

**Position of ESTA on
the draft Regulation on legal tender of Euro cash
(Com (2023) 364 Final)**

July 2023

(Transparency register number: 850612124598-41)

Summary

Link to feedback:

https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13392-A-digital-euro-for-the-EU/addFeedback_en?p_id=32223685

ESTA welcomes the proposal for a Regulation on Legal Tender of Euro cash presented by the Commission on 28 June 2023. In the views of ESTA, the Regulation needs to secure two critical aspects of the future of cash, namely i) an effective distribution and supply of change money to retailers, to ensure the smooth operation of cash payments and ii) the adoption by Member States of effective and deterrent sanction for anyone refusing cash without good reasons.

With regards to the new definition of legal tender, ESTA wishes that no specific derogation is given to grant ex ante exclusion of cash, such as sales on board airplanes, for example. The rationale of the Regulation, which is in the consistency and coherence of legal tender as a EU exclusive competence, also call for the withdrawal of any existing cash payment restriction put in place by Member States.

Finally, the draft Regulation on Legal Tender is only a proposal attached to the draft regulation on the introduction of the e-euro, which is aimed at securing a stronger central bank anchor in an environment where the place of cash is reducing. ESTA warns on the potential huge obstacles that lie on the road to the e-euro, as can be seen in other jurisdictions where work on CBDCs has slowed down or be put on hold, and not fall in the temptation to let cash continue going down with the expectation that CBDCs will soon be able to take over: cash needs to be protected before it falls below its critical mass.

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I. Introduction

The Commission presented on 28 June 2023 its legislative package concerning the draft Regulation on the codification of legal tender for euro cash, and the two regulations on the establishment of the digital euro as a central bank money for the euro area (hereafter “*the e-euro*”).

ESTA is very pleased that a number of its points have been endorsed by the Commission and the European Central Bank, as can be seen from the documents presented, including the Impact Assessment:

- Legal tender must mean legal certainty of acceptance,¹ which ESTA stressed from the outset, and the first time when commenting on the Advocate General opinion on the Häring Case, back in September 2020;
- Legal tender, as part of an EU exclusive competence cannot be left to the discretion of any retailer deciding on whether cash is, or is not, legal tender in its premises. This is explicitly acknowledged in the Impact Assessment which states that “*different interpretations undermine the EU competence*” which “*is inconsistent with the notion that the single currency has legal tender across the euro area*”.² The very principle that legal tender, as part of the EU monetary policy as an exclusive EU competence makes it incompatible with a de facto “legal tender à la carte”, which has prevailed until now.
- ESTA is also very pleased that the EU monetary policies acknowledge that the crowding out of cash by commercial e-money is de facto a process of privatisation of money when it states that “*the usage of central bank money could be more and more replaced by private money and private electronic means of payment*”.³

ESTA is also particularly pleased that the EU institutions acknowledged the serious issue in access to cash and have decided to take action in ensuring that cash remain available to citizens, consumers and businesses. ESTA could not agree more with the fact that access to cash is an integral part of legal tender, as cash can only be used if it is made readily available. We understand the sensitivity of taking direct actions concerning the key stakeholders in the access to cash, namely commercial banks in the light of subsidiarity. However ESTA considers that a critical omission in the Impact Assessment, and subsequently in the legislative packet, concerns the role of change money. This role is recognised as a

¹The Impact assessment mentions it a number of times, but particularly in Box E “acceptance of cash”, page 38.

²IA, at page 27

³IA, at page 47

key factor for the use of cash, and in the definition of legal tender, as it is part of the good faith exceptions for which cash may be refused, if a retailer does not have change money: without change, cash payment cannot operate smoothly. However, precisely because change is a “good faith” exception, the draft Regulation should have covered the critical need for ensuring an adequate supply of change money to retailers. This is allegedly one of the tactics of the war on cash which has been particularly effective in Sweden with the result that Sweden is the country in the EU with the lowest share of cash in the economy.

II. The definition of Legal Tender

ESTA is very pleased that the definition of legal tender proposed in the draft Regulation extends to “payment obligations”, not just the settlement of a debt.

Also much welcome is the acknowledgement, much requested by ESTA, of what “mutual agreement” for using alternative means of payment should mean. Both parties, the payer and the payee have to agree *together*, not one party (usually the payee) refusing cash as part of its retail policy “cash not accepted here”. Therefore, the prohibition of any form of ex-ante exclusion of cash in retail is a major feature of the Regulation.

