

Cash Payment Limitations and the fight against the funding of terrorism

Critique of the online survey questionnaire

Annex to ESTA's full response document to the EU consultations

The Commission opened on 1st March 2017 a public consultation on a possible initiative on cash payment limitations (CPLs) in relation to combat terrorism funding.

The consultation is conducted via a "survey" accessible through the link below.
<https://ec.europa.eu/eusurvey/runner/CashPayments>

The survey is composed of 18 questions¹, all offering responses only through multiple choices. The survey asks for opinions on very complex and specialist issues without any reference to relevant research on how cash payment restrictions can assist in fighting against the funding of terrorism. More critically, a number of key questions asks for views on certain aspects of "illicit activities", not specifically terrorism. In some cases, terrorism is not even considered in the responses offered to respondents, although the initiative is specifically about terrorism.

No question offers the possibility for respondents to comment or qualify their responses via open boxes. As such, the survey is merely an opinion poll, more than a consultation *per se*. It does not allow 'stakeholders [to] provide comments on all IA elements, i.e. the problem, the question of subsidiarity, the policy options and their impacts' as mandated by the Commission Better Regulation tool box's on public consultation (see section III.1 of ESTA's full response).

In reality, the absence of open boxes in the questionnaire means that stakeholders have not been able to "comment" on any IA elements. In that instance, ESTA feels that neither the spirit nor the letter of the Better Regulation principles have been complied with.

The survey, as it is construed, cannot be a substitute for a Commission review of the vast array of research and evidence which exists on terrorism funding and some important questions cannot be left to 'the opinion' of respondents as they require substantial developments to be dealt with in a meaningful manner.

Comments on specific questions

Question 2

How do you assess these national restrictions on payments in cash?

¹ Not counting the mandatory fields on identification of respondents. As questions are not numbered, the question "in your country of residence are there any restriction on payment in cash ?" is referenced here as question 1.

- *They are appropriate.*
- *They are too restrictive.*
- *They are not restrictive enough.*
- *No opinion.*

Failing to have a box “*they are inappropriate*” or “*ineffective*”, it is impossible for ESTA to respond. ESTA has a strong opinion on this question and a response “*they are too restrictive*” would imply that they might be a step in the right direction, only going too far.

The other serious bias in the question is that respondents are asked on the appropriateness of ‘*national*’ restrictions in the context of their possible harmonisation at EU level. However, as the Inception Impact Assessment (IIA) of the Commission rightly recalls, these measures have been introduced by some Member States for a different purpose (tax evasion) than the one considered by the EU (terrorism funding). As our full response stresses, tax evasion is not an issue in relation to terrorism financing.

The question therefore is misleading: the relevance of the measure when implemented for a different purpose by Member States bears no relevance to the assessment of their adequacy at EU level for another purpose (please refer to **Section III.4.4** of our full responses).

ESTA therefore skipped the question.

Question 5

If restrictions were introduced at EU level, should they:

- *Be identical in all Member States.*
- *Depend on the specificities of the Member State concerned.*
- *No opinion.*

ESTA skipped the question.

Again, answering this question would imply that ESTA agrees to restrictions, which is not the case. As explained in our full response to the consultation, ESTA considers that there is no right solution: a one-size-fits-all threshold might prevent displacement, provided that evidence is produced that displacement of terrorist related transaction is an issue, however it would be meaning less due to the wide divergence in purchasing power parity (PPP) that the IIA also highlights. Different thresholds taking PPPs into consideration would defeat the purpose of limitations when their sole justification is in the alleged displacement.

Please refer to **Section II.1.4** of our full response.

Question 6

If restrictions on payments in cash were introduced at EU level, should the limit be:

- *Very low (between €500 and €1500, or the equivalent in other national currencies).*
- *Rather low (between €1500 and 3500€, or the equivalent in other national currencies).*
- *In the middle (between €3500 and €6500, or the equivalent in other national currencies).*
- *Rather high (between €6500 and €9500, or the equivalent in other national currencies).*
- *Very high (above €9500, or the equivalent in other national currencies).*
- *No opinion.*

ESTA skipped this question. It question implies that the preceding question on a single or multiple thresholds has already been answered, since it asks for the views of respondent on what a single threshold might be.

