Legal high Committee for
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THE EVOLUTION OF THE LEGAL CONCEPT OF MONEY

of the Legal High Committee for Financial Markets of Paris

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9 rue de Valois, 75001 Paris, France - Tel.: +33 (0)1 42 92 20 00 - hautcomite@hcjp.fr - www.hcjp.fr

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Introduction

"*Trust in money is the alpha and omega of society*". While this is a statement by the economist Michel Aglietta, it nonetheless raises a question of law, since this trust depends on the legal foundations of money.

In the twentieth century, the nature of money has been at the center of a debate between two points of view. On the one hand, *up-to-the-bottom* statist theory holds that trust derives from the issuance of money by the public authorities, in other words, from monetary sovereignty. On the other hand, sociological theory holds that trust is generated by the use of money in society, in other words, by the autonomy of the will. Although debated, a legal notion of money does exist, and must be distinguished from the functions that economists recognize in what they also refer to as money, according to the traditional triptych: intermediary of exchanges, unit of measurement of values, reserve instrument. In this way, the economic functions of money help to blur the legal notion of money, particularly in the distinction that needs to be drawn with the notion of payment. As Frederick Alexander Mann pointed out:

"*The troublesome question, What is money? has so constantly engaged the minds of economists that a lawyer might hesitate to join in the attempt to solve it. Yet the true answer must, if possible, be determined. ... a great deal of a lawyer's daily work centers around the term 'money' itself and the many transactions or institutions based on that term, such as debt, damages, value, payment, price, capital, interest, tax, pecuniary legacy*"[1] .

With the introduction of the euro in 1999, a third theory of money was proposed by Antonio Sáinz de Vicuña, who was the first legal director of the European Central Bank (ECB): money is founded on confidence of society and markets, produced by the institutional framework guaranteed both by the action of the central bank and by the supervision of credit institutions[2] . This so-called institutional theory of money[3] supports, from an economic point of view, the coexistence of different manifestations of money, existing either in the form of a tangible asset (coins and banknotes) or in an intangible form (book entries), both used for payment purposes. Thus, considered as a whole and as a public good, money in the legal sense includes both money classically described as fiduciary, comprising coins and banknotes issued by the central bank, and money traditionally referred to as scriptural, corresponding to deposits of sums of money represented by entries in accounts opened with credit institutions, electronic money institutions or payment institutions, which are licensed by a public authority that also ensures supervision, the intensity of which varies according to the nature of the institution. In this way, a more modern approach to money could emerge, at least in law, consisting of distinguishing between money issued by central banks (public money) and money issued by establishments licensed and supervised by the public authority (private money), the issuance of which does not have the same legal significance in both cases. In this approach, the focus is as

[1] F. A MANN, *The Legal Aspect of Money*, Oxford, Clarendon Press, 1982, 4thed., p, 3.

[2] A. SÁINZ DE VICUÑA, "The concept of money in the XXIstcentury", MOCOMILA meeting, Tokyo, 2004. A. SÁINZ DE VICUÑA, "Institutional theory of money", *in* M. GIOVANOLI, D. DEVOS (eds.), *International monetary and financial law: the global crisis*, Oxford, New-York, Oxford University Press, 2010, pp. 517-532.

[3] See the institutional theory developed by economists: A. ORLEAN, "L'approche institutionnaliste de la monnaie: une introduction", (2007) https://www.parisschoolofeconomics.com/orlean-andre/depot/publi/Sudbury0704.pdf; M. AGLIETTA and A. ORLEAN, *La monnaie, entre violence et confiance*, Paris, Odile Jacob, 2002.

much on the *medium of* monetary value as on the debt owed by the debtor. It is therefore generally accepted that banknotes and coins are issued only by central banks, whereas scriptural money is issued by credit institutions, which are licensed and supervised. While relevant, this opposition is nonetheless reductive, and is no longer adapted to the changes brought about by the digitization of society and the economy.

In 2021, in a landmark *Hessischer Rundfunk* ruling, the Court of Justice of the European Union (CJEU) defined legal tender for the first time in EU law, reserving this status to euro bills and coins alone, while linking their issue to the exclusive competence for monetary policy attributed to the European Union for member states that have adopted the euro[4]. This ruling rekindled the debate on the legal concept of currency, while the Court of Justice, in a less high-profile case, clarified the meaning of "euro cash"[5]. A decisive distinction emerges for the euro, depending on whether or not the plural is used: the euro, which embodies the unit of account, is legally distinct from euros, which designate the currencies used to fulfil a payment obligation. It would therefore be simplistic to confine ourselves to a legal notion of currency confined solely to the issue of bills and coins. As the European Commission points out in its proposal for a Council Regulation on the digital euro, "[b]ank bills and coins, which are the only current forms of legal tender available to the general public (i.e. citizens, public authorities and businesses), cannot on their own support the EU economy in the digital age"[6].

The debate on the legal concept of money has been rekindled by the advent of digital technology, with the emergence of so-called "*crypto-currencies*", temporarily referred to as "*virtual currencies*" as opposed to "*legal tender*"[7] . Entry into the digital age has undeniably accelerated the dematerialization phenomenon stimulated by new distributed ledger technologies (DLT *distributed ledger / blockchain*) in the payments ecosystem, already marked in the 2000s by e-money schemes[8] and payment services[9]. The MiCA Council Regulation thus emphasizes that "*[i]n common with e-money, crypto-assets are electronic substitutes for coins and banknotes and may be used to make payments*"[10]. While the term "*currency*" is overused for these crypto-assets, which are largely governed by the MiCA Council Regulation, their proliferation has contributed to questioning the notion of currency in an increasingly ambiguous relationship with that of payment, especially as this Council Regulation enshrines the notions of "*token*", "*token referring to an asset or assets*" and "*electronic money token*". In its proposal for a Council Regulation on the digital euro, the Commission notes that "*private digital means of payment"* are marginalizing the use of banknotes and coins as the only form of central bank

[4] CJEU, Grand Chamber, January 26, 2021, *Dietrich and Häring v Hessischer Rundfunk*, C-422/19 and C-423/19, ECLI:EU:C:2021:63.
[5] CJEU, April 20, 2023, *"Brink's Lithuania" UAB v Lietuvos bankas*, C-772/21, ECLI:EU:C:2023:305.
[6] Proposal for a Council Regulation of the European Parliament and of the Council establishing the digital euro, June 28, 2023, COM(2023) 369, p. 1.
[7] Art. 2, d), of Directive 2019/713/EU of the European Parliament and of the Council of April 17, 2019 on combating fraud and counterfeiting of non-cash means of payment, *OJEU* L 123 of May 10, 2019, p. 18.
[8] Directive 2009/110/EC of the European Parliament and of the Council of September 16, 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions, *OJEU* L 267, October 10, 2009, p. 7.
[9] Directive (EU) 2015/2366 of the European Parliament and of the Council of November 25, 2015 on payment services in the internal market, *OJEU* L 337 of December 23, 2015, p. 35.
[10] Recital 18 of Council Regulation (EU) 2023/1114 of the European Parliament and of the Council of May 31, 2023 on markets in crypto-assets (MiCA Council Regulation), *OJEU* L 150 of June 9, 2023, p. 40.

money[11] . This is one of the explanatory factors behind the emergence of MNBC *Central Bank Digital Currencies* (CBDCs), which the Bank for International Settlements (BIS) places at the heart of the "*future monetary system*"[12] , which would be based "on *public central bank assets, founded on a digital version of sovereign money, could encourage innovation while preserving stability and security" in a dual monetary system formed by "central bank digital currencies" and "rapid payment systems*" . [13]

The debate on the legal concept of currency is all the more relevant now that, in 2020, the ECB has launched the digital euro project, embodied in a Commission proposal for a Council Regulation to establish the euro "*as the digital form of the single currency*"[14] . Although this project has not yet come to fruition[15] , it has provided food for thought for this report, which is not confined to central bank digital currencies. The 2021 BIS report also analyzes "*the structural limitations of cryptocurrencies*", which it presents as not being "stable currencies"[16]. Already, in two studies from 2012 and 2015[17] , the ECB had asserted that "*virtual currencies*" were not money in either the economic or legal sense of the term[18] . The digital payment boom has nonetheless contributed to reflection on the notion of money in the legal sense of the term, in a context marked by a discrepancy between the state of the law and the terminology commonly used: the term "*money*" is increasingly used in everyday language to designate any type of exchange instrument. Revealing in this respect are the definitions used by the ECB in its 2012 and 2015 studies for "*virtual currencies*"[19] , "*money*"[20] and "*currency*"[21] , which for the euro can take the form of banknotes, coins, scriptural money and electronic money, together forming funds within the meaning of the Payment Services Directive, as noted by the ECB[22] . Considering the legal notion of money in the digital age also leads to a renewed vision of the international role of currencies in a new geopolitical context, a role understood as the use made of money by non- residents outside its territory of issue, as a means of payment, a unit of account or a store of value. At stake here, of course, is the relationship between each currency, as a representation of value, and foreign currencies, raising the question of exchange. It also becomes a question of currency as an instrument in international relations, notably for sanctions, raising the issue of the territorial extension of law, sometimes referred to as legal extraterritoriality[23].

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[11] Art. 3 of the proposed Council Regulation establishing the digital euro, COM(2023) 369, cited above.
[12] BIS, *Annual Economic Report*, 21 June 2022.
[13] *Ibid*.
[14] ECB, *Report on a digital euro*, October 2020.
[15] In December 2024, the ECB published the second progress report. Progress on the preparation phase of a digital euro, Second progress report, 2024.
[16] BIS, *Annual Economic Report*, 21 June 2022.
[17] ECB, *Virtual currency schemes*, 2012.
[18] ECB, *Virtual currency schemes - a further analysis*, 2015, p. 24.
[19] *Ibid.* p. 4: "*Digital representation of value, not issued by a central bank, credit institution or e-money institution, which, in some circumstances, can be used as an alternative to money*".
[20] *Ibid*. p. 24: "From a legal perspective, money is anything that is widely used to exchange value in transactions".
[21] *Ibid*: "The term currency is used for "minted" forms of money; nowadays usually taking the form of coins and banknotes. In a more conceptual sense, a (particular) currency refers to the specific form of money that is in general use within a country".
[22] *Ibid*.
[23] See HCJP, *Report on the extraterritoriality of European Union law*, May 2022.

Coins and banknotes, legal tender, electronic money, virtual money, digital assets, crypto-assets, *stablecoins*, tokens, electronic money tokens, central bank digital money, digital means of exchange, money, etc., the terms multiply and become entangled in a particularly evolving context as legal texts and institutional reports follow one another. What they have in common is that they constitute a representation of value, which contributes to the permeability of notions. They do, however, differ in terms of the nature of the medium - materialized or dematerialized, distributed account or register - and the nature of the issuer - public or private.

This context contributes to a general questioning of the diversity of legal natures of the means used to make payments, and of the rules that derive from them, and, more generally, of the legal nature of money itself, as the object of monetary sovereignty that needs to be thought through "*in the 21st century*", to use Governor Villeroy de Galhau's expression[24] . Because of the confusion of terminologies and the multiplication of notions, a clarification of the legal concept of currency and its various variations is all the more necessary as the body of legislation has been formed by legislative and regulatory sedimentation - at European, national and international levels - not without side effects, a clarification that would enable the various regimes to be better articulated with one another.

Finally, a preliminary clarification is necessary, as the work of this Group has shown the legal polysemy of the notion of money. This varies according to the field of law in which it is used. One of the difficulties encountered arises from the confrontation between the different fields of law, each of which has its own definition of money. In French law, for example, the Civil Code never uses the term "*monnaie*" on its own, preferring other expressions such as argent[25] , deniers[26] , espèces (or "*espèces ayant cours*")[27] , fonds[28] , somme d'argent[29] , and, to designate the debt of money, the obligation to pay a sum of money in euros[30] . Dation en paiement, on the other hand, refers to the delivery of something other than euros in payment of a monetary obligation[31] . The concept of money in civil law will therefore not be the same as that used in public law, which links money to the competence of the central bank. In Union law, concepts also vary from one text to another, depending on the aims pursued[32] . For example, the definitions adopted may not be the same for the fight against money laundering and terrorist financing, or for payment services. Even within the disciplines of economic law, concepts are intertwined: money in the sense of monetary law differs from money in the sense of banking law, financial law, tax law[33] , data law, and so on. The report therefore favors a logic of independence of legislation, whereby definitions are relevant to a given field. Nevertheless, the Working Group considered the need to rationalize the use of terms and to unify legal concepts,

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[24] *Monetary sovereignty in the 21st century*, F. Villeroy de Galhau, Interventions, November 14, 2023, https://www.banque-france.fr/fr/interventions-gouverneur/la-souverainete-monetaire-au-xxie-siecle

[25] Art. 533, 536 and 587 of the French Civil Code and art. 1895 of the French Civil Code (which covers loans "in money").

[26] Art. 515-5-2 and 1099-1 of the French Civil Code; art. 815-13, 1433, 1250 and 2374 of the French Civil Code.

[27] Art. 1932 on the deposit of "monetary sums"; art. 1895 of the Civil Code.

[28] Art. 491, 501, para. 2, 501, para. 3, art. 1843-3 and 2332 of the French Civil Code.

[29] Art. 785 and 802 of the French Civil Code; art. 2374 et seq. and 1352-6 of the French Civil Code.

[30] Art. L. 1231-6 and L. 1343 et seq. of the French Civil Code (Special provisions for money obligations).

[31] Art. L. 2374 et seq. of the French Civil Code.

[32] The question of local currencies will not be dealt with in this report.

[33] Significant in this respect is the *Hedqvist* ruling, which gives a definition of *bitcoin* relevant only for the application of the VAT Directive. CJEU, October 22, 2015, *Hedqvist*, C-264/14, ECLI:EU:C:2015:718.

which would have the merit of enabling a better articulation of regimes. The starting point was monetary law, understood as comprising two sets of rules[34] . The first are those governing the exercise of central bank powers (*central bank law*). The statute - which generally groups these rules together - assigns functions to the central bank and grants it powers to determine its mandate. The monetary functions are essentially the issue of currency, on the one hand, and the management and supervision of payment systems, on the other, which must be articulated with the conduct of monetary policy. The two monetary powers are the issuing of currency and the opening of accounts. The second are the rules governing the use of money (*monetary law*). In a given territory, monetary law determines the official monetary unit of account (currency unit), on the one hand, and the official means of payment (money signs), on the other.

The aim of this report by the Haut Comité Juridique de la Place Financière de Paris (HCJP) is, in view of the evolution of the legal concept of money, to offer a legal reflection on the concept of money and the notions it encompasses, distinguishing them from other objects that cannot be legally qualified as money. The report includes a glossary of definitions. The law distinguishes between money as a unit of account (I) and means of payment (II). The phenomenon of digitization has led to developments which, ultimately, reinforce this distinction (III).

[34] See the distinction made by an IMF study. *Legal Aspects of Central Bank Digital Currency: Central Bank and Monetary Law Considerations*, IMF Working Paper, Legal Department, 2020.

I - Money as a unit of account

"*Only he who has the power to make law can give law to currencies*"[35] . Jean Bodin's statement underlines the consubstantial link between money and sovereignty. Today's notion of money cannot be understood without placing it in a historical context. This explains why, in law, in the strictest sense of the term, money - or official money - is first and foremost the unit of account designated by the State on its territory in the exercise of its sovereignty (A). This in turn raises the question of how currency is understood outside the territory of the state (B).

A - The unit of account designated by an act of monetary sovereignty

On a conceptual level, we need to look again at the sovereign attribution of the status of "*official currency*" (1). In the European Union, monetary sovereignty takes the form of competence in the field of monetary policy (2).

1 - Sovereign attribution of "official currency" status

Money is traditionally defined in terms of the three economic functions it is supposed to fulfill - each of these functions being defined from a legal point of view[36] . Firstly, money is an instrument for measuring value, enabling economic agents to agree on a common valuation. This implies the acceptance by agents, or the imposition on them, of the same unit of account. Secondly, money is an instrument used as an intermediary in exchanges. In legal terms, this is reflected in the releasing power of money, which has the capacity to extinguish all debts and obligations. These first two functions reflect the two essential dimensions of money: intellectual (unit of value) and material (payment function)[37] . Thirdly, money can also be understood as a store of value, raising the question of whether it legally constitutes an object of property. The preservation of value is, however, conditional on the issuer implementing procedures to ensure its stability. Value can also be altered in substance by devaluation operations. It is in the light of these three dimensions that we can explain the decisive role historically played by the State in the way the monetary phenomenon has been organized.

In order to fulfill its main functions (instrument of exchange, measurement and store of value), money - or more precisely, the value repository it establishes - must be accepted within a community. This acceptance may result from spontaneous recognition by the private individuals who use it. Historically, however, it has more often than not been imposed by sovereign entities, which also found in money a means of asserting their financial power[38] . The development of coinage had a specific advantage in that it conferred a financial benefit on the issuer: the latter, through coinage, simultaneously derived a profit, on the one hand, from the difference between the nominal value of the coins and the intrinsic value of the metal they contained (what can be described as seigniorage) and, on the other hand, from exchange operations imposed on foreign merchants insofar as only the local currency was legal tender. Coinage also facilitated tax collection, sparing the administration the complex task of collecting

[35] J. BODIN, *The Six Books of the Republic*, Book I, Chapter X, 1576.
[36] Ch. PROCTOR, *Mann on the Legal Aspect of Money*, Oxford, OUP, 2012, 7th ed. p. 9 ff.
[37] R. LIBCHABER, *Recherches sur la monnaie en droit privé*, Paris, LGDJ, 1992, p. 20 ff.
[38] V. R. BISMUTH, "Monnaie (droit)" *, in Dictionnaire encyclopédique de l'Etat*, Paris, Berger-Levrault, 2015, p. 636 et seq.

wealth. Through the magnitude of the fiscal gain resulting from the issue of currency, money "*thus took on a status that had not previously manifested itself: it became the exclusive privilege of the sovereign power*"[39].

Given its financial value, it was therefore not surprising, with the emergence of the modern state, that money became part of the "*sovereignty basket*"[40] and that the right to coin money (*jus cudendae monetae*) was an attribute of state sovereignty. This position was recognized by the Permanent Court of International Justice in the *Serbian and Brazilian Borrowings* cases, which found that "*it is a generally recognized principle that every State has the right to determine its own currencies*"[41] . State sovereignty is thus expressed in its monetary dimension, and implies that the State can issue its currency, determine its unit of account and impose its legal tender by deciding on the monopoly of its exclusive use or not as a means of payment. This can be seen, for example, in the US Constitution, which gives Congress the power to "*[t]o coin Money, regulate the Value thereof, and of foreign Coin*"[42] or in Article 34 of the Constitution of October 4, 1958, which states that "*the law fixes the rules concerning* (...) *the system for issuing money*".

The historical predominance of the state in monetary phenomena, facilitated in particular by its ability to impose its currencies on exchanges, has led some authors to make money an exclusive creation of the state and its law. This approach is particularly evident in the "*state theory of money*" developed by Knapp, for whom "*[t]he soul of currency is not in the material of the pieces, but in the legal ordinances which regulate their use*"[43]. This theory is naturally reflected in certain international instruments adopted by States, such as the International Convention for the Suppression of Counterfeiting Currency, concluded in Geneva on April 20, 1929, article 2 of which says that "*the word 'currency' means paper money, including banknotes, and metallic money, having legal tender status*".

This is how the legal notion of money came to be understood, in its strictest sense as "*absolute*", as a unit of account: through an act of sovereignty, a name determines an intrinsic value without any quid pro quo. The accounting function is therefore governed by the rules of "*abstract money*", which concern the measurement of value (the unit of account and its graduation) and the means of determining the standard of this measurement. As a unit of measurement, money has known different standards[44] . The standard for the monetary unit of account was originally a precious metal, since the pound of gold and the monetary pound were identical[45] . During the French Revolution, the "*livre*" unit gave way to the "*franc*"[46] , whose

[39] G. LE RIDER, *La naissance de la monnaie - Pratiques monétaires de l'Orient ancien*, Paris, PUF, 2001, p. 81.
[40] R. LIBCHABER, *Recherches sur la monnaie en droit privé*, *op. cit.* p. 60.
[41] CPJI, July 12, 1929, *Serbian and Brazilian Loans case*, series A, no. 20/21.
[42] Constitution of the United States of America, Art. 1, Section 8 § 5-6.
[43] G. F. KNAPP, *The State Theory of Money*, London, Macmillan, 1924, p. 2.
[44] By way of comparison, to take a known unit, the metre, the standard has successively been defined as "one ten-millionth of a quarter of the earth's meridian", then as "the length of the path travelled by light in a vacuum for a duration of 1/299,792,458 seconds". Décret n° 2003-165, 27 févr. 2003, relatif aux unités de mesure et modifiant le décret n° 61-501, 3 mai 1961, art. 2.
[45] The Carolingian pound of the VIIIthcentury had the pound of weight as its monetary standard.
[46] Decree dated 18 Germinal Year III (7 Apr. 1795) introduces the name franc: "The new measures will henceforth be distinguished by the republican nickname [...] meter, are, stere, liter, gram, [...] Finally, the unit of currency will take the name franc, to replace that of livre used until now".

standard was the 5-gram silver coin[47] under the gold species standard. The law of August 5, 1914 then gave Parliament the right to increase the Banque de France's issuing power by imposing a ceiling on banknote issuance[48] . The return to the gold bullion standard was enacted by the Poincaré franc established by the law of June 25, 1928, which reintroduced the convertibility of banknotes entitling the holder to metal in the form of a gold bullion standard[49]. If we speak of gold convertibility of the unit of account, the gold standard was definitively abandoned when the decree-law of June 30, 1937 gave a new definition in metal of the unit of account. The French system thus became a nominal monetary regime, i.e. a monetary order based on law - or the name given to it by law - and no longer on metal[50] . Nevertheless, the franc, defined in relation to the dollar, remained convertible into gold under the international convertibility regime of the *gold exchange standard* within the Bretton-Woods system. The abrogation of the dollar's gold convertibility by the Jamaica Agreement of January 8, 1976 marked the severing of the link between the metal and the monetary standard. Absolute money became its own standard, since it was "detached from any counter-value of which it would be the representation: it has no value other than that assigned to it by an act of will of the public authority" [51].

