

## **Position of ESTA on the final ELTEG report of 6 July 2022**

23 September 2022

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### **Summary**

ESTA, the European Cash Management Companies' Association, is pleased that the ELTEG has published its report on legal tender after its series of meetings since January 2021.

The report confirms the reality of a number of serious threats to cash related to its environment and the cash supply model in place, as the main stakeholder responsible for it is clearly disengaging from cash, with no clarity as to whom should take over. The issue is further complicated by the fact that banks are charging for a cash service they provide less and less, and are delegating the service to others, without sharing the fees they collect for it.

ESTA would caution the banks' apparent idea that once cash is made available to their customers, their responsibilities are fulfilled. Providing cash to their customers is a basic service they have to provide. The real issue are the conditions under which the service is supplied, in terms of cost and convenience, particularly in situations where banks pool their cash services, reducing their own costs and maximising their revenues, while banks' customers, or other non-bank stakeholders, bear the cost of the availability of cash.

With regard to legal tender, ESTA reiterates its views that **legal tender must mean legal certainty of acceptance** of cash by retail. Legal tender, as part of a policy of exclusive EU competence, must not mean that acceptance of cash as a payment is left to the discretion of each individual retailer.

There is no legal basis to allow for private law to interfere with legal tender. The notion of "contractual agreement" has been introduced in the discussion without justification and it is creating confusion.

ESTA considers that the confusion in the meaning and scope of legal tender may be easily solved, by simply clarifying the plain English meaning of two words used in the definition of legal tender. "Cash must be accepted as a payment *unless parties agree on a different means of payment*" should mean exactly that: the default principle is that cash is accepted unless both parties (hence the plural) do decide together (not one imposing implicitly or explicitly on the other) on another means of payment. This must exclude *fait accompli* such as "*cash not accepted here*". In essence, it cannot be left to any private organisation to decide if cash is accepted or not, in whatever circumstances.

Furthermore, this part of the definition is not raising any issue at all, since the means to pay with a different means of payment than cash exists almost everywhere. The real issue is to guarantee the acceptance of cash.

ESTA agrees that legislation is needed for granting the e-euro with legal tender and that it would be a good idea to reinforce that of cash by the same token, as we have submitted before. In the meantime,

ESTA would suggest that the EU monetary authorities issue a Communication clarifying the simple language used in the definition, as suggested above. In the light of the ELTEG Report stating that the legal framework of the digital euro is currently in its assessment phase and could be presented in the course of 2023, ESTA calls that the legal framework for the e-euro to be discussed with the relevant stakeholders, and that it also reinforces the place of cash, as the primary form of central bank money, including the reinforcement of its legal tender status.

A non-binding act such as a Recommendation implementing a primary law binding provision, *a fortiori* one of an exclusive EU competence, was bound to be a factor of great confusion. To overcome this rapidly, ESTA suggests referring to the EUCJ jurisprudence on granting primary law with a direct effect in order to solve this dilemma, as the conditions would arguably be met for 128.1 TFEU.

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### **I. Introduction**

The report of the European Legal Tender Expert Group (“ELTEG”) was adopted on 6 July 2022. The group was re-established in January 2021 and held its first meeting on 28 January 2021. Although the introduction to the report does not mention it, the link to the European Court of Justice joint cases C-422/19 and C-423/19 (“the Court ruling”) rendered two days before on 26 January 2021 seems obvious. The cases are referred to in several instances in the body of the ELTEG report. It is against this background that the present ESTA position will be considered.

ESTA has adopted a position on the Advocate General’s position of 29 September 2020 and another on the final ruling of 26 January 2021. In these positions ESTA strongly emphasised the fact that legal tender should be intrinsically linked to legal certainty of acceptance of cash for consumers.<sup>1</sup> We are pleased to see that the question of legal certainty has been retained in the ELTEG report as an issue of clear relevance.

In the final ruling, ESTA was also pleased to observe that the lengthy development of the Advocate General in relation to contractual freedom, as a private ground for refusing cash, has been ignored by and large in the Ruling, the Court making only one single reference to private law in §56.<sup>2</sup> It does not mention contractual freedom at all.

