Provisional text

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 29 September 2020 (1)

Joined Cases C-422/19 and C-423/19

Johannes Dietrich (C-422/19)
Norbert Häring (C-423/19)
v
Hessischer Rundfunk

(Request for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Germany))

(Reference for a preliminary ruling – Economic and Monetary Union – Article 2(1) and Article 3(1)(c) TFEU – Exclusive competence of the European Union – Monetary policy – Single currency – Article 128(1) TFEU – Regulation (EC) No 974/98 – Concept of 'legal tender' – Obligation to accept euro banknotes – Limitations on payments in cash established by Member States – National legislation requiring the acceptance of banknotes for the fulfilment of statutorily imposed payment obligations – Regional legislation precluding the payment of radio and television licence fees in cash)

1. What is the extent of the exclusive competence conferred on the European Union with regard to monetary policy? More specifically, does this exclusive competence include monetary law and the determination of the status of legal tender of the single currency? What are the effects of legal tender as regards euro banknotes? In this context, can Member States whose currency is the euro adopt national laws restricting the use of euro banknotes and, if so, to what extent?

2. These are, in summary, the questions raised by this request for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Germany).

3. This case is of considerable importance, not least because of its constitutional implications. It involves the determination of the extent of the European Union's exclusive competence in the area of monetary policy and thus raises questions about the division of competences between the European Union and the Member States and the way in which their respective competences are exercised. It presupposes, in particular, the definition of criteria for circumscribing the action of the Member States when, in exercising their own competences, their action, while not encroaching on an area of exclusive competence of the European Union, nonetheless touches on concepts that fall into that area.

4. Furthermore, this case raises new questions which are of considerable practical importance, both now and in the future, for the euro as the single currency. The Court is asked to interpret concepts of monetary law which it has not previously had an opportunity to rule on, and, more specifically, the concept of legal tender. All this in a complex environment in which the success of scriptural and electronic money and technological progress, with potentially disruptive effects on the use of money, is accompanied by the existence of a significant number of vulnerable people who still do not have access to basic financial services.

I. Legal framework

A. EU law

5. Article 128(1) TFEU, which is reproduced almost verbatim in the first paragraph of Article 16 of Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank ('the Statute of the ESCB and of the ECB'), provides:

'The European Central Bank shall have the exclusive right to authorise the issue of euro banknotes within the Union. The European Central Bank and the national central banks may issue such notes. The banknotes issued by the European Central Bank and the national central banks shall be the only such notes to have the status of legal tender within the Union.'

6. Recital 19 of Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (2) is worded as follows:

'Whereas banknotes and coins denominated in the national currency units lose their status of legal tender at the latest six months after the end of the transitional period; whereas limitations on payments in notes and coins, established by Member States for public reasons, are not incompatible with the status of legal tender of euro banknotes and coins, provided that other lawful means for the settlement of monetary debts are available.'

7. Article 10 of that regulation provides that:

'With effect from the respective cash changeover dates, the ECB and the central banks of the participating Member States shall put into circulation banknotes denominated in euro in the participating Member States. Without prejudice to Article 15, these banknotes denominated in euro shall be the only banknotes which have the status of legal tender in participating Member States.'

8. Under Article 11 of Regulation No 974/98, 'with effect from the respective cash changeover date, the participating Member States shall issue coins denominated in euro or in cent and complying with the denominations and technical specifications which the Council may lay down in accordance with the second sentence of Article [128(2) TFEU]. Without prejudice to Article 15 and to the provisions of any agreement under Article [219(3) TFEU] concerning monetary matters, those coins shall be the only coins which have the status of legal tender in participating Member States. Except for the issuing authority and for those persons specifically designated by the national legislation of the issuing Member State, no party shall be obliged to accept more than 50 coins in any single payment'.

9. Pursuant to Article 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions: (3)

'The authorities of the Member States shall consult the ECB on any draft legislative provision within its field of competence pursuant to the Treaty and in particular on:

– currency matters,

– means of payment,

– national central banks,

– the collection, compilation and distribution of monetary, financial, banking, payment systems and balance of payments statistics,

– payment and settlement systems,

– rules applicable to financial institutions in so far as they materially influence the stability of financial institutions and markets.'

10. Recitals 3 and 4 of Commission Recommendation 2010/191/EU of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins (4) state, respectively, that 'there is currently some uncertainty at euro area level with regards to the scope of legal tender and the consequences thereof' and that 'this recommendation is based on the main conclusions of a report prepared by a working group consisting of representatives from Ministries of Finance and National Central Banks of the euro area'.

11. Points 1 to 4 of the recommendation provide that:

'1. Common definition of legal tender

Where a payment obligation exists, the legal tender of euro banknotes and coins should imply:

(a) Mandatory acceptance:

The creditor of a payment obligation cannot refuse euro banknotes and coins unless the parties have agreed on other means of payment.

(b) Acceptance at full face value:

The monetary value of euro banknotes and coins is equal to the amount indicated on the banknotes and coins.

(c) Power to discharge from payment obligations:

A debtor can discharge himself from a payment obligation by tendering euro banknotes and coins to the creditor.

2. Acceptance of payments in euro banknotes and coins in retail transactions

The acceptance of euro banknotes and coins as means of payments in retail transactions should be the rule. A refusal thereof should be possible only if grounded on reasons related to the "good faith principle" (for example the retailer has no change available).

3. Acceptance of high denomination banknotes in retail transactions

High denomination banknotes should be accepted as means of payment in retail transactions. A refusal thereof should be possible only if grounded on reasons related to the "good faith principle" (for example the face value of the banknote tendered is disproportionate compared to the amount owed to the creditor of the payment).

4. Absence of surcharges imposed on the use of euro banknotes and coins

No surcharges should be imposed on payments with euro banknotes and coins.'

B. German law

12. Paragraph 14(1) of the Gesetz über die Deutsche Bundesbank (Law on the German Bundesbank; 'the BBankG') (5) provides that:

'Without prejudice to Article 128(1) of the Treaty on the Functioning of the European Union, the Deutsche Bundesbank shall have the sole right to issue banknotes in the area in which this Act is law. Banknotes denominated in euro shall be the sole unrestricted legal tender … .' (6)

13. Paragraph 2(1) of the Rundfunkbeitragsstaatsvertrag (State Treaty on radio and television licence fees; 'the RBStV') (7) lays down an obligation to pay a radio and television licence fee for each dwelling by the owner of that dwelling.

14. Paragraph 9(2) of the RBStV authorises regional broadcasters (*Landesrundfunkanstalt*) to establish, by means of a regulation (*Satzung*), the procedures for payment of the radio and television licence fee.

15. Paragraph 10(2) of the Satzung des Hessischen Rundfunks über das Verfahren zur Leistung der Rundfunkbeiträge (rules of the Hessischer Rundfunk (the public broadcaster for the Land of Hesse) on the procedure for the payment of radio and television licence fees, 'the payment procedure rules') adopted on the basis of Article 9(2) of the RBStV provides that:

'The payer of the radio and television licence fee may not pay the licence fee in cash, but only by the following means of payment:

1. SEPA direct debit,

2. bank transfer,

3. standing order.'

II. Facts, main proceedings and the questions referred for a preliminary ruling

16. The applicants in the main proceedings, Mr Johannes Dietrich and Mr Norbert Häring, are required, under Article 2(1) of the RBStV, to pay a radio and television licence fee to Hessischer Rundfunk.

17. They offered to Hessischer Rundfunk to pay this fee in cash. Citing Paragraph 10(2) of its payment procedure rules, according to which the fee may be paid only by direct debit, bank transfer or standing order, Hessischer Rundfunk rejected that payment offer and, by decision of 1 September 2015, sent Mr Dietrich and Mr Häring payment notices quantifying the overdue amount as EUR 52.50, plus a late payment surcharge of EUR 8.

18. Mr Dietrich and Mr Häring challenged the payment notices sent to them by Hessischer Rundfunk. However, their action was unsuccessful at first and second instance.

19. Mr Dietrich and Mr Häring subsequently appealed before the Bundesverwaltungsgericht (Federal Administrative Court), the referring court. In their appeal, they submit that both the second sentence of Paragraph 14(1) of the BBankG and the third sentence of Article 128(1) TFEU make provision for an unconditional and unrestricted obligation to accept euro banknotes as a means for the settlement of monetary debts. This obligation, they argue, may be restricted only by a contractual agreement between the parties or on the basis of an authorisation under federal or EU law. There can be no justification for excluding cash payments for practical reasons linked to 'mass procedures'; in other words, situations in which there are an extremely large number of fee payers.

20. First, the referring court affirms that under national law, the appeals before it should be allowed. It explains that the payment of the radio and television licence fee in cash, precluded under the Hessischer Rundfunk payment procedure rules, is contrary to the higher-ranking provision of federal law contained in the second sentence of Paragraph 14(1) of the BBankG. (8)

21. The referring court notes that this provision is to be interpreted as placing an obligation on public authorities to accept euro banknotes if they are intended to meet statutorily imposed payment obligations. Exceptions cannot be based merely on reasons of administrative practicability or cost savings, but rather require authorisation by virtue of a federal law, since, as in the present case, authorisation provided by the law of a *Land* is not sufficient.

22. In that context, however, the referring court believes that the main proceedings raise three questions for which a preliminary ruling by the Court of Justice is necessary.

23. First, the referring court asks whether the second sentence of Paragraph 14(1) of the BBankG is compatible with the conferral of exclusive competence on the European Union for monetary policy under Article 3(1)(c) TFEU.

24. It notes that the concept of monetary policy is not defined in the Treaties and that its content and therefore the scope of the European Union's exclusive competence has not yet been conclusively clarified. On the basis of the existing case-law of the Court, the referring court considers that it is unable to decide conclusively whether the European Union's exclusive competence in the area of monetary policy extends to governing the legal consequences associated with the status of legal tender of euro banknotes, and, in particular, to stipulating an obligation on the part of public authorities to accept euro banknotes for the fulfilment of pecuniary obligations governed by public law.

25. It observes that, on the one hand, this obligation does not relate to the objective of maintaining price stability, nor is there a direct connection with the instruments specified in primary law for achieving monetary policy objectives. In particular, the right to issue euro banknotes that is conferred on the ECB and the national central banks by Article 128(1) TFEU is not restricted or modified by any such obligation. On the other hand, the referring court finds that the case-law of the Court does leave room for the assumption that rules intended to ensure the acceptance of euro banknotes as legal tender, and therefore the effective functioning of monetary transactions, also belong in the area of monetary policy. In particular, it is conceivable that, as a measure that is necessary for the use of the euro as a single currency, a legal act that governs the status of legal tender of euro banknotes could be based on Article 133 TFEU, and the exclusive competence of the European Union could therefore also be assumed in this respect.