As a result of this historical evolution, monetary law would benefit from clarification by generalizing the legal concept of "*official currency*", understood as the unit of account chosen by a State, especially as such a concept exists in European Union law[52] . According to the definition given by the MiCA Council Regulation, official currency is that "*issued by a central bank or other monetary authority*"[53] . In its "*absolute*" sense, currency is the unit of account designated as such by an act of sovereignty of the State, legally conferring on it the quality of "*official currency*". It would therefore be desirable to generalize the use of the notion of "*official currency*" to legally qualify the unit of account.

[54]. It should be pointed out that official currency is the unit of account designated as such by means of a standard issued by the holder of monetary sovereignty. Unlike payment

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[47]"Five grams of silver at the rate of nine tenths of a fine, constitute the monetary unit, which retains the name of franc", Law of 7-17 germinal year XI (March 28, 1803) on the manufacture and verification of coins.

[48] Law of August 5, 1914 increasing the issuing power of the Banques de France et de l'Algérie, provisionally establishing the forced exchange of their bills and approving agreements with these establishments, *JORF* n°213 of August 6, 1914 p. 7127.

[49] Monetary law of June 25, 1928*, JORF* of June 25, 1928 p. 7085.

[50] Décret-loi du 30 juin 1937 portant modification de la loi monétaire du 1eroctobre 1936 et approbation d'une convention avec la Banque de France, *JORF* n°151 du 1erjuillet 1937 p. 7431.

[51] "In the current monetary system, all instruments in circulation have the character of absolute money, are detached from any support of precious metal [...]; all the value they may have comes from the State (hence, sometimes, the expression fiduciary money, money of trust, of confidence in the State). J. CARBONNIER, *Les biens*, Paris, PUF, 2000, 19eed., n°23.

[52] It can be found in monetary agreements with third countries, see e.g. art. 1er: "The Principality of Monaco is authorized to use the euro as its official currency in accordance with amended Council Regulations (EC) no1103/97 and (EC) no974/98. The Principality of Monaco gives legal tender status to euro banknotes and coins", Monetary Agreement between the European Union and the Principality of Monaco*, OJEU* C 310 of October 13, 2012, p. 1.

[53] Art. 3, paragraph 1, 8) of the MiCA Council Regulation, cited above.

[54] Order no. 2024-936 refers to the notion of "official currency" only to add a 9eparagraph to article L. 54-10-5 c) of the French Monetary and Financial Code: "When they provide services linked to electronic money tokens denominated in a currency that is not an official currency of a Member State or tokens referring to one or more assets within the meaning of Council Regulation (EU) 2023/1114 (...) on crypto-asset markets, they communicate to the issuer of these tokens the information provided for in paragraph 3 of Article 22 of this Council Regulation". Ordinance n°2024-936 of October 15, 2024 relating to crypto-asset markets, *JORF* n°245 of October 17, 2024.

currencies, it does not circulate, so the term "issue" is irrelevant. Coins, banknotes or electronic money are issued, but it is inappropriate to use the term "*issue*" to designate a legal norm.

By the same token, the economic concept of "*fiat currency*", which is both rare and confusing, should no longer be used in law. For example, the DAC 8 directive defines "f*iat money*" as "*the official currency of a jurisdiction, issued by a jurisdiction, by the Central Bank or by the designated monetary authority of a jurisdiction, and represented by physical banknotes or coins or by money in various digital forms, including bank reserves and Central Bank Digital Coins*", before adding "*[t]he term also includes commercial bank money and electronic money products*"[55] . This definition of "*fiat money*" is therefore ambiguous and would require amendment of the DAC 8 directive.

2 - Monetary policy competence within the European Union

Governor Villeroy de Galhau[56] asked, "*Is the euro a stateless currency... or the beginning of European sovereignty?*" For him, monetary sovereignty is exercised jointly within the Union by the member states that have adopted the euro. By concluding the Treaty, they agreed to the establishment of Economic and Monetary Union (EMU), which includes the Union's exclusive competence in the field of monetary policy[57].

As the Court of Justice has noted, in the silence of the TFEU, monetary policy is defined both by its objectives and the instruments available to the Eurosystem to implement them[58] . Article 127(2) TFEU sets out the fundamental monetary policy tasks carried out by the Eurosystem[59] , while the instruments are determined by Articles 18 to 20 of the Statute[60] . Article 128 TFEU and Article 16 of the Statute confer on the ECB the power to issue euro banknotes and to authorize the issue of euro coins by Member States that have adopted the euro. In its *Hessischer Rundfunk* ruling, the Court of Justice affirmed that the concept of monetary policy implies an "*operational implementation*"[61] which corresponds to the operations carried out by the Eurosystem to achieve the primary objective of price stability. It also includes "*a normative dimension aimed at guaranteeing the status of the euro as a single currency*"[62] . Thus, "*[s]uch an interpretation of the concept of 'monetary policy' is corroborated by the primary objective of maintaining price stability, as set out in Articles 127(1) and 282(2) TFEU. Indeed, as the Advocate General pointed out in paragraph 66 of his Opinion, if the status of the euro as a single currency could be understood differently and governed by different rules in the Member States whose currency is the euro, the uniqueness of the single currency would be*

[55] Annex I point A 10) of Council Directive (EU) 2023/2226 of October 17, 2023 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, *OJEU* L, 2023/2226, 24.10.2023.
[56] Monetary Sovereignty in the 21st Century, op. cit.
[57] Art. 3 § 1, c), TFEU.
[58] CJEU, Plenum, November 27, 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraph 53; CJEU, Gde ch., June 16, 2015, *Gauweiler e.a.*, C-62/14, EU:C:2015:400, paragraph 42; CJEU, Gde ch., December 11, 2018, *Weiss e.a.*, C-493/17, ECLI:EU:C:2018:1000, paragraph 50.
[59] The ESCB's fundamental tasks include defining and implementing the Union's monetary policy, conducting foreign exchange operations in accordance with the Treaty, holding and managing the official foreign exchange reserves of the Member States, and promoting the smooth operation of payment systems.
[60] *Open market* and credit operations, reserve requirements and other instruments decided by the ECB Governing Council.
[61] CJEU, *Hessischer Rundfunk*, C-422/19 and C-423/19, cited above, paragraph 38.
[62] *Ibid*.

called into question and, as a result, the objective of maintaining price stability would be seriously compromised"[63]. The euro is thus the unit of account whose value depends on the ECB's monetary policy. This choice of the euro as the unit of account was given concrete form by the legal operation of introducing the single currency under the conditions laid down in EC Council Regulation 974/98 [64].

In accordance with Articles 2 and 3 TFEU, exclusive competence in the field of monetary policy means that only the European Union determines the unit of account, which is the euro as the single currency[65]. It is totally out of the question for a Member State that has adopted the euro to designate any other unit of account. Any unilateral initiative on the part of the State - or one of its territorial or functional subdivisions[66] - in this direction would constitute a violation of Union law. On the other hand, Member States are obliged to adopt all measures necessary to implement the rules governing the euro as a single currency[67]. France's currency is the euro[68]. The choice of the euro as the unit of account has a series of consequences in French law. Under article L. 123-22 of the French Commercial Code, persons required to account for their activities must draw up their accounting documents in euros. Similarly, the State is required, in its public finance programming laws, to indicate projected expenditure volumes or general government expenditure resulting from the implementation of a finance law in euros (articles 1A, 1B, 1H, 1I of the LOLF), adding that its borrowings must be denominated in euros "*unless expressly provided for in a finance law*"[69] . This requirement to use the euro as a unit of account is also reflected in legal provisions: for example, article L. 322-12 of the French Code de l'expropriation pour cause d'utilité publique requires expropriation compensation to be "*fixed in euros*". Finally, in its version in force since January 1, 2022, article 1er of the decree of December 3, 1987 requires that "*[a]ll information on the prices of products or services must show, whatever the medium used, the total sum including all taxes which must actually be paid by the consumer, expressed in euros*"[70] . It is worth considering whether it would be appropriate to give this requirement a legislative basis, especially as some professionals are carrying out communication campaigns on the possibility of paying with electronic money tokens.

B - Currency apprehended outside its territory

Determined by sovereignty, official currency means that the notion of money must be understood in relation to the territory of the state. A currency is legally absolute only in the territory where sovereignty is exercised, having conferred on it the legal status of a unit of account. This raises the question of the official currency used outside the territory of issue. In

[63] *Ibid*, point 39.
[64] Council Council Regulation (EC) no. 974/98 of May 3, 1998 on the introduction of the euro, *OJEC* no. L 139 of May 11, 1998 p. 1. Art. 2: "The currency of the participating Member States is the euro. The monetary unit is one euro. One euro is divided into one hundred cents". Art. 3: "the euro replaces the currency of each participating Member State at the conversion rate". Art. 4: "[t]he euro is the unit of account of the European Central Bank (ECB) and the central banks of the participating Member States".
[65] Art. 3 § 4 TEU: "the Union shall establish an economic and monetary union whose currency shall be the euro".
[66] In this respect, it is important not to misunderstand regional or local currencies, which are not units of account but means of payment.
[67] See the provisions of the French Monetary and Financial Code.
[68] Art. L. 111-1 of the French Monetary and Financial Code.
[69] Art. 26 of the LOLF.
[70] Decree of December 3, 1987 on consumer price information.

addition to the conventional hypotheses of stipulation in a foreign currency (2), the official currency may be used by other States (1).

1 - Use by States

The holder of monetary sovereignty derives from its power to determine the official currency on its territory prerogatives regarding its use outside its territory. In this configuration, official currency is understood as currency; more precisely, currency designates the unit of account recognized by a state other than the one which has consecrated it as such. Devoid of any reference to intrinsic value, the currency of one state has value only in relation to that of others. It is therefore determined according to the supply and demand for the currency, which is expressed by the exchange rate. The exchange rate thus refers to the value of the unit of account in the relationship between two official currencies. This value is set either by a legal agreement between the sovereign states of the official currencies, or by free market forces in the absence of such an agreement. In practice, in the international monetary system as it emerged *de facto* (1971) and *de jure* (1976) from the modification of the Bretton Woods agreements, the exchange rate is in principle freely determined by market rules, but central banks can intervene through foreign exchange operations to influence the supply or demand of a currency. Other states impose an exchange rate, creating a parallel rate on an unofficial market. In this respect, we need to distinguish between exchange controls, a common expression used to designate state control of the entry and exit of official national or foreign currencies. In this case, however, control is exercised over the medium materializing the monetary value, and will therefore be examined in section II.

It's also worth mentioning the hypothesis of one state using, on its own territory, an official currency issued by another. Originally, this phenomenon was known as dollarization: the U.S. dollar is used as an official currency by a state other than the United States. Economists have identified three types of dollarization: unofficial, semi-official or mixed, and official or full. The first describes a de facto situation, where an official currency is used on the initiative of private agents as a unit of account in small-scale monetary exchanges; more often than not, the official (local) currency of the dollarized state is pegged to an official currency of another state, which serves as an anchor through a fixed exchange rate. When the monetary unit of account is used officially and in parallel with the state's official currency (local currency), dollarization is said to be mixed, and the monetary system is dual-currency. In both cases, the official currency of the dollarizing state remains, and the state retains its central bank. On the other hand, official or full dollarization implies the substitution of the official currency of another state for the official local currency, and consequently annihilates the national monetary organization. In the silence of public international law[71] , the decision of the dollarized state is in principle unilateral, so it is questionable whether the use of the official currency requires the authorization of the issuing state.

Like the U.S. dollar, the euro undergoes a process of Euroisation, whereby a non-EU country chooses the euro as its official currency, if necessary by recognizing it as legal tender. Euroisation may be *de jure* when a monetary agreement has been concluded under Article 219(3) TFEU between the European Union and a third country, as is the case for Andorra,

[71] C. KLEINER, *La monnaie dans les relations privées internationales*, Paris, LGDJ, 2010, p. 39 et seq.

Monaco, the Vatican and San Marino[72]. Euroisation can also be *de facto* when a third country chooses the euro as the official currency on its territory, as in the case of Montenegro and Kosovo. The transition from unofficial to official (or full) euroization may be only temporary, as in the case of Andorra. The Council and the ECB rule out any Euroization in the Union for member states that have not adopted the euro (Bulgaria, Czech Republic, Denmark, Hungary, Poland, Romania and Sweden)[73]. For the ECB, unilateral adoption of the euro through euroization outside the framework provided by the Treaty would run counter to the economic rationale underlying EMU, which sees adoption of the euro as the culmination of a convergence process embodied in the criteria of Article 140 TFEU[74].

2 - Use by private players

Monetary sovereignty, with its consequence that a currency is linked to a State and a territory, leads us to consider the hypotheses in which private (and sometimes public) actors, in their agreements, use an official currency outside the territory of the issuing State. This allows for the identification of the concept of foreign currency, understood as a monetary unit of account that is not the official currency of: (1) the State in which the debtor or the creditor resides; (2) the State of which the debtor or the creditor is a national; or (3) the State on whose territory a payment is made or a monetary obligation is entered into. The foreign character of the currency is based on varying criteria, the common denominator of which - the notion of foreign currency - is the relationship between a creditor and a debtor, bound by a monetary obligation denominated in an official currency which is not that of either or both parties. It should be noted that in French law, when a foreign currency is involved, it is most often the term "*currency*" that is used, whether in the Consumer Code, the General Tax Code, the Code of Criminal Procedure or the Civil Code, among other examples.

Foreign currencies in contractual relationships can be stipulated as either the currency of account or the currency of payment. This has legal implications when it comes to neutralizing exchange rate risks. Fluctuations in the value of a currency change the *quantum of* the monetary obligation, leading to a degree of instability in contractual relations. As the IMF points out, the principle is that any monetary obligation must be satisfied, or any payment made, by settling the exact amount stipulated in the contract or provided for by the relevant law. Hence, in the absence of contractual provisions to the contrary, the loss of value of the official currency, whether domestically through inflation or externally through depreciation of the exchange rate, is at the creditor's risk[75]. In this respect, French law adopts fairly pragmatic solutions to indexation clauses. The basic position is that of respect for monetary nominalism, since article 1343, paragraph 1[er]of the French Civil Code says that "*[t]he debtor of an obligation to pay a sum of money is discharged by payment of its nominal amount*". However, the rigidity of this

[72] Monetary Agreement EU and Principality of Andorra, *OJEU* C 369, 17.12.2011, p. 1; EU and Vatican City State, *OJEU* C 28, 4.2.2010, p. 13; EU and Republic of San Marino, *OJEU* C 121, 26.4.2012, p. 5; EU and Principality of Monaco, *OJEU* C 310, 13.10.2012, p. 1.

[73] Conseil ECOFIN, Stratégie de change des pays candidats à l'adhésion, November 7, 2000. Council (Ecofin) report on the exchange-rate aspects of enlargement, submitted to the Nice European Council, Brussels, November 8, 2000, Council of the European Union press release no. 13055/00.

[74] Policy position of the ECB Governing Council on exchange rate issues relating to the accession countries, December 18, 2003.

[75] IMF, *Legal Aspects of Central Bank Digital Currency*, cited above, point 57.

principle is immediately tempered by the following paragraph of the same article, according to which "*the amount of the sum due may vary through indexation*". Under French law, therefore, it is not forbidden to adjust the consequences of variations in currency exchange rates. However, automatic indexation of prices, goods and services is prohibited. Only indexation *chosen* and *governed* by the provisions of articles L. 112-1 et seq. of the French Monetary and Financial Code is authorized. In short, to be valid, an indexation clause must have a direct relationship either with the object of the contract in which it is inserted, or with the activity of one of the parties. Certain contracts, such as commercial leases, are subject to special rules. In principle, the use of a very general index is prohibited. Exceptions are certain contracts covered by article L. 112-3 of the French Monetary and Financial Code, which may be indexed to the general price level, and employment contracts, which in some cases are indexed to the minimum wage. Other contracts, such as debt securities and financial contracts, are exempt from the ban.

The comparison between indexation clauses and clauses using a foreign currency as a unit of account has been made by the case law of the Cour de cassation (French Supreme Court)[76] . Considering that the contractual choice of a foreign currency to vary the value of the obligation had the same function as an index used in an indexation clause, several rulings have assimilated clauses referring to a foreign currency to indexation clauses[77] . While this solution is open to criticism in that an index - made up of an aggregation of data collected in a given sector of activity - is by its very nature different from a foreign currency unit, which reflects the state of a foreign economy, this type of clause is nevertheless accepted. However, the regime governing such clauses is rather special, in that it applies only to "domestic" contracts. International contracts, whatever their applicable law, are excluded from the application of the strict regime laid down by articles L. 112-1 et seq. of the French Monetary and Financial Code, by virtue of a substantive rule of private international law, which recognizes the freedom of parties to an international contract to arrange the valuation of their obligations.

While the choice of a foreign currency is purely private, it is not insignificant from a legal point of view, in that it can create a right of action for the State, the issuer of the official currency. Monetary sovereignty thus catches up with the private use of money. Apart from the voluntary choice of a currency for the value it represents and its stability, the parties to a transaction using a foreign currency (for them) must also be aware that the use of this monetary unit also implies a choice of *law*, or more precisely, a choice of a legal and monetary nature. The choice of a monetary unit entails far more far-reaching consequences than those envisaged by the contracting parties, and can be referred to as monetary extraterritoriality, in that it is the result of a combination of freedom of choice of foreign currency and the exercise of public power inherent in the official currency. Indeed, in France, since the transaction agreement concluded in 2014 between BNP Paribas and the *Department of Justice* (DoJ) the use of the US dollar in a financial transaction - even if not initiated by an institution located in the United States and if the beneficiary and its bank are also located outside the territory of the United States while not being subsidiaries of institutions located in the United States - implies the use

[76] Cass. 1re civ, January 12, 1988*, de Brancovan*, no. 86-11.966.

[77] Case law on foreign currency loan contracts has adopted this analogy. See e.g. Cass. 1re civ, March 29, 2017, n°15-27.231. The significant litigation arising from real estate loan contracts concluded in Swiss francs led the legislator to drastically limit this measure (art. L. 313-49 and R. 313-30 et seq. of the French Consumer Code).

of the interbank clearing system irremediably located in the United States[78] . The use of funds denominated in the official U.S. currency means that the provisions of U.S. law governing the Council Regulation of the U.S. dollar and the payment circuits through which all transactions pass are applicable. The application of these provisions confers jurisdiction on the American public authorities responsible for enforcing them. While the legitimacy of such a title continues to be debated, the territoriality of U.S. law has been established.

[78] *United States of America v. BNP Paribas, S.A.*, Statement of Facts, June 30, 2014, https://www.justice.gov/sites/default/files/opa/legacy/2014/06/30/statement-of-facts.pdf

II - Currencies as means of payment

The other essential function of money is to serve as an instrument for enforcing payment obligations, whether these are imposed unilaterally by the public authorities or arise from an agreement between the parties to a contract. As a result, the legal concepts of money and payment interact with each other, but do not merge, raising the question of the relationship between monetary law and the law governing means of payment. A twofold distinction can be made at the outset. The first focuses on the actor who issues the currency. In a logic of concentric circles, the issuance of money is legally reserved for central banks and regulated institutions (credit or electronic money). The second, closely related to the first, focuses attention on the medium through which currencies are issued. We thus contrast "*value*" currencies with "*account*" currencies: the latter are book-entries representing the nominal value of the unit of account, be it a liability on the central bank's balance sheet in the case of fiat money, or a liability of credit institutions in the case of book money. In this way, money as a means of payment takes on different forms, depending on the nature of the issuing institution. In addition to currencies issued by the central bank (A), there are currencies issued by regulated institutions (B).

A - currencies issued by central banks

Issued by the central bank, money is made up of items which, by law, have a payment function. Fiduciary money is defined by two criteria (1). There is also central bank wholesale money (2).

1 - Fiduciary money

In French law, fiduciary money is a legal concept covered by Title II of Book I of the Monetary and Financial Code, which groups together "*metallic coins*" and "*banknotes*"[79] . Restricted to metallic coins and banknotes with legal tender status, the notion of fiduciary money has two characteristics (a). In the EMU, it comes under the legal regime of the euro as a single currency under EU law (b).

a - The two features

Issued by the central bank or by the State (in the case of coins) (i), fiduciary money is legal tender (ii).

i - Issuance by the central bank

It is commonplace to date the birth of coinage to the minting of coins in Lydia in the 6thcentury BC[80] . The reference is revealing of the confusion that exists between official money and coins as means of payment. A historical perspective allows us to apprehend the notion of paper money from a functional and organic angle.

From a functional point of view, the fiduciary nature of money can be explained historically. In the metallist system, coins had an intrinsic value corresponding to that of the

[79] Art. L. 121-1 to L. 123-1 of the French Monetary and Financial Code.
[80] V. Banque de France, *Paiements et infrastructures de marche à l'ère digitale*, 2023, p. 18 et seq.

precious metal in which they were minted (*commodity money*)[81]. In a system of convertible currencies, they were replaced by metallic and paper money, whose extrinsic value was independent of the material medium: coins and banknotes could be converted into gold, silver or other commodities (*commodity-backed money*). This gave rise to "*fiat*" money, whose value depended on the trust placed in it, leading to the abandonment of the possibility of charging for the gold equivalent of banknotes and the withdrawal of gold and silver coins from circulation. Attention focused on the value of currencies (nominal and intrinsic value) and on the conditions of their circulation (principle and limits of their acceptance). We return to the distinction made by Savigny, who represented the functioning of currencies in terms of three values: nominal value, understood as "the value that must be attributed to each coin, according to the will of its author [the monetary sovereign]"; metallic value, "*by virtue of the weight of silver or pure gold it contains*"; and commercial value, understood as "*the value that general belief, public opinion consequently, attributes to a certain kind of money*"[82]. Confidence leads us to the organic element.

