

## **Position of ESTA on the draft Regulation on Legal Tender of Euro Cash (Com (2023) 364 Final)**

22 September 2023

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### **The Legal Tender Regulation in a snapshot:**

The draft Regulation on the legal tender on cash is a major and much awaited piece of legislation which will fill a very serious gap in the EU monetary policy. Its adoption will have some major impact on cash and cash users:

- in transposing in a clear and concrete way a rather obscure primary law provision into a measure that all, consumers and retailers, can understand and implement easily;
- on the consistency of cash acceptance throughout the eurozone, ending a regime of *de facto* legal tender à la carte where acceptance is left to each individual retailer;
- on the legal certainty of cash acceptance which is critical for consumers;
- on the legal certainty of mandatory acceptance for retailers who now will now know the rules;
- on seeking to fill gaps in the cash distribution and supply resulting from the disengagement from cash of financial institutions.

Failing to adopt it, or adopting it in a weakened form, will reinstate these various loopholes which until today have undermined the legal tender status of cash. It would allow operators dedicated to offer other means of payments than cash to continue their predatory competition against cash, with a risk of disappearance.

The draft Regulation is not perfect: for example, the prohibition of ex-ante exclusions should be much stronger, the cash cycle should be secured in a strong manner and the provision of change money as well as its distribution channel should be more specific. ESTA believes that the ability to adopt implementing act will soon allow to fill these gaps.

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### **Preliminary comments on the legislative package of 28 June 2023**

ESTA has considered in detail the legislative package adopted on the 28th of June 2023 on the legal tender for cash, the introduction of the e-euro and the revision of PSD2 into a new PSD3 and two new Regulations. Although the proposals are distinct, ESTA sees all three initiatives as part of a whole process. The package is characterised by a substantial asymmetry in the treatment of the three different payment instruments concerned, namely cash, commercial e-money and central bank e-money:

- The legal tender for cash is arguably weaker than that of the forthcoming e-euro; ex-ante exclusions for the e-euro are not tolerated, whilst they are permitted to remain for cash and left to Member States to monitor;
- the adequacy of the channel of distribution of cash, which suffers serious loopholes with the increasing disengagement of banks, is left for most of it to the Member States whilst that of the e-euro is precisely defined and strictly mandated in the legislation;
- the e-euro is protected by the legislative scheme against unfair/predatory competition from the financial institutions' payment instruments whilst cash is not; cash must be protected in a similar way, to be allowed to subsist;
- the revision of PSD2 aims at ensuring a better choice for payments instruments for the consumers, via a promotion of new forms of commercial electronic money (essentially non-card-based schemes and instant payments), but does not include cash in the choice to be guaranteed by law to consumers.

Although the draft regulation on legal tender for the euro cash is a right step in the right direction, the package as a whole does not appear to be designed to strongly protect the long term subsistence of cash, nor protect it from the factors which have led to its current demise, as a consequence to the substantial asymmetry favouring non-cash forms of money.

### **Summary**

This position paper on the draft Regulation on Legal Tender of Euro Cash is presented in conjunction with ESTA's position paper on the draft Regulation on the introduction of the e-euro.

Legal tender is, from the point of view of ESTA, the corner stone of the continuation of cash. Only central bank money is legal tender, and as a consequence, legal tender is not only what distinguishes cash from other forms of money, but also what grants it its pre-eminence over any other forms of money.

ESTA therefore welcomes the proposal for a Regulation on Legal Tender of Euro cash presented by the Commission on 28 June 2023. The proposal retains a number of important points raised by ESTA in various positions on legal tender, either in relation to the EU Court of Justice joint court rulings C-422/19 and C-423/19 or in relation to the July 2022 report from the European Legal Tender Expert Group (ELTEG) which gave reasons for concerns. ESTA is very pleased that the Commission proposal has avoided the critical controversial aspects of this report. ESTA welcomes the coherence in the definition and the understanding of legal tender brought by the draft regulation, as should be the case of any EU exclusive competence.

