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From:	General Secretariat of the Council
To:	Working Party on Financial Services and the Banking Union (Payment Services/ PSR/PSD) Financial Services Attachés
Subject:	Presidency Discussion Note: Discussion on the regime of distributors vs agents

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Payment services package proposals (PSD3/PSR)
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Presidency Discussion Note
Discussion on the regime of distributors vs agents

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The regime of distributors vs agents

Based on the feedback received from Member States following the January CWP meeting, the Presidency notes Member States' opinions on the definition of agents and on the question of whether distributors of e-money should be treated as agents remain divided.

Some Member States were of the view that the activity of distributing e-money should not be treated as the activity of an agent, as that would impose a disproportionate burden on PIs (current EMIs) and NCAs, with a potential negative market impact and disruption to existing EMI business models reliant on distributors. These Member States agreed with the proposal put forward by the Presidency in the January CWP to specify in PSD3 that "*The mere selling or distribution of electronic money by a third party acting on behalf of the issuer, including the collection of funds on behalf of the issuer from the holders of e-money in exchange for electronic money, without the provision of any other payment services should not be deemed to be the activity of an agent".*

By contrast, other Member States disagreed with this proposal and were of the view that entities currently operating as distributors should be treated as agents. These Member States were of the view that (i) distribution involves the same risks, including ML/TF, as other activities carried out by agents; (ii) as distributors are handling consumers' money, if distribution were not to be deemed a payment service, this would expose consumers to risks of loss of funds by an unregulated third-party provider collecting funds on behalf of a PI.

Some Member States proposed having a broad definition of agents whereby any entity that (i) enters into possession of the funds (including distributors) or (ii) is directly involved in the PSP's provision of payment services would be deemed to be agents. For other MS, such a definition would be too broad.

There were also some Member States which suggested keeping the two concepts (agents and distributors) as in the current legal framework.

Taking into account the feedback from Member States, the Presidency would like to suggest the reintroduction of the concept of distributors in PSD3/PSR, considering:

- that the merging of distributors into the concept of agent would create a significant burden for both industry and NCAs, and have a negative market impact on existing EMI business models;
- the fact that a PI using distributors remains ultimately liable for any acts of its distributors in the distribution of e-money. This principle, which is reflected in Article 23 PSD3, is also in line with the principle in the AML legislation that PIs/EMIs, as obliged entities, are liable for any breaches of AML/CFT legislation by a person acting on their behalf or under their authority, including agents and distributors. The Presidency also notes that there are specific requirements in the AMLR relating to distributors (which includes, for example, obligations for EMIs/future PIs in PSD3 to provide their distributors with training on AML/CFT measures), which may address some of the ML/TF concerns raised by Member States.

More specifically, the Presidency proposes to:

- Reintroduce the definition of distributors in Article 2 PSD3 but with some changes.
- Clarify that the distribution of e-money also covers the receipt, in exchange for e-money, of funds from the holder acquiring the e-money while also clarifying that distributors should always act on

behalf of the PI issuing the e-money, which remains ultimately liable for the acts of its distributors, in line with Article 23 PSD3.

- Clarify that where a distributor receives, in exchange for e-money, funds from the holders acquiring the electronic money those funds should be considered to have been received by the PI itself, given that the distributor is acting on behalf of the payment institution.

  In this regard, the Presidency recalls that under the current legal framework, in line with an EBA opinion from 2019 on the nature of passport notifications regarding agents and distributors (see EBA-Op-2019-03 para. 26), "*if a distributor receives the funds from the end-customer in exchange for e-money, the funds are considered to have been received by the issuer itself, considering that the distributor is acting on behalf of the issuer. The safeguarding obligation of the issuer starts as soon as the distributor receives the funds from the customers, and remains with the issuer/EMI (not with the distributor), so that the customer does not bear any consequence of the funds not being transferred from the distributor to the issuer, including in the event of the distributor's insolvency".*

- Specify that the principle that the PI always remains liable for the acts of its distributors should not be circumvented by contractual provisions stating that distributors purchase the e-money *in their own name* from the issuer and then resell it, *in their own name*, to PSUs.

- As regards the redemption of e-money, based on the assumption that payment services under PSD3/PSR will include e-money services, which in turn will comprise (i) the issuance of e-money and (ii) redemption, the PCY proposes to clarify that redemption is an activity reserved to agents, not distributors, but differentiate between the redemption of e-money, which implies that the e-money is redeemed/exchanged for funds and ceases to exist/is extinguished, as opposed to the case where the distributor purchases the e-money from an e-money holder, without the e-money being redeemed/extinguished.

