The Cash Management Companies Association

Statement by ESTA on the EU proposal for an EU cash payment limit of €10,000

How to address the real issue rather than fighting symbols

28 July 2021

Executive summary

The anti-money laundering (AML) package presented by the Commission on 2021 is aimed at fighting money laundering, crime and terrorist funding, objectives that ESTA fully supports.

ESTA does not believe that the provision aiming at limiting cash payments in the EU will be effective and it should not be proposed. As a clear and objective restriction to the free movements of capital within the EU (Art 63 TFEU), it can only be justified if it meets very stringent conditions of necessity and proportionality. However ESTA argues in this paper that the measure will not be able to deliver on its purported objectives, therefore it is not necessary and cannot be deemed to satisfy the proportionality condition.

The measure departs from all previous measures adopted, in the last 30 years, in the context of EU AML policies. It is the first time that the Commission suggests a restriction on a specific means of payment. It is also the first time that the Commission, on the argument of the simplification (removing from the list of *obliged entities* traders in goods and services accepting payment in cash above €10,000), departs from its philosophy of targeting measures and restrictions solely on a clearly defined list of "obliged entities". Instead, it extends the restriction to *all* business and citizens, whilst the very vast majority of them are law-abiding and do not enter into crime, terrorism or even the grey economy. In doing so, this measure further departs from the new justification of the AML/CFT scheme of its claimed "*risk-based approach*", as it targets everyone irrespective of risks. From this point of view, the change in the approach is further challenging to the condition of proportionality.

In addition, by excluding for good reason (enforceability) transactions between individuals, the proposal excludes from its scope those who should be primarily targeted by the measure, namely criminals and terrorists who are never incorporated as business and only trade as individuals. What is the rationale of defining a tool against criminals and terrorists and at the same time excluding them formally from the scope of the Regulation?

Studies have shown, moreover, that cash payment limitations will only marginally address the shadow economy, and therefore will not be effective in fighting it.

Because the measure will in effect only impact on *domestic* payments, and have no additional impact compared to status quo on cross-border payments which can be controlled via the mandatory declaration of cash transported by travellers at the border, it also fails to meet the condition of subsidiarity under the Article 5 TEU.

One of the reasons for these flaws is possibly that the Commission has decided to rely upon the very controversial study conducted by CEPS and ECORYS on cash payment limitations in 2017. ESTA has flagged the many flaws and contradictions of this study at the time. However, the Commission seems to have ignored the main conclusion by the authors that there would be a "similarity of impact" on "distortions" whether from an outright ban or a declaration obligation. Therefore, a declaration obligation, which the Commission acknowledges is very effective in the case of cross-border transport of cash, would be as effective and much less restrictive than cash payments limits. A cash payment limitation therefore is a disproportionate restriction imposed to all, where a declaration of obligation to some obliged entities would be as effective.

Cash is a symbol, and we believe the provision in the Regulation is only aimed at fighting symbol, thus distracting from the real focus.

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The European Commission presented on 20 July 2021 a new Anti-money Laundering (AML) package comprised of 4 proposals and an impact assessment. The core spirit of the package is the new "*risk-based approach to the EU AML/CFT system*" and the supranational/international nature of these risks. ESTA supports all measures targeting efficiently money laundering and aiming at protecting businesses and citizens from crime and terrorism.

The package includes measures targeting cash. ESTA supports measures aiming at sharing information on money-laundering incidents, whether in cash or, more often, non-cash, which are a significant part of the proposals in the package. However, the newly proposed Regulation includes a provision for capping cash payment limits in the EU to €10,000, or the equivalent in local currency for non-Eurozone countries. This is the first time that EU AML legislation introduces a measure aiming at preventing the use of a specific payment instrument: never before, in three decades of EU AML policies since the first AML directive of 1991 has the EU deemed necessary to restrict the use of payment instruments in Member States territories.[1]

The proposal is such that Member States with existing lower limits are entitled to keep them. The limit also applies to businesses only ("B2B" and "B2C") but not between individuals/consumers ("C2C"), which logically would be very difficult to enforce, not least because consumers do not have the capacity to accept real time electronic payments as a substitute to cash. The measure is meant to curb the shadow economy, crime and terrorism funding.