In organic terms, from the Latin *fides*, fiduciary money refers to the currency issued by the central bank, which, through its integration into a legal system, generates the confidence inherent in the quality of money. For a long time, the power to issue money, first in metal (the right to mint money) and then on paper with the printing of banknotes, was the prerogative of feudal or royal power, but the monopoly of monetary issuance has now been transferred to central banks, private companies that were later nationalized and have now become independent public institutions for the most part. Admittedly, because they are regulated, credit institutions also issue money based on a relationship of trust. However, fiduciary money generates trust by the very fact that it is issued exclusively by the central bank.

It is therefore the criterion of issuance by the central bank that first determines the fiduciary nature of money. The second criterion is legal tender.

ii - Legal tender

While legal tender is classically one of the characteristics of central bank money in its fiduciary form[83] , its legal definition has remained constant in French law. The term "*cours*" originally derives from the formula whereby currencies "run" on a territory[84] . The "*cours*" is closely linked to both the *issuance* (putting into circulation) and *circulation* (acceptance for value) of fiduciary money.

Under French law, which derives from the 1810 Penal Code[85] , legal tender is governed by article R. 642-3 of the Penal Code, amended in 1994, which condenses in a single sentence the logic of issuance and circulation specific to paper money, by referring to "legal tender" twice.

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[81] V. ECB, *Virtual currency schemes*, 2012, p. 9.
[82] F. C. VON SAVIGNY, *Le droit des obligations*, 2, 2nd edn, § 41, p. 27, available [online].
[83] Recital 15 of the proposal for a Council Regulation establishing the digital euro, COM(2023) 369, cited above: "Legal tender is a defining characteristic of central bank money".
[84] "Nous voulons & commandons que nulle monnaie ne coure en notre royaume", Philip III in Paris, at the Touffaint Parliament, 1271, Ordonnances des Rois de France, p. 298.
[85] "Ceux qui auraient refusé de recevoir les espèces et monnaies nationales, non fausses ni altérées, selon la valeur pour lesquelles elles ont cours", Penal Code, art. 475, 11°, 1810.

"The refusal to receive coins or banknotes that are legal tender in France according to the value for which they are legal tender is punishable by a fine [...]"[86].

The first course of action characterizes fiduciary money: only coins or banknotes "having legal tender status" are covered by the penal code. A coin or banknote "*not having legal tender status in France*" does not legally fall into the category of fiduciary currency[87]. The granting of legal tender thus signifies the passage from the status of material (metal and paper) to that of fiduciary currency. As part of the fight against counterfeiting, however, the legislator has extended the protection afforded to fiduciary money to coins and banknotes "no longer legal tender" (art. 442-3 of the French Penal Code) or "*not yet legal tender*" (art. 442-15 of the French Penal Code). Legal tender is therefore intrinsically linked to issuance by the central bank: it characterizes the circumstance that banknotes and coins have been legally put into circulation (which is distinct from the idea of legal tender, see *below*).

The second part of article R. 642-3 of the French Penal Code defines the rules governing the circulation of "*legal tender*" banknotes and coins. Legal tender means that coins or banknotes must be accepted by the creditor for the "value for which they are legal tender". This is the nominalism of circulation, according to which fiduciary currencies must circulate without losing their value, excluding the charging of any commission and preventing any challenge to their value[88] . This value is nominal in that it corresponds to the name of the unit of account chosen by the holder of monetary sovereignty[89] . It covers the cost of manufacture, and therefore allows for a residual amount known as seigniorage. The power to *force* a nominal value higher than the intrinsic value of the thing (metal or paper) is called *forced price*. Although the expression is not enshrined in positive law[90] , forced tender means that the value of a coin or banknote is the amount of the official monetary unit struck on the coin or printed on the banknote by the issuer. As a component of legal tender, forced tender refers to the act of forcing either value or acceptance, or both.

Article R. 642-3 of the French Penal Code punishes "*[t]he act of refusing to receive coins or banknotes which are legal tender in France according to the value for which they are legal tender*". Legal tender weighs on the creditor in that it prohibits him from refusing bills and coins when they are sent to him by the debtor in payment of an obligation to pay a sum of money, whatever the amount. By specifying that "*[i]n the event of payment in bills and coins, it is the debtor's responsibility to make up the difference*", article L. 112-5 of the French Monetary and Financial Code enshrines the "make up" rule, which helps to limit the excessively

[86] Art. R. 642-3 of the French Penal Code. Article R. 162-2 of the Monetary and Financial Code refers to article R. 642-3 of the Penal Code. Underlining added.
[87] In the 19th century, foreign metal coins were circulating in France as "legal tender".
[88] Circulation nominalism is distinct from contractual monetary nominalism (see art. 1343 of the French Civil Code) and from monetary nominalism, which refers to the fact of no longer referring to metal.
[89] Under the metallistic and dual regime of the ancien régime, the value for which coins were accepted as currency was determined (for each type of coin, such as the ecu) by a value expressed in terms of money of account: the ecu (4.04 grams of gold) had to be accepted for a value of 3 livres tournois.
[90] This *forced exchange rate* reached its climax when the means of payment lost all intrinsic value with the proclamation of the *inconvertibility* of banknotes into gold coins. However, *inconvertibility*, when introduced at the end of the 19th century, was secondary to the *forced acceptance of* banknotes. Conversely, Mater wrote: "The price of banknotes will be absolutely free, without in any case being forced to accept them", A. MATER, *Traité juridique de la monnaie et du change*, 1924, p. 90. On forced exchange in contemporary law, see R. ZANOLLI. *Essai d'une théorie juridique de la monnaie à partir de la notion de cours*. Université Paris Cité, 2019, § 883, p. 566.

radical effects of a legal tender of public order that is subject to criminal sanction. In practice, the obligation to make up the difference means that the creditor cannot be penalized for refusing to accept cash if the debtor does not present the exact amount of the payment[91] . Lastly, article L. 121-1 of the French Monetary and Financial Code adds that "*[s]ubject to those which are legal tender in France, foreign metal coins cannot be accepted in public coffers in payment of duties and contributions of any kind whatsoever, payable in cash*".

Initially limited to metal coins, legal tender was extended by the 1994 reform of the French penal code to banknotes, which until then had been covered by the legal concept of *legal tender*[92] . This concept is all the more confusing as it is sometimes the translation of the notion of *legal tender* used in Anglo-Saxon countries[93] . Under French law, by virtue of the principle of free determination of the content of the contract, the parties are free to determine the terms of payment of an obligation to pay a sum of money and, if they so wish, to exclude cash payments in favor of another method of payment. Nevertheless, subject to special legal exceptions, articles R. 162-2 of the French Monetary and Financial Code and R. 642-3 of the French Penal Code prohibit the refusal of cash payments. This prohibition is a matter of public policy. On the one hand, article R. 642-3 of the French Penal Code falls within the scope of repressive law, which is, by definition, a matter of public policy. On the other hand, in general terms, legislation on the use of currency meets the requirements of the smooth running of the national economy, and is therefore a matter of public economic policy. According to the Conseil d'Etat, Article L. 112-6 of the French Monetary and Financial Code, which prohibits cash payments above a certain amount, applies "*to all payments which take place in France, whatever the law applicable to the contract for the performance of which they are made and whatever the nationality or place of habitual residence of the debtor or creditor or, in the case of companies, the State in which they have their registered office*"[94] . In the Conseil d'Etat's view, this provision thus constitutes a "*loi de police*", compliance with which for payments made in France is deemed crucial to safeguarding the State's public interests, even when the transaction involves foreign elements. Since the prohibition on refusing payment in cash is a matter of public policy, the parties cannot set it aside by mutual agreement in a clause to the contrary.

In addition, the question arises of respect for contractual freedom, which may nevertheless be restricted for a reason of general interest, subject to proportionality[95]. A first general interest reason for limiting contractual freedom in order to impose cash payment on co-contractors is the fight against social exclusion, in order to guarantee the protection of people

[91] The rule has sometimes been apprehended from the opposite perspective of the obligation to "give change": "The railway administration and its employees did not refuse a legal tender bill from the Bank of France for its value, but only that they did not want to change the said bill and give the difference", Cass. crim., Jan. 6, 1872, DP.72.I.47, *Min. Publ. C. Chemin de Fer Paris-Lyon-Méditerranée*. See the opposite obligation in the United States: "*An exception has been duly admitted by American courts to the effect that railways in selling their tickets should be prepared to give change within reasonable limits*". A. NUSSBAUM, *Money in the law*, Foundation Press, 1950, p. 53.

[92] "The creditor cannot legally refuse to accept in payment a piece of credit paper to which the law has assigned a value that is necessarily equivalent to that of metallic cash", *ibid*.

[93] "The legal tender status of notes only becomes relevant where there is a debt to be discharged. C. PROCTOR, *Legal tender in English law in The euro as legal tender*, *op. cit.* 2020. C. P. GILLETTE, "American legal tender rule and loss allocation", *in* R. FREITAG & S. OMLOR (eds.), *The euro as legal tender*, de Cuyper, 2020.

[94] CE, May 10, 2012, n°337573.

[95] Cons. const., June 13, 2013, no. 2013-672 DC recitals 10 to 13.

in precarious situations who do not have access to a bank account or an electronic instrument. Allowing merchants to refuse payment in cash could deprive people of essential products or services. Moreover, "*monetary policy*" is a matter of public policy, and can be justified on more general grounds linked to the preservation and proper functioning of the economy and the social body as a whole. This particular dimension has already been recognized by the French Constitutional Council, which saw this policy as "*an area in which the essential conditions for the exercise of national sovereignty are at stake*"[96] . Thus, the prohibition on refusing payment in cash meets the fundamental requirements of: (1) ensuring access to a universal means of payment for all, whatever their status or social condition; (2) offering a means of payment that respects anonymity and privacy; (3) enabling immediate payment, protected from possible malfunctions (e.g. computer bugs for payment in central bank digital money). As an essential condition of the trust that society places in money, the prohibition on refusing payment in cash meets a general interest objective. Moreover, this prohibition in principle is accompanied by numerous exceptions authorizing or obliging the refusal of cash payments, so that it is not disproportionate. The law authorizes refusal to pay in cash in a number of situations: payment in foreign currency; payment with coins or banknotes in poor condition; payment with more than 50 coins for a single transaction, except for payments to the Treasury; payments without the debtor having made up the difference; counterfeit money. Cash payments may also be refused for technical or security reasons. Cash payments between private individuals (e.g. for car purchases) are not restricted, but a written document is required for transactions in excess of 1,500 euros. Cash payments over the counter at public finance centers are limited to 300 euros. Cash payments from private individuals to professionals, or between professionals, are authorized up to €1,000. This limit is raised to €15,000 if the taxpayer's tax domicile is abroad, and if the payment is for personal expenses such as the purchase of a private vehicle. Salaries may be paid in cash up to a maximum of 1,500 euros per month; above this amount, the employer must pay by cheque or bank transfer. Cash payments for certain property transactions managed by a notary or may be made in cash if the transaction is less than 3,000 euros.

In principle, the payment obligation is denominated in the official currency of the state where it is performed (local currency rule). Nevertheless, the question arises as to whether the contract refers to a foreign currency that may be used by parties to a contract as a means of payment to settle the payment obligation. In French law, under the 2016 reform of contract law[97] , Article 1343-3 of the Civil Code was amended to incorporate the rules already acquired for over a century for payment in foreign currency[98] , namely that in France, payment must be made in the official national currency, i.e. the euro. In other words, the releasing power of a foreign currency unit can be limited by the legislator, for operations that he considers to be *internal*, i.e. exclusively linked to the French legal system, even if a principle of fungibility is accepted for obligations to pay a sum of money, even in different currencies, provided they are convertible[99] . Exceptions are made for "*transactions of an international nature*" and for

[96] Cons. Const., April 9, 1992, no. 92-308 DC, recital no. 43.
[97] Ordinance n°2016-131 of February 10, 2016 reforming contract law, the general regime and proof of obligations, *JORF* n°35 of February 11, 2016.
[98] Req., June 7, 1920: *S.* 1920, 1, p. 193.
[99] Under the terms of art. 1347-1 of the French Civil Code.

payment in execution of a foreign judgment. In 2018[100] , the legislator added a third exception, according to which "*the parties may agree that payment will take place in a foreign currency if it occurs between professionals, where the use of a foreign currency is commonly accepted for the transaction concerned*"[101].

The question arises as to the circulation of a means of payment denominated in an official currency. The hypothesis relates to the entry into the national territory of a currency or the exit from the national territory of the official currency of the State. This brings us back to the question of exchange controls. In France, exchange controls were abolished by article 1[er]of law no. 66-1008 of December 28, 1966, which established the principle of freedom of financial relations between France and foreign countries, while reserving to the State the possibility of restricting foreign exchange transactions in particular. Although this power was exercised until a decree of December 29, 1989, the principle of freedom is enshrined in Article L. 151-1 1 of the Monetary and Financial Code, as well as in Article 63 TFEU . [102]

Legal tender is thus distinct from conventional *legal tender*. Generally speaking, in view of its historically marked and conceptually ambiguous nature, the term legal tender should no longer be used, especially as its rare occurrence in texts is a source of confusion.

b - The legal status of the euro as a single currency

The term "*fiduciary money*" is not used in EU law. At the time of the changeover, the ECB confined itself to using the term "euro cash" to replace coins and banknotes in national currencies[103]. According to Articles 128 TFEU and 16 of the ESCB Statute, only the ECB issues euro banknotes and authorizes the issue of euro coins by the Member States (i). The status of these banknotes and coins is governed by the acts adopted pursuant to Article 133 TFEU (ii), which constitute "*the expression of the same single currency and [of] a single legal regime*"[104].

i - Banknotes issued by the Eurosystem and coins issued by member states

Issuing constitutes the power to put money into circulation under the terms of Article 128 TFEU. Article 10 of Council Regulation 974/98 says that the ECB and the NCBs of the Eurosystem shall put into circulation euro-denominated banknotes, which are the only legal tender in the euro zone. As such, the ECB is responsible for regulating the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes[105] . Article 11 of

[100] Law n°2018-287 of April 20, 2018 ratifying order n° 2016-131 of February 10, 2016 reforming contract law, the general regime and proof of obligations, *JORF* n°93 of April 21, 2018.
[101] Art. 1343-3 of the Civil Code; art. 14 of law n°2018-287 of April 20, 2018.
[102] Decree no. 89-938 regulating financial relations with foreign countries, amended by Decree no. 90-58 of January 15, 1990, transposing Council Directive 88/361/EEC of June 24, 1988 implementing Article 67 of the Treaty. Art. L. 151-1 of the Monetary and Financial Code: "Financial relations between France and foreign countries are free. This freedom is exercised in accordance with the procedures set out in this chapter, in compliance with France's international commitments".
[103] ECB Guideline of January 10, 2001 adopting certain provisions relating to the euro cash changeover in 2002 (ECB/2001/1), *OJEC* L 55 of February 24, 2001, p. 80.
[104] Recital 2 of Decision 2011/67/EU, cited above.
[105] ECB Decision 2013/211/EU of April 19, 2013 on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes (recast) (ECB/2013/10), *OJEU* L 118 of April 30, 2013, p. 37; ECB Guideline of March 20, 2003 on measures to be applied with regard to irregular reproductions of euro banknotes and the exchange and withdrawal of euro banknotes (ECB/2003/5), *OJEU* L 78 of March 25, 2003, p. 20. Art. D. 122-2 and D122 of the Monetary and Financial Code.

Council Regulation 974/98 says that euro zone member states shall issue coins denominated in euros or cents which comply with the denominations and technical specifications adopted by the Council[106] . Putting coins into circulation involves a series of physical operations[107] . The ECB specifies "the legal framework for the production and supply of euro banknotes"[108] . Member States are responsible for production, which corresponds to the operation of manufacturing coins (minting)[109] and NCBs for banknotes (printing), as well as supply, which consists of their delivery or supply[110] . Once they have been supplied, the ECB and the NCBs physically put euro bills and coins into circulation - sometimes referred to as distribution - through the professional cash handlers referred to in article 6(1) of Council Regulation n°1338/2001[111]. These include credit institutions, payment service providers and any other economic agent involved in the processing and delivery to the public of banknotes and coins[112] . These professionals are also responsible for "putting back into circulation, directly or indirectly, euro banknotes which they have received either from the public, in payment or as a deposit on a bank account, or from another professional called upon to handle cash"[113] . The proposal for a Council Regulation on the legal tender status of euro banknotes and coins uses the term "cash industry" to refer to "*credit institutions offering payment accounts to customers and cash handling service providers involved in managing the distribution and circulation of euro banknotes and coins*"[114] . Once issued to the public, euro bills and coins also constitute cash (see below). In European Union law, the concept of "cash" is preferred to that of "fiduciary money", and is used in a whole range of legal instruments outside the monetary sphere. Distinct from the power of issue by the ECB (central bank law), the statute of the euro (monetary law) governs the circulation of coins and banknotes issued in this way.

ii - The status of the euro

In 2002, the Bulletin de la Banque de France noted that "*[t]he creation of the euro, in legal terms, has revived and renewed the concept of monetary law. Previously, monetary law or lex monetae was essentially a matter for the monetary sovereignty of individual* states"[115] . This law is embodied in the "*normative dimension aimed at guaranteeing the status of the euro*

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[106] Art. 128 § 2 TFEU. Council Council Regulation (EU) 729/2014 of June 24, 2014 on denominations and technical specifications of euro coins intended for circulation, *OJEU* L 194, July 2, 2014, p. 1.
[107] ECB Decision 2011/67/EU of December 13, 2010 on the issue of euro banknotes (recast) (ECB/2010/29), *OJEU* L 35 of February 9, 2011, p. 26.
[108] Recital no. 1 of the ECB Guideline of November 13, 2014 on the establishment of the Eurosystem's production and supply system (ECB/2014/44), *OJEU* L 47 of February 20, 2015, p. 29.
[109] In France, metal coins are produced by the Monnaie de Paris on behalf of the State.
[110] Guideline ECB/2014/44, cited above.
[111] ECB Decision ECB/2010/14 of September 16, 2010 on the authenticity and fitness checking and recirculation of euro banknotes, *OJEU* L 267 of October 9, 2010, p. 1.
[112] These are establishments whose activity consists in exchanging banknotes or coins of different currencies, such as bureaux de change, cash-in-transit companies, other economic agents, such as retailers and casinos, involved on an ancillary basis in the processing and delivery of banknotes to the public by means of automated teller machines (ATMs), within the limits of these ancillary activities. Art. 6 § 1 of Council Regulation (EC) n°1338/2001, cited above.
[113] Art. 2 of ECB Decision 2010/597/EU, cited above.
[114] Art. 3 of the proposal for a Council Regulation on the legal tender status of euro banknotes and coins, COM(2023) 364.
[115] J.-C. CABOTTE, A.-M. MOULIN, "Le statut juridique de la monnaie unique", *Bulletin de France*, 2002, n° 108, p. 35.

as a single currency"[116] that monetary policy competence entails. Pursuant to Article 133 TFEU[117] , "*the measures necessary for the use of the euro as a single currency*" are established.

Legal tender.

The euro statute refers to the legal tender status of euro banknotes, as recognized by article 128 TFEU, and of euro coins, as recognized by article 11 of Council Regulation nº974/98. In the silence of the Treaty and legislation, but following on from a Commission recommendation of 2010[118] , the Court of Justice characterizes the legal tender status of euro banknotes and coins by three elements: (1) compulsory acceptance: the beneficiary of a payment obligation cannot refuse euro banknotes and coins, unless the parties have agreed on another method of payment; (2) acceptance at face value: the monetary value of euro banknotes and coins is equal to the amount shown on the banknotes and coins; (3) discharge: a debtor may discharge a payment obligation by offering euro banknotes and coins to his creditor.

The *Hessischer Rundfunk* judgment adds that "*the notion of 'legal tender' of a means of payment denominated in a monetary unit means, in its usual sense, that this means of payment cannot generally be refused in settlement of a debt denominated in the same monetary unit, at its nominal value, with full discharge effect*"[119]. Contrary to what the phrase "in its current sense" might suggest, legal tender cannot be conferred on any means of payment, but must be reserved exclusively for euros issued by the Eurosystem and the Member States. This conclusion follows from the exclusive nature of the Union's competence in the field of monetary policy, to which the Court of Justice attaches Article 133 TFEU. A means of payment can therefore only become legal tender by virtue either of a provision of primary law (for euro banknotes: art. 128 TFEU and 16 of the ESCB Statute), or of a legislative act adopted pursuant to article 133 TFEU (euro coins)[120]. The European Commission has presented a proposal for a Council Regulation on the legal tender status of euro banknotes and coins, based on the Court of Justice's definition[121]. As emphasized by the ECB, this proposal is intended to promote "*the necessary legal certainty with regard to the concept of 'legal tender' in Union law, namely the status attributed to euro banknotes in primary Union law and to euro coins in secondary Union law*"[122].

