

Newly released documents show: There is no legal basis for imposing restrictions on the use of cash

[June 8, 2020 | In many countries of the monetary union there are upper limits for cash payments. The European Central Bank \(ECB\) and the EU Commission have rubberstamped them, relying on a rather obscure legal basis. Using documents obtained from the archives of EU institutions, I can show that the ECB's and the Commission's reasoning are based on a misinterpretation.](#)

The ECB must be consulted in advance on legislative proposals that affect the ECB's area of competence. This is the case with restrictions on the use of euro notes and coins, including the legal ceilings for cash payments that many countries have introduced.

Questionable authorization to restrict cash use

Until 2017, the ECB rubberstamped these restrictions, citing recital 19 of [Council Regulation \(EC\) No 974/98](#) of 3 May 1998 on the introduction of the euro.

Recital 19 says (emphasis mine throughout):

(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.**

This, the ECB argues, constitutes an authorization for Member States to introduce restrictions on the use of the legal tender on grounds of public policy. Let me quote, as typical example, the [ECB's opinion](#) on the cash payment ceiling of 2500 euros introduced in Spain in 2012:

The ECB notes that the draft law is in compliance with Union law and in particular with **recital 19 of Council Regulation (EC) No 974/98**, which states (...) The ECB acknowledges that: (i) such other lawful means for the settlement of monetary debts, other than cash, are available in Spain; and (ii) the draft law's objective of combatting tax evasion qualifies as a public reason outweighing the impact of the limitations on cash payments.

Article 128 TFEU (Treaty on the Functioning of the EU), which is both more recent and stands much higher in the legal hierarchy than recital 19, and which declares euro cash to be legal tender, was regularly not mentioned by the ECB in these opinions. From 2017 onward, the ECB developed a more cash-friendly stance.

<https://norberthaering.de/en/war-on-cash/ecb-cash-ceilings-mersch/>

However, the ECB's legal argumentation did not fundamentally change. The ECB only reassessed the proportionality it considers necessary between the intensity of the restriction of citizens' rights and the public interest in the purpose of the restriction.

The EU Commission, as guardian of the treaties, regularly allowed the cash ceilings to pass without any

problems, encouraged by the positive opinion of the ECB. In January 2017, the commission published an [impact analysis](#) on a potential Europe-wide cash payment ceiling, as requested by the EU Council on Germany's initiative. In it, the Commission also cited recital 19 as a suitable legal basis for imposing such a cash ceiling, and ignored Article 128 TFEU. They wrote that up to now such ceilings were introduced at national level and that they were generally regarded as compatible with European law because:

For the euro area, **Recital 19 of Council Regulation (EC) No 974/98** states that '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.

This reasoning is incorrect, as I will now show. Recital 19 was solely intended to regulate the coexistence of a multitude of national notes and coins during a first transitional period and of these and euro notes and coins during a second transitional period. It has been obsolete since the end of these transitional periods.

If you are interested in the rather long and intricate history of my archive inquiries, you will find it here:

<https://norberthaering.de/en/how-i-finally-obtained-important-documents-from-eu-archives/>

A look at the history of EU-Regulation 974/98 shows very clearly that recital 19 was not intended to give Member States the competence to restrict the use of euro banknotes and coins, let alone permanently. I can demonstrate this for the first time thanks to the documents I have obtained from the EU archives.

The purpose of the regulation

In the Commission's [draft of 21.10.1996](#) of the euro introduction regulation, the purpose of the regulation is described as (my translation from German):

The purpose of this Regulation is to lay down the monetary law provisions applicable to Member States without a derogation. The Regulation would enter into force on 1 January 1999. It provides for the euro to replace the national currencies. **For a transitional period ending on 31 December 2001 at the latest, the national currencies of participating Member States will be redefined as sub-units of the euro. During this period, the euro unit and the national currency units will be legally equivalent. The text of the Regulation includes rules for the use of the national currency unit and the euro in its own unit.** It also lays down provisions on euro banknotes and coins, which will be put into circulation by 31.12.2001 at the latest.

Even more succinctly, a [Council dossier of 25 November 1996](#) on the purpose of Regulation 974/98 states (my translation from German):

This regulation is mainly concerned with the replacement of the currencies of the participating Member States by the euro, **transitional provisions, in particular on the legal equivalence of national currencies and the euro** and the conversion of debts, and rules on the issue of notes and coins in euro.

This makes it clear that the Regulation on the introduction of the euro served predominantly to regulate the introduction of the euro and the transitional period and did not intend to regulate the competences of the Member States after the introduction of the euro and the end of the transitional period.

The genesis of the recital

In the [Commission's draft of Regulation 974/98 from October 21, 1996](#), Recital 14 (later 19) read (partly translated from German):

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; For practical reasons, it might be appropriate to introduce euro notes and coins shortly before the end of the transitional period.

In the [version of November 25, 1996](#), for the first time, the sentence was added, which is used by some as an enabling rule for cash limits (partly my translation from German):

(14) Whereas banknotes and coins denominated in national currency units will lose their status as legal tender at the latest six months after the end of the transitional period. For practical reasons it may be appropriate to introduce euro banknotes and coins shortly before the end of the transitional period.
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.

Already the placement of this key sentence in recital 14, which was intended to regulate the transitional period, indicates that this clarification was only intended to regulate the temporary coexistence of a multitude of national euro notes and coins, which were all legally equivalent to euro notes and coins.