Question 12

If restrictions on payments in cash were introduced at EU level, should they apply to:

- *All persons, residents and non-residents.*
- *Only residents of the EU.*
- *Only residents of the country where the transaction takes place.*
- *No opinion.*

ESTA skipped the question, which actually is *not* a question. For example, one would strongly query the purpose of any restriction that would apply “*only to resident of the country where the transaction takes place*” when the only argument of the IIA is based on displacement of transactions...

Assuming that CPLs are relevant, then the only possible answer to the question as asked in this survey would be the first choice. Any other response would be contradictory to the purported objective of restrictions. Missing choices would include whether they should apply to B2B, B2C or C2C. Then, the following (critical) question should be to ask how C2C restrictions could be properly enforced.

YOUR VIEWS ON THE IMPACT OF CASH RESTRICTIONS ON YOU, OR YOUR BUSINESS OR ON YOUR ORGANISATION

Question 8

If restrictions on payments in cash were introduced at EU level, would they hinder or benefit you, or your business or your organisation?

- *They would be beneficial.*
- *They would not have any significant impact.*

- *They would be a hindrance.*
- *No opinion.*

The use of the word “hindrance” is inadequate as it is not the contrary to “benefit”. The likely negative impact on physical persons is very different from that of legal entities, for example with regards to fundamental rights/ECHR (eg privacy).

ESTA’s response that the measure is a “*hindrance*” should therefore be understood as “*detrimental*”.

Question 9

How would the introduction of restrictions on payments in cash EU level benefit you, or your business or your organisation (multiple replies are possible)?

- *Handling cash is cumbersome.*
- *Handling cash is expensive.*
- *Handling cash carries a security risk.*
- *My activity is to provide alternative non-cash means of payments. While I am constrained by national restrictions on payments in cash, my competitors are not.*
- *None of the above.*

ESTA skipped this question. In all logic, the question only applies to those who responded “beneficial” to Question 8.

But the problem with this question does not stop here. ESTA really questions the relevance of responses such as “*cash is cumbersome*”, “*cash is expensive*”, “*cash carries a security risk*”, which are not of relevance to the purported objective of the fight against terrorism funding. The consultation is not about cash properties, and the question is irrelevant.

The fourth choice proposed is puzzling: if one’s business is to offer non-cash alternatives, how could they possibly be “*constrained by national restrictions on payments in cash*”?

ESTA invites the Commission not to take this question in consideration in its assessment of the response as it is unrelated to the purpose of the consultation.

Question 11

If restrictions on payments in cash were introduced at EU level, do you believe they would negatively affect the economy?

- *No.*
- *Yes, but only mildly.*
- *Yes, significantly.*

- *No opinion.*

The question is so broad that it is at risk of being meaningless: offering the possibility of respondent to provide at least a short explanation of their response would have been very useful for the assessment of responses to this question.

Question 12

Do you consider that the negative impact on the economy is:

- *Acceptable in view of the objectives pursued (fight against criminal activities, terrorism, tax evasion).*
- *Not warranted by the objective pursued (fight against criminal activities, terrorism, tax evasion).*
- *No opinion.*

The question has been dealt with extensively in our full submission. The question is so broad and implies many intricate responses: a mere multiple choice options as the one proposed is not a relevant way of seeking responses. Please note that ESTA's 35 pages discussion in our full submission have only addressed the tip of the iceberg behind this question.

ESTA wonders how the 'opinion' of the public on such a complex issue might be of any relevance, as the issues at stake require a substantial level of specialist expertise and analysis. The responses to this question should not be considered in the Commission compilation of results of the survey, and only relevant substantiated comments in written responses should be considered.

Please refer to **sections II, III.3 and 3.4** of ESTA's full response

Question 13

In your opinion, do existing restrictions on payments in cash established at national level distort competition or create obstacles to trade in the internal market?

- *Yes.*
- *No.*
- *No opinion.*

This question is intended to provide grounds to justify the recourse to Art 114TFEU which ESTA is strongly opposing. The question is critically missing the opportunity for respondents to explain "*if yes, how?*", which is the only way it might have been meaningful.

Also, the rationale of this question in the survey is questionable when the Commission should first conduct its thorough assessment of the internal market implications of CPLs,

and notably whether they are reverse discriminations and/or selling arrangements which are by virtue of rulings of the ECJ neither “*distortions*” nor “*obstacles to trade*”.

