

Cash Payment Limitations and the fight against the funding of terrorism

The response of ESTA to the EU public consultation

30 May 2017

ESTA

The Association of Cash Management Companies
is registered in the European Transparency registry under the Number 850612124598-41

Rond Point Schuman 6, B5; B-1040 Brussels; Belgium
Tel + 32 (0)2 234 7820; contact@esta.biz

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Foreword

ESTA strongly supports any measure which would effectively assist in the fight against terrorism and its funding and which would improve the security of European citizens.

However, ESTA would submit, based on extensive evidence, that cash payment limits (CPLs) will do little, if anything, to reduce the risk from terrorism in the EU or elsewhere. Where cash payment limitations have been implemented, they failed to prevent attacks. Where they were made more stringent, they still failed to prevent terrorist attacks, the same way as they failed to curb corruption. For whatever reasons they have been implemented (e.g. tax evasion, corruption and crime), CPLs have not achieved the required objectives.

ESTA is confident that, if the Commission's Better Regulation principles are strictly followed, the conclusion to be drawn by the Commission is that CPLs will not contribute much to the fight against terrorism and its funding. Because existing limitations have been unable to prevent terrorist attacks, it is questionable how their extension will do better in the future.

The evolution of terrorism and related funding shows a rapid capacity to adapt to the counter measures targeted. The funding of terrorist actions in Europe is increasingly i) self-financed and ii) from legal sources, making its detection very difficult:

*"Almost half the plots (43%) are entirely self-financed, meaning there is no evidence that they received external support (for now). Such cells are almost impossible to detect through their financial activity, especially when plotters rely on legal income sources only. They have no economic ties to established terrorist organizations, and few of their financial activities are in themselves suspicious."*¹

This submission in its section II on the review of the "problem definition" explains why CPLs are the wrong response to this new challenge. Section III reviews the steps that a possible draft legislation would have to overcome under the *Better Regulation* principles of the EU.

¹ Petter Nesser, Anne Stenersen and Emilie Oftedal "Jihadi Terrorism in Europe: The IS-Effect", The research reviews 36 plots having taken place before 1.09.2016 (<http://www.terrorismanalysts.com/pt/index.php/pot/article/view/553/html>)

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.

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I. Introduction

On 1st March 2017, the European Commission (EC) launched a public consultation on CPLs ending on 31st May 2017 following the adoption of the action plan of 2 February 2016 “*against the financing of terrorism*”. The action plan states that “*payments in cash are widely used in the financing of terrorist activities*” and therefore suggests “*exploring the relevance of potential upper limits to cash payments*”.

There is no evidence that cash might be ‘*widely*’ used by terrorists as alleged in the EC document. There is however extensive evidence that non-cash payment instruments are commonly used by terrorists for the funding of their activities which we will review later in this document.

There is no evidence that the detection of suspicious payments is a successful method used as prevention of terrorism. The fact that a number of the transactions to be identified as precursors to terrorist attacks are perfectly legal and genuine, makes such detection very difficult. There are two different situations that need to be distinguished:

- Either the transaction takes place with potential perpetrators who are unknown to the authorities, and the likelihood that it is spotted – whether conducted by cash or not – is very slim;
- Or the perpetrator(s) is(are) known to the authorities and the means of payment used is then irrelevant as surveillance should be in place: the payment instrument used would then not be the critical factor preventing an attack.

Existing CPL measures already in place have failed for a large part to achieve the desired outcome so far.

II. Review of the Problem definition in relation to a possible EU harmonization of CPLs

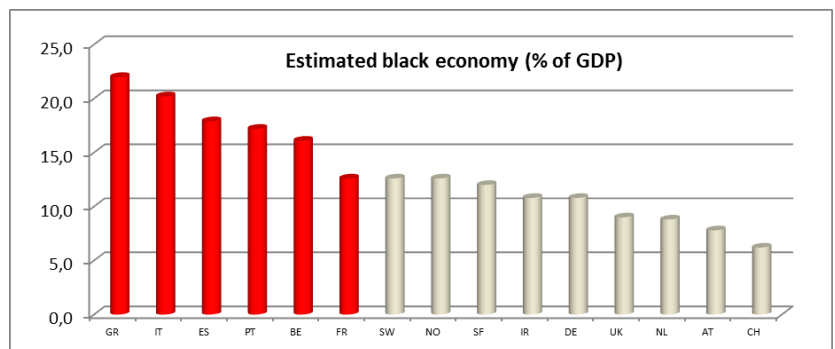
II.1 CPLs: some initial considerations

Before reviewing the alleged virtues of CPLs in preventing terrorism funding, it may be interesting to look at their possible impact on other issues such as the black economy, corruption and terrorism in the EU

II.1.1 CPLs have failed to curb the black economy



Countries with cash payment limits²



Estimated black economy as a percentage of GDP³

The map on the left shows countries with strict cash payment limitations, which are represented in red. It shows countries where there are strict limits applying to consumers. Other countries, like Hungary, have limits which only apply to businesses, not to consumers. The histogram on the right side shows the estimated level of black economy in 15 countries, where countries with CPLs are represented with red bars. Among the countries with limits, in some cases, the limit only applies to residents, whilst non-residents enjoy a much higher limit, around €15.000 (e.g. FR and SP). Also, in some cases (e.g. FR) CPLs do not apply for transactions between private parties but only when a business is a party to a transaction.

As can be seen from the histogram above, the first six countries with the highest estimated shares of black economy are all countries which have strict CPLs in place.⁴ Considering that cash payment limits were primarily introduced to address this issue and related tax evasion, the obvious conclusion is that they did not deliver as expected. If CPLs were effective tools, these countries should be on the lower end of the graph. The two countries with the highest

² Source : centre européen des consommateurs

³ Source : Schneider/Boockman, quoted in "Bares Bleibt Wahres Bargeld Als Garant Für Freiheit Und Eigentum", Stiftung Markt Wirtschaft, November 2016

⁴ We don't have the data of estimated black economy for the other countries applying strict cash limits

levels, France and Portugal, have suffered an increase of their estimated black economy since the limits have been put in place.⁵

Incidentally, it can also be noted that the country with the highest bank note denomination, Switzerland (CHF1,000), has the lowest estimated share of black economy.

II.1.2 CPLs have failed to curb corruption

The same applies to corruption, where the countries with CPLs are also those which have the highest level of corruption. The map below combines the maximum level of payment in cash and the corruption index based on Transparency International standards for a number of European countries.⁶



(source: Stiftung Marktwirtschaft 2016)

The dark grey countries have the worst corruption index, and lighter grey a better corruption index. The map overlaps with that of CPLs, where countries with higher corruption are also the countries with strict CPLs in place.

According to the authors of this research, corruption index in France and Spain has worsened since the introduction of their CPL whilst those in Germany and other countries without CPL have improved.

There is arguably no 'correlation' between CPLs and corruption; however the unavoidable conclusion is that CPLs have done little, if anything, in fighting corruption.

II.1.2 CPL and terrorist attacks and arrests

As seen above, countries with CPLs look like those where there seems to be the highest proportion of black economy and the worst index of corruption, although CPLs were primarily designed to fight against tax evasion and the black economy.

⁵ Cf. "Bares Bleibt Wahres Bargeld Als Garant Für Freiheit Und Eigentum", Stiftung Markt Wirtschaft, November 2016, page 5

⁶ Ibid.

Europol provides data from 2015 on the number of attacks – implemented, foiled or failed – in Europe and the number of arrests in relation to terrorism.



Figure 2: Terrorist attacks and arrests in the EU in 2015

The graph on the side is extracted from the “TE SAT 2016” report.⁷ For each country, the blue box gives the number of attacks and the white box underneath the number of arrests. With the exception of the UK, for which the number of attacks (103) is not strictly related to terrorism, the map shows that most of the attacks have taken place in countries where CPLs are in place.

With the exception of the UK, most attacks took

place in France, Spain and Italy, three countries with CPLs (note that the graph relates to 2015, so attacks in Belgium and Germany are not represented here).