Also of concern is that the measure will be subject to review three years after its implementation. The Regulation already hints at the forthcoming report's conclusion by stating that the Commission will submit a "*report assessing the need and proportionality of further lowering the limit for large cash payments*". ESTA is bemused that many years before the report will be considered, and many months before the EU measure will even be enacted, the conclusion seems already to have been reached that the measure can only be tightened, as if the assessment of its effectiveness might be superfluous.

[1] AMLD4 2015/849 of 20 May 2015 did not impose any restrictions on cash payment, but only included as obliged entities traders who might receive payments in cash above €10,000

Cash Payment Restriction Compatibility Under EU Law

Cash payment restrictions are, in essence, incompatible with EU law as they constitute an obstacle to the free movement of capital provided under article 63 TFEU. A measure of cash payment restriction is further incompatible with Art 63.2 TFEU,

These measures, which are obstacles to one of the four fundamental freedoms guaranteed by the EU Treaties, can only be declared compatible under EU law if they meet specific conditions, and in particular if they are necessary, and proportionate, i.e. not restricting movement of capital more than what is strictly necessary in the light of their objectives.

The purpose of the new AML package is to ensure uniform application of AML rules to all obliged entities. This is clearly stated in the recitals of the Regulation, which reads:

> *"The main challenge identified in respect to the application of the provisions of Directive (EU) 2015/849 laying down* ***obligations for private sector actors, the so-called obliged entities****, is the lack of direct applicability of those rules and a fragmentation of the approach along national lines. […]Therefore, it is necessary that rules on matters currently covered in Directive (EU) 2015/849* ***which may be directly applicable by the obliged entities concerned are addressed in a new Regulation in order to achieve the desired uniformity of application****."*[2]

The focus is therefore explicitly on the definition of "*obliged entities*", which are particularly vulnerable to money laundering, according to the new "*risk-based approach*" of the Commission. However, the €10K payment limit applies to *all* citizens and businesses, irrespective of whether they are "obliged entities" or not. The Impact Assessment explicitly acknowledges this, by claiming a "simplification" of the scheme by "removing traders in goods and services" from the list of obliged parties:[3] as a consequence, the Regulation converts an obligation of declaration that applied until now to certain categories of obliged entities only as a prohibition to pay above a certain limit, whereby extending it to *all* citizens and businesses.

Therefore, the provision goes much beyond the scope of the AML package in general and the Regulation in particular, which is to limit restrictions to *obliged entities* only. Extending restrictions to all citizens and business is obviously not "*in line with the risk-based approach that lies at the basis of the AML/CFT system*", as claimed by the impact assessment.[4] It aims in the contrary at targeting everyone, irrespective of their risks.

The Advocate General in case C-544/19 confirms this analysis when he states that the scope of AMLDs is targeted towards a "*limited number of entities, identified on grounds of their level of exposure to risks of money laundering or their level of vulnerability to money laundering, or the vulnerability of their transactions*".[5] By removing dealers accepting payments for goods or services above €10,000, the regulation extends a restriction to

[2] Draft Regulation COM(2021) 420 Final; recital 2 (emphasis added)
[3] Impact assessment, SWD(2021) 190 Final, at page 41.
[4] The "*risk-based approach of the new AML/CFT system*" is claimed for all measures in the Impact Assessment.
[5] C-544/19; ECOTEX BULGARIA, Opinion of Advocate General M. Jean Richard De La Tour, 18 November 2020, at § 54

everyone, although the very vast majority of persons concerned are law-abiding citizens or companies, just to mitigate the risks of a fraction only of the society acting illegally.

The Advocate General in Case C-544/19 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).

In addition, the prohibition to pay in cash has wider implications and costs to all those who are abiding to the law: it implies that the other means of payments available (notably cards and bank transfers) are all subject to fees, and for non-Eurozone countries, not eligible to specific rules of intra-EU payments in euros (e.g. crediting by D+1). The implication of using such electronic payments may also deprive consumers and businesses to choose the most efficient conversion rate for foreign currencies in which to make the payment, as cards and banks exchange rates are notoriously not the most competitive on the market.

For such restrictions to be compatible, they need to be necessary and proportionate. However they are neither, as will be argued below.

The package is proposed under article 114 TFEU. Measures adopted under 114 must have the objective of improving the functioning of the internal market and whilst the Commission makes reference to "distortions" between Member States, none is shown in the impact assessment.[6] In addition, if the issue was to remedy to trade distortions, the proposal would harmonise cash payment limitations at EU level, and not allow for existing lower limits to subsist: if they can subsist, with a ratio of 20 between the lowest and the highest, it is simply because this creates no cross-border issues at all.

