

## **Position of ESTA on the Ruling of the European Court of Justice Joint cases C-422/19 and C-423/19 and its implications on legal tender.**

**3 February 2021**

### **Summary**

*ESTA welcomes the ruling published on 26 January 2021 on the joint cases C-422/19 and C-423/19. This is an important ruling in relation to legal tender which raises some substantial points. ESTA particularly welcomes the confirmation that there is an obligation, albeit “in principle” according to the Court, to accept cash. ESTA’s reading of the Ruling, however, is that there is no rationale to argue that the obligation would be of principle only.*

*There is, however, a strong indication that the obligation to accept cash is quasi-absolute. Member States may adopt restrictive measures, “for public reasons”. The scope for such reasons is however limited, and the bar for the proportionality test is set very high.*

*The Ruling does not endorse the wide-ranging argumentation in the AG’s opinion on “contractual agreements”, which would have weakened the case of mandatory acceptance for cash, leaving it to anyone to decide.*

*ESTA is also pleased by the legal analysis which confirms that only the physical form of the currency is legal tender – no other (i.e. private) forms of the currency are legal tender - and therefore there is no obligation, not even in principle, to accept other forms of currency which are not legal tender.*

### **Introduction**

ESTA welcomes the ruling published on 26 January 2021 on the joint cases C-422/19 and C-423/19 (“the Ruling”). This is an important ruling in relation to legal tender with a number of major points that will be developed in this note.

The Ruling rejects some quite audacious reasoning from the AG’s Opinion (“the Opinion”) which ESTA contested (cf. our position paper of 28 October 2020) which, if retained, would have weakened the position of cash as an element of the EU monetary policy.

The Ruling sets a very clear context for acceptable motives for refusing cash based on “public reasons”, imposing very stringent conditions for proportionality.

However, we think that here is no legal substantiation in the Ruling for the Court’s interpretation that legal tender only entails an obligation “in principle” to pay in cash. The Court confirms that it is up to EU legislators to define the meaning and scope of legal tender

provided in Article 128 TFEU. ESTA thinks that by adopting Recommendation 2010/191/EU, the EU legislator has done just that.

## **An important contribution of the ruling is... what is not in it!**

Despite leading to the same conclusions as the Opinion of 29 September 2020, the path chosen by the Court is substantially different, and this is good news.

### **No reference in the ruling to “contractual agreement”**

ESTA is delighted to see that a number of controversial developments of the opinion of 29 September have not been endorsed by the Court. The Ruling reproduces the language of Recommendation 2010/191/UE of 22 March 2010 on the obligation to accept cash as a payment, only subject to the ability of parties to agree on a different means of payment. As ESTA pointed out in its comments on the AG’s Opinion, the interpretation of a “*contractual agreement*” exception, for which there is no EU legal basis, would have introduced a critical uncertainty in the meaning of legal tender. It is therefore extremely welcome that the Ruling has not validated this reasoning.

This interpretation of the Opinion, which was also tantamount to allow anyone to decide on the legal impact of legal tender, has not been endorsed by the Court. Yet, the Ruling does not exclude private law motives (cf. §56). However, by refusing to substantiate extensively these motives any further, contrary to the Opinion, the Ruling confirms that these reasons for refusing cash can only be understood in a very narrow way. This therefore excludes situations of *fait accompli* that consumers face with, for example, retailers simply stating “*no cash accepted here*” at the entrance of the shop.

In ESTA’s opinion, this would have substantially weakened the legal certainty of acceptance of cash that must be attached to legal tender.

### **No legal tender for non-physical forms of currencies**

ESTA is also pleased that the somewhat complicated development in the Opinion on which forms of currencies were legal tender or not has not been retained by the Court. The Opinion argued that it could not be excluded that non-cash forms of currency may also be legal tender, since the EU legislators had not ruled out explicitly that this might be the case when they had the opportunity to do so.

