of the currency and the State’s sovereign power over it and the determining what constitutes ‘money’ and the nominal value thereof. See further: Proctor (2012), margin number 13.04.

¹²⁷ Proctor (2012), margin number 2.16. The idea of nominalism can be seen as a juxtaposition to the ideas of *metallism* and *autometallism*, according to which the inherent object value of the chattel, such as the raw materials used in coins, influences partly or in totality the value of the coin as *medium*, not object, of exchange. Rather, money ought not to be used as a quantity of its raw materials, but rather as an “abstract unit of measurement”. See further: f.ex. Proctor (2012), margin number 9.01; Keskitalo, p. 32.

¹²⁸ Knapp, citation in the source Keskitalo, p. 33.

¹²⁹ Ascarelli, citation in the source De Stasio and Boatto, p. 60.

¹³⁰ Ascarelli, citation in the source De Stasio and Boatto, p. 61.

necessary to state the number of units of account in question.¹³¹ Furthermore, unit of account of money could, in Knapp's view, only be defined in relation to a prior unit of account, through an act called *recurrent linking*. Proctor, however, seems hesitant about Knapp's approach, arguing that while practical, it does not truly define unit of account, but rather offloads the burden of definition to the rate of conversion in relation to a former monetary standard.¹³² Ultimately, however, Proctor acknowledges that "the unit of account is whatever the national legislator states it to be", and as such, is consistent with the State theory of money. Proctor concludes that the meaning of unit of account cannot be further illuminated without relating it to some other concept or measure of value.¹³³ According to Siekmann, the criticisms directed towards the State theory of money are unconvincing, and that while the theory might not encompass a perfect explanation to the nature and origins of money, it gives at least a partial one.¹³⁴

The State theory of money comes into direct juxtaposition with another theory, penned by Carl Menger. Menger postulates that while money as a social institution ought to be explained by the actions of individual agents, the coordination of such actions is generally not based upon explicit contracts, but rather guided by an "invisible hand". Menger therefore describes the emergence of money as a social institution as seemingly paradoxical, as how could an institution as important as money "come into being without a *common will*".¹³⁵

The paradoxical nature of Menger's theory is alleviated by the notion that some exchangeable goods tend to generally be more in demand and more easily transportable than others. This leads to the finding that the most widely traded goods essentially become money over time, and no explicit contract is needed, ultimately leading to a self-enforcing practice. This, in turn, points the way to the crux of Menger's theory: "money is whatever is accepted as

¹³¹ Proctor (2012), margin number 2.38.

¹³² Proctor explains that recurrent linking occurs in situations where a State decides to change its national currency, the new currency must be established in relation to the former currency, so that obligations contracted before the change can be successfully discharged with the new currency.

¹³³ Proctor (2012), margin numbers 2.41–2.43.

¹³⁴ Siekmann (2020), p. 30.

¹³⁵ Menger, citation in the source Lagerspetz, pp. 52–53.

money”.¹³⁶ In contrast, Karl Olivecrona rejects this way of thinking by calling Menger’s theory to fall victim to circular reasoning. It is however argued that exactly this circular nature is necessary for the trust in money to develop, because mutual belief is deemed necessary for the institution of money, and many other such institutions in a modern economy, to exist.¹³⁷

As pointed out by the State theory of money above, the State nevertheless has a vested interest in the matter. Through its central banks and other monetary institutions, it seeks to uphold trust in the money in circulation, by fostering the convertibility of its national currency. By being the actor with the most resources available, the State’s actions towards a shared understanding of money are likely to instil faith in the rationale of accepting money payments.¹³⁸ Enforcing the end result with sanctions is seen as unnecessary, because after the practice has been established, there would be nothing to be gained by deviating from the norm. Thus, in this regard the practice can be seen as self-enforcing.¹³⁹ Ultimately, it can be argued that the State, by the endorsement of its money and encouraging others to follow suit, yields a result as close to a ‘common will’ as is reasonably possible.

It is important to note, however, that the idea of the State retaining and exercising sovereignty over its monetary matters, as described by the Statist theories, does not prevent groups of States from introducing a common currency, such as the euro, but rather, it exemplifies the State’s power to decide upon such matters.¹⁴⁰

Another theory that affords a different point of view is the *Societary theory of money*, which, according to Proctor, “holds that it is the usage of commercial life or the confidence of the

¹³⁶ Menger, citation in the source Lagerspetz, pp. 52–53; Kuusimaa supports a stance that the quintessential purpose of money is to function as evidence of purchasing power (in Finnish: ‘*todellinen kate*’). Therefore, Kuusimaa supports a medium-neutral view where the emphasis should be on the end result, that being the satisfactory execution of monetary debt, and not on the manifestation or form of money, so long as the value of the used money does not change in relation to central bank currency and that the money is convertible on demand to central bank currency. See further: f.ex. Kuusimaa, pp. 461–462; Keskitalo, p. 31; Desan (2014), pp. 31–32.

¹³⁷ Olivecrona, citation in the source Lagerspetz, pp. 53–54; Stonier and Hague argue further that general acceptability is the *sine qua non* of any kind of money, and that the general acceptability is, in essence, a social phenomenon. See further: A Textbook of Economic Theory, pp. 403; 405.

¹³⁸ Lagerspetz, p. 57.

¹³⁹ Lagerspetz, p. 56; Similarly: Desan (2014), pp. 31–32; This certainly marks a departure from the times of Kublai Khan, in which the paper currency issued by his court was declared legal tender and to be accepted by everyone within his domain on pain of death. See further: Prasad, p. 4.

¹⁴⁰ Proctor (2012), margin number 1.18.

people which has the power to create or recognize ‘money’”. In contrast to the Statist theories, the Societary theory of money emphasises the public’s “attitude” towards what is perceived as money.¹⁴¹ In essence, means of payment that are generally accepted in a society and that have solidified their use within it, *are* money.¹⁴² The Societary theory can be then said to bear more than merely a passing resemblance to Menger’s theory, as each of them stress the importance of a shared understanding in the value of money.

In more modern times, another theory of money, called the *Institutional theory of money*, has been developed. Rather than seeing money first and foremost as chattel, it concentrates on the idea of money as “transferable credit” that relies on a framework that seeks to uphold the purchasing power, wide availability (even in times of banking stress) and the capability of money to settle monetary obligations.¹⁴³ Nowadays, as the value of money is no longer affixed to that of gold or other precious metals, nor otherwise fixed or determined by the State, more emphasis is therefore given to the institutional framework that the money operates within.¹⁴⁴ Without an anchor to which the value of money can rely upon, the institutional arrangements are given the role of determining “(i) the value of money and its stability, (ii) the fungibility and equivalence of central bank and commercial bank money, and (iii), the functionality of money as a means of exchange”¹⁴⁵. According to the Institutional theory, even commercial bank money, issued by private banks, can be then regarded as money, for the sole reason that it is always revertible into central bank money on demand. Therefore, the theory stresses that money, in essence, is a claim, direct or indirect, against the issuing central bank.¹⁴⁶ The pronounced emphasis on institutions, and not in small part the issuing central bank, leads to the notion that in present times, confidence in currency in a variety of ways likens to confidence in the central bank.¹⁴⁷

¹⁴¹ Proctor (2012), margin number 1.29.

¹⁴² Keskitalo, p. 35.

¹⁴³ Proctor (2012), margin number 1.30.

¹⁴⁴ Keskitalo, p. 36.

¹⁴⁵ Proctor (2012), margin number 1.35.

¹⁴⁶ Proctor (2012), margin number 1.36.

¹⁴⁷ Proctor (2012), margin number 1.38.

The institutional theory is said to acknowledge the realities modern economies tend to exist in, where money exists in a ‘scriptural’, or otherwise digital, rather than physical, form, and where the value of money is devoid of any inherent value, but rather that its value relies upon confidence in the central bank and the framework that regulates the properties of scriptural money. In many respects, the Institutional theory therefore seems attractive in many respects to be used to analyse modern and advanced realities and viewpoints.¹⁴⁸ However, Siekmann criticises the Institutional theory of money for its inaccuracy. According to Siekmann, the Institutional theory “indiscriminately mixes normative and factual arguments and oscillates between the abstract and the concrete or between visions [sic] for the future and the present legal situation”. Siekmann acknowledges the crucial role that central banks play in the modern world, but disregards definitions that claim that money is “no more than credit against an obligor” or “no longer a chattel, but a transferable credit”. According to Siekmann, such statements are poorly compatible with Article 128 TFEU, particularly without defining who, or what, is the obligor.¹⁴⁹

According to Keskitalo, the State and Institutional theories of money share a common ground in the respect that they are intended to be used to find answers to the question of what money at its core *is*, rather than what the legal definition of money is as a *means of payment*. Similarly, Keskitalo identifies shortcomings in the Societary theory of money, in that in giving significant importance to the prevalence and general acceptance of the means of payment, the theory does not take into account other legal considerations.¹⁵⁰ Proctor holds a similar view to Keskitalo, arguing further that the functionalist approach where anything can be money if it is perceived and used as such, cannot, however, provide a fitting basis for a legal definition for money, and that the Societary theory seems to largely disregard the “undeniable monopoly” that States wield over their currencies and the acknowledgement of such powers within international law.¹⁵¹

¹⁴⁸ Proctor (2012), margin number 1.43. The problem with the Institutional theory, however, is that it relies on the idea of central bank enjoying independence in respect to its actions. Therefore, according to Proctor, the theory cannot provide a *universal* theory, as not all countries have central banks with such independence.