Therefore, the relevance of CPLs to the fight against the funding of terrorism, where cash is not the main payment instrument used, is questionable. Empirical evidence gives abundant proof to the contrary:

- Countries with cash payment limitations have been subject to many more attacks than countries without;
- The attacks in Paris of January 2015 are estimated at a total cost of less than €26,000.⁸ They were conducted at a time when a limit of €3,000 was in place in France;
- On 1st September 2015, the limits for cash payments were reduced to €1,000 in France.⁹ Despite this, two very serious attacks totalizing 216 casualties and 843 wounded took place in November 2015 and July 2016; The reduction from 3,000 to 1,000 euros by 1.09.2015 has not been helpful in preventing the November attacks of an estimated cost in excess of €80,000;¹⁰
- On 22nd March 2016, the Brussels attacks were conducted in a country which also implements one of the lowest cash payment limitations (€3,000);
- The Nice, Berlin, London and Stockholm attacks involved vehicles driven through crowds: there is no need for the use of cash or even other instruments for such

⁷ https://www.europol.europa.eu/sites/default/files/documents/europol_tesat_2016.pdf

⁸ Source : CAT

⁹ The décret of 24 June 2015 justifies the measure on grounds of fighting illicit funding circuits “ Cette disposition vise à renforcer la lutte contre les circuits financiers illicites qui ont recours à des moyens de paiement anonymes »

¹⁰ Source: CAT

events.

From this empirical evidence, it can be seen that:

- CPLs in place in the two EU countries where the most significant attacks occurred have not prevented the funding of terrorism operations in each of these countries;
- The strengthening of the limits from 3,000 to 1,000 in France has also been ineffective in preventing further two serious attacks totalling a high number of deaths and seriously injured citizens

No arrests in Europe took place further to suspicious payments

80 terrorist attacks were prevented or foiled in recent years in Europe between 2013 and end of 2016.¹¹

There have been nearly 1,100 arrests of potential terrorists in a number of European countries.¹² In most cases, the arrests were based on intelligence, including through international cooperation. There does not appear to be a single case where a suspicious payment – cash or non-cash – was such that it triggered an enquiry leading to an arrest.

II.1.4 CPLs and purchasing power parity.

In its Inception Impact Assessment (IAA), the Commission questions whether a single threshold should be adopted for the entire EU, or should different thresholds be adopted to reflect purchasing power parity, in case CPLs should be harmonised throughout the EU.

Country	Limits (€ or € equivalent)
BE	3,000
FR	1,000
IT	3,000
PL	15,000
CZ	14,000
BU	5,000

Looking at the existing CPLs in place in those countries which are applying them, CPLs are higher in countries with low purchasing power, and lower in countries with high purchasing power, as shown in the examples in this table.

The reason is that CPLs have initially been implemented for the purpose of tax evasion, where the focus is mostly on the 'big fish'. However, for the type of terrorism we witness in Europe, small amounts matter as terrorist attacks cost less and less.

The conundrum to tackle is the following: The prevention of trade displacement (see section III.5 below) to be addressed is best met if a one-size-fits-all solution is proposed. However, since purchasing power parity varies widely within the EU, different thresholds would be required to be meaningful. The issue becomes then how to avoid transaction displacement, if any, if thresholds are different ?

¹¹ Interview of Jean-Charles Brisard, Director of the Center for the Analysis of Terrorism, Europe1, 23 May 2017 (<http://www.europe1.fr/emissions/le-club-de-la-presse/europe-soir-le-club-de-la-presse-jean-charles-brisard-et-rene-dosiere-23052017-3339533>)

¹² Europol « E-SAT report 2016 », 2017

II.2 The IIA problem definition: “anonymity is the key driver of the use of cash”

The Commission IIA states that “*preventing anonymity linked to cash payment is the key driver*”. The objective is therefore to “*force payment through means of payments that are not anonymous*”.

There are two critical unsubstantiated assumptions in the problem definition of the IAA:

- “*Terrorists use cash to fund their operations*”
- “*Terrorists use cash because it is an anonymous means of payment*”

These assumptions need to be questioned in the light of existing research and evidence.

An implicit third assumption would also need to be substantiated: would non-cash payments really be easier to detect in an environment of more than 110 billion card transactions per year in the EU?¹³ Unless authorities already know what they look for, this looks like the proverbial needle in the haystack.

II.2.1 A dead terrorist does not care about anonymity

The major difference in recent terrorism contrary to previous forms of terrorism is that perpetrators are not afraid to die, or even seek to die in suicide attacks. Whilst this is a further challenge to authorities, this has major consequences on preparatory steps.

Anonymity is not a major issue for suicidal terrorists: according to Europol, “*a majority of terrorists use their own genuine documents to travel*”.¹⁴

When anonymity is required, an efficient and frequent way of ensuring anonymity is the use of fake identification documents. Deceased terrorists’ documents can also be used by look-alikes so that some police forces keep names of presumed deceased terrorists in their list of wanted persons, in case their passport is used by other persons.

The preferred choice of fake ID documents is documented in a report from the International Center for the Study of Radicalisation and Political Violence: reviewing how terrorists in the case of the Paris attacks managed to remain “under the radar”, the report says:

“Inside an apartment in the district of Saint-Gilles, investigators discovered a sophisticated factory that had been creating hundreds of fake identification cards, drivers’ licenses, and social security cards. The apartment was complete with a hot press, computers, and ID card printers, as well as hundreds of printing rolls and negatives of fake IDs. Among those negatives were IDs that had been produced for the ‘supercell’ that perpetrated the attacks in Paris in November 2015 and Brussels in March 2016. As it turned out, the network had used fraudulent documents throughout their attack planning in order to wire money, travel between countries, rent cars, and – crucially – acquire safe houses”¹⁵

¹³ Source ECB, September 2016

¹⁴ “European Union Terrorism: Situation and Trend Report 2016” (TE-SAT) Europol, 2017, page 28.

¹⁵ “Criminal Pasts, Terrorists futures”, ICSR, October 2016.

Nowhere in this report is it stated that cash is a way used by terrorists to “remain under the radar”: they use fake documents of high quality to give more freedom to move and operate. When an ID is “burned”, they simply change it.

II.2.2 Optimising media exposure is a goal of terrorist actions

On the contrary, a major factor of terrorism is publicity and ex-post media exposure. Terrorist organisations will moreover claim actions by terrorists in all cases. The wider the media exposure, the more successful is the terrorist action. Therefore terrorists need to remain ‘under the radar’ up to their action, and seek maximum exposure after that, through the choice of carefully selected targets.

This response is not the place to elaborate on how terrorists leverage media attention, other than stressing that the need for ‘anonymity’ of perpetrators is quite relative. This may be different for supporting networks that have an interest in remaining permanently under the radar, but this situation is not specific to terrorist organisations. These networks can be located anywhere, including outside the EU.

II.3 Funding of terrorist activities: the vast array of evidence

II.3.1 The IIA “most relevant evidence”

The Commission IAA document cites the Europol “*Why cash is still king?*”¹⁶ as “*the most relevant evidence*” of the use of cash by terrorists.

ESTA would suggest that there is other more pertinent evidence from Europol, such as the “*European Union Terrorism Situation and Trend Report 2016*”¹⁷, and other sources on the funding of terrorism. Indeed, these sources speak a lot about terrorism and say virtually nothing about cash, whilst “*Why Cash Is Still King?*” talks a lot about cash but hardly relates to terrorism.