26. Second, the referring court asks whether EU law actually contains a prohibition precluding public authorities of a Member State from refusing the fulfilment of a statutorily imposed payment obligation by means of euro banknotes. If that were the case, irrespective of the compatibility of the second sentence of Paragraph 14(1) of the BBankG with EU law, Paragraph 10(2) of the Hessischer Rundfunk payment procedure rules would be unlawful owing to an infringement of superior rules of law, with the result that the appeals before the referring court would have to be allowed.

27. The referring court notes that mandatory acceptance of euro banknotes cannot be inferred automatically from the concept of legal tender, as provided for in the third sentence of Article 128(1) TFEU, the third sentence of the first paragraph of Article 16 of the Statute of the ESCB and of the ECB, and the second sentence of Article 10 of Regulation No 974/98. Neither primary nor secondary EU law defines this concept. Recital 19 of that regulation merely suggests that, according to the EU legislature, limitations on the possibility of making payments in cash does not automatically affect the status of legal tender of euro banknotes and coins. According to the referring court, it is also unclear how much importance should be attached to Recommendation 2010/191/EU in this context. Although it is true that the recommendation provides for a 'common definition of legal tender', according to Article 288(5) TFEU, recommendations of the institutions of the European Union have no binding force.

28. Third, even if, in answer to the first question, the Court were to find that, owing to the European Union's exclusive competence in the area of monetary policy, the German legislature did not have competence to adopt a rule such as the second sentence of Paragraph 14(1) of the BBankG, the referring court wonders whether that provision should nevertheless be applied to the extent that, and for so long as, the European Union has not made use of its exclusive competence in a conclusive manner. The referring

court takes the view that it is not clear from existing case-law whether a national legal act can also not be applied if it came into being by breaching the restrictive effect of the exclusive competence of the European Union owing to a lack of legislative action on the part of the latter.

29. In those circumstances, the referring court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does the exclusive competence that the European Union, pursuant to Article 2(1) TFEU, in conjunction with Article 3(1)(c) TFEU, enjoys in the area of monetary policy for the Member States whose currency is the euro preclude a legal act of one of those Member States that provides for an obligation on the part of public authorities of the Member State to accept euro banknotes in the fulfilment of statutorily imposed payment obligations?

(2) Does the status as legal tender of banknotes denominated in euro, as established in the third sentence of Article 128(1) TFEU, the third sentence of [the first paragraph of Article 16] of the [Statute of the ESCB and of the ECB], and the second sentence of Article 10 of [Regulation No 974/98] contain a prohibition precluding public authorities of a Member State from refusing fulfilment of a statutorily imposed payment obligation in such banknotes, or does EU law leave room for provisions that exclude payment in euro banknotes for certain statutorily imposed payment obligations?

(3) If the first question is answered in the affirmative and the second question is answered in the negative:

Can a legal act of a Member State whose currency is the euro which is adopted in the context of the European Union’s exclusive competence in the area of monetary policy be applied to the extent to which, and for so long as, the European Union has not made use of its competence?’

III. Legal analysis

A. Preliminary observations

30. As mentioned in the introduction, this request for a preliminary ruling raises sensitive issues concerning the scope of the European Union’s exclusive competence in the area of monetary policy, and thus the division of competences between the European Union and the Member States and how their respective competences are exercised. More specifically, it touches on the difficult question of the possibility for Member States in the euro area to adopt measures restricting the use of cash and the limits on those measures. This case also concerns the interpretation of complex and undefined concepts of monetary law on which the Court has not yet had the opportunity to rule.

31. Therefore, it is worth clarifying at the outset the scope of certain key concepts in order to be able to answer the questions referred by the national court. I will begin by making several points about the European Union’s exclusive competences within the framework of the categorisation of competences formalised by the Treaty of Lisbon (Section B). I will then address the question of the scope of the exclusive competence conferred on the European Union in the area of monetary policy, examining whether it includes a regulatory dimension relating to monetary law (*lex monetae*; Section C). Next, I will analyse the scope of the concept of ‘legal tender’ in EU law, and in particular the scope of legal tender in the context of banknotes and coins. In this respect, I will examine the possibility of adopting legislation that restricts the use of cash and the limits on that possibility (Section D). Lastly, in the light of the points covered, I will answer the questions referred to the Court by the national court (Section E).

B. Exclusive competences of the European Union

32. It is widely recognised that to bring more clarity to the system of competences of the European Union, (9) the Treaty of Lisbon introduced for the first time in primary law – right at the beginning of the TFEU (10) – rules on the different categories of competences conferred on the Union (Article 2 TFEU), as well as a detailed list of the different areas in which competences have been conferred on the Union (Articles 3 to 6 TFEU).

33. The initial provisions of the TFEU on the division of competence, which reflect and, to a large extent, codify the previous case-law of the Court, deal with the constitutional issue of the division of powers between the Union and its constituent Member States, which is based on the principle of conferral enshrined in Article 5(1) and (2) TEU (and in Article 4(1) TEU), in the light of which those provisions must be interpreted. The aim is to clarify, at the level of primary law, the respective areas of competence of the European Union, on the one hand, and its constituent, still sovereign, Member States, on the other, the objective being to strike a balance between them. (11)

34. To that end, the initial provisions of the TFEU divide the competences of the European Union, depending on their relationship with those of the Member States, into 'exclusive competences' (Article 2(1) and Article 3 TFEU), 'non-exclusive competences', made up, more specifically of shared competences (Article 2(2) and Article 4 TFEU), and supporting competences, intended to support, coordinate or complement the actions of the Member States (Article 2(5) and Article 6 TFEU). (12)

35. It also follows from Article 2(6) TFEU that, in practice, the scope of and arrangements for exercising the competences conferred on the Union, whether exclusive or non-exclusive, are determined by the provisions of the Treaties relating to each area.

36. Specifically with regard to *exclusive competences*, Article 2(1) TFEU provides that when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts. Member States may do so themselves only if so empowered by the Union or for the implementation of Union acts.

37. As regards *non-exclusive competences*, however, Article 2(2) TFEU states that when the Treaties confer on the Union a competence shared with the Member States in a specific area, both the Union and the Member States may legislate and adopt legally binding acts in that area. However, the Member States exercise their competence only to the extent that the Union has not exercised its competence and may again exercise their competence only to the extent that the Union has decided to cease exercising its competence. As regards supporting competences within the meaning of Article 2(5) TFEU, when the Union has competence to carry out actions to support, coordinate or supplement the actions of the Member States in certain areas, that competence does not supersede that of the Member States in those areas.

38. It is clear from the rules on the competences of the Union codified by the Treaty of Lisbon that, unlike the conferral of non-exclusive competences, when competence is conferred on the Union exclusively, Member States *immediately and irreversibly* lose all rights in relation to the area of competence conferred on the Union. The conferral of exclusive competence on the Union deprives the Member States of any competence in the area in question and any legislative action of the Member States in that area is therefore a priori in conflict with the Treaties.

39. The loss of competence by the Member States occurs *immediately* in the sense that, unlike the conferral of shared competence, (13) it does not matter whether the Union has exercised its competence for the Member States to lose their rights in the area of competence conferred on the Union exclusively.

40. This loss is *irreversible*, in the sense that only a formal amendment to the Treaties can alter the exclusive nature of the conferral of competence on the Union by devolving competences to the Member States in an area of exclusive competence of the European Union.

41. The immediacy and irreversibility of the loss of national competences in areas of exclusive competence of the European Union are, moreover, intrinsically linked to the function, as recognised by the

Court, of the exclusive nature of the conferral of competence on the Union. This makes it possible to substitute, for the unilateral action by the Member States in the area in question, a common action based upon uniform principles on behalf of the entire European Union, in order to defend the common interests of the Union, within which the particular interests of the Member States must endeavour to adapt to each other. (14)

42. Exceptions to the constitutionally exclusive nature of a competence conferred on the European Union must derive from primary law. In this sense, under the second sentence of Article 2(1) TFEU, there are only two cases in which Member States may legislate and adopt legally binding acts in an area of exclusive competence of the European Union: if they have been authorised by the Union or to implement Union acts.

43. Regarding the possibility for the Union to authorise Member States to adopt legislative acts in areas of exclusive Union competence, Article 2(1) TFEU determines neither the arrangements nor the scope of the authorisation. Moreover, it is clear from the case-law of the Court prior to the adoption of the Treaty of Lisbon that legislative acts of the Member States in areas of exclusive competence of the European Union are permissible only by virtue of 'specific' authorisation by the Union. (15) Furthermore, in order to be compatible with the constitutional configuration of the abovementioned competences, such authorisation can only be limited in nature and cannot lead to a permanent change in the division of competences between the Union and the Member States resulting from said configuration. (16)

44. In this respect, it is also worth noting that, under the rules governing the exclusive competences of the Union, the inaction of the Union legislature in an area of exclusive competence cannot in any case restore to the Member States the power and freedom to act unilaterally in that field. (17) Even in the absence of appropriate action on the part of the Union legislature in an area of exclusive competence and where the adoption of measures is necessary, specific authorisation will always be required for a Member State, which may henceforth act only as a trustee of the common interest, to be able to bring into force measures, even if only interim conservation measures, in an area within the exclusive competence of the Union. (18)

45. Although the system formalised by the Treaty of Lisbon provides a detailed categorisation of competences, in practice it may not be easy to pinpoint the exact boundaries between areas of Union competence and areas of competence left to the Member States, particularly in situations where there is interference between those areas of competence. These points seem particularly relevant, as is clear from the case-law of the Court, in the context of Economic and Monetary Union, (19) which, as I have already observed, is governed by its own institutional equilibrium. (20)

46. Moreover, as scholars of federal systems will know, interference between the exercise of competences devolved to different levels of government or of overlapping competences is common in multi-level government systems, even where there is a clear distinction/separation of competences between the federal state and the other state units, according to 'dual federalism' models, through constitutional catalogues that carefully distinguish between the competences of the federal state and those of the other state units.

47. Within the legal order of the Union, in situations of this kind, the main problem is to find ways of coordinating the (exclusive) sphere of competence of the Union and the exercise of the powers left to the Member States. In these cases, two different requirements need to be balanced: first, to avoid interference with EU law that would undermine its effectiveness when state powers are exercised; second, to allow Member States some discretion in governing cases outside the competences conferred on the Union.

48. This balancing act can be achieved in different ways – while still respecting the Treaties and the respective roles assigned to each actor – depending on the nature and type of legal positions provided for under EU law which come into contact with the exercise of national competences. It should, however, be guided by the principle expressed by the Court that 'whilst European Union law does not detract from the

power of the Member States … the fact remains that, when exercising that power, Member States must comply with European Union law'. (21)

C. The scope of the Union's competences with regard to monetary policy

49. The questions referred to the Court by the national court, and particularly the first and second questions, require clarification regarding the scope of the Union's exclusive competence in the area of monetary policy. These questions require a determination of whether, and if so to what extent, the adoption of monetary law provisions relating to the euro falls within the European Union's exclusive competence in the area of monetary policy, such that, in accordance with the principles mentioned in points 37 to 44 above, any regulatory action by Member States in this field should be excluded unless they are specifically authorised by the Union.