According to the Court of Justice, legal tender, as necessary for the use of the euro as a single currency within the meaning of Article 133 TFEU, does not imply "*the imposition of an absolute obligation to accept those banknotes as a means of payment [and] requires not absolute acceptance, but only acceptance in principle of euro-denominated banknotes as a*

[116] CJEU, *Hessischer Rundfunk*, C-422/19 and C-423/19, cited above, paragraph 38.
[117] "Without prejudice to the powers of the [ECB], the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary for the use of the euro as a single currency".
[118] Commission Recommendation 2010/191/EU of March 22, 2010 on the scope and effects of legal tender for euro banknotes and coins, *OJEU* L 83 of March 30, 2010, p. 70.
[119] CJEU, *Hessischer Rundfunk*, C-422/19 and C-423/19, cited above, paragraph 46. Italics added.
[120] Art. 11 of Council Regulation no. 974/98 adopted on the basis of Article 123(4) EC, replaced by Article 133 TFEU, as noted in the *Hessischer Rundfunk* judgment (C-422/19 and C-423/19, cited above, paragraph 51).
[121] Proposal COM(2023) 364, cited above.
[122] ECB Opinion of October 13, 2023 on a proposal for a Council Regulation on the legal tender status of euro banknotes and coins (CON/2023/31), *OJEU* C/2023/1355, point 1.1.

means of payment"[123]. Consequently, Member States may provide for restrictions, or even exclusions, on the possibility of discharging a payment obligation in euro bills and coins, provided that this is justified on "*public interest grounds*" in compliance with the principle of proportionality and insofar as other legal means are available for the settlement of money claims[124] .

The relationship between Articles 128 and 133 TFEU calls for two sets of comments. Firstly, Article 128 TFEU does not preclude the Union legislator, on the basis of Article 133 TFEU, from authorizing the issue of the euro in a form other than coins and banknotes, provided that the issue in that other form is authorized by the ECB. This explains why a proposed Council Regulation is intended to confer legal tender status on the digital euro (see below). Secondly, on the basis of article 133 TFEU, the European Commission has presented a proposal for a Council Regulation on the legal tender status of euro banknotes and coins[125] , the concomitance of which with the proposal for a Council Regulation on the digital euro is legally significant. According to the ECB, the combination of the two proposed Council Regulations confirms that the introduction of the digital euro in no way results in the disappearance of euro banknotes and coins, whose availability must be ensured in order to guarantee sufficient and effective access to cash[126] . In this sense, article 128 TFEU enshrines a primary law obligation to issue euro bills and coins, so that cash will continue to be available even if the digital euro is in circulation. In order to "*guarantee the effective use of the euro as a single currency*", the proposed legal tender Council Regulation aims to guarantee access to cash, so that euro banknotes and coins will have to be in circulation throughout the territory of the euro zone member states[127].

It is also intended to provide a framework for the acceptance of cash payments, which, while a matter of principle, is subject to two sets of exceptions, the first general, the second "additional, monetary law"[128] , the distinction being important in terms of competence. The fact that the *Hessischer Rundfunk* judgment recognized the exclusive nature of the Union's competence for the normative dimension of the euro statute leads to a debate on the margin left to the Member States in regulating the acceptance of payments[129] . Because it falls within the scope of Articles 128 and 133 TFEU, legal tender is a concept of monetary law which therefore falls within the exclusive competence of the Union; Member States can only act on the basis of a given authorisation or to implement Union acts[130] which covers the exceptions that the proposal describes as "*monetary law*". On the other hand, according to the Court of Justice, following in the footsteps of its Advocate General, the Union's exclusive competence in matters of monetary policy is "*without prejudice to the competence of Member States whose currency*

[123] CJEU, *Hessischer Rundfunk*, C-422/19 and C-423/19, cited above, paragraph 55.
[124] *Ibid*, points 59-78. Recital 19 of Council Regulation nº974/98, cited above.
[125] Proposal COM(2023) 364, cited above.
[126] ECB Opinion CON/2023/31, point 1.1. J. BAQUERO Cruz, "Is there a right to euro cash?", *in ECB Legal Conference*, 2024, pp. 130-135.
[127] Proposal COM(2023) 364, cited above.
[128] Art. 5: Exceptions to the principle of compulsory acceptance of euro banknotes and coins; art. 6: Additional monetary law exceptions to the principle of compulsory acceptance of euro banknotes and coins.
[129] V. A. WESTERHOF LÖFFLEROVÁ, "Analysing exclusivity in the context. Union rules on the legal tender of euro banknotes and coins", *in ECB Legal Conférence*, 2024, pp. 108-117; J. DIRIX, "The legal tender of euro banknotes and coins from a Member States' perspective. What role is left for national lawmakers?", *in ECB Legal Conférence*, 2024, pp. 109-129.
[130] CJEU, *Hessischer Rundfunk*, C-422/19 and C-423/19, cited above, paragraph 52.

is the euro to regulate the manner in which payment obligations, whether under public or private law, are discharged, provided in particular that such Council Regulation does not affect the principle that, as a general rule, it must be possible to discharge a payment obligation by means of such cash"[131]. Member States may, in the exercise of their own powers, introduce derogations from the obligation to accept cash payments on grounds of public interest[132] . National competence must be respected all the more since the Court of Justice adds that it is "*no more necessary for the use of the euro as a single currency and, more particularly, for the preservation of the effectiveness of the legal tender status of euro-denominated cash for the Union legislature to lay down, in an exhaustive and uniform manner, exceptions to that obligation in principle, provided that the possibility for any debtor, as a general rule, to discharge a payment obligation by means of such cash is guaranteed*"[133]. In this respect, in its initial wording, article 5 of the proposed Council Regulation on the legal tender of euro banknotes and coins says that the general exception - which does not stem from monetary law - to the principle of compulsory acceptance takes the form of the - albeit restricted - right of the payee to refuse euro banknotes and coins. The fact that the Council Regulation directly grants the payee the right to derogate from the compulsory acceptance of bills and coins poses a major difficulty, in that the European Union's exclusive competence encroaches on the competence of the Member States with regard to the payment of obligations. The Council Regulation should therefore reserve to the Member States the right to derogate from compulsory acceptance of coins and banknotes on grounds of public interest, if necessary within the framework of delegated acts that the Commission might adopt. In so doing, the proposal confuses *legal tender* and legal tender, the former relating solely to cash, the latter to euro bills and coins.

To sum up, under the exclusive competence conferred by Article 133 TFEU, it is up to the Union legislator to define the concept and regime of legal tender for euro bills and coins. Under their own powers, it is up to the Member States to determine the rules governing the acceptance of cash as payment.

Protecting the euro.

On the basis of Article 123(4) EC - replaced by Article 133 TFEU - Council Regulation No. 1338/2001 laying down measures necessary for the protection of the euro against counterfeiting was adopted[134]. Within the meaning of Article 133 TFEU, the use of the euro includes the protection of the euro, which covers measures to prevent and penalize the counterfeiting and falsification of banknotes and coins. The said Council Regulation defines the notion of "*counterfeiting*" as referring to fraudulent acts involving the manufacture and alteration of euro bills or coins, as well as the putting into circulation, import, export, transport, receipt or procurement of counterfeit euro bills or coins. In order to protect their integrity and enable effective detection of counterfeits, euro banknotes must be maintained in good

[131] *Ibid*, point 56.
[132] *Ibid.*
[133] *Ibid*.
[134] Council Council Regulation (EC) No 1338/2001 of 28 June 2001 laying down measures necessary for the protection of the euro against counterfeiting, consolidated version: ELI: http://data.europa.eu/eli/reg/2001/1338/2009-01-23.

condition. To this end, the ECB has adopted a decision to ensure easy and reliable verification of banknote authenticity, which imposes obligations on "professional cash handlers"[135] .

Insofar as this protection also involves criminal law and intellectual property law, Article 133 TFEU alone is not sufficient. This explains why the Convention of April 10, 1929 for the Suppression of Counterfeiting Currency remains relevant. In Union law, it is a 2014 directive adopted on the basis of Article 83 TFEU in the field of the area of freedom, security and justice that guarantees the criminal protection of the euro and, correlatively, the fight against counterfeiting[136]. Protection is, however, limited to the currency issued by the central bank. The Convention defines currency as "*paper money, including banknotes, and metallic money, having legal tender status*"[137] . As for the 2014 Directive, it reserves criminal protection and the fight against counterfeiting solely to currency understood as "*banknotes and coins having legal tender status, including euro-denominated banknotes and coins having legal tender status*"[138] . In France, criminal law punishes "*the counterfeiting or falsification of coins or banknotes which are legal tender in France or issued by foreign or international institutions authorized for this purpose*"[139] , while "*banknotes and coins benefit from the protection instituted for works of the mind by articles L. 122-4 and L. 335-2 of the Intellectual Property Code*"[140] . This protection is clearly distinct from that provided by Directive (EU) 2019/713 on combating fraud and counterfeiting of non-cash means of payment, which also covers non-cash payment instruments[141]. This directive has fostered confusion by mixing up the terms cash and legal tender or virtual currency.

Considerations on French law.

Under French law, banknotes and coins are legal tender in France. The question arises as to the extent to which the provisions of articles L. 121-1, L. 121-2 and L. 121-5 of the Monetary and Financial Code and article R. 642-3 of the Penal Code would benefit from a modernization of their wording, which will be made all the more necessary by the adoption of the Council Regulation on the legal tender of euro bills and coins and the Council Regulation on the digital euro. French texts use the terms "*monnaies métalliques*", "*pièces de monnaie*" and "*pièces*", as well as "*billets de banque*" and "*billets*". It would be advisable to use only the terms "coins" and "banknotes", and to specify "in euros" when these coins and banknotes are legal tender. In fact, legal tender is based solely on article R. 642-3 of the French Penal Code, which enshrines the sanction of an obligation. Article L. 121-1 of the Monetary and Financial Code should also be revised, adding that "*[s]ubject to those which are legal tender in France,*

[135] Decision ECB/2010/14, cited above.
[136] Directive 2014/62/EU of the European Parliament and of the Council of May 15, 2014 on the criminal-law protection of the euro and other currencies against counterfeiting, *OJEU* L 151 of May 21, 2014, p. 1.
[137] Art. 2 of the International Convention for the Suppression of Counterfeiting Currency, 1929.
[138] Art. 2 of Directive 2014/62/EU, cited above.
[139] Art. 442-1, 442-3, 442-13 of the French Penal Code and art. L. 162-1 of the French Monetary and Financial Code.
[140] Art. L. 123-1 of the French Monetary and Financial Code.
[141] Defined as "a non-material or material protected device, object or record or a combination thereof, other than legal tender, which, on its own or in conjunction with a procedure or set of procedures, enables its holder or user to effect a transfer of money or monetary value, including by digital means of exchange". Art. 2 of Directive (EU) 2019/713 of the European Parliament and of the Council of April 17, 2019 on combating fraud and counterfeiting of non-cash means of payment, *OJEU* L 123 of May 10, 2019, p. 18.

foreign-made metal coins may not be accepted in public coffers in payment of duties and contributions of any kind whatsoever, payable in cash". Coins not denominated in euros cannot be legal tender without infringing EU law. When the Council Regulation on the legal tender status of euro bills and coins is received, the French provisions on compulsory acceptance and the derogations from them could therefore be revised.

iii - Non-monetary restrictions on legal tender

Unlike euro bills and coins (and, in future, the digital euro), scriptural and electronic currencies are not legal tender. This has not prevented their development, particularly in view of the restrictions on payments in bills and coins justified by the need for traceability. Pending the Council Regulation on legal tender for euro bills and coins, non-monetary restrictions on the obligation to pay for reasons of public interest are provided for in both EU and national law.

With regard to LCB-FT, article 80 of Council Regulation 2024/1624 says that cash payments in exchange for goods or services are capped at 10,000 euros or the equivalent in national or foreign currency[142] . The same provision allows Member States to adopt lower limits after consultation with the ECB. These limits do not apply to payments between natural persons who are not acting in a professional capacity, nor to payments or deposits made on the premises of credit institutions, electronic money issuers and payment service providers. In this context, the concept of cash within the meaning of Article 2(1)(a) of Council Regulation 2018/1672[143] is used. Cash is defined as: i) cash; ii) bearer negotiable instruments; iii) goods used as highly liquid stores of value; iv) prepaid cards. Cash is defined as "*banknotes and coins which are in circulation as an instrument of exchange or which have been in circulation as an instrument of exchange and which can still be exchanged through financial institutions or central banks for banknotes and coins which are in circulation as an instrument of exchange*". In this sense, cash refers to bills and coins denominated in an official currency, not necessarily the euro.

In French law, articles L. 112-6 et seq. of the chapter of the Monetary and Financial Code relating to "*Rules for the use of money*" set out the limitations on the acceptance of cash payments which, distinct from monetary law, are justified by reasons of general interest, whether for tax reasons, public order, public security or the fight against money laundering and the financing of terrorism. Article L. 112-6 states: "*I. - No payment may be made in cash or by means of electronic money, electronic money tokens or tokens referring to one or more assets for a debt exceeding an amount set by decree, taking into account the debtor's tax domicile, whether or not the transaction is for professional purposes, and the person for whose benefit the payment is made*". The provision adds that payment of salaries and wages "*must be made by crossed cheque or by transfer to a bank or postal account or to an account held by a payment institution or an electronic money institution that provides payment services*", while payment for the purchase of metals from a private individual or another professional must be made by crossed cheque or by transfer to an account opened in the name of the seller. According to article L. 112-6-1-A, payment for online reservation or rental services, or for putting people in

[142] Council Regulation (EU) 2024/1624 of the European Parliament and of the Council of May 31, 2024 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, *OJEU* L, 2024/2987, 4.12.2024.
[143] Council Regulation (EU) 2018/1672 of the European Parliament and of the Council of October 23, 2018 frames cash controls, *OJEU* L 284 of November 12, 2018, p. 6.

touch with each other with a view to renting accommodation, cannot be made by a monetary value stored in electronic form and usable by means of an electronic money medium. Under the terms of article L. 112-6-1, payments made or received by a notary on behalf of the parties to an authenticated deed subject to land registration must be made by bank transfer. The same applies to payments made by court-appointed receivers and agents on behalf of certain institutions or concerning certain salaries and wages[144]. Finally, deliveries of cereals by producers to cooperatives are settled by cheque or transfer to a credit institution, a payment institution or an electronic money institution as part of the provision of payment services[145] . If these provisions are not called into question by the future Council Regulation on the legal tender status of euro bills and coins, we need to make sure that their wording complies with its provisions.

iv - Relationship with the concept of payments within the meaning of Article 63 TFEU

Under EU law, Article 63 TFEU enshrines the free movement of payments both between Member States and with third countries, so that, in principle, exchange controls are prohibited under EU law, even though third countries still apply controls, more or less strict, on the entry and exit of currency from their territories. For the Court of Justice, currency is a means of payment within the meaning of Article 63 TFEU[146] . While the issue has lost some of its relevance for the euro zone, it remains problematic in two respects.

Firstly, Council Regulation (EU) 2018/1672 frames controls on cash entering or leaving the Union by imposing a declaration obligation for movements exceeding 10,000 euros[147] . A broader concept distinct from currency, cash refers to "banknotes and coins which are in circulation as an instrument of exchange or which have been in circulation as an instrument of exchange and which may still be exchanged through financial institutions or central banks for banknotes and coins which are in circulation as an instrument of exchange". The movement of cash in currencies other than the euro is subject to declaration. In order to determine whether the amount of 10,000 euros has been reached, an exchange rate must be applied which, in the absence of any mention in the Council Regulation, is determined by the Member States in compliance with the requirements laid down by the Court of Justice.[148]

Secondly, in exceptional circumstances, exchange controls, or "*capital controls*" for short, can be reintroduced. This was the case in Cyprus and Greece in 2013, where regulatory measures were adopted to limit banknote withdrawals and outflows from the national territory.

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[144] Art. L112-6-2.
[145] Art. L112-8.
[146] ECJ, January 31 1984, *Luisi and Carbone*, 286/82 and 26/83, ECLI:EU:C:1984:35.
[147] *OJEU* L 284, 2018, p. 6.
[148] The rate: 1) corresponds to one of those actually and frequently applied to foreign exchange transactions in euros of the currency concerned; 2) has been designated by the Member State concerned in a clear, intelligible and unambiguous manner as being that applicable for this purpose; 3) is the subject of freely and easily accessible information; 4) has been brought to the knowledge of the persons concerned in a certain manner at the latest at the time when they entered or left the territory of the Union. CJEU, April 30, 2025, *Maksu- ja Tolliamet*, C-745/23, ECLI:EU:C:2025:294.

2 - The has wholesale central bank money

The ECB and the national central banks of the euro zone also issue wholesale central bank money, which does not consist of euro bills and coins. This money is closely linked to the settlement of transactions with central banks, securities transactions, interbank payments and instant payments. Used within the framework of TARGET, which structures all euro payment systems[149] , wholesale central bank money is covered by other EU legislation.

This is the case with Council Regulation n°909/2014 on the improvement of securities settlement in the European Union and on central securities depositories (CSDs), one of the aims of which is to encourage the settlement of transactions in central bank money[150] . Article 40 provides for "*cash settlement*" without defining the notion of cash, which does not include euro bills and coins. The first paragraph of the provision says that "*[f]or transactions denominated in the currency of the country where settlement takes place, the CSD shall settle cash payments of its securities settlement systems through accounts with a central bank of issue of the said currency, to the maximum extent possible*".

The Pilot Scheme Council Regulation (PSR) provides for "*the settlement of cash payments in central bank money*" as opposed to the "*payment method*" of commercial bank money[151] .

Finally, the BRRD also refers to the "*urgent provision of liquidity*", which consists of "*the provision by a central bank of central bank money or any other provision likely to increase the stock of central bank money held by a financial institution (...) without this operation forming part of monetary policy*"[152].

This central bank money can therefore be referred to as "*wholesale*" money, to distinguish it from central bank money consisting of euro bills and coins. In this respect, the term "cash" should not be used for payments made in wholesale central bank money.

B - Currencies issued by regulated institutions

Since currencies are also considered as means of payment, the legal concept of money can include currencies whose issuers are not only central banks, but also institutions regulated by public authorities. It is generally accepted that commercial banks "*issue*" money, and that there is such a thing as "*scriptural*" or "*commercial*" money, and sometimes "*private*" money. These currencies have the characteristic of being issued by an institution by means of a book entry, which is the general criterion for characterizing scriptural money. However, this registration is not required for electronic money, while central banks also issue money by book entry (wholesale central bank money, see *above*). This is why it is preferable to refer to

[149] ECB Decision (EU) 2022/911 of April 19, 2022 on the terms and conditions of TARGET-ECB, *OJEU* L 163 of June 17, 2022, p. 1. ECB Guideline (EU) 2022/912 of February 24, 2022 on a new generation Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET), *OJEU* L 163 of June 17, 2022, p. 84.
[150] Council Regulation (EU) 909/2014 of the European Parliament and of the Council of July 23, 2014, *OJEU* L 257 of August 28, 2014, p. 1.
[151] Recital 34 of Council Regulation (EU) 2022/858 of the European Parliament and of the Council of May 30, 2022 on a pilot scheme for market infrastructures based on distributed ledger technology, *OJEU* L 151, June 2, 2022, p. 1.
[152] Art. 1, § 1, 29) of Directive 2014/59/EU of the European Parliament and of the Council of May 15, 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, *OJEU* L 173 of June 12, 2014, p. 190.

currencies issued by regulated institutions, and to distinguish between scriptural bank money (1) and electronic money (2).

1 - The scriptural currency

Scriptural money is an old concept that still conceals a number of imprecisions for the jurist[153] . As derived from the work of Maurice Ansiaux, it is "subtle and almost immaterial, encrypted and unstamped, passing from account to account rather than circulating from hand to hand"[154] . It is therefore a sign, a monetary symbol, enabling the circulation[155] of available balances from account to account. The registration of funds on an account therefore implies that scriptural money is necessarily issued by a bank.

In a first restrictive approach, bank accounts do not constitute money, but correspond to debts and credits. This has long been Frederick Alexander Mann's assertion that "*[b]ank accounts... are debts, not money', or that '[m]oney is not the same as credit*"[156] . Breaking with this reductive vision, Charles Proctor no longer opposes the idea that an account entry can correspond to a monetary issue[157] . For another author, however, since payment for transactions is essentially made by bank transfer, "*The crucial question... is not what constitutes money but what constitutes payment*"[158] .

Even when the account entry corresponds to a claim on the bank, it undergoes a "*mutation*"[159] towards the status of money and the legal regime that goes with it. The process of transmitting scriptural money gives concrete expression to this mutation. The character of a debt is replaced by that of money. Account-to-account entries are to the transfer of scriptural money what hand-to-hand delivery is to the circulation of fiduciary money. This view of scriptural money has prevailed, since it can only circulate via account entries and payment instruments (transfers, cheques, cards, etc.): debiting the originator's account definitively divests the originator of the currency, crediting the beneficiary's account definitively invests the beneficiary with the currency. Uncertificated money can only be transferred by the remittance of funds, which are recorded in the account[160]. Beyond this, the remittance of scriptural money is assimilated to the remittance of fiduciary money, a concept legally enshrined in article 29 of the law of July 13, 1967[161] , which treats payments by credit transfer in the same way as cash payments.

The book-entry system embodies scriptural money, enabling commercial banks to create a money supply distinct from coins and banknotes. It is through monetary policy that this

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[153] See C. LASSALAS, "La monnaie scripturale", *in Mélanges de l'AEDBF-France* T. II. 1999, p. 235 et seq. J.-L. RIVES-LANGE, "La monnaie scripturale (contribution à une étude juridique)", *in Études de droit commercial à la mémoire de Henry Cabrillac*, Paris, Litec, 1968, p. 403.

[154] M. ANSIAUX, *Traité d'économie politique*, T. 2, Giard, 1923, p.262.

[155] This circulation is ancient, dating back to antiquity, and was refined from the 16th century onwards, at the request of merchants from the Republic of Venice and the creation of the Rialto bank in 1587.

[156] MANN, *op. cit.*, pp. 5-6.

[157] PROCTOR, *Mann on the Legal Aspect of Money*, *op. cit*. pp. 5-6.

[158] E. MCKENDRICK, *Goode on Commercial Law*, London, Penguin, 2016, 5th ed. p. 490.

[159] J.-L. RIVES-LANGE, op. cit., p. 410.

