Response to Social Partner Consultation
on access to essential services

Brussels, 02 June 2022

1. What are in your view the most important barriers impeding access to essential services at national and local level, and what are the most affected groups?

With this contribution, the Confederation of European Security Services (CoESS) stresses that European citizens' access to cash is increasingly limited – affecting particularly our societies' most disadvantaged groups such as the least well-off, elderly or people with migrant background. Together with our European Sectoral Social Partner, UNI Europa, we have repeatedly raised awareness of this issue – notably in a Joint Statement in 2019 and a number of following roundtable discussions.

Cash services are essential services provided to citizens, retailers and consumers. This is particularly so as millions of European citizens are unbanked and have no other choice for payments than using cash. The EU adopted a Directive in 2014 on the basic payment services account which provides that cash services, both deposits and withdrawals, are basic services regardless of the number of operations.

The EUCJ acknowledged this in its Ruling C-422 and C-423/19 of 26 January 2021 where it said:

> *"77 It is nevertheless for the referring court to ascertain whether such a limitation is proportionate to that objective, in particular in the light of the* ***fact that the lawful alternative means of payment*** [to cash] *of the radio and television licence fee* ***may not be readily accessible to everyone liable to pay it, which would entail providing for those without access to such means of payment to be able to pay in cash****."* (Our emphasis).

The conundrum of cash is that it is possibly made available to the public through its "worst enemy", i.e. the banking sector. We mean by this that the banking industry has competing payment instruments to offer on which it makes substantial profits, through card and transactions fees, compared to cash which finance institutions consider primarily as a cost centre.

Yet, the limitation of European citizens' access to cash is increasingly problematic in a number of countries, so much so that a number of them have adopted, or are considering, legislative measures to secure access to cash. It has to be reminded that cash is the only public (i.e. Central Bank) money which is public tender, and any increase of the market share of electronic money (all private money) to the detriment of cash is nothing less than a creeping privatisation of money. The vast majority of companies offering private money are non-European and have an overwhelming market share and, subsequently, market power.

The European Central Bank (ECB) is looking at the problem of access to and acceptance of cash and set up in 2021 a Working Group within its consultative body, the European Retail Payment Board (ERPB). Its final report was released in December 2021. This report is absolutely key to understanding the issue of access to cash from the point of view of the banking sector and barriers introduced by banks. It can be summarised in a few simple points:

- Cash is a cost for banks – one of the members of the ERPB referred to the "banks' pain of providing cash": "*for incumbent banks, easing the pain-of-providing access to cash is top of mind for banks: regulators increasingly scrutinise banks for providing ubiquitous and free access to cash.*"[1]
- Banks resist legislation which would impose cash services to their customers: as the ERPB working group report states, Member States' legislation "*banning fees for withdrawal and deposits may have harmful side effects on access to cash (e.g. banks further discontinuing cash services due to foregone profits)*".[2] In other words, attempts by public authorities to secure cash access for the public may end up in no access at all.
- The pandemic has substantially contributed to the reduction of the share of cash in payments, and particularly so in the area of micropayments where cash had a quasi-monopoly. This was not achieved by chance, but through a permanent threat by card operators that "*paying in cash is extremely risky*" and reassurance that "*contactless is the safest paying method*".[3] The change of behaviour of a number of retailers and consumers, and particularly in senior categories of the population less prone to use electronic means of payment, was achieved through fear of contamination. The allegations continued in spite of a number of Central Banks, and not least the ECB, confirming with epidemiological evidence that the risk of contamination through banknotes and coins was very limited, and almost non-existent after a short period of time, due to the very low concentration of viruses on money. So, when the world was fighting COVID, some used it for their marketing.
- Banks are adamant that the reduction of cash services, notably reduction in the number of ATMs, only follows a declining cash demand. This is clearly stated in the position of banks

[1] "*Cash and access to cash – the MasterCard perspective*" Presentation to the ERPB, May 2021. Mastercard is not a member of the European Payments Council (EPC) which is a member of the ERPB, however, their subsidiary HomeSend is a member of the EPC, and therefore represented in the ERPB.
[2] ERPB working group report on access to and acceptance of cash, at page 29.
[3] As stated by MasterCard in their position paper sent to the European Commission and the European Banking Authority on 20 April 2020 when lobbying for the increase of contactless limits from €30 to €50.

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reflected in the ERPB report. However, this is contradicted by their acknowledgement that the average amount of cash withdrawn increases when the number of ATMs decreases, as a compensation for longer distance and higher cost for the public to access their cash.[4]

- The views of the banking sector, as evidenced by their position expressed in the ERPB report, is that cash should preferably be supplied through "out-of-banks" channels, namely cashback, cash-in-shops and independent ATM deployers, as least where ATMs are not profitable to banks.[5] Now that the supply of cash has been almost completely transferred to ATMs for cost reasons (no bank would supply cash over the counter anymore), the new trend is to reduce the cost of ATMs via removing them and suggesting out-of-banks cash supply channels instead. Therefore part of the cost of supplying cash to the public (longer distances, possible withdrawal and deposit fees) and retailers (managing more cash than needed for their trade to supply the public with cash, difficulties in cash deposits, etc.) is transferred to non-bank stakeholders. Shops in local communities are asked to substitute for banks services and ATMs in the supply chain of cash.