50. First, it should be noted that, under Article 3(1)(c) TFEU, the European Union has exclusive competence in the area of monetary policy for the Member States whose currency is the euro. (22)

51. The competences conferred on the Union in the area of monetary policy fall within the framework of the Economic and Monetary Union, the currency of which is the euro, established in accordance with Article 3(4) TEU.

52. Those competences are recognised in Part Three, Title VIII TFEU (Articles 119 to 144 TFEU) concerning economic and monetary policy, and more specifically in Chapter 2 of that title (Articles 127 to 133 TFEU) concerning monetary policy in particular.

53. In this respect, it should be noted that the Court has already found that the TFEU contains no precise definition of monetary policy but defines both the objectives of monetary policy and the instruments available to the ESCB for the purpose of implementing that policy. (23)

54. As the Court observed, under Article 282(1) TFEU, the ECB and the central banks of the Member States whose currency is the euro, which constitute the Eurosystem, are competent to conduct the monetary policy of the Union. Under Article 282(4) TFEU, the ECB adopts such measures as are necessary to carry out its tasks in accordance with Articles 127 to 133 and Article 138 TFEU and the conditions laid down in the Statute of the ESCB and of the ECB. (24)

55. The Court also noted that, in order to determine whether a measure falls within the area of monetary policy, it is appropriate to refer principally to the objectives of that measure. The instruments that the measure employs in order to attain those objectives are also relevant. (25)

56. It is in this context that the scope of the Union's exclusive competence in the area of monetary policy needs to be clarified.

57. In this respect, it follows from a textual, systematic and teleological analysis of the relevant provisions of the Treaties that the concept of monetary policy (*Währungspolitik*, in German), which, under Article 3(1)(c) TFEU, falls within the exclusive competence of the Union for the Member States whose currency is the euro, must be understood to mean that it is not limited to the definition and conduct of monetary policy in operational terms (monetary policy in the strict sense; *Geldpolitik*, in German), within the meaning of the first indent of Article 127(2) TFEU. Rather, it must be understood in the broad sense, in that it also includes a regulatory dimension relating to the single currency, which includes provisions of monetary law. (26)

58. Therefore, preliminary consideration should be given to Article 119 TFEU, the opening provision of Title VIII on economic and monetary policy, which plays an important systematic role in this respect. It follows from the structure of that provision that, while paragraph 1 sets out, in general terms, the criteria to be followed with regard to action by the Member States and the Union in the field of economic policy

(developed in Chapter 1), paragraph 2 concerns action by the Member States and the Union in the area of monetary policy (*Währungspolitik*), developed in Chapter 2.

59. Under Article 119(2) TFEU, the activities of the Member States and the Union include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy. (27) It follows from this provision that this action comprises three elements: a single currency (the euro); the definition and conduct of a single monetary policy (understood in the operational sense as *Geldpolitik*); and the definition and conduct of a single exchange-rate policy.

60. In my view, it follows from this provision that the Union's competences in the area of monetary policy, which are included in Chapter 2 of Title VIII, cannot be understood in the strict sense as being limited only to the definition and conduct of monetary policy in operational terms (*Geldpolitik*), but must also include exclusive competence relating to the single currency, in other words the euro (and exchange-rate policy). Furthermore, the reference to the singleness of the currency contained in Article 119(2) TFEU presupposes the conferral on the Union of exclusive competence, which, to be able to guarantee this singleness, must include the power to govern the regulatory aspects of the currency itself, and must therefore include monetary law.

61. This interpretation is, moreover, confirmed by the provisions of Chapter 2 of Title VIII on monetary policy, in the light of which, under Article 2(6) TFEU, the scope of the exclusive competences of the Union in the area of monetary policy (*Währungspolitik*) must be determined.

62. That chapter includes Article 128 TFEU, which deals, in paragraph 1, with the issue of euro banknotes within the Union, their status of legal tender and, in paragraph 2, the issue of coins.

63. It also includes Article 133 TFEU, which explicitly empowers the Union legislature to lay down the legislative measures necessary for the use of the euro as the single currency. (28)

64. The existence of these provisions in that chapter and the inclusion of the competences provided for therein within the exclusive competence conferred on the Union in the area of monetary policy are, moreover, necessary to guarantee the singleness of the single currency (namely, the euro).

65. The competence to issue and authorise the issue of euro banknotes and to regulate the issue of euro coins, the competence to define the status of legal tender and the competence to issue the measures necessary for the use of this currency underpin the unique character of the euro currency and are also a precondition for the conduct of a single monetary policy.

66. The absence of exclusive competence for the Union in these areas would mean that each Member State of the euro area could adopt a different approach to the single currency. This would obviously call into question the singleness of the euro as a currency of economic and monetary union, and could jeopardise the effectiveness of the operational monetary policy conducted by the ESCB and the measures taken to that end.

67. In line with point 41 above, the conferral of exclusive competence on the Union in relation to these aspects of the single currency reflects the need to establish uniform principles in this area for all Member States whose currency is the euro, in order to defend the common interests of the Economic and Monetary Union and the euro as the single currency. The creation of a single currency for the Member States of the euro area and its proper functioning presuppose the total, complete and exclusive transfer of their monetary sovereignty to the Union, within the framework of the Economic and Monetary Union which it established.

68. It should be considered therefore that the exclusive competence of the Union laid down in Article 3(1)(c) TFEU includes all the powers and competences necessary for the creation and proper functioning of the single currency, the euro.

69. With regard to the status of legal tender more specifically, as will be explained in more detail in the next section, this has to do with the official nature of the single currency in the euro area, preventing other currencies from qualifying for it. The definition and regulation of the status of legal tender are thus key to ensuring the single nature of the euro as the currency of the Member States in the euro area. It is no coincidence that legal tender, which is a concept of public law, and more precisely monetary law, (29) was mentioned at the level of EU primary law in the third sentence of Article 128(1) TFEU, the interpretation of which I will come back to shortly.

70. Accordingly, I must conclude that the European Union's exclusive competence in the area of monetary policy for the Member States whose currency is the euro within the meaning of Article 3(1)(c) TFEU must be understood as encompassing all the competences and powers necessary for the creation and proper functioning of the single currency, the euro, including a regulatory dimension relating to that single currency, which includes the definition and regulation of its status as legal tender.

71. That said, in line with the comments made in points 45 to 48 above, the exercise of this competence by the Union must necessarily take into account the need to strike a fair balance with the exercise by the Member States of the competences that are left to them, including, in this area, those under civil law regarding the fulfilment of obligations, those relating to the organisation and functioning of public administrations, and those concerning matters of tax and criminal law.

D. The concept of legal tender

72. Having clarified that the European Union's exclusive competence in the area of monetary policy includes a regulatory dimension relating to the single currency, including the definition and regulation of its status as legal tender, in order to answer the questions raised by the referring court, it is necessary to determine the scope in EU law of the concept of legal tender, particularly as regards euro banknotes.

73. To that end, however, several preliminary points must be made regarding the single currency.

1. Preliminary points regarding the single currency

74. As has already been pointed out, under Article 3(4) TEU, the euro is the currency of the Economic and Monetary Union instituted by the European Union. Several provisions of the Treaties, notably Article 119(2) and Article 133 TFEU, (30) define the euro as 'the single currency'. The second sentence of Article 282(3) TFEU also refers to the euro as such.

75. The EU legislature – like many, if not all, national legislatures – does not provide a definition of the concept of currency. (31)

76. In the substantive law of the Union, the concept that appears to be the closest to the concept of currency is that of 'funds', as provided for in Directive (EU) 2015/2366 on payment services. (32) Under that directive, the harmonised framework for payment services is concerned with the transfer of 'funds', a concept for which not even the directive gives a precise legal definition. However, Article 4(25) of that directive provides a list of the 'funds' that may be the subject of payment services, indicating that they consist of 'banknotes and coins, scriptural money or electronic money' as defined in Directive 2009/110/EC. (33)

77. In economic theory, a functional definition of money – understood in the more general sense of 'money' or 'Geld' (34) – tends to be used which, according to a concept dating back to Aristotle, (35) reveals the three functions it serves, namely: (i) a unit of account; (ii) a means of payment (or exchange); and (iii) a store of value.

78. From a legal point of view, it seems that this economic definition must be supplemented by elements arising from the state theory of money, (36) in the sense that money is a creation of the State or,

in the case of the euro, of the Economic and Monetary Union, and that its existence can only be understood within a given legal system.

79. From a historical point of view, the nature of money has evolved over time. (37) Nowadays, modern economies, including the Economic and Monetary Union, are based on 'fiat money'. This is money that is declared legal tender and issued by a central bank, but which cannot be converted into, for example, a fixed weight of gold. (38)

80. As can be seen, moreover, from the concept of funds mentioned earlier, money – represented in the Economic and Monetary Union by the single currency, the euro – as such exists either in physical form, as banknotes and coins (in other words, cash), or in scriptural or electronic form (for example, as the balance of a bank account). Money – and thus the euro, in the euro area – exists and circulates in the economy in different forms.

81. Historically, the most important form of money has been the physical form of cash (banknotes and coins), the ultimate expression of the monetary sovereignty of the State. As recent data show, cash still plays an important role in the economy, within the euro area as a whole. A recent study published by the ECB (39) shows that in numerical terms, cash accounts for some 79% of Europeans' daily payments and around 54% of their value in the European Union. This is particularly true for small denomination payments, as only 10% of the cash transactions analysed relate to goods or services with a value of more than EUR 100. The study also shows very different habits and preferences in the various Member States.

82. As that study clearly shows, and as the ECB itself confirmed at the hearing, cash still plays an important role in the euro area economy and thus the advent of a cashless society does not seem as imminent as some people like to think (in Europe, at least). However, this does not detract from the fact that the process of economic modernisation and, even more recently, technological progress have resulted in the creation of other non-physical forms of money which have become increasingly relevant over time (40) and are destined to become even more important in the future. (41) In recent years, technological innovation has become so rapid and disruptive that it could potentially revolutionise the financial sector, even threatening monetary sovereignty (both national and of the European Union, in the euro area).(42) It therefore comes as no surprise that, as in other major global economies, (43) there has been an EU-level debate on the possibility of introducing a central bank digital currency (CBDC), (44) which potentially could have a significant impact both on the European monetary and financial system and on the international role of the euro. (45)

83. In any event, no matter what form it takes (physical, cash or non-physical), money – represented in the euro area by the single currency, the euro – exists and can, in all its forms, serve the abovementioned three functions, including, for the purposes of the present case, as a means of payment. (46)

84. In the light of these points, especially in relation to the latter function, it is necessary to examine how the Union has exercised its exclusive competence regarding the single currency, mentioned in the previous section, specifically regarding the determination of legal tender.

2. The exercise by the Union of its exclusive competence on legal tender

85. In exercising its exclusive competence, the EU legislature has governed certain legal aspects of the single currency, but has not adopted comprehensive and exhaustive rules in this area.

