

EU Advocate General sees obligation to accept cash for public entities but also wide-ranging exceptions

[October 2, 2020 | The EU Advocate General, who prepares decisions of the European Court of Justice, has established a fundamental obligation of public authorities to accept euro cash. At the same time, he has adopted the exceedingly creative anti-cash position of the EU Commission with regard to possible exceptions.](#)

On September 29, 2020, the European Court of Justice (ECJ) published a press release with a short version of the [opinion of the EU Advocate General](#). The ECJ usually - but not always - follows these opinions. Since it is not obvious what this opinion would mean for the outcome of my case pending before the highest German administrative court Bundesverwaltungsgericht (BVerwG), I would like to reproduce this short version of the Advocate General's opinion (slightly abbreviated) and comment on its various parts.

I would like to say in advance that after this opinion, I expect to be proved right by the BVerwG against Hessischer Rundfunk and to be allowed to pay my broadcasting fee in cash. However, I would be disappointed by the level of legal protection of the use of cash, that would result if the ECJ followed the Advocate General's (creative) interpretation of EU law.

Headline

According to Advocate General Pitruzzella, EU law provides that creditors have an obligation in principle to accept cash in euros for the payment of monetary debts. The European Union and the Member States can, however, in exercising powers other than those relating to monetary policy, impose, under specific conditions, limits on the use of euro banknotes as a means of payment, in order to pursue public interest objectives.

The first sentence sounds very good. But with sentence two, the EU Advocate-General opens the gates for the EU Commission and governments that want to push back on the use of cash. Fortunately, the European Central Bank has switched into the camp of the cash friends and the BVerwG also seems to belong to this camp. Otherwise things would look bleak. According to the long version of the opinion, the European Central Bank will be called to examine national restrictions on the use of cash to see whether they are necessary and proportionate. If this judgment would be negative, and if the national government were to stick to the regulation nonetheless, the EU Commission would have to initiate infringement proceedings.

The case

Two German citizens, required to pay a radio and television licence fee in the Land of Hesse (Germany), offered to pay that fee to Hessischer Rundfunk (the public broadcaster for the Land of Hesse) in cash. Citing its payment procedure rules, according to which the fee may not be paid in cash, Hessischer Rundfunk rejected the payment offers of those citizens and sent them payment notices. Those two German citizens challenged those payment notices and the case reached the Bundesverwaltungsgericht. Before that court, they submit that both national law (in particular, Paragraph 14 of the Gesetz über die Deutsche Bundesbank (Law on the German Central Bank); 'the BBankG') and EU law make provision for an unconditional and unrestricted obligation to accept euro banknotes as a means for the settlement of monetary debts. That obligation, they argue, may be restricted only by a contractual agreement between the parties or on the basis of an authorisation under federal or EU law. There can be no justification for excluding cash payments for practical reasons linked to 'mass procedures', in other

words, situations in which there are an extremely large number of fee payers.

The questions posed to the ECJ

The Bundesverwaltungsgericht considers that the payment of the radio and television licence fee in cash, precluded under the Hessischer Rundfunk payment procedure rules, is contrary to the higher-ranking provision of federal law contained in Paragraph 14 of the BBankG, which provides that euro banknotes are the sole 'unrestricted' legal tender. That court asks whether that provision of the BBankG is compatible with the European Union's exclusive competence for monetary policy. It is, in addition, uncertain whether EU law itself actually contains a prohibition precluding public authorities of a Member State from refusing the fulfilment, by means of euro banknotes, of a statutorily imposed payment obligation, which would mean that the rules of Hessischer Rundfunk are incompatible with EU law.

Exclusive EU competence

As regards monetary policy specifically, according to the Advocate General, the exclusive competence conferred on the European Union is not limited to the definition and conduct of monetary policy in operational terms (monetary policy 'in the strict sense'), but also includes all the powers and competences necessary for the creation and proper functioning of the single currency, the euro. It also includes a regulatory dimension relating to the single currency, which includes the definition and regulation of its status as legal tender and, in particular, that of euro banknotes and coins. As a result, a provision of national law adopted by a Member State whose currency is the euro which, by its objective and content, governs the status of legal tender of euro banknotes, encroaches on the exclusive competence conferred on the European Union and is, therefore, incompatible with EU law.

In other words. Whether §14 Bundesbankgesetz is still in force or not depends on whether it is intended to define, by way of derogation from or in addition to EU regulations, what it means that euro banknotes are legal tender. To anticipate this: Although the Advocate General says that the BVerwG must decide this, he makes it clear that in his opinion this intention is given and therefore §14 Bundesbankgesetz is no longer applicable.

