

## Cash industry association ESTA contradicts EU Advocate General on the right to pay in cash

27. 10. 2020 | [ESTA, the association of European cash management companies, has published a position paper contradicting the assessment of the EU Advocate General of my case before the European Court of Justice regarding the right to pay my broadcasting fee with the legal tender, cash.](#)

The opinion of the Advocate General is a recommendation to the highest EU court. The Advocate General has more or less adopted the anti-cash stance of the EU Commission. The Board of ESTA, in [its opinion](#) adopted on October 26, takes offence at the Attorney General's assessment that private parties could, without meaningful restrictions, agree by explicit or implicit contractual agreement on a means of payment other than legal tender:

A limitation of legal tender based on contractual agreement, the legal basis of which is not specified in the Opinion, is incompatible with the EU treaties in as much as it bears the promise of the elimination of cash, as it allows market forces to gradually, but irreversibly, phase out cash in the economy.

I find the legal arguments behind it very convincing. The association argues that the legal philosophy of the EU assumes a power imbalance between companies and customers, so that the latter would need special protection. The argument of contractual freedom should therefore be used with great caution.

Nor is freedom of contract a provision of EU primary law that is on the same level as the provisions on legal tender. Rather, contractual freedom is restricted by a large number of lower-order legal rules, including competition law and consumer protection law. With a norm such as contractual freedom, which is located far down in the EU hierarchy of norms, the scope of the primary law norm of legal tender cannot be restricted as easily as the EU Advocate General would have it.

As an example, the paper cites a store that does not accept cash. In the case of a single store, this is not a major problem. But if most or even all comparable stores on a street or in a neighborhood no longer accept cash, there is clearly no freedom of contract in terms of the chosen means of payment for customers any more.

The lack of voluntariness is even clearer when it comes to private bus companies, cabs, parking lots or parking garages, for which customers regularly have no equivalent substitute. For this reason, ESTA concludes that only explicit agreements on a different means of payment could be considered as a valid abdication of the obligation to accept cash, but not unilateral decisions by one party:

Contractual freedom therefore should come, at best, as an exceptional derogation to legal tender. It would imply a clear consensus by both parties to a transaction to agree on a different means of payment than cash. *Fait accompli* such as "cash not accepted here" is not a mutual agreement, particularly in specialised shops for which there is no competitor at reasonable arm's length. Ultimately, the fundamental question is, however, if anyone is entitled to accept or refuse cash as a payment as they see fit, does this mean that cash is still legal tender? Legal tender should entail the legal certainty that cash will be accepted, except in very specific – good faith – circumstances.

The position paper: [2020 10 26 Note on AG opinion - Final](#)

[dossier on the court case](#)

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