¹⁴⁹ Siekmann (2020), p. 31.

¹⁵⁰ Other such legal considerations, according to Keskitalo, are elements pertaining to taxation or compatibility with the monetary unit. See further: Keskitalo, p. 226.

¹⁵¹ Proctor (2012), margin number 1.29. Proctor further notes for completeness that the State and Societary theories were developed during the time when the value of national currencies was affixed to gold. During that

The criticisms presented regarding the theories mentioned above has led Keskitalo to create a theory of money that seeks to encompass money as a legally recognised means of payment that constitutes a legal means of discharging monetary obligations *inter partes*. In essence, Keskitalo's *Legal theory of money* seeks to encapsulate the meaning and definition of the term legal tender. According to Keskitalo, this Legal theory of money (in Finnish: 'oikeustieteellinen rahateoria') can be universalised into four elements:

- i) the value of the medium of payment must be bound to a monetary unit of the legal system;
- ii) the means of payment must have a numerically verifiable value;
- iii) the medium of payment must be available to disposition; and
- iv) the means of payment must be broadly and generally accepted.¹⁵²

Keskitalo argues that importance should not be given to whether the medium of payment ('oikeudellinen raha') uses the currency of the legal system, but rather that its value must be affixed to the value of the currency.¹⁵³ This means that a monetary obligation may in principle be discharged using a means of payment that is not the currency used within the relevant legal system, if the means of payment meet the criteria of its value being affixed to said currency, provided the other conditions are also concurrently met.

3.1.2 The role of central banks in validating money

As was discussed in the prior chapter, the legality of a currency is linked to the legal framework established by and with the power of the respective state (*lex monetae*). In this sense, the term 'currency' refers to the banknotes and coins issued (or otherwise controlled the amount of) by a central authority mandated with the (often exclusive) right to do so. This

time, Proctor states, it was legitimate to argue that the value of the currency was thus "fixed or determined by the State". Therefore, nowadays where the value of money is largely determined by the monetary policy of central banks and market forces, the claims of monetary sovereignty by States are, according to Proctor, a "relatively limited concept". See further: Proctor (2012), margin numbers 1.29–1.31.

¹⁵² Keskitalo, pp. 226–227; 242.

¹⁵³ Keskitalo, p. 226. This stance may at least partly be explained by the fact that in Finland, according to the Promissory Notes Act 7 §, if a promissory note has been made payable in a currency which is not legal tender at the place of payment, the payment may be made in the currency of the place of payment provided it is calculated according to the occurring exchange rate in force.

currency is often then given the status of legal tender, denoting its value and credibility, but also the state's pledge to support it.¹⁵⁴ Given the important link between currency and the power with which it is issued, it perhaps comes as no surprise that historically, central banks have often emerged to fill a void of creditworthy institutions to work as *lenders-of-last-resort* (LOLR) and to ensure better managing of bank runs.¹⁵⁵

As presented in the first chapter, central banks traditionally have the legal monopoly to authorise the issuance of banknotes and control the amount of coins in circulation. This *principle of monetary sovereignty*, also in line with the State theory of money and affirmed in international law, entails that a sovereign state is entitled to issue its own money and create its own monetary system and policy. As discussed, this principle equally allows sovereign states to transfer their respective sovereignties to a supranational entity to, for example, issue a common currency.¹⁵⁶

With the Maastricht Treaty, the Member States of the then European Community (EC), decided to establish the ECB in order to define and implement the single monetary and exchange-rate policy, and later tasked with prudential supervision of for example, credit institutions, and the issuance of banknotes and coins denominated in euro.¹⁵⁷ The ECB is part of ESCB, which consists of the ECB acting as a 'hub', and all the NCBs of all the Member States, regardless of whether they have euro as their currency or not.¹⁵⁸ Primarily, the objective of the ESCB is to maintain price stability, and secondarily to support other, general economic policies in the EU.¹⁵⁹ However, the ESCB (nor the Eurosystem) does not have a legal personality, and the ECB must make sure the tasks the ESCB/Eurosystem have been

¹⁵⁴ Dong He et al., p. 16; it is worthwhile to distinguish the terms 'money' and 'currency' from each other, wherein the former can also be created by private entities (in addition to central banks), such as banks, and that cover a wider set of monetary instruments, that are convertible into the latter. Therefore, the status of legal tender cannot be held as a true characteristic of money. See further: f.ex., Proctor (2012), margin number 1.81.

¹⁵⁵ Dong He et al., p. 13; Interestingly, many central banks in major advanced economies were initially established as private banks, and the currencies issued by them did not enjoy the status of legal tender or monopoly. The banknotes they issued may also have been nonconvertible or had their convertibility revoked in order to, for example, curb tendencies of printing money in excess, such as during the U.S. Greenback era. See further: Dong He et al., p. 12.

¹⁵⁶ Gortsos, p. 5.

¹⁵⁷ Gortsos, pp. 34; 78.

¹⁵⁸ Gortsos, p. 185.

¹⁵⁹ Gortsos, pp. 186, 282. For a rundown on the full list of tasks and powers of the ECB and the NCBs, see Gortsos p. 420. For a rundown on the list of regulatory and sanctioning powers, see Gortsos pp. 252; 416–417.

endowed with are implemented by its own activities or those of the NCBs (whose currency is the euro).¹⁶⁰ By virtue of Article 130 TFEU, the ECB has been given ‘institutional independence’, meaning that the ECB, (nor an NCB, within the context of ESCB) shall not seek or take instructions from other Union institutions, bodies, offices or agencies nor from any government or national body and in return, for such institutions, bodies, offices, governments and the like to respect this independence.¹⁶¹

Although the ECB has been given the exclusive competence to *authorise* the issuance of banknotes, the ECB is however not the only authority to issue such banknotes within the EU.¹⁶² As regulated in Article 128(1), in addition to banknotes issued by the ECB, the Member States (whose currency is the euro) and their NCBs also have such a right. Regardless of their issuer, euro banknotes issued by either the ECB or an NCB have the status of legal tender in those Member States whose currency is the euro.¹⁶³

In contrast to euro banknotes, the ECB has not been given competence to issue euro coins, as this remains the exclusive competence of those Member States whose currency is the euro, as stipulated in Article 128(2). The issuance of coins, however, is highly restricted and subject to the ECB’s approval, among other limitations, as the issuing of euro coins and the volume thereof ultimately influences the single monetary policy of the EU.¹⁶⁴

It is worth highlighting, that euro banknotes and coins do not automatically acquire the status of legal tender from the moment they physically exist. Instead, they have to be officially issued into circulation by the relevant authorities, through a legal act known as *dedication*.¹⁶⁵

¹⁶⁰ Gortsos, pp. 186; 190. The ECB, however, does have legal personality, as stipulated in Article 282(3) TFEU. See further: Gortsos, p. 246.

¹⁶¹ See further: Gortsos pp. 264–265; 417–418.

¹⁶² The term ‘issue’, according to Gortsos, also holds within itself not merely the act of releasing of banknotes into circulation, but also their *withdrawal*. Regarding this, in ECB Decision ECB/2013/10 are the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes and in Decision ECB/2010/29 the issuance of euro banknotes stipulated. See further: Gortsos, pp. 320–322.

¹⁶³ Gortsos, pp. 320–321.

¹⁶⁴ See further: Gortsos, pp. 325–326; Siekmann argues that as the minting of coins has historically been one of the oldest sovereign rights of states, it might be one of the reasons for why EU Member States still possess the competence to issue coins. See further: Siekmann (2018), pp. 21–22.

¹⁶⁵ Similarly, euro banknotes and coins lose this quality when they are (officially) withdrawn. See further: Siekmann, p. 37. Furthermore, Kriese posits that it is debatable whether the issuance requires the monetary

This is to prevent situations where euro banknotes and/or coins are stolen, lost, or otherwise end up in circulation prematurely or without the correct procedure.¹⁶⁶

3.2 The core of legal tender

3.2.1 Introduction

According to Article 128(1), third sentence TFEU, the banknotes issued by the European Central Bank and the national central banks shall be the only euro notes to have the status of legal tender within the Union. Euro coins, in turn, are prescribed legal tender in Article 11 of Regulation 974/98 on the introduction of the euro, according to which “[w]ithout prejudice to Article 15¹⁶⁷, these coins shall be the only coins which have the status of legal tender in all these Member States.”¹⁶⁸ According to these provisions of law, it is evident that euro banknotes and coins are considered legal tender, but what exactly does the concept of legal tender truly mean? Based on the wording of the provisions, no definition for the term can be found. Neither any legal definition for ‘legal tender’ currently exists within the EU.¹⁶⁹

The ECJ, in its 26 January 2021 decision *Dietrich and Häring v Hessischer Rundfunk*, stated that “[s]ince Article 128(1) TFEU does not make reference to the law of the Member States for the purpose of determining the meaning and scope of the concept of ‘legal tender’ referred to therein, that concept is a concept of EU law that must be given an autonomous and uniform interpretation throughout the European Union, which interpretation must take into account not only the wording of the provisions in which it appears but also the context of those provisions and the objective pursued by them (...).”¹⁷⁰ As was pointed out earlier in this thesis, the ECJ in its decision used a three-part abstraction, that consisting of *i) mandatory acceptance, ii) acceptance at full face value; and iii) power to discharge from payment obligations, to*

medium in question to be factually entered into circulation for the medium to be called legal tender (‘monetarised’). See further: Kriese, p. 70.