86. Regarding legal tender in particular, the relevant provisions of EU law are, at the level of primary law, the third sentence of Article 128(1) TFEU, which is incorporated into the third sentence of the first paragraph of Article 16 of the Statute of the ESCB and of the ECB, and, at the level of secondary law, Regulation No 974/98, and in particular Articles 10 and 11 thereof.

87. These provisions concern the issue of banknotes and coins and their status as legal tender, but do not provide a precise definition of the concept of legal tender. This oversight is no accident, given the

sensitivity of the issue and the difference in the approach taken by the various Member States concerned. (47)

88. In the light of the observations made in points 59 to 70 above, the concept of legal tender is, in my view, a monetary law concept specific to EU law, which, as such, must be given an independent and uniform interpretation throughout the Union. (48)

89. In this respect, I note that, although the EU legislature has not provided a precise definition of the concept of legal tender, it remains free to do so at any time by defining the exact meaning to be given to that concept in law.

90. Furthermore, it should be reiterated that, since the determination of the scope of that concept falls within the exclusive competence of EU law, the Member States – which, as mentioned in points 38 to 44 above, have lost all rights in that respect – are precluded from enacting legislative provisions which, in view of their objective and content, govern the status of legal tender, even in the event of inaction on the part of the EU legislature. The Member States whose currency is the euro no longer have any competence to determine the concept of legal tender.

91. As regards specifically the provision that confers the status of primary law concept on legal tender, namely Article 128(1) TFEU,, the first two sentences of that provision state that the ECB has the exclusive right to authorise the issue of euro banknotes within the Union and that the ECB and the national central banks may issue such notes. (49) The third sentence of paragraph 1 states that the banknotes issued by the ECB and the national central banks shall be the only such notes to have the status of legal tender within the Union.

92. This provision, which reproduces Article 106 EC verbatim but does not precisely define the concept of legal tender, is of the utmost importance.

93. First, it is an expression of the sovereign power conferred exclusively on the Union, by the Member States whose currency is the euro, to define which good or instrument (tangible or non-tangible) has the status of legal tender in the euro area.

94. Second, it fundamentally serves as a guarantee. As rightly pointed out by the Federal Republic of Germany, it is designed to create a ‘monopoly’ for the ECB and the national central banks to issue banknotes that have the status of legal tender, prohibiting, at a constitutional level, the creation by any other entity, whether public or private, of banknotes or other forms of parallel currency that could be considered legal tender. (50)

95. Third, this provision guarantees the very existence of euro banknotes at a constitutional level, which suggests that their complete abolition would be contrary to EU law.

96. However, it does not follow, in my view, from Article 128(1) TFEU or from any other rule of EU law, that the constitutional legislature of the Union intended to exclude the possibility for the Union to assign, alongside euro banknotes (and coins), (51) the status of legal tender to other forms of currency that are not necessarily physical. (52) The sovereign power of the Union to define legal tender includes the power to determine, at its discretion and in compliance with EU law, the instrument or instruments which have the status of legal tender in the euro area. (53)

97. In that context, it should also be noted that, although the Union has not explicitly assigned the status of legal tender to forms of currency other than cash, it has nevertheless comprehensively regulated payment services (in Directive 2015/2366) and the issue of electronic money (in Directive 2009/110) within the framework of internal market regulation. In this context, the Union itself has favoured the use of electronic means of payment. (54) This comprehensive framework aimed at ensuring the security of payments with scriptural and electronic money has contributed, in view of the security and proliferation of these means of payment, to a reduction in the use of cash. (55)

98. Nevertheless, it should also be noted that, while the exclusive competence conferred on the Union with regard to the single currency allows it to determine the concept of legal tender – which, as will be seen in the next section, directly concerns the use of money as a means of settling monetary debts – that exclusive competence does not go so far as to include a general competence to regulate the procedures for settling pecuniary obligations, whether under private law or public law, which has been left to the Member States. Accordingly, there is a need to coordinate, in the sense conveyed in points 45 to 48 and 71 above, the European Union's exclusive competence for the definition of legal tender with that of the Member States, both in civil law, with regard to the settlement of monetary debts of a private nature, the organisation and functioning of public and tax administrations, and the discharge of pecuniary obligations of a public nature, and in criminal law, with regard to the interrelationship between the circulation of money and the fight against crime.

3. The concept of legal tender in EU law as regards euro banknotes

99. To answer the questions referred by the national court, it is necessary to determine the scope of the concept of legal tender as regards euro banknotes, even in the absence of a precise definition of the concept of legal tender from the EU legislature exercising its exclusive competence in the matter. Since this is a concept of EU law, it is for the Court to determine, by way of interpretation, the scope of that concept as the law currently stands. (56)

100. Despite the absence of a precise definition, EU law provides some guidance on interpretation which enables the concept of legal tender in relation to euro banknotes and coins to be outlined in EU law. This guidance consists of, on the one hand, Recommendation 2010/191/EU and, on the other, recital 19 of Regulation No 974/98.

101. As regards the first guidance, namely Recommendation 2010/191/EU, that recommendation specifically concerns the scope and effects of legal tender of euro banknotes and coins. As is apparent from recital 4, it is based on the main conclusions of a report prepared by a working group, set up under the aegis of the Commission and the ECB, consisting of representatives from Ministries of Finance and National Central Banks of the Member States of the euro area.

102. In its order for reference, the national court explicitly questions the scope of that recommendation.

103. In this respect, it should be noted that, according to the settled case-law of the Court, even if, under Article 288(5) TFEU, recommendations are not intended to produce binding effects and are not capable of creating rights that individuals can rely on before a national court, they are not completely without legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding EU provisions. (57)

104. The Court has also recognised that where a document, as in the case of Recommendation 2010/191/EU, has been drawn up by a group of national experts and the Commission's services, it may provide useful information for the interpretation of the relevant provisions of EU law and therefore contribute to ensuring that they are applied uniformly. (58)

105. Recommendation 2010/191/EU thus provides valuable guidance on interpretation for the purpose of determining the content of the concept of legal tender in relation to euro banknotes and coins in EU law, particularly since it is based on the report drawn up by the working group of representatives of the Member States of the euro area.

106. It follows from the common definition of legal tender as regards euro banknotes and coins contained in paragraph 1 of that recommendation that, where a payment obligation exists, the status of legal tender of euro banknotes and coins should imply three things: first, mandatory acceptance; second, acceptance at full face value; and third, the power to discharge from payment obligations.

107. With regard to mandatory acceptance more specifically, paragraph 1(a) of Recommendation 2010/191/EU states that the creditor of a payment obligation cannot refuse euro banknotes and coins unless the parties have agreed on other means of payment.

108. It must be concluded, therefore, in view of the definition of legal tender contained in Recommendation 2010/191/EU, that the concept of legal tender in EU law, as regards banknotes and coins, entails a general obligation in principle of acceptance of cash by the creditor for the settlement of the monetary debt, but that this obligation is not absolute, as itmay be waived in accordance with the contractual freedom of the parties.

109. As the Commission rightly points out, it should be stressed that there was unanimous support for this definition within the working group composed of the representatives of the various Member States. (59) Accordingly, a concept of legal tender such as the one outlined above may be considered a concept common to the legal order of the Member States in the euro area.

110. As the law currently stands, however, the independent concept of legal tender in EU law must also be interpreted in the light of the other guidance on interpretation, namely recital 19 of Regulation No 974/98.

111. It is clear from that recital that any limitations on payments in notes and coins, established by Member States for public reasons, are not incompatible with the status of legal tender of euro banknotes and coins, provided that other lawful means of payment for the settlement of monetary debts are available.

112. Before analysing the influence of that recital on the concept of legal tender in EU law, it is necessary to clarify the value to be attributed to a recital in a legal act of the Union, which was discussed at the hearing.

113. According to the case-law of the Court, the preamble of an EU act may explain the content of the provisions of that act and the recitals of an EU act constitute important elements for the purposes of interpretation, which may clarify the intentions of the author of that act. (60)

114. It follows that, although a recital does not in itself constitute a legal rule and thus has no binding legal force of its own, it may cast light on the interpretation to be given to a legal rule or concept provided for in the act in which it is contained. (61)

115. It is apparent from that case-law that recital 19 of Regulation No 974/98, contained in a legislative act which governs the status of legal tender of euro banknotes and coins – the second sentence of Article 10 and the second sentence of Article 11, respectively – provides qualified guidance on interpretation which, as such, must be taken into consideration when determining the exact scope of the uniform concept of legal tender in EU law. This concept is used both in Regulation No 974/98 and in primary law in the third sentence of Article 128(1) TFEU, as reproduced in the third sentence of the first paragraph of Article 16 of the Statute of the ESCB and of the ECB. (62)

116. It follows from that recital that, although the concept of legal tender is not precisely defined as regards banknotes and coins, the EU legislature has recognised that there is some room for manoeuvre in pursuit of the public interest, (63) not necessarily limited to public policy. (64) Therefore, not only individual freedom, but even more importantly, the pursuit of the public interest may justify a waiver of the (non-absolute) mandatory acceptance by creditors of euro banknotes and coins which have the status of legal tender for the settlement of pecuniary obligations.

117. The pursuit of the public interest is a matter both for the Union and the Member States in their respective areas of competence.

118. As far as the Union is concerned, in exercising its powers other than those relating to monetary policy, it has already adopted, in pursuit of the public interest, certain rules which, although they do not, in view of their objective and content, (65) seek to govern the legal tender status of euro banknotes and coins,

nevertheless have an impact on the use of cash as a means of payment. In this respect, the Commission cites the Anti-Money Laundering Directive (66) and the legislation on controls on cash entering or leaving the Union. (67)

119. In the same vein, I believe that, as recognised in recital 19, in exercising their powers Member States may, for public reasons, adopt measures that, in view of their objective and content, do not constitute rules on the legal tender status of the euro, but nonetheless govern the discharge of obligations of a private or public nature, limiting, in specific conditions and within certain limits, the use of cash for the payment of such obligations. Such legislation must be considered, within the limits set out in the following section, as compatible with the uniform concept of legal tender in EU law as regards euro banknotes and coins. (68) This compatibility can be inferred from the very concept of legal tender in EU law, as it stands at present.

120. Such an interpretation of the concept of legal tender resulting from the current guidance on interpretation in EU law is not contrary to the systemisation of the Union's competences, as set out in Section B of this Opinion, and does not conflict with the concept of exclusive Union competence outlined therein.

121. It is not in any way apparent from this interpretation that the Member States have the legislative power to govern the status of legal tender of euro banknotes or coins, a concept that comes under monetary policy in the broad sense and is thus the exclusive competence of the European Union.

122. More specifically, recital 19 of Regulation No 974/98 does not by any means constitute specific authorisation within the meaning of Article 2(1) TFEU, as discussed in points 42 and 43 above. Apart from anything else, from a formal point of view, I seriously doubt whether such authorisation can be contained in a recital of a legislative act, rather than in a legislative provision of that act. In any event, it cannot be inferred from that recital that the Member States are authorised to enact provisions governing legal tender. National legislation that, by its objective and content, constitutes a set of rules on legal tender would encroach on the exclusive competence of the European Union.

