

EU Harmonisation of cash payments limits

State of Play

ESTA Conference

Budapest, 14 May 2018

Thierry Lebeaux

Secretary General

Action plan for the fight against terrorism financing

Strasbourg, 2.2.2016
COM(2016) 50 final

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT AND THE COUNCIL
on an Action Plan for strengthening the fight against terrorist financing



Follow up:

→ AMLD 5

- *Agreed by Council and EP;*
- *rubber stamped by the EP*

→ CPLs initiative

- *Inception impact assessment*
- *Public consultation*
- *Stakeholders Workshop*

- **It says very little about cash,** except:
"Payments in cash are widely used in the financing of terrorism"
(P. 10)
- However, the section on *"targeting the sources of funding"* remains silent on cash !

ESTA's response to the public consultation of 2017

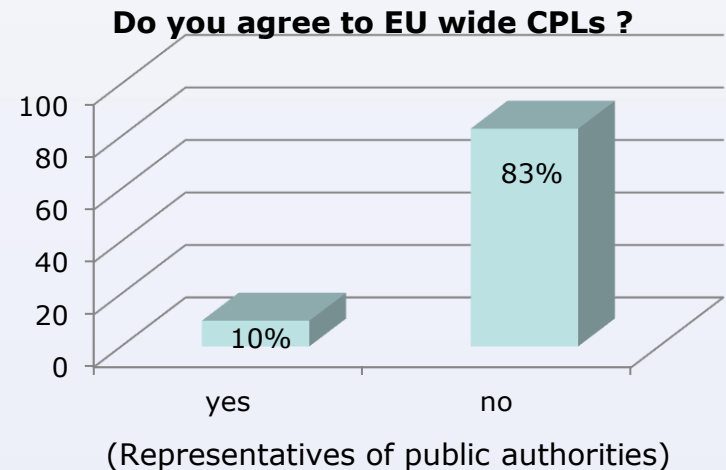
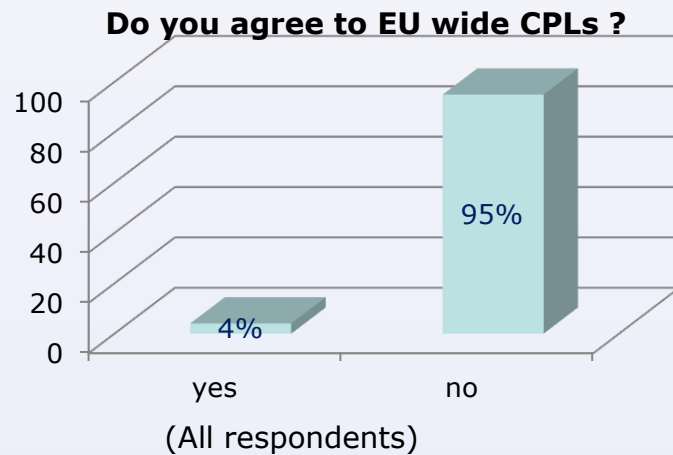
“Better regulation principles need to be maintained throughout the legislative process”

(EU governance key principle)

- Challenged the problem definition
- Criticised the questionnaire for online survey
- Challenged the evidence base supporting the initiative
- Challenged the internal market relevance
- Necessity (particularly as fundamental rights are encroached)
- Proportionality
- Subsidiarity
- Legal basis

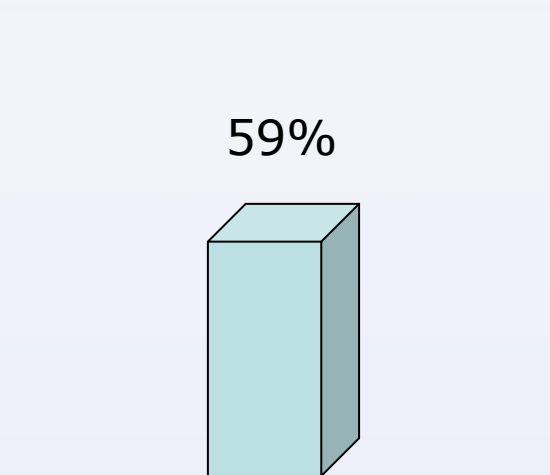
Outcome of public consultation ending 31.05.2017:

- 30,317 responses (essentially from DE, FR and AT)