ESTA claimed that such an interpretation would risk opening a huge Pandora’s Box if the interpretation of existing law also had to be assessed under the light of laws which might have been adopted.

By ruling out such an interpretation the Ruling in essence confirms that only physical forms of currencies – namely cash, considered as the only “official”, i.e. Central Bank currency – is legal tender. This is also welcome.

Incidentally, the Ruling also confirms that in the Eurozone, only euro banknotes and coins are legal tender, at the exclusion of any other notes and coins (§ 44). This is also welcome in the light of some currency projects that may be proposed in the future, whether at local (Member States) or global level.

## Comments on the Ruling

There are a number of significant points to be noted in the Ruling.

### **The EU has specifically ruled on the meaning and scope of legal tender as meaning a quasi “absolute” acceptance of cash**

The Ruling confirms in § 51 that only the EU legislators have the ability to specify what the status of legal tender should entail. This further excludes any competence to do so by Member States.

The Ruling further states in § 55 that it is not “*necessary for the use of the euro as the single currency and, more specifically, for the preservation of the effectiveness as legal tender of cash denominated in euro that the EU legislature lay down exhaustively and uniformly the exceptions to that fundamental obligation, provided that every debtor is guaranteed to have the possibility, as a general rule, of discharging a payment obligation in cash*”.

However, ESTA would submit that the EU legislators actually did exactly that, when they adopted Recommendation 2010/191/EU, so the issue of interpretation of what Member States can or can’t do in relation to the exceptions to legal tender, is now over.

With regard to the nature of the mandatory acceptance of cash, paragraph 1(a) of Recommendation 2010/191/EU states that “*the creditor of a payment obligation cannot refuse euro banknotes and coins unless the parties have agreed on other means of payment*”. As a matter of fact, this provision specifically defines the scope and effects of legal tender of euro banknotes and coins. It allows for exceptions, which are, however, very narrowly understood.

ESTA agrees with § 48 of the Ruling that according to Article 288(5) TFEU, “*Recommendations are not intended to produce binding effects and are not capable of creating rights on which individuals may rely before a national court*”. But, as the Ruling says, a Recommendation is, however, very relevant in the *interpretation* of the law, particularly when the wording is as clear-cut as that of paragraph 1(a) or the Recommendation.

However, if a Recommendation may not create such binding effect on which consumers may rely upon in court due to the absence of direct effect of non-binding acts, Article 128 of the Treaty does, as EU jurisprudence has established the principle of direct effect of primary law under certain conditions. Legal tender provided in this Article has now been substantially defined by the EU legislators in a way which, according to EUCJ case law, meets the conditions for direct effect of primary law, as it is now *precise, clear and unconditional* (other

than for the freedom of parties agreeing otherwise). Also, as the Ruling points out, Member States have no latitude in the matter as it is an exclusive competence of the EU.

Whilst Article 128 TFEU would only initially provide for a general obligation of accepting cash without further definition of what it means, the Recommendation makes the definition of legal tender very clear and specific and very compelling with regard to its interpretation.

This is particularly so because the very first recital of Recommendation 2010/191/EU refers explicitly to Art 128 TFEU. So the Recommendation derives directly from Art 128 which “*underpins the singleness of the euro and are a precondition for the effective conduct of the European Union’s monetary policy*” (§ 43).

We do not see in the Ruling any clear justification why, in the absence of any contradicting provision in EU law, the scope of legal tender set in article 128 of the Treaty would be deemed not to have been precisely defined with respect to mandatory acceptance of cash.

Furthermore, nothing in the Ruling substantiates why the mandatory acceptance as defined in EU law should be considered as “in principle” only.

Therefore, it is ESTA’s view that the EU legislators have ruled on the matter, which is therefore settled as a strict obligation to accept cash, except in very specific cases, the scope of which is to be understood very narrowly.