123. That recital simply acknowledges the fact that it is conceivable that legislation adopted by the Member States in exercising their sovereign powers – for example, in civil law with regard to the discharge of obligations, or the organisation of their public administration, or in fiscal matters, or to combat crime – that are not devolved to the Union may touch on, and interfere with, the concept of legal tender as regards banknotes or coins. As qualified guidance on the interpretation of the concept of legal tender, it recognises that, although Member States cannot define the concept of legal tender, legislation adopted by them – in exercising their powers and subject to the conditions and within the limits discussed in detail in the next section – which restricts the use of cash as a means of payment is not incompatible with the concept of legal tender in EU law as regards euro banknotes.

124. To conclude, it is clear from the foregoing that, as EU law currently stands, the concept of legal tender as regards banknotes and coins must be understood as entailing an obligation in principle for the creditor of a payment obligation to accept banknotes and coins, unless the contracting parties exercise their contractual freedom to agree on other means of payment, or unless the legislation adopted by the Union or by a Member State in exercising their respective competences, which by its objective and content does not constitute a set of rules on legal tender, imposes limitations on payments in banknotes for public reasons.

125. The concept of legal tender thus means that euro banknotes and coins constitute means of payment by default: (69) they must be accepted unless otherwise agreed independently by the parties or unless otherwise provided by regulations restricting their use as a means of payment for public reasons.

4. Conditions and limits on restrictions on the use of cash

126. The question of the conditions under which, and the limits within which, the Union and the Member States may, in exercising their respective competences, adopt rules imposing limitations on the use of cash as a means of payment still needs to be addressed.

127. First, it follows from points 93 to 95 above that legislation that could lead, in law or in fact, to the complete abolition of euro banknotes or which could render ineffective the status of legal tender of euro banknotes must be regarded as incompatible with the third sentence of Article 128(1) TFEU.

128. Second, as explicitly recognised in the text of recital 19 of Regulation No 974/98, in order to be compatible with the concept of legal tender in EU law as regards banknotes and coins, legislation that imposes limitations on the use of cash as a means of payment must be established for public reasons, which, as explained above, are not necessarily linked to public policy, (70) and may be adopted only if other lawful means for the settlement of monetary debts are available.

129. Third, I believe that legislation adopted in exercising competences other than those of monetary law, which, in pursuit of the public interest, restrict the use of cash as a means of payment, should impose a restriction proportionate to the objective pursued.

130. In that regard, it should be recalled that, according to settled case-law, the principle of proportionality is one of the fundamental principles of EU law. This requires that the measures be appropriate for attaining the legitimate objectives pursued by the legislation at issue and not go beyond what is necessary in order to achieve those objectives. (71) Thus, when there is a choice between several appropriate measures, recourse must be had to the least onerous.

131. The principle of proportionality, as a principle that restricts authorities in the exercise of their powers by requiring a balance to be struck between the measures adopted and the objective pursued, affects both the content and form of the action of the Union in exercising its competences, as explicitly set out in Article 5(4) TEU, and the action of Member States, where such action, carried out in the exercise of their own competences, touches on or interferes with legal situations governed by EU law. (72)

132. A restriction on the use of cash as a means of payment should be appropriate therefore for attaining the public interest objective pursued and not go beyond what is necessary in order to achieve that objective.

133. In that regard, it should also be noted that, as is clear from the concept of legal tender outlined in the previous section, the Union does not provide for an absolute right to payment in cash in all cases. Even if it is accepted that EU law gives rise to a subjective position in which cash can be used for payments with the effect of releasing the debtor – a position that has, moreover, been contested by the Federal Republic of Germany – it would still be, as the Commission pointed out at the hearing, a subjective position which certainly does not feature in the catalogue of fundamental rights guaranteed by EU primary law.

134. The status of legal tender given to cash may be linked to the exercise of certain fundamental rights, although in my opinion this link is indirect. Indeed, while there is no doubt that cash may be used to exercise certain fundamental rights linked to the use of money, its use is not generally necessary for the enjoyment of those fundamental rights, which can be achieved through the use of forms of money or means of payment other than cash. (73)

135. However, a direct link between cash and the exercise of fundamental rights does exist in cases where there is a social inclusion element of the use of cash. The use of money other than in its physical form (namely, cash) currently requires an account that allows payment transactions to be executed, held with a credit institution or a financial institution of a similar nature.

136. Although Directive 2014/92/EU (74) has recognised that anyone legally resident in the European Union has the right to open a payment account with basic features in any country of the European Union – an account that must include the execution of payment transactions such as credit transfers and direct debits within the European Union – and although that directive explicitly seeks to encourage unbanked vulnerable consumers to participate in the retail banking market, (75) recent data show that the number of people who do not yet have access to basic financial services in the European Union and the euro area, while being a minority, is not insignificant. (76)

137. For these vulnerable individuals, cash is the only form of accessible money and thus the only means of exercising their fundamental rights linked to the use of money.

138. Measures restricting the use of cash as a means of payment should therefore take into account the social inclusion element of cash as a means of payment for those vulnerable people and should ensure the effective existence of other lawful means for the settlement of monetary debts, as mentioned in recital 19 of Regulation No 974/98. This social inclusion element must also be taken into account when analysing the proportionality of those measures. More specifically, I believe there is an obligation to take appropriate measures to enable vulnerable people who do not have access to basic financial services to discharge their obligations, particularly those of a public nature, without additional costs.

139. In this context, it is for the ECB, in view of its power of consultation provided for in Article 127(4) and Article 282(5) TFEU and, in the case of draft national legislative provisions, in Council Decision 98/415, (77) to analyse the compatibility of measures restricting the use of cash as a means of payment – adopted in the exercise of powers other than those of the Union, in the area of monetary law – with the requirements arising from the concept of legal tender specific to EU law as outlined in the previous section, as well as compliance with the conditions and limits referred to in this section. It is potentially for the Commission, as guardian of the Treaties, in the context of infringement proceedings, and for the national courts and the Court of Justice, to ensure that those requirements, conditions and limits are met.

E. The questions referred

140. In the light of the legal framework outlined in the previous sections and the points made therein, I will now answer each of the questions referred by the national court.

1. The first question referred

141. By means of its first question referred for a preliminary ruling, the national court asks whether the exclusive competence that the European Union, pursuant to Article 2(1) TFEU, in conjunction with Article 3(1)(c) TFEU, enjoys in the area of monetary policy for the Member States whose currency is the euro precludes the adoption of a legal act of one of those Member States that provides for an obligation on the part of public authorities of the Member State to accept euro banknotes in the fulfilment of statutorily imposed payment obligations.

142. As noted in points 23 to 25 of this Opinion, it is apparent from the order for reference that the national court referred the first question to the Court in relation to the provision contained in the second sentence of Paragraph 14(1) of the BBankG. The referring court queries whether, to the extent that that provision of national law can be regarded as governing the legal consequences of the status of legal tender of euro banknotes, it may be incompatible with the conferral of exclusive competence on the European Union in the area of monetary policy, as provided for in Article 3(1)(c) TFEU.

143. In this respect, it follows from points 57 to 70 above that the exclusive competence conferred on the European Union with regard to monetary policy within the meaning of Article 3(1)(c) TFEU includes, within the framework of the powers necessary for the creation and functioning of the single currency, a legislative dimension relating to that single currency, which comprises the definition and regulation of its status and legal tender. As noted in points 90 and 122 above, it follows that, in accordance with the principles for the division of competences between the European Union and the Member States set out in points 38 to 44 above, Member States in the euro area do not have any competence in this respect and so cannot adopt legislation which, by its objective and content, governs the status of legal tender of the euro and, more specifically, euro banknotes.

144. In practice, it is for the referring court, which alone is competent to determine the exact scope of the national legislation, to establish whether the second sentence of Paragraph 14(1) of the BBankG constitutes legislation which, by its objective and content, lays down rules on the status of legal tender of euro banknotes.

145. In this respect, however, I consider the following points to be relevant.

146. It should be recalled that the second sentence of Paragraph 14(1) of the BBankG states that banknotes denominated in euro are the sole unrestricted legal tender.

147. It must be concluded, therefore, that the wording of that provision does not confine itself to reproducing word for word, but instead departs from, the wording of the third sentence of Article 128(1) TFEU.

148. First, the qualification of legal tender as 'unrestricted' does not appear at all in the provision of EU law.

149. Furthermore, whereas the provision of EU law states that euro banknotes are the only *banknotes* that have the status of legal tender ([*Euro*]*Banknoten sind die einzige Banknoten, die in der Union als gesetzliches Zahnlungsmittel gelten*), the national provision expresses the concept that euro banknotes are the only instrument, the only means of payment, (78) with the status of unrestricted legal tender ([Euro]*Banknoten sind das einzige unbeschränkte gesetzliche Zahlungsmittel*). This difference in the wording of the provisions reflects their different objectives. As noted in point 92 et seq. above, the EU provision is essentially aimed at providing a guarantee, fundamentally seeking to ensure that the ECB and the national central banks have a monopoly in issuing banknotes with the status of legal tender. By contrast, the objective of the national provision is seemingly to ensure the unrestricted nature of the status of legal tender of euro banknotes.

150. Moreover, this is apparent from the preparatory work on the national provision in question, which shows that the aim of maintaining the reference to the 'unrestricted' nature of the status of legal tender of euro banknotes was precisely to supplement the scope of EU legislation. (79)

151. The particular institutional context of the ESCB within which that provision operates represents a novel legal construct in EU law that brings together national institutions, namely the national central banks, and an EU institution, namely the ECB, and causes them to cooperate closely with each other, and within which a different structure and a less marked distinction between the EU legal order and national legal orders prevails. (80) The Commission and the ECB argue that this context might perhaps justify the exact reproduction of provisions of EU law in national law in order to ensure legal certainty. They recognise that this constitutes an exception to the principle arising from case-law that the reproduction in national law of a rule of EU law directly applicable in the legal order of the Member States is contrary to the Treaties, as it may create misunderstandings as to both the legal nature of the rules to be applied and the time of their entry into force. (81) It is clear that this exact reproduction should not, however, give rise to doubts or misunderstandings as to the legal source of the provisions. (82)

152. However, even if, in the particular context of the ESCB, it were admissible, in the light of the wording of the national provision at issue and the elements set out in points 147 to 150 above, it would appear, subject to the final analysis to be carried out by the referring court, that that provision is not simply an exact copy of the provisions of EU law, but has its own meaning and purpose aimed at supplementing the concept of legal tender in EU law as regards banknotes. (83)

153. If the referring court should arrive at this conclusion, it would have to find that the second sentence of Paragraph 14(1) of the BBankG is a provision which, by its objective and content, constitutes a set of rules on the status of legal tender of euro banknotes and which, by encroaching on the European Union's exclusive competence in the area of monetary policy, would have to be disapplied.