II.3.2 There has been extensive research on terrorism funding that the Commission needs to review

It is not enough for the Commission to rely on one, not particularly relevant, source of information to claim that cash is widely used by terrorists. On the contrary, it is striking that specialized sources and reports on terrorism say so little about cash. It is also striking that the EU action plan against the funding of terrorism (Com(2016) 50) says nothing in its recommendations on cash.¹⁸

The conclusion of a study reviewing 40 terrorist attacks in the last 20 years is that:

¹⁶ *Why is Cash Still King ? A Strategic Report on the Use of Cash by Criminal Groups as a Facilitator for Money Laundering* »; Europol 2015

¹⁷ “*TE-SAT report 2016*” Europol, 2017

¹⁸ Cf section 2 « *targeting the sources of funding* » which remains silent on cash. Cash appears in one paragraph of the action plan where it is stated that “the relevance of potential upper limits to cash could be explored”

*“terrorists raise, move and spend money in ways that are remarkably ordinary. With the exception of buying weapons and bomb-making ingredients, there is little that distinguishes their financial activities from the myriad of economic transactions taking place every day”.*¹⁹

Since 2001 and the 9/11 attacks, the reinforcement of financial controls and international regulations have reduced the ability for terrorists to move funds cross border and has subsequently led to an evolution of terrorism funding: *“terrorist cells have turned increasingly so self-financing methods that are harder to detect and prevent”.*²⁰

Existing research reviews the way financing of terrorism is organised:

“Terrorist financing is not limited to monetary assets, as “money is only one of a number of essentially interchangeable instruments that can be exchanged for one another in order for terrorist groups to obtain the end-use resources they need.” For instance, valuable commodities, drugs or weapons can be used instead of cash to store and transfer resources, sold to generate money, and traded into goods or services that the terrorists need. Terrorists can also be provided directly with goods and services they need for attacks, or receive support that is not directly attack-related, but that reduces costs and frees up money for other activities, for example, if the family of a terrorist provides housing and food.”

The graphs below are extracted from Oftedal’s analysis on terrorism funding.²¹

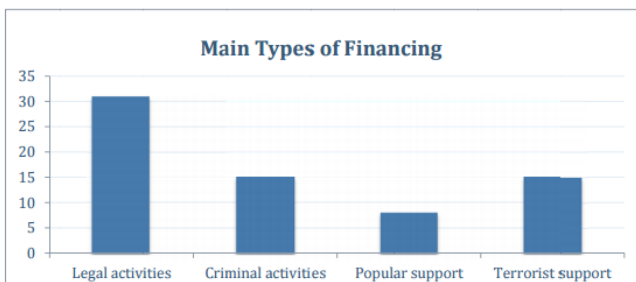


Figure 3.2 Number of cells that have received money from four main types of funding.

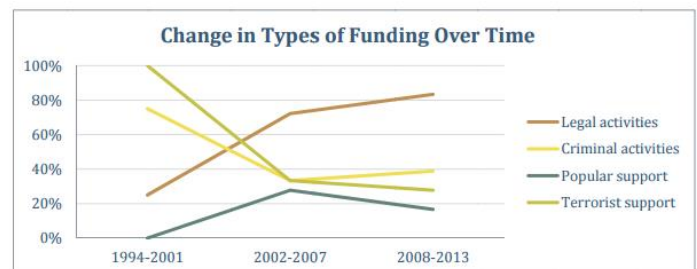


Figure 3.4 Proportion of cells generating income from the main types of funding in three time periods: 1994–2001, 2002–2007 and 2008–2013.

They show that the main source of funding is from legal sources (salaries and savings, used in 73% of the attacks surveyed) and the second source is from criminal activities and how each of the respective sources have evolved over time. Terrorist organisations support only concerned one attack in four in the 40 analysed by Oftedal. It also shows that the share of self-funding through legal activities has increased sharply over time. At the same time, the share of criminal activities has reduced substantially, although the slope has reverted to upwards after 2007.

The challenge from this evolution of the funding of terrorism is serious for the authorities: self-financing is more difficult to detect, particularly as small cells require less funding. This is critical as self-financed cells are also more likely to attack (53% have conducted an attack, according to Oftedal, compared to 21% of those receiving external support): the most dangerous cells are also the most difficult to detect.

¹⁹ Emilie Oftedal “The financing of Jihadi terrorists cells in Europe”, , FFI Report, Norwegian Defense research establishment, January 2015

²⁰ *ibid*

²¹ *ibid*, page 18 & 19.

Europol reports on funding of activities in different parts of its “TE-SAT” report. Again cash is never flagged as an priority issue in need of being tackled to reduce the risk from terrorists, and certainly not as a urgency. Commonly, terrorism funding is arranged the following way:²²

- Social media is instrumental for raising and moving funds, notably from ‘sympathetic’ communities
- Small cells/individual terrorists have relatively small financial requirement and are essentially self-funding:
 - from their employment income
 - Support from families and friends
 - Social welfare
 - consumer loan: loans are obtained often in presenting fake documents to justify employment and related income
 - sales of personal property: it consisted in buying a car with a credit and selling it shortly after that for a much lower value possibly in cash;²³
 - proceeds from criminal activities (e.g. sale of counterfeit goods)
- VAT fraud
- Petty crime

The Europol report also alerts on “*serious risks linked to electronic, online payment, methods and anonymous prepaid card*” which are often seen in the preparation of attacks.

Europol describes the funding of the January 2015 attacks against Charlie Hebdo in the following manner:

“The perpetrators of the January Paris attacks were not in employment at that time; they made use of a consumer loan obtained with forged documents and cashed out, they had the proceeds of the sale of a car, and had cash linked to the sale of counterfeit goods.”

All cash used was obtained from non-cash origin which, for most of it, was legal (i.e. all but the exception of the sale of counterfeit goods and the use of forge documents). This is confirmed by another source, which reports that these attacks were

“funded from own funds, generated notably from an illicit trade of clothes and shoes made in China, and, mainly, a multiplication of consumer loans.”²⁴

Indeed, one of the perpetrators of the January 2015 attacks raised, with his wife, funds via two consumer loans, once of €6,000 with *Cofidis* in December 2014 and €27,000 from *Financo* in September 2014 to purchase a car, exchanged for weapons shortly afterwards.²⁵ Genuine identification was provided for the *Cofidis* loan, though a fraudulent payslip was used from a company called *Naxos*. “*Even a cursory check could have raised suspicions as publicly available records show that the company has no employees and the phone number*

²² European Union Terrorism Situation and Trend Report 2016 (TE-SAT) Europol, 2017, page 11

²³ http://www.lemonde.fr/les-decodeurs/visuel/2015/02/20/attentats-de-paris-recit-detaille-des-trois-jours-qui-ont-change-la-france_4580095_4355770.html#introduction

²⁴ « *Le financement des attentats de Paris* », Center for the Analysis of Terrorism, Paris, Septembre 2016, quoted in « *Attentats en France : enquête sur l'argent des terroristes* », Journal du Dimanche, 16 October 2016

²⁵

was not in use".²⁶ Actually a third attempt to obtain a consumer loan from *Credipar* failed when the alleged employer was called, confirming that the loan applicant was not an employee.

It is hard to see how cash payment limits could help in any way in preventing the funding of attacks by fraudulent consumer loan requests using fake documents. However, in the light of the above, two critical steps seem to have been missing at the time:

- Clearly, stricter due diligence on customer information might have prevented the terrorists obtaining the funding for their action from *legal* sources.
- After the failure of the fraudulent loan application with one credit organisation, a reporting mechanism could have alerted other credit organisations and the authorities of a serious risk situation, particularly when applicants are known from anti-terrorists forces, as was the case at the time.

II.4 Funding of Terrorism and Crime

The link between crime and terrorism is documented in a number of research. Some of the terrorists are former criminals, and crime remains one of the common means of funding of terrorism. However, two aspects need to be distinguished.

II.4.1 Limited links between organised crime and terrorism

The IIA of the Commission refers to Europol's "Why Cash Is Still King" as the "*most relevant evidence*" for its demonstration that cash is widely used by terrorists for seeking anonymity, although as stated before the report hardly addresses terrorism.

A serious flaw of this report is that cash is not an end in itself: the objective of criminal organisations is profit, not cash. Removing cash altogether would have a limited impact on criminal organisations. In reality, the magnitude of non-cash crime is far bigger than cash related crimes.²⁷ This is even more so for terrorist organisations, for which cash appears even less critical.

Indeed, this report refers to how criminal organisations use cash to remain anonymous. Cash payment limitations in that case are only effective as long as the parties to a transaction wish to comply with the law, and this is by definition not to be taken for granted in the case of criminals. In effect, CPLs could only impact on legal transactions, i.e. transactions where at least one of the parties is legal and does not wish to break the law: this is a first, very important, limitation to the effectiveness of CPLs. It would further only impact on legal transactions *above* the threshold. Whilst compliance is a general limit of any rule, the risk in the case of CPLs is to give the 'impression' of solving a problem which *in fine* is critical to the security of citizens, when they will achieve little and when there is no safety net behind.