¹⁶⁶ Siekmann (2020), pp. 37–38.

¹⁶⁷ Article 15 of Regulation 974/98 refers to the transitional period of the Member States from their previous, national currency to euro.

¹⁶⁸ The expression “all these Member States” in this context refers to those Member States whose currency would be euro.

¹⁶⁹ Bonneau, p. 81.

¹⁷⁰ *Dietrich and Häring v Hessischer Rundfunk*, 26 January 2021 (Joint cases C-422/19 and C-423/19).

formulate a definition for legal tender. However, as will turn out, the nature and the diversity of interpretations regarding legal tender and its use cases is more complicated and nuanced.

3.2.2 The anatomy of legal tender by legal scholars

Bonneau argues that the concept of legal tender has four main features, of which the fact that it currently has no legal definition is the first one. The second such feature is that it is not connected to all monetary supports, but rather, only to banknotes and coins denominated in euro. For example, as it stands, electronic means of payment (often also called ‘book money’, or ‘scriptural money’) do not have the status of legal tender in the EU.¹⁷¹ The third core feature is that it is, “an attribute granted by the public authority”, and not, for instance by a private institution, such as a commercial bank. The fourth and final attribute of legal tender, according to Bonneau, is that it entails a certain degree of compulsoriness to the people, meaning that they are entitled to not accept attempts to discharge a debt by means of payment that do not have the status of legal tender, and, not entitled to refuse payment with a status of legal tender.¹⁷² To sum up these features, Bonneau concludes that “legal tender is the decision taken by a State mentioning that such and such monetary supports must be accepted as a means of payment.”¹⁷³

Proctor defines ‘legal tender’ instead as referring “to the money prescribed in national law that will be effective for the discharge of debts expressed in the national currency”. According to Proctor, the laws pertaining to legal tender “almost invariably refer to physical notes and coins as legal tender”. Proctor then comes to a similar conclusion as Bonneau, that with this sort of definition, anything that is considered legal tender will be considered money, but not everything that is money is legal tender.¹⁷⁴ Siekmann argues firstly that the settlement of “any kind of monetary obligation – private or public” is the chief trait of legal tender. Secondly,

¹⁷¹ It is worth noting for clarity that according to Bonneau, checks and credit cards are not monetary supports, either. See further: Bonneau, p. 83.

¹⁷² Bonneau explains herein that “creditors have to accept coins and bank notes with legal tender in France”. Bonneau, p. 84.

¹⁷³ Bonneau, pp. 81–84.

¹⁷⁴ Proctor (2020), p. 91.

Siekmann claims that legal tender must be accepted by the creditor if it is offered to them. Thirdly, Siekmann asserts that creditors have a claim only for legal tender.¹⁷⁵

Further breaking the meaning of ‘legal tender’ down to its constituent parts, Bonneau considers two concepts related to legal tender. First of such concepts is the effect with which debts can be discharged by using money that is legal tender. This discharge effect is, according to Bonneau, “hoisted” on people by law, and therefore does not stem from the desires or willingness of the parties involved in the contract (obligor/creditor). Because such an effect is legal, rather than based on a convention or the relevant contract, Bonneau argues that the parties involved cannot “modify the discharge effect” to their liking.¹⁷⁶ The second concept is the process with which the status of legal tender is granted to monetary supports. This process, according to Bonneau and as has been examined earlier in this thesis, lies within the sovereignty of the State.¹⁷⁷

Furthermore, the concept of legal tender, according to Bonneau, must also not be mixed up with that of ‘legal money’. Where ‘legal tender’ pertains to the acceptance of coins and banknotes by a State, ‘legal money’ is related to the use of currencies foreign to that of the State as a unit of account or that of payment.¹⁷⁸ Keskitalo makes a similar conclusion, albeit using somewhat different verbiage, stating that the term ‘money’ can in this context be understood either narrowly or broadly. Narrow understanding, according to Keskitalo, equates money with legal tender, and broad understanding as containing other means of payment that could be used based on commercial practices or other established customs.¹⁷⁹ However, Siekmann refers to Knapp’s (or Hartmann’s) findings regarding the State theory of money, that money is solely created by the State, and concludes that legally, the term ‘money’ should be equated with legal tender.¹⁸⁰

¹⁷⁵ Siekmann (2018), p. 24.

¹⁷⁶ In this regard, Bonneau goes even so far as to say that two distinct kinds of legal tender can be recognised: ‘simple’ legal tender and ‘forced’ legal tender. Legal tender is ‘simple’, according to Bonneau, when parties to a contract have the option to choose whether to abide by the notion of legal tender set forth by the public authority. Conversely, legal tender is ‘forced’ when such option does not exist. See further: Bonneau, p. 87.

¹⁷⁷ Bonneau, pp. 85–86.

¹⁷⁸ Bonneau, p. 86.

¹⁷⁹ Keskitalo, p. 238.

¹⁸⁰ Siekmann (2018), pp. 6–7. Cf. Proctor (2012), margin number 2.25.

Bonneau also makes a distinction between legal tender and *forced money* and explains the latter term to be equivalent with the terms ‘fiat money’ and *inconvertibility*.¹⁸¹ Bonneau argues that the distinction between legal tender and forced money may not be obvious, as “according to some people, legal tender takes the name of forced money when it is applied to inconvertible paper money”.¹⁸² Indeed, according to Proctor, all legal tender money is regarded inconvertible in modern times, and in this sense, Proctor deems the terms *forced issue*, *compulsory tender*, and ‘fiat money’ equivalent with forced money. Proctor also seems to equate legal tender with these terms and explains that “if a creditor refuses to accept payment of a debt when the necessary quantity of legal tender is proffered to him, then he will be disadvantaged in any subsequent proceedings relating to that debt”.¹⁸³

This discussion about the definitions of different terms used within this field is a particularly telling example that illustrates the difficulty of examining different themes and viewpoints regarding legal tender and those in close connection to it. The examples mentioned above seem to depict a kaleidoscopic view of the different aspects connected to the term of legal tender: even if the observable subject remained the same throughout, even a slight change to the parameters easily alters the picture. Thus, even the terms that are used to describe the subject are changed.

Of those mentioned, the successful discharging of debts seems to be perhaps the most important feature and one that is in one way or another, connected to all the different views regarding the functions of legal tender. From the point of view of legal tender, it will be fruitful to examine how and when exactly the discharging of a debt occurs in this regard.

¹⁸¹ Inconvertibility in this context refers to the times currencies were backed by physical assets, such as gold. During those times, the physical asset in question was considered the ‘standard currency’ (or ‘standard money’). Bank notes (or ‘paper money’, as it was referred to during those times) in turn were, at least in principle, freely exchangeable for the pertinent standard currency. This was to ensure paper money maintained its nominal value. In modern times, where currencies are no longer backed by physical assets, banks no longer have to pay for its own notes with that physical asset, and therefore currencies are deemed inconvertible. See further: Proctor (2012), margin numbers 2.21–2.23, Keskitalo, pp. 37–38.

¹⁸² Bonneau, p. 86.

¹⁸³ Proctor (2012), margin number 2.27; According to Gillette, in the United States, if legal tender is offered but not accepted as a means of discharging a debt, the non-acceptance does not discharge the underlying obligation but merely relieves the obligor from other liabilities, such as obligation to pay interest. See further: Gillette, p. 118.

3.2.3 How and when a debt is discharged

At first glance, the exact act and time of discharging a debt may appear straightforward to determine, but in reality, they pose a variety of interesting legal and philosophical conundrums. As has been established prior in this thesis, currently, forms of legal tender and thus, money capable of discharging debts, have only been conferred to cash or physical money, namely banknotes and coins. Therefore, unless the parties to a debt have agreed to settle their monetary obligations using another forms of payment, ultimately only the use of legal tender is able to successfully resolve any and all monetary obligations between the parties.

The philosophically stimulating legal questions pertain especially to the precise time and method of discharging of a debt. Ascarelli believed that a debt is successfully discharged at the exact moment when the obligor gives the sum of money they owe to the creditor.¹⁸⁴ In this regard, it proves rather easy to conceive that a debt becomes discharged once the money quite literally changes hands¹⁸⁵. Furthermore, Ascarelli opined that the use of monetary instruments *other* than cash, such as a cheque, does not effectively discharge the debt but merely provide the creditor with another form of the same monetary obligation. This stance has been supported by the Italian Supreme Court of Justice in its relatively recent decisions. In them, the Court has stated that whenever the obligor to a debt relies on other means of payment than cash to discharge themselves from said monetary obligation, they may coincidentally deprive the creditor of their right to benefit from the *immediate access* to the corresponding amount of money. Moreover, the Italian Supreme Court has gone so far as to determine that in situations where a cheque is used to settle a monetary obligation, the debt becomes discharged not when the obligor supplies the creditor with the cheque, but only when the creditor cashes it in. What follows then, is that according to the Italian Supreme Court, the discharging of the debt in such circumstances is dependent on whether the obligor's bank account has sufficient funds to facilitate the transfer of money and thus the discharging of the debt.¹⁸⁶

¹⁸⁴ Ascarelli, citation in the source De Stasio and Boatto, p. 61.