The Commission reference to 'distortions" made in its 2018 report states that

> "*The* [CEPS/ECORYS] *report also concluded that diverging national provisions on payments in cash distort competition in the internal market, leading to potential relocations of businesses across-borders",*[7]

ESTA would submit that the Commission might consider taking some distance with the conclusions of the authors in this area. First because, when looking at the CEPS/ECORYS report, there is only one anecdotal reference to such distortion: only a single interviewee in Belgium declared having lost revenue to up to 30% from a "*significant competitive disadvantage*" from foreign jewellery not bound by cash payment limits in their countries (CEPS/ECORYS report at page 74). However, the interviewee seems rather concerned about the limit in place in his country than the absence of limits in neighbouring countries.

Second because the CEPS/ECORYS conclusion leading to "*Internal Market distortions*" relates to their very cumbersome, and inaccurate, understanding of the essence of the Single Market: the conclusion derives from the authors' views that cross-border trade in goods and services and "relocation" (in other words, the right of establishment in other Member States)

[6] The IA makes explicit reference to the 2017 CEPS/ECORYS study in annexe 9.
[7] Impact assessment SWD(2021) 190 Final, at page 111

are nothing short of a "*failure*" of the Internal Market. For these authors, the right to trade cross-border and the right of establishment cross-border, two of the four fundamental freedoms enshrined in the Treaties, are qualified as "*evasion*" (page 159). It seems unlikely that the Commission might wish to endorse this opinion in any way.

Obviously, their authors seem not to have fully understood what the Internal Market is about, and the Commission should be wary when endorsing such conclusions, when it promotes, in the contrary, European citizens and businesses make the best out of the Internal Market. Furthermore, it should be recalled that "displacement", of itself, is not a "distortion" of the internal market, as per the recurrent jurisprudence from the Court of Justice in Luxembourg.

Noteworthy, some countries have implemented very strict cash payment limits, however, for some of them for residents only and not for non-residents (or with a limit 15 times higher for the latter in some cases), which no other Member State has challenged as a "distortion" of trade incompatible with the Internal Market.

Therefore, cash payment limitations do not create "distortions" nor are "evasions" that the Commission might wish to remedy with a provision in an act proposed under Art 114 TFEU.

Here also, the opinion of Advocate general M. Jean Richard De La Tour in case C-544/19 might shed a different light on "distortions" as alleged by CEPS/ECORYS:

> *"The national legislation* [on cash payment limitation] *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."*

The Measure Will Not Impact on Crime and Terrorism

ESTA submits that a measure of payment limitation is not necessary, ineffective and as such incompatible with EU law. Clearly, measures against cash are meant to fight a symbol but will do very little in delivering on their purported objectives.

The measure will be ineffective in curbing crime and terrorism funding for a number of reasons. Notwithstanding that not all crime proceeds need to be "laundered", as a part of them is used for the financing of their illegal activities, criminals and terrorists rarely conduct their activity as registered companies, and therefore will not be subject to cash payment limitations. Worse, they are not even *expected* to comply with the imposed limitations which specifically exclude trade between "individuals". What is the purpose of introducing such a symbolic measure and by the same token excluding from its scope those who should be primarily targeted by it?

ESTA has already criticised the measure by recalling, as does the Advocate General in his opinion in case C-544/19, that people ready to commit very serious criminal offences and related money laundering, are very unlikely to be deterred by a minor offence of paying above a set limit. Not least because in some case, the trade they engage in is, such as weapons or explosives, already illegal, irrespective of the instrument with which they pay for it. For

this very reason, the Advocate General considers, in his opinion in case C-544/19 that cash payment limitations have little to do with anti-money laundering policies.[8]

The measure will impact most on the category of the law-abiding part of the population, which is by far the biggest share of the population. By its very design, the measure will not be effective as it excludes the very obvious targets (*individuals* acting as criminals and terrorists) for which it is allegedly proposed. The restrictions to capital movements it introduces are therefore not necessary, and as such fail to be proportionate.