The ELTEG report looks at both acceptance and availability of cash, two major issues which in the course of 2021 have been extensively discussed in the ECB hosted European Retail Payment Board (ERP),<sup>3</sup> an advisory body principally looking at electronic payments, and which composition is in a majority made of banking and PSPs organisations. Although only a consultative body, the report of the ERPB adopted in November 2021 provides useful information not unrelated to some of the developments covered by the ELTEG report, which ESTA will also integrate in its analysis of the conclusions of ELTEG III.

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<sup>1</sup> Report at page 3.

<sup>2</sup> § 56 – “It follows that the European Union’s exclusive competence in matters of monetary policy is, as the Advocate General noted in point 98 of his Opinion, without prejudice to the competence of the Member States whose currency is the euro to regulate the procedures for settling pecuniary obligations, whether under public law or private law, provided, in particular, that the legislation does not affect the principle that, as a general rule, it must be possible to discharge a payment obligation in cash.”

<sup>3</sup> ESTA was invited to join the ERPB as a guest but decided to withdraw after two months, when it appeared that the agenda would be limited to the topics which the members of the ERPB accepted to address. ESTA’s comment on the ERPB report is to be found here: <https://www.esta-cash.eu/publications/report-to-the-erp-working-group-on-access-to-and-acceptance-of-cash/>

## II. Initial Comments

### II.1. ACCEPTANCE OF CASH – THE ISSUE OF CONTRACTUAL FREEDOM

The Report looks at existing national provisions for legal tender status in the Eurozone Member states and whether retailers can legally refuse a cash payment from consumers. The report refers to the “*dichotomy between compulsory acceptance and contractual freedom*”.<sup>4</sup> where modalities differ between countries, “*pointing to the complex relationship between legal tender and contractual freedom*”. According to the report, no statutory provision exists in most cases, and the report suggests that “*a common understanding on the element of a contract is a prerequisite for its conclusion*”.

The ERPB report of November 2021 focusses on this serious loophole with regard to mandatory acceptance of cash: it further stated that “*the freedom of contract allows a payer and a payee to agree not to use cash*”.<sup>5</sup> In essence, it means that a sign such as “*cash not accepted here*” is an agreement accepted if the consumers enter the premises.

This calls for a number of important considerations.

The 2010 Recommendation states, as the Court ruling reminded, that the default rule is that of “*mandatory*” acceptance, and cash *must* be accepted as a payment. It also states that “*the parties*” (plural) might “*agree*” on a different means of payment. This implies a joint decision by both parties, not one imposed to the other. If the question of contractual freedom still needs to be clarified, clearly *fait accompli* (e.g. “*cash not accepted here*”) does not meet the definition of “*a payer and a payee agreeing not to use cash*”, if the payer wishes to pay in cash. An effective contractual freedom cannot be “*take it or leave it*”, particularly on a matter which involves the use of a guaranteed central bank money, the only one being legal tender. Contrary to what is stated in both in the ERPB report and the ELTEG report, being “*informed*” does not imply “*agreeing*”.

As ESTA pointed out in its position on the Advocate General’s opinion,<sup>6</sup> the major loophole of accepting restrictions to legal tender based on private law is that there is no relevant legal basis anywhere in the Treaties that would allow legal tender to be restricted under such law. The Advocate General’s opinion mentions none either, despite its lengthy developments on the topic. The very principle of the rule of law is that no interdiction can prevail if it is not prohibited by law, and no obligation can be imposed, if it is not mandated by law.

Legal tender is, as reminded by the Court ruling and the ELTEG report, a central feature of monetary policy which is an exclusive competence of the EU. Therefore, it is not a “*subjective*” concept that can be left arbitrarily to the discretion of each individual retailer. Exclusive EU competence means that the EU legislator, and *only* the EU legislator, decides when cash can be accepted or refused.

