ESTA
The Cash Management Companies Association

Position of ESTA on the draft Revision of PSD2

(Com (2023) 366 Final, Com (2023) 367, COM (2023) 360)

22 September 2023

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Summary

The CIT/CMC industry was not covered by the scope of PSD2, which will be repealed with the adoption of the new package. Our understanding is that the industry is not further covered by the new rules, provided it does not directly service payment accounts. In particular, CIT/CMC companies deploying independent ATMs are not subject to compliance to the new PSD3/PSR package if they only allow access to payments accounts, but are not servicing them.

ESTA would, however, like to express its views on three aspects: the new provision for a cash-in-shop facility up to 50 euros and the definition of "technical services providers", inasmuch as they concern the CIT/CMC activity. Thirdly, since one of the purported aims of the revision of PSD2 is to enhance the choice of the consumer for payment means, it should also include the promotion of cash as a means of payment, at a time when the EU institutions seek to restore cash as a monetary anchor.

Central bankers have always claimed their neutrality in relation to payments means, cash or e-money. The new architecture of the payment legislation, together with the introduction of the e-euro as central bank money could be understood as the end of the principle of neutrality, shifting towards digital money. In the light of where the past neutrality has led cash, ESTA suggests that it is now time in the contrary to discriminate positively in favour of cash, in order to protect it against other forms of commercial money.

Concerning the former, ESTA would like to make clear that cash-in-shop is not, and cannot be a substitute for a proper cash infrastructure. Related cash supply costs should be borne by the disengaging banking industry, which remains responsible for the supply of cash.

For the latter, definitions of relevance in the proposals should be adapted, or created, so that they do not render the CIT/CMC operations more cumbersome in an already very complex and challenging environment.

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I. Introduction

The Commission presented on 28 June 2023 its legislative package concerning the revision of the Second Payment Services Directive (PSD2), which is made of three proposals, one Directive and two Regulations. Most of the legislative package is of little relevance to ESTA. However some of its provisions are quite important.

The need for a revision of PDS2 is justified *inter alia* by a changing landscape in payment services and the decreasing use of cash. The decrease of cash is essentially provoked by payment institutions regulated under PSD2, through the nudging of their customers towards profitable electronic payments solution in competition with cash which they see as a cost.

ESTA welcomes that pure cash payments are still excluded from the scope of the legislative package. However, cash withdrawals are covered, whether from independent ATMs deployers (IAD) or from shops (without purchase) as per the new article 37 in the draft proposal on PSD3 (COM(2023) 366). ESTA would like to stress that both developments, which come in addition to cash-back, are only imperfect proxies rendered necessary due to the increasing, and in some places critical, disengagement of financial institutions from cash. These measures cannot substitute for a proper and efficient cash infrastructure which is required for cash to operate smoothly and efficiently. In essence, their development is only the consecration of the disengagement of the banking sector from cash, and their substitution by the non-bank sector, including the retail sector.

In doing so, not only do banks transfer their responsibility in cash supply to the non banking sector, but they also transfer the cost of cash supply to them, asking retailers to act as their branch, particularly in rural areas where banks consider that a branch, or let alone an ATM, is no longer worth their costs. From a bank's customer/cash user perspective, cash-in-shop cannot substitute for a decent cash infrastructure for a number of reasons: the availability of the cash-in-shop facility will obviously depend on the availability of cash in the cash register of the retailer, it will be a possibility, not a right, subject to the good will of the retailers. The cost of supplying cash may be charged to the customer/cash user.

The legislative package refers to many pieces of legislation. However one is never mentioned, which ESTA thinks is of relevance in this context: Directive EU 2014/92 on the basic payment account. This directive provides that fees charged to their customers by credit institutions should cover cash services, deposits and withdrawals regardless of the number of operations. The obligation made to the financial sector to provide cash services to their customers may not be transferred to the retail sector, a fortiori at their sole discretion. One of the reasons would be that access to cash is an integral part of

the legal tender of cash, and it must be provided with a high level of certainty, and not left to the off chance that a retailer has enough cash in its register.