The Measure Will Not Impact Significantly on the Shadow Economy

With regard to the shadow economy, ESTA can only refer to the series of work by Prof Friedrich Schneider and his works on cash limitations and their impact on the grey economy. According to his works, when GPD decreases by 10 %, the shadow economy increases by 18.4 %. However, when the share of cash payments reduces by 10 %, the level of shadow economy only reduces by 2%, which makes Schneider conclude that "*If we make the assumption that no cash is available any more, the shadow economy would decrease by 20%. Cash limits have no significant effects.*"[9]

The focus of the fight against the shadow economy should therefore be elsewhere than on cash. Cash is not the end goal of the shadow economy nor of crime, it is only a tool among many others. There are many other factors that are more relevant and direct determinants of the shadow economy than cash payments.

Here again, the measure is disproportionate and unnecessary under EU law, and it is therefore incompatible with the principles set by the Treaties.

The Measure Is Not Compatible With the Subsidiarity Principle

The measure at stake prohibits all payments in cash in excess of €10,000 which involve a business. The Regulation will apply to cross-border payments as well as to domestic payments.

The measure adds no new element in the case of cross-border payment in cash to prevent money laundering. In order to make (or receive) intra-EU payments in cash, one would have to travel with cash and cross a border. However, crossing a border with cash in excess of €10,000 or the equivalent in local currency requires a compulsory declaration at the border. According to the 2017 supranational impact assessment, around 100,000 such declarations are made each year in the EU, for a total €60-70Bn declared, and only 12,000 (12%) undeclared cash transports are spotted each year by customs authorities, for a value of €300M

[8] C-544/19, opinion of the Advocate General, at § 46.
[9] Prof. Dr. F. Schneider, "*Restricting or Abolishing Cash: An Effective Instrument for Eliminating the Shadow Economy, Corruption and Terrorism?*"; SUERF Policy Note, Issue No 90; Suerf.org, 2019. The Commission IA has not reviewed this evidence.

(0.4%).[10] So the regulation is effective enough to prevent undeclared cross-border transport of cash without the need for a "one-size-fits-all" back-up provision prohibiting ALL payments in cash above the same limit as that triggering mandatory declaration at the border.

There is therefore no need to impose a cash payment limitation to €10,000 for cross-border payment because cash has to be declared at the entry into the country, and passengers do declare it: authorities can check the origin of the funds and prevent any money laundering at that stage.

The measure is therefore only impacting *domestic* payments. This raises serious issues under EU law. First because, in essence, this only affects concretely eight countries with no cash payment limitations in place (all others, according to the graph on page 112 of the Commission impact assessment, have limits equal to or below €10K).

There is also a more fundamental issue. The principles of subsidiarity and proportionality, as set out in Article 5 of the Treaty on European Union, provide that the EU should only act if the objectives of these proposals cannot be sufficiently achieved by Member States and can therefore be better achieved at the Union level. The entire package has been justified on grounds of the need to have a cross-border/international action required by the nature of the issue to address:

> *"The 2019 Commission AML package highlighted how criminals have been able to exploit the* ***differences among Member States' AML/CFT regimes****. Flows of illicit money and terrorist financing can damage the stability and reputation of the Union financial system and threaten the proper functioning of the internal market. […]* ***The cross-border nature*** *of much money laundering and terrorist financing makes good cooperation between national supervisors and FIUs essential to prevent these crimes."*[11]

The rationale of the payment limitation provision in the AML package is about tackling an issue of undisputable cross-border/international nature, and presented as such by the Commission. This package, therefore, cannot be a justification for a measure which in effect only affects *domestic* payments. Therefore its pertinence in the AML package is highly questionable, particularly when this measure is designed in such a way that it will be by definition unable to address the core issues at stake (exclusion of transactions between criminals and terrorists acting as individuals).

Failure to Conduct a Full Impact Assessment

The impact assessment attached to the 2021 AML package addresses, in annexe 9, the issue of cash payment limitations. The basis for this provision is the Report from the Commission on cash payment limitations of 12 June 2018.[12] This report relies entirely upon

[10] EU Commission 2017 staff working document on supranational risks assessment, SWD(2017) 241 of 26 June 2017, at page 15.
[11] Proposal for a Directive on AML repealing Directive 2015/849 (COM(2021) 423 Final) at pages 3-4
[12] COM(2018) 483 Final

the very controversial study conducted by CEPS/ECORYS in 2017, which cash organisations have severely criticised in a letter to Commissioner MOSCOVICI dated 4 July 2018. [13]

Neither this study, nor *a fortiori* the 2018 Commission report, provide a basis sufficiently robust for imposing cash payment restrictions of any kind.