In the views of ESTA, the Regulation needs to secure three 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 sanctions for anyone refusing cash without good reasons. The third critically important element of the future of cash is to protect it from unfair competition from commercial e-money providers.

With regards to the new definition of legal tender, ESTA wishes that no specific derogation is given to grant ex-ante exclusions 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 calls for the withdrawal of all existing cash payment restrictions put in place by Member States.

The draft Regulation on Legal Tender is presented as a proposal attached to the draft regulation on the introduction of the e-euro, which is aimed at securing a stronger central bank monetary anchor in an environment where the place of cash is reducing. In its position paper on the e-euro, ESTA considers that the solution to the problem that the e-euro is meant to fix (the weakened monetary anchor resulting from the severe reduction of cash) would be solved in a simpler, faster, safer and more reliable way by putting in place a robust defence of cash rather than reinventing the wheel. The reason is that demand for digital currency will remain weak in countries where cash use is already low. Therefore, the creation of an e-euro will not, by itself, solve the question of the monetary anchor where cash has gone too low. Cash use will have to be increased first. Also, an e-euro will require cash to provide a satisfactory monetary anchor: therefore, with or without the e-euro, cash volumes will have to be restored.

ESTA therefore believes that:

- The draft regulation on legal tender is the best immediate tool to restore cash, that should come into force as soon as possible, and should be accompanied by a set of deterrent sanctions by Member States in case of non-compliance;
- A direct system of reporting by consumers must be put in place to assess in good time any major loopholes in compliance;
- The restoration of cash volumes calls for a strong protection of cash against competition from commercial electronic money providers, in a similar way as the e-euro proposal offers to protect the future e-euro from this competition;
- The pre-eminence of article 4 on the mandatory acceptance over article 7 on the monitoring of ex-ante exclusion of cash needs to be reaffirmed, so as not to weaken the principle of mandatory acceptance. Ex-ante exclusions are in essence private exceptions to the EU monetary policy and should be extremely limited. Their existence is contrary to the very purpose of the Regulation which is to increase the coherence of legal tender as a central

element of the EU monetary policy and the affirmation by the EU institutions of the need to preserve cash. It also undermines the legal certainty of acceptance of cash.

- Finally, the legislative package adopted on 28 June 2023 lacks a provision ensuring that cash is a means of payment that consumers are entitled to choose in the choice for payment instruments. The focus of the revision of PSD3 and the new Payment Services Regulation (PSR) on electronic payment disregards the right for consumers to fully benefit from the ability to choose cash for their payments. ESTA sees no reason for the promotion of electronic payment through the legislative package when these payments have been able to mushroom by their own and, in many cases, to crowd out cash.

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## **Position of ESTA on the draft Regulation on Legal Tender of Euro cash (Com (2023) 364 Final)**

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### **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,<sup>1</sup> which ESTA stressed from the outset, and the first time when commenting on the Advocate General’s 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*”.<sup>2</sup> The very principle is that the status of legal tender is incompatible with a *de facto* “legal tender à la carte”, which has prevailed until now;
- ESTA is also very pleased that the EU monetary authorities acknowledge that the crowding out of cash by commercial e-money is a stealth 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*”.<sup>3</sup> There is no better reason to protect cash against its substitution by commercial money.

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 key factor for the use of cash, and in the definition of legal tender, as it is part of the good faith

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

<sup>2</sup>IA, at page 27

<sup>3</sup>IA, at page 47

exceptions for which cash may be refused, if a retailer does not have change money: without change, cash payments 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.

ESTA would draw the attention on the fact that the typical metrics in measuring cash as a percentage of point-of-sale purchases, by volume or value, is in reality misleading and leads to an over estimation of cash payments. A large number of payments outside points-of-sale cannot be made in cash, for legal or practical reasons, and this is not taken into account in the effective share of cash payments. In the typical structure of expenses of European households, more than 40% are payments for housing, utility bills, communications, education and health, which are usually paid through a bank account. Even other payments that used to be made through cash or card, such as leisure or entertainment, are being displaced by subscription methods through bank accounts or transfers through electronic payment platforms. The reality is that indeed hardly 5% of payments are made in cash.