There are at least two major differences between organised crime and terrorism that explains the limited overlap between them:

- The sole objective of criminal organisations is the pursuit of profits; It is not for terrorists for whom profits is only a mean to pursue ideological purposes;

²⁶ "Criminal pasts, terrorist futures", ICSR, October 2016

²⁷ Cf for example "L'essor foudroyant de la criminalité numérique", Alain Bauer & Xavier Raufer, Le Figaro, 26 May 2017

- Like a legitimate business, organised crime is structured to stay and grow. Therefore, anonymity is a condition of the continuation of criminal activities and illicit profits, first by ensuring that activities are not detected and second by preventing that evidence can be produced for the indictment of individuals or organizations involved in those activities. Whist criminals will seek to remain anonymous permanently, terrorists only need to be undetected *before* their attack, as they do not intend to survive their first attack.

The difference is very important as, considering the time frame between transactions required for a terrorist attack and the attack itself, alleged “non-anonymous” means of payment may not allow detection within an appropriate timeframe – and will therefore remain *de facto* anonymous.

Criminal organisations have limited interest in any involvement in terrorism, which substantially increases the risk of detection. Research shows that terrorists can join organised crime in the participation of specific criminal activities, allowing them to obtain the funding for future actions. However, in most cases, criminal organisations would be unaware of the terrorist motivations of their occasional recruit.²⁸

For these reasons, measures targeted at curbing organised crime will only be partially effective against terrorism. These are essentially the measures related to money laundering and moving of funds. Financial intelligence units in Member States have been successful in detecting and identifying suspicious transactions, which have helped in addressing large cross border transfer of funds such as those required prior to the 9/11 attacks. Subsequently however, terrorism has become increasingly self-financed (43% of all plots detected were entirely self-financed, whilst 73% of the plots in Europe in 2014-16 were at least funded from legal sources, “*the most common funding source*” of terrorism today)²⁹, and terrorist actions designed in such a way as to require much less financing.

II.4.2 Petty crime funding 40% of the plots

More than through organised criminality, terrorism seems largely funded from petty crime. Terrorists are criminals and criminals can become terrorists. 40% of terrorists’ plots in Europe are financed by petty crimes, especially drug-dealing, theft, robberies, the sale of counterfeit goods, loan fraud, and burglaries.³⁰

The principal difficulty in detecting crime as a means of terrorist financing is “*that it does not involve a change of behaviour but merely one of purpose: individuals with criminal pasts often continue what they were doing in their earlier lives, except that the profits are used to finance terrorist attacks or trips to Syria.*” As a result, it can be difficult to separate funds that were raised for terrorism from money that is spent on other, “*often entirely mundane purposes*”.³¹

²⁸ See for example Emilie Oftedal “The Financing of Jehadi Cells in Europe”, 2015, page 35 ff

²⁹ “Jihadi Terrorism in Europe : The IS effect”, P. Nesser, A. Stenersen and E. Oftedal, op.cit

³⁰ “Criminal pasts, terrorist futures”. Rajan Basra, Peter R. Neumann, and Claudia Brunner, ICSR, 2016

³¹ *ibid*

However, Oftedal's report (2015) puts the overall importance of criminality into perspective:

Contrary to the assumption that terrorists are turning increasingly to illegal activities and gray markets, there is little evidence in our data that terrorist involvement in criminal activity has increased over time. In fact, [...] there has been a decline in criminal activities from the mid-1990s to the mid-2000s, followed by a slight increase again.

The risk of detection linked to criminality, and therefore of failure of their plot, is one that terrorists seem reluctant to take.

Of key importance is that terrorist attacks from self-funding small cells are low cost: 76 % of terror plots cost less than \$10,000.³² It costs virtually nothing to steal a lorry and run it into a crowd as was the case in Berlin.

II.4.3 Counterfeit products

A number of terrorists have notably funded their activities via counterfeit trade, which is seen as a relatively low risk activity: one of the *Charlie Hebdo* perpetrators, Said Kouachi, was involved in running a counterfeit operation, whereby he was importing fake Nike shoes, the process of which is reported to have been used for buying the weapons for the attacks. The French Customs spotted the illegal business and Kouachi was simply fined, although at the time his radicalisation was known to the authorities.

Specific attention is drawn to counterfeit cigarettes, which is alleged to provide a not negligible part of the funds collected by terrorist organisations, with 15 of the largest terrorist organisations being allegedly engaged in the sale of cigarette counterfeits.³³ The reason is the low risk and high profits that can be earned in smuggling a heavily taxed product. A. Coulibaly, one of the January 2015 perpetrators in Paris, was involved in cigarette trafficking for the funding of his attack.

The share of tobacco counterfeit is believed to increase in the future, and the reason for this is that counterfeiting of packaging in the EU is been rendered substantially easier with recent and current regulatory developments prohibiting "attractive" features of tobacco packs.³⁴

*"Many governments are considering introducing tobacco product plain packaging that requires all legal tobacco products be sold in government-designed drab packaging devoid of any branding or trademarks. For those of us tracking the illicit trade in tobacco this is cause for concern."*³⁵

Indeed, the consequence of "plain packaging" of tobacco products in a number of EU Member States risks making detection of counterfeit more difficult, and facilitate the manufacturing of counterfeit product by removing all trademark elements (except the name) which are difficult (and costly) to copy: when all packs have the same shape, colours, design and font policy for brand names, once one brand is copied, all are.

³² Emilie Oftedal (2015)

³³ <http://www.intersecmag.co.uk/how-illegal-tobacco-funds-terror/>

³⁴ Tobacco product directive 2014/40, article 14 which for example mandate packs of a "cuboid" form

³⁵ <http://www.intersecmag.co.uk/how-illegal-tobacco-funds-terror/>

Illicit tobacco trade is a major source of potential funding for terrorism: the Center for the Analysis of Terrorism estimates that the revenue of illicit sales of cigarettes is, on an annual basis, in excess of € 6 million for three cities only in France,³⁶ which provides for substantial resources considering that most attacks in Europe cost less than €9,000 euros. As many as 60bn illicit cigarettes are sold each year in the EU, i.e. around 10% of the entire cigarette consumption of the EU, with a very substantial loss in taxes and excise.³⁷

II.4.4 Moving funds: cash not the preferred methods

The increasing recourse to self-funding of terrorist cells is obviously reducing the need to move and transport funds. The very inexpensive cost of attacks also sharply reduces the need to transport funds. Nevertheless, even in case of self-funding moving funds can still be required.

Oftedal (2015) considers that :

“Cash, money service businesses (particularly Western Union), and bank transfers appear to be the most common transfer methods, both for receiving external support and for transfers between cell members.”³⁸

The transport of cash above €10,000 into the EU and between Member States is subject to compulsory declaration. The limit of declaration is the willingness to comply with the law, however sanctions for lack of declaration, such as confiscation, can be a deterrent. The relevant legal instrument in the EU is being revised with notably the possibility to confiscate amounts lower than €10,000 if a link to crime is suspected.

What specialised research shows, however, is that there are other means than cash to transfer sums, particularly prepaid cards, gifts vouchers, trade mis-invoicing and hawala.

³⁶ “*Illicit trade and terrorism financing*”, Center for the analysis of terrorism, Dec 2016

³⁷ The issue of smuggling in relation to terrorism does not concern tobacco products alone, however tobacco smuggling is both very lucrative and very low risk.

³⁸ “*The financing of Jihadi Terrorist cells in Europe*”, page 23

III. CPL and Better Regulation Principles

This second part of the ESTA submission reviews the key questions that, according to the EU Better Regulation process, the Commission will have to review prior to proposing legislation.