[160] Among scriptural money instruments (title III of the CMF), see art. L. 133-3: "A payment transaction is an action consisting in paying, transferring or withdrawing funds, independently of any underlying obligation between the payer and the payee, initiated by the payer, or on his behalf, or by the payee".

[161] Law no. 67-563 of July 13, 1967 on judicial settlement, liquidation of assets, personal bankruptcy and bankruptcies; Acts not enforceable against the general body of creditors. V. J.-L. RIVES-LANGE, op. cit., p. 421.

money supply is controlled by the central bank. In fact, in monetary aggregates, scriptural money is added to coins and banknotes. Because it is issued by a banking institution, scriptural money is also distinct from wholesale central bank money. This issue is guaranteed in that its counterpart is the assets held by commercial banks, which create money by increasing the size of their balance sheets. The credit granted by commercial banks thus corresponds to money creation, while the repayment of the loan means the destruction of the money created. In accordance with the rules of the CRR Council Regulation, the CRD IV directive and the provisions of the French Monetary and Financial Code, institutions that can issue this currency must be authorized and are subject to Council Regulation. This is similar to the notion of funds repayable from the public for credit institutions: the prior existence of funds entrusted to the authorized entity enables it to issue commercial bank money, subject to strict prudential constraints[162] . This brings us back to the institutional interpretation of money: what is issued by regulated commercial banks is also money (see *above*).

In French law, the notion of scriptural money is used in Title III of Book I of the Monetary and Financial Code, entitled "*Scriptural money instruments*". Articles L. 131-1 to L. 133-45 of the Monetary and Financial Code govern: cheques and their transmission; bills of exchange and promissory bills; other payment instruments and access to accounts; payment transactions, the payment service provider and the payment service user; electronic money redemption procedures; and access to payment accounts. In so doing, the term "scriptural money" is somewhat broad. The fact that electronic money and payment services are covered by these provisions of the Monetary and Financial Code should not be misleading. If this part of the code refers to the terms and conditions for reimbursing electronic money, it is because scriptural money is a form of money "materialized solely by entries in banks' books of account [...]", which enables electronic payments[163] . Similarly, scriptural money can also be created in that it is "[issued] against the prior remittance of funds", by means of account remittances, which are the material element in the definition of a bank account and *a fortiori* in that of a payment account[164].

The notion of scriptural money is used - without being defined - in a number of EU legal texts, but only as a component of the more global notion of funds within the meaning of the PSD 2 directive[165] and the "*cross-border payments*" Council Regulation[166] . Funds are defined as "banknotes and coins, scriptural money or electronic money"[167] . In contrast to central bank money, the "*pilot scheme*" (RRP) Council Regulation uses the notion of commercial bank money[168] by referring to the definition in Council Regulation n°909/2014[169].

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[162] Art. L 312-2 of the French Monetary and Financial Code.
[163] K. MEDJAOUI, "Quelques remarques concernant la monnaie électronique à l'épreuve des notions de compte et de monnaie scripturale", *Banque et droit*, n°149, May-June 2013, p. 3.
[164] *Ibid*, p. 5.
[165] Directive (EU) 2015/2366 on payment services in the internal market, cited above.
[166] Council Regulation (EU) 2021/1230 of the European Parliament and of the Council of July 14, 2021 on cross-border payments in the Union, *OJEU* L 274 of July 30, 2021, p. 20.
[167] Article 4 25) of Directive (EU) 2015/2366 on payment services in the internal market, cited above; art. 2, 10) of Council Regulation (EU) 2021/1230, cited above.
[168] Recital no. 34 of Council Regulation (EU) 2022/858, cited above; see also art. 10 of ECB Council Regulation (EU) 795/2014 of July 3, 2014 on oversight requirements for systemically important payment systems (ECB/2014/28), *OJEU* L 217, July 23, 2014, p. 16.
[169] Council Regulation (EU) 909/2014, cited above.

If we consider that scriptural money refers to money characterized by its entry in an account, this notion is not fully appropriate in that it would also include wholesale central bank money. The fact that articles L. 131-1 to L. 133-45 of the French Monetary and Financial Code include in the category of scriptural money instruments that are not scriptural money adds to the confusion. Finally, EU law uses the term - without defining it - in competition with that of commercial bank money. A clarification of the concepts and a rewording of the provisions would therefore be necessary.

2 - Electronic money

The concept of electronic money presents a paradox. Although it is defined by law, its characteristics distinguish it from central bank money and, to a lesser extent, from scriptural money. Directive 2009/110/EC of the European Parliament and of the Council of September 16, 2009 defines electronic money as "*monetary value which is stored in electronic, including magnetic, form, representing a claim on the issuer, which is issued against the delivery of funds for the purpose of payment transactions as defined [by the PSD] and which is accepted by a natural or legal person other than the electronic money issuer*"[170] . The definition is reproduced *in extenso* in article L. 315-1 of the French Monetary and Financial Code, with the difference that payment transactions are defined in article L. 133-3 of the same code.

According to recital 8 of the directive, electronic money includes both money held on a payment device belonging to the holder and money stored remotely on a server and managed by the holder via a specific electronic money account. The definition should be sufficiently general not to hinder technological innovation and to encompass not only all e-money products available on the market, which is likely to evolve. According to recital 13 of the same directive, e-money issuance does not constitute a deposit-taking activity within the scope of CRD IV[171] , given its specific nature as an electronic substitute for cash, intended to be used to make payments, generally of limited amounts. Unlike credit institutions, e-money institutions are not authorized to grant credit on the basis of funds received or held for the purpose of issuing e-money. In addition, they are not authorized to grant interest or any other advantage unless such advantages are not linked to the duration of the electronic money holder's holdings. However, Directive 2009/110/EC says that electronic money institutions must be authorized and are subject to prudential requirements proportionate to the operational and financial risks to which they are exposed as a result of issuing electronic money, independently of any other commercial activity. Credit institutions may also issue e-money. Electronic money is thus detached[172] from its medium, which may be magnetic. E-money can only be issued by entities (credit and e-money institutions) which are authorized to do so, whether or not as their principal activity, and this implies varying levels of prudential supervision, depending on the techniques used.

There is therefore a great similarity between electronic money and scriptural money, even if the former is issued against the remittance of funds, whereas the latter can also be issued

[170] Art. 2 § 2 of Directive 2009/110/EC of the European Parliament and of the Council of September 16, 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions and amending Directives 2005/60/EC and 2006/48/EC*, OJ* L 267, October 10, 2009, p. 7.
[171] More specifically, the provision concerns Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions.
[172] V. Lamy droit du financement, *Les instruments de monnaie électronique*, n°2886.

in the form of an account credit facility. In particular, the fact that scriptural money is recorded on a payment account leads to the conclusion that, if not an analogy between these two currencies, at least the artificial nature of a distinction between the two concepts. This conclusion is dictated by the very analysis of the characteristics of payment accounts and e-money[173] . The fact remains that e-money corresponds to prepaid units, and the remittance of e-money is more akin to the remittance of cash than to a transfer in scriptural money. The question therefore arises as to the appropriateness of maintaining this confusing term, especially as it is also used in the MiCA Council Regulation (see *below*). A better name would be "*scriptural money on electronic media*".

3 - Links with the concept of funds

The concept of funds is linked to that of fiduciary money, scriptural money and electronic money. A distinction must therefore be made according to the branch of law in which the notion of funds is used.

Funds are a central concept in payment law. The PSD 2 directive governs payment transactions in the internal market, defined as "*an action, initiated by or on behalf of the payer or payee, consisting in the payment, transfer or withdrawal of funds, irrespective of any underlying obligation between the payer and the payee*". These funds are constituted by "*banknotes and coins, scriptural money or electronic money*"[174] so that this notion interferes with that of money. Article L. 311-3 of the French Monetary and Financial Code says that "*all instruments enabling any person to transfer funds, whatever the medium or technical process used, are considered as means of payment*".

Repayable funds are a banking law concept. The CRR Council Regulation defines a credit institution as "*the business of receiving deposits or other repayable funds from the public and granting loans on its own behalf*"[175] . According to Article L. 312-2 of the French Monetary and Financial Code, "*funds which a person receives from a third party, notably in the form of deposits, with the right to dispose of them on his own account but with the obligation to return them, are considered to be repayable funds from the public*". Fiduciary money and scriptural money are linked to the bank deposit operation. The constitution of deposits is reserved for credit institutions, and their circulation is subject to the legal regime governing transfers of funds. Deposits are made up of "*funds repayable from the public*", defined as "*funds that a person receives from a third party, notably in the form of deposits, with the right to dispose of them on his own account, but with the obligation to return them"*[176] . This definition differs from that of EU law, which refers to "*a credit balance resulting from funds left on account or from transitory situations arising from normal banking operations, which the credit institution must return in accordance with the applicable legal and contractual conditions, including term*

[173] K. MEDJAOUI, op. cit., p. 5.
[174] art. 4, 25) of Directive (EU) 2015/2366 of November 25, 2015 on payment services in the internal market, cited above.
[175] Art. 4, paragraph 1, 1) of Council Regulation (EU) 575/2013 of the European Parliament and of the Council of June 26, 2013 on prudential requirements for credit institutions and investment firms, *OJEU* L 176 of June 27, 2013, p. 1.
[176] Art. L. 312-2 of the French Monetary and Financial Code.

deposits and savings deposits [...]"[177] . These funds could constitute a sub-category of the PSD2 notion of funds, issued only by credit institutions.[178]

Funds are also a concept used in the rules governing AML/CFT and restrictive measures. In the field of AML/CFT, funds are part of a broader concept of "*property*" or "*assets*"[179]. "*Funds or assets*" are defined as "p*roperty within the meaning of Article 2(2) of Directive (EU) 2018/1673*"[180] , i.e. as "*assets of any kind, whether tangible or intangible, movable or immovable, tangible or intangible, as well as documents or legal instruments in any form, including electronic or digital, evidencing ownership of or rights over such assets*"[181]. "*Funds or other assets*" are defined by means of a lengthy enumeration[182] . Replacing Council Regulation 2015/847, the "TFR" Council Regulation governs "*transfers of funds, in any currency*", funds being defined by reference to Article 4(25) of Directive (EU) 2015/2366[183].

In the field of restrictive measures, both funds and economic resources are targeted by the particularly abundant texts of EU law. In French law, Article L. 562-1 2° of the Monetary and Financial Code defines the notion of "*funds*" as "financial assets and economic advantages of any kind", of which its 2° sets out a long list[184] . The notion of funds is then contrasted with that of "*economic resources*", defined by article L. 562-1 3° of the Monetary and Financial Code[185] . These extremely broad definitions are intended to encompass any type of asset that a

[177] See art. 2(3) of Directive (EU) 2014/49 on deposit guarantee schemes.
[178] Funds redeemable by the public would make up the bulk of scriptural money (the rest being funds issued by payment institutions).
[179] Council Regulation (EU) 2024/1624, cited above; Directive (EU) 2024/1640 of the European Parliament and of the Council of May 31, 2024 relating to mechanisms to be put in place by Member States to prevent the use of the financial system for the purpose of money laundering or terrorist financing, *OJEU* L, 2024/1640, 19.6.2024.
[180] Art. 2, paragraph 1, point 4) of Council Regulation (EU) 2024/1624, cited above.
[181] Directive (EU) 2018/1673 of the European Parliament and of the Council of October 23, 2018 to combat money laundering by means of criminal law, *OJEU* L 284 of November 12, 2018, p. 22.
[182] Art. 2, paragraph 1, point 48) of the aforementioned Council Regulation (EU) 2024/1624: "all assets, including but not limited to financial assets, economic resources, including oil and other natural resources, property of any kind, whether tangible or intangible, movable or immovable, acquired by whatever means, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such funds or other assets, including, but not limited to, bank credits, travellers' cheques, bank cheques, money orders, shares, securities, bonds, drafts or letters of credit, as well as any interest, dividends or other income or capital gains received on such funds or other assets, and any other assets that could potentially be used to obtain funds, goods or services".
[183] Council Regulation (EU) 2023/1113, supra; Directive (EU) 2015/849 of the European Parliament and of the Council of May 20, 2015 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, *OJEU* L 141, June 5, 2015, p. 73.
[184] "a) Cash, cash receivables, bills of exchange, payment orders and other instruments or means of payment; b) Deposits of funds with the persons mentioned in article L. 562-4 such as funds repayable from the public held or paid into deposit accounts, funds paid into a payment account, funds invested in savings products such as those governed by Title II of Book II, funds paid into individual or collective asset management contracts, the balances of such accounts or contracts; c) Funds paid into insurance contracts governed by Chapter II of Title III of Book I of the Insurance Code, as well as the surrender value of such contracts; d) Receivables; e) Financial instruments governed by Title I of Book II and their equivalent under foreign law, in particular debt securities, ownership and loan securities, such as shares, certificates representing securities, bonds, promissory bills, warrants, unsecured bonds and financial contracts; f) Interest, dividends or other income from assets or capital gains received on assets; g) Credit transactions within the meaning of article L. 313-1 or their equivalent in foreign law, in particular loans, endorsements, sureties, guarantees, performance bonds or any other financial commitment; h) Letters of credit, bills of lading, sales contracts; i) Right of set-off; j) Any document attesting to the holding of shares in a fund or financial resources; k) Any export financing instrument".
[185] "Assets of any kind, tangible or intangible, movable or immovable, which are not funds but which can be used to obtain funds, goods or services. Also considered as economic resources within the meaning of this chapter are insurance operations that do not relate to the life-death or nuptial-natal branches, that are not linked to investment

person may possess or own, and therefore liable to be frozen. It is interesting to note that, within this framework, banknotes denominated in euros or in any official currency of a Member State are subject to a specific prohibition on sale, supply, transfer or export to or from a third country covered by restrictive measures[186].

Lastly, the rules governing the transport of funds, which include banknotes and coins, jewelry and precious metals, are specific to this issue[187] . This broad approach is explained by the need to include all types of economic or commercial value in the fight against money laundering and the financing of terrorism.

New technologies are also being used by entities other than credit or e-money institutions to circulate new representations that come close to money without having all its characteristics. These representations facilitate payments and renew discussion on the notion of money in the digital age.

funds, and that are not part of operations involving the formation of associations bringing together members with a view to jointly capitalizing their contributions and distributing the assets thus built up either among the survivors, or among the heirs of the deceased, or that do not fall within the scope of the capitalization or management of collective funds or any collective operation defined in Section 1 of Chapter I of Title IV of Book IV of the French Insurance Code.

[186] See on the subject of exporting euro banknotes to Russia: CJEU, April 30, 2025, *Generalstaatsanwaltschaft Frankfurt am Main (Exportation d'argent liquide en Russie)*, C-246/24, ECLI:EU:C:2025:295.

[187] Art. R. 613-24 of the French Internal Security Code.

III - Money in the digital age

Digitization has brought about transformations in monetary, payment and financial systems. On the one hand, coins and banknotes are being used less and less, in favor of dematerialized payments, especially as online commerce increases[188] . On the other, the financial sector is being transformed as distributed ledger technology (DLT) develops [189] . Currency is no exception to this digitization phenomenon, which has given rise to conceptual confusion due to the use of terms such as "*crypto-currency*" or "*virtual currency*" to designate securities dematerialized using DLT technology. While the Council Regulation on crypto-assets has brought legal clarification (B), projects for central bank digital currencies have emerged (A).

A - The emergence of central bank digital currencies

A number of central banks have embarked on Central Bank Digital Currency (CBDC) projects, which, while failing to follow a single model, can be typologized as[190] (1). In the euro zone, the digitization of central bank money is likely to take two forms (2).

1 - A typology of central bank digital currencies

"CBDC is not a well-defined term. It is used to refer to a number of concepts. However, it is envisioned by most to be a new form of central bank money. That is, a central bank liability, denominated in an existing unit of account, which serve both as a medium of exchange and a store of value"[191] . Although they currently exist in the form of projects, some of which have given rise to experimentation, MNBCs are a general concept with common characteristics condensed in a generic BIS definition: "*CBDC is a digital payment instrument, denominated in the national unit of account, which is a direct liability of the central* bank"[192] . MNBCs are thus characterized by three elements: 1) they take a digital form; 2) they are issued by a central bank, of which they constitute a liability (*liability of the central bank*); 3) they are denominated in a unit of account constituting an official currency. Beyond these characteristics, MNBCs are based on models that vary considerably according to the operational and technical characteristics of the projects. They give rise to legal questions raised by an IMF study[193] , which adopts an interpretation grid differentiating MNBCs by four criteria:

1) **in the form of an account** (account-based): the MNBC corresponds to an account opened with the central bank; **in the form of a token** (*token-based*): the MNBC takes the form of a token issued by the central bank, without the holder of the token having an account with the central bank.

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[188] V. Banque de France, *Rapport de l'Observatoire de la sécurité des moyens de paiement 2023*, 10.09.2024.
[189] D. BEAU, *Monnaie numérique de banque centrale et articulation avec le monde des crypto-actifs*, April 25, 2024.
[190] For an update on the situation in March 2024: https://www.bis.org/publ/work880_updates_mar2024.pdf
[191] BIS, Committee on Payments and Market Infrastructures, Markets Committee, *Central bank digital currencies*, March 2018, p. 3.
[192] BIS, *Annual Economic Report*, 21 June 2022, p. 93.
[193] IMF, *Legal Aspects of Central Bank Digital Currency*, op. cit., pp. 9-11.

2) **for wholesale transactions**: the MNBC is issued only to central bank counterparties or payment system participants; **for** *retail* transactions: the MNBC is issued to all agents.

3) **direct issue** (*direct / 1-tier*): MNBC is issued directly by the central bank, which administers its circulation; **indirect issue** (*indirect 2-tier*): MNBC corresponds to debt issued by a commercial bank but guaranteed by the central bank.

4) **centralized**: MNBC transfer is regulated by the central bank; *decentralized*: MNBC transfer is regulated by distributed ledger technology (DLT) with or without central bank authorization.

According to the IMF study, the main distinction to be made is between :

1) Account-based MNBC are created by a contract between the central bank and the holder of the account in which the book *money* is deposited, with the central bank authorized to lend this money. This money is transferred as debit (debt) and credit (claim) between accounts.

2) token-based MNBC are created by the central bank's issuing authority as a direct claim on the central bank, embedded in an immaterial token which the holder possesses through knowledge of a datum (code, password, key, etc.). MNBC in token form circulate by transferring the token. MNBC tokens can be issued using distributed ledger technology. Legally speaking, according to the IMF study, this does not change the nature of token-based MNBC, which remains quite distinct from *account-based* MNBC, on the grounds that "*the booking of token-based CBDC in a register or ledger operated by the central bank is legally not the same as the booking of a credit balance in a cash current* account"[194] . In short, token-based MNBC corresponds to a *direct liability*, an accounting term distinct from a receivable in the legal sense of the term.

Focusing on *token-based* currencies, the IMF study goes on to stress the need for MNBC projects to be based on a sound legal framework, which should entail the adoption of a specific regime with regard to two sets of monetary rules. On the one hand, it must be determined whether, with regard to the rules governing the exercise by the central bank of its powers (*central bank law*), MNBCs fall within the central bank's mandate insofar as they are an integral part of the functions assigned to it and involve the exercise of powers assigned to it. Secondly, we need to determine whether, in terms of the use of money in a given territory (*monetary law*), the MNBC constitutes an official unit of account and an official means of payment. MNBC projects in the euro zone should be assessed in this light.

2 - Central bank digital currencies in the euro zone

The digital euro is a project designed to support the digitization of retail payments in the euro zone (a). At the same time, the *tokenization of* finance is leading to the emergence of interbank central bank digital currency projects for large-value payments (b).

[194] *Ibid*, p. 12.

a - Specific features of the digital euro

In October 2020, the ECB presented the project for a digital euro[195] which was the subject of a progress report in December 2024[196] . In legal terms, the issuance of the digital euro was envisaged at the time in four forms: 1) as a monetary policy instrument like minimum reserves, accessible only to the counterparties of the Eurosystem central banks (art. 127 § 2 TFEU and art. 20 of the ESCB Statute); 2) as a monetary policy instrument accessible to all economic agents by means of accounts opened with the central bank (art. 127 § 2 TFEU and art. 17 of the ESCB Statute); as a settlement instrument for specific types of payment provided by a payment infrastructure accessible only to eligible participants (art. 127 § 2 TFEU and art. 22 of the ESCB Statute); as an instrument equivalent to a euro banknote (art. 128 TFEU and art. 16 of the ESCB Statute)[197] . Finally, article 127(2) TFEU, combined with articles 17, 20 or 22 of the ESCB Statute, would have enabled the issue of a digital euro for limited uses, lacking the general status of legal tender.

Finally, on June 28, 2023, the European Commission presented a proposal for a Council Regulation on the digital euro, under which the ECB would issue the single currency in digital form as legal tender[198] . This proposed Council Regulation is likely to evolve as the European legislative process progresses. It is based on Article 133 TFEU, which provides for recourse to the ordinary legislative procedure. It is clear from this proposal that the intention is to give the digital euro a truly monetary anchor. In other words, the purpose of the digital euro is to assert the euro's monetary sovereignty in a digital age in which the single currency faces potential competition from both private *stablecoins* and other MNBCs. In the light of the IMF study, it is therefore possible to characterize the two legal foundations of the digital euro that emerge from the proposed Council Regulation.

Firstly, in terms of *central bank law*, the digital euro is based on Article 127(2) TFEU. In the *Hessischer Rundfunk* judgment, the Court of Justice interpreted this provision as including in the competence of monetary policy the "*normative dimension aimed at guaranteeing the status of the euro as a single currency*"[199] . Consequently, as part of the competence for monetary policy in the broad sense, the Union legislator can grant the ECB the power to issue the euro in digital form. Although only mentioning euro bills and coins, Articles 128 TFEU and 16 of the ESCB Statute do not preclude the ECB from issuing the single currency in a form other than euro bills and coins, if the Union legislator defines the conditions. However, they do constitute a legal obstacle to the abolition of euro banknotes and coins. This is why the digital euro will be in addition to euro bills and coins, and will in no way replace them. Cash cannot legally disappear as long as articles 128 TFEU and 16 of the ESCB Statute are not amended in accordance with the ordinary treaty revision procedure laid down in article 48 TEU. Conversely, a revision of these provisions is not legally necessary to enable the digital euro, even if it might be appropriate to enshrine the existence of the euro in its digital form in the Treaty.