¹⁸⁵ Lemke describes the process as “[t]he transfer of ownership also marks the point in time when the underlying monetary obligation is discharged”. See further: Lemke, pp. 227–228; 253.

¹⁸⁶ De Stasio and Boatto, p. 62; According to Gillette, in the USA, case *Genesee Scrap & Tin Baling Co., Inc. v. City of Rochester*, the court declared that using checks as payment constituted a “substitute for legal tender”, arguing that the payee could present the check to a bank and therefore redeem it for cash. Gillette finds this

Furthermore, according to De Stasio and Boatto, the most recent decisions of Italian courts also support the idea of attributing the status of legal tender to bank drafts or cashier's cheques. This is understood to be for at least two reasons. Firstly, such means of payment are said to allow for *nearly immediate* access to the amount due by the obligor. Secondly, such an attribute would reduce the obligors' burden of having to convert their funds to cash.¹⁸⁷ The justification for attributing the status of legal tender to such instruments is interpreted to be the fact that bank drafts or cashier's cheques are authorised by a trusted intermediary (=a bank), and therefore can ensure the creditor an effective means of access to the amount due. However, such a development has been interpreted as "implicitly attributing" said status to even a larger variety of payment options than merely bank drafts or cashier's cheques, but any that are similarly authorised by a trusted intermediary. For example, a bank transfer is deemed similar enough to bank drafts or cashier's cheques in regard of fulfilling the creditor's interests and therefore may provide the obligor a suitable option to successfully discharge their debt. However, the Italian Supreme Court's stance is that the discharge effect only ever occurs when the creditor is able to enjoy the "effective availability" of the amount due, and that the obligor, not the creditor, is nevertheless held responsible in situations of inconvertibility¹⁸⁸ and/or the timeliness of such conversion.¹⁸⁹

Through these examples, it becomes increasingly apparent that the use of other forms of payment than cash to settle a monetary obligation appears to introduce some tension to the concept of discharging of a debt and by extension, that of legal tender. The decisions of the Italian Supreme Court however expose a crucial element to the discussion, that being the revelation that the discharging of a debt may not necessarily occur, or have to occur, simultaneously with when the obligor deprives themselves of the amount due. Consequently,

reasoning troublesome, arguing that "an ordinance that payment must be made in water bottles would similarly serve as a cash substitute if there were a ready market in which water bottles could be exchanged for cash, just as a bank is willing to convert a check into cash". According to Gillette, the "court conflated the monetary risk addressed by legal tender rules with the transactional risk that exists when one takes a check that may be drawn on insufficient funds or that the buyer may countermand." See further: Gillette, pp. 123–126.

¹⁸⁷ According to De Stasio and Boatto, the creditor's demand for the obligor to pay their debt in cash can also be seen as contrary to the principles of correctness and good faith set out in the Italian Civil Code, in case of an unreasonable rejection of bank drafts or cashier's cheques. See further: De Stasio and Boatto, p. 67.

¹⁸⁸ In this context, 'inconvertibility' refers to the conversion of other forms of money, such as bank drafts or cashier's cheques, to cash, and not to physical assets that back the value of the currency.

¹⁸⁹ De Stasio and Boatto, pp. 68–70. Similarly: Lemke, pp. 232; 276.

the introduction of the concept of immediate access proves fruitful when the expansion of legal tender to other forms of payment than cash are considered.

Let us briefly backtrack in the discussion to the prior example, where a debt was discharged merely by the corresponding amount of cash changing hands between the obligor and the creditor, and then contrast it with the concept of immediate access. Once again, it is perhaps relatively uncontroversial to surmise that, by receiving the cash from obligor, the creditor is then able to immediately use the money received in their consequent monetary transactions. However, as the aim of this thesis is ultimately to provide noteworthy information to the discussion of CBDCs as legal tender, it is paramount to examine these themes mentioned in the previous paragraphs in a modern, European context. How would then this situation fare in say, modern-day Finland?¹⁹⁰ In this context, it is often far more cumbersome and awkward to find use-cases for cash in its physical form, as many of the daily transactions are done online and a large part of merchants in physical stores may not consent to transactions made in cash. Moreover, a creditor receiving cash as payment to discharge a debt may suddenly find themselves in a situation where they may not be able to use said cash, largely nullifying the benefits of the concept of immediate access. Regardless, using cash in large transactions can often be tedious or even unsafe. Within this context, the concept of immediate access, that only cash, and by extension, legal tender, has traditionally been endowed with, is proving to be highly incompatible with the demands and realities of a highly digitalised society.¹⁹¹

These sorts of developments seem to indicate something akin to a paradigm shift in the discussion regarding legal tender. If other forms of money than cash were endowed with the

¹⁹⁰ For example, in Finland, smaller businesses are where cash payments are used the most, but simultaneously they are also often those that are more inclined to not accept cash as payment in contrast to bigger businesses. Regarding public authorities, some Finnish public transportation, libraries, patent and registration office and some waste stations are reported to not accept cash as part of their payment policies. A lower willingness to accept cash in Finland is reported to be for at least two reasons: alleged high cash handling costs and limited cash services offered by banks. See further: Final report of ELTEG (2022), p. 4.

¹⁹¹ However, Gillette emphasises the reason why creditors would prefer legal tender, or cash. According to Gillette, the reasoning is not necessarily that creditors would more easily be able to exchange it for goods and services or otherwise use for their own transactions, but rather that non-cash forms of payment inherently carry a risk of their own: for example, a credit card charge may be countermanded, or the drawer of a check may choose to cease payments. According to Gillette, even “cash equivalent” forms of payment, such as checks and electronic transfers, run the risk of being subject to claims from other parties or a bank willing to respect its customer’s efforts to stop payment. See further: Gillette, p. 115-116. Similarly: Siekmann (2018), pp. 48 – 49; In Germany, the Federal Constitutional Court has claimed that the property of being freely exchangeable into other goods is an essential trait of legal tender. Even if the verbiage may be different from that of the Italian Supreme Court and lower courts regarding immediate access, the core idea appears to remain largely the same. See further: Siekmann (2018), p. 31.

status of legal tender, the result would in fact be more in line with the ideas of nominalism and the institutional frameworks à la the Institutional theory of money – that a debt does, indeed, not equal a certain *quantity* of cash, but rather, a certain *sum* of money; money that refers to the legal unit created and assigned to express a certain value by the State.

Considering that, under nominalism, there is no numeric difference between the value of different payment options, the obligor may discharge their debt with their preferred option of payment, without a need to distinguish a hierarchy among them, as they all ultimately express the same quantity of monetary units.¹⁹²

According to De Stasio and Boatto, if the nature of money as legal tender is to be used for the discharging of monetary obligations, under nominalist principles, there would be no discernible difference between the effectiveness of cash or other forms of payment, such as scriptural money, if the use of such other forms of payment incontestably achieves the transfer of the amount due. Consequently, the idea or the mere fact that discharging of a monetary obligation may not always occur, or have to occur, simultaneously with the transfer of the amount due, as is largely the case with electronic forms of payment, does not undermine the effectiveness of such forms of payment representing the relevant sum of money. This finding has led De Stasio and Boatto to conclude that electronic forms of payment may enjoy the status of legal tender, alongside its cash counterparts.¹⁹³

3.2.4 Digital euro as cash?

As examined before in this thesis, for example regarding the digital euro, in statements of Fabio Panetta and in the Report on a digital euro, the digital euro is often compared to cash, describing some of its properties as “cash-like features”, or otherwise likening it to its physical counterparts as regard their legal basis, namely Article 128 TFEU. However, Siekmann sees a multitude of obstacles in this sort of approach. Firstly, Siekmann has argued

¹⁹² De Stasio and Boatto, pp. 55–56, 65–67; On the dematerialisation of money, see f. ex. De Stasio and Boatto, pp. 55–56; 65, 73–74, Proctor (2012), margin number 1.43, Cf. Siekmann (2020), pp. 27–28, Omlor, p. 615.

¹⁹³ De Stasio and Boatto, pp. 72–73; it is worth noting that according to Siekmann, firstly, “(...) digital currencies [sic] are not money. Nobody is obliged to accept them and their function as unit of account and store of value is highly questionable” and secondly, that at least in this context, Siekmann is referring to instruments such as bitcoin and other cryptocurrencies, not scriptural money authorised by trusted intermediaries, such as banks. (2018), pp. 6–7. De Stasio and Boatto argue instead that the development of the dematerialised dimension of money has always stressed the unavoidable role of the State in attributing the ability to express certain nominal value to a money, and therefore virtual currencies cannot be considered to be money. See further: De Stasio and Boatto, p. 65; Similarly, Omlor argues that “[i]t is essential that public and private law recognize the legal equivalence of cash and book money”. See further: Omlor, p. 624.

that the terms “banknote” and “coin” carry within themselves centuries of history that establish a clear meaning and interpretation for the terms.¹⁹⁴ Furthermore, according to Siekmann, such an instrument would have to be “functionally 100% equivalent to the existing cash” and therefore successfully fulfil a number of conditions. Those conditions, according to Siekmann, are:

- i. its issuance would have to be authorised by the ECB;
- ii. it would have to be denominated in euro;
- iii. it would have to be usable without disclosing or identifying its owner;
- iv. it would have to be transferable from person to person without using an intermediary and without additional costs;
- v. it would have to be a permanent storage of value, unlimited in volume; and
- vi. it would have to be accepted by all government entities.¹⁹⁵

Even if traditionally only cash is seen as legal tender, and even if “cash-like features” might be desirable for a CBDC, such features do not however directly correspond with whether the money amounts to legal tender. As examined in this thesis, to be considered legal tender, a money needs to fulfil conditions mostly separate from its possible cash-resembling features.