The call for the development of new forms of commercial e-money that transpires from the revision of PSD2 further calls for a protection of cash. Central banks should put an end to their alleged neutrality in relation to electronic money vs cash, in the light of where this neutrality has led cash. It is time for a positive discrimination of cash as any further development of commercial money risks being critical, if not fatal, to it.

II. Cash must be part of the choice of payments means guaranteed by law

The revision of PSD2 aims at enhancing the development of and the competition between payments instruments and should favour the developments of new electronic payment instruments other than card-based system, and particularly instant payments. However, the policy towards consumer choice for payment instruments should not only be limited to electronic money, but should include cash as well.

This would have some consistency with the policy pursued by the legislative package to protect cash and to establish the principle of mandatory acceptance, according to Article 4 of the draft Legal Tender Regulation: what would be the point of establishing mandatory acceptance, if cash is not considered in the choice of payment instruments guaranteed by the payment legislation?

III Cash-in-shops

The revision introduces the possibility for retailers to supply cash on demand from their customers, up to a maximum of 50 euros through cash-in-shops, i.e. a supply of cash in retail without purchases. This would be made on a voluntary basis, with no right granted to the consumer and only on the condition that the retailer has enough cash to provide. According to the draft provision, the retailer may charge the cash user for the service.

The provision is justified on ground of declining cash and the increasing difficulties in accessing cash. The reason for this is now well known: it is the consequence of the increasing disengagement of banks from cash, the closing down of banks' branches and the removal of ATMs, particularly (but not only) in rural areas. In addition, consumers are constantly nudged towards paying with commercial electronic money. In 2021, the ECB-hosted European Retail Payment Board's (ERPB) working group looked at this issue. In the report, banks warned that legislations 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).*"[1] This gives ample explanation of the situation that cash is facing today.

[1] ERPB final report, at page 29.

Concerning rural areas and the gaps in access to cash, the banks expressed the views in the ERPB report that, when looking at the issue of the distance to access cash: "*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 working place*".[2] The shortcomings of this comment are partially included in the use of the conditional "*might*", when actually it is evident that many inhabitants of rural areas *do not* commute at all to go to their work: for these people, distance is a major issue for which commuting is not a solution.[3]

In this context, the ERPB has reviewed the possibility of cashback and cash in shops and looked at the "lack of incentives" for retailers to adopt cashback and cash in shops, while stressing the cost factor (impossibility to distinguish the two parts of the transaction, the cash supply from the purchase), leading to increased costs to retailers. However by doing so, banks are pushing their cash supply responsibility towards retailers.

Cashback and cash in shops are only proxy solutions to overcome cash supply deficiencies, they cannot substitute for a proper cash infrastructure. Retailers are not part of financial services and their role cannot be to substitute for banks. The draft revision of PSD2 acknowledges exactly that when stating that cash-in-shops would only be possible on a purely voluntary basis, and would create no right for consumers and cash users.

For this very reason, cash-in-shops cannot be an element of what constitutes legal tender, which includes a satisfactory level of access to cash and creates rights for cash users and obligations for cash suppliers.

ESTA therefore suggests that:

- Cash-in-shop can only be exceptional, and not be a proxy for the failure of banks to comply with their responsibility to provide cash to their customers;
- The cost charged by the retailer to provide cash to a user should not be borne by the cash users/bank's customer, but must be borne by the financial institution/payment institution on behalf of which cash is offered to its customer; it would be unfair to allow financial institutions to reduce their cost and leave the increased cost of access to cash to retailers or their customers;
- a recital in the legislative package should be introduced to state that the application of draft Payment Services Regulation is without prejudice to Directive 2014/92 on the basic account directive, which provides that banks' customers are entitled to cash services, both deposits and withdrawals and regardless of the number of operations, for which the cost is essentially covered by the account annual fees paid by customers.
- Cash in shops should only be allowed to be offered by shops provided with banknotes authentication devices to ascertain a high level of guaranty of the genuine nature of the bank notes recirculated through this new supply channel.

[2] ERPB final report, at page 18.
[3] See ESTA's position on the ERPB final report, 10 February 2022.