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[195] ECB, *Report on a digital euro*, p. 24.
[196] ECB, *Second progress report on the digital euro preparation phase*, December 2024.
[197] *Ibid*, p. 24-26.
[198] Proposal for a Council Regulation establishing the digital euro, COM(2023) 369, cited above.
[199] CJEU, *Hessischer Rundfunk*, C-422/19 and C-423/19, cited above, paragraph 38.

Convertible into euro banknotes and coins, the digital euro will nevertheless be distinct from them. In this respect, it is clear from the proposed Council Regulations on the digital euro and on the legal tender status of euro banknotes and coins that the term "cash" will be reserved for euro banknotes and coins only. This could, however, pose difficulties with regard to other legislative acts which make use of the notion of cash.

The draft Council Regulation goes on to specify the digital form of the single currency. Thus, according to the typology drawn up by the IMF, the digital euro is an MNBC:
1) in token-based form**:** it corresponds to a *direct liability* (an accounting term to be distinguished from a direct claim) of the ECB or the national central banks towards the end-users. The issuance of the digital euro should be authorized exclusively by the ECB, and it would be put into circulation by the ECB and the NCBs of the euro zone; at this stage, however, an *account-based* digital euro with the central bank cannot be ruled out.
2) retail: may be owned by individuals or companies;
3) managed indirectly: the user will hold it in one or more portfolios opened with one or more service providers;
4) centralized or decentralized: the choice of whether or not to use distributed registry technology has not yet been made.

Secondly, in terms of *monetary law*, the proposed Council Regulation is based on Article 133 TFEU, which allows the legislator to confer legal tender status on the digital euro. Indeed, while Article 128 TFEU confers legal tender status on euro bills and coins, it does not preclude the Union legislator from conferring such a status on the single currency issued in another form, in this case digital. Like the proposal on legal tender for euro bills and coins, the proposal on the digital euro adopts a definition of legal tender as set out in the *Hessischer Rundfunk* ruling[200] (see above). At the same time, the proposal prohibits the unilateral exclusion of digital euro payments. As an expression of monetary sovereignty, the digital euro will have a geographical scope of application: it will be legal tender, on the one hand, for off-line payments of a pecuniary debt denominated in euros which take place in the euro zone, and, on the other hand, for on-line payments of a pecuniary debt denominated in euros whose beneficiary resides or is established in the[201] euro zone. Acceptance of the digital euro will thus be compulsory, without any additional costs, since the imposition of additional charges for payment of a debt in digital euros should be prohibited. Withdrawals, on the other hand, can be billed as they are today, as long as they are a service.

Following on from the *Hessischer Rundfunk* ruling[202] , the proposed Council Regulation provides for a series of exceptions to compulsory acceptance. It should be noted that these two sets of exceptions are found in the proposal for a Council Regulation on the legal tender status

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[200] CJEU, *Hessischer Rundfunk*, C-422/19 and C-423/19, cited above, paragraph 38. Recommendation 2010/191/EU, cited above; Art. 7 § 2 of the proposal for a Council Regulation establishing the digital euro, COM(2023) 369, cited above. Art. 7 § 3, 4 and 5: "[b]y virtue of the obligation to accept the digital euro, the beneficiary of a payment obligation will not be able to refuse digital euros presented to honor that obligation"; "[b]y virtue of the obligation to accept the digital euro at its face value, the monetary value of digital euros presented in settlement of a debt is equal to the value of the pecuniary debt"; "[b]y virtue of the liberatory power of the digital euro, a payer may discharge a payment obligation by presenting digital euros to the beneficiary". Acceptance of payments in digital euros cannot be avoided by means of adhesion contracts (without negotiation).
[201] *Ibid.* Art. 8.
[202] Recommendation 2010/191/EU, cited above; CJEU, C-422/19 and C-423/19, cited above, paragraph 38.

of euro banknotes and coins, with a few slight differences[203] . On the one hand, a provision provides for cases in which a beneficiary has the right to refuse the digital euro (SME, strictly personal or domestic activity, contractual agreement, etc.). On the other hand, "*additional monetary law exceptions*" may also be provided for by delegated acts adopted by the Commission, provided they are justified by a public interest objective and proportionate to that objective. It should be pointed out that, insofar as these exceptions fall solely within the scope of "monetary law", the Digital Euro Council Regulation should not prevent a Member State from providing for other limitations on legal tender in compliance with the conditions enshrined in the *Hessischer Rundfunk* case law: firstly, the national legislation does not have the object or effect of determining the legal status of the digital euro; secondly, it does not lead, de jure or de facto, to the abolition of the digital euro, in particular by calling into question the possibility, as a general rule, of discharging a payment obligation using the digital euro; thirdly, it has been adopted on grounds of public interest; fourthly, the restriction on payments in digital euro implied by this Council Regulation is suitable for achieving the public interest objective pursued; fifthly, it does not exceed the limits of what is necessary to achieve this objective, in the sense that other legal means are available for discharging the payment obligation. Member States will have to designate one or more competent authorities responsible for supervision and sanctions concerning the application of legal tender provisions, in cooperation with the ECB, and will also have to ensure that the public is properly informed.

Under the proposed Council Regulation, all payment service providers authorized within the European Union will be able to provide payment services in digital euros, without the need for additional authorization. A contract will have to be concluded between the provider and the end-user - end-users will not be able to have direct contractual relations with the ECB or national central banks. Service providers must enable users (for one or more accounts) to debit or credit these accounts manually or automatically, using banknotes, coins or from euro accounts, whether digital or not. Service providers must enable users to make payments in digital euros, with the necessary adjustments to comply with the holding limits set by the ECB, by linking each user's digital euro account(s) to a dedicated "non-digital" (commercial) euro account, which may be opened with a third-party service provider. Finally, service providers will have to offer a basic set of services to individual users. For those without accounts, Member States will have to designate entities (e.g. post offices) responsible for offering these basic services.

The proposed Council Regulation on the digital euro clarifies this by stipulating that there is no direct link between users and the Eurosystem, despite the somewhat laconic formulation of "direct liability" (see above). Similarly, and in line with this notion of no direct link, accounts should not be opened by the Eurosystem, but by intermediary service providers. This does not require any changes to Article 17 of the ESCB Statute, which sets out and limits the cases in which accounts can be opened by the ECB and national central banks.

With regard to the use of the future digital euro as a store of value and as a means of payment, the digital euro will not earn interest and will not be remunerated, while its holding may be subject to limits on the amount, according to a series of criteria. The amount of fees and commissions to be paid by users to providers, by merchants to providers or between providers

[203] Proposal for a Council Regulation, COM(2023) 364, cited above.

should be subject to limitations according to a calculation methodology drawn up by the ECB based on statistical reporting by providers and representative samples.

In terms of technical features, the digital euro will enable both online and offline payments. The ECB will endeavor to guarantee interoperability with private digital payment systems. Wallets will have a unique identifier, and users should benefit from portability between different providers. Online transactions will be settled by transfer from the payer to the recipient within a Eurosystem-approved settlement infrastructure. Offline transactions will be settled by updating the values stored on the payer's and recipient's local devices.

It is essential to add that, according to the proposed Council Regulation, the digital euro will in no way be a programmable currency: it will not have an intrinsic logic that limits the full fungibility of each digital currency unit, as was pointed out in a Eurogroup declaration of January 2023[204] . In concrete terms, this means that the digital euro can be used to pay for any transaction, whatever its purpose: it is totally out of the question for public authorities to differentiate digital euro payments according to their purpose. This non-programmable nature guarantees the confidentiality and anonymity of transactions vis-à-vis the Eurosystem for the general public. It also guarantees full data protection, as provided for in the proposed Council Regulation.

The distribution of the digital euro will be possible in the Union outside the euro zone subject to the conclusion of agreements between the ECB and the national central bank concerned. Similarly, the distribution of digital euro will be possible in third countries subject to an international agreement between the Union and the third country and agreements between the ECB and the central bank of the third country concerned. Cross-border payments will be possible subject to agreements between the ECB and the central banks concerned [205].

The timetable for the introduction of the future digital euro has not yet been precisely defined. The timing and amount of the digital euro issue will have to be decided by the ECB, acting within the scope of its attributed powers, after final adoption of the Council Regulation.

b - Interbank central bank digital currency

"*A confidence-inspiring framework for the development of the tokenization of finance requires the maintenance of central bank money as the preferred settlement asset between financial intermediaries*"[206]. To this end, central banks must "*adapt the form and supply of central bank money to the characteristics of transactions involving tokenized assets - i.e. tokenized securities such as shares, bonds or fund units - to ensure that central bank money can be issued, registered and used for DLT settlement*"[207] . This is the purpose of interbank central bank digital money (ICBDM) projects for large-value payments. In addition to retail central bank digital money (euro digital money), interbank "*wholesale*" central bank digital money would be used, in particular, for the settlement-delivery of financial securities.

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[204] Eurogroup statement on the digital euro project, 16 January 2023, available at: Eurogroup statement on the digital euro project, 16 January 2023 - Consilium: "As money however, digital euro should at all times and throughout the euro area be convertible at par with other forms of the euro, such as banknotes and commercial bank deposits. The digital euro therefore cannot be a programmable money."

[205] C. KLEINER, "Le paiement en monnaies numériques banque centrale", *RD bancaire et fin*. 2023, dossier 12.

[206] D. BEAU, supra.

[207] *Ibid*.

At present, the texts relating to retail central bank money, including the proposed Council Regulations on the digital euro or on legal tender, and the MiCA Council Regulation, exclude interbank money from their scope, even though this concept is not explicitly defined in the relevant legal texts. The only occurrence of the concept of interbank MNBC in Union law is in Article 5, paragraph 8, subparagraph 2, of the pilot scheme Council Regulation (RRP)[208] , which does not define it:

"*Payments shall be settled using central bank money, including in tokenized form, where practically feasible or, where not practically feasible, via the CSD account in accordance with Title IV of Council Regulation (EU) No 909/2014 or using commercial bank money, including in tokenized form, in accordance with said Title, or using "electronic money tokens*".

The proposed Council Regulation on the digital euro adds that discussions are underway on the subject of interbank central bank digital money.

Apart from these references, interbank central bank digital money is not defined either by EU or national law, or by Eurosystem doctrine. The concept of retail money is circumscribed in current law, which makes no clear distinction between central bank money and commercial bank money (even though the legal regimes applicable to these different types of currency are distinct). The texts dealing with retail money generally confine themselves to excluding interbank money from their scope of application.

However, the notion of retail money (whether central or commercial) can be assimilated to the notion of "*funds*" defined in the PSD 2 directive, which is defined as "*banknotes and coins, scriptural money or electronic money within the meaning of Article 2(2) of Directive 2009/110/EC*". However, Article 3(h) of the same directive excludes the application of payment services Council Regulations to payment transactions carried out within a payment or securities settlement system. This notion of "*funds*" is clarified in the proposed amendment to PSD 2 (PSD 3), recital 15 of which states that "Central bank money issued for use between the central bank and commercial banks, i.e. for wholesale use, should not be covered by the definition"[209] . This is why the definition of funds will be amended in PSD 3 to read: "*central bank money issued for retail use, scriptural money and electronic money*"[210].

At the same time, the proposed Council Regulation on the retail digital euro confirms that the digital euro should be considered as falling within the category of "funds" within the meaning of PSD 2, and its recital 4 states that:

"*The digital euro should not cover payments between financial intermediaries, payment service providers and other market participants (i.e. wholesale payments), for which there are existing settlement systems in central bank money and for which the use of different technologies is currently under further consideration by the Eurosystem*."

Unlike the concept of retail money, that of interbank money is not defined in EU law. Indeed, EU texts on the operation of market infrastructures in which interbank money circulates do not define the notion of funds. They use undefined terms such as "*cash*", "settlement

[208] Council Regulation (EU) 2022/858, cited above.
[209] Proposal for a Directive of the European Parliament and of the Council on payment services and electronic money services in the internal market, 28.6.2023, COM(2023) 366.
[210] *Ibid.* Art. 2 § 1, point 23.

currencies", "*central bank money*" or "*funds*", which are not necessarily relevant in an interbank context. In any case, it would be advisable not to refer to the PSD 2 or 3 definition. Nor is the notion of interbank money defined in the texts governing the Eurosystem, which prefer to refer to money in the generic sense mainly as "*cash*".

The concept of interbank money, whether central or commercial, is therefore not defined by the relevant legal texts. However, it is possible to attach it as a digital variant in non-binding legal texts, such as Article 9 of the BIS Principles of Financial Market Infrastructure, which states:

"*Central bank money is a liability of a central bank, in this case in the form of deposits held at the central bank, which can be used for settlement purposes. Settlement in central bank money typically involves the discharge of settlement obligations on the books of the central bank of issue*"[211] .

This situation of imprecise legal definitions is likely to persist in the medium term. The texts currently under discussion, such as PSD 3 and the proposed Council Regulation on the digital euro, will not affect the interbank sector.

On an international scale, several forums address the issue of CBMs, such as the work of the IMF, the BIS and the Hague Conference, where a group of experts is tasked with studying questions of applicable law and jurisdiction raised by cross-border use and international transfers of CBMs.

The interbank MNBC would be issued by the central bank in dematerialized form and used exclusively by central banks, commercial banks or a few other financial institutions, to handle payments (including cross-border payments) and transactions in tokenized or untokenized financial securities.

Pending a definition of digital central bank money, a pragmatic approach might be to consider it as a simple technical representation of central bank money in the new DLTs, which would be equivalent to traditional TARGET/T2S settlement accounts. This would be the case for the "*exploratory cash tokens*" (ECTs) of the "*pilot regime*" Council Regulation (RRP), which are today a simple technical representation of traditional "funds" and have no legal definition or intrinsic value of their own.

B - Rejecting the monetary characteristics of crypto-assets

The phenomenon of digitization has conceptually blurred the notion of currency, with the emergence of purely dematerialized forms of money based on distributed ledger technology (*blockchain*). The development of tokens in connection with this technology has led to worldwide projects expressing a desire for private money creation outside any state authority or central bank, or even banking intermediation, as exemplified by the original spirit of Bitcoin taken from Satoshi Nakamoto's white paper[212] . The central question is therefore whether some

[211] IOSCO, Principles for financial market infrastructures, Bank for International Settlements, April 2012.

[212] S. NAKAMOTO, "Bitcoin: A Peer-to-Peer Electronic Cash System", 2008 [https://bitcoin.org/bitcoin.pdf] accessed 09/28/24. Failing to formulate a monetary ambition, the white paper proposes a payment system without "going through a financial institution": "*A purely peer-to-peer version of electronic cash would allow online payments to be sent directly from one party to another without going through a financial institution*".

of these tokens have the potential to perform functions that would bring them closer to money. This led to uncertainty (1), which the MiCA Council Regulation dispelled by introducing the general notion of crypto-assets (2), whose components nonetheless raise questions, notably the electronic money token (3). The new regime also covers the tokenization of deposits (4) and payment in crypto-assets (5). In any case, the new regime governing crypto-assets does not call monetary sovereignty into question, in the European Union at least (6).

1 - The uncertainty caused by the emergence of blockchains

In 2009, Bitcoin has been created as a coin associated with the first blockchain, paving the way for numerous other blockchains and derived tokens on an international scale. For some fifteen years, these token creations, issues and exchanges evolved without a regulatory framework, circulating according to the rules of their own market before some innovative legislation appeared, such as in France with the Pacte law concerning service providers on digital assets (PSAN)[213] or in Japan as early as 2016[214].

The emergence of cryptographic tokens using distributed ledger technology led to conceptual confusion. For example, to designate the first forms of tokens to appear with bitcoin and then ether, the category of "payment token" was proposed, which conferred no particular rights on their holder and were useful only for the value the public placed on them. These tokens were then given a variety of labels, hesitating between a reference to investment (an asset) and exchange (money): digital asset, cryptographic asset, virtual asset, digital asset, on the one hand, crypto-currency, digital currency, digital money, on the other.

This semantic hesitation has found its way into the discourse of central banks and regulatory authorities. In 2012, the ECB contrasted *digital money* with real *money* in its report on *virtual currency schemes*[215] . More cautious, in 2013 the Banque de France denounced *Les dangers liés au développement des monnaies virtuelles : l'exemple du bitcoin*[216] , a phrase echoed by the ACPR in its January 2014 statement on Bitcoin transactions in France[217] . In 2018, the EU legislator used the expression "*virtual currency*" in the 5thDirective on money laundering and terrorist financing, which it contrasted with "legal tender"[218] , illustrating the difficulties caused by the use of the term "*currency*" in the context of non-monetary legislation, as in the field of AML/CFT. The turning point comes with the 2023 recasting of the "TFR" Council Regulation, which includes in its title the precision: "[...] *and certain crypto-assets". This Council Regulation provides a bridge between the terms "virtual currencies" and "crypto-assets*" or "*virtual assets*"[219]. This approach has been taken up by the LCB-FT Council Regulation of 2024[220], which only makes a historical reference to virtual currency as opposed to legal tender, preferring the expression crypto-assets. This reinforces the official position of the French authorities embodied in the statement: "*They [crypto-assets] are often called*

[213] Law no. 2019-486 of May 22, 2019 on business growth and transformation.
[214] M. LEHMANN & T. MORISHITA, "General Report", *in* M. LEHMANN & T. MORISHITA (eds.), *Cryptocurrencies in National Laws - A Global Survey*, Brill, Series: Ius Comparatum, Vol. 8, 2025.
[215] ECB, *Virtual currency schemes*, 2012, cited above.
[216] Banque de France, *Focus*, no. 10, December 5, 2013.
[217] ACPR, Press release on Bitcoin transactions in France, January 29, 2014.
[218] Directive (EU) 2018/843, cited above.
[219] Recital 9 of Council Regulation (EU) 2023/1113, cited above.
[220] Council Regulation (EU) 2024/1624, cited above.

'crypto-currencies', but crypto-assets are not currencies"[221]. As the phenomenon has become more established, the use of the term currency has therefore declined, especially as the use of crypto-assets as money has not materialized, not least due to the high volatility of their prices. Nor has their payment function flourished. Attempts by a few retailers to accept payments in bitcoin have remained short-lived, given the extreme volatility of these crypto-assets[222] , although a few offers have resurfaced[223] . The fact remains that confusion has been fuelled by the use of marketing slogans that borrow the notion of currency for crypto-asset payment circuits.

To remedy this volatility, stablecoins have been developed that either back the token with a stable value, like an official currency such as the dollar or the euro, or use an issuing algorithm that plays on supply or demand to stabilize the value of the stablecoin[224] . An emblematic example, the Libra (now Diem) developed by the Meta company was intended to establish a payment system internal to all the services offered by Meta, and to be used outside this ecosystem through partnerships. The Libra issue was to be backed by a basket of currencies consisting mainly of dollars. Faced with the reluctance of the public authorities, the project was abandoned[225]. Other projects did emerge, such as those of SG-Forge (EURCV) and Circle (USDC and EURC), which subsequently obtained the necessary approvals to issue e-money tokens . [226]

Other types of token have appeared without any claim to a payment function or even a link to money, and have therefore been excluded from this study. Nevertheless, their potential hybridity makes them difficult to categorize. This is the case for tokens qualified as financial instruments offering a replication of the functions of financial securities and contracts, which are subject to financial Council Regulation. Finally, there are the so-called "*utility*" tokens, which form a buffer category for all types of rights conferred by a token that do not fall into other categories, such as governance rights in a DAO, or access to information or connected objects, like NFTs.

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[221] Investing in crypto-assets: beware of the risks! ABEIS (abe-infoservice.fr), https://www.abe-infoservice.fr/epargne/autres-placements-risque/investir-dans-les-crypto-actifs-quels-sont-les-risques/investir-dans-les-crypto-actifs-attention-aux-risques

[222] For example, Monoprix had announced in 2014 that it was preparing to accept Bitcoin payments before giving up in 2015 https://www.numerama.com/politique/33462-monoprix-bitcoins.html (Accessed 09/28/2024). Valve, the company that operates the Steam video game platform, has not followed through with its Bitcoin payment project: https://steamcommunity.com/games/593110/announcements/detail/1464096684955433613 (Accessed 09/28/2024).

[223] https://www.actu-juridique.fr/affaires/droit-financier/un-grand-magasin-parisien-accepte-les-paiements-en-cryptomonnaie/#:~:text=Pour%20payer%20en%20bitcoin%2C%20l,laquelle%20correspond%20une%20cl%C3%A9%20priv%C3%A9e.

[224] "*Stablecoins* are a category of crypto-assets that aim to stabilize their value through a backing, for example, to one or more currency(ies) or commodity(ies) (gold, oil, etc.) or through algorithmic adjustment of their quantity in circulation. Stable-coins can be analyzed as second-generation crypto-assets in that they partly adopt the underlying technology of first-generation crypto-assets, while being backed by a reserve fund or regulating their number by algorithms, with a view to guaranteeing them a certain stability" *in* Banque de France, *Paiements et infrastructures de marché à l'ère digitale*, Rapport 2023, p. 412.

[225] See ECB Opinion of February 19, 2021 on a proposal for a Council Regulation on crypto-asset markets, and amending Directive (EU) 2019/1937 (CON/2021/4), *OJEU* C 152 of April 29, 2021, p. 1.