Next, it will be prudent to bring together all the elements regarding digital euro and legal tender examined thus far to juxtapose and reflect them against each other, and to extrapolate analyses that will ultimately bring forth conclusions and answers regarding the research questions of this thesis.

¹⁹⁴ Siekmann (2018), p. 27.

¹⁹⁵ Siekmann (2018), pp. 27–28.

4 Analysis

4.1 Introduction

Earlier in this thesis, in chapter 3.1, money was defined as something non-perishable, having a commonly agreed predetermined value, and something with which economic activities could be advanced and developed. Therefore, the contractual nature of money and its value was recognised. A digital euro would indeed be non-perishable in its electronic form, its value at par with its physical counterparts would thus be predetermined and commonly agreed, and an instrument with which a multitude of economic activities would be able to be carried out. Some of such economic activities could be unique to digital euro in a European framework if claims of alleged heightened financial inclusion and other benefits, social and otherwise, prove to be true. At least from these standpoints, it would appear that digital euro as a potential new form of payment would fulfil these essential prerequisites of money.

4.2 Digital euro and compatibility with monetary theories

Digital euro may be considered money, but will it be considered legal tender? Never mind the political will for digital euro to attain the status of legal tender, how would digital euro, in its planned form, fare against monetary theories, both traditional and modern? In this section, the question of compatibility of a digital euro with said theories to place the digital euro within the continuum of money will be examined.

How compatible would the digital euro be with the State theory of money, then? Perhaps the most important feature of the State theory is the emphasis given to the will and actions of the State. In this regard the similarities with the digital euro project are not difficult to identify. Firstly, the digital euro is being implemented by the EU, to which the Member States have transferred their *jus monetae* to. The project to implement a digital euro is not one of a single Member State, or a group of Member States, nor even all the Member States, but rather one of the European Union. It bears reminding that in this regard, claims that such a project would be contrary to the principle of monetary sovereignty of a State are nullified as the States have willingly transferred their *jus monetae* to a supranational entity. Furthermore, as argued by Knapp/Hartmann, only chattels issued by the State could be considered money.¹⁹⁶ Therefore,

¹⁹⁶ Knapp, citation in the source Keskitalo, p. 34.

in this regard the introduction of digital euro appears to be perfectly compatible with the State theory, as digital euro would indeed be a State-issued currency.

Secondly, the digital euro would be validated by accepting it at face value and introducing it to complement the existing euro banknotes and coins as being convertible at par to each other. In this regard the digital euro may not perfectly align with the State theory, as the theory requires the money be proclaimed valid “in terms of the historically preceding unit”, as argued by Ellis.¹⁹⁷ This could be interpreted to imply that said historically preceding unit in truth would no longer be used and therefore be replaced by the introduction of the new money.

However, perhaps an equally valid way to interpret the meaning of “historically preceding” is to merely acknowledge the succession of or sequence in which different monies were implemented and therefore accept the possibility of a co-existence of several units.¹⁹⁸ As the digital euro would (allegedly) co-exist with its physical counterparts, in this respect its implementation gives way for interesting notions and discussions as regards the duality, or bifurcation, of the euro to physical and digital and to what extent such distinctions remain relevant in the future.

Thirdly, the implementation and issuance of digital euro would be authorised by the ECB. As examined earlier, central banks traditionally have the legal monopoly to authorise the issuance of banknotes and control the amount of coins in circulation. In this regard the digital euro, a CBDC, would be no different to euro banknotes and coins, as all of them are, by definition, central bank money. Similarly, even if digital euro would be issued to private persons and other end-users by commercial banks, as is the custom with euro banknotes and coins, the process would still have to be greenlit by the ECB.

Fourthly, the value of digital euro would be fixed by law to that of the euro banknotes and coins, and not in reference to other yardsticks, such as the production costs or other

¹⁹⁷ Ellis, citation in the source Lagerspetz, p. 52.

¹⁹⁸ According to Proctor, the State theory indeed does not prevent a State from introducing more than one currency. Therefore, in this respect the introduction of digital euro alongside its cash counterparts would not be incompatible with the State theory, even if digital euro and its cash counterparts were not considered wholly different currencies or independent from one another. See further: Proctor (2012), margin number 1.18.

seignorage values. In this regard, the digital euro would appear to align with Knapp's/Hartmann's opinions in that the manifestation of a chattel, corporeal or otherwise, does not directly affect its nature as money. It would also be in line with Knapp's/Hartmann's and Ellis' views in that the unit of account of digital euro would be defined in relation to the prior unit of account (*'recurrent linking'*) even if, again, the prior unit(s) of account, those being euro banknotes and coins, continue to exist alongside digital euro.

Comparing the digital euro project to the insights of Menger's theory, it appears difficult to gauge to what extent digital euro as money would be a cause of a social institution, particularly as digital euro has not yet been implemented at the time of writing this thesis. However, the analysis of the 'invisible hand' hypothesis of Menger's theory can yield some interesting findings. What would be the invisible hand(s) that would guide the coordination of individual agents' actions as regards the use of digital euro? Perhaps they could, in at least moderately digitalised societies, be trust in the stability of the ECB, the ease of use in relation to physical cash, or other alleged quality-of-life improvements over other payment options. After all, as Menger's theory proposes, the most widely traded goods become money over time, and if digital euro gets a sufficiently high rate of adoption, it may lead to a self-enforcing practice where digital euro enjoys general acceptance as a form of payment.

Furthermore, while Menger's theory and similarly, the Societary theory of money, postulate that money is whatever is accepted as money, Proctor and Keskitalo remain (rightfully) sceptical and argue that it cannot be grounds for a legal definition.¹⁹⁹ In similar vein, Gillette argued in regard to the case *Genesee Scrap & Tin Baling Co., Inc. v. City of Rochester*, that even water bottles could be considered money "if there were a ready market in which water bottles could be exchanged for cash".²⁰⁰ The obvious difference between digital euro and Gillette's example is that, unlike water bottles or other such items, digital euro would be implemented and authorised by the ECB with the help of NCBs and issued by trusted intermediaries, namely commercial banks.

¹⁹⁹ Keskitalo, p. 226; Proctor (2012), margin number 1.29.

²⁰⁰ Gillette, p. 124.

The digital euro appears to, however, be highly compatible with the Institutional theory of money. Neither digital euro nor the Institutional theory is concerned with issues pertaining to chattels or value thereof, but rather they concentrate on the ideas of “transferable credit” and the relevant institutional framework, as the digital euro being a central bank issued money would be essentially a claim against the ECB. Similarly to euro banknotes and coins, the trust and confidence in the ECB would then very much affect the value of the digital euro, notwithstanding the proposed legal framework that, in any event, adheres the banknotes and coins’ values to that of the digital euro at par with each other. Furthermore, in the ECB’s Report on a digital euro, many of the disclosed reasons for implementing digital euro²⁰¹, such as being an improvement for the overall resiliency of the payment system, and being widely available and transacted via resilient channels, being a response to a significant decline in the role of cash as a means of payment, and having “cash-like features”, largely conform or are a direct match with the goals of institutional arrangements, as formulated by Proctor²⁰², those being, for example, the upholding of purchasing power, wide availability, capability to settle monetary obligations, but also advancing the value and stability of money and the functionality of money as a means of exchange.

Lastly, let us examine the compatibility of digital euro to Keskitalo’s Legal theory of money. As introduced in chapter 3, the theory has four conditions which, if met, would mean the money ought to be considered a legal means of discharging monetary obligations *inter partes*. The first condition, that the value of the means of payment must be bound to a monetary unit of the legal system, the digital euro seems to fulfil, as its value would, under the proposed legislation, be tied to that of euro banknotes and coins. The second condition, that the medium of payment must have a numerically verifiable value, the digital euro also meets, because digital euro would be denominated in euro and that its value does not hinge upon its intrinsic properties, such as production costs. The third condition, that the value of the medium of payment must be available to disposition, the digital euro can be argued to meet by way of direct or indirect claims against the ECB. However, the fulfilling of the fourth and final condition, that the means of payment must be broadly and generally accepted, cannot be

²⁰¹ Report on a digital euro, pp. 9–15.

²⁰² Proctor (2012), margin number 1.35.

sufficiently ascertained and verified before the implementation of digital euro, although the broad and general acceptableness is undoubtedly a very sought-after quality.