ESTA understands that wrong habits may have been adopted in countries where “*mutual agreement*” is widely implemented in a unilateral way (i.e. “*cash not accepted here*”), and that it may be difficult to

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<sup>4</sup> Report at page 2

<sup>5</sup> ERPB report at p. 37

<sup>6</sup> <https://www.esta-cash.eu/publications/note-on-legal-tender/>

get retailers to change these habits. However, since legal tender is an exclusive EU competence, ESTA would submit to deal with it under Principle 18 of the ELTEG report, where it is stated that “The Commission reserves the right to take steps against Member States which are non-compliant and might not have applied EU law correctly”: this should not only concern countries which have gone “too far” in the obligation to mandate cash, as it is meant in the Report, but equally those who have not gone far enough.

## **II.2. NO PROBLEM OBSERVED IN CASH ACCEPTANCE... BUT THIS IS NOT THE ISSUE!**

We agree with the Report that in general, no structural issues of acceptance of cash are observed in Member States in the Eurozone. ESTA would, however, submit that the issue is elsewhere, and far more subtle than a point-blank refusal to accept cash.

We appreciate that Sweden is not part of the Eurozone and therefore the ELTEG may not have considered the reasons for the strong decline of cash in this country. The reasons are multiple, partly linked to the very vast banknote swap with very short redemptions periods (suggested, according to the Riksbank, by commercial banks)<sup>7</sup> whereby cash users saw substantial cash value vanishing in their wallets because of banknotes becoming invalid.

However, a strong factor in Sweden has been the scarcity of change money, with retailers having difficulties obtaining any.<sup>8</sup> There is no better way to fight cash payment, as it makes paying in cash very impracticable: no one will pay in cash a price of 17,50 euros if the retailer does not have 2.50 euros in change for a 20-euro note. Restricting change money is the perfect stealth weapon against cash.

Similar to this, uneven coin or note denomination availability may have similar effects. It is regrettable that the ELTEG did not look into these questions.

In addition, it is worth noting that cash has been and continues to be under severe attacks from powerful commercial financial institutions and PSPs. Some of these organisations have gone very far in their endeavour to reduce cash, such as sponsoring shops to become 100% cashless or, as will be seen below, scaring specific cash users’ categories of the population with fears of contaminations from COVID. If the use of cash is left to the discretion of retailers, the demise of cash will continue up to a point that it will come below a critical mass that will compromise its sustainability. The ELTEG should be fully aware that a high level of mandatory acceptance of cash becomes a critical part of monetary policy, as its absence is just the promise of the disappearance of cash.

## **II.3. COVID**

The ELTEG Reports looks into the COVID pandemic impact on payments in cash: “*sanitary/hygiene reasons for eschewing cash payment are also mentioned especially in relation to COVID. However, most responses note that this resulted in strong recommendations to pay electronically and a decline in cash use rather than actual refusals to accept cash.*”<sup>9</sup>

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<sup>7</sup> “Banknote and coin changeover in Sweden: Summary and evaluation” report from the Riksbank, March 2018 (page 7) available at :

<https://www.riksbank.se/globalassets/media/sedlar--mynt/sedel--och-myntutbytet-2015-2017/engelska/evaluation-banknote-and-coin-changeover-in-sweden.pdf>

<sup>8</sup> The ELTEG report rightly identifies this as a measure to ensure sufficient cash availability, Report at page 7.

<sup>9</sup> Report at page 4.

The understatement in this language is striking. In lieu of “strong recommendations”, the payment industry indulged extensively in shameless scaremongering of typical cash payers (particularly elderly people, who were the most exposed to COVID risks). MasterCard produced a position paper to the EBA where it stated explicitly “*Contactless limits virus spreading*”, “*Using Cash is extremely dangerous*” and “*contactless is the safest payment method*”<sup>10</sup> – statements which were not substantiated and which central banks, including the ECB, strongly refuted. When the world fought COVID19, some were using it for the promotion of their products.