Please Refer to **Sections III.5 and III.6** of ESTA’s full response

Question 15

Do you feel that the benefits of restrictions on cash payment in the fight against illicit activities outweighs the loss of personal liberty or increased inconvenience when conducting business?

- Yes.
- No.
- No opinion.

The question starts from the premises that there are unquestionably “benefits” in the restrictions of cash payment. The “benefits of cash restrictions” are at best hypothetical, as empirical evidence reviewed in our full response demonstrates. Particularly, this question must be read in the context of the IIA which hardly reviews any alternative solution than cash restrictions.

The question also is asked with a reference to the whole fight against “illicit activities”, not specifically against “terrorism” despite that being the purpose of the consultation. ESTA reiterates that terrorism related funding does not overlap fully that of other ‘illicit activities’, and the questionnaire should be more specific to the purpose of the consultation.

No previous specific questions have asked about the perception on loss of privacy (completely omitted in the entire questionnaire) and personal liberties, though respondents are now asked to gauge this risk with the alleged “benefits” of cash restrictions. Regrettably, no open comments are allowed on this critical question either.

In addition, no question in the questionnaire ask whether (in relation to terrorism funding) the same *benefits could be achieved by other means*, such as the declaration, record keeping or reporting of cash purchases above a certain threshold or any other solution that the Commission might wish to consider. The views of respondents are not even sought on what they would consider as alternative solutions.

Also, the question does not separate the views of physical persons and legal entities, which are not to be considered at the same level. This is of serious concern as according to EU principles of consultation, the registration to the “EU transparency register” is a critical consideration in the processing of public consultation. However, business much more than physical persons are likely to be registered.

Please refer to **Section III.4**, and particularly **III.4.1 to III.4.3** of ESTA’s full submission.

Question 16

In your opinion, could restrictions on payments in cash at EU level contribute to tackling

any of the following illicit activities (multiple replies are possible)?

- *Serious criminal activities and organised crime.*
- *Minor criminal activities.*
- *Money laundering.*
- *Tax evasion.*
- *Other illicit activities.*
- *None.*
- *No opinion.*

ESTA skipped this question.

ESTA wonders what might be the relevance of this question to a consultation on CPLs in relation to terrorism funding, when “terrorism funding” is inexplicably excluded from the options proposed to respondents.

For empirical evidence of the lack of effectiveness of CPLs on a number of illicit activities, please refer to **Sections II.1.1 and II.1.2** of ESTA’s full submission

Question 17

Do you think that the announcement of the European Central Bank to stop issuing new €500 banknotes from 2018 onwards would be sufficient to combat the misuse of cash in illicit activities?

- *Yes.*
- *No.*
- *No opinion.*

ESTA skipped this question and has previously communicated its position on this issue to the Commission and the ECB. The question as it is worded implies that the withdrawal of the €500 note is a right step in the right direction, the views of respondents being only asked on the magnitude (“sufficient”, “not sufficient”) of the step. ESTA disagrees with the views that this can be of any help. In addition, if as stated by the Commission IIA, cash is “widely” used by terrorism because it offers anonymity, then one should question the rationale of asking about the withdrawal of the €500 note, a note which is very likely to draw attention.

Question 18

Do you believe that an obligation to declare payments in cash above a certain threshold would be as effective as restrictions on payment in cash to combat the misuse of cash in illicit activities?

- *Yes.*
- *No.*
- *No opinion.*

This last question of the survey is also the only one that offers respondents the opportunity to give their views on alternative solutions, albeit limiting alternative solutions to just one.

However, the question is strongly biased by asking “*would it be as effective as restrictions on payments?*”, which implies that cash restrictions would be effective, irrespective of the answers of respondents to question 14.

Finally, it asks the views on the effectiveness with regards to “*the misuse of cash in illicit activities*” and not specifically on the funding of terrorism, which nature and challenges are very specific, as ESTA has argued throughout its full response.

Despite responding by “no” in the online survey, ESTA’s views are that this question is not relevant to the public consultation at stake.

Please refer to **section II.1** for the review of empirical evidence on the lack of effectiveness of CPLs and **section IV** on alternative solutions of ESTA’s full response.