

Cash Payment Limitations and the fight against the funding of terrorism

Executive summary The response of ESTA to the EU public consultation

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Executive summary

The purpose of the consultation is to seek stakeholders' views on a possible harmonisation of cash payment limitations (CPLs) with a view to combat terrorism funding.

ESTA's submission covers two main aspects in relation to this initiative: first, it reviews the problem definition, looking particularly at empirical evidence of what CPLs have – or rather have not – achieved in Member States in areas of tax evasion, fighting crime and fighting corruption. Second, ESTA believes that there are major pre-conditions required before the Commission can proceed with a legislative proposal.

Looking into the problem definition and relevant evidence

Empirical evidence is not very flattering for CPLs, as they have not addressed in a meaningful manner any of their objectives. Worse, countries which have implemented these measures are often in worse situation than those which have not. This should call for caution when considering imposing CPLs throughout the EU.

ESTA further reviews the problem definition that the Commission seeks to address through its initiative. Contemporary terrorism in Europe has radically changed in the last few years, possibly due to stricter anti-money laundering measures and stricter controls on international transfer of funds. They have been very effective in reducing illicit cross border transfers of money, however pushing terrorist actions towards smaller, local terrorist cells, coinciding with an increasing propensity to self-funding of attacks, mostly from legal sources.

Cash is used for payments in relation to terrorism funding together with other means of payments. There is no evidence that cash is particularly desired for anonymity purposes, contrary to criminal organisations. Also key is that cash has often been obtained from non-cash sources (e.g. consumer loans) as can be seen from a number of documented cases. Barter (e.g. car or drugs for weapons) has also been used.

By the same token, sums involved in the organisation of terrorist attacks in Europe have reduced drastically to a very low level, fuelling the expression of 'low cost' terrorism. The amounts at stake would in most cases remain below a 'reasonable' threshold of CPL, meaning that their EU harmonisation would be ineffective. ESTA's submission invites the Commission to broaden substantially the evidence used for its assessment, and essentially to revert to terrorism-specific analyses, rather than to reports dealing almost exclusively with organised crime and very little with terrorism and of which the relevance may be questioned.

The requirements under the Better Regulation principles

The second part of this submission (section III) reviews a number of issues that the Commission will have to address before it can decide to submit a formal legislative proposal to harmonise CPLs. These requirements are imposed by its Better Regulation principles, which, under the Juncker Commission, have been elevated as never before and are under the realm of one of the two Vice-presidents of the Commission. The first of these requirements is to expect that the Commission starts from a robust evidence base. ESTA offers some direction as to which evidence may be considered.

The issue of proportionality of EU actions is one imposed by the EU and TFEU Treaties. As shown in the first part, empirical evidence suggests that CPLs have not been effective so far in addressing what they were meant to achieve: the proportionality test required prior to their EU harmonisation becomes a very critical one. It is even more so since privacy is a right guaranteed by the EU fundamental right as well as by the European Convention on Human Rights (ECHR) which the EU, as a new signatory to the ECHR, is now bound to respect. ESTA does not suggest that fundamental rights/ ECHR rights cannot be restricted; we argue that any restriction require a substantially higher burden of proof with regard to their necessity and proportionality, particularly as not only States but also companies would benefit from the limitations to the right to privacy.

The ESTA submission is critical of the subsidiarity aspect of a possible CPL harmonisation proposal. In the absence of any obvious cross border impact, it is not clear how EU intervention may be more effective than what Member States may be able to achieve. Concerning the possible internal market impact, ESTA strongly doubts that displacement of cash transactions in relation to terrorism is a reality. ESTA also considers that the alleged “distortion of competition” for all legitimate transactions is a very weak argument put forward essentially to justify the possible use of Article 114TFEU. ESTA argues that it is merely an incidental objective, which does not justify the recourse to article 114TFEU.

This submission argues that, should there be convincing evidence of such displacement, these displacements are either “*selling arrangements*” or “*reverse discriminations*” which are not obstacles to trade (or measures of equivalent effect), as already ruled by existing ECJ case law.

ESTA recalls that article 114TFEU, despite being a residual legal basis, can only be used if a series of very stringent conditions are met, which is not the case in the instance of CPLs.

ESTA flags that national measures to limit cash payments have been introduced for tax evasion purposes, not to fight terrorism. Since tax evasion plays no role in the funding of terrorism, the need for harmonisation on this ground is highly questionable.

In a final section, ESTA reviews existing policies which may be considered instead, possibly with some adaptations, to fight terrorism more effectively than CPLs, as payments made in relation to these activities are “*almost impossible to detect*”.

This full submission is ESTA’s main response to the EU public consultation. ESTA does not consider that the online survey is an adequate consultation of stakeholders. Questions are loosely or ambiguously worded and some choices do not even refer to the funding of terrorism, which is the alleged purpose of the consultation. Other questions imply a high level of understanding of the issue and a lot of expertise from respondents: an ‘opinion’ is not an acceptable substitute for such expertise. ESTA invites the Commission, therefore, to rely on substantiated submissions rather than on the online survey.