In conclusion, digital euro in its proposed form appears to in many ways be consistent and compatible with the examined monetary theories, bar some details that are, at the time of publishing this thesis, still undetermined or inconclusive. While consistency and compatibility with monetary theories may suggest compatibility with existing legal frameworks and customs, it may not be guaranteed, especially in a European framework with its plurality of legal heritages. Regardless, compatibility with monetary theories makes placing the digital euro amongst other forms of payment easier. The findings made within this thesis as regards digital euro and its compatibility with monetary theories indicates support for digital euro to be considered as money and also as legal tender.

4.3 Regarding the legal basis for a digital euro

Matters pertaining to the legal basis of digital euro pose a variety of different starting points from which a digital euro could be cultivated. The chosen legal basis for digital euro will then influence the way in which it can be implemented. As examined in the second chapter, in the ECB's Report on a digital euro, four different options for a legal basis were introduced.

The first of such options was Article 127(2) TFEU in conjunction with the first sentence of Article 20 of Statute of the ESCB. Considering that such a legal basis for digital euro would, according to the report, lead to digital euro being a monetary instrument similar to central bank reserves and not intended for nor accessible to the wider public, it can be safely omitted from further discussion as at the time of writing this thesis, it is already known that digital euro will not take the form that such a legal basis would allow for.

The second option for a legal basis proposed by the report is Article 127(2) TFEU in conjunction with Article 17 of the Statute of the ESCB. At first glance, given the goals and intended use-cases for digital euro, the inclusion of Article 17 of the Statute appears logical, as it would seem to enable the ECB to issue a monetary instrument that is available to the wider public, much like how privately operated commercial banks have been able to provide a digital alternative to cash. This option for the legal basis would likely be most fitting in a situation where the CBDC is strictly account-based and where the CBDC accounts are operated by the central banks, as the wording implies that the central banks open the accounts

for the relevant market participants. However, such an option for a legal basis could not be chosen, as the digital euro accounts are planned to be operated by and the digital euro to be distributed by PSPs, and not central banks.²⁰³ Therefore, like the first option, this option for a legal basis can be safely omitted from further discussion.

The third option offered by the report is Article 127(2) TFEU in conjunction with Article 22 of the Statute of the ESCB. Considering that such a legal basis would not allow for widespread use and accessibility but rather, only specific types of payment and accessible to those deemed eligible, it can also, similar to the first and the second option, be safely omitted from further discussion.

The fourth and final option, however, appears to provide the most talking points. Firstly, it is the only option for a legal basis of those introduced by the report to not include Article 127(2) TFEU in it. Instead, the offered legal basis would be Article 128 TFEU, in conjunction with Article 16 of the Statute of the ESCB. Secondly, this option is the first of those introduced to pay any mind to hopes and aspirations of digital euro having the status of legal tender. Both Article 128 and Article 16 of the Statute explicitly state that euro issued with this legal basis is legal tender and the only legal tender within the Union (in those Member States whose currency is the euro). Thirdly, and perhaps most controversially, the Articles only refer to euro banknotes or coins in them, digital euro as a form of digital currency being neither of them. As Siekmann has argued regarding equating electronic payment options with cash, even if it might be favourable for digital euro to have “cash-like features”, it would seem questionable and sporadic to pigeonhole digital euro to be interpreted as either euro banknotes nor coins, considering the well-established meaning of the terms ‘coin’ and ‘banknote’. Therefore, while possessing useful mentions of legal tender (albeit lacking a definition) and the ECB’s exclusive right to authorise the issuance of euro, the fourth option appears rather unconventional at first glance, because it appears to disregard the seemingly obvious and illogical lack of compatibility with the generally accepted terminology (banknotes, coins) and the intended use-case (CBDC).

However, as De Stasio and Boatto have pointed out, the wording of Article 128 TFEU (or Article 16 of the Statute) cannot be “interpreted nor construed as suggesting” that euro can be

²⁰³ See further regarding the choice to utilise PSPs in opening digital euro accounts and distributing digital euro: A stocktake on the digital euro, p. 6.

considered legal tender only when it is expressed in banknotes or coins.²⁰⁴ Considering that the wording of Articles 128 TFEU and 16 of the Statute of the ESCB appear to, at the least, not disallow for new manifestations of euro be regarded as legal tender, it seems logical that the Proposal package (‘Proposal I’ and ‘Proposal II’) relies upon Article 133 TFEU as their legal basis, which gives the lawmaker a relatively large margin of discretion as regards to the measures it elects to act upon. Coincidentally, it would appear that the wording of Articles 128 TFEU and 16 of the Statute do not appear to demand to be changed in order to introduce new forms of euro as legal tender. This is likely the reason the Proposals do not suggest the provisions be amended, either. Therefore, the answer for whether digital euro, or other new forms of euro, *can* be legal tender, under existing legislation, appears to be affirmative.

It is worthwhile to remind that the stances regarding the definition and consequences of legal tender of the participating Member States in the ELTEG meetings appeared to be somewhat aloof and disapproving to changes both in their national legislation and at the EU level, instead preferring a soft law approach, even if some concessions were made regarding the need for EU legislation if digital euro was implemented with the status of legal tender. It is in this regard that De Stasio and Boatto’s stances regarding “intervention by EU political authorities” seem to be so fitting. They argue that until sufficient harmonisation is implemented at the EU level, the legal tender nature of euro is in a “grip of a paradox”: legal tender, the quintessential characteristic of the single currency of the European Union, is subject to national laws of the respective Member States, and therefore prone to high fragmentation.²⁰⁵ Such instances of fragmentation could include, among other things, the loss of availability and acceptability of cash and digital euro (if implemented) in favour of scriptural money. Similarly, Proctor argues that an approach where legal tender laws consist of EU law and run parallel with the law regarding the issuance of its currency seems intuitive, as the *Grundnorm* of the euro also stems from EU law.²⁰⁶ In conclusion, regulating the legal tender laws of both euro cash simultaneously with those regarding digital euro, both at the EU level, seems particularly timely and appropriate, but also proportionate to their goals.

²⁰⁴ De Stasio and Boatto, pp. 59; 73–74. Similarly: Kriese, pp. 71; 78. Cf. Siekmann (2020), pp. 49–50.

²⁰⁵ De Stasio and Boatto, p. 59.

²⁰⁶ Proctor (2020), p. 94.

4.4 Consequences of different design options for digital euro as legal tender

In addition to considerations regarding the preferred legal basis for a CBDC, the different ways a CBDC can be designed may have meaningful implications to its use cases, target groups and general acceptability, among other things. Furthermore, the chosen way of design of a CBDC may influence its capabilities to be considered legal tender.

As examined earlier in this thesis, CBDCs, specifically rCBDCs, can be divided into value-based and account-based. One of the main differences between them is that in a value-based CBDC, the central bank provides the payment infrastructure for end-users, but the end-users bear the responsibility of verifying the transaction between them, whereas in an account-based CBDC, a tertiary operator, for example a commercial bank, is endowed with the responsibility of verification.

The question of to whom the responsibility of verification ultimately would fall upon – the parties to a monetary transaction or a tertiary operator – does not appear to correspond to any *direct* effect on the capabilities or the probability that a CBDC would be considered to be legal tender. The choice made between these two alternatives influence other design options that in turn, may affect matters pertaining to legal tender. However, from the viewpoints of Menger's theory and the Societary theory of money, the question regarding the burden of verification may influence the general acceptability of a CBDC. The endowment of the responsibility of verification to a commercial bank or other trusted intermediary would potentially liken the CBDC to other electronic means of payment offered by commercial banks and therefore improve the outlook of the CBDC in the public eye. Additionally, it may help separating the CBDC from Gillette's "water bottles", thereby instilling further confidence in the CBDC. Furthermore, it bears repeating that according to Keskitalo's Legal theory of money, broad and general acceptability is one of the four preconditions of determining whether a certain money can be considered legal tender. Therefore, the option between value-based and account-based CBDC may indirectly influence the probability that a CBDC be considered legal tender. At the time of writing this thesis, it is already known that digital euro will represent an account-based CBDC.²⁰⁷ Therefore, the choice to make digital

²⁰⁷ See further regarding the choice to implement digital euro as an account-based CBDC: A stocktake on the digital euro.

euro an account-based CBDC may have improved its chances of being recognised as legal tender.

What effect might the choice between a CBDC only supporting online-use or a CBDC also supporting offline-use have on matters pertaining to legal tender? The option to use a CBDC offline in a value-based system completely removes any tertiary operators from the transaction, leaving the process solely to the hands of the parties of the transaction, similar to the way cash is used. If the tertiary operator is a commercially operated bank, the option to remove it from the equation appears to solve any related insolvency risks.²⁰⁸ Therefore, the offline-use of a CBDC appears to liken the CBDC to cash and while a CBDC may have “cash-like” features, though as examined earlier, a CBDC may not legally be called neither banknotes nor coins, however many cash-like features it may have. Instead, if an electronic means of payment, be it a CBDC or other monetary instrument, would be called an electronic banknote or otherwise treated as one, it would have to fulfil the six conditions penned by Siekmann, as examined in chapter 3.2.4. A digital euro would be authorised by the ECB and denominated in euro, therefore definitely fulfilling at least two of the six conditions.²⁰⁹ Regardless, the number of cash-like features and perceived likeness to banknotes or coins, the forms of currency traditionally endowed with the status of legal tender, does not directly influence whether a CBDC would (or should) be considered legal tender.