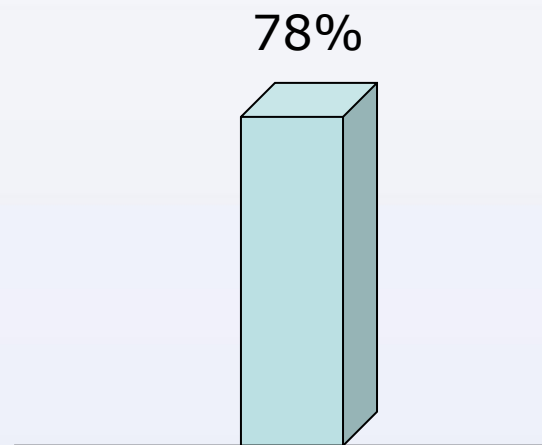


Main arguments against the introduction of restrictions on payments in cash at EU level

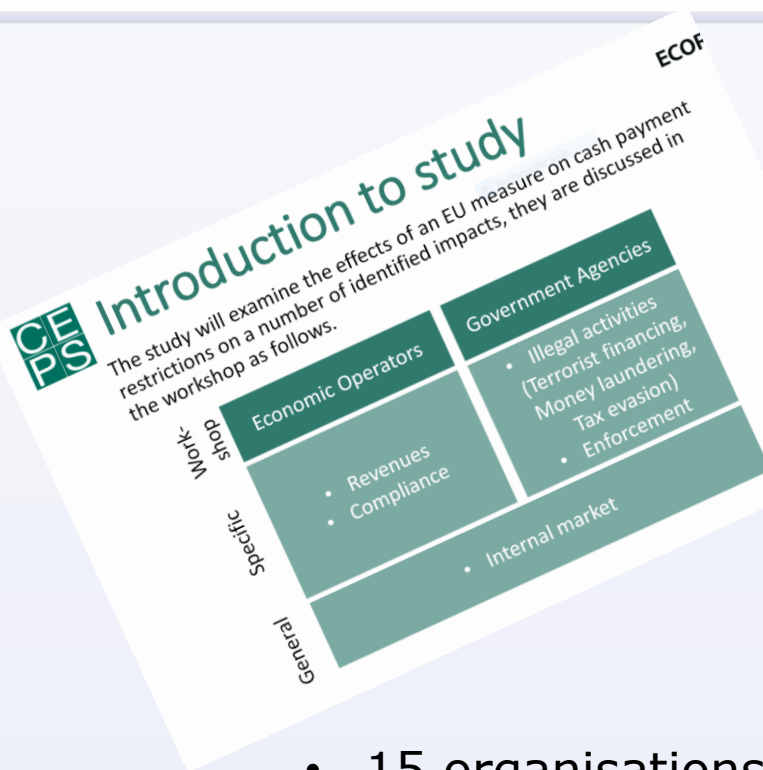
(Representatives of public authorities only)



« Ineffective in curbing crime, tax evasion, terrorism »



« Paying anonymously in cash is an essential freedom »



- 15 organisations invited (2.5 hours)
- 'Bumpy ride' - agenda and *modus operandi* contested
- CEPS not willing to listen to anything not on their agenda
 - Necessity / proportionality of no interest to CEPS
 - Internal market relevance discussion censored

Consultation process not complying with Better Regulation principles

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

(Source: Better Regulation guidelines, page 59)

- ACI, EURICPA, ESTA complained to Com.

EC informs ESTA of postponment

From: Errikos [REDACTED]
To: Thierry Lebeaux
Cc: Johan [REDACTED]; Stavroula [REDACTED]
Subject: RE: AFET committee discuss terrorism financing

Sent: Fri 23-Feb-18 11:12 AM

Dear Mr Lebeaux,

The ECORYS/CEPS report has indeed been finalised.

In summary, its findings are that restrictions on payments in cash do not have any significant impact on terrorism financing, or directly on tax evasion. However, the report also concludes that restrictions on payments in cash are useful in combatting money laundering, and that the existence of diverging restrictions at national level distort competition in the internal market.

Following these findings, the Commission will report to the ECOFIN Council at its June meeting that it would not be opportune to present a legislative proposal at this stage, taking also into account the limited time available in the remainder of the legislative term and the sensitivity of the file.

As no legislative proposal will be issued this time, a full impact assessment is not necessary, but the findings of the ECORYS report are nevertheless informative and they will be presented in a Commission staff working document or report. Both that report and the ECORYS/CEPS report will be made public in June, at the time conclusions are communicated to the ECOFIN. We would therefore invite you to wait for this official publication in June.