"Better Regulation" means designing EU policies and laws so that they achieve their objectives at minimum cost. Better Regulation is not about regulating or deregulating. It is a way of working to ensure that political decisions are prepared in an open, transparent manner, informed by the best available evidence and backed by the comprehensive involvement of stakeholders. This is necessary to ensure that the Union's interventions respect the overarching principles of subsidiary and proportionality i.e. acting only where necessary and in a way that does not go beyond what is needed to resolve the problem."³⁹

In this section, ESTA will review how Better Regulation principles should be considered, in our view, in the preparation of the Impact assessment and the possible decision to propose a legislative proposal. Of particular relevance will be the following aspects of Better Regulation:

- Consultation principles
- Clear evidence base to support the proposal
- Necessity (needs for new tools)
- Proportionality
- Subsidiarity
- Legal basis

III.1 Consultation principles

The Better Regulation tool box provides precise guidelines for stakeholders consultation. The survey questionnaire provided for the consultation is said to be the "essential input to the open public consultation". However, the consultation is limited to a "survey" which only provides for limited multiple choices options and offers no opportunity for more detailed input. No opportunity is given to substantiate responses with evidence or for providing explanation to answers given. As such, we do not think that the consultation meets the requirement in the Better Regulation tool box of

"Ensuring that stakeholders can provide comments on all IA elements, i.e. the problem, the question of subsidiarity, the policy options and their impacts."⁴⁰

The questionnaire therefore does not allow for "expert" views to be expressed, as ticking boxes is not sufficient. From ESTA's point of view, the only response which counts is therefore this response (not the response to the online survey) which we hope will be seen as constructive, substantial, substantiated and evidence based.

³⁹ "Better Regulation Guidelines"; Commission staff working document SDW(2015)111

⁴⁰ Better Regulation tool box, page 59 (accessible at http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf)

As ESTA found it difficult answering a large number of questions of the online survey, the annex attached provides a clarification on ESTA's responses, and reasons for skipping questions in the survey.

ESTA would like to flag two characteristic examples of questions in the survey that raise serious concerns with regards to the consultation.

First, ESTA can only question the relevance of the survey when it comes to the critical question of the effectiveness of the measure (last part of the survey), and notably the following question:

"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.* "

Indeed, "*terrorism funding*" is inexplicably excluded from the choice of responses, despite the fact that the consultation is specifically about "*restrictions of cash payment with a view of combatting terrorism financing*"!⁴¹

Similarly the last question of the survey is puzzling:

"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.*"

Regardless of the fact that this last question is the only one that asks respondents about the effectiveness of alternative solutions (albeit limited to just the "*obligation to declare cash payments*"), the question raises two serious concerns:

- 1) The expression "*as effective as restrictions*" implies that restrictions *are effective* (irrespective of what respondents may have answered to the question "*do you believe that restrictions in cash at EU level could contribute to combatting terrorism financing*")
- 2) The question refers to the broad "*misuse of cash in illicit activities*", and not specifically to the specific funding of terrorism, which is the purpose of the consultation. As we have argued throughout this response, the new form of terrorism in Europe as led to a significant change in its funding methods which are increasingly

⁴¹ Commission Consultation strategy document "EU initiative on restrictions on payment in cash"

different from most of the other “illicit activities”, not least due to the fact that funding of terrorism is increasingly from *legal sources*.

III.2 Clear evidence base

“Compiling a robust information or evidence base is an essential component of better policy making. Evidence is needed both to evaluate existing interventions and to substantiate a need for new ones.”⁴²

The Commission Better Regulation tool box is very clear as to the need to compile robust and relevant evidence prior to law making.

The Commission IAA justifies this initiative on the basis of the 2016 action plan against the funding of terrorism which claims that “*payments in cash are widely used in the financing of terrorist activities*”. The statement is not substantiated by any evidence and the Commission IIA overlooks the fact that cash is only one of the methods; other payment instruments are easily used and readily available and offer a similar level of ‘anonymity’.

As mentioned above, the IIA document is rather short and does not elaborate much on evidence. It cites the Europol “*Why cash is still king?*” report as “the most relevant evidence”, although the report hardly mentions terrorism, as we pointed out above.

ESTA advises that evidence should be collected from all available sources, including Europol, which will yield a better understanding of the reality of terrorism, how it is organised, how much it costs and how it is funded, as a *passage obligé* of the assessment of the ineffectiveness and (lack of) proportionality of CPLs. The impact assessment should conduct a critical analysis of the evidence available.

Our response, in its first section above, also refers to a number of studies and researches on the funding of terrorism: ESTA would invite the Commission to review these studies, and other works referenced in these papers as part of gathering comprehensive evidence required for the understanding of the issue at stake.

Finally, the Commission should review empirical evidence of the effectiveness of measures implemented in Member States who have set such limits. In some cases, these limits have been changed (France has reduced from 3,000 to 1,000 on 1st September 2015, and Italy raised from 1,000 to 3,000 at the end of 2014). Empirical evidence from these Member States would be highly relevant to the assessment and regulatory impact assessment to be conducted by the Commission in the context of this initiative.

III.3 Necessity

This test aims at assessing whether new measures are required to solve the problem raised by the Commission.

⁴² Better Regulation tool box, page 14

The funding of terrorism can be seen as composed of two complementary parts: one part covering direct costs generated by preparing and executing attacks and the other part covering indirect operation costs which are recurrent and usually more significant.⁴³

According to Europol, most of the attacks conducted recently in the EU have been organised in countries which already implement strict cash limits (see section II.1.3 above). As noted earlier, the reinforcement of existing measures in France as of 1st of September 2015 has failed to prevent two major attacks in the few months that followed the reduction of threshold.

Cash is not widely used by terrorists. When cash is used, it is obtained from traceable non-cash sources (loans, own bank account etc.) and therefore the use of cash can hardly be seen as a research for anonymity, since its sources can be traced easily.

Further terrorist funding, whether cash or not, is used for conducting transactions which in most cases are legal (car renting, accommodation renting, etc.) and which would hardly be considered as suspicious, unless at least one of the two parties to the transaction is subject to surveillance. Cash limitations will not be of any help, and should a payment in cash not be possible, there is no evidence that the transaction might not take place: either both parties agree to go illegal and make payment beyond the legal limits or the transaction might take place using other payment instruments: would the security of European citizens have improved?

As mentioned earlier in this response, the funding of terrorism is increasingly local and self-financed, primarily from legal sources, and concerns small amounts which are more difficult to detect. Funding of terrorism is often a continuation of criminal activities – mostly petty crimes, and as such is not a “*change of behaviour, but a change of purpose*”. This ‘change of purpose’ can also concern legal funding such as own salaries and savings of terrorists.

To a large extent, good ordinary law enforcement and community policing is the best counter-terrorism. Therefore, ESTA believes that no new tools can be designed specifically for that kind of funding, and existing tools aimed at addressing crime and in particular petty crimes are in place anyway, irrespective of whether they need to be reinforced. Cash limitations will not deliver any additional value.

It should also be noted that based on research on funding of some terrorist attacks, some of the transactions require the production of proof of identification: this is the case for car rental (driving licenses + ID and credit card for guaranty) or for accommodation (ID), air tickets (ID) etc. Even if the payment takes place in cash, the ID of the customer should be checked.

In the light of the evolution of terrorism, enforcement of existing law and community policing is the best counter-terrorism. The Commission will therefore need to assess how the new context of terrorism funding, summarised above can be efficiently addressed by CPLs by opposite to existing measures which may be reinforced or adapted, or new, but different to CPLs, which are proportionate.

⁴³ “ *Illicit Trade and Terrorism Financing* ” , Center for Analysis of Terrorism, December 2016

III.4 Proportionality: the burden of proof is much more important when EU fundamental rights are at stake

There is a strong legal requirement for the assessment of proportionality in the treaties: Article 1, Protocol 2, Treaty of the European Union (TEU) states that the Commission must “ensure constant respect for the principle of proportionality” and Article 5 of the same Protocol requires that draft legislative acts should be justified with regard to that principle. Article 5 TEU further provides that “Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties”.

The severe negative effects of the proposed initiative lead to the conclusion that it is not compatible with the requirement for proportionality enshrined in the EU Treaties when considered in the light of what they may achieve to fight terrorism through its funding.

III.4.1 The EU Charter of Fundamental Rights

The Commission IIA states that i) paying in cash is not a fundamental right and ii) that CPLs do not hinder the principle of legal tender of cash. However the direct corollary of cash payments is privacy, which is a fundamental right enshrined in Article 7 of the Charter of fundamental right. “Privacy” is for honest citizens what the Commission calls “anonymity” for terrorists and criminals: these are the two sides of the same coin.