## 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” on 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 restrictions of any form of ex-ante exclusion of cash in retail is a major feature of the Regulation. ESTA feels that all ex-ante restrictions should be prohibited, not just “monitored” (see below).

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 are now excluding cash payments when serving food and drinks for sale to their airborne passengers. While we understand that change may be limited on board planes, it should be part of the commercial policy of eurozone airlines to plan for enough cash, the same way they care about having sufficient goods to sell when airborne. In the worst-case scenario, they should 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 sanctions 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 from €150 in Spain (for the first infringement), and virtually no fine in France despite being an offence: some 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.

ESTA welcomes the need to address the ex-ante restrictions to payment on cash, although Article 7 does not prohibit them altogether but asks Member States to “monitor” them. ESTA thinks that this provision is not coherent with Article 4 on the mandatory acceptance subject to only limited exceptions.

### 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 a central part of 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 payments which would encroach on legal tender, and which would only increase the inconsistency of cash acceptance in the Eurozone. Article 6 allows, however, the Commission to adopt restrictions justified by public interest and proportionate to that aim. These measures presented as “*measures of restrictions to the principle of mandatory acceptance*”, are therefore clearly restrictions to the legal tender.

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 no limits at all, with sometimes different thresholds for payments to consumers, businesses and administrations. The draft Regulation on anti money laundering<sup>4</sup> is harmonising the limitation at 10,000 euros, including in countries within the eurozone which currently do not have any cash payment limitation. The alleged “legal basis” for such limitations is the 19<sup>th</sup> recital of Regulation 978/98 of 3 May 1998 on the introduction of the euro, which states that “*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 for a number of reasons:<sup>5</sup>

- A recital is not part of the normative provisions of any legal act, it only serves the need for explanation of the related provision in the body of an act;
- No provision related to Recital 19 exists in the body of the Regulation: it has therefore no normative substance;
- 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 euro notes and coins.
- Cash payment restrictions are incompatible with the free movement of capital enshrined in the EU treaties. Any restriction must be justified by overarching reasons of public interest and must be necessary and proportionate. As ESTA has argued in substance, they meet none of these requirements. The provisions in Article 59 of the draft AML Regulation allows Member States to set lower limits, which goes against the coherence of legal tender as a central element of central bank money as an exclusive EU competence.<sup>6</sup>

<sup>4</sup> 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, July 2021.

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

<sup>6</sup> See *inter alia* ESTA’s response to the public consultation on cash payment limitations of 30 May 2017 and ESTA’s statement on the EU proposal for cash payment limits of €10,000 of 28 July 2021



Now that a Regulation is proposed, the question is to consider whether existing cash payment restrictions by Member States are compatible with the Regulation once it will be adopted. ESTA suggests that the Commission requires all 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.

Cash payment limitations grant commercial PSPs with a legal monopoly for any payment above these limits as cash, and most likely the e-euro when it will be operational as cash payment limitations will apply to it as well, are legally forbidden for these payments. Therefore, these payments can only be made with commercial e-money.

If cash payment limitations are to be extended to the e-euro, and allowed to remain below the harmonised level that will be decided in the AML regulation, the e-euro payment limits will be in some places much lower than the forthcoming e-euro holding limits. That risks further jeopardising the adoption of the e-euro by the public in those countries.<sup>7</sup>

#### IV. Access to Cash

ESTA is pleased to see that *“the improvement of access to cash is a priority of the Commission”*<sup>8</sup> and *“where cash provides consumers with an alternative to digital means of payment, improved cash availability is therefore in consumers’ interest”*.<sup>9</sup> 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 commercial electronic payment instruments only.

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 for the reaction of the Commission and its transmission back to Member States for being effective: the survival of cash is, in a number of places, a matter of time.