154. However, I share the Commission's view that the European Union's exclusive competence in the area of monetary policy does not preclude a Member State, in exercising its specific competence to govern the functioning of its public administration, from providing – by means of legislation which, by its objective and content, does not constitute a set of rules on the status of legal tender of euro banknotes, but governs

the organisation of the public administration – an obligation for that administration to accept cash payments from citizens.

155. In the light of the foregoing, I consider that the answer to the first question referred by the national court is that Article 3(1)(c) TFEU, read in the light of Article 2(1) and (6) and Article 128(1) TFEU, must be interpreted as meaning that the exclusive competence conferred on the Union in the area of monetary policy includes, within the framework of the powers necessary for the creation and functioning of the single currency, a legislative dimension relating to that single currency, which includes the definition and regulation of its status and legal tender, particularly of banknotes and coins denominated in euro. It follows that a provision of national law adopted by a Member State whose currency is the euro which, by its objective and content, governs the status of legal tender of euro banknotes, is incompatible with EU law and should therefore be disapplied. The European Union's exclusive competence in the area of monetary policy does not preclude a Member State, in exercising its specific competence to govern the functioning of its public administration, from adopting national legislation which, by its objective and content, does not constitute a set of rules on the status of legal tender of euro banknotes, but governs the organisation and functioning of the public administration, which entails an obligation for that administration to accept cash payments from citizens.

2. The second question referred

156. By means of the second question referred, the referring court asks whether the status of legal tender of banknotes denominated in euro, as established in the third sentence of Article 128(1) TFEU, the third sentence of the first paragraph of Article 16 of the Statute of the ESCB and of the ECB, and the second sentence of Article 10 of Regulation No 974/98, entails a prohibition precluding public authorities of a Member State from refusing fulfilment of a statutorily imposed payment obligation in such banknotes, or whether EU law leaves room for provisions that exclude payment in euro banknotes for certain statutorily imposed payment obligations.

157. As noted in points 26 and 27 of this Opinion, it is clear from the order for reference that the national court referred the second question to the Court in relation to the provision of Paragraph 10(2) of the Hessischer Rundfunk payment procedure rules. The referring court asks whether that provision, which provides that the radio and television licence fee payable to Hessischer Rundfunk may be paid only by direct debit, bank transfer or standing order, and thus excludes payment in cash, is compatible with the concept of legal tender as regards euro banknotes under EU law.

158. In this respect, as points 99 to 125 above show, as EU law currently stands, the concept of legal tender as regards euro banknotes – a concept of monetary law specific to EU law, whose definition falls under the European Union's exclusive competence in the area of monetary policy – must be understood as entailing an obligation in principle for the creditor of a payment obligation to accept euro banknotes, unless the contracting parties in exercising their contractual freedom have agreed on other means of payment, or unless legislation adopted by the European Union or by a Member State in exercising their respective competences, which by its objective and content does not constitute a set of rules on legal tender, imposes limitations on payments in euro banknotes for public reasons.

159. It is also apparent from points 127 to 138 above that, in order to be compatible with the status of legal tender of euro banknotes, such limitations cannot lead in law or in fact to a complete abolition of euro banknotes, must be established for public reasons and can only be adopted provided that other lawful means for the settlement of monetary debts are available. They must also be proportionate and must therefore be appropriate for attaining the public interest objective pursued and not go beyond what is necessary in order to achieve that objective.

160. It is for the referring court, which has all the necessary legal and factual elements to carry out the analysis, to determine, on the basis of any guidance provided by the Court, whether a national provision imposing limitations on payments in notes is compatible with EU law and with the status of legal tender of euro banknotes.

161. With regard to the provision contained in Paragraph 10(2) of the Hessischer Rundfunk payment procedure rules, I consider the following points to be relevant.

162. First, it is not apparent from the order for reference, nor from any other element in the case file, that the purpose of that provision is to govern the status of legal tender of euro banknotes and that it therefore encroaches on the European Union's exclusive competence in the area of monetary policy. That provision, in so far as it concerns the methods of payment of the radio and television licence fee, appears to be of a fiscal or 'parafiscal' nature.

163. Second, although it categorically rules out the payment in cash of the radio and television licence fee to the regional broadcaster, it does not manifestly lead to the abolition of euro banknotes and explicitly provides for other lawful means for the settlement of the pecuniary obligation in question.

164. Third, it is not entirely clear from the order for reference what the restriction on payment in notes laid down in Paragraph 10(2) of the Hessischer Rundfunk payment procedure rules is seeking to achieve. The order for reference simply refers to the collection of the radio and television licence fee in the context of 'mass procedures', choosing payment methods on the basis of the need for efficiency of the public administration, as also mentioned by the German Government at the hearing. The documents from the national court and the submissions of the parties to the proceedings before the Court also mentioned reasons to do with the efficiency of tax collection and combating crime.

165. In this respect, I believe that these objectives can all be described as public reasons, which can justify restrictions on the use of cash.

166. Fourth, with regard to the proportionality of the measure, I note that it provides for an apparently absolute exclusion, without exception, of the use of euro banknotes for the payment of the radio and television licence fee. In this regard, it is not apparent from the case file that the social inclusion element of cash for the vulnerable people mentioned in points 136 to 138 above is taken into account. (84)

167. In the light of the foregoing, I take the view that the answer to the second question referred by the national court is that the concept of legal tender as regards euro banknotes, as laid down in the third sentence of Article 128(1) TFEU, the third sentence of the first paragraph of Article 16 of Protocol No 4 on the Statute of the ESCB and of the ECB, the second sentence of Article 10, of Regulation No 974/98 must be understood as entailing in principle the mandatory acceptance of euro banknotes by the creditor of a payment obligation, unless the contracting parties in exercising their contractual freedom have agreed on other means of payment or unless legislation adopted by the European Union or by a Member State in exercising their respective competences, which by its objective and content does not constitute a set of rules on legal tender, imposes limitations on payments in euro banknotes. Such limitations are compatible with the concept of legal tender as regards euro banknotes provided that they do not lead in fact or in law to the complete abolition of euro banknotes, that they are established for public reasons and that other lawful means of payment for the settlement of monetary debts are available. They must also be appropriate for attaining the public interest objective pursued and not go beyond what is necessary in order to achieve that objective.

3. The third question referred

168. By its third question, the referring court asks, if the first question is answered in the affirmative and the second question is answered in the negative, whether a legal act of a Member State whose currency is the euro that is adopted in the context of the European Union's exclusive competence in the area of monetary policy can be applied to the extent to which, and for so long as, the European Union has not made use of its competence.

169. In the light of the answers given to the first and second questions referred for a preliminary ruling, I do not consider it necessary to answer that question.

170. In any event, it follows from points 38 to 44 above that, in an area of exclusive competence of the European Union, irrespective of whether the Union has exercised its competence in the matter, the Member States have no rights and therefore any legislative action by the Member States in this area is, a priori, in conflict with the Treaties.

IV. Conclusion

171. In the light of all the points set out above, I propose that the Court's answers to the questions referred for a preliminary ruling by the Bundesverwaltungsgericht (Federal Administrative Court, Germany) should be as follows:

(1) Article 3(1)(c) TFEU, read in the light of Article 2(1) and (6) and Article 128(1) TFEU, must be interpreted as meaning that the exclusive competence conferred on the European Union in respect of monetary policy includes, within the framework of the powers necessary for the creation and functioning of the single currency, a legislative dimension relating to that single currency, which comprises the definition and regulation of its status and legal tender, particularly of banknotes and coins denominated in euro. It follows that a provision of national law adopted by a Member State whose currency is the euro which, by its objective and content, governs the status of legal tender of euro banknotes, is incompatible with EU law and should therefore be disapplied.

The European Union's exclusive competence in the area of monetary policy does not preclude a Member State, in exercising its specific competence to govern the functioning of its public administration, from adopting national legislation which, by its objective and content, does not constitute a set of rules on the status of legal tender of euro banknotes, but governs the organisation and functioning of the public administration, entailing an obligation for that administration to accept cash payments from citizens.

(2) The concept of legal tender as regards euro banknotes, as laid down in the third sentence of Article 128(1) TFEU, the third sentence of the first paragraph of Article 16 of Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank, the second sentence of Article 10 of Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro, must be understood as entailing in principle the mandatory acceptance of euro banknotes by the creditor of a payment obligation, unless the contracting parties in exercising their contractual freedom have agreed on other means of payment or unless legislation adopted by the European Union or by a Member State in exercising their respective competences, which by its objective and content does not constitute a set of rules on legal tender, imposes limitations on payments in euro banknotes. Such limitations are compatible with the concept of legal tender as regards euro banknotes provided that they do not lead in fact or in law to the complete abolition of euro banknotes, that they are established for public reasons and that other lawful means of payment for the settlement of monetary debts are available. They must also be appropriate for attaining the public interest objective pursued and not go beyond what is necessary in order to achieve that objective.

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1 Original language: Italian.

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2 OJ 1998 L 139, p. 1, as last amended by Council Regulation (EU) No 827/2014 of 23 July 2014 amending Regulation No 974/98 as regards the introduction of the euro in Lithuania (OJ 2014 L 228, p. 3).

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3 OJ 1998 L 189, p. 42.

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4 OJ 2010 L 83, p. 70; 'Recommendation 2010/191/EU'.

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5 BGBl. I, p. 1782.

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6 The original version of the second sentence of Paragraph 14(1) of the BBankG reads ‘Auf Euro lautende Banknoten sind das einzige unbeschränkte gesetzliche Zahlungsmittel’. The term ‘legal tender’ (‘corso legale’, in Italian, ‘cours legal’, in French), which has a specific legal meaning, corresponds, in German, to the term ‘Gesetzliches Zahlungsmittel’, the literal translation of which would however be ‘lawful means of payment’ (‘mezzo di pagamento legale’, in Italian, ‘moyen légal de paiement’, in French). It is worth remembering this terminological difference in the various languages, which complicates the translation process and, if not given due consideration, can cause linguistic confusion.

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7 As approved by the Land of Hesse by law of 23 August 2011 (GVBl. I 2011, p. 382). The version applicable to the case at issue is that of the Fünfzehnter Rundfunkänderungsstaatsvertrag (Fifteenth Interstate Broadcasting Treaty Amendment).

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8 The referring court points out that, under Paragraph 31 of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany), federal law takes precedence over *Land* law.

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9 The need to ‘clarify, simplify and adjust the division of competence between the Union and the Member States’ was emphasised in the Laeken Declaration on the Future of the European Union annexed to the Presidency conclusions of the European Council meeting in Laeken, 14 and 15 December 2001 (SN 300/1/01, Rev. 1; see p. 4 of the declaration) and, even earlier, in similar terms, in Declaration 23 of the Treaty of Nice (OJ 2001 C 80/1).

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10 Title I (‘Categories and areas of Union competence’) of Part One (‘Principles’).

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11 See, in that regard, Opinion of Advocate General Sharpston (2/15 (EU-Singapore Free Trade Agreement), EU:C:2016:992, especially points 55 and 57).