Finally, it might be worth recalling the statement of Mr Fabio Panetta, Executive director of the ECB, who considered that the COVID crisis “*has sped up digitalisation*” by no less than seven years.<sup>11</sup>

## II.4. THE CONVERGENCE OF THE ELTEG AND ERPB REPORTS ON THE DECLINE OF CASH

### *No Reference To Card Fraud*

The ELTEG report is also listing the typical clichés found in most cash paper. Security issues concerning cash is, of course, the first one mentioned: it covers robberies – but shops are also subject to robberies for their goods, not just their cash –, cost of handling, etc. ESTA would submit, once more, that it omits the consideration of the “cost of non-cash”, the first of which being card fraud. According to the ECB report on card fraud, it amounted to no less than 1,900 million in 2019.<sup>12</sup> This is a cost which is in most cases borne by retailers and card holders. Using cash is also a way to protect oneself from card fraud.

Noteworthy, the largest card fraud occurs in CNP (card not present) payments, i.e. when cash is usually not an alternative payment.

### *Reference To Counterfeit Money*

The omission of card fraud is of particular concern to ESTA as the report does not omit to cite the risk of counterfeit notes as a risk inherent to cash payments.<sup>13</sup> Exactly the same argument was put forward in the ERPB report which stated unexpectedly that “*an identified legal obstacle is that counterfeit money has no value by regulation*”<sup>14</sup> ESTA has submitted that a counterfeit note is not a note, it is a fraud, as a cloned card is not a card, but a fraud.

As a comparison to the 1,900 million euros lost to card fraud in 2019, 459,229 counterfeit euro banknotes, with a face value of 21.4 million euros, were removed from circulation according to the ECB.<sup>15</sup> It is surprising that ELTEG mentions counterfeit money as an obstacle to the use of cash when

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<sup>10</sup> “*Covid-19 and SCA Transition*”, MasterCard position paper to the EBA, 15.04.2020. The document advocated for the increase of the contactless limit from 30 to 50 euros, while postponing the implementation of SCA by six months or more. In other words: increase the limit now and we increase security later. The same arguments were used in a Visa position paper of March 2020 to the EBA.

<sup>11</sup> Speech of Mr F. Panetta, ECB, “*Cash in time of turmoil*”, 21 June 2021. Note that the “*digitalisation*” of payments is only another word for “*privatisation of money*”.

<sup>12</sup> [https://www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr211029\\_2~aa750b3a1c.en.html](https://www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr211029_2~aa750b3a1c.en.html); according to the ECB, 3.6% were lost to any €100 euros paid by card.

<sup>13</sup> Report at page 4.

<sup>14</sup> ERPB report at page 37.

<sup>15</sup> Report, at Annex 7.



only 12 counterfeit notes per million (0.0012%) were detected in 2020. The risk is arguably insignificant compared to that of being a victim of a card fraud.

### *Thinning Of Banks' Cash Services*

The ELTEG report contains a number of statements which perfectly match the critical statements<sup>16</sup> made by the banking industry in the ERPB report:

- *“Finally, the Netherlands confirms that a lack of adequate cash lodgement facilities is raised as a reason by retailers/authorities to not accept cash”*
- *Germany notes that especially in rural areas there are some complaints that the decrease in the number of bank branches makes the management of cash more difficult/costly;*
- *Finland confirms that limited cash services offered by banks lead to a situation where lodgements of cash by retailers may both be more cumbersome and expensive;*
- And more generally, when it stresses that, beyond the increasing closure of the bank's branches, a number of branches cease to offer cash services.

This is fully consistent with the statements made in the ERPB report which confirms the disengagement of banks from cash (except where it remains profitable to them, i.e. essentially in densely populated areas) and their willingness to promote out-of-bank cash supply, namely cashback and cash-in-shops, which are also referred to in the ELTEG report. In essence, what the ELTEG report risks missing in its assessment is the possible skimming of the cash market by credit institutions, leaving its unprofitable part to other stakeholders whose business is not in cash and finance (e.g. convenience stores,) or independent ATMs deployers. By forcing those operators to act as a bank branch providing cash services to local communities, banks do pass the cost of those cash services to others, then force them to manage more cash than needed for their own business. All this while banks are still cashing in the fees for cash services, included in the banking fees that they do charge to their customers and the fees charged for the provision of cards with which their customers have less and less access to the bank's own ATMs.

