



Brussels, 8 March 2022  
(OR. en)

6988/22

LIMITE

JUR 149  
ECOFIN 203  
DROIPEN 28  
CRIMORG 28  
COTER 66  
CODEC 251  
IA 23  
FISC 64

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**Interinstitutional File:  
2016/0239 (COD)**

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## **OPINION OF THE LEGAL SERVICE<sup>1</sup>**

Subject: Proposal for a Regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing:

- compatibility of the proposed limits to large cash payments with fundamental freedoms and with the status of the euro banknotes as legal tender within the Union

### **I. INTRODUCTION**

1. On 20 July 2021, the Commission presented a proposal for a Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ("the proposal").<sup>2</sup>

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<sup>1</sup> This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

<sup>2</sup> COM(2021) 420 final.

2. The proposal aims at, inter alia, introducing limits to large cash payments. In particular, its Article 59 requires that persons trading in goods or providing services may accept or make a payment in cash only up to an amount of EUR 10 000 or equivalent amount in national or foreign currency, while Member States may adopt or continue to apply a lower threshold.
3. During the discussions in the Council's preparatory bodies questions were raised as to the compatibility of this limitation with the status of the euro banknotes and euro coins as legal tender within the Union and with the Charter of Fundamental Rights of the EU (“the Charter”).
4. Delivered at the request of the Financial Attachés Working Party of 26 November 2021, the present opinion replies to these questions.

## II. LEGAL AND FACTUAL BACKGROUND

### *a) The proposal*

5. The proposal is based on Article 114 TFEU and aims at establishing an EU single rulebook of measures for combating money laundering and terrorist financing (Article 1).
6. Thus, it is part of a wider package, which also comprises a proposal for a Directive establishing the mechanisms that Member States should put in place to prevent the use of the financial system for money laundering and terrorist financing purposes, and repealing Directive (EU) 2015/849<sup>3</sup>, a proposal for a Regulation creating an EU Authority for anti-money laundering and countering the financing of terrorism<sup>4</sup>, and a proposal for the recast of Regulation (EU) 2015/847 expanding traceability requirements to crypto-assets<sup>5</sup>.

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<sup>3</sup> COM(2021) 423 final.

<sup>4</sup> COM(2021) 421 final.

<sup>5</sup> COM(2021) 422 final.

7. This package is a continuation of a long-standing policy of the Union to prevent and combat money laundering and terrorist financing, starting with the first EU anti-money laundering Directive, adopted in 1991. It has gradually expanded in scope and substance over the last thirty years, together with the evolving international standards and the increased sophistication of financial crime.
8. Within the process of development of this policy, in 2015, the EU legislator noted that *“the use of large cash payments is highly vulnerable to money laundering and terrorist financing”*<sup>6</sup> and, accordingly, subjected persons trading in goods to anti-money laundering/counter-terrorist financing requirements when they make or receive cash payments of EUR 10 000 or more, including through linked payments. However, these requirements did not involve an outright ban on using cash for payments above this threshold.
9. Subsequent developments were considered by the Commission as justifying a stricter approach. Thus, the Impact Assessment accompanying the proposal points out that *“[t]he risks associated to cash are reflected in the fact that the use of cash is still the main reason triggering reports of suspicious transactions within the financial system. However, when it comes to prosecution, it is challenging to demonstrate the link between cash and criminal activities”*<sup>7</sup>.

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<sup>6</sup> Recital (6) to Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (“4<sup>th</sup> AMLD”), OJ L 141, 5.6.2015, p. 73.

<sup>7</sup> Commission staff working document, Impact Assessment accompanying the Anti-money laundering package, SWD(2021) 190 final (“Impact Assessment”), page 114.

10. Currently, 19 Member States have introduced or are introducing limitations to cash payments, ranging from EUR 500 in Greece to EUR 10 300 in Czechia, with an average value of about EUR 4 500<sup>8</sup>.
11. However, the Commission notes that diverging national restrictions weaken the effectiveness of national cash thresholds, by displacing illegal activities from a Member State with cash payment restrictions to a neighbour with more lenient restrictions or no restrictions at all, which impacts the coherence in the application of the AMLD and distorts competition in the internal market<sup>9</sup>.
12. On this basis, and after having assessed several options to address this problem, the Commission has put forward, within the framework of the current proposal, a text which would:
- prohibit persons trading in goods or providing services to accept or make a payment in cash in excess of EUR 10 000 or equivalent amount in national or foreign currency, whether the transaction is carried out in a single operation or in several operations which appear to be linked (Article 59(1) of the proposal);
  - allow Member States to adopt lower limits following consultation of the European Central Bank; these are to be notified to the Commission. Equally, lower national limits which are already existing may continue to be enforced (Article 59(2) and (3) of the proposal);
  - waive the cash limit thus established in respect of payments between natural persons who are not acting in a professional function and payments or deposits made at the premises of credit institutions (Article 59(4) of the proposal).

