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**COMMISSION STAFF WORKING DOCUMENT**

**IMPACT ASSESSMENT**

*Accompanying the document*

**Proposal for a Regulation of the European Parliament and of the Council  
on controls on cash entering or leaving the Union and repealing Regulation (EC) No  
1889/2005**

{ COM(2016) 825 final }  
{ SWD(2016) 471 final }

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# 1. Introduction and background

## 1.1 Genesis of the Cash Control Regulation

Prior to the introduction of the Cash Control Regulation, the issue of cross-border cash movements in the EU Member States was first examined by Operation "Money Penny".

Money Penny was an operation which took place from September 1999 to February 2000 between the customs authorities of the –at the time 15- Member States of the European Union. It monitored cash movements across the EU's internal and external borders in excess of EUR 10 000. It examined whether the scale of such movements indicated a threat that the controls applied by financial institutions to prevent money laundering could be circumvented by cross-border movements of cash.

Although the final report did not distinguish between intra and extra-EU cash movements and included only limited input from 9 Member States that did not apply specific controls on cash at their borders it nevertheless revealed cross-border cash-movements of 1.35 billion Euro and substantial differences in controls applied by the Member States.

In June 2002 the Commission presented to the Council its "Proposal for a Regulation of the European Parliament and the Council on the prevention of money laundering by means of customs co-operation".

The Commission proposed that the Anti-Money Laundering Directive (AMLD)<sup>1</sup> should be complemented by a Regulation introducing controls on large sums of cash crossing the EU's external border. For the controls to be effective, a system would also be needed whereby the Member States could exchange information on suspicious movements with each other and the Commission.

The Cash Control Regulation<sup>2</sup> entered into force on 15 December 2005 and is applicable since 15 June 2007. It provides for an EU-wide approach to controlling cash movements into or out of the EU. It was a decisive step in the EU policy aimed at the strengthening of measures to prevent money laundering, terrorist financing and other illegal activities.

## 1.2 Description of key terminology and the overall legal framework in the area of AML/TF

**Money laundering**<sup>3</sup> concerns activities related to assets which have a criminal or illicit origin. Criminals engaged in money laundering will therefore attempt to conceal or disguise the true nature, source or ownership of the assets in question and transform them into seemingly legitimate proceeds. If dirty money is allowed to flow through the financial system, the stability and reputation of the

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<sup>1</sup> Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering. Later As of May 20, 2015, Directive (EU) 2015/849 of the European Parliament and of the Council 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> Anti-Money Laundering Directive') was adopted. It is currently being transposed into national legislation by Member States, who have until June 26<sup>th</sup>, 2017 to implement its provisions. Hereinafter referred to as AMLD.

<sup>2</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32005R1889>

<sup>3</sup> & <sup>4</sup> Definition as used in the Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering, including terrorist financing, pp. 8-9, to be consulted at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013SC0021&from=EN>

financial sector can be seriously jeopardised - which in turn could undermine the integrity of the single market.

**Terrorist financing**<sup>4</sup> concerns the provision or collection of funds to carry out any of the offences defined in Council Framework Decision 2002/475/JHA on combating terrorism. Terrorist activities can be funded through legitimate as well as criminal activities and terrorist organisations engage in revenue-generating activities which in themselves may be, or at least appear to be, legitimate. There is a clear risk to the integrity, proper functioning, reputation and stability of the financial system, and with potentially devastating consequences for the broader society.

The EU considers the anti-money laundering/combating the financing of terrorism (AML/CFT) framework as crucial for ensuring the successful functioning of the single market and safeguarding the security of citizens.

The fight against money laundering and the financing of terrorism happens at various levels. On a supranational level, the Financial Action Task Force (henceforth: 'FATF') in which the Union is represented through the Commission, establishes recommendations for jurisdictions and describes how to best tackle money laundering and terrorist financing. These recommendations are not directly applicable legal instruments but do carry weight: the FATF members perform mutual evaluations to determine compliance which are closely scrutinized and have great reputational impact. On FATF-level, Recommendation 32 specifically treats the issue of cross-border cash movements.