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12 Added to those competences are the competence to define the arrangements for the coordination of the economic and employment policies of the Member States, provided for in Article 2(3) and Article 5 TFEU, and the competence for the common foreign and security policy provided for in Article 2(4) TFEU and Title V TEU.

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13 As is apparent from the second and third sentences of Article 2(2) TFEU, referred to in point 37, in that case the Member States lose their rights in relation to the area of competence in question *indirectly* – that is to say, only to the extent that the Union has exercised explicitly or implicitly the competence conferred on it. The last sentence of that paragraph implies that the loss of competence is reversible. See Opinion of Advocate General Sharpston (2/15 (EU-Singapore Free Trade Agreement), EU:C:2016:992, point 59).

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14 See Opinion 1/75 (OECD Understanding on a Local Cost Standard) of 11 November 1975 (EU:C:1975:145, pp. 1363 and 1364).

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15 See, to that effect, judgments of 15 December 1976, *Donckerwolcke and Schou* (41/76, EU:C:1976:182, paragraph 32), and of 17 October 1995, *Werner* (C-70/94, EU:C:1995:328, paragraph 12), and *Leifer and Others* (C-83/94, EU:C:1995:329, paragraph 12).

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16 For an example of authorisation granted by the Union to Member States in an area of exclusive competence of the European Union (for the conservation of marine biological resources under the common fisheries policy, European Union's exclusive competence under Article 3(1)(d) TFEU), see Article 5(2) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC (OJ 2013 L 354, p. 22).

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17 See judgment of 5 May 1981, *Commission* v *United Kingdom* (804/79, EU:C:1981:93, paragraph 20).

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18 See, in that regard, judgment of 5 May 1981, *Commission* v *United Kingdom* (804/79, EU:C:1981:93, paragraph 30). It is clear that if the adoption of a measure in an area of exclusive competence is necessary, any inaction on the part of the Union legislature is likely to create problems in the absence of another authority competent to adopt the measure. Hence the exclusive nature of a Union competence must remain limited to what is necessary to attain the Union's objectives.

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19 In the context of Economic and Monetary Union, the Court has repeatedly held that monetary policy measures, which fall within the exclusive competence of the Union, may have indirect effects that can also be sought in the context of economic policy, which remains the competence of the Member States, and vice versa (see judgments of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 56); of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 52); and of 11 December 2018, *Weiss and Others* (C-493/17, EU:C:2018:1000, paragraphs 60 to 67)).

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20 See point 44 of my recent Opinion in Joined Cases *Council* v *K. Chrysostomides & Co. and Others and K. Chrysostomides & Co. and Others* v *Council and Others* (C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, EU:C:2020:390). In this respect, see also point 151 of this Opinion.

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21 See, inter alia, judgments of 13 April 2010, *Bressol and Others* (C-73/08, EU:C:2010:181, paragraph 28 and the case-law cited); of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraphs 37 and 38 and the case-law cited); and of 26 June 2018, *MB (Change of gender and retirement pension)* (C-451/16, EU:C:2018:492, paragraph 29 and the case-law cited).

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22 Judgments of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 50), and of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 35).

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23 Judgments of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 53); of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 42); and of 11 December 2018, *Weiss and Others* (C-493/17, EU:C:2018:1000, paragraph 50).

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24 Judgments of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 49); of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 36); and of 11 December 2018, *Weiss and Others* (C-493/17, EU:C:2018:1000, paragraph 48).

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25 Judgments of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraphs 53 and 55); of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 46); and of 11 December 2018, *Weiss and Others* (C-493/17, EU:C:2018:1000, paragraph 53).

26 The existence in the Treaties of two different concepts linked to the term ‘monetary policy’ (‘politique monétaire’ in French), one ‘in the broad sense’, which includes the other ‘in the strict sense’, is confirmed by the fact that in the German version these two concepts are identified with different terms, namely ‘Währungspolitik’ and ‘Geldpolitik’, respectively.

27 Judgments of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 48); of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 34); and of 11 December 2018, *Weiss and Others* (C-493/17, EU:C:2018:1000, paragraph 46).

28 On the basis of this provision, several pieces of legislation have been adopted, including Regulation (EU) No 1210/2010 of the European Parliament and of the Council of 15 December 2010 concerning authentication of euro coins and handling of euro coins unfit for circulation (OJ 2010 L 339, p. 1); Regulation (EU) No 651/2012 of the European Parliament and of the Council of 4 July 2012 on the issuance of euro coins (OJ 2012 L 201, p. 135); Regulation (EU) No 331/2014 of the European Parliament and of the Council of 11 March 2014 establishing an exchange, assistance and training programme for the protection of the euro against counterfeiting (the ‘Pericles 2020’ programme) and repealing Council Decisions 2001/923/EC, 2001/924/EC, 2006/75/EC, 2006/76/EC, 2006/849/EC and 2006/850/EC (OJ 2014 L 103, p. 1).

29 In this respect, see the report of the representatives from Ministries of Finance and National Central Banks of the euro area mentioned in recital 4 of Recommendation 2010/191/EU (Report of the Euro Legal Tender Expert Group (ELTEG) on the definition, scope and effects of legal tender of euro banknotes and coins), and specifically paragraph 2.1.1(a), p. 3.

30 See also the preamble to the Treaties and Article 140(3) TFEU.

31 From a terminological point of view, the term ‘currency’ (‘monnaie’, in French) can be confusing, since in other languages it can be translated using different terms: first, in the sense of ‘currency’, or the legal tender in a given country or monetary union (‘moneta’, in Italian; ‘Währung’, in German; these terms correspond to the term ‘currency’ used in the Treaty to refer to the euro); and second, in the more ordinary sense of ‘money’ (‘denaro’, in Italian; ‘Geld’, in German). In actual fact, the two meanings of the term are interlinked (see Siekmann, H., in Freitag, R., and Omlor, S., *The Euro as Legal Tender: A Comparative Approach to a Uniform Concept*, (2020), pp. 8 and 9).

32 Directive of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ 2015 L 337, p. 35).

33 Directive of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ 2009 L 267, p. 7). See Article 2(2) in particular.

34 See footnote 31 above.

35 See *Nicomachean Ethics*, Book V, Section 5, reprised in the Middle Ages by Thomas Aquinas *in the Summa Theologiae* (II-II, Question 78, Article 1.7).

36 Generally attributable to Knapp, G.F., *Staatliche Theorie des Geldes* (1905). However, see Siekmann, H., 'Restricting the Use of Cash in the European Monetary Union: Legal Aspects', in Rövenkamp, F., Bälz, M., and Hilpert, H.G., *Cash in East Asia*, (2017), p. 157 et seq., which contains numerous other doctrinal references. On the concept of money and the different legal theories of money, see also Chapter 1 of Proctor, C., *Mann on the Legal Aspect of Money*, sixth edition, 2005.

37 Early money consisted of 'commodity money', or an object made of something that had a market value, such as a gold coin. Later on, money became 'representative money', or banknotes that could be exchanged against a certain amount of gold or silver. For a quick overview, see the ECB's explanatory paper entitled 'What is money' (https://www.ecb.europa.eu/explainers/tell-me-more/html/what_is_money.en.html).

38 Fiat money has no intrinsic value – the paper used for banknotes is in principle worthless – yet it is still accepted in exchange for goods and services because people trust the central banks to keep the value of money stable over time. If central banks were to fail in this endeavour, fiat money would lose its general acceptability as a medium of exchange and its attractiveness as a store of value.

39 See Henk Esselink and Lola Hernández, 'The use of cash by households in the euro area', ECB Occasional Paper Series No 201, November 2017 (which can be downloaded from https://www.ecb.europa.eu/pub/pdf/scpops/ecb.op201.en.pdf), p. 18 et seq.

40 In November 2017, deposits with monetary financial institutions (MFIs) in the euro area amounted to EUR 17.5 trillion, compared with around EUR 1.1 trillion in cash in circulation (see the lecture by Yves Mersch, member of the Executive Board of the ECB, entitled 'Virtual or virtueless? The evolution of money in the digital age', which can be downloaded from https://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp180208.en.html).

41 In this regard, among the many studies, see the study by Adrian, T., and Mancini-Griffoli, T., 'The Rise of Digital Money', International Monetary Fund, FinTech Notes No 19/001, July 2019, which can be downloaded from https://www.imf.org/en/Publications/fintech-notes/Issues/2019/07/12/The-Rise-of-Digital-Money-47097, which contains further references.

42 See, for example, the joint statement of the French Republic and the Federal Republic of Germany of 13 September 2019 on Libra, the cryptocurrency project unveiled by Facebook together with a consortium of other companies and non-governmental organisations.

43 According to recent press reports, the People's Republic of China has begun to implement a pilot scheme in several cities with a view to introducing a central bank digital currency. The project is already at an advanced stage. Following this news, the debate in the United States on the introduction of a digital dollar has gathered pace (the United States Senate held a hearing on 22 July 2020 in that regard; see https://www.banking.senate.gov/hearings/us-china-winning-the-economic-competition). This issue undeniably has highly significant and sensitive geopolitical implications. On the potentially disruptive impact on the monetary system of the introduction of a CBDC, see, inter alia, the recent study (June 2020) published by the Federal Reserve Bank of Philadelphia, 'Central Bank Digital Currency: Central Banking for All?', which can be downloaded from https://www.philadelphiafed.org/-/media/research-and-data/publications/working-papers/2020/wp20-19.pdf.

44 This discussion took place at the Ecofin Council meeting in December 2019 (see the ECB report prepared for this meeting entitled ‘Innovation and its impact on the European retail payment landscape’, which can be downloaded from https://www.ecb.europa.eu/pub/pdf/other/ecb.other191204~f6a84c14a7.en.pdf). See also the speech by Yves Mersch, member of the Executive Board of the ECB, entitled ‘An ECB digital currency – a flight of fancy?’, at https://www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200511~01209cb324.en.html.

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45 In this regard, see the Commission Communication of 5 December 2018, ‘Towards a stronger international role of the euro’, COM(2018) 796 final.

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46 A monetary debt may be settled lawfully either using the single currency in its physical form (cash) or in its non-physical form (by transferring non-physical money by bank transfer).

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47 See, in this regard, the discussions held within the working group consisting of representatives from Ministries of Finance and National Central Banks of the euro area referred to in recital 4 of Recommendation 2010/191/EU (see the report mentioned in footnote 29 above). In the report, the national experts concluded that the concept of legal tender was a generally accepted concept in national law, but that there were differences in the legal and consumer traditions across Member States. In this regard, see Angel,B., and Margerit, A.,, ‘Quelle est la portée du cours légal de l’euro?’, *Revue du Marché commun et de l’Union européenne*, No 532/2009, especially pp. 589–590.

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48 See, by analogy, judgment of 4 October 2011, *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 154).

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49 See ECB Decision 2011/67/EU of 13 December 2010 on the issue of euro banknotes (recast) (OJ 2011 L 35, p. 26).

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50 Historically, it also guaranteed at a constitutional level the complete substitution of the euro for the national currencies of the Member States which adopted the euro as their single currency.