[226] V. https://www.capital.fr/crypto/crypto-les-stablecoins-de-lentreprise-circle-officiellement-autorises-dans-le-nouveau-regime-europeen-mica-1499064

2 - Categories introduced by the MiCA Council Regulation

The MiCA Council Regulation has clarified the state of the law by enshrining the general notion of crypto-assets. The Union's legislator has therefore not retained the notions of virtual currency, or the more widely publicized notions of crypto-currencies, *stablecoins* or *crypto-currencies*, which are not associated with any legal mechanism covered by this Council Regulation. This confirms that crypto-assets are not money in the legal sense of the term, even if they may have certain monetary functions.

The MiCA Council Regulation defines a crypto-asset as the digital representation of a value or right that can be transferred and stored electronically, using distributed ledger or similar technology. It then distinguishes three categories of crypto-assets:

1) "***Asset Referenced Tokens***" defined as "a *type of crypto-asset that is not an e-money token and that aims to maintain a stable value by referring to another value or right or a combination thereof, including one or more official currencies*" (also referred to as ART *Asset Referenced Tokens*)

2) "***Electronic money tokens***" defined as "*a type of crypto-asset that aims to maintain a stable value by referring to the value of an official currency*" (also known as EMT *E-Money Tokens*)

3) "***Utility tokens***" defined as "*a type of crypto-asset intended solely to provide access to a good or service provided by its issue*r" .[227]

The MiCA Council Regulation excludes central bank money from its scope of application, at least when it is issued by the ECB and the national central banks of Member States acting in the context of monetary policy[228]. Indeed, the Council Regulation does not apply "*to the issuance by central banks of central bank money based on distributed ledger technology or in digital form, intended to supplement existing forms of central bank money, which the ECB may authorize*"[229] . MNBCs are therefore crypto-assets as long as they are based on DLT technology, in line with the definitions and scope of MiCA, since they are assets with a value. However, DLTs issued by the ECB or Member State central banks do not fall within the scope of the MiCA Council Regulation. On the other hand, the question arises for those issued by other central banks.

3 - Questions raised by electronic money tokens

Returning to the sub-categories of crypto-assets, two stand out in the classification: electronic money tokens (EMT) and "*tokens referring to an asset or assets*" (ART). Reflecting the logic of stablecoins, these two types of token refer either to a single official currency (EMT), or to any other asset or combination of assets that may include an official currency (ART). In principle, these two categories of token are subject to a similar framework: issued by an entity that is necessarily authorized and supervised, they must be the subject of a white paper that takes into account the existence of a reference asset, and are subject to greater control in the event that they become "*significant*". However, one difference remains.

While ARTs are governed entirely by the MiCA Council Regulation, EMTs are subject to a hybrid regime. In fact, they are defined as crypto-assets in Article 3, while Article 48

[227] Art. 3 of the MiCA Council Regulation, cited above.
[228] Art. 2 § 2, c) MiCA Council Regulation, cited above.
[229] Opinion CON/2021/4, cited above, point 1.3.

subjects them to the regime laid down in Titles II and III of the "*e-money 2"* directive[230] , unless otherwise provided for in Title IV of the said Council Regulation. Recital 18 of the MiCA Council Regulation states: "*Like electronic money, these crypto-assets [EMTs] are electronic substitutes for coins and banknotes and may be used to make payments*"[231] . To what extent, then, can EMT be equated with e-money? The question is a complex one, since it requires us to distinguish between two phases for EMTs: their issuance and their circulation.

As far as conditions of issue are concerned, the MiCA Council Regulation models the EMT regime on that of e-money, but a white paper must be drawn up, notified to the supervisory authorities and published before any EMT is offered to the public. EMTs are thus issued by electronic money institutions or credit institutions. When they reach a size requiring classification in the significant EMT category[232], the regime is strengthened, since the issuer must comply with more stringent prudential rules, similar to those for ART issuers[233]. Finally, the issuer of an EMT that refers to a currency that is not the official currency of a Member State must report regularly to the competent authority and, once certain thresholds are reached establishing that the asset is widely used as a medium of exchange, to cap the issuance of the token or cease issuing it[234].

As far as circulation conditions are concerned, the assimilation of EMTs and e-money is the subject of debate, as interpretations of the MiCA Council Regulation diverge. According to one view, EMTs would be assimilated by reference to e-money within the meaning of the "*e-money 2*" directive. They would be subject to the regime governing the circulation of funds under the PSD 2 directive, which includes "*banknotes and coins, scriptural and electronic money*"[235]. The draft PSD 3 directive includes a recital asserting the inclusion of EMTs in the category of funds, and an Article 2, point 23) which does not formally provide for this inclusion[236], which makes the prospect still uncertain. The classification as a fund could mean that the prudential requirements of the future text and the guarantees offered would then have to apply to EMTs[237]. From a second point of view, the circulation of EMTs should not be assimilated to that of electronic money. The latter is legally qualified as a transfer of funds necessarily intermediated by a payment service provider as part of the provision of payment services. In fact, unlike funds, the circulation of EMTs is not necessarily intermediated (the principle of unhosted wallets). What's more, when it is, this circulation is covered by the provision of the crypto-asset transfer service on behalf of customers, necessarily provided by a crypto-asset service provider[238].

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[230] Electronic Money Directive 2", cited above.
[231] See recital 13 of the "e-money 2" directive, cited above.
[232] Art. 56 of the MiCA Council Regulation, cited above.
[233] Art. 58 of the MiCA Council Regulation, cited above.
[234] Art. 58 § 3 of the MiCA Council Regulation, cited above by reference to articles 22 and 23 of the Council Regulation.
[235] Article 3, point 25 of the aforementioned DSP 2 directive. See also art. 2, 4. c) of the MiCA Council Regulation, which specifies that the Council Regulation does not apply to crypto-assets qualified as funds, with the exception of e-money tokens.
[236] Proposal for a Directive of the European Parliament and of the Council on payment services and electronic money services in the internal market, amending Directive 98/26/EC and repealing Directives (EU) 2015/2366 and 2009/110/EC, COM/2023/366.
[237] ECB notice of April 30, 2024, pt. 1.8.
[238] Art. 3(1)(16j) MiCA Council Regulation, cited above.

Moreover, to clarify these boundaries, the EU legislator has provided in the MiCA Council Regulation for a report on the assessment of the treatment of these services where this is not regulated by the revision of the PSD 2 Directive[239]. In its recitals 91 to 93, the MiCA Council Regulation provides for an articulation with this Directive for "services associated with the transfer of electronic money tokens"[240] . In contrast, EMT transfers would remain a MICA[241] crypto-asset service. This distinction between activities involving crypto-assets and those involving the transfer of funds is, incidentally, well known in French law since the PACTE Act, which greatly influenced the MiCA Council Regulation.

In addition, a further complicating factor arises from the exclusions set out in the MiCA Council Regulation, which, under Article 2(4), does not apply to crypto-assets that are classified as "*(a) financial instruments; (b) deposits, including structured deposits; (c) funds, unless they are classified as electronic money tokens*"[242] . This means that funds deposited with a credit institution in the form of crypto-assets are excluded from the MiCA Council Regulation, and remain governed exclusively by payment services law. On the other hand, funds issued by a payment or e-money institution (which are not deposits) in the form of crypto-assets and meeting the definition of EMT could be caught within the scope of the Council Regulation.This therefore requires clarification, and the reform of PSD 2 could provide an opportunity to clearly establish defined categories.

Irrespective of the question of assimilation to electronic money, the fact remains that a *stablecoin* may not necessarily have a stable value. In a nominalistic monetary regime[243] , the value of the monetary unit of account is inherently stable: a 10-euro bill or a payment account showing 10 euros always has the value of 10 euros. This is not the case for *stablecoins*, whose stable monetary value is not imposed by law, but results from mechanisms for referencing a stable asset. As a result, *stablecoins* remain assets with a market value, dependent on the law of supply and demand. The value of *stablecoins* therefore necessarily varies, even if their volatility is much lower than that of other crypto-assets. Admittedly, the mechanisms used for referencing (algorithm or constitution of reserves in a ring-fenced account) may bring them closer to a logic of monetary nominalism, without ever being equivalent to it, since their price fluctuates, particularly in times of crisis, despite being anchored to an official currency[244] . The *stablecoins* BUSD, USDC and USDT, for example, experienced significant variations during the collapse of FTX and the bankruptcy of Silicon Valley Bank[245] . These variations pose a further difficulty, since the issuer is under a legal obligation to redeem the *stablecoins* at par with their monetary value[246]. While the repayment obligation is appropriate for electronic money, it is less so for EMTs, as repayment is imposed with a view to protecting EMT holders.

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[239] Respectively, cons. 93 and art. 142 of the MiCA Council Regulation, cited above.
[240] Cons. 93 of the MiCA Council Regulation, cited above: "[...] Depending on the precise characteristics of the services associated with the transfer of electronic money tokens, these services could fall within the definition of payment services set out in Directive (EU) 2015/2366 [...]".
[241] Art. 3(1)(16j) of the MiCA Council Regulation, cited above: "the provision of crypto-asset transfer services on behalf of customers".
[242] Emphasis added.
[243] See above.
[244] "As stablecoins are tradable, their prices can deviate from par [...]". BIS, Annual Economic Report, p. 93, 2023.
[245] R. GARRAT & H. SONG SHIN, "Stablecoins versus tokenised deposits: implications for the singleness of money", *BIS bulletin*, no. 73, April 11, 2023, graph 2, p. 4.
[246] Art. 49, 4) MiCA Council Regulation, cited above.

EMT would be deemed to be e-money, and therefore subject to the rules governing payment services, but would also be a crypto-asset, and therefore covered by the MiCA Council Regulation. Its hybrid nature means that certain services are subject to multiple rules. EMT can circulate within the retail payments market, currently governed by the PSD 2 directive, through the definition of "funds" authorized to be exchanged as part of payments. However, this definition of funds includes electronic money[247]. EMT would therefore be included within the scope of the PSD 2 directive. This is reinforced by the proposed PSD 3 directive[248] , which says that EMT are "*funds*". However, the basic definition remains unchanged, referring to "*central bank money issued for retail use, scriptural money and electronic money*". This may have very concrete consequences, as it means that certain *crypto-asset* service providers (CASPs), EMTs being treated as funds, would qualify as payment service providers (PSPs), and would therefore need to be licensed to carry out this activity. Indeed, EMT trading platforms can be both CASPs (crypto-assets service providers) by operating a crypto-asset trading platform, or by exchanging crypto-assets for funds. The latter can thus potentially be e-money providers, payment service providers or e-money distributors.

The lack of coordination at this stage between these two systems could lead to a more stringent approval and control regime, as well as possible inconsistencies, since each status is subject to its own prudential regime. While these conflicts can be resolved simply by choosing the highest level of approval for each condition, the fact remains that separate procedures can create unwelcome red tape. A real system for ensuring consistency between these different statuses, given the hybrid nature of EMTs, needs to be implemented. In a letter to the EBA, the European Commission proposed distinguishing between EMTs used for payment purposes and EMTs used for investment purposes[249]. This confirms the possible dual function of e-money tokens on the retail market covered by PSD 2 and investment tokens on the cryptoasset market covered by MiCA. While the EBA has not yet ruled on this distinction criterion, which is provided for by MiCA for ARTs, clarification will eventually be required as part of the revision of the PSD 2 directive.

4 - Tokenization of deposits

Bank deposits are the dominant form of scriptural currency, and their tokenization sheds light on the notion of money. Tokenization is the process by which securities are recorded in distributed registers, with the aim of facilitating their storage and circulation. For financial

[247] Art. 3-25 of the PSD 2 directive, cited above.

[248] Art. 2(23) of the Proposal for a Directive of the European Parliament and of the Council on payment services and electronic money services in the internal market, amending Directive 98/26/EC and repealing Directives (EU) 2015/2366 and 2009/110/EC, COM(2023) 366.

[249] EU Commission, Letter to the EBA, "Interplay between MiCA and PSD2 - Possible "no action letter" by the EBA", December 6, 2024. In this letter, the European Commission underlined the need to clarify the interactions between the MiCA Council Regulation and the PSD2 Directive. The letter highlights the interaction between the two Council Regulations and proposes to address issues affecting crypto-asset providers, who would likely need to be licensed as a payment service provider when EMTs would be used for payment purposes and not exclusively for investment purposes. The Commission is asking the EBA to issue a *no-action letter* to avoid requiring application of the PSD when the service provided on the EMT is not a payment service but an investment service. Obviously, this temporary approach is unsatisfactory, as there is a fine line between using EMTs for investment purposes and for payment purposes. Any transfer of EMTs will have to be verified to analyze the purpose of the transaction, which entails a number of legal risks.

securities, this process is governed by the "*pilot scheme*" Council Regulation (RRP)[250] . The process can also be extended to the registration of other securities, such as bank account balances. In this way, tokenization of deposits would take the form of issuing tokens on distributed registers representing scriptural money deposits already registered in an account with a credit institution, or issuing them *ab initio* on a register on a distributed register (non-native and native tokenization respectively)[251].

The legal status of these tokenized deposits is currently under review. Article 2(4)(b) of the MiCA Council Regulation excludes deposits from its scope of application. In principle, this means that the Council Regulation does not apply to scriptural money deposits, even if they are tokenized[252] . In a report published in December 2024, the EBA considers that the tokenization process does not alter the fundamental nature of deposits. However, it notes the lack of European harmonization of the notion of bank deposit, even though it accepts that the primary characteristic of deposits is that they are funds issued by credit institutions[253].

The apparent legal porosity between tokenized deposits and EMTs raises questions about their similarities and differences. Firstly, from an accounting point of view, EMTs, when issued by an e-money institution, have the nature of tokens backed by a pool of assets (asset backed token)[254] represent a transferable claim on the issuer. Their movement transfers the issuer's liability from one holder to another. It is not necessary to update the issuer's balance sheet when these tokens are transferred. It is only when a holder wishes to redeem a token for cash that balance sheets need to take this into account. When issued by a credit institution, EMTs or tokenized deposits appear, like deposits, on the credit institution's balance sheet (balanced sheet tokens). In other words, the credit institution's commitment is not the same for tokenized deposits as it is for EMTs. Secondly, EMTs, even if issued by a credit institution, are not covered by the deposit guarantee under the Deposit Guarantee Schemes Directive (DGS)[255] , since only deposits, as defined by the Directive as credit balances resulting from funds left on account or from transitory situations arising from normal banking operations, benefit from it. Tokenized deposits, on the other hand, should be covered by this protection. A third difference relates to the negotiable nature of EMTs. The value of EMTs is negotiable, as their issuer aims to maintain a stable value by reference to the value of an official currency[256] . The value of EMTs can therefore be traded on a market, despite the issuer's legal obligation to redeem at par. Conversely, the EBA emphasizes that tokenized deposits have the nominal value of the official currency in which they are denominated (like the funds to which they are attached as scriptural money). A fourth difference concerns transferability. The EBA considers that

[250] Council Regulation (EU) 2022/858, cited above.
[251] Non-native tokenization refers to crypto-assets that represent off-chain DLT assets. V. EBA, Report on tokenised deposits, 2024, EBA/REP/2024/24.
[252] This analysis is supported by Recital 9 of the MiCA Council Regulation, which provides for the exclusion from the scope of application of crypto-assets that qualify as deposits within the meaning of Directive 2014/49/EU, including structured deposits as defined in Directive 2014/65/EU.
[253] This analysis is supported by Recital 9 of the MiCA Council Regulation, which provides for the exclusion from the scope of application of crypto-assets that qualify as deposits within the meaning of Directive 2014/49/EU, including structured deposits as defined in Directive 2014/65/EU.
[254] R. GARRAT, H. S. SHIN, *Stablecoins versus tokenised deposits: implications for the singleness of money*, op. cit.
[255] Directive 2014/49/EU of the European Parliament and of the Council of April 16, 2014 on deposit guarantee schemes (DGS), *OJEU* L 173 of June 12, 2014, p. 149.
[256] Art. 3(1)(7), MiCA Council Regulation, cited above.

EMTs are bearer instruments that can be transferred to third parties on secondary markets. Conversely, the transferability of tokenized deposits is disputed. It is said to be limited to transactions between customers of the issuing institution. As a result, the delivery of tokenized deposits in a transaction between customers of different banks is only finalized once interbank settlement has taken place. Conversely, the remittance of EMTs constitutes final settlement[257]. Lastly, like deposits, tokenized deposits could bear interest, whereas MiCA Council Regulations expressly prohibit the payment of interest for the holding of EMTs[258] . The criteria laid down by the EBA describing the delimitation between tokenized deposits and EMTs appear to overlap with those drawing the line between currencies (deposits and funds) and assets (crypto-assets and financial instruments, etc.).

5 - Crypto-asset payments

An important question in determining the "*quasi-monetary*" nature of crypto-assets concerns the possibility of paying with crypto-assets. Is it legal in France to pay with crypto-assets, such as bitcoin or ether? According to the communication from the Ministry of the Economy, "*In France, the only official currency is the euro, in accordance with Article L111-1 of the Monetary and Financial Code. This is the case for all euro zone countries (...). Nevertheless, while creditors are obliged to accept payments in euros, they may also accept foreign currencies or virtual currencies*"[259].

In practice, we can see that initiatives are being taken in this direction. This is the case in towns such as Talence and Cannes, which have stated their intention to make crypto-asset payments widespread among merchants, particularly in ether. In reality, these payments are not really made in crypto-assets, which would require the customer to transmit crypto-assets from his wallet to that of the merchant. Instead, the terminal used requires the services of a service provider responsible for converting the crypto-assets used into payment instruments denominated in official currency, with the merchant in practice receiving only scriptural money in euros, usually in the form of a bank transfer. Legally, the operation involves an intermediary putting a customer in touch with a crypto-asset service provider, who then proceeds to redeem the crypto-assets. A payment service provider then transfers the value denominated in official currency to the merchant in a conventional payment transaction. As a result, no payments are actually made in crypto-assets, which are only used as a store of value that can be mobilized to make cashless payments. The fact remains that, from the customer's point of view, the impression is that they are freeing themselves from their payment obligation by using crypto-assets. Attention should be drawn to the risk of customers being misinformed, as a service and billing are ultimately imposed on them.

There is no legal provision in the French legal system prohibiting payment in crypto-assets. However, the notion of payment needs to be clarified. Article 1342 of the French Civil

[257] EBA, Report on tokenised deposits, table p. 19, cited above.
[258] The ECB stressed that the ban on interest payments on crypto-assets "is in line with the Council Regulation of other instruments primarily used as means of payment, such as e-money" before adding that "this ban could make the relative attractiveness of e-money tokens and tokens referring to assets depend, from the holder's point of view, on the interest rate environment [so that o]ne cannot entirely exclude the possibility that this could generate inflows and outflows in the event of a significant change in the interest rate environment, which could have repercussions on financial stability and the transmission of monetary policy". Opinion CON/2021/4, cited above, point 2.1.1.
[259] https://www.economie.gouv.fr/cedef/paiement-cryptomonnaie/. Accessed February 27, 2025.

Code states that "*Payment is the voluntary performance of the service due. It must be made as soon as the debt becomes due. It discharges the debtor vis-à-vis the creditor and extinguishes the debt, except where the law or the contract provides for subrogation in the creditor's rights*". The notion of payment under civil law, i.e. the voluntary performance of an obligation, is therefore not linked to that of payment under financial law, as it is entirely possible to perform a service voluntarily by means other than the payment of a sum of money. The broad understanding of payment in French law therefore allows us to deduce that a payment made by means other than monetary units is valid. The condition of validity is based on the agreement between *solvens* and *accipiens*, who are free to agree on the object of payment, i.e. any crypto-asset, and not just EMTs, conceived by the European legislator as a means of payment. However, certain special texts impose a given payment method, which may exclude the delivery of crypto-assets, as for example for the payment of wages[260].

If a creditor cannot impose payment in crypto-assets on his debtor, he can nevertheless accept them in payment, the transaction then having the consequence of validly releasing the debtor, in accordance with the rules relating to exchange[261] or dation in payment if the creditor agrees to receive a crypto-asset in place of monetary units[262] . Payment in crypto-assets is made by means of a crypto-asset transfer, subject to the "TFR" Council Regulation, the aim of which is to prevent circumvention of AML/CFT rules by using crypto-assets in place of monetary units[263]. The "TFR" Council Regulation applies as soon as the crypto-asset service provider, or the intermediary PSCA, of either the originator or the beneficiary of crypto-assets, has its registered office in the Union[264] . However, when both the originator and the beneficiary of crypto-assets are PSCAs acting on their own behalf, or when the transfer takes place between private individuals, without the intervention of a PSCA, the Council Regulation is inapplicable [265].

6 - Preserving monetary sovereignty

The ECB's fundamental mission is to conduct monetary policy, the primary objective of which is price stability[266]. This is determined by the money supply in circulation, which the ECB measures using monetary aggregates. In addition to euro bills and coins issued by the Eurosystem, monetary policy takes into account scriptural money issued by credit institutions. Article 127(2) TFEU adds that the ECB also has the fundamental task of promoting the smooth operation of payment systems.

The MiCA Council Regulation considers the relationship between monetary policy and crypto-assets, at least EMTs and ARTs. Its recital 5 states:

"Still modest in size, crypto-asset markets do not currently pose a threat to financial stability. However, it is possible that types of crypto-assets that aim to stabilize their price relative to a specific asset or basket of assets could be massively adopted by retail holders in the future, and such a development could pose additional challenges

[260] Art. L. 3241-1 of the French Labor Code.
[261] Art. Art.1702 of the French Civil Code.
[262] Article 1342-4 of the French Civil Code.
[263] Council Regulation (EU) 2023/1113, cited above.
[264] *Ibid*, art. 2 § 1.
[265] *Ibid*, art. 2 § 4.
[266] Art. 127 § 1 and 2 TFEU.

in terms of financial stability, the smooth functioning of payment systems, the transmission of monetary policy or monetary sovereignty."