That being said, the Advocate General specifies, however, that the exclusive competence conferred on the European Union in relation to the single currency does not go so far as to include a general competence to regulate the procedures for settling pecuniary obligations, whether under private law or public law, which has been left to the Member States. It follows that a Member State can adopt national legislation which, by its objective and content, does not constitute a set of rules on the status of legal tender of euro banknotes, but governs the organisation and functioning of the public administration, providing for an obligation for that administration to accept cash payments from citizens.

§14 of the Law of the Bundesbank not valid any more

It is for the Bundesverwaltungsgericht, which alone is competent to determine the exact scope of the national legislation, to establish whether Paragraph 14 of the BBankG constitutes a provision which, by its objective and content, lays down rules on the status of legal tender of euro banknotes.

According to the Advocate General, it seems that that paragraph is aimed at supplementing the concept of legal tender in EU law as regards banknotes. Should that be the case, it would, therefore, have to be found that that paragraph governs the status of legal tender of euro banknotes, thereby encroaching on

the European Union's exclusive competence in the area of monetary policy, and on that ground would have to be disapplied.

The view that the federal legislator wanted to regulate legal tender as a supplement to the EU legislator with §14 is based, probably quite soundly, by the Advocate General on the formulation that euro banknotes are the "only unrestricted" legal tender, whereby "only" and "unrestricted" do not appear in the corresponding Art. 128 TFEU of EU law.

If the BVerwG would see the regulatory intention behind §14 in the same way as the Advocate General, this paragraph would make §14 invalid and thus remove the basis for the court's finding that public administrations are under an unconditional obligation to accept cash under German law. Thus, the BVerwG would have to decide on the meaning of legal tender directly based on EU law, and in the way that the European Court of Justice will stipulate. In the following, we will examine what this would look like if the ECJ were to follow the Advocate General.

Inventing an authorization for restricting the use of cash

Advocate General Pitruzzella concludes that, as EU law currently stands, the concept of legal tender as regards banknotes must be understood as entailing in principle the mandatory acceptance of banknotes by the creditor of a payment obligation, with two exceptions: (i) where the contracting parties in exercising their contractual freedom have agreed on other means of payment than cash and (ii) where the European Union or a Member State whose currency is the euro, in exercising their own competences other than those relating to monetary policy, have adopted legislation, which by its objective and content, does not constitute a set of rules on legal tender but imposes, in pursuit of the public interest, limitations on euro banknotes as a means of payment.

From here on, the opinion becomes hard to stomach for me. For the second exception, the Advocate General, like the EU Commission and formerly the ECB, relies on the obscure recital 19 in the 1998 Regulation on Introduction of the Euro. A recital in a 22-year-old regulation, which has been overtaken several times by more recent laws and treaties on the same subject matter, is used to claim an authorization for the EU Commission and the member governments to restrict or even largely undermine the usability of legal tender for almost any reason, an authorization that the European lawmakers have not bothered to mention in the legal texts of passed in the last 22 years. Call me a sore loser: This smells to me like a highly political opinion, which has the main goal to justify ex-post the many restrictions that the anti-cash and anti-citizen EU Commission has already introduced or allowed to be introduced by national governments.

Recital 19 of Council Regulation (EC) No. 974/98 of 3 May 1998 on the introduction of the Euro reads: "Banknotes and coins in national currency units shall lose their status as legal tender at the latest six months after the end of the transitional period. Limitations on payments in banknotes and coins introduced by Member States for reasons of public policy are not incompatible with the legal tender status of euro banknotes and coins, provided that other legal means exist for the settlement of monetary debts".

I think I can prove, with documents excavated from the EU archives, that this recital - as well as essentially the whole regulation - only deals with the regulation of the transitional period of the introduction of the euro. In particular, it deals with the period when national currencies were nondecimal subdivisions of the euro, which did not yet exist as euro banknotes. These national currencies, although equivalent to euro cash as legal tender, were not accepted in countries other than their own. For this and similar problems of the transitional period, recital 19 made it clear that such restrictions were in order. ([More on this here.](#))

Although this aspect was discussed at the hearing and we provided the Court with the relevant documents, the Advocate General does not say a word about the genesis and the aim of the Regulation and the recital. That does not seem to me to be in proper jurisprudence, if one bases such far-reaching conclusions on it as the Advocate General does. That the Advocate General knows quite well how to include the genesis of a law is proven by §14 Bundesbank Act, which he considers no longer applicable with an argumentation involving the genesis of the law. This selective blind spot seems purposeful, as well as the fact that he does not try to define what is "other lawful means" for the settlement of monetary debts. He would find it difficult to define. Unless, that is, he would take into account the character of the transitional provision of the regulation, as I have shown. (Potatoes are lawful means of settling monetary debts, if both parties agree.). But it gets even thicker:

Wide limits on cash-restrictions

Such limitations are, however, compatible with the EU law concept of legal tender as regards euro banknotes, provided that they do not lead in fact or in law to the complete abolition of euro banknotes, that they are established for public reasons and that other lawful means of payment for the settlement of monetary debts are available. They must also be proportionate and therefore appropriate for attaining the public interest objective pursued and not go beyond what is necessary in order to achieve that objective.