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51 It should be recalled that euro coins were given the status of legal tender in secondary law by Article 11 of Regulation No 974/98. Coins are, moreover, specifically mentioned in Article 128(2) TFEU.

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52 In that respect, I note that it is clear from the wording of the third sentence of Article 128(1) TFEU that that provision provides that the euro banknotes issued by the ECB or by the national central banks are the *only notes* (die einzigen Banknoten) which have the status of legal tender within the Union. It cannot be inferred from this that these notes are the only instruments which have the status of legal tender within the Union, which is, moreover, confirmed by the fact that coins are also legal tender.

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53 This interpretation is consistent with the need for flexibility that EU law must have in order to adapt to the changes brought about by technological progress, which, as mentioned in point 82 above, can be extremely fast-paced from an economic perspective.

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54 See, for example, recital 5 of Directive 2015/236 and the 2012 Commission Green Paper ‘Towards an integrated European market for card, internet and mobile payments’ (COM(2011) 941 final).

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55 This comprehensive regulation has resulted in such a level of transaction security and proliferation of their use that some believe that scriptural money should now be considered to have the status of legal tender. See, for example, inter alia, De Stasio, V., 'Verso un concetto europeo di moneta legale: valute virtuali, monete complementari e regole di adempimento', *Banca borsa titoli di credito*, 2018, in particular, p. 751.

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56 The Court has not yet had the opportunity to deal with this concept of EU law directly, but has mentioned it incidentally in cases relating to the free movement of goods (judgment of 23 November 1978, *Thompson and Others* (7/78, EU:C:1978:209)), in matters of value added tax (judgments of 14 July 1998, *First National Bank of Chicago* (C-172/96, EU:C:1998:354, paragraph 25), and of 22 October 2015, *Hedqvist* (C-264/14, EU:C:2015:718, paragraphs 25 and 44 et seq.)), and in matters of transport (judgment of 15 November 2018, *Verbraucherzentrale Baden-Württemberg* (C-330/17, EU:C:2018:916)).

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57 Judgments of 13 December 1989, *Grimaldi* (C-322/88, EU:C:1989:646, paragraphs 7, 16 and 18); of 21 January 1993, *Deutsche Shell* (C-188/91, EU:C:1993:24, paragraph 18); of 11 September 2003, *Altair Chimica* (C-207/01, EU:C:2003:451, paragraph 41); and of 24 April 2008, *Arcor* (C-55/06, EU:C:2008:244, paragraph 94).

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58 Judgment of 6 September 2012, *Chemische Fabrik Kreussler* (C-308/11, EU:C:2012:548, paragraph 25).

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59 See p. 4 of the report of the national experts referred to in footnote 29 above.

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60 See judgment of 19 December 2019, *Puppinck and Others* v *Commission* (C-418/18 P, EU:C:2019:1113, paragraph 75), and, to that effect, judgment of 10 January 2006, *IATA and ELFAA* (C-344/04, EU:C:2006:10, paragraph 76). See also judgments of 22 September 2011, *Budějovický Budvar* (C-482/09, EU:C:2011:605, paragraph 40 et seq.), and of 11 June 2015, *Zh and Others* (C-554/13, EU:C:2015:377, paragraph 42 *in fine*).

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61 See, to that effect, judgment of 4 March 2020, *Mowi* v *Commission* (C-10/18 P, EU:C:2020:149, paragraphs 43 and 44 and the case-law cited).

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62 In that regard – as, moreover, declared at the hearing by all the parties involved and as is clear from the case-law of the Court referred to in points 113 and 114 – a recital cannot take precedence over a bona fide legislative provision, let alone a provision of primary law. However, it may be used to interpret a concept of the act itself which is provided for in both primary and secondary law and must therefore be understood in a standardised and uniform manner. In that regard, it should also be noted that the second sentence of Article 10 of Regulation No 974/98 reproduces verbatim, in a manner that can be described as declaratory, the provision contained in Article 106 EC, in force at the time of the adoption of that regulation, which later became Article 128 TFEU.

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63 There is nothing to suggest, even in the preparatory work for Regulation No 974/98, that the recital should only be transitional in scope, as argued by the applicants before the referring court.

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64 In that regard, it should be noted that, as the Commission rightly pointed out at the hearing, recital 19 refers to 'public reasons' ('intérêt public', in French; 'interesse pubblico', in Italian; 'interés público', in Spanish; 'interesse público', in Portuguese). The German version of that recital refers to grounds of public policy (*Gründen der öffentlichen Ordnung*), adopting an overly restrictive concept which is inconsistent with the meaning of that expression in most of the language versions of the legislative act in question.

65 See, by analogy, judgments of 13 September 2005, *Commission* v *Council* (C-176/03, EU:C:2005:542, paragraphs 41 to 53), and of 6 May 2014, *Commission* v *Parliament and Council* (C-43/12, EU:C:2014:298, paragraphs 32 to 42).

66 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ 2015 L 141, p. 73). Under Article 11(1)(c) of that directive, Member States are to ensure that obliged entities apply customer due diligence measures, inter alia, in the case of persons trading in goods, when carrying out occasional transactions in cash amounting to EUR 10 000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked.

67 See Regulation (EU) 2018/1672 of the European Parliament and of the Council of 23 October 2018 on controls on cash entering or leaving the Union and repealing Regulation (EC) No 1889/2005 (OJ 2018 L 284, p. 6).

68 A list of such regulations in force in the various Member States (current as of 2016) can be found in the document of the Bundestag (Federal Parliament, Germany) concerning the discussion on the limitations on payment in cash (Diskussion über die Begrenzung von Bargeldzahlungen; WD 4 – 3000 – 043/16, pp. 8 and 9).

69 As correctly observed by the German Government at the hearing, when it described the function of cash as ‘Auffangfunktion’.

70 See footnote 64 above.

71 See, *ex multis*, judgments of 8 April 2014, *Digital Rights Ireland* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 46); of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 67 and the case-law cited); and of 11 December 2018, *Weiss and Others* (C-493/17, EU:C:2018:1000, paragraph 72).

72 As can be seen from the case-law of the Court reviewing the measures taken by a Member State in exercising its powers, imposing limitations on one of the fundamental freedoms guaranteed by the Treaties in order to pursue a general interest. See, by way of example, *ex multis*, judgments of 22 November 2018, *Huijbrechts* (C-679/17, EU:C:2018:940, paragraphs 30 and 36), and of 18 June 2020, *Commission* v *Hungary (Transparency of associations)* (C-78/18, EU:C:2020:476, paragraph 76). On the application of the principle of proportionality in relation to State action, see also Opinion of Advocate General Kokott in *Di Maura* (C-246/16, EU:C:2017:440, point 48 and the references cited).

73 For example, its function as a store of value, which is generally associated with the right to property enshrined in EU law by Article 17 of the Charter of Fundamental Rights of the European Union, is fulfilled predominantly by money in its non-physical form (see details in footnote 40 above) and is not necessarily associated with money in its cash form. The same applies, in my view, to the exercise of fundamental existential rights such as freedom of profession or freedom of action in general. It is true that physical money in the form of cash, rather than in scriptural or electronic form, is currently the only form of central bank money in the Union and so is not exposed to the risk of bankruptcy of the financial institution managing the account. Nevertheless,

this risk – which in practice, owing to the strict regulations that govern financial institutions, can in fact be considered marginal – does not restrict the use of other forms of money or other means of payment in order to exercise those fundamental rights, as is shown by the widespread and ever-increasing use of non-cash forms of money in activities where fundamental rights are exercised. In addition, the use of cash both as a store of value and as a means of payment is also exposed to risks (such as theft or robbery), especially if the payment is for a large amount. As regards respect for privacy, although in some cases the use of cash may, as a result of its anonymity, afford a higher level of protection of that right than the use of other means of payment, that right does not appear to be at stake in a situation such as the one before the referring court, in which the public authority to which the radio and television licence fee is to be paid is already aware of the fee payers' details.

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74 Directive of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (OJ 2014 L 257, p. 214). See in particular Article 2(2) and Article 16 and recitals 9, 46 and 48 of that directive.

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75 See, in particular, recital 46 and Article 18(4) and Article 20(1) of Directive 2014/92.

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76 Thus, according to a 2017 ECB study, 3.64% of households in the euro area did not have access to banking/financial services (0.96% in Germany. See Ampudia, M., Ehrmann M., 'Financial inclusion: what's it worth?', ECB Working Paper Series No 1990, January 2017, especially Table 1. The document can be downloaded from https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1990.en.pdf). According to another source, in 2016 some 36.5 million people in the European Union (around 850 000 of them in Germany) did not have access to financial services (unbanked persons). See https://www.wsbi-esbg.org/press/latest-news/Pages/Close-to-40-million-EU-citizens-outside-banking-mainstream.aspx.

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77 In general, on the obligation to consult the ECB, see point 131 et seq. of the Opinion of Advocate General Jacobs in *Commission* v *ECB* (C-11/00, EU:C:2002:556).

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78 On the terminological differences between Italian, French and German, see footnote 6 above.

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79 Thus it is apparent from the explanations relating to the draft law on the amendment of monetary legislation following the introduction of cash in euro (Entwurf eines Gesetzes über die Änderung währungsrechtlicher Vorschriften infolge der Einführung des Euro-Bargeldes (Drittes Euro-Einführungsgesetz – Drittes EuroEG); Deutscher Bundestag, Drucksache 14/673) that the reference to the 'unrestricted' nature of legal tender was retained for reasons of legal clarity since there was no explicit regulation in EU law (see p. 15, under 'Zu Artikel 3', third paragraph).

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80 Judgment of 26 February 2019, *Rimšēvičs and ECB* v *Latvia* (C-202/18 and C-238/18, EU:C:2019:139, paragraph 69).

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81 See judgments of 7 February 1973, *Commission* v *Italy* (39/72, EU:C:1973:13, paragraphs 16 and 17), and of 10 October 1973, *Variola* (34/73, EU:C:1973:101, paragraphs 9 to 11).

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82 It appears from the information provided by the Commission that in the past, the institutions accepted, in the particular context of the ESCB, that certain provisions of EU law should be reproduced in the statutes of the national central banks. See, in that regard, the ECB Convergence Report, May 2018, p. 19 (https://www.ecb.europa.eu/pub/pdf/conrep/ecb.cr201805.en.pdf).

83 In this respect, it should also be noted that, as the Commission pointed out, in the context of its power of preliminary consultation mentioned in point 139 above, the ECB has on several occasions analysed the BBankG, without, however, taking a position on legal tender (see opinions CON/99/10 of 3 September 1999, CON/2011/92 of 11 November 2011 and, previously, the opinion of the European Monetary Institute CON/97/10 of 30 May 1997).

84 It should also be noted that the applicants in the main proceedings do not appear to fall into that category, a fact that the referring court will need to verify. It is not apparent from the case file that they have ever claimed that they were unable to pay the radio and television licence fee because they did not have access to basic financial services.