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<sup>8</sup> Impact Assessment, page 112. In addition, Malta has introduced a limit of EUR 10 000 to payments in cash for some sectors, and other Member States having decided or planning to lower these limits. In three cases (France, Italy and Spain), higher thresholds apply to non-residents (between EUR 10 000 and EUR 15 000), and while in Hungary and Poland limits apply only to B2B transactions, some countries such as Slovenia have set different thresholds for B2C and B2B transactions. Among the countries that have not set any limit to cash payments, Ireland and Sweden allow traders to refuse payments in cash.

<sup>9</sup> Impact Assessment, page 115.

**b) Applicable provisions**

13. Article 7 of the Charter, on the respect for private and family life, states that “[e]veryone has the right to respect for his or her private and family life, home and communications”.
14. Article 8 of the Charter, on the protection of personal data, states:
- “1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified (...)”
15. Article 16 of the Charter, on the freedom to conduct a business, states that “[t]he freedom to conduct a business in accordance with Union law and national laws and practices is recognised”.
16. Article 17 of the Charter, on the right to property, states that “[e]veryone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest”.
17. Article 128(1) TFEU, provides that “[t]he European Central Bank shall have the exclusive right to authorise the issue of euro banknotes within the Union. The European Central Bank and the national central banks may issue such notes. The banknotes issued by the European Central Bank and the national central banks shall be the only such notes to have the status of legal tender within the Union”.

18. Recital 19 of Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (“Regulation No 974/98”)<sup>10</sup> states:

*“(…) 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”.*

19. Article 10 of Regulation No 974/98 provides that:

*“As from 1 January 2002, the ECB and the central banks of the participating Member States shall put into circulation banknotes denominated in euro. Without prejudice to Article 15, these banknotes denominated in euro shall be the only banknotes which have the status of legal tender in all these Member States”.*

### **III. LEGAL ANALYSIS**

#### ***a) Compatibility of the provisions on cash limits with the status of legal tender of euro banknotes and euro coins***

20. The first question raised is whether the prohibition to pay in cash for amounts exceeding EUR 10 000 would run counter the status of legal tender of euro banknotes and coins, as laid down in primary and secondary law.
21. The status of legal tender of euro banknotes is enshrined in the third sentence of Article 128(1) TFEU and, with almost identical wording, in the third sentence of the first paragraph of Article 16 of the Protocol on the ESCB and the ECB. It is also enshrined in secondary legislation, in the second sentence of Article 10 of Regulation No 974/98<sup>11</sup>.

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<sup>10</sup> OJ L 139, 11.5.1998, p. 1.

<sup>11</sup> In addition, the second sentence of Article 11 of that regulation also confers the status of legal tender on coins denominated in euro. See judgment in *Hessischer Rundfunk*, C-422/19, EU:C:2021:63, paragraph 61.

22. When a payment obligation exists, the legal tender of euro banknotes and coins implies:
- i) mandatory acceptance (the creditor of a payment obligation cannot refuse euro banknotes and coins unless the parties have agreed on other means of payment);
  - ii) acceptance at full face value (the monetary value of euro banknotes and coins is equal to the amount indicated on the banknotes and coins);
  - iii) the power to discharge from payment obligations (a debtor can discharge himself from a payment obligation by tendering euro banknotes and coins to the creditor)<sup>12</sup>.
23. In its 2021 *Hessischer Rundfunk* judgement, the Court has however recognised that the status of the euro as a legal tender and, in particular, the obligation for creditors to accept euro banknotes and coins as discharge of debts, admits restrictions for reasons of public interest. Such restrictions must however be proportionate to the public interest objective pursued<sup>13</sup>.
24. In the particular context of Member States' restrictions to the freedom to provide services, the Court has established that the prevention and the combatting on money laundering and terrorist financing are legitimate aims related to the protection of public order<sup>14</sup>. These aims can therefore also be considered as reasons of public interest for introducing restrictions to the status of legal tender of euro banknotes and coins.
25. The principle of proportionality requires, that the measures concerned are appropriate for attaining the legitimate objectives pursued by the legislation at issue and that they do not go beyond what is necessary in order to achieve those objectives. When there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued <sup>15</sup>.

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<sup>12</sup> Judgment in *Hessischer Rundfunk*, above, paragraph 67. See also Commission recommendation of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins, (2010/191/EU), OJ L 83, 30.3.2010, p. 70.

<sup>13</sup> Judgment in *Hessischer Rundfunk*, above, paragraphs 67 and 68.

<sup>14</sup> Judgment in *Jyske Bank Gibraltar*, C-212/11, EU:C:2013:270, paragraphs 62-64 and case law cited.