III.4.2 The European Convention of Human rights

The right for privacy is also enshrined in the ECHR convention Article 7. The EU has become, since the Lisbon Treaty providing it with a legal personality, a signatory of the ECHR.

As such, the European Convention of Human Right applies directly to the EU. With regards to privacy, the EU is therefore bound not only by its own jurisdiction, but also by that to which it is a signatory.

III.4.3 Very stringent conditions required for the limitations of fundamental rights

The EU charter also set very stringent conditions under which public authority may ‘interfere’ with privacy and other fundamental rights in Article 52 of the EU charter:

*“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are **necessary and genuinely** meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”*

Article 7 ECHR provides stringent conditions in its second paragraph on grounds to restrict privacy:

*“2. There shall be no interference by a public authority with the exercise of this right except such as **is in accordance with the law and is necessary** in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”*

The languages of the charter and of the Convention make it clear that limitations of privacy can only be accepted if the measures are necessary for and proportionate to the purported public policy objectives. An unsubstantiated claim that the measure is necessary to fight terrorism is way below the minimum burden of proof required to justify the restriction of a fundamental/human rights, when the proposed measures have done nothing to achieve those objectives in Member States who have put such measures in place. One may argue that, by having a dedicated paragraph on how privacy rights can be limited, the ECHR sets an even stronger level of requirement than the EU charter, which considers such limitation in a general provision.

In view of its commitments under Article 7 ECHR, the EU is bound to produce very robust evidence that the measure is necessary and that the same objectives cannot be achieved through means already in place or through other proportional means – some of them having demonstrated their effectiveness to counter terrorism.

Prior to considering a limitation of fundamental rights through restrictions on cash payments, key questions would be, *inter alia*:

- is cash the unique/main factor that allows anonymity for terrorists when making payments?
- would restrictions on cash payment increase substantially the security of citizens ?
- can anonymity of terrorists be circumvented by other means than restrictions on cash?

III.4.4 CPLs were not designed for fighting the funding of terrorism, but fiscal fraud

Moreover, the measures put in place in Member States were aimed at tax evasion, not countering the financing of terrorism.

Tax evasion may be a serious concern to Member States, however, it does not play a role in terrorism financing. It is difficult to see how the EU harmonisation measures in place in Member States would help in any way achieving an objective for which they were not designed in the first place and for a purpose which plays no specific role in the objective pursued by the Commission.

Harmonising, for the sake of prevention of terrorism funding, measures which have not been designed for this and which are arguably ill-designed to be effective, cannot be the right approach to the problem definition raised in the IIA.

III.4.5 “There are valid privacy reasons for maintaining cash”

Mr Yves Mersch, Executive Director of the ECB stated in a speech in Tokyo on 8 May 2017⁴⁴ that “*there are valid privacy reasons for maintaining cash*”.

The consultation is not about whether cash should stay or go, but is about an additional measure that reduces the space left to cash. There is no doubt that the less cash is used once payment limitations are in place, the more information a number of actors, and not just public authorities, will have on the behaviour of citizens.

Cash is a public payment instrument. Electronic payments are all private payment instruments which allow for “*big data*” being collected by a large number of private economic operators, including multinational companies most of them being non-EU. These data are used, without the consent of the ‘data subjects’, to profile customers and citizens at large. Travel, preferences, cultural taste, private life, consuming habits etc. are all recorded through electronic payment instruments, kept and crossed with other sources for profiling. This information is then sold, still without any consent of the data subjects, for ‘tailored’ marketing or other purposes.

The struggle that public authorities had to ensure that those companies collecting big data would delete them after a “reasonable period of time” (i.e. substantially less than the 30 years claimed by some global operators) in the context of, *inter alia*, the data protection directive shows that the risk is not only real, but very serious. The risk of abuse of these data is a major challenge for democratic societies.⁴⁵

There is no mystery that a number of Member States have had in place, for many years now, policies to reduce the use of cash and substitute it with “*non-anonymous*” electronic payment instruments. The effect, if not the object, is to gain much more control of citizens.

ESTA believes that there is a risk that the fight for terrorism is used as an excuse for reducing the role of cash further while gaining more control of citizens. Whether this is the intent or not, there is the risk of actors empowered by the proposed measures to engage in misconduct and abusive behaviours by both States and private organisations detaining this kind of data. History shows that there is also a natural propensity to engage into such abuses, when the means of doing it are available.

In the light of the major risks for the privacy of citizens, by opposition of a very uncertain, if not hypothetical, gain for the fight against terrorism funding, ESTA consider that the measure would be largely disproportionate and going against the European Convention of Human Rights to which the EU is a signatory. The lower the threshold, the higher the disproportionality.

This should not be considered lightly, and certainly not with the level of evidence currently referred to by the IAA.

⁴⁴ <https://www.ecb.europa.eu/press/key/date/2017/html/ecb.sp170508.en.html>

⁴⁵ See for example “*L’Homme Nu - la dictature invisible du numérique*”, par Marc Dugain et Christophe Labbé (Plon-Robert Laffont)

III.5 Subsidiarity

The subsidiarity check is a major component of EU legislation. Article 1 of Protocol 2 TFEU provides that the Commission must have “*constant respect*” for the principle of subsidiarity as defined in Article 5 TEU.

The subsidiarity principle calls for measures to be adopted at EU level only in so far as they cannot be better implemented by Member States.

For a measure to be eligible for harmonisation, it must have a cross border dimension, as it would otherwise not affect the internal market. Therefore, in order to justify a possible harmonisation of upper cash payments limits, the existence of displacement of trade needs to be robustly documented. The IIA identifies two possible cross-border impacts: i) the possible displacement of transactions by terrorists from a strict to a less strict country and ii) the general idea that CPLs “*distort competition in the internal market*”, even for genuine – non terrorism related – transactions. However the IIA offers no evidence to substantiate any of these impacts.

III.5.1 Displacement of trade “to bypass the restriction of a stricter country”

The impact of any measure on the internal market is a central part of Better Regulation. The Commission Better Regulation tool box contains a large section devoted to it.⁴⁶ We advise that the tool box should be implemented carefully before any legislation is proposed.

The IIA states:

“The existence of cash payments limitations in some Member States, and their absence in other Member States, creates the possibility for criminals and terrorists to bypass the restrictions by moving to the Member States, which have not introduced any restrictions, while still conducting their illegal activities in the ‘stricter’ Member State.”⁴⁷

There is no such evidence and displacement does not take place on grounds of cash payment limits:

- As shown above, cash is used among many other payment instruments for the funding of preparatory steps of terrorist attacks, together with prepaid card or loans and other cards.
- In a number of cases, such as France, cash payment limits only apply to transactions involving a business, not to transaction between private individuals
- Transactions which are in essence illegal (e.g. weapons, explosive etc.) means that there is a clear willingness of the parties to the transaction to break the law – why would they go in another country to complete it, when all know it is illegal anyway ?
- Most transactions required by contemporary terrorists active in Europe would be below the likely threshold of an EU harmonised CPL⁴⁸ so that they would be

⁴⁶ See the Better Regulation tool box, pages 143-151.

⁴⁷ IIA, page 2

⁴⁸ No level is suggested in the IIA, but literature often refers to amount between €3,000 and €5,000

ineffective. Larger transactions would either deals with goods or services for which an ID is required (car purchase or rental, accommodation rental, including in a number of countries hotels) or would be illegal (e.g. weapons) and therefore not likely to comply with any threshold anyway;

- Some critical transactions possibly above the possible threshold, such as accommodation rentals, are local and cannot be displaced.

Even in the improbable case where the Impact Assessment could establish the proof of displacement, the low level and purpose of payments would make any CPL unlikely to cover them.

III.5.2 Distortion of competition resulting from different levels of cash payment restrictions

More surprisingly, the IIA's problem definition also states:

*"Furthermore, such diverging practices among Member States regarding restrictions on cash payments create an uneven playing field and these differing **restrictions create distortions of competition in the internal market**, with some activities moving across border to elude the cash restriction. The lack of approximated measures at EU level makes the (reinforced) controls by the Member States ineffective".⁴⁹*

Further, the IIA states:

"The introduction of harmonised EU wide restrictions should prevent the distortions of competition (uneven playing field) occurring when restrictions exist only in some Member States and affect businesses unevenly within the internal market."⁵⁰

Here, the issue is no longer one in relation to terrorism funding, but one that affects all legitimate transactions in the internal market.