The ELTEG report states that *“the general opinion is that there was a decline in ATM infrastructure in general which has not been offset by the increase of alternative means of access to cash”*.<sup>17</sup> The Report, however, fails to note that in order to “offset” the more difficult access to cash, as noted in the ERPB report, it *“forces people to withdraw higher amounts”* of cash or *“make them more dependent on trusted persons”*.<sup>18</sup> This certainly put into perspective the statement in the ELTEG report that *“the decline in cash use might evolve into a permanent change of payment habits”*,<sup>19</sup> when the change of habits is in all likelihood the consequence of reduced access to cash and cash services.<sup>20</sup>

### *Cost Of Cash Withdrawal As A Barrier To Cash*

The ELTEG report states that *“a majority of Member States consider that fees currently imposed on cash withdrawal do not act as a barrier to cash availability”*.<sup>21</sup> ESTA would caution such statements as they may become obsolete and inaccurate much sooner than expected. As the ELTEG report notes,

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<sup>16</sup> Report at page 4.

<sup>17</sup> Report at page 6.

<sup>18</sup> ERPB report at page 11.

<sup>19</sup> Report at page 4.

<sup>20</sup> This argument of consumers' changing habits is forcefully made in a presentation of MasterCard to the ERPB working group on access to and acceptance of cash, though it omits to recall the company's huge pressure against cash on grounds of alleged fears of contamination from COVID.

<sup>21</sup> Report at Page 7.



the network of ATMs is thinning as part of the banks' disengagement from cash. The issue, therefore, is not only the cost of withdrawing cash, but the external cost faced by any bank customer in rural or peripheral areas for accessing a cash supply point, both in terms of distance and time.

Here again, the reference to the ERPB report provides a good idea of the banks' perspective on their duty to supply cash, when they state that "*the measure of distance from where people reside does not take fully into account commuting patterns as people in rural areas might commute and have access to cash near their workplace*".<sup>22</sup> This may be true for some, but not for those who do not commute, either because their activity is local, or because they do not work (retired people, people with disabilities or with illness, etc.).

The other reason why the statement may be slightly presumptuous is due, as the ELTEG report itself notes, to the development of "joint-use of ATM and deposit facilities". There are indeed in a number of Member states initiatives by commercial banks of pooling ATMs. The latest example is the BATOPIN initiative in Belgium by the four largest commercial banks (others are invited to join). ESTA would urge Member States to monitor this very carefully. The pooling of ATMs will limit the number of ATMs to just one in many areas, in which case cash users will have no choice and are likely to be charged significant fees when using it. Whilst the bank's only argument is to secure cash access, the consequence of this initiative may well be that it will reduce their own costs, increase their revenue while the consumer will pay more, leading to an imbalance between the benefits to the banks not equally shared with those for the consumers.

It would be very wrong to believe that the consumer's benefits would only be in the ability to access its cash. Cash access is a must, as consumers have not decided to have their cash in the form of electronic commercial money in a bank (see section II.5 below). The only benefit expected by the consumer is primarily in reasonably good conditions to access it.

#### *Legislation To Impose Cash Services On The Banking Sector*

As ESTA has pointed out many times, the conundrum of cash is that it is made available to the public through its worst enemy, namely a stakeholder which does not invest in cash, sees it as a cost and has its own competing payment products to offer on which it could charge hundreds of millions of euros to its customers and retailers. And which therefore has strong reasons to discriminate against cash and promote its more profitable products instead.

A number of countries, mostly outside the eurozone, have adopted recently measures to impose minimum cash services on banks. The ELTEG report questions whether national measures should be required for keeping an adequate ATM networks or other measures (e.g. cash back or cash in shops) to ensure adequate access to cash. Views within Member States expressed in the report are divided on this.

ESTA would, however, draw the attention of ELTEG and EU monetary authorities to the comment made by the banking institutions in the ERPB report when it states that legislation proposed by some Member States "*in order to reduce the cost borne by consumers*", e.g. by banning fees for withdrawal and deposits "*may have harmful side effects on access to cash which should be carefully considered (e.g. banks having to cover the cost or further discontinuing cash services due to foregone profits)*". It

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<sup>22</sup> ERPB report at page 18.

might be worth remembering that banks are remunerated through various fees for cash services as recalled above.