Articles 17 (authorization of a credit institution to issue ARTs), 20 (assessment of the application for authorization), 21 (granting or refusal of authorization) and 24 (withdrawal of authorization) of the MiCA Council Regulation set up a system for monitoring the risks associated with the application to issue ARTs, where these present a risk "to the smooth operation of payment systems, the transmission of monetary policy or monetary sovereignty". For this reason, the application for authorization is forwarded by the competent authority to the ECB and to the central bank of the Member State in which the establishment is located outside the euro zone. Similarly, if a non-euro currency issued by a Member State of the Union is used as a reference asset, the central bank of that State is informed. The ECB or the central banks will then issue an opinion on this risk, and may consequently refuse or withdraw approval.

This central bank veto right shows that, while crypto-assets with a "*quasi-monetary*" function do not pose a threat to financial stability at this stage, their development could lead central banks to outlaw their marketing *ab initio* or *a posteriori*. In its opinion on the proposed MiCA Council Regulation, the ECB pointed out that the risks are constituted by the possible diminution of the role of deposit banks and the disruption of the market for the underlying assets[267] . It added "*[t]he widespread use of tokens referring to assets for payment purposes could call into question the role of euro payments, or even compromise the provision, by public authorities, of the unit-of-account function of money*"[268].

This consideration of crypto-assets as risks to monetary policy or financial stability does not, however, appear to extend to other areas of EU law. In the field of LCB-FT, for example, crypto-assets have been specifically addressed, with the aim of covering as many situations as possible. On the one hand, following on from the 5th "*money laundering*" Directive 2018/849, Council Regulation 2024/1624 applies to crypto-asset service providers "*in order to limit the risks of misuse of crypto-assets for money laundering or terrorist financing purposes*"[269] . On the other hand, the "TFR" Council Regulation was amended in 2023 to include information on crypto-asset originators and beneficiaries accompanying crypto-asset transfers[270] . This Council Regulation also lays down rules on policies, procedures and internal controls to ensure the implementation of restrictive measures when at least one of the crypto-asset service providers involved in the transfer of funds or the transfer of crypto-assets is established or has its registered office in the Union. While Article 2 § 4 b) and c) of the MiCA Council Regulation does not assimilate crypto-assets to funds within the meaning of the PSD 2 directive, they are nevertheless integrated into the corpus of the LCB-FT, which confirms the attractive notion of funds in this area. However, obligations are differentiated for the transfer of funds and for the transfer of crypto-assets. Thus, the notion of "*funds*" in the "TFR" Council Regulation does not incorporate the notion of crypto-assets.

Finally, crypto-assets call into question monetary sovereignty as an expression of the choice of a unit of account as official currency, raising two questions. Is it possible for a state

[267] ECB, Opinion CON/2021/4, cited above, point 2.1.
[268] *Ibid*, point 2.1.3.
[269] Cons. no. 14 and art. 3 § 3 b), of Council Regulation (EU) 2024/1624, cited above.
[270] Council Regulation (EU) 2023/1113 of the European Parliament and of the Council of May 31, 2023 on information accompanying transfers of funds and certain crypto-assets, *OJEU* L 150 of June 9, 2023, p. 1.

to designate a crypto-asset as its official currency? Is it possible to privatize currency? These classic questions have been renewed with the development of digital technology, with privatization taking place via crypto-assets.

With regard to the first question, it is important to avoid any confusion concerning El Salvador, which has recognized bitcoin as legal tender, but has not accepted it as a unit of account, which remains the dollar[271]. Bitcoin had not been substituted for the dollar, which is legal tender in El Salvador, but had been added to it. As the Treaties currently stand, EU law precludes a Member State from conferring legal tender status on a crypto-asset: (1) only an act of secondary legislation adopted on the basis of Article 133 TFEU can confer legal tender status on a thing; (2) such legal tender status can only be granted to a thing issued by a central bank. However, the Salvadoran precedent has raised the question of whether a crypto-asset recognized as a unit of account by one state should be accepted as official currency by another. On the one hand, the example of El Salvador is irrelevant on the grounds that, under the MiCA Council Regulation, bitcoin is not an official currency, insofar as it is not a unit of account designated by a sovereign state. On the other hand, just because a State recognizes a crypto-asset as an official currency, this does not mean that France must accept it as a foreign currency within the meaning of article 1343-3 of the French Civil Code. It is up to each state to decide, according to its own rules, whether to recognize a unit of account as an official currency. The initiative nonetheless led the IMF to ask El Salvador to reconsider its choice, in view of the risks to financial stability, consumer and investor protection and financial integrity[272]. El Salvador finally amended its *Ley Bitcoin* in January 2025 by withdrawing all legal tender from bitcoin, limiting its acceptance as a means of payment to a purely voluntary basis[273].

As for the second question, the aborted Libra project is significant, since its ambition was to set up a private currency that could be used as a means of exchange within a global network. The choice of using a crypto-asset in private law contractual relations is free, as long as each party agrees to this method of payment[274]. The fears aroused by Libra, leading to its abandonment, are explained more by the scale of the project. Crypto-assets do indeed thrive in local exchange systems (LETS), but their small scale means that the public authorities are neutral, except in the eventual case of taxation. In addition to concerns about personal data protection, consumer protection, transaction integrity, the fight against financial crime and the viability of the banking sector, the global scale of the Libra project has sparked debate about the threat posed by a global stablecoin[275] to the monetary sovereignty of states. The risk is that it will replace official currencies, which will be abandoned by users. Libra's global reach could

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[271] Article 3 of the *Ley Bitcoin* states that "All prices can be expressed in Bitcoins", while article 4 states that "Taxes can be paid in Bitcoins". www.asamblea.gob.sv/node/11282

[272] IMF Reaches Staff-Level Agreement with El Salvador on an Extended Fund Facility Arrangement, December 18, 2024: "The potential risks of the Bitcoin project will be significantly reduced in line with the Fund's policies. Legal reforms will make acceptance of Bitcoin by the private sector voluntary. For the public sector, engagement in bitcoin-related economic activities and bitcoin transactions and purchases will be limited. Taxes will be paid in US dollars only, and government participation in the electronic crypto-currency wallet (Chivo) will be phased out. Transparency, Council Regulation and supervision of digital assets will be strengthened to safeguard financial stability, consumer and investor protection and financial integrity." https://www.france24.com/en/live-news/20250130-el-salvador-merchants-no-longer-obliged-to-accept-bitcoin.

[273] Lawmakers in El Salvador rush new bitcoin reform after IMF deal | Reuters ; FC2C7E66-490B-4420-B8B5-221C2F2A4C28.pdf

[274] See *above.*

[275] Facebook-Meta has over 3 billion active users.

have given it the status of an international reserve currency, to the detriment of official currencies. This would have led to a decoupling of Libra's missions from the assets backed by it, and thus effectively triggering a kind of money creation process. Secondly, there is the question of the incompatibility of Libra's "*monetary policy*", since Libra would have been a private organization with discretion over its asset-weighting choices and the impact these choices might have had on official currencies, such as the decision to remove the euro from the reserve basket. We would have been faced with a decision, taken by a private organization outside any monetary discipline, which is conceived within a democratically-defined framework. This potentially inescapable fact has provoked two legal reactions. The emergence of global stablecoins is one of the factors behind the launch of MNBC projects. It has also led European legislators to include provisions in the MiCA Council Regulation to protect the monetary policy of the ECB and other central banks in the European Union.

In short, the introduction of such private instruments runs up against the dual problem of user confidence in a private monetary policy and the threat to monetary stability guaranteed by public institutions.

Conclusion

Money is certainly a legal concept. The purpose of this report is to shed light on the corresponding legal concepts. To this end, it proposes two sets of conclusions. The first are the legal definitions used to better articulate legal concepts and regimes. Basically, money has two meanings. On the one hand, official currency is the unit of account that a state or group of states designates as such, by an act of sovereignty over its territory, raising the question of foreign currency. On the other hand, currencies are means of payment that can take the form of money issued by central banks or states, or scriptural money issued by institutions regulated by the public authorities. The phenomenon of digitization is therefore ambivalent for the legal concept of money: on the one hand, it reinforces monetary sovereignty, since money is intended to be issued by central banks or States in digital form; on the other hand, crypto-assets - which do not legally constitute money - compete, at least for some of them (electronic money tokens), with monetary means of payment. The report's second conclusions are recommendations designed to clarify and rationalize the use of legal definitions of money. The Working Group stresses the importance of consistency in the use of these definitions. One of the main difficulties encountered is the use of a monetary law concept in another field of law, as illustrated by the example of AML/CFT rules. It would be desirable if, as far as possible, legal definitions of money were unified between branches of law, or at least if consistency within each branch were favored.

LIST OF RECOMMENDATIONS

The Working Group recommends:

- 1. rationalize the use of monetary concepts in legal texts
- 2. fully respect the principle of independence of legislation, by ensuring consistency between monetary law definitions and those used in other branches of law
- 3. distinguish the concepts of monetary law from those of AML/CFT rules and restrictive measures
- 4. to distinguish between the legal concept of money, which refers to the rules of the unit of account, and that of money as a means of payment
- 5. to designate as the official currency the currency chosen by a State as the unit of account, it being specified that, in the euro zone, the official currency is the euro
- 6. to designate foreign currency as the unit of account in which contracting parties choose to denominate a contractual obligation, if this currency is not the "official currency" of: 1) the State in which the debtor or creditor resides; 2) the State of which the debtor or creditor is a national; or 3) the currency to which the State has not given legal tender in its territory on which a payment is made or a monetary obligation is entered into.
- 7. not to call the choice of an official currency an "issue", and to reserve the term for the power to put currencies into circulation
- 8. no longer use confusing terms in legal texts, avoiding in future: crypto-currency, fiat currency (preferring the notion of legal tender), virtual currency, stable-coin, etc.
- 9. articulate the concepts of scriptural money and commercial bank money, either by favouring one concept over the other, or by limiting the concept of scriptural money to its *lato sensu* meaning and preferring that of commercial money for scriptural money issued by credit institutions give a definition of the concept of scriptural money in a legislative text of Union law.
- 10. define the concept of scriptural money by clarifying the provisions of Title III of Book I of the Monetary and Financial Code, entitled "Scriptural money instruments", particularly with regard to the concepts of deposits, funds redeemable by the public and funds (of which scriptural money is one).
- 11. clarify the content of the notion of cash: does it refer only to coins and banknotes that have been put into circulation, or does it include e-money and e-money tokens?
- 12. not to use the term "cash" for interbank central bank money
- 13. consider the advisability of enshrining a definition of interbank central bank digital currency in a legal text under European Union and/or national law.
- 14. enshrine in a more explicit and more general legal provision the obligation for consumer information on prices or services to be expressed in euros
- 15. enshrine in an explicit legal provision the obligation for merchants communicating that they accept payments in crypto-assets to provide information (nature and costs of the service offered).
- 16. to make express provision in the Council Regulation on legal tender status of euro banknotes and coins for the circumstances in which Member States are entitled to

restrict legal tender status by providing for public-interest restrictions on the acceptance of cash payments

- 17. consider revising the provisions of French law traditionally associated with legal tender (articles L. 121-1, L. 121-2 and L. 112-5 of the French Monetary and Financial Code; article R. 642-3 of the French Penal Code), which should be revised when the Council Regulation on the legal tender status of euro banknotes and coins is received, in order to establish a French legal tender regime compatible with EU law.
- 18. not to use the term currency for crypto-assets
- 19. clarify the relationship between the concepts in the MiCA Council Regulation and those in the texts governing payment services and electronic money

LIST OF DEFINITIONS

GENERAL DEFINITIONS

- **Exchange rate:** value of an official currency in relation to another official currency.
- **Indexation or currency variation clause:** clause in a contract by which the parties who have denominated an obligation in a currency agree to allocate or share the transaction exchange risk, in the event of a variation in the exchange rate of the chosen currency.
- **Price:** refers to the circulation of monetary instruments for a given value in a given territory.
- **Forced exchange rate:** legal device designed to force the acceptance of monetary instruments (prohibition of refusal) or to force their value by imposing the official monetary unit in which they are denominated by their issuer.
- **Legal tender:** price (acceptance and value) of monetary instruments governed by legislation
- **Currency:** unit of account accepted by a state other than that which issues the official currency.
- **Dollarization:** the phenomenon whereby, *de facto* or *de jure*, the official currency of one state is used as the official currency of another state, either in parallel or exclusively.
- *Central bank law*: set of rules governing the exercise of central bank powers (comp. *monetary law*).
- **Issuance of official currency:** act of sovereignty by which a state or group of states designates a unit of account.
- **Monetary extraterritoriality:** a title of jurisdiction by which a state relies on its official currency to govern a situation governed by a foreign legal system.
- **Payment instrument:** device used to transfer funds from one monetary medium to another.
- **Legal tender:** monetary instruments recognized by the public authorities or stipulated by the contracting parties as permitting payment in fulfilment of a monetary obligation.
- **Monetary law (*lex monetae)*:** set of rules governing the issue and circulation of central bank money (comp. *central bank law*).
- **Monetary nominalism (in civil law) or conventional nominalism:** rule whereby the debtor of an obligation is discharged by payment of its nominal amount (comp. indexation).
- **Monetary nominalism (in monetary law):** a monetary regime that no longer refers to metal (opp. gold standard or commodity currencies).
- **Nominalism of circulation:** obligation to respect the face or nominal value of a means of payment (e.g. bills and coins, prohibition of trading)
- **Commercial currency:** as opposed to central bank money, all currencies issued by establishments authorized and supervised by the public authorities.
- **Central bank money:** money issued by the central bank in fiduciary or scriptural form.
- **Currency of account:** stipulation in an agreement designating the unit of account used to measure a debt (contract law).

- **Currency of payment:** stipulation in an agreement designating the method of payment of a debt (contract law).
- **Foreign currency:** currency which is not the "official currency" of: (1) the State in which the debtor or creditor resides; (2) the State of which the debtor or creditor is a national; or (3) the State which has not granted legal tender status in its territory, on which a payment is made or a monetary obligation is entered into. Foreign currency differs from foreign exchange in that it is relevant only to the use of the currency in a contractual relationship.
- **fiat currency:** a purely economic concept referring to means of payment (in positive law, coins and banknotes) that are legal tender in the sense that their value corresponds to the amount of the official currency unit in which they are denominated by their issuer. Consequently, they must be accepted in payment for this value, without convertibility into gold coin. In the common sense, as opposed to financial assets and crypto-assets, fiat currency can be used to designate means of payment denominated in an official currency.
- **Fiduciary money:** all monetary instruments, generally in the form of bills and coins, which are issued by a central bank and have legal tender status.
- **Legal tender:** all means of payment recognized by the State (syn. funds).
- **Official currency:** unit of account designated as such by a State or group of States through an act of sovereignty over a given territory.
- ***Central Bank Digital Currency*:** currency issued by a central bank (central bank liability) in digital form, denominated in a unit of account, which performs the functions of a means of payment and a store of value.
- **Protection of currency:** all measures designed to prevent and punish the counterfeiting and falsification of central bank money, which under positive law are coins and banknotes and, in future, digital central bank money.
- **Monetary medium:** scriptural (account), magnetic or electronic device for storing funds

TEXTUAL DEFINITIONS

MONETARY LAW

- **Legal tender (Union law):** the character of a means of payment denominated in a monetary unit means, in Union law, that this means of payment cannot generally be refused in settlement of a debt denominated in the same monetary unit, at its face value, with full discharge effect.
- **Issuing:** power of the ECB to put euro banknotes or digital euros into circulation and to authorize the putting into circulation of euro coins.
- **Cash:** in monetary law, legal tender means of payment, generally in the form of coins and banknotes.
- **Euro:** unit of account designated as the official currency of the member states of the euro zone
- **Digital Euro:** digital form of the single currency euro
- **Retail digital euro:** digital form of the single euro currency reserved for payments between individuals
- **Digital wholesale euro:** digital form of the single euro currency reserved for payments for financial transactions.
- **Euroization:** the phenomenon whereby, *de facto* or *de jure*, the euro is used as the official currency of a country outside the European Union, whether occasionally, in parallel or exclusively.
- **Circulation:** the physical operations involved in producing, supplying, distributing and protecting euro bills and coins and digital euros.
- **Fiduciary money:** money issued by the central bank which, under positive law, takes the form of coins and banknotes, which are legal tender in the sense that their value corresponds to the amount of the official monetary unit in which they are denominated by their issuer.
- **Central Bank Digital Currency:** currency issued as a liability on the balance sheet of a central bank (central bank liability) in digital form, denominated in a unit of account, which performs the functions of a means of payment and a store of value.
- **Interbank central bank digital currency:** currency issued by the central bank in digital form and used exclusively by central banks, commercial banks or other financial institutions to identify between them payments (including cross-border payments) and transactions in financial securities, whether or not these are tokenized.
- **Scriptural money:** *lato sensu*, money issued by an institution by entry in an account opened with that institution; *stricto sensu*, money issued by a credit or payment institution by entry in an account opened with that institution. When issued by a payment institution, scriptural money appears to refer to deposits.
- **Single currency:** euro as the official currency of the European Union for member states taking part in the third phase.
- **Professional cash handlers:** credit institutions, payment service providers and any other economic agent involved in the processing and delivery to the public of banknotes and coins, also responsible for putting back into circulation, directly or indirectly, euro

banknotes, which they have received either from the public, in payment or as a deposit on a bank account, or from another professional cash handler.

- **Protection of the euro:** all measures designed to prevent and punish counterfeiting and falsification of coins and banknotes.

- **Crypto-asset:** digital representation of a value or right that can be transferred and stored electronically, using distributed ledger or similar technology.
- **Funds:** banknotes and coins, scriptural money and electronic money and potentially digital money from retail or interbank central banks, denominated in a unit of account, stored on a monetary medium and transferable by order given by means of a payment instrument.
- **Fonds remboursables du public (in French law):** funds that a person collects from a third party, notably in the form of deposits, with the right to dispose of them on his or her own account but with the obligation to return them.
- **Tokens:** digital assets or crypto-assets
- **Utility token:** crypto-asset intended solely to provide access to a good or service supplied by its issuer.
- **Electronic money token (EMT):** a type of crypto-asset that aims to maintain a stable value by referencing the value of an official currency.
- **Asset-referenced token (ART):** a type of crypto-asset that is not an e-money token and that aims to retain a stable value by referring to another value or right or a combination thereof, including one or more official currencies.
- **Official currency:** unit of account designated as such by a State or group of States through an act of sovereignty over a given territory.
- **Electronic money:** monetary value stored in electronic form, including magnetic form, representing a claim on the issuer, which is issued against the remittance of funds for the purpose of payment transactions and which is accepted by a natural or legal person other than the issuer of electronic money.
- **Payment transaction:** action, initiated by or on behalf of the payer or by the payee, of paying, transferring or withdrawing funds, irrespective of any underlying obligation between the payer and the payee.

- **Cash:** i) cash; ii) bearer negotiable instruments; iii) commodities used as highly liquid stores of value; iv) prepaid cards.
- **Cash entering or leaving the Union:** banknotes and coins which are in circulation as an instrument of exchange or which have been in circulation as an instrument of exchange and which can still be exchanged through financial institutions or central banks for banknotes and coins which are in circulation as an instrument of exchange.
- **Assets (LCB-TF):** assets of any kind, whether tangible or intangible, movable or immovable, tangible or intangible, as well as documents or legal instruments, in any form whatsoever, including electronic or digital, evidencing the ownership of such assets or rights thereto.
- **Cash:** banknotes and coins which are in circulation as an instrument of exchange or which have been in circulation as an instrument of exchange and which can still be exchanged through financial institutions or central banks for banknotes and coins which are in circulation as an instrument of exchange".
- **Funds or other assets :** all assets, including but not limited to financial assets, economic resources including oil and other natural resources, property of any kind, whether tangible or intangible, movable or immovable, acquired by any means whatsoever, and legal documents or instruments in any form whatsoever, including electronic or digital, evidencing title to or interest in such funds or other assets, including, but not limited to, bank credits, travellers' cheques, bank cheques, money orders, shares, securities, bonds, drafts or letters of credit, as well as any interest, dividends or other income or capital gains received on such funds or other assets, and any other assets that could potentially be used to obtain funds, goods or services".

WORKING GROUP COMPOSITION

Chair: Francesco MARTUCCI, Professor, Université Paris Panthéon-Assas

- Constance ANDRE-CHIOSSONE, Direction générale du Trésor, Adjointe au chef de bureau "Services bancaires et moyens de paiement" (Bancfin4)
- Patrick BARBAN, Professor at Cergy Paris Université
- Régis BISMUTH, Professor at Sciences po Paris
- Sandrine BOGEY-LELEU, Groupe BPCE, Legal Department, Senior Legal Counsel
- France DRUMMOND, Professor at the University of Paris Panthéon-Assas
- Laura DUFAY-KRULIK, Banque de France, Deputy Head of Legal Services
- Andreja FAJGELJ, Banque de France, Head of the Financial and European Law Department (Legal Services Directorate)
- Gérard GARDELLA, General Secretary Emeritus of the Haut Comité Juridique of the Paris Financial Center
- Caroline KLEINER, Professor, Université Paris-Cité
- Frédérick LACROIX, Partner, Clifford Chance
- Sylvain LAMBERT, Société Générale, Director, Legal Expert, Group Legal Department
- Matthias LEHMANN, Professor at the University of Vienna
- Jean-Baptiste MOIROUD, Direction générale du Trésor, Adjointe au chef de bureau " Services bancaires et moyens de paiement " (Assistant to the Head of the "Banking Services and Means of Payment" Office)
- David SABBAN, Direction générale du Trésor, Adjoint au chef de bureau " Services bancaires et moyens de paiement " (Bancfin4)
- Clément SAUDO, Autorité des marchés financiers, Legal Affairs Division
- Hubert de VAUPLANE, Partner, Morgan Lewis
- Romain ZANOLLI, Autorité de contrôle prudentiel et de résolution, Legal Affairs Department