ESTA is not aware of any competition or infringement case in relation to cash payment limitations where CPLs have hampered cross border trade or goods or services.⁵¹ This risk of distortion of competition suggested by the IIA is a very unlikely and abstract risk.

The assumption defies common sense as additional transaction costs for 'avoiding cash payment limits' in one country to go to another would substantially increase the cost of the transaction for legitimate transactions: why would consumers or businesses support these costs at all just for using a payment instrument rather than another?

There is for example not much evidence that citizens of neighbouring countries of Germany go and buy their cars in cash in Germany only when it is not possible to pay by cash in their homeland.⁵²

⁴⁹ IIA, page 2, (our emphasis).

⁵⁰ IIA, page 5, (our emphasis)

⁵¹ The only competition cases ESTA knows of are those concerning multilateral interchange fees charged on the use of some electronic payments. No competition case exist that has involved cash – quite the contrary, cash is what ensures that completion between payment instruments remain strong.

⁵² There is evidence of consumers going and buying their cars abroad as they can be cheaper, but they do rarely pay in cash nor do they do it simply to be able to pay in cash.

Can the choice of payment instrument made by consumers or business *really* distort competition? Can it impede the functioning of the internal market? The response is obviously negative.

III.5.3 ECJ Keck & Mithouard case law on “selling arrangements”

Assuming that the evidence can be brought that there might be a cross border dimension to CPLs, this would most probably be considered as a “selling arrangement” which would fall under the exemption of the *Keck & Mithouard* case law since 1993:

“a national provision which restricts or prohibits certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment, provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States”⁵³

Indeed, CPLs apply to all traders, buyers and products, whether domestic or imported from other Member States.

In the (improbable) case that CPLs in place might be shown as having a cross border impact, this kind of regulation would very likely be considered as a “selling arrangement” which would not constitute a “*measure of equivalent effect*” and would therefore still be compatible with the internal market.

III.5.4 CPLs are “reverse discriminations”

CPLs have no bearings on cross border trade and, as the Commission IIA acknowledges, the only (hypothetical) risk might be to lead residents to displace trade in other Member States due to existing CPLs in their country of residence. Should however CPLs have a cross border/internal market impact as the one alleged by the IIA, it would at worst drive business out of the Member State applying a CPL to the benefit of another Member State. In that case, a CPL would clearly constitute a “*reverse discrimination*”.

It should be noted that rules on the functioning of the internal market do not prohibit reverse discriminations, i.e. the adoption by a Member State of a measure which is more stringent for its residents than for non-residents, provided that these rules do not create obstacles to trade nor discriminate against non-residents.⁵⁴

Here again, CPLs could not be considered as an infringement to the internal market. Allowing consumers and businesses to cross their home country border to conduct business in another Member States is precisely what the internal market is about...⁵⁵

⁵³ ECJ rulings, joined cases C/267 and 268/91, §16.

⁵⁴ See case C-184/96 Commission vs France, § 28

⁵⁵ Exactly as Article 56 TFEU (ex-Article 49 TEC) on the freedom to provide services works both ways: it guarantees the freedom of the service provider to cross the border to sell its services and of the consumer the right to cross its border to buy a service.

III.6 Legal basis

The peculiarity of the EU is that it may only act within the limits of the competence that have been expressly conferred to it by the Treaties and a valid legal basis is therefore a pre-condition to action by the EU.

III.6.1 The stringent conditions for the recourse to Article 114 TFEU

The IIA suggests that, should the Commission consider that it needs to propose legislation, Article 114 TFEU could likely be the chosen legal basis.⁵⁶ Art. 114 TFEU says:

*“Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objective set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social committee, adopt the measures for approximation of the provisions laid down by law, regulations or administrative action in Member States which have as their object **the establishment or the functioning of the internal market.**”⁵⁷*

The legal basis therefore only applies to acts which have as their core objective a measure that genuinely improves the functioning of the internal market. Article 114 TFEU is a residual legal basis, as confirmed by the first words of its first paragraph (“*Save where otherwise provided in the treaties...*”) and should therefore only be employed when no other more specific legal basis is available.⁵⁸

In its impact assessment, the Commission will therefore have to check the various tests which have been consistently laid down by the Court of Justice regarding recourse to Article 114 TFEU (or its predecessor, Art. 95 TEC).

These tests are the following:

- Member States have taken or are likely to take divergent measures which may extend to anticipated disparities⁵⁹ as well as those in existence;⁶⁰
- The divergent measures must constitute or be likely to constitute an obstacle to trade and/or distort, or be likely to distort competition thus affecting the internal market;⁶¹
- The effect of the obstacle to the internal market must be appreciable, not just an abstract risk;⁶²
- Measures adopted under 114 must genuinely have as their object the improvement of the condition for the establishment and functioning of the internal market;⁶³
- Harmonisation must be an appropriate response.⁶⁴

⁵⁶ IIA, page 3

⁵⁷ Only §1 of Article 114 is cited here.

⁵⁸ See case C-533/03 Commission vs Council [2006] § 44 and 45

⁵⁹ See Case C-491/01 BAT [2002], §67

⁶⁰ See case C-380/03 Tobacco advertising II [2006] at § 51, C-210/03 Swedish Match at § 37, C-434 Arnold André [2004]

⁶¹ See Case C-376/98 Tobacco advertising I, § 66 and 84

⁶² See Case C-376/98, at § 84

⁶³ See case C-376/98, at § 84

⁶⁴ See case C-376/98, at § 83.

These tests are cumulative and must all be met for any measure proposed under Article 114 TFEU.

However, from all these tests, only the first one is met in the case of CPLs (i.e. there exist disparities between Member States with some having no regulation and others having limits of different levels).

Considering the lack of evidence produced as a justification of the measure, these disparities do not create any obstacle to trade (considering in particular that “selling arrangements” or “reverse discriminations” are not obstacles to trade). The proposed measure could not, therefore, have as its object the “*improvement the functioning of the internal market*” and harmonization would therefore not be an appropriate response. It could therefore not be proposed under 114TFEU

These tests are further confirmed in the Better Regulation tool box of the Commission which states.⁶⁵

- *“Measures adopted on the basis of Article 114 TFEU should objectively and effectively aim to improve the conditions for the establishment and functioning of the internal market. The risk of impaired functioning of the internal market should be sufficiently concrete: mere disparities between national rules or an abstract risk of infringements of fundamental freedoms or of distortion of competition are not sufficient. Action may also be justified to prevent the likely emergence of such obstacles.”*

ESTA also believes that restricting payments in cash would further reduce competition between payment instruments and therefore be harmful to the functioning of the internal market.

III.6.2 The internal market argument

The internal market argument related to the distortion of competition proposed by the Commission’s IIA, which does not concern the objective of terrorism funding but concerns all transactions, is at best incidental while the primary objective is related to terrorism funding.

It is established case law that:

“When a measure pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component.”⁶⁶

ESTA believes that the internal market objective, introduced in the IIA, as misleading as it might be in the grave context of fighting terrorism, is only meant to provide a justification of the recourse to Article 114 TFEU as a legal basis.

⁶⁵ See the *Better Regulation tool box*, at page 143

⁶⁶ See case C-211/01 Commission vs Council [2003], § 39

This is going against the Commission Better Regulation tool box which states:⁶⁷

- *Article 114 should not be used as legal base if the establishment and functioning of the internal market is secondary or incidental to another objective (e.g. health or environment protection).*

ESTA strongly believes that Art. 114 TFEU cannot be the adequate legal basis for any proposal on harmonisation of CPLs in the EU, should the Commission decide that harmonisation is necessary.

III.6.3 Article 114 TFEU as the legal basis for anti-money laundering directives (AMLD)

The IIA states that Article 114 TFEU could potentially be considered as the legal basis “*for being the legal basis of the Anti-Money Laundering Directives (AMLDs), which pursue the same objectives*”.