Corresponding Articles and Recitals in the Regulation

Recital 8 of Regulation 974/98 states:

In order to prepare a smooth changeover to the euro a transitional period is needed between the substitution of the euro for the currencies of the participating Member States and the introduction of euro banknotes and coins; **whereas during this period the national currency units will be defined as subdivisions of the euro; whereas thereby a legal equivalence is established between the euro unit and the national currency units.**

Article 1 of the regulation clarifies that 'transitional period` shall mean the period beginning on 1 January 1999 and ending on 31 December 2001, and Article 5 says that "Articles 6, 7, 8 and 9 shall apply during the transitional period."

Article 9, applying during the transitional period says:

Banknotes and coins denominated in a national currency unit shall retain their status as **legal tender within their territorial limits** as of the day before the entry into force of this Regulation.

Thus, from January 1, 1998 to December 31, 2000 national notes and coins were all legally equivalent subdivisions of the euro and legal tender, but only within the respective countries that had issued them.

At the same time as adding Recital 14 (19), the same draft of November 25, 1996. added a paragraph 2 to

Article 15 (1), which allowed national coins and notes to remain legal tender for a maximum of six months after the end of the transitional period. The new paragraph reads:

(2) Each participating Member State may, for a period of up to six months after the end of the transitional period, lay down rules for the use of the banknotes and coins denominated in its national currency unit as referred to in Article 6(1) and take any measures necessary to facilitate their withdrawal.

Recital 14 (19), Recital 8, Article 9 and Article 15 (1) as well as 15 (2) in particular should be seen in conjunction. During the transitional period national banknotes and coins were legally equivalent to euro banknotes and coins. However, in many countries there were arrangements whereby only their own national currency had to be accepted for the settlement of monetary debts.

An internal [Commission document of 10 October 1996](#) explains a conundrum inherent in Article 9 (my translation from French):

This article establishes the limits on the circulation of national notes and coins during the transitional period, even though they are different units of the same currency with the same legal force. However, it does not specify what will be the provisions of the Member States' monetary laws which, in certain cases, prohibit payments in foreign currency. **Do national currency and the euro have the same status as a foreign currency under national monetary laws or not? This raises the more general problem of legal tender and the question of whether other means of payment must and may be accepted by law (acceptabilité légal) in order to settle a debt.**

Shortly thereafter, on [November 25, 1996](#), the clarifying sentence in question was introduced in today's Recital 19 (then 14), to the effect that restrictions on the use of national currencies of other countries could be maintained during the transitional period, without being in breach of the legal tender status of euro banknotes and coins. This was necessary because, for obvious practical reasons, it was not intended to oblige the recipients of cash benefits to accept national banknotes from all countries of the monetary union.

The clarification in Recital 14 (19) became all the more necessary because the new Article 15 (2) was intended to give States the possibility, during the six-month post-transition period, of imposing restrictive rules on the use of not only foreign, but also their own national notes and coins still in circulation, even though they continued to be legal tender. Paragraph 2 expressly granted States the right "to take all necessary measures to facilitate the withdrawal of such notes and coins from circulation". In practice, this included that shops and banks should still accept national banknotes but were not allowed to put them back into circulation. As national banknotes were de jure equivalent to euro banknotes, it was necessary to clarify in recital 14 (19) that such restrictions on the cash nature of national banknotes and coins should not be considered in violation of the status of legal tender of **euro**-notes and coins.

Gladly overlooked, important details in the wording

Recital 14 (19) only refers to limits for payments in banknotes and coins, without the addition of "euro". It says that these restrictions are not incompatible with the legal tender status of **euro** notes and coins. Once you have realized that the recital is concerned with regulating the coexistence of legally equivalent notes and coins during the transitional period and their coexistence with euro notes and coins in the post-transition period, these otherwise easily overlooked details of the wording show their material significance. It is only the use of national notes and coins that can be restricted according to recital 14 (19), not **euro** notes and coins.

Also instructive is the choice of terms in the condition in recital 14 (19) "where other legal means exist for the settlement of monetary debts". Indeed, the regulation contains in Article 1 a definition of the term "legal instrument", which is "legislation, administrative acts, judicial decisions, contracts, unilateral legal acts, **means of payment other than banknotes and coins** and other instruments with legal effect". The part "means of payment other than banknotes and coins" would have fitted perfectly if the legislator had intended the "other legal means of settlement" to refer to bank deposits and other non-cash means of payment, as those who justify cash ceilings with recital 19 will claim. However, the council chose not to speak of "other legal instruments" available.

This, however, makes perfect sense, if the aim was - as argued here - to allow restrictions of the use of only one type of notes and coins, namely notes and coins from other countries, on condition that the other type, namely those of the own nation or those in euros, were available. Since notes and coins are not covered by the definition of legal instruments, it was not possible to use this term. This is why the undefined term 'legal means' has been used.

From administrative to. public policy reasons

It was only in the [consolidated draft of the regulation of 12 June 1997](#) that "for administrative reasons" was replaced by "for reasons of public order" in the relevant recital. An explanation of this could not be found in the archive documents. Presumably the new wording is intended to avoid a narrow interpretation, since the intention was to give the governments of the Member States a free hand in the post-transitional period to make all the restrictive arrangements that seemed appropriate to withdraw national notes and coins from circulation quickly.

Conclusion

The history and rationale of Regulation 974/98 does not provide any evidence that the wording in Recital 19 "Limitations on payments in banknotes and coins are not incompatible with the legal tender status of euro banknotes and coins" was intended to confer on Member States the competence to limit the use of euro cash as a means of payment after the transitional and post-transitional period. On the contrary, all the indications are that that Recital 19 was meant to clarify only that restrictions on the use of national banknotes and coins should be possible during the transitional and post-transitional periods without coming into conflict with the legal tender status of euro cash.