Various legal instruments have been adopted to ensure an effective anti-money laundering and combating terrorist financing framework at EU level. The most relevant ones are:

- The Fourth AML Directive<sup>5</sup>, which covers most of the FATF Recommendations;
- Regulation (EC) No 1781/2006 of 15 November 2006 on information on the payer accompanying transfers of funds<sup>6</sup>, which implements FATF SR VII on wire transfers;
- Directive 2007/64/EC of 13 December 2007 on payment services in the internal market<sup>7</sup> (Payment Services Directive) which, in combination with the AMLD, implements FATF SR VI on alternative remittance;
- Regulation (EC) No 2580/2001 of 27 December 2001<sup>8</sup> on specific restrictive measures directed against certain persons and entities with a view to combating terrorism which, together with Regulation (EC) No 881/2002 of 27 May 2002<sup>9</sup> implementing UN Al Qai'da and Taliban sanctions, implements part of FATF SR III on freezing terrorist assets.

Broadly describing the interaction between the various instruments, it could be said that as regards the fight against money laundering and terrorist finance, the Anti Money Laundering Directive lays down a framework of rules to be implemented as regards the functioning of the formal financial sector whereas the CCR lays down a framework of rules which is complementary and protects the Union against cross-external border transfers of cash money by money launderers and terrorist financiers who could opt for this mode of transport in order to circumvent the controls on the formal financial system.

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<sup>5</sup> OJ L 141, 05.06.2015, p. 73.

<sup>6</sup> OJ L 345, 8.12.2006, p. 1.

<sup>7</sup> OJ L 319, 5.12.2007, p. 1.

<sup>8</sup> OJ L 344, 28.12.2001, p. 70.

<sup>9</sup> OJ L 139, 29.5.2002, p. 9.

The Cash Control Regulation was adopted for this purpose and seeks to reconcile the fundamental principle of free movement of goods, persons, services and capital with the prevention of money laundering and terrorist financing in the context of the single market.

Complementary to the legislation specifically adopted to target anti money laundering and terrorist financing the Community Customs Code and/or national legislation generally apply for the movements of cash in post and freight at the Member States' borders. This means that, in most Member States, cash has to be declared on a customs declaration form for a particular parcel, container etc.

However, the information required on the customs declaration form is significantly less comprehensive than the data required on the EU-CDF and does not include the desired level of detail required for AML/CTF purposes (e.g. owner of cash, provenance and intended use of cash).

### 1.3 International context

The Financial Action Task Force (FATF)<sup>10</sup> is an inter-governmental body set up by the G7 Summit held in Paris in 1989 in response to mounting concern over money laundering.

The FATF has primary responsibility for developing and promoting global policy standards, both at national and international level, to prevent money laundering and combat terrorist financing. It tries to generate the necessary political will to bring about legislative and regulatory reforms in these areas, and for this purpose it has adopted 40 recommendations.

It is important to note that the recommendation concerning cash couriers was developed during the same time period when the Commission was drafting and proposing the Cash Control Regulation ('CCR' or "the Regulation"). Initially the FATF labelled this norm 'Special Recommendation IX', the current Regulation lays down measures which at the time were consistent with this recommendation.

In the course of time and after adoption on EU-level of the CCR, FATF Special Recommendation IX was complemented with an interpretative note and was finally renamed 'Recommendation 32'. For reasons of consistency and readability this document will always refer to 'Recommendation 32', even when referring to a point in time where the renaming had not yet taken place.

The European Commission is a member of the FATF and is therefore committed to implementing its recommendations.

15 EU Member States are also full members of the FATF in their own right, while the countries that joined the EU from 2004 onwards are represented in the Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL), FATF's affiliated regional body.

Starting with its own members, the FATF monitors countries' progress in implementing AML/CFT policies by rating their compliance with its recommendations and measuring the effectiveness of their AML/CFT systems via a mutual evaluations procedure and by reviewing anti money laundering and combatting terrorist financing techniques and relevant counter-measures.