## **II.5. CASH USERS HAVE NOT CHOSEN TO HAVE THEIR MONEY IN COMMERCIAL E-MONEY**

Cash is the only means for banks' customers to withdraw their deposits from their bank. For most of them, their deposits in the banks come from the payment of salaries and/or social benefits or other revenues. They have not chosen to have this money in the form of commercial e-money, but in most cases, they are forced to do that as there are legal restrictions on receiving their revenues in cash.

Therefore, the idea that banks' customers should pay to convert a form of money they have not chosen into a form of money they wish to have defies any logic, particularly when they pay fees for their bank account which cover basic services (of which cash services, whether deposits or withdrawals), pay for their card needed to make withdrawal at ATMs (often their only access to cash) and finally pay for withdrawals at ATMs.

ESTA would once again stress that “*deposits are a statutory debt that a bank owes its customers*”, and that “*a lender should not have to pay a surcharge for collection of debt*”.<sup>23</sup>

## **II.6. SOARING BANKING FEES TO SMALL RETAILERS**

The ELTEG report stresses the cost of cash to retailers. Retailers, particularly small ones, have seen their bank fees soaring due to the increase of e-payment during the COVID crisis. The cost will become even higher with the accelerating inflation, as card fees are based on a percentage of the price, and will increase when inflation pushes up the price of goods.<sup>24</sup>

## **II.7. THE “QUASI-LEGAL TENDER” STATUS OF OTHER MEANS OF PAYMENTS**

The idea that non-cash forms of money might be legal tender was floated in the Opinion of the Advocate General in the Dietrich & Häring case of September 2020, in a way which was criticised by ESTA. The Court ruling, however, rejected this analysis and stated that no other form of currency than cash is legal tender. Yet, the ELTEG report observes that in some countries, “*Other means of payment may be considered to have a “quasi” legal tender status*”.<sup>25</sup>

ESTA would submit that this cannot be the case. The reason for this is that, as stated by the EUCJ and the ELTEG report, legal tender is central to monetary policy and as far as the Eurozone is concerned, this competence belongs exclusively to the EU. The EUCJ ruling states that it “*precludes a Member State from adopting a provision which, in the light of its objective and its content, establishes legal rules governing the status of legal tender of euro banknotes*”. The ELTEG report comes to the same conclusion in its § 15 to 19.

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<sup>23</sup> Tuomas Välimäki, Bank of Finland; 28 November 2018.

<sup>24</sup> <https://cashesentials.org/the-house-never-loses-visa-and-mastercard-cash-in-on-inflation/>

<sup>25</sup> Report at page 3.

In a similar way, because of the EU competence in monetary policy, as they cannot extend or reduce the status of legal tender of cash, Member States are not in a position either to grant legal status, whether quasi or not, to any other form of currency, nor to mandate the acceptance of specific form of money as this would be tantamount to rule on legal tender, something they cannot do. ESTA urges the Commission to extend §18 of the ELTEG report to any legislation adopted in Member States granting a “quasi-legal tender status” to any form of currency other than cash.

## II.8. LEGAL TENDER STATUS OF CASH VERSUS E-EURO

The ELTEG report states that the Commission is in the assessment stage of the e-euro, preparing a legislative proposal to establish a digital euro and regulate the essential elements so that it can be issued by the ECB.<sup>26</sup> The digital euro would “*complement, not substitute for cash*”. Therefore, ESTA considers that it would be wrong that the new legal framework that will be required for the digital euro only deals with the e-euro. It should be a framework that covers both forms of central bank money, i.e. including cash, on the basis of equal footing and distinguishing it only on the basis of its intrinsic differences, ie materialised or dematerialised.