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

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<sup>7</sup> See ESTA’s paper on the draft regulation on the e-euro, page 9.

<sup>8</sup> According to Recital 62 of the draft directive on PSD3, repealing PSD2, (COM(2023)366 Final of 28 June 2023)

<sup>9</sup> Impact Assessment of draft PSD3, at page 179.

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 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*”.<sup>10</sup> 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 now officially 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 and the risks to mitigate before it can be operational are important. In essence, the biggest issue relates to financial stability and justifies that the European Central Bank may have to adopt under Article 16 of the e-euro Regulation 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 payment limits envisaged (possibly similar to those applying to cash), which will cumulate with maximum holdings limits, and will continue to grant a legal monopoly to commercial e-money to a very large chunk of commercial transactions (see section III above). 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,<sup>11</sup> 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 in 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?

<sup>10</sup> IA at page 22. As stated in ESTA’s position paper on the e-euro, the argument of the development of the e-economy is, in the light of how it has mushroomed without digital central bank currency until now, is not credible.

<sup>11</sup> Article 17(1) of Draft regulation COM(2023) 369 Final of 28 June 2023

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,<sup>12</sup> 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 “*what current frictions exist or may emerge in the payment system that only a CBDC can solve or that a CBDC can solve most efficiently?*”.<sup>13</sup> These questions are highly relevant to the digital euro proposed. In the UK, the House of Lord Economic Affairs Committee reported that it heard many on the risks associated with CBDCs, but very few able to point to its benefits, so much so that it referred to CBDCs as “*a solution in search for a problem?*”.<sup>14</sup>

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,<sup>15</sup> ESTA would urge to put in place a robust defence of cash as cash may come below its critical 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. One of the problems that appear in the legislative package is the asymmetry in the schemes between the e-euro and physical cash. This applies to legal tender (legal tender requirement is met even if cash is not accepted but e-euros are), ex-ante exclusions for cash (only monitored for cash, but prohibited for the e-euro), and the strength of their respective distribution channels (left to Member States to decide for cash, while it is precisely mandated for the e-euro). The revision of PSD2 into PSD3 and the PSR does not secure cash as a guaranteed means of payment to the consumers, whilst it guarantees the plurality of commercial e-money instruments.

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 limit competition and allow to charge fees, etc.

In addition, as ESTA has developed in its position paper on the e-euro, the potential of a digital currency in restoring the monetary anchor weakened by the reduction of the place of cash will only be successful if the e-euro is accepted by retailers and consumers. There are reasons explained in our position paper to anticipate that this may not be spontaneously the case. But in any case, the e-euro will not suffice by itself to achieve it, not least because of the unavoidable holdings limits which will be imposed to mitigate risks on monetary and financial stability. Furthermore, demand for digital currency will remain weak in countries where cash use is already low.<sup>16</sup> Cash use will have to be

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<sup>12</sup> <https://www.riksbank.se/en-gb/payments--cash/e-krona/>

<sup>13</sup> 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 — See also ESTA’s position paper on the e-euro.

<sup>14</sup> House of Lords Economic Affairs Committee “*Central Banks Digital Currencies: a solution in search of a problem ?* 13 January 2022 (<https://publications.parliament.uk/pa/ld5802/ldselect/ldconaf/131/131.pdf>)

<sup>15</sup> As 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.

<sup>16</sup> Tanai Khiaonarong and David Humphrey, “*Cash Use Across Countries and the Demand for Central Bank Digital Currency*”, IMF working papers WP19/46, March 2019.

increased first. Also, an e-euro will require cash to provide a satisfactory monetary anchor: therefore, with or without the e-euro, cash volumes will have to be restored.

## **Conclusions**

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 for not accepting cash.

Consumers should be able to report quickly any refusal of cash by retailers and businesses other than for good faith reason. A reporting scheme should be put in place, so as to allow for timely remedies. Failing this the share of cash might fall below the sustainable volume before measure are even considered.

ESTA hopes that this position paper is of interest and that its suggestions will be endorsed and implemented.