Next, let us consider what other design options for a CBDC exist that may have an impact on legal tender and its functions as money. Considering the first function of money presented in this thesis, *medium of exchange*, firstly, a CBDC could be designed to be distributed in CBDC tokens. It would entail that the central bank would have to issue such tokens through dedication, similar to cash. A CBDC in the form of tokens would indeed be yet another “cash-like feature” but, as discussed before, would have no direct effect on its potential legal tender status by itself. It can be argued that even if a CBDC is manifested through other means than tokens, it would still be authorised and issued by the relevant central bank, and therefore the

²⁰⁸ See further: Siekmann (2018), pp. 48–49.

²⁰⁹ The fulfilment of the remaining four conditions, those being that the banknote would have to be usable without disclosing or identifying its owner, transferable from person to person without using an intermediary and without additional costs, a permanent storage of value, unlimited in volume, and accepted by all government entities, is inconclusive based on the information available at the time of writing this thesis.

act of dedication of CBDC tokens would not necessarily inherently provide any better outcome in terms of the status, legal tender or otherwise, of such currency.

As regards digital euro, even if the ECB has wanted the digital euro to have cash-like features, a token-based CBDC is not one of its preferred design options. Instead, it would appear that digital euro would in this regard resemble more debit cards than cash.²¹⁰ This choice would likely have no direct influence on legal tender either, as firstly, neither Article 128 TFEU nor Article 16 of the Statute of the ESCB do not implicitly state that only banknotes and coins can be considered legal tender and secondly, because many monetary theories, the Institutional theory in particular, nevertheless support the idea of transferable credit in favour of chattels. Regardless, digital euro can be argued to be an effective medium of exchange, as its value will be at par with its physical counterparts and freely convertible to each other, but also allow for funding to and from digital euro accounts and commercial bank accounts as designated by the user.²¹¹

Holding limits to a CBDC can influence *store of value*, second of the three functions of money presented in this thesis, as they can either limit or discourage the possession of money above a certain threshold. Do holding limits have an effect on legal tender, then? As discussed before, in the judgment *Dietrich and Häring v Hessischer Rundfunk* the ECJ argued that the concept of legal tender consists of three elements: *acceptance at full face value*, *mandatory acceptance*, and *power to discharge from payment obligations*.

Firstly, holding limits do not appear to pose any risk to digital euro not being accepted at full face value, as the value of digital euro is denominated in euro, tied to the value of its physical counterparts, and freely convertible to each other.

Secondly, at first glance, holding limits do not appear to have any material impact on mandatory acceptance either, as the matter of mandatory acceptance is a question between parties to a monetary transaction, and holding limits being a personal matter of those who possess digital euro. Consider an example, where A and B, both private individuals, have a debt between them. A, the obligor to the monetary transaction, is not typically concerned with

²¹⁰ See further: f.ex. A stocktake on the digital euro, p. 22–23.

²¹¹ Additionally, the Eurosystem may introduce multi-currency compatibility at a later point in time to allow for payments between euro and other currencies. See further: A stocktake on the digital euro, p. 30.

whether B, the creditor, has enough space in their wallet to hold the cash they are about to receive from A to settle the monetary transaction between them. However, when a similar situation is put into the context of digital euro and the proverbial wallet of the obligor is already full, so as to say they either currently possess the maximum amount of digital euro allowed for by the holding limit, or the sum of money paid by A would make B's holdings exceed the limit, either the digital euro payment system does not allow the transaction to take place, or the amount that exceeds B's holding limits goes on to B's designated commercial bank account, through waterfalling.²¹² How do the principles of legal tender fit in these situations? In the former situation, if A has only digital euro at hand, and B cannot accept digital euro because their holding limits will not allow for the transaction to happen, how should the situation be assessed through the lens of the principle of mandatory acceptance? Perhaps in this situation it is reasonable to argue that it would be B's burden to ensure their digital euro account has sufficient headroom for the debt owed by A to fit in the digital euro account, or otherwise seek ways to resolve the issue for example, by allowing the use of an alternative method of payment. Not even Proposal II is particularly helpful in this situation, as B as a private individual can, according to Article 9 subparagraph c, always refuse digital euro.

How would the principle of good faith be applied in this situation? In Article 9(b) of Proposal II, it is stated that a refusal to accept digital euro can be made in good faith, if it is based on "legitimate and temporary grounds in line with the principle of proportionality in view of concrete circumstances beyond the control of the payee". Is the situation where the holding limits of B's digital euro account obstructs B from receiving payment in digital euro from A "beyond the control of the payee"? In earlier correspondence regarding the principle of good faith (albeit regarding cash), the ECB has stated that it can be applied in situations where "the retailer does not have enough cash to give the change back, or when there is a disproportion between the amount to be paid and the face value of the banknote", implying applicability only in situations that strictly involve cash, and not digital euro nor other forms of electronic money. In any case, these examples given by the ECB (not enough change, disproportionate

²¹² On the A stocktake on the digital euro, it is specifically elaborated that "[i]f there is no linked commercial bank account or waterfalls are not enabled, the user would be responsible for keeping the digital euro account balance within the holding limit, increasing the need to manually fund and defund the account and the possibility of transaction failure". See further regarding waterfalls: A stocktake on the digital euro, pp. 14–15.

value of the banknote) are therefore mostly, if not completely, meaningless, in the context of CBDCs, and electronic forms of money in general.

Neither are the restrictively defined objective reasons for not refusing cash penned by the ELTEG of much use in this regard, as they too are related to the physical nature of cash. Perhaps the redeeming quality of the principle of good faith and its application to different situations, be they real-world or hypothetical, is that they are evaluated on a case-by-case basis. It is, however, suboptimal in the sense that the outcome of situations like presented above may be very difficult to predict and ultimately comes down to questions of evidence. As Kriese puts it, exceptions to the rule of good faith ought to be “clearly and precisely defined” to prevent their abuse.²¹³

Delving deeper into questions regarding legal tender and holding limits, in the situation where the debt paid by A cannot fit within the holding limits of B’s digital euro account and the exceeding amount is directly and automatically transferred to B’s designated commercial bank account, can it be reasonably argued that the exceeding amount was paid with legal tender, regardless of whether the totality or merely a fraction of the money paid went to B’s commercial bank account? This is where the question of what impact holding limits have on the power to discharge from monetary obligations comes in. If A’s digital euro account has insufficient funds with which to settle the monetary obligation with B and A uses the capability provided by the digital euro services to fund the settlement by automatically withdrawing the necessary liquidity from their commercial bank account, through a process called *the continuous reverse waterfall functionality*, is that transaction then settled with legal tender, and is the monetary obligation successfully discharged?

Moreover, does in this situation the fact that money was transacted through digital euro services, even if the services were provided by a commercial bank or other such private payment service provider, make the totality of the payment done with legal tender? If the answer to the last question is affirmative, what meaningful difference exists between payments done via already existing electronic payment systems, similarly provided by commercial banks or other such private payment service providers, and those described, using

²¹³ Kriese, p. 78.

the digital euro services? Additionally, what impact, if any, do payments that wholly or partly exceed the holding limits of digital euro accounts have on the concept of immediate access?

Ultimately, these are completely novel questions to themes regarding legal tender. Answers to these questions can hardly be found by citing and interpreting the monetary theories and analyses penned by legal scholars of hundred years (or more!) past. Certainly, many of the questions cannot be meaningfully answered within the scope of this thesis and therefore demand to be answered in their own research papers. It may very well be that the current understanding of the concept of legal tender is not flexible enough to capacitate answers to the questions presented above.

Finally, digital euro appears to have no direct impact the third and final function of money presented in this thesis, *unit of account*. Digital euro is meant to be a complement to cash and in many ways work akin to cash. A different outcome to the impact assessment might be more likely in the event that the Eurosystem agrees to introduce a function to remunerate digital euro holdings, which it currently has no plans to do.²¹⁴

4.5 What role for legal tender in the future?

In chapter 3.2.3, the discussion pertained in large part to technicalities regarding the discharging of a debt and, by extension, whether other forms of payment could be considered legal tender. De Stasio and Boatto concluded that interpreting the findings made by the Italian Supreme Court – that monetary instruments, such as bank drafts or cashier's cheques, appear to open the doors to even a larger variety of payment options to be considered legal tender – coupled with the notion that under nominalist principles a debt constitutes a certain *sum* of money, not a certain *quantity* of cash, even electronic forms of payment could then be considered to be legal tender.

These findings and interpretations then paint, of course, a picture in very pleasing light as regards CBDCs, a central bank issued digital currency, and the focus of this thesis. But as discussed, it is not solely CBDCs that could attain the newfound quality of legal tender based on De Stasio and Boatto's findings, but rather perhaps any that are authorised by a trusted intermediary. Such a situation begs the question then, what role is left for legal tender in the

²¹⁴ See further: A stocktake on the digital euro, pp. 31–33.

future if it becomes a quality of many, or most, payment options, rather than a select few? Would such a development trivialise legal tender by way of dilution? It is of course worthwhile to ponder whether the concept of legal tender has already been trivialised, especially in societies where scriptural money dominates the p(l)aying field over coins and banknotes.²¹⁵

In Proposal I, it is argued that non-access to cash could lead to “erosion and gradual loss of the effectiveness of the status of cash as legal tender”, among other potential (unrelated) consequences, and therefore recommends regulatory action to ensure the access to cash and safeguard its status as legal tender.²¹⁶ It bears reminding once more that according to Keskitalo, the broad and general acceptability is also one of the preconditions for legal tender. Therefore, it can be argued only the mere act of ensuring the level of access to cash does not prevent the legal tender from potentially eroding if matters of general acceptability are not sufficiently taken care of.