<sup>15</sup> Judgment in *Hessischer Rundfunk*, above, paragraph 70, and case law cited.

26. Moreover, the Court has accepted that the EU legislature must be allowed a broad discretion which applies not only to the nature and scope of the measures to be taken in areas in which its action involves political, economic or social choices, and in which it is called upon to undertake complex assessments and evaluations, but also, to some extent, to the finding of the basic facts, with the result that the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue<sup>16</sup>.
27. In the Impact Assessment accompanying the proposal, the Commission has examined three options<sup>17</sup> in order to address the problems identified in connection with the use of cash payments for the purposes of money laundering and terrorist finance and analysed the advantages and disadvantages of each of them. On this basis, it has concluded that the option put forward is the optimal one, in particular because it “*would provide a more harmonised approach across the internal market, reduce the inefficiencies of the current AML/CFT framework by lifting obligations on traders in goods and level the playing field among businesses, whilst not calling into question legal tender status of euro banknotes*”<sup>18</sup>.
28. Moreover, in the same Impact Assessment, the Commission justifies that “*such limit would be consistent with existing thresholds for cash control and would ensure that vulnerable consumer groups are not adversely impacted by setting a sufficiently high ceiling to cater for their needs. This option would also allow Member States to maintain lower limits already in place, recognising that national specificities might justify lower thresholds (...)*”<sup>19</sup>. Similarly to the case in *Hessischer Rundfunk*, the measures at issue would preserve other means of payment than cash<sup>20</sup>.

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<sup>16</sup> Judgments in *Czech Republic v Parliament and Council*, C-482/17, EU:C:2019:1035, paragraphs 77 and 78, and in *Poland v Parliament and Council*, C-626/18, EU:C:2020:1000, paragraphs 95 and 97.

<sup>17</sup> 1) A further enforcement of the current AML/CFT framework; 2) the introduction of an EU-wide limit to cash transactions of EUR 10 000, while allowing Member States to set a lower threshold and 3) the introduction of an EU-wide limit to cash transactions lower than EUR 10 000 (Impact Assessment, p. 116-117).

<sup>18</sup> Impact Assessment, p. 116.

<sup>19</sup> Impact Assessment, p. 116.

<sup>20</sup> Judgment in *Hessischer Rundfunk*, above, paragraph 75.

29. Bearing in mind the elements provided in the Impact Assessment referred to above, in particular the ponderation of the different options and of the different interests at stake, the limitation to the payment in cash proposed does not appear to be manifestly inappropriate to achieve the objectives pursued by that measure.
30. Finally, it is recalled that the fact that the measures that were discussed in the *Hessischer Rundfunk* judgment were adopted by a Member State, whereas the proposed limitation is to be enacted by the Union, cannot put into question the reasoning above.
31. In this respect, it is to be noted that the Court has not ascribed a specific relevance to the fact that the public interest measure is defined by national law or by EU legislation<sup>21</sup>. In other words, the scope and meaning of the notion of public interest as justification to a possible limitation to the value of legal tender of euro banknotes or euro coins does not admit any differentiation whether that limitation is introduced by Member States or by the Union itself. Actually, the possibility to introduce any such limitations by Member States is provided for by EU secondary law (Regulation 974/98) as would be the limitation to the use of cash under consideration.

***b) Compatibility of the provisions on cash limits with EU fundamental rights and freedoms***

32. The views of the Council Legal Service are sought in relation to the compatibility of the prohibition to pay in cash amounts in excess of EUR 10 000 with the Charter. However, the question does not specify with which of the fundamental rights and freedoms set out in the Charter the prohibition concerned would raise problems of compatibility. Two preliminary remarks should be made.
33. First, despite the existence of limitations in 19 Member States to the use of cash analogous to the one under discussion, the compatibility of such existing limitations with fundamental rights has not been contested nor examined so far either by the European Court of Justice or by the European Court of Human Rights.

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<sup>21</sup> See, for example, judgment in *Kieffer*, C-114/96, EU:C:1997:316, in particular paragraphs 28 to 37, where the Court has examined EU-imposed measures with a restrictive effect on the internal market against the same criteria as the ones that may justify equivalent national restrictions.