Taking into account the above, the Presidency proposes the following drafting amendments in red, using as reference the text in the COM PSD3 proposal (the wording could be further improved):

Article 2 PSD3

36) 'distributor' means a natural or legal person that distributes ~~or redeems~~ electronic money on behalf of a payment institution issuing the electronic money, or repurchases the electronic money from a holder, based on a contractual relationship with the payment institution issuing the electronic money, where this does not amount to a redemption of the electronic money;

Recital 45 PSD3

To expand the reach of their services, payment institutions may need to use entities providing payment services on their behalf, including agents ~~or, in the case of electronic money services,~~ and distributors. Where a payment institution providing electronic money service makes use of an agent, said agent may not issue electronic money itself but may redeem it on behalf of the payment institution. Payment institutions issuing electronic money should be allowed to distribute electronic money via distributors acting on their behalf, without such activity constituting a payment service. When distributing electronic money, distributors should always act on behalf of the payment institution issuing the electronic money, which remains ultimately liable for any acts of its distributors in the distribution of electronic money, and for compliance with AML/CFT requirements as regards the activities carried out via distributors. This principle should not be circumvented by contractual provisions stating that

distributors purchase the electronic money from the issuer and resell it, in their own name, to electronic money holders.

The distribution of electronic money should also cover the receipt, in exchange for electronic money, of funds from the holder acquiring the electronic money. Where a distributor receives, in exchange for electronic money, funds from a holder acquiring the electronic money, those funds should be considered to have been received by the payment institution itself, considering that the distributor is acting on behalf of the payment institution.

~~*Payment institutions may also exercise their right of establishment in a host Member State, different from the home Member State, through branches. In such cases, it is appropriate that the payment institution communicates to the national competent authority all the relevant information related to agents, distributors and branches and informs national competent authorities of any changes without undue delay.*~~ *[PCY proposes deleting this sentence as it is also covered in other recitals in PSD3 (e.g. recital 55), as well as to avoid mixing up too many different aspects in this recital]* *To ensure transparency vis-à-vis end users, it is also appropriate that agents~~,~~ and distributors ~~or branches~~ acting on behalf of a payment institution inform payment service users of that fact.*

New Recital 45a

Taking into account that the redemption of electronic money is deemed to be an electronic money service and hence a payment service under this Directive, the redemption of e-money should be treated as the activity of an agent, and not of a distributor. However, in cases where a distributor, pursuant to a contractual relationship with the issuer, repurchases the electronic money from the holder of electronic money in exchange for funds, this should not be deemed as redemption of electronic money if the electronic money is not extinguished. This is without prejudice to the obligation of the issuer to redeem the electronic money at par value at the request of the electronic money holder.

Article 20

Distributors of electronic money services

1. Member States shall allow payment institutions that provide electronic money services to distribute ~~and redeem~~ electronic money through distributors.

2. ~~Member States shall ensure that payment institutions that intend to provide electronic money services through a distributor apply the requirements laid down in Article 19 mutatis mutandis.~~ Where a distributor receives funds from the holders acquiring the electronic money, those funds shall be considered to have been received by the payment institution itself.

3. Where the payment institution intends to distribute electronic money services in another Member State by engaging a distributor, Articles 30 to 33, with exception of Article 31(4) and (5) of this Directive, including the delegated acts adopted in accordance with Article 30(5) of this Directive, shall apply mutatis mutandis to such payment institution.

New Article 20a

Issuance and redemption of electronic money

Member States shall allow payment institutions that provide electronic money services to redeem electronic money through agents.

Payment institutions shall not issue electronic money through agents.

As regards the liability of the PI for the acts of its distributors and agents, beyond the clarifications proposed above in recital 45 PSD3, the Presidency notes that this is already reflected in Article 23(2) PSD3, which reads as follows:

"2. Member States shall require that payment institutions remain fully liable for any acts of their employees, or any agent, distributor, branch or entity to which activities are outsourced".

The Presidency acknowledges that the above proposals, which focus on the regime of distributors of e-money versus agents, do not address the broader question of the definition of agents in Article 2(28) PSD3. Given the divergent views still remaining amongst Member States on the definition of an agent, further analysis in this regard is needed.

Questions for the Member States:

Q1. *Do you agree with the proposed approach regarding the regime of distributors and agents, and the proposed drafting suggestions?*

Q2. *Member States are kindly invited to put forward their further proposals for the definition of an agent, which still remains an open key issue for Member States.*

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