Nobody disputes the cross-border dimension of money laundering and the fact that the limitation of jurisdiction within national boundaries has been critical to undermining the efficiency of anti-money laundering policies. However, contrary to money laundering, there is no evidence that displacement of transactions by terrorists takes place in the EU where terrorists would displace a transaction in a less strict country that would not be legal in their own.

Also it is questionable whether ALMDs and the proposed harmonisation of cash payment limits in the EU to fight against terrorism can be justified simply on the grounds that they are deemed to have the “same objectives”: They may to some extent, but the need as much as the mechanisms required for laundering are different in the case of criminal profits and for funding terrorism (at least for the part of terrorism funding which is disconnected for criminal activities performed to generate funding). This is particularly true for the increasing part of terrorism funding, which is legal and does not need any ‘laundering’. As outlined above there is no credible internal market dimension to CPLs that would justify harmonisation.

The fact that AMLDs are based on 114 TFEU is therefore not enough to justify the use of 114TFEU for CPLs.

In addition, the 4th AMLD of 20 May 2015 already covers the funding of terrorism.⁶⁸ The Action plan Com(2016)50 for strengthening the fight against terrorism financing also provides precise recommendations on amendments to be brought to the 4th AMLD, even before the directive enters into force in 2018 (cf. page 9 of the action plan).

⁶⁷ Better Regulation tool box, page 143

⁶⁸ The full title of the Directive 2015/849 is “the prevention of the use of the financial system for the purposes of money laundering or terrorist financing”.

IV. Alternative solutions

Cash requirements for terrorist attacks, together with the general cost of these attacks, are likely to continue decreasing. Equally, cash will remain very popular and will continue to be used for nearly 80% of all transactions by consumers in the EU – no one is seriously considering a cashless society.

Instead of considering policies with little to no effect on stated objectives, while generating a series of negative effects on legitimate interests (not just on genuine economic activities but arguably also on the fight against crime and terrorists) the key focus ought to be to construct a counter terrorist strategy which takes into account up-to-date evidence of the evolution of terrorism and of its funding and of *modus operandi* of perpetrators.

Each new terrorist attack, such as that of Manchester in May 2017, highlights potential loopholes in security and triggers quasi immediate correction, worldwide, on the way protection is organised.

However, rather than proposing restrictive measures against cash with the off-chance that it might undermine the funding of attacks, it seems preferable to envisage countering terrorism using more efficient and relevant tools.

As mentioned above, 80 terrorist plots related to the Syrian/Iraqi context have been foiled since 2013 in the EU, and this includes 40 in France and 13 in the UK.⁶⁹ Compared to this number, the number of successful attacks is very low, though the human toll has been quite important. Nevertheless, it shows the effectiveness of intelligence and counter terrorism forces in Europe, in a context where a zero-risk is not realistic

This is most likely the most efficient way of protecting EU citizens from terrorist attacks. According to authoritative sources, more can be done to reinforce the effectiveness of the relevant services and their international cooperation, however ESTA is not competent to comment or make any recommendations in this area. ESTA's view is that it is preferable to focus on efficient solutions rather than propose accessory measures such as CPLs which may give the impression of "doing the job" while their main effect may be to distract from the main objective.

The main tools at stake, apart from conventional and new intelligence methods which have allowed foiling a large number of attacks, are the Anti-Money Laundering Directives and related measures. Of note, the February 2016 action plan against the funding of terrorism makes most of its recommendation in the strengthening and amendment of the 4th AMLD.

ESTA believes that action in the following areas should be considered with a view to assessing their potential in countering the funding of terrorism:

⁶⁹ Radio Interview of Jean-Charles Brisard, Director of CAT, 23 May 2017 quoted above

- 1) AMLDs will address criminal organisations as well as the part of terrorism funding which is common to criminals (i.e. when the switch to terrorism amounts to a change of purpose, and not one of behaviour), as the tools and methods are not different. The directive includes notably know-your-customers processes and declaration of suspicious transactions, which are effective tools to address transactions in cash (and non-cash). The action plan makes recommendations for its amendment.
- 2) Some legal purchases, such as those necessary for the preparation of homemade explosives are already considered in specific EU legislation restricting the purchase of explosive precursors.⁷⁰ ESTA is obviously not competent to advise whether this legislation needs to be amended or not.
- 3) Prepaid cards are already targeted with regards to thresholds for compulsory identification. Considering that it is electronic money, which is in essence traceable, the ways to make it “non-anonymous” should be envisaged.
- 4) Bank account holders abruptly emptying their bank account(s) should trigger an alert as this is a behaviour which is common to a number of perpetrators on the verge of committing an attack or leaving for Syria. Relevant (cross border) alert mechanisms should be considered, as resources from one’s own account is one of the most common sources of funding for terrorist attacks.
- 5) A system of alert for fraudulent loan applications, with a cross border dimension, a minimum requirement of ID checks and customer due diligence should be considered as this is a standard means of payment of terrorist actions. Had a system of this kind worked effectively, one of the perpetrators of the January 2015 Paris attack could have been neutralised before his attack.
- 6) A reinforcement of IPR enforcement rules should be considered as counterfeiting is a common source of funding of terrorism. Concerning IPRs, EU or national policies which have as their effect the undermining of IPR protection should be assessed also in the context of illicit funding of terrorism. The same could be done in the case of national measures concerning the prohibitions of a number of IP elements of tobacco packaging.⁷¹
- 7) By extension, adapting the Impact Assessment guidelines in such a way that they require an assessment, for specific measures, also in relation to their impact the funding of terrorism, might also be considered.
- 8) Reporting of transactions in cash above a certain limit would also help. It would create a limited burden as the number of cash payments in amounts in four digits or more are relatively infrequent and likely to draw attention anyway.

⁷⁰ Cf the EU regulation 98/2013 on explosive precursors and related delegated acts

⁷¹ These measures are designed to counter the attractiveness of tobacco packs which can be appealing to adolescents; however the Manchester attack in May 2017 showed that adolescents are also a target of terrorists.

V. Conclusions

We hope that this submission will help the Commission to have a better understanding of the problem definition it wishes to address in its impacts assessment.

Contrary to what is stated in the IIA:

- Cash does not play a major role in terrorist funding
- Cash is mostly obtained from legal sources which makes it very difficult to detect as these transactions cannot be seen as “suspicious”, since their purpose cannot be known
- Seeking to prevent future terrorist attacks by focusing on cash use is not the most appropriate approach as
 - the sums required are usually very low and unlikely to be detected;
 - the attacks are self-financed, with a limited need to transfer sums;
 - other, non-cash, payment instruments are commonly used by terrorists;
- The anonymity that provides cash is neither a driver for the use of cash, nor critical to terrorists.

Therefore CPLs will do very little in assisting in the fight against terrorism. This is probably why none of the relevant counter-terrorism organisations, at national or international levels are proposing such measures. The reason is because, as stated in the first quote used in this submission, terrorist cells *“are almost impossible to detect through their financial activity”*.

ESTA can only reiterate its views that cash payment limitations will do very little, if anything, in reducing the risk from terrorist plots in the EU.

ESTA therefore can only reiterate its views that no EU harmonization of CPLs should be considered, that such a measure would not be justified on grounds of the absence of serious cross-border issue to address, and particularly with regards to subsidiarity (as CPLs are either selling arrangements of reverse discriminations which are not incompatible with the internal market).

Further, ESTA’s views are that the harmonisation would not be proportional as more effective measures have proven being far more effective. It would further go unduly against the right to privacy of citizens, as protected by the ECHR to which the EU is now a party.

Last but not least, the objective of the policy needs to be considered carefully. If CPLs only lead to cash being replaced by non cash and the transaction going through anyway, the attacks being performed, then the security of EU citizens will not have improved much. It is important to remind of the priority which should be considered: the main point for counter-terrorism is not to stop payments in one instrument that would take place in another, but to

maintain the capacity to monitor them, dismantle networks and projects and ultimately stop the attack in time.

This can best be achieved through intelligence, not by imposing any restrictions on maximum thresholds of payments in cash.

ESTA remains at the disposal of the Commission for any further information or clarification that may be needed on this important topic.