ESTA responded to the 2021 public consultation by the ECB and the 2022 public consultation by the Commission on the e-euro. One of the initial considerations of ESTA’s response is that, if one of the motivations for the e-euro is the decline of cash, it might be quicker and more efficient to protect cash than reinvent it in a digital form: by the time it will be operational, cash may have gone below its sustainable critical mass. Therefore, the above-mentioned legal framework should in no way risk putting in jeopardy the form that already exists (cash) for one that will be established (digital).

However, in these responses, ESTA has consistently stressed that nothing would justify that central bank monies may have different legal tender status depending on their form, and we have called for uniform rules for both. ESTA pointed out that nothing in the existing law would allow an e-euro to be legal tender, and legislation would need to be passed for that purpose. ESTA stressed that it would be a very good opportunity to include cash and reinforce the legal tender of cash by the same token. We are therefore happy to see that this is also the route the ELTEG might be considering in its principles 20 to 22.

ESTA submits that the status of legal tender must necessarily include the legal certainty that cash will be accepted as a payment by customers, and only refused for very limited, exhaustive, good faith reasons. With regards to the e-euro, the mandatory acceptance may be restraint by the need for terminals, which might be an issue for small retailers. However, we consider that in such case there would be no breach in legal tender rules if cash is accepted when e-euros cannot be. Cash should in any case always be accepted. Since e-euros may not be used by everyone in society, the reverse should not be acceptable: legal tender rules would not be deemed to have been met, if only the digital euro is accepted and not cash. This inevitably grants a slight precedence to cash over digital.

ESTA respectfully disagrees with the point made in the ELTEG report by some Member States that “*the legal tender definition is vague and clarification is needed*”.<sup>27</sup> The definition as developed in the 2010 Recommendation is very clear. What makes it unclear is the extension to “contractual agreement” that abusively derives from the expression “*unless parties agree on a different means of payment*”. The

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<sup>26</sup> Report at page 9

<sup>27</sup> Report at page 9.

issue is very simple to settle, in reality. It suffices that monetary authorities remind all concerned operators that:

- The expression uses the plural form of “*parties*”, which excludes by definition any unilateral decision; and
- “Agree” means a joint decision by both parties, not a *fait accompli* by one of the parties imposed to the other. If no agreement can be found, then cash must be accepted with the exception of the usual fair grounds.

No regulation is required for this in the case of cash and this could simply be the purpose of a communication by the monetary authorities. This could be done anyway until a law is passed to grant legal tender status to the e-euros, and reinforce that of cash, if the process of its creation is confirmed.

ESTA urges the European Commission and the ECB to clarify the meaning of these simple words very quickly, as time is of the essence in a number of Member States. If this done, then there is no longer any need to consider that private law might be a reason for restricting legal tender in any way. Legal tender cannot be subject to the arbitrary decision of each retailer. The possibility not to pay in cash already exists in most cases anyway, and this should remain so whilst the consumer keeps a real choice, which is currently not the case with the unilateral interpretation of the verb “agree”.

### III. ESTA’s comments on the ELTEG’s draft principles – section 5 of the ELTEG report

ESTA’s has reviewed the proposed principles and wishes to make the following comments.

#### III.1. ACCEPTANCE OF THE EURO

- Principle 1: ESTA agrees with the definition which refers to that of the 2010 Recommendation, with the proviso that the parties to a contract effectively do “agree” freely on a particular payment method: the words should mean exactly that. The first part of the definition is that “cash must be accepted”: if not agreement on an alternative means of payment can be reached between the parties, then cash is the default one. It should not be considered that where the consumer enters premises with a sign “cash not accepted here”, it has formally agreed not to pay in cash, as the consumer may have no other choice than this retail if no suitable alternative shop is in the vicinity. Agreement should not include imposed choices or *fait accompli*. The key is that legal tender **must mean legal certainty of acceptance**;
- Principle 2: ESTA would caution that Recital 19 of Regulation No 974/98 is not a very strong legal basis for restricting legal tender for two reasons. First because the recital refers to a period of six months after the transitory period which is long gone. Second because recital 19 introduces no specific provisions in the body of the Regulation, which further confirms that its purpose was of a transitory nature;<sup>28</sup>