That is blatant: "if they did not lead de iure or de facto to the **complete abolition** of euro banknotes". It is enough for the EU Advocate General if a few 5-euro bills are still circulating somewhere in the private sector. As long as this is the case, governments and the EU Commission can undermine the legal tender status of euro banknotes almost at will. They only have to pursue (or advance) a public interest objective. Fighting undeclared work, tax evasion, terror and the like always go against cash as (pretend) reasons of public interest. In his detailed opinion, he even seems to suggest to the German government that such a goal for the exclusion of cash payment in the broadcasting contribution should be claimed and suggests that, in his view, the exclusion would then (mostly) be okay.

Very restricted view of citizens' rights

The Advocate General also notes that although the European Union does not provide for an absolute right to payment in cash in all cases, a direct link between the value of legal tender attributed to cash and the exercise of fundamental rights may exist in cases where there is a social inclusion element to the use of cash. The use of money other than in its physical form (namely, cash) currently requires the use of basic financial services, to which a not insignificant number of people do not yet have access. For those vulnerable individuals, cash is the only form of accessible money and thus the only means of exercising their fundamental rights linked to the use of money. The Advocate General considers that there is an obligation to take appropriate measures to enable vulnerable people who do not have access to basic financial services to discharge their obligations, particularly those of a public nature, without additional costs.

the Advocate General is making a stand for people without a bank account. This is good. However, he does not mention the other fundamental rights of citizens, especially the right to privacy. In his detailed opinion he claims, without mentioning these other rights and interests in detail, that these could be exercised in other ways than by cash payment. How one should be able to pay anonymously, i.e., preserving one's financial privacy, if one has to do it digitally, remains his secret. I find this very annoying. I assume, however, that the BVerwG will be able to incorporate its own, more far-reaching view of citizens' rights and interests into its judgment.

It is, however, for the Bundesverwaltungsgericht to determine whether a national provision, such as the

Money and more

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rules for the payment of radio and television licence fees of the Hessischer Rundfunk, laying down limitations on payment in euro banknotes, is compatible with EU law and with the status of legal tender of euro banknotes. In that regard, the Advocate General notes that the measure appears to provide for an absolute exclusion, without exception, of the use of euro banknotes for the payment of the radio and television licence fee, without the social inclusion element of cash for the vulnerable people referred to above being taken into account.

In the last sentence, the Advocate General makes it clear that, in his view, broadcasters must accept cash from people without an account or offer them another way to pay their contribution without additional costs.

The Advocate General emphasises, lastly, that it can in no way be inferred from the provision of the TFEU that confers the status of primary-law concept on legal tender, 4 or from any other provision of EU law, that the constitutional legislature of the Union intended to exclude the possibility for the European Union of assigning, in addition to euro banknotes and coins, the status of legal tender to other forms of currency that are not necessarily physical such as, for example, a digital currency (central bank digital currency).

I agree with that. If the European Central Bank wants to issue a digital central bank currency, the EU legislator can make it another legal tender.

Conclusions

It remains to be seen whether the Bundesverwaltungsgericht will come to the conclusion that §14 of the Bundesbank Act is still applicable. It seems unlikely. If it still applies, it must be interpreted in conformity with Union law. Only what EU law says and how the European Court of Justice interprets it is then binding for the meaning of the legal tender status.

Although the EU Advocate General sees a fundamental obligation for public authorities to accept cash, he also invokes (or invents) very extensive possibilities for the member states (and the EU Commission) to restrict this obligation.

When examining the proportionality of cash restrictions, including in my case, the BVerwG is relatively free to decide. I therefore look forward with confidence to the court's decision in my proceedings against Hessischer Rundfunk.

But all in all, I would be dissatisfied with the outcome of the proceedings if the European Court of Justice were to follow the Advocate General, because the Advocate General opens the gates for cash restrictions under European law much wider than I had hoped (and consider correct).

[German version](#)

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