This is particularly so as the 2021 impact assessment attached to the AML package critically ignores that the CEPS/ECORY study was not conclusive with regards to their preferred policy option: the Study's conclusion points to a similarity of impact on the alleged "distortions" in the Internal Market by virtue of a cash payment limit which consists of an outright ban or a declaration obligation (cf. Table 7.1, §7.4, p.135). The report also concludes that cash payment limitations would be rather ineffective to prevent terrorism funding as is acknowledged in the 2018 Commission report:

> *"*[...] *cash restrictions would not significantly address the problem of terrorism financing* […since] *transactions targeted under these objectives are either of a value too low to be covered, or are already illegal transaction* [sic] *where an additional prohibition would have little impact, or both."* [14]

There is therefore no reason why the Commission, when using the CEPS/ECORYS study as its evidence, would choose the most restrictive measure when there is a "similarly effective" option of declaration which is much less restrictive. As recalled earlier, the Commission's supranational assessment of 2017 has acknowledged that a "declaration" for cross-border transport of cash above €10K was very efficient, as infringements to it only amount to 12% in volume of the cases and only 0.4% in value

In July 2018, a group of cash organisations wrote to Commissioner MOSCOVICI criticising the many flaws of the CEPS/ECORYS impact assessment on which the Commission report of 2018 was based. Commissioner MOSCOVICI responded on 10 September 2018, promising that, if a new initiative were to be considered, it would

> "*require, in the framework of better regulation, the preparation of a full impact assessment*".

After a coalition of cash organisations had contacted Commissioner McGuinness on 21 April 2021 on the same issue, the Commissioner invited these organisations to a discussion with the relevant unit of FISMA. During this discussion, which took place on 16 June 2021, FISMA confirmed that the measure would not rely on the CEPS/ECORYS study, but on a new impact assessment. However, as ESTA could see, no new impact assessment on the matter was conducted. The promise of Commissioner MOSCOVICI on the basis of Better Regulation was not kept.

It remains, however, that the Commission cannot rely on the CEPS/ECORYS study for such a severe, and wide ranging, restriction to Article 63 TFEU. ESTA would submit that a

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[13] Letter from ATMIA, EURICPA and ESTA to Commissioner Pierre Moscovici on the Commission report of June 2018 and the underlying CEPS/ECORYS study *"Cash payments restrictions: initial comments on the Commission report COM(2018)483 Final of 12.06.2018 based on the CEPS/ECORYS study"* Its annexe included a comprehensive analysis of the flaws and contradictions of the study.

[14] Commission report COM(2018) 489, at page 8.

restriction to a fundamental freedom guaranteed in primary law would require a substantially more robust assessment.

Conclusion

As is shown in this document, a measure of cash payment limitation of €10,000 as introduced by the Draft Regulation is incompatible with EU law. This is because:

- It is not necessary, as it will not contribute to its purported objectives, not least because it excludes from its scope individuals, which is the very nature under which criminals and terrorists operate;
- It will not curb the shadow economy, or only marginally;
- It is disproportionate, as it extends a measure of restriction to all business and citizens rather than concentrate the measure on obliged entities only, as is the spirit of the AML package. In addition, the extension of this restriction to all citizens and businesses targets without reasons nor justification primarily a vast majority of legal and physical persons which are law-abiding; This departs from the alleged "*risk-based approach*" of the new package;
- It brings no added cross-border impact compared to status quo as cross-border payments in cash are already *de facto* controlled by the obligation to declare cash at Member States borders;
- Therefore it only applies to *domestic* payments, which is explicitly not what the AML package is supposed to tackle. This therefore infringes the principle of subsidiarity as Member States are better placed to decide whether they need or not such restriction imposed to their nationals.

We understand that cash is a symbol. We also understand the importance of addressing symbols in policies.

However, cash as a symbol does not justify cutting corners with EU law. Public authorities should be wary of blaming cash for terrorism, crime, money laundering and corruption when cash is the preferred payment instrument of European citizens – more than ¾ of payments are made in cash[15] and, as the sanitary crisis as shown, demand for cash has increased significantly, for precautionary purposes or others, with a substantial increase of cash in circulation (sometimes 2 digit growth in 2020 compared to 2019). Cash is a public good, and the authorities should protect it, not blame it for what it is not responsible.

Even a symbol that regulators may not like deserves a fair process.

[15] ECB SAGE Survey, 2019