With kind regards,

Errikos [REDACTED]

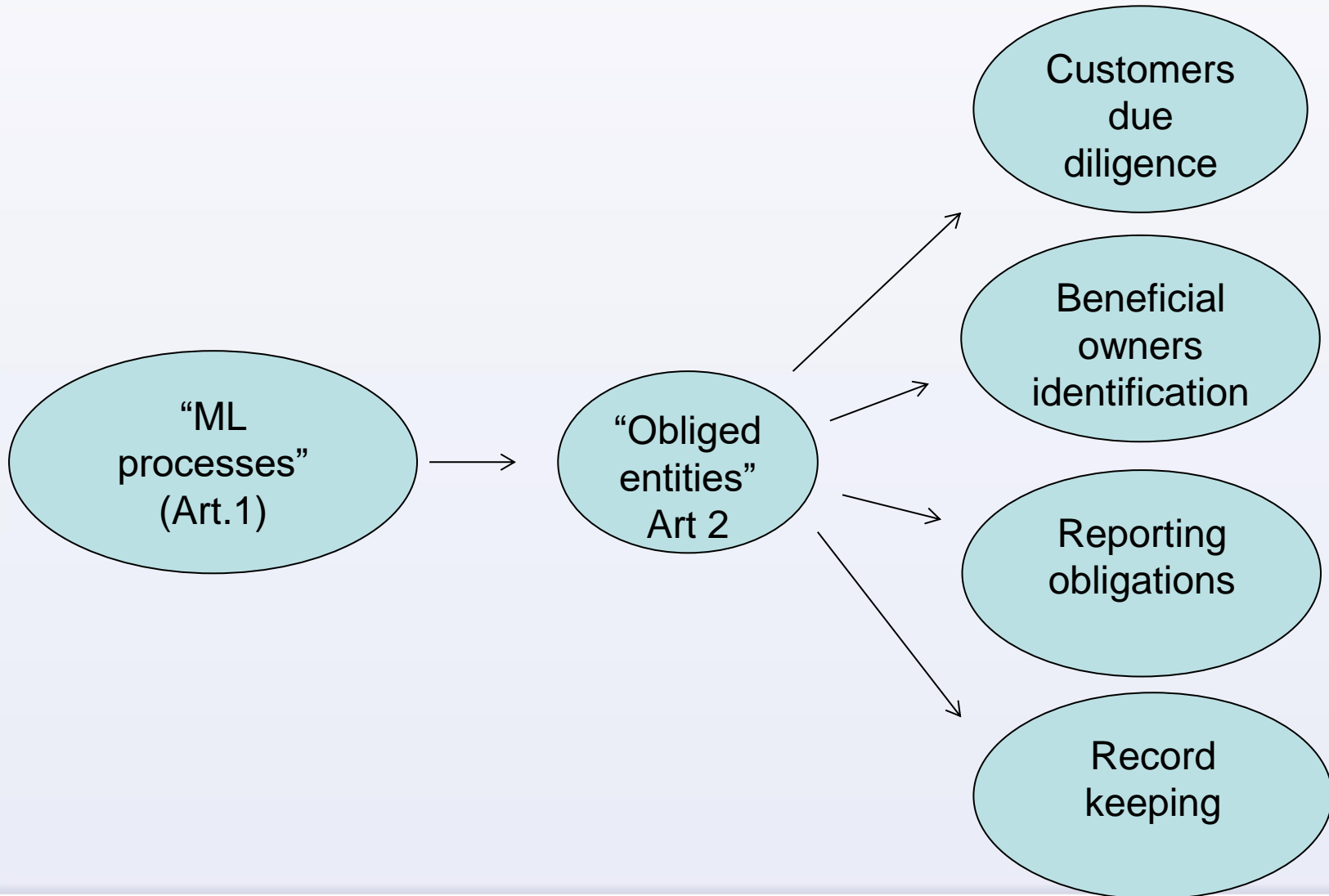


European Commission
DG Economic and Financial Affairs
Unit Euro Protection and Euro Cash
[REDACTED]

B-1049 Brussels/Belgium
[REDACTED]

- *'No significant impact of CPLs on terrorism'*
- *'CPLs useful for combatting money laundering'*
- *'Diverging CPLs create market distortions'*
- *'No proposal issued « this time »'*

27 years of AMLDs from AMLD 1 in 1991 to AMLD 5



Is there any loophole with cash in AMLDs ?