ESTA would like to draw the attention on one specific issue in relation to ex-ante exclusion of cash, namely in airlines, most if not all of them now excluding cash payments when serving food and drinks for sale to their airborne passengers. While we understand that change may be limited, it should be part of the commercial policy of eurozone airlines to plan for enough cash and in the worst-case scenario still allow for payment with the exact sum in cash. No derogation should be justified there. On this point, it is important that the system of sanction which Member States will be asked to put in place is effective and deterrent. Currently, for example, refusal to accept payment in cash is subject to a fine of €150 in Spain, and virtually no fine in France despite being an offence: companies may prefer to pay those insignificant fines rather than accept cash as a payment.

ESTA is very pleased, however, that no wide-ranging exception has been granted under the fallacious reason of “contractual freedom”, which, as ESTA pointed out, has no legal basis in EU law to restrict an exclusive EU competence enshrined in primary law.

III. Cash payment restrictions by Member States

The Regulation is justified *inter alia* by the need to provide consistency and coherence to Legal Tender as part of the EU monetary policy as an EU exclusive competence. Therefore, it is not surprising that the Regulation does not provide for any measure to be taken by Member States to restrict cash payment which would encroach on legal tender, which would only increase the inconsistency of cash acceptance in the Eurozone.

There are a number of countries in the EU, and in particular within the eurozone, which have adopted cash payment restrictions, which range from 500 to 15.000 euros. The draft Regulation on anti money

laundering⁴ is harmonising the limitation to 10,000 euros, including in countries which currently do not have ant cash payment limitation. The alleged “legal basis” for such limitations is the 19th recital of Regulation 978/98 of 3 May 1998 on the introduction of the euro, which states that “*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*”. ESTA has opposed this view on a number of reasons:⁵

- A recital is not part of the normative provisions of any legal act, it only serves the need for explanation of the provision in the body of an act;
- No provision related to Recital 19 exists in the body of the Regulation;
- Recital 19 is only about provisional measures during the introduction phase of the euro when two currencies with legal tender, the incoming single currency and the outgoing national currency, were coexisting: the restrictions envisaged then were not meant beyond that period and were not meant to concern all legal tender currency, but only the outgoing one;
- Cash payment restrictions affecting the only currency having legal tender are clearly restrictions to payment that reduce the legal tender of the euro notes and coins.

Now that a Regulation is proposed, the question is to consider whether existing cash payment restrictions are compatible with the Regulation once it will be adopted. ESTA suggests that the Commission requires Member States to withdraw all existing restrictions and rely on the harmonised level that will be adopted with the AML Regulation by the Council and the Parliament.

IV. Access to Cash

ESTA has consistently raised the risk in cash supply related to the commercial banks’ disengagement from cash, which is now well acknowledged. This creates serious tensions on the cash cycle and cash availability. The impact of suboptimal cash supply is immediate and leads to digitisation of payments if consumers and households cannot access their cash: they are left with only electronic payment instruments.

ESTA has already pointed out that commercial banks have a strong incentive in suppressing cash supply in order to promote card payments on which they make substantial profits. We also appreciate that the regulation cannot set a one-size-fits-all standards to assess the adequacy of cash supply. Therefore specific criteria will need to be proposed.

In addition to Member States of the participating countries reporting to the Commission, ESTA feels that it will be important to establish a system of consumers direct feedback, by way of a dedicated website or email address, where consumers can report on cash payment refusals or inadequacy of cash availability. It is essential that this can be done in real time, and not wait until the next reporting of Member states, which then will have to wait the reaction of the Commission and their transmission back to Member States for being effective: the survival of cash is, in a number of places, is a matter of time.

⁴ Com(2021)420 final - Proposal for a Regulation of the Council and Parliament on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

⁵ See ESTA’s position on the Court ruling on cases C-422/19 and C-423/19; 3 February 2021 at page 5.

Another critical dimension of access to cash concerns the availability of change money, an issue which is not raised in any meaningful way in the Impact assessment or the draft Regulation. Since the absence of change may be raised as a good faith reason for refusing a cash payment, it is essential to ensure that retailers have change money available, and do not abuse of this excuse to refuse cash. The cash infrastructure for change is more challenging than that for notes, as coins are heavy, low nominal value and require a local infrastructure and even more so than notes. ATMs do not provide coins for change. The absence of change money is the perfect stealth weapon against cash.