### 1.4 The objectives and main provisions of the CCR

The original objectives of the Cash Control Regulation, as described in the text of the Regulation are presented in the diagram below.

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<sup>10</sup> Information about the FAFT, its recommendations and all related documents is available on the public web- pages of the FATF: <http://www.fatf-gafi.org>

**Figure 1. Original objectives of the Cash Controls Regulation**



The provisions designed to meet these objectives were codified in the Cash Control Regulation in line with the requirements of the FATF's Recommendation 32 on cash couriers, with the view of aligning EU practices with the highest global AML/CFT standards. An outline of those provisions is reproduced below, more detailed information can be obtained in the 2015 evaluation report in Annex 2 of this impact assessment.

#### Definition of cash

The definition of cash in the Cash Control Regulation matches the definition used by the FATF for Recommendation 32 on cash couriers and includes:

- Currency, i.e. banknotes and coins that are in circulation as a medium of exchange.
- Bearer-negotiable instruments (BNI)

As the Cash Control Regulation mirrors the definition of 'cash' used in the supra-national standard (FATF recommendation 32), gold, precious metals or stones, electronic cash cards and casino chips are not included in the definition of cash.

#### The obligation to declare

The Cash Control Regulation establishes a uniform EU approach towards cash controls based on a mandatory declaration system.

If a natural person entering or leaving the EU (including transiting) transports cash of a value of EUR 10 000 or more, he/she must declare these funds.

The EUR 10 000 threshold is considered high enough not to burden the majority of travellers and traders with disproportionate administrative formalities.

However, when there are indications of illegal activities linked with movements of cash lower than EUR 10 000, the collecting and recording of information related to these movements is also authorised.

This provision was introduced in order to limit the practice of 'smurfing' or 'structuring', the practice of deliberately carrying amounts lower than the threshold with the intention to escape the obligation to declare. This can be achieved either by dividing a large sum of cash between several individuals travelling together, such as a family of 2 adults and 2 young children, each carrying 9500 Euro, or by a single individual who travels multiple times in a short time-span and on each occasion transfers amounts slightly below the declaration threshold. Structuring can be linked to money laundering, terrorist financing, fraud or other financial crimes and should therefore be monitored by the competent authorities.

#### Designation of powers of the competent authorities<sup>11</sup>

In order to ensure compliance with the obligation to declare, the national competent authorities are empowered to:

- Request, accept, check and certify a cash declaration;
- Check compliance with the obligation to declare;
- Carry out controls on natural persons, their baggage and their means of transport

#### Recording and processing of information

Member States must record and process all information they obtain through declarations or controls, and make this information available to the national authorities competent for fighting money laundering and terrorist financing.

These authorities are designated as national Financial Intelligence Units (FIUs), central national units responsible for receiving and analysing information and suspicious transactions received from authorities or private sector operators, analysing them and if there are reasons to suspect that illicit activity may be going on, to notify the competent (judicial) authorities.

It should be noted that all information obtained through the Cash Control Regulation is confidential. All personal information must be dealt with in accordance with the relevant data protection provisions and respect for fundamental rights.

#### Exchange of information

Where there are indications that the sums of cash are related to any illegal activity associated with the movement of cash, exchange of information may take place with competent authorities in other Member States. Information adversely affecting the financial interests of the EU must also be transmitted to the Commission.

Under the framework of existing agreements on mutual administrative assistance, information obtained under the Cash Control Regulation may also be communicated to a third country, subject to compliance with relevant national and EU provisions on the transfer of personal data to third countries.

#### Penalties

Member States are required to provide for penalties against persons who fail to declare EUR 10 000 or more in cash when crossing EU external borders. The penalties resulting from such proceedings must be effective, dissuasive and proportionate to the offence<sup>12</sup>, so as to have a deterrent effect.