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<sup>28</sup> ESTA has consistently opposed cash payment limitations, on the basis that they are disproportionate (a declaration would be sufficient) and unnecessary, and fail to meet the subsidiarity test as their effective impact is only domestic – please see: <https://www.esta-cash.eu/publications/statement-by-esta-on-the-eu-proposal-for-an-eu-cash-payment-limit-of-e10000/>

- Principle 3: The main issue with the current legal tender status is the non-binding nature of the recommendation that specifies what legal tender should mean. It is indeed odd that a binding provision of the Treaty (art 128.1) translates into a non-binding act implementing an exclusive EU competence. ESTA has submitted that legislation on legal tender for cash might not be necessary if the jurisprudence of the EUCJ on the direct effect of primary law is applied. In this case, article 128.1 would be deemed to have direct effect as its meaning is specific and made clear by virtue of the recommendation. Since primary law is binding, it is irrelevant that the definition is in a Recommendation. We also submit that a clarification of the meaning of the words “parties” (in the plural form) and “agree”, as stated for principle 1 above, would solve a number of issues, while reminding that the first part of the definition is that “*cash must be accepted as a payment*”.

### III.2. AVAILABILITY OF CASH

- Principle 6 and 8: ESTA has stressed that the main threat to cash is the disengagement of banks from its supply function and the absence of clarity which operator should substitute for it. Banks continue to charge their customers for cash services they provide less and less. Directive 2014/92 is clear as to basic payment accounts, but lacks clarity for other accounts, for which banks charge more fees. If cash services are declared services of general interest, a position that ESTA would support, a discussion must start on the cash business model, so that banks’ customers are not charged several times for the same service, or for a service they do not get anymore;
- Principle 7: cash in shops and cash back are no adequate substitute to banks’ disengagement of cash, because of the fact that banks are charging for a service they provide less and less and expect others to fulfil, whilst not sharing the fees gathered for the service;
- Principle 9: ESTA recalls that most banks’ customers have not chosen to receive their monies in the form of commercial e-money and therefore should not pay a surcharge to withdraw their deposits, which is a statutory debt of the banks. ESTA recalls that a number of charges occur (account fees, card fees and withdrawal fees);
- Principle 10: these projects should also be reviewed by competition authorities in Member States as the risk is the reduction of cost and increase of profits of credit institutions with no commensurate benefit for their customers, particularly its lack of competition leads to imposing/increasing fees for withdrawal and lodgements. The benefit for banks’ customers is not in the provision of cash, as this is due to them by virtue of the services a bank has to deliver to its customers, but the quality and the cost of the service.

### III.3. LEGAL TENDER OF EURO CASH

- The EU exclusive competence should not solely be understood as Member States not being able to go beyond the existing rules. They should also impose a minimum level of mandatory acceptance and not let vague concepts such as “contractual agreement” get in the way of legal certainty;

- This also means that “*quasi-legal tender*” status of non-cash forms of currency should be opposed by the Commission, also on grounds of EU exclusive competence for monetary policy.

#### **III.4. DIGITAL EUROS AND ITS IMPLICATIONS ON THE LEGAL TENDER OF CASH**

- Principle 21: ESTA agrees with this principle. The legal tender status should be uniform for cash and non-cash central bank money. It should be the opportunity to reinforce the legal certainty that cash will be accepted as a payment, that goes along with legal tender. The principle should also integrate the precedence of cash over digital, as not everyone in society may be able to use digital euros (cf section II.8 above) and should therefore keep the choice to pay in cash;
- Principle 22: ESTA would urge not to include private law in the codification of the CJEU ruling of 26 January 2021, as this is bound to create confusion and a weakness in the consistency of legal tender throughout the participating Member States. As mentioned above, the possibility not to pay in cash exists widely, and private law has been used to constrain consumers into electronic payments;
- In addition to these principles, ESTA would urge EU monetary authorities to issue a Communication clarifying that “parties” (plural) and “agree” used in the definition of legal tender in the 2010 Recommendation should be understood under their simple, plain English meaning: i.e. that parties have to come explicitly and jointly to a decision to use other means of payment than cash.