With regards to access to cash, and in particular the availability of change money, ESTA suggests that the Commission adopts fairly soon after the entry into force of the Regulation an implementing act under Article 8 of the draft Regulation, as per article 9, in order to secure change money for retailers.

V. The rationale of the digital euro and its relevance to cash.

ESTA noted with interest that the introduction of the digital euro is motivated by the severe decline of cash, or, as the Impact Assessment says, a “*weakened monetary anchor*”, a trend which is “*expected to continue*”.⁶ Cash replacement by commercial e-money is also, as said earlier, a recognised form of privatisation of money acknowledged in the Impact Assessment, when public money is crowded out by commercial forms of money. These are issues which ESTA has raised a number of times in the past, and we are pleased that this reality is acknowledged.

These realities have, however, implications for the future. There is still uncertainty in relation to the future of the digital euro, as the issues to solve are important. In essence, the biggest issue relates to financial stability and justifies that the Commission will have to adopt implementation acts to limit deposits and holdings of e-euro to, very likely, €3,000, the level under which there is no substantial risks on financial stability according to the Joint Research Centre's papers presented with the legislative package. This raises two major issues:

- if consumers are limited to a maximum of, likely, €3,000 in digital central bank money form, for which they will need to open a dedicated account which will be subject to annual fees, and require a card or a device to use their e-euros, which again will likely generate costs, the question might be whether they will consider it worth the cost and effort for such a limited use of e-euros? This is also the case in relation to maximum paying limits envisaged (possibly similar to those applying to cash), which will cumulate with maximum holdings limits, and will continue to grant a de facto monopoly to commercial e-money to a very large chunk of commercial transactions. The use of the e-euro in this area will be limited, as is the use of cash.
- if banks, as it is stated, will not be able to charge fees to private users of e-euros, and will have capped fees on professional use, will they consider that there is a sufficient commercial interest in supporting the e-euros, when each transaction in e-euro will substitute for another on commercial e-money? In other words, will they like the e-euro more than they have (dis)liked cash, with the dramatic consequences which the Commission has identified in its impact assessment.

⁶ IA at page 22

The uncertainty is such that, for example, the Swedish Central Bank has announced that it is stopping work on the e-krona, as it fails to see a “*sufficient social need*” for it,⁷ whilst it continues to look at the technicalities of the e-krona. Similarly, in the US, the FED is currently working on two questions before progressing on the e-dollar: “*what is the issue to be solved with it?*”, and “

Therefore, whilst there may be a temptation to let cash continue to go down in the longer term as the e-euro might at some point take over,⁹ ESTA would urge to put in place a robust defence of cash as cash may reach its critical mass level sooner than expected and in any case before the e-euro may be up and running and before it might be able to substitute for it.

A number of arguments deployed for the e-euro, namely the protection against unfair competition of electronic PSPs, the need to secure a level playing field between the e-euro and commercial electronic money, the risk of overcharging in processing of e-euros (as overcharging or reducing cash services has occurred), could also be deployed for cash. Cash needs to be protected from the unfair competition of commercial money (which includes any tarnishing of cash), it needs to be protected from stealth anti-cash strategies: suppression of change money, reduction of cash services, both deposits and withdrawals, pooling of ATMs which limits competition and allow to charge fees, etc.

Conclusion

ESTA is welcoming the proposal for a Regulation on the legal tender for cash. It hopes that the proposal can be adopted at first Reading by Parliament and Council without changes before the institutional chances of 2024 so that it can enter into force as soon as possible.

As part of the monitoring of its implementation, ESTA urges Member States to take a particular attention to the provision of change money to retailers and ensure that the considerations into the access to cash also include this critical aspect of legal tender, so that it cannot be used as an excuse not to accept cash.

⁷<https://www.riksbank.se/en-gb/payments--cash/e-krona/>

⁸ Cf “*Considerations for a Central Bank Digital Currency*”; Remarks by Michelle W. Bowman, Member Board of Governors of the Federal Reserve System at the Georgetown University McDonough School of Business, Psaros Center for Financial Markets and Policy, Washington, DC 18 April 2023

⁹As ESTA pointed out to the ECB in the 2023 consultation process which took place on the “concentration” of the CIT industry, in relation to the continuity of the cash cycle.