### **The obligation of accepting cash as a central element of the Eurozone monetary policy**

The Ruling acknowledges that any Member States adopting “*a national rule, the object or effect of which is to abolish, in law or in fact*” cash would be contrary to EU law due to the exclusive competence of the EU in this area (§ 62).

Arguably, measures which would lead, *de jure* or *de facto*, to the abolition of cash in one Member State of the Eurozone, or which would reduce the circulation of cash in such a way that the cash cycle becomes unsustainable, would therefore be deemed incompatible with the exclusive competence of the EU, since the disappearance of the physical euro would in effect annihilate any legal tender to the euro in that country – precisely what the Court says Member States cannot do (see inter alia § 51, 58, 78).

A number of countries outside the Eurozone – DK, NO, SE and the UK – have adopted or are considering legislation to protect cash, notably through specific cash obligations to the banking sector. This acknowledges that unless something is done for protecting cash, cash may disappear sooner than expected, and the COVID crisis is contributing greatly to that.

Compulsory acceptance of cash – or its reverse, the right to pay in cash – is one of the measures needed to secure a sustainable cash cycle. When the circumstances pertaining to the cash cycle are considered, the level of mandatory acceptance of cash becomes an obvious part of monetary policy, as its absence is just the promise of the disappearance of cash.

Failing this, the unicity of monetary policy would be undermined, as it would be if Member States might be entitled to different interpretations of legal tender as an obligation to accept payments. In support of the AG's Opinion, the Court states that diverging interpretations of the status of the euro by Member States would compromise the unicity of the single currency and thus the objective of stability of prices – the “main objective”, as it recalls, of the EU monetary policy.<sup>1</sup> The elements of monetary policy at stake are the emission of banknotes and their legal tender, as it derives from article 128 TFEU, and indirectly the emissions of coins by Member States.

Mandatory acceptance of cash, possibly with exception of measures of public interest adopted by Member States, are essential to preserve cash, the emission of which is a core element of the EU monetary policy.

### **Recital 19 of Regulation No. 974/98**

The Opinion, as well as the Ruling, refers to recital 19 of Regulation No. 974/98 as the other justification for their interpretation that the obligation of accepting the euro with legal tender as a payment would be “*in principle*” only.

ESTA considers that this part of the Regulation cannot assist in any way in supporting the conclusion that acceptance of cash is only an obligation *in principle*. Indeed, ESTA would argue to the contrary.

Regulation 974/98 deals with the “introduction” of the euro. Its Recital 19 reads:

*(19) Whereas banknotes and coins denominated in the national currency units lose their status of legal tender at the latest six months **after the end of the transitional period**; whereas limitations on payments in notes and coins, established by Member States for public reasons, are not incompatible with the status of legal tender of euro banknotes and coins, provided that other lawful means for the settlement of monetary debts are available (...).*

Arguably, Recital 19 only refers to the *transitional period* to the euro, during a time when two currencies, both with legal tender, might coexist in one country until the euro replaces the outgoing domestic currency. This refers to a very specific, time limited, situation which is now long gone.

Second, the vast majority of restrictions on cash payment in Member States concern cash payment limitations, restricting the ability of making cash payments above a certain threshold – which currently varies from €500 to nearly €15.000 in the EU. These restrictions have been imposed by Member States for tax reasons, or in some rare cases for anti-terrorism measures, i.e. areas where the EU has a very limited competence. In most countries, these payments only apply to specific stakeholders (B2B and C2B, but not C2C): these are only partial restrictions

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<sup>1</sup> Cf paragraph 39 of the ruling.

to the use of cash.<sup>2</sup> The Commission has announced its intention to harmonise them in its May 2020 communication on anti-money laundering.<sup>3</sup>

ESTA would submit that these reasons are not of general scope: the argument of the fight against tax evasion, money laundering or terrorist funding, which are the most frequent public reasons for Member States measures restricting cash payments, are irrelevant when the measures aim at paying taxes to the administration. “Laundering” cash directly with the administration does not make sense.