The consequence of these new channels of cash supply is the need for a redefinition of the business model for cash. As said earlier, EU law regulates how banks can charge customers for basic services, including cash withdrawals and deposits. Banks are including the cost of these services in the fees they charge to their customers, whether in the general bank fees or specific card fees or transaction fees at ATMs where they apply. It is not an issue per se that they "outsource" cash services, unless their customers have to pay twice for services that have already been paid for in their general bank account fees.

"*Deposits held by banks are a statutory debt they owe their customers: lender surely should not pay a surcharge for the collection of debts*",[6] and in any case not pay twice for it. Banks may decide to delegate cash services to third parties if they decide that cash is no longer good enough for them. However, their responsibility remains that of ensuring that their customers still access their cash at no additional costs other than those already charged for providing payment accounts and card allowing to use ATMs and make electronic payments, for which they also pay fees. Access to essential

[4] ERPB report, at page 18

[5] See for example the BATOPIN initiative in Belgium, a grouping of four major banks aiming at reducing the number of ATMs by half (from 7,000 currently to 4,000) by 2024. The serious concern of the initiative is that ATMs are free of charge in areas where cash users have the choice, but usually introduce a fee when there is only one left: the very nature of the initiative will most likely lead to fees being introduced due to lack of competition in rural areas.

[6] Speech of Tuomas Välimäki, Bank of Finland, 28 November 2018

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cash services requires that banks do not disengage from cash without alternative suitable and cost effective solutions to cash users.

Finally, cash is what works when nothing else does. Some believe that cash is only good enough to substitute for electronic payments in case of crises, disruption of cards and other mobile payments networks. It is a fallacy to think that cash can only be reduced to this contingency function: cash is a volume driven business which requires a level of infrastructure which can only be sustained if a critical volume of cash circulates. If cash is not functioning smoothly on a daily basis, it will not be readily available in case of crises, as the infrastructure may no longer be available if cash drops below a critical mass.

And, importantly, different societal groups risk suffering from the reduced access to cash. It remains an essential payment system for relevant segments of the society, notably the economically disadvantaged (who have been "debanked"), elderly, children, homeless and foreigners. The "War on Cash" is a fundamental issue of consumer and citizen rights and puts the jobs of service workers in many sectors at risk, including private security, financial services, printing, logistics and commerce. The dominance of non-EU players in the financial market adds a further challenge to European citizens' rights.

2. What are the most effective measures to support access to essential services at EU level? What are concrete examples of good practices from the national and local level?

Disengagement from cash by banks needs to be monitored and controlled. As their argument goes, banks disengage from cash as the demand for (transactional[7]) cash is reducing. The reality is that consumers are actually constantly deterred from using cash by reducing the number of ATMs and, for example, nurturing fears of contamination to COVID by cash when such a risk is very low, and lower than that of contacts with everyday life's objects (e.g. door handles, holding bars in public transport and… plastic payment cards for example). With regard to cash, very effective and concrete actions should be considered to secure access to essential cash services:

- Banks must be told that they have the responsibility to supply cash, as the main cash supply channel. If, instead of investing in cash technology to ensure an efficient cash service to their customers, they wish to delegate it in one way or another, they should do that in such a way

[7] Indeed, the current "cash paradox" is that cash in circulation continues to grow substantially faster than the economy but transactional cash used for payment is reducing rapidly.

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that there is no gap in access, and no additional costs to cash users. Whatever the solution, the responsibility should remain theirs, as the primary stakeholders of cash supply to the public.

- A very effective way to deter retailers and consumers from using cash is change money shortages. This has proven to be critical in countries such as Sweden, where retailers faced increasing difficulties to get hold of change money and ensuring smooth cash payments. Coins, however, are even more disliked by banks than notes. They are essential to ensuring that physical money works well for payments.
- A smooth cash operation requires that cash is not discriminated against card payments. The suggestion to phase out the 1 and 2€ cent coins and round prices only for cash payments will lead to increasing the prices of goods paid in cash, as rounding will be more frequently up than down. Since cash is used essentially for small payments, the few cents at stake will not be insignificant at the end of the month, particularly if they apply to a number of daily payments, for those on very low budget.
- Since cash is the only public money available to the public, marketing operations by card operators sponsoring 100% cashless retails should not be allowed. Since the cost of non-cash will substantially increase card and mobile payments fees if cash is no longer available, this should be considered as predatory anti-competitive practices.[8]
- Legislation adopted in some countries to ensure minimal cash services by the banking sector is an important contribution to securing cash services to cash users, however, it should not leave all of its implementation to the discretion of banks, as banks have other payment services to offer that are far more profitable to them.
- To ensure that cash remains in demand, rules on acceptability of cash must be clarified and in a number of cases reinforced. A possible confusion is the issue raised by the EUCJ ruling of January 2021 concerning "the contractual freedom".[9] The obligation to accept cash is, as the Court said in the aforementioned joint cases, a "non-absolute mandatory obligation".[10] Indeed, no right and no obligation is ever absolute. However, this does not mean that the obligation to accept cash as a legal tender (article 128 TFEU) is a weak obligation. For example, the fundamental rights entailed in the EU Charter are not "absolute", as recalled by its article 52. However, who could claim they are "weak"? Rules on acceptance of cash