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<sup>11</sup> As in most Member States the national customs authorities are competent authorities for the implementation of the Cash Control Regulation, the terms 'competent authorities' and 'customs authorities' are used interchangeably in the evaluation, depending on context.

<sup>12</sup> Offence refers to the mere failure to declare and is not related to any underlying illicit activity concerning the money.

## 1.5 Quantitative data

On average, 100 000 cash control declarations are submitted annually in the EU, representing a total amount declared between 60-70 billion Euro. While amounts of undeclared or incorrectly declared cash which have been detected by authorities are highly variable (240 Mio – 1.5 billion Euro/year), on average approximately 300 Mio Euro per year is detected following controls.

Statistics show a sustained, high level of cash declarations over the years and also a significant increase in the number of recordings at the EU border in recent years.

It is difficult to pinpoint the exact combination of reasons behind these trends based on the available data.

Possible factors include higher numbers of travellers in general, more frequent controls by customs authorities, cash being used as an alternative means of payment due to increased regulation in the financial sector etc.

## 1.6 Evaluation of the Cash Control Regulation

The existing CCR has been subject to regular monitoring and evaluations.

The existing legal framework and the implementation of the Regulation were the subject of an extensive evaluation, performed in 2015 (See annex 2). This evaluation identified several areas that could be considered for amendment and which are now included in the problem definition section.

According to the evaluation; the overall performance of the Cash Control Regulation was considered adequate, but consideration should be given to the possibility of more in-depth analysis to improve the following aspects:

- Consider including cash movements by mail and freight at EU external borders within the scope of the Cash Control Regulation;
- Consider widening and harmonising the possibilities for information exchange between Member States:
  - a. By including all cash control information (including non-suspicious voluntary declarations);
  - b. By setting clear procedures and providing effective tools for the exchange of information;
- Consider to explicitly provide for the possibility of using cash declaration information for tax purposes, including the fight against tax fraud and evasion;
- Consider a level of approximation of cash control penalties applied by Member States at EU external borders.

In addition, the Commission is in continuous interaction with Member States' national experts who implement the Regulation. This interaction is both ad hoc and structural, with 2 annual meetings of the 'Cash Controls Working Group' held under the aegis of the Customs 2020 programme.

Following the terrorist attacks in Paris and taking into account conclusion Nr. 8 of the extraordinary Justice and Home Affairs Council of 20 November 2015, the Commission published on 2 February 2016 a Communication to the Council and the Parliament on an Action Plan to further step up the fight

against the financing of terrorism<sup>13</sup>. The Action Plan builds on existing EU rules to adapt to new threats and aims at updating EU policies in line with international standards.

One of the elements of the Action Plan concerns the commitment of the Commission to present – at the latest by Q4 2016 - a legislative proposal to amend the Cash Control Regulation<sup>14</sup>.

The Commission Action Plan emphasises the need to speed up the evaluation/revision exercise of the cash control regulation which was already ongoing and specifically identifies a number of key areas on which expeditious action should be undertaken to strengthen the existing framework. The areas in question are:

- Cash shipments in post and freight
- Allowing authorities to act on amounts of cash below the declaration threshold in case there are indications of suspicious activity associated with the cash.
- Examining the possibility to include precious metals and/or other highly liquid stores of value in the definition of cash.

While these areas were already under investigation for amendment, the Action Plan, clearly establishes the political priorities assigned by the Commission to the specific topics mentioned.

The conclusion from the evaluations and the recommendations from the Commission's Action Plan to further step up the fight against the financing of terrorism resulted in the identification of a number of areas in which the existing CCR could be improved<sup>15</sup>.

## 1.7 Effectiveness of the Cash Control Regulation

The effectiveness of the cash controls regulation has to be considered in the wider framework of supranational EU-measures which seek to tackle money laundering and terrorism finance, such as the AMLD, as described in the previous section.. The CCR is complementary to this. The overall performance of the Cash Control Regulation was considered adequate based on feedback from various sources (national FIU's, law enforcement agencies).