34. Second, EU law does not provide for an absolute right to payment in cash in all cases. Likewise, no such a right is included in the Charter<sup>22</sup>. Although there is no such absolute or fundamental right to use cash, the question to be examined is whether the prohibition in question may affect fundamental rights for the exercise which such use of cash is instrumental. In particular, the following rights may be relevant: the right to conduct a business and the right to property (Articles 16 and 17 of the Charter) and the rights to respect for private and family life and the protection of personal data (Articles 7 and 8 of the Charter).
35. Concerning the right to conduct a business and the right to property, while there is no doubt that cash may be used to exercise them, such a use is not generally necessary for their full enjoyment, which can be achieved through the use of other forms of money or means of payment other than cash<sup>23</sup>. Moreover, neither the right to conduct business nor the right to property can be read as precluding economic or financial regulation merely because they constitute an interference in the exercise of those rights.
36. Actually, with regard to the right to conduct business, its exercise necessarily implies the reconciliation of the interests of its beneficiaries with other lawful interests protected<sup>24</sup>. In any event, it cannot be concluded that the proposed limitation amounts to an infringement of this right, in the same way in which, for instance, prudential or antitrust regulation have never been considered incompatible with the freedom to conduct business.

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<sup>22</sup> See opinion of Advocate General Pitruzzella in joined cases C-422/19 and C-423/19, *Hessischer Rundfunk*, EU:C:2020:756, paragraph 133.

<sup>23</sup> See opinion of Advocate General Pitruzzella, *Hessischer Rundfunk*, above, paragraph 134.

<sup>24</sup> Explanation on Article 16 (Freedom to conduct a business) and case-law cited, OJ C 303, 14.12.2007, p. 17.

37. Likewise, with regard to the right to property, it is a settled case-law that it is not absolute but must be viewed in relation to its function in society. Consequently, the exercise of the right to property may be restricted, provided that those restrictions in fact correspond to objectives of public interest pursued by the Union and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed.<sup>25</sup> The examination of the objective of public interest as well as the one of proportionality of the measures undertaken in paragraphs 23 to 30 above, in the context of the status of legal tender questions, are fully applicable here to conclude that the measure proposed would not entail an unjustified interference with the right to property.
38. A final remark must be made in relation to the right to property. It may be argued that a direct link between the use of cash and the exercise of that right is relevant in relation to social inclusion elements, i.e., in relation to citizens which do not have yet access to basic financial services in the Union and for which cash is the only means to exercise this fundamental right<sup>26</sup>.
39. Yet, the prohibition on the use of cash under examination, concerns only payments above a threshold (EUR 10 000) which is high enough as to exclude most everyday transactions. Furthermore, that prohibition does not apply to natural persons who are not acting in a professional function. As explained in the Commission's impact assessment accompanying the proposal, these limitations of the prohibition's scope seem proportionate to guarantee the exercise of the right to property of vulnerable individuals through the use of cash<sup>27</sup>.

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<sup>25</sup> Judgment in *Kadi and Al Barakaat International Foundation*, C- 402/05 P and C- 415/05 P, EU:C:2008:461, paragraph 355.

<sup>26</sup> According to a 2017 ECB study, 3.64% of households in the euro area did not have access to banking/financial services. See Ampudia, M., Ehrmann M., 'Financial inclusion: what's it worth?', ECB Working Paper Series No 1990, January 2017, especially Table 1.

<sup>27</sup> See paragraph 28 above.

40. The establishment of the proposed cash payment limit may also potentially represent an infringement of the rights to respect for private and family life and the protection of personal data. Arguably, the proposed prohibition to use cash may lend itself to a relative interference with those rights, in particular by potentially leading to the establishment of records of particular aspects of the life of the individuals concerned and exposing patterns of their private behaviour, such as consumption and general interaction with their communities.
41. Notwithstanding the above, the limited intensity of such interference cannot warrant a conclusion that it that the prohibition would constitute a more serious intrusion in the rights to respect for private and family life and the protection of personal data by comparison to existing methods of payment other than cash, such as debt and credit cards, wire transfers, including for purchases on-line and, in any event, does not point at its absence of proportionality. Moreover, payment in cash does not, by itself, provide more anonymity than other transaction means since, as a general rule and by virtue of national legislation, payments in consideration for goods or services are invoiced, which invoicing requires - in principle - the personal identification of the recipient of the said goods or services.
42. It is also recalled that the processing of personal data obtained by market operators as a consequence of payments, whichever their means, is in any event subject to the EU data protection legislation which, in essence, guarantees the right to the protection of those personal data. Finally, as explained above in the context of the rights to conduct a business and to property, the scope of the prohibition in question is subject to important quantitative and qualitative limits which ensure that most everyday transactions are excluded and that, hence the volume of data trails thus generated would not surpass in their intrusiveness of privacy the one caused by any existing means of payment.

#### **IV. CONCLUSION**

43. In the light of the above, the Legal Service is of the opinion that:

- a) the limitation of cash payments proposed does not encroach on the status of the euro banknotes as legal tender within the Union, as established by the TFEU and further detailed by secondary legislation;
  - b) equally, the proposed limitation is compatible with the rights, freedoms and principles recognised by the Charter, in particular the rights to conduct a business and the right to property (Articles 16 and 17 of the Charter) and the rights to respect for private and family life and the protection of personal data (Articles 7 and 8 of the Charter).
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