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[8] Cf the fivefold increase in MIF in card fees charged by a major card operator for payments from the UK to the EU after Brexit, when the EU MIF Regulation stopped being applicable.
[9] The Court ruling provides no legal basis in EU law allowing to refuse cash as a payment on ground of "contractual freedom".
[10] This apparent oxymoron is based on the fact that Article 128 TFEU, which provides for the legal tender status of the Euro in the Eurozone, is mandatory, but does not specify what legal tender means concretely. The details are provided by a recommendation of 2010, which by definition creates no obligation.

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must be clarified. The ERPB report, already mentioned, refers to "contractual freedom" to justify that cash can be refused as a payment by a retailer.[11] The conundrum of this approach would be that legal tender might be denied by virtue of a retailer's decision. In other words, EU primary law would only be enforceable if a private stakeholder accepts it, and not in case it is of a different view. Contractual freedom suggests an agreement between parties, not fait accompli by only one of them. It is essential that rules on acceptability ensure that cash must be accepted by default, and only refused on "fair grounds" (e.g. if the denomination is not commensurate to the payment, or limitation in the number of coins used for a payment…).

It is worth noting that rules on acceptance of cash are no panacea to increasing cash used for payments. It is nonetheless critically important to ensure that consumers keep the choice of payment by all legal means of payment. Those who wish to pay in cash must have the possibility to do so – and thus have access to this essential service.

3. In what way can the social partners contribute to improving the access to essential services?

Social partners, and Social Dialogue, bear responsibility for adequate and safe working conditions as well as for a just and fair collective bargaining policy for employees in those sectors affected by the "War on Cash" – such as the security services. In view of the developments described above, we have repeatedly appealed to politicians to ensure that an economically sustainable cash infrastructure is maintained in Europe. National social partners have taken respective action at Member State level too, for example in Germany.

Unfortunately, the most effective solutions are outside the control of social partners, and more in the hands of regulators and legislators.

Further to the Court ruling in joint cases C-422 and C-423/19, the European Legal Tender Expert Group (ELTEG) has met a number of times to discuss whether rules on acceptability should be amended. As it goes, it is very unlikely that it will recommend any changes in the existing rules. CoESS would suggest two solutions:

[11] The argument goes that if a retailer displays a notice that cash is not accepted as a payment, the consumer is deemed to have accepted the contract by entering the premises.

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- As expressed in a joint letter of June 2021 with UNI Europa to the Commission ECFIN Directorate general, the specific conditions set in the EUCJ jurisprudence for a primary law provision such as Article 128 TFEU for having a direct effect are met, precisely by virtue of the 2010 recommendation. It does not matter whether the recommendation is binding or not, since it explains what legal tender means, when legal tender is mandated by the Treaty itself, and therefore binding by definition.
- In any case, the discussions on the e-euro as an electronic (non-physical) Central Bank money, require, if the decision is made to create it, to adopt secondary legislation to grant it with legal tender.[12] Since it is unthinkable that the e-euro might have a different legal tender regime than the physical euro,[13] the creation of the e-euro will necessitate a revision of the legal texts underlying legal tender, which will be the opportunity to clarify the rules, and strengthen the obligation to accept cash (and e-euros) as a payment with only fair ground exceptions.

As the EUCJ stated in its ruling of January 2021, monetary policy is an exclusive EU competence. Legal tender is fully part of it, and as a consequence is also an exclusive EU competence, that no Member State may be allowed to encroach upon. By leaving the status quo, where the understanding of legal tender varies from one Member State to the other, it deprives the EU of a fundamental part of its monetary policy powers. This happens not only with Member States, but also with private stakeholders which are entitled to decide whether they wish to accept cash or not, i.e. whether cash is legal tender or not.

About CoESS

CoESS acts as the voice of the private security industry, covering 23 countries in Europe and representing 2 million security officers as well as over 45,000 companies. The private security services provide a wide range of services, both for private and public clients, including Cash-in-Transit services. CoESS is recognised by the European Commission as the only European employers' organisation representative of the private security services. Representing a labour-intensive sector, CoESS is actively involved in European Sectoral Social Dialogue.

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[12] Since article 128 TFEU refers explicitly to "Euro banknotes and coins".
[13] With the exception of possible limits in the amount of e-euros that each one may detain, for obvious prudential and stability reasons.

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