IV. The cash industry in the payment services legislative package

PSD3 deals with the access to the activity of payment institutions and their supervision, whilst the draft PSR deals with the conduct of payment services. The PSR excludes from its scope all transactions purely conducted in cash as was the case of PSD2. However, it does not explicitly exclude any more "*the professional activity of physical transport of banknotes and coins, including their collection, their processing and their delivery*" (formerly article 3(c) of PSD2).

ESTA understands, however, that the cash industry is not drawn automatically into the scope of the legislative package.

Therefore, it is ESTA's understanding that cash operators would only be drawn into the scope of the legislation if under PSD3 they are defined as payment institutions, which would imply that CIT/CMC operators would "*service payment accounts*", not just "*enable cash withdrawals from payment accounts*". It would then imply that they conduct "payment transactions" under the PSR. Failing this, ESTA understands that cash operators do not fall into the scope of the legislative package.

ESTA would however draw attention on the wording of the exclusion listed under article 2.2.(i) of the draft PSR of "*services without prejudice to Article 23(2), and Articles 58 and 87, services provided by technical service providers*". Technical services providers are defined in the regulation in article 3(36) as :

> '*technical service provider' means a provider of services which support the provision of payment services, without entering at any time into possession of the funds to be transferred".*

The restriction of "*without entering at any time into possession of the funds*" is very restrictive. In their activities, and in order to process funds efficiently, CIT/CMC operators do become "the owner" of the funds for very brief moments. Before the revision of PSD2, they had in some cases either to be registered as PSPs and subject to specific supervisions rules or, when not, they were backed by a commercial bank, making them dependent from the banking system for their operations. The revision of PSD2 should allow for flexibility. In essence, the business consists in transferring cash from a customer to the central bank or vice versa. In doing so, the CIT/CMC operator may become the owner of the funds for a very short time, usually less than 24 hours, to smooth and speed up the process, which also entails a reduction of the physical transport of cash. This also has the advantage to facilitate the exchange of excess denomination with others or the provision of change money.

It is therefore suggested that the definition is changed to "***without entering into the possession of the funds to be transferred for more than 24 hours***". In doing so, no payment transaction is made, as cash is converted into scriptural money for a very short while and then converted again as cash to and from the central bank and or the customers, via the vaults of the CIT/CMC.

It would be excessive to mandate that a technical service providers do come fully under the scope of the legislative package for technical requirement to own funds for tiny moments. This would have substantial impacts which would not be proportionate to their objective.

Alternatively, the definition of "*technical service provider*" should exclude the CIT/CMC industry from it, and possibly add a new definition of "*logistics service providers*" fitting the industry, and excluding it from the scope of the PSR.

This change in the draft Regulation is critically important for the CIT/CMC industry. In the current context of low cash volumes when cash is a volume driven activity, the sustainability of the cash business is at stakes. It is therefore essential that the flexibility in the management of cash is allowed without unnecessary, disproportionate supervision due to the fact that the risk is minimum, the duration of the ownership is extremely short and in most cases, CMC operations of the kind are backed by a financial institution. If the objective is to secure that the CIT/CMC industry continues to play its role in the cash cycle, the conduct of operations must be facilitated.

Conclusions

ESTA welcomes the revision of PSD2 into a legislative package comprising of a draft directive on the supervision of payment institutions and a draft regulation on the conduct of the payment services activity.

ESTA welcomes the facility offered by the new provision of cash in shops up to 50 euros, provided that incoming notes have been properly checked for authentication before they are recirculated.

Cash in transit and cash management companies are not, normally, regulated by the legislative package, unless they carry "payment transactions" servicing a payment account, in which case they would have to register as payment institutions. Technical services providers should be defined as services which may come in "*possession of the funds to be transferred*", however, for a duration not exceeding 24 hours, as it is often required for technical reasons to come in possession of the funds. These operations are either backed by a bank or by a PSP status where they are conducted, so that there are no loopholes in terms of supervision. Alternatively, ESTA suggests that a new definition might be added to fit the CIT/CMC industry, the "*logistics service provider*", excluded from the scope of PSR.