

## Cash industry association ESTA comments on legal tender ruling of the European Court of Justice

4 February 2021 | [The European association of cash handling companies ESTA has issued an opinion on the ruling of the European Court of Justice in my case concerning the right to pay my fees to the public broadcaster in cash. They agree with me that the main justification of the court for postulating that the obligation to accept the legal tender can be restricted by national and sub-national lawmakers is severely flawed.](#)

The following are parts of the [opinion of ESTA](#) which I consider particularly important and interesting.

### Comments on the Ruling

There are a number of significant points to be noted in the Ruling.

#### **The EU has specifically ruled on the meaning and scope of legal tender as meaning a quasi “absolute” acceptance of cash**

The Ruling confirms in § 51 that only the EU legislators have the ability to specify what the status of legal tender should entail. This further excludes any competence to do so by Member States.

The Ruling further states in § 55 that it is not “necessary for the use of the euro as the single currency and, more specifically, for the preservation of the effectiveness as legal tender of cash denominated in euro that the EU legislature lay down exhaustively and uniformly the exceptions to that fundamental obligation, provided that every debtor is guaranteed to have the possibility, as a general rule, of discharging a payment obligation in cash”.

However, ESTA would submit that the EU legislators actually did exactly that, when they adopted Recommendation 2010/191/EU, so the issue of interpretation of what Member States can or can't do in relation to the exceptions to legal tender, is now over.

With regard to the nature of the mandatory acceptance of cash, paragraph 1(a) of Recommendation 2010/191/EU states that “the creditor of a payment obligation cannot refuse euro banknotes and coins unless the parties have agreed on other means of payment”. As a matter of fact, this provision specifically defines the scope and effects of legal tender of euro banknotes and coins. It allows for exceptions, which are, however, very narrowly understood. ESTA agrees with § 48 of the Ruling that according to Article 288(5) TFEU,

“Recommendations are not intended to produce binding effects and are not capable of creating rights on which individuals may rely before a national court”. But, as the Ruling says, a Recommendation is, however, very relevant in the interpretation of the law, particularly when the wording is as clear-cut as that of paragraph 1(a) or the Recommendation.

However, if a Recommendation may not create such binding effect on which consumers may rely upon in court due to the absence of direct effect of non-binding acts, Article 128 of the Treaty does, as EU jurisprudence has established the principle of direct effect of primary law under certain conditions. Legal tender provided in this Article has now been substantially defined by the EU legislators in a way which, according to EUCJ case law, meets the conditions for direct effect of primary law, as it is now precise,

clear and unconditional (other than for the freedom of parties agreeing otherwise). Also, as the Ruling points out, Member States have no latitude in the matter as it is an exclusive competence of the EU.

Whilst Article 128 TFEU would only initially provide for a general obligation of accepting cash without further definition of what it means, the Recommendation makes the definition of legal tender very clear and specific and very compelling with regard to its interpretation.

This is particularly so because the very first recital of Recommendation 2010/191/EU refers explicitly to Art 128 TFEU. So the Recommendation derives directly from Art 128 which “underpins the singleness of the euro and are a precondition for the effective conduct of the European Union’s monetary policy” (§ 43).

We do not see in the Ruling any clear justification why, in the absence of any contradicting provision in EU law, the scope of legal tender set in article 128 of the Treaty would be deemed not to have been precisely defined with respect to mandatory acceptance of cash.

Furthermore, nothing in the Ruling substantiates why the mandatory acceptance as defined in EU law should be considered as “in principle” only.

Therefore, it is ESTA’s view that the EU legislators have ruled on the matter, which is therefore settled as a strict obligation to accept cash, except in very specific cases, the scope of which is to be understood very narrowly.

### **The obligation of accepting cash as a central element of the Eurozone monetary policy**

The Ruling acknowledges that any Member States adopting “a national rule, the object or effect of which is to abolish, in law or in fact” cash would be contrary to EU law due to the exclusive competence of the EU in this area (§ 62).

Arguably, measures which would lead, de jure or de facto, to the abolition of cash in one Member State of the Eurozone, or which would reduce the circulation of cash in such a way that the cash cycle becomes unsustainable, would therefore be deemed incompatible with the exclusive competence of the EU, since the disappearance of the physical euro would in effect annihilate any legal tender to the euro in that country – precisely what the Court says Member States cannot do (see inter alia § 51, 58, 78).

A number of countries outside the Eurozone – DK, NO, SE and the UK – have adopted or are considering legislation to protect cash, notably through specific cash obligations to the banking sector. This acknowledges that unless something is done for protecting cash, cash may disappear sooner than expected, and the COVID crisis is contributing greatly to that.

Compulsory acceptance of cash – or its reverse, the right to pay in cash – is one of the measures needed to secure a sustainable cash cycle. When the circumstances pertaining to the cash cycle are considered, the level of mandatory acceptance of cash becomes an obvious part of monetary policy, as its absence is just the promise of the disappearance of cash. Failing this, the unicity of monetary policy would be undermined, as it would be if Member States might be entitled to different interpretations of legal tender as an obligation to accept payments.

In support of the AG’s Opinion, the Court states that diverging interpretations of the status of the euro by Member States would compromise the unicity of the single currency and thus the objective of stability of prices – the “main objective”, as it recalls, of the EU monetary policy. 1 The elements of monetary policy

at stake are the emission of banknotes and their legal tender, as it derives from article 128 TFEU, and indirectly the emissions of coins by Member States.

Mandatory acceptance of cash, possibly with exception of measures of public interest adopted by Member States, are essential to preserve cash, the emission of which is a core element of the EU monetary policy.

### **Recital 19 of Regulation No. 974/98**

The Opinion, as well as the Ruling, refers to recital 19 of Regulation No. 974/98 as the other justification for their interpretation that the obligation of accepting the euro with legal tender as a payment would be “in principle” only. ESTA considers that this part of the Regulation cannot assist in any way in supporting the conclusion that acceptance of cash is only an obligation in principle. Indeed, ESTA would argue to the contrary.

Regulation 974/98 deals with the “introduction” of the euro. Its Recital 19 reads: (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 (...).

Arguably, Recital 19 only refers to the transitional period to the euro, during a time when two currencies, both with legal tender, might coexist in one country until the euro replaces the outgoing domestic currency. This refers to a very specific, time limited, situation which is now long gone.

### **A right to pay in cash ?**

The ruling also calls for assessing the proportionality of the restriction in relation to the fact that alternative legal means of payment may not be readily available to all people having to pay a tax and that a possibility to pay in cash must still be secured for these people (§ 77).

In other words, there may be an obligation to accept cash from certain people whilst not from others. Or maybe, to say it differently, there may be a right to pay in cash for people with no choice. The question will be, therefore, to decide, in each individual instance, who is entitled to pay in cash, and who is not, and on the basis of which criteria. Enforcement of this will be particularly tricky.

### **Conclusions**

It results from the Ruling that the obligation to accept cash is quite a strong one. The Rulings states that there is no “absolute” obligation. In the same way that EU citizen’s fundamental rights in the Charter are not “absolute” and can be subject to restrictions, the rights, or obligation remain quite strong and can only be limited on the basis of very strict and narrow circumstances.

Therefore, according to EU law, the way legal tender enshrined in TFEU’s Article 128 has subsequently been defined by EU legislators, in a clear and precise language, provides it with a direct effect. The obligation to accept cash as a payment is undoubtedly a very strong one.

Since money is based on trust, and a high level of trust is needed for a currency to operate, the concept of legal tender must entail a high level of obligation to accept it to provide enough legal certainty to its

users.

[More on my courtcase regarding the meaning of legal tender](#)