ESTA
The Cash Management Companies Association

Position of ESTA on the Advocate general opinion of the European Court of Justice on cases C-544/19 on cash payments limitation in Bulgaria

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A case is currently pending in the EUCJ (case C-544/19) on cash payments limitations (CPLs). The opinion of the AG was rendered in November 2020. [1]

The case looks *inter alia* at two aspects of importance to ESTA. The first is the relevance of CPLs to anti-money laundering policies. The second is to review CPLs under the light of article 63 TFEU prohibiting restrictions to the free movement of capital.

CPLs and anti-money laundering.

The AG's opinion considers that CPLs are not measures of relevance to the 4th EU Anti-Money Laundering directive (AMLD) 2015/849:

- The AMLD aims at preventing offences which are of a much serious nature that just limiting cash payments below a certain threshold (§46);
- Legislation of Member States under which CPLs are adopted usually aim at preventing the shadow economy, and not fight against money laundering *per se*;
- No provision in AMLD aims at regulating the use of means of payments in Member States' territories;
- Recital 6 of Directive 2015/849 that provides that Member States may adopt regulation on cash payments is of enough, however, to put CPLs regulations of Member States under the scope of AMLDs (§54).

CPLs and Article 63 TFEU

The Advocate General therefore considers that CPLs may only be assessed under primary EU law, namely article 63 TFEU on the free movement of capital. He considers that CPLs constitute indeed a restriction incompatible with article 63; however, that they may be justified under the rule of proportionality in view of their purported objectives, albeit only so if they do not go beyond what is justified to achieve their objective.

The AG's argumentation is structured around the following points:

- CPLs apply to any individual or company, whether resident or not, willing to make a payment on the territories where they are enforced. As the consequence, they are intrinsically of a cross-border nature (§67).

[1] The AG's opinion available on the EUCJ website seems not to be available yet in English. For this note, the French version of the opinion was considered.

- CPLs in Eurozone countries also contradict, as stated in §70 and §71 of the Opinion, the status of legal tender of the euro in the Eurozone, which implies the obligation in principle of mandatory acceptance of cash;

- The prohibition of cash payments above a certain threshold makes it indispensable for consumers and citizens to have a bank account, which is not the case of all citizens (§74). It also implies the payment of fees related to the transaction which cannot take place in cash because of the thresholds (§77);

- The Advocate General refers to EUCJ jurisprudence according to which restrictions to the movement of capital may be justified if they contribute to "*measures aiming at preventing tax fraud and tax evasion*."

The AG's opinion therefore concludes that whist being unquestionably a restriction to the free movement of capital, they are justified due to their purported objectives of fighting tax fraud and tax evasion.

There are, however, two serious conundrums, if not paradoxes, in the AG's opinion:

- The first is that the AG also critically states that there is currently "*no consensus whether CPLs have an effective impact on the volume of tax fraud and tax evasion*" (§87).
- The second is the recognition that cash payments limitation is a "*minor offence*" whilst infringements to AML rules constitute a much serious offence that EU and Member States' legislation aim to combat (§46).

It therefore seems challenging to consider that CPLS may be justified under the principle of proportionality when, first, their effectiveness is not demonstrated (i.e. their ability to deliver on their purported objective) and, second, their infringement is a minor offence compared to the much more serious offence of money laundering, as ESTA has consistently pledged in all its positions and submissions to AML public consultations.

Or, in other words: this amounts to argue that criminals willing to commit a very serious offense with serious penal risks might be deterred by committing a minor offence with much limited penal risks.

In ESTA's views, the AG just demonstrated that CPLs are not compatible with Article 63TFEU, and that they cannot be justified by the proportionality principle as they are ineffective in combatting what they are meant to prevent.

Incidentally, ESTA is pleased to note on §74 of this opinion:

> *"The national legislation in question therefore seems to me to be such as to dissuade an individual, residing, for example, in a border area, from going to the neighboring Member State in order to purchase goods or services from traders which will require, for the purposes of payment, the use of a transfer or deposit into a payment account."*

This strongly contradicts, as ESTA forcefully argued at the time, the position expressed in the 2017 impact assessment by CEPS-ECORYS, that cross border purchases by individuals and right of establishment of companies are an "evasion", as they stated in their report, when it is in contrary the very purpose of the internal market, as confirmed in the AG's opinion.[2]

[2] The CEPS ECORYS report is mentioned by the AG in footnote 3. The report refered to cross border purchases possibly related to CPLS as an "*evasion*" (page 159) and a failure of the internal market, when it is what the internal market in reality stands for.