Third, these measures are only possible for “*public reasons*”, and are therefore legislative or regulatory measures *adopted by Member States*. As such, restrictions to cash payment can only concern payments within the scope of the measures adopted. In no way could they justify restrictions to general payments for the convenience of private parties. This is confirmed in § 67 of the ruling, which says that “*the obligation of accepting cash can be restricted by Member States, in principle, in consideration of reasons of public interest*”.

This indeed restricts very significantly the cases where cash can be refused as a payment as it requires measures adopted by Member States for public reasons. Other than this situation, there is no possibility for anyone to restrict the ability to pay in cash, other than on good faith.

So the notion of obligation “*in principle*” only refers to restrictions where Member States measures of public interest are relevant. The obligation of accepting cash as a payment applies to all other circumstances where no Member States’ rule exists for public reasons, except “in good faith”.

The expression “*in principle*” is therefore to be understood as “unless specific and justified measures of public interest have been adopted by Member States”. In all other situations, the obligation of accepting cash is strict, as Article 128 is to be interpreted with the help of the 2010 Recommendation.

### **Restrictions to measures adopted in consideration of “public reasons”**

The Court ruling does not limit itself to acknowledging the restriction to the mandatory obligation to accept payment as part of the definition of legal tender. The Court acknowledges that restrictions by Member States do “*restrict the ability, recognised by EU law, to settle a payment in cash*”. Therefore, Member states must ensure that these restrictions are compatible with the principle of proportionality. ESTA would submit that these restrictions need to pass the general test set under EU law of necessity (i.e. needed to attain the purported objective) and proportionality (i.e. not going beyond what is necessary to attain the objectives).

Re the latter, the Ruling provides a useful benchmark for the assessment of proportionality: In § 72, the Court referred to “*the 46 million taxpayers*” and the “*substantial*

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<sup>2</sup> ESTA has conducted a thorough analysis of these limitations in the context of the 2017 public consultation by the Commission on their possible harmonisation.

<sup>3</sup> Communication from the Commission on an Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing, C(2020) 2800 final, 7 May 2020



*cost*” that the obligation to pay the tax by scriptural payments would avoid. Clearly, the Court sets the bar very high in relation to proportionality (§ 75).

### *A right to pay in cash ?*

The ruling also calls for assessing the proportionality of the restriction in relation to the fact that alternative legal means of payment may not be readily available to all people having to pay a tax and that a possibility to pay in cash must still be secured for these people (§ 77).

In other words, there may be an obligation to accept cash from certain people whilst not from others. Or maybe, to say it differently, there may be a *right* to pay in cash for people with no choice. The question will be, therefore, to decide, in each individual instance, who is entitled to pay in cash, and who is not, and on the basis of which criteria. Enforcement of this will be particularly tricky.

### *Side implications of the Court Ruling*

It derives from the ruling (§44), that only the euro cash is an official money (i.e. Central Bank money) in the Eurozone. Even if, as the Court suggests, there is no obligation to accept cash other than *in principle*, this therefore means that there **is no obligation at all** (i.e. not even in principle) **to accept non-physical euros**, which is not official money and is not legal tender.

## **Conclusions**

It results from the Ruling that the obligation to accept cash is quite a strong one. The Rulings states that there is no “absolute” obligation. In the same way that EU citizen’s fundamental rights in the Charter are not “absolute” and can be subject to restrictions, the rights, or obligation remain quite strong and can only be limited on the basis of very strict and narrow circumstances.

Therefore, according to EU law, the way legal tender enshrined in TFEU’s Article 128 has subsequently been defined by EU legislators, in a clear and precise language, provides it with a direct effect. The obligation to accept cash as a payment is undoubtedly a very strong one.

Since money is based on trust, and a high level of trust is needed for a currency to operate, the concept of legal tender must entail a high level of obligation to accept it to provide enough legal certainty to its users.