It is however valid to question that if erosion and loss of cash as legal tender occurs or may occur even without and before introducing CBDCs as an alternative payment option and as an official complement to cash, would the introduction of a CBDC not potentially contribute to the erosion and loss even further, considering the ease and effectiveness of use of electronic forms of payment in general and the rate with which they are used, especially in highly digitalised societies? This appears even more true for high-value transactions. CBDCs may be subject to holding limits, thus either discouraging or preventing high-value transactions altogether, but waterfall functionalities might mitigate the effect of holding limits to a degree in this regard and make CBDCs a more flexible form of payment.

What role does legal tender play in the implementation of digital euro? On the surface level, it appears perhaps logical that a central bank issued currency ought to be endowed with the status of legal tender, even if the currency was in digital form. This appears particularly cogent considering that these two forms of payment are supposed to be convertible to each

²¹⁵ Bonneau argues that for this very reason legal tender is a leftover, obsolete notion, and that “the concept of legal tender is in fact useless as regards scriptural money”. See further: Bonneau, pp. 82–83. Similarly: Proctor (2012), margin numbers 1.47; 2.28, Proctor (2020), pp. 93; 102, Gillette, pp. 103–104; 119; 127.

²¹⁶ Proposal for a Regulation of the European Parliament and of the Council on the legal tender of euro banknotes and coins, 28.6.2023, pp. 5–6.

other at par at face value, and that digital euro is planned to complement its physical counterparts.

But what meaningful and practical benefit would the status of legal tender confer to digital euro as a payment option? Certainly, debts are customarily successfully discharged even without legal tender forms of payment. In a world where scriptural, non-legal tender forms of payment are ever-increasingly popular, it is hard to envisage what gains could be had by implementing digital euro as legal tender, as a large part of transactions (especially those of high value) are indubitably made with non-legal tender forms of payment. Moreover, it may once more be argued that concepts regarding legal tender are simply too inflexible and outdated to suit the modern concepts and use-cases of money. If these claims turn out to be true, for what reason or reasons would the ECB want digital euro to be legal tender?

As was examined in the second chapter, the ECB explained in its Report on a digital euro that the legal tender status would be a “desirable feature”, and Panetta held that legal tender for digital euro would be “convenient for all users”, the justifications for both statements largely being that without legal tender, acceptance of digital euro could be compromised being similar to other electronic forms of money.²¹⁷ But this sort of justification alone does not quite feel satisfactory – if likening digital euro in this regard to other electronic forms of money (that are already widely used and accepted) is something to be avoided, how would stamping the legal tender status on digital euro be a solution? Moreover, if digital euro is hoped to have a high rate of adoption, would it not best be achieved by implementing truly desirable features from the end user’s point of view that make it stand out amongst other, private competitors? From a monetary theory point of view, the outcome of this ultimately influences whether the project for digital euro aligns most with the State theory of money, where the State declares a certain type of money legal tender and therefore enforces and guarantees its acceptance, or Menger’s theory, where sufficiently high rate of adoption in itself leads to a self-enforcing practice.

One other possible reason as to why the ECB would like digital euro to be legal tender could be that by conferring the legal tender status to digital euro, the ECB seeks to ensure that the coordination problem, as mentioned by Gillette²¹⁸, is solved, and not left merely hinging upon

²¹⁷ Report on a digital euro, p. 33; A digital euro: widely available and easy to use, Fabio Panetta, 24 April 2023

²¹⁸ Gillette, pp. 108–109.

banknotes and coins, the use of which has been on the decline. Furthermore, by granting the status of legal tender to digital euro, the sought-after benefits are perhaps outside the sphere of what the functions of legal tender are traditionally understood to be. It may be that by conferring the status of legal tender to digital euro, the CBDC appears more legitimate in the eyes of the general public, thereby instilling confidence in the payment option, and by extension, in the ECB, thus also inferring further compatibility and alignment with the Societary and Institutional theories of money. By adhering the stamp of legal tender to a new form of payment such as a CBDC, it might appear more marketable to the general public, as it would in that regard be equal to the old forms of money (banknotes and coins).

Additionally, it may be that *not* declaring digital euro, a central bank issued currency, as legal tender would garner suspicions about the useability of said payment option and its convertibility to other forms of money. It may also be that declaring digital euro as legal tender is simply an easy enough choice for the lawmaker, with little to no risks related. Regardless, it appears as though the aspiration to confer the status of legal tender to digital euro is largely an echo of the past, especially in terms to the (lack of) practical benefits that may be attributed to the status of legal tender. Thus, the pursuit to endow digital euro with legal tender comes across as a somewhat anachronistic act without altogether convincing justifications and end goals.

But if digital euro is given the status of legal tender, there would certainly be an ill-defined distinction between digital euro and other electronic payment options. As discussed in section 4.4, there is currently great uncertainty as to whether payments done using digital euro services, provided by commercial banks, and especially with waterfall functionalities, would constitute legal tender under existing (and proposed) legislation, and with what justification. If the answer to the question is affirmative, it would create a strange and artificial divide between payments using digital euro services and payments using commercial banks' other electronic payment services. Furthermore, if the quality of legal tender is left for only central bank issued forms of payment, it would distinguish a hierarchy between digital euro and electronic payment options offered by commercial banks. Concurrently, such a hierarchy would go against the principles of nominalism. The solution to this problem may be to either extend the status of legal tender to all electronic payment options offered by commercial banks or to diminish the meaning of legal tender to only represent a monetary expression by the State.

The existence of the previously described problem can, however, be questioned by asking whether other electronic forms of money that are already widely accepted even need legal tender, the answer to which likely depends on the answerer. Those seeking to safeguard and promote ECB's interests might answer negatively, arguing for example that legal tender ought to remain as an exclusive feature of a State-issued currency. Others might answer affirmatively, reasoning that commercial banks are already under heavy scrutiny by central banks and therefore endowing legal tender to electronic forms of money by trusted intermediaries is merely to further equate different forms of money that, under nominalism, are already convertible at par. Some might respond with indifference or utterly disagree with the premise of the question, arguing that if "other electronic forms of money" do not allegedly need to be endowed with legal tender, why then does digital euro need it?

For now, the concept of legal tender appears to exist in something of a limbo. On one hand, legal tender is prescribed to forms of currency by a legal act, and on the other, legal tender is described by its properties, or as a feature in general. In addition to the above-mentioned uncertainty regarding potential inflexibility of legal tender as regards CBDCs, responsibility of verification, waterfalling, and holding limits, further clarification, either in the form of research, legislation, or case law, is needed to ascertain whether legal tender is a product of the properties of a form of currency and/or the authority of the issuer, or whether legal tender can exist only by act of legislation. In other words, to what extent is a form of currency considered legal tender because it fulfils the necessary preconditions related to discharging monetary obligations, or is a form of currency considered legal tender only when decreed as such by law?

5 Summary of the conclusions

The answer to the first research question, how legal tender is defined in the EU, can be summarised as follows. From a legal standpoint, legal tender consists of three parts: mandatory acceptance, acceptance at full face value, and power to discharge from payment obligations. From an academic standpoint, legal tender can be said to have differing, or altogether more preconditions, such as *general* acceptance. Furthermore, some academics argue that legal tender is an expression and a creation of the State. Finally, the interpretations and applications of the concept of legal tender, such as whether contractual freedom may or may not prevail over law, or whether legal tender can be extended beyond coins and banknotes, appear to differ within EU Member States, but also in terms of whether national legislations have a definition or distinct provisions for legal tender.

In terms of answers to the second research question, digital euro would not collide with existing legislation, as Article 128 TFEU was found to not disallow for other forms of money than banknotes and coins, to be legal tender and therefore, plans to implement digital euro as legal tender does not demand existing legislation to be amended. Furthermore, the status of digital euro and euro cash as payment options and legal tender is to be clarified and strengthened by Proposals ‘I’ and ‘II’. Digital euro was found to be largely compatible with academic definitions and monetary theories pertaining to money and legal tender, bar some details that are presently undetermined or inconclusive. The choice or outcome where digital euro would not enjoy the status of legal tender was found to be one to garner suspicions, but ultimately unlikely to pose any immediate or fundamental consequences, at least from the perspective of the end user, as non-legal tender forms of money are already being widely used. However, from the ECB’s point of view, the lack of legal tender might leave the coordination problem unsolved and hinging upon coins and banknotes, the use of which has been declining.

The ways in which digital euro is planned to be implemented as regards its technical design choices was found to have potentially substantial impact on matters pertaining to legal tender. Of those examined, particularly holding limits, waterfall functionalities and to whom the responsibility of verification is set to fall upon appear to influence the answer to whether digital euro can meaningfully be considered legal tender the most. Conversely, “cash-like features” were found to not have any direct influence on whether digital euro, or any CBDC in general, would (or should) be considered legal tender.

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