- All economic operators of relevance to cash are concerned (financial and credit institutions, lawyers, accountants, casinos, estate agents, trust and company service providers, high value dealers...)
- Processes cover all “properties” :
 - Acquisition, transfer, use, concealment of property derived or related to crime
 - Very wide definition of “properties”
- “persons trading in goods”
 - Payments made or received in cash > €10 000
 - Whether “*in one single operation or in several operations which appear to be linked*”

Why should a payment in cash *not* requiring due diligence under AMLD be prohibited?

Article 114 TFEU

CJEU case law

*“Measures for approximation of the provisions [...] in Member States which have as their object **the establishment or the functioning of the internal market**”*

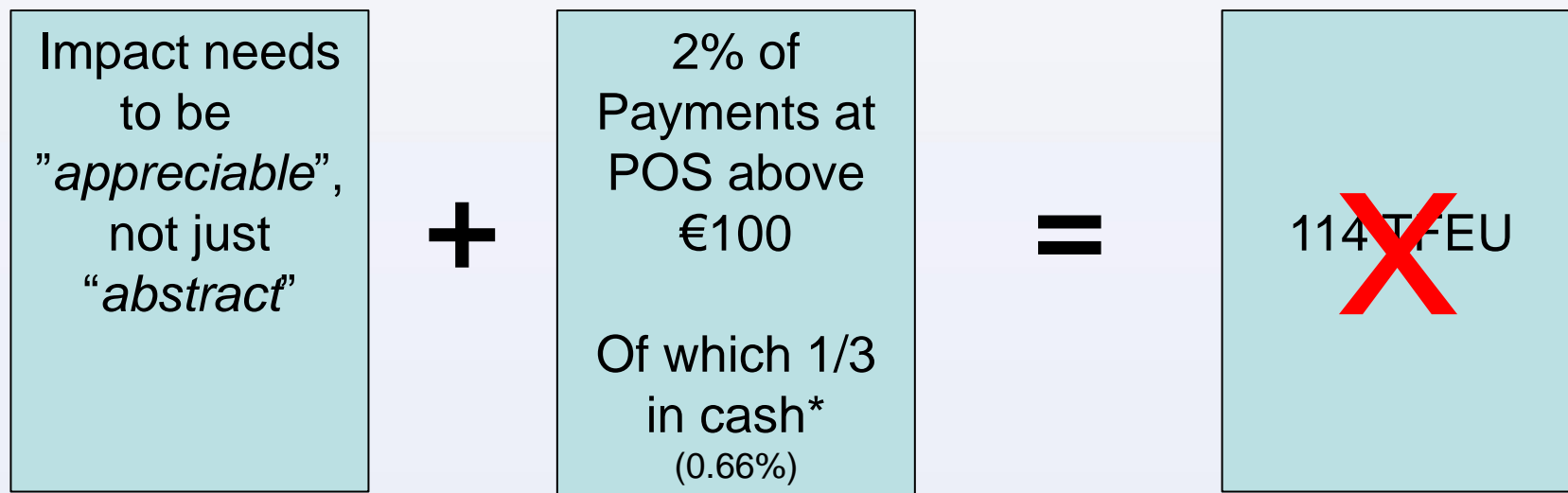
1. MS must have taken divergent measures
2. The divergent measures must constitute an obstacle to trade (or be likely to constitute one)
3. The effect of the obstacle on the internal market must be appreciable – not just an abstract risk
4. Measures under Art. 114 must genuinely have as their object the improvement of the conditions for the establishment and functioning of the IM
5. Harmonisation must be an appropriate response

“A mere finding of **disparities** between national rules is **not sufficient** to justify having recourse to Article 114 TFEU”

CJEU case C-514/14 of 4 May 2016 , § 58

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- *Germany v Parliament and Council*, C-376/98, EU:C:2000:544, § 84 and 95;
 - *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, § 59 and 60;
 - *Arnold André*, C-434/02, EU:C:2004:800, § 30;
 - *Swedish Match*, C-210/03, EU:C:2004:802, § 29;
 - *Germany v Parliament and Council*, C-380/03, EU:C:2006:772, § 37
 - *Vodafone and Others*, C-58/08, EU:C:2010:321, § 32

“A mere finding of **disparities** between national rules is **not sufficient** to justify having recourse to Article 114 TFEU”



**No swing of trade, no internal
market impact !**



*“It don't mean a thing
If it ain't got that swing !”*