The information collected by the authorities via the declaration system allows to achieve the goals set out by the Cash Control Regulation and the utility of this information is judged to be good by authorities involved.

An important part of the effectiveness of the CCR is the fact that it implements FATF recommendation 32. The European Commission (Commission) represents the European Union with the FATF and is therefore committed to implementing its recommendations.

15 EU Member States are also full members of the FATF in their own right, while the countries that joined the EU from 2004 onwards are represented in the Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL), FATF's affiliated regional body.

Through a system of mutual evaluations between members, according to a defined methodology, the FATF monitors countries' progress in implementing AML/CFT policies by rating their compliance with its recommendations and measuring the effectiveness of their AML/CFT systems, techniques and

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<sup>13</sup> <http://eur-lex.europa.eu/legal-content/en/TXT/HTML/?uri=CELEX:52016DC0050&from=EN>

<sup>14</sup> Annex 1 of the Action Plan presents the timeline for the proposals.

<sup>15</sup> Annex 2 Evaluation report and the Commission Action Plan

relevant counter-measures.

FATF-evaluations of Member States conclude that the existing regime of controls at the external border is largely effective, so does feedback received from Europol and competent authorities.

FIUs play a key role in ensuring that the information collected through cash declarations and cash controls is properly analysed and where appropriate, used effectively to investigate suspicions of money laundering and terrorist financing. The information on cash controls obtained by national FIUs results in a significant number of investigations coordinated by the FIUs, as well as in court convictions on money laundering and other criminal activities, as demonstrated by the statistical information and examples presented in Annex 2.

It is often difficult to link a conviction for money laundering or terrorist financing to a customs control on cash, due to lack of feedback from law enforcement agencies and/or FIUs to customs authorities that provided the information, as well as the fact that cash controls frequently form only part of the evidence in a particular case and that cases may take years to be decided.

In response to a questionnaire sent by the Commission in 2014, only 9 Member States provided examples (not complete statistics) on investigations/convictions that can be attributed to the implementation of the Cash Control Regulation between 2011 and 2013:

- Austria – 36 convictions (type of offence not specified);
- Bulgaria – 72 convictions for money laundering;
- Estonia – 58 convictions for money laundering
- France – 176 judicial enquiries for money laundering (69 related to narcotics), out of which customs authorities can confirm 11 convictions (results of most investigations unknown or investigations still on-going);
- Germany – 6 convictions for money laundering and 2 for other illegal activities;
- Greece – 3 pending court cases on money laundering charges;
- Lithuania – 17 convictions for other illegal activities;
- Malta – 11 convictions (type of offence not specified);
- The Netherlands – 105 cases (2013) of money laundering prosecutions.

Other Member States either do not have available statistics, have not recorded any investigations / convictions or have not provided an answer.

## 1.8 Consultation of stakeholders

In parallel with the evaluation of the Regulation in 2015 an open public consultation<sup>16</sup> was held by Directorate-General Taxation and Customs Union (TAXUD). This consultation took the form of a questionnaire that sought input on a number of potential policy options that could be envisaged in a revision of the CCR. The consultation was published on the 'My Voice in Europe' site which ensures automatic notification of all registered interest representatives. The consultation document was also accessible via the TAXUD homepage. The scope of the consultation was wide, with private citizens (EU and other), public authorities, private enterprises and interest representatives invited and able to

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<sup>16</sup> Annex 3: Summary report of the public consultation

respond.

The consultation was accessible from March until June of 2015. Due to the limited number of replies received and the methodology it can in no way be seen as representative for overall public opinion. Nevertheless the responses received provide valuable insight in the way various policy approaches are perceived by the stakeholders.

A targeted questionnaire was sent to the fiscal authorities of Member States in 2015 where they were queried about the possibilities of using cash control data for fiscal purposes and the current practice at national level. A total of 24 Member State authorities replied.

Another targeted questionnaire was sent in June 2016 to police authorities, FIUs and customs authorities regarding the use of gold a way to circumvent cash controls. A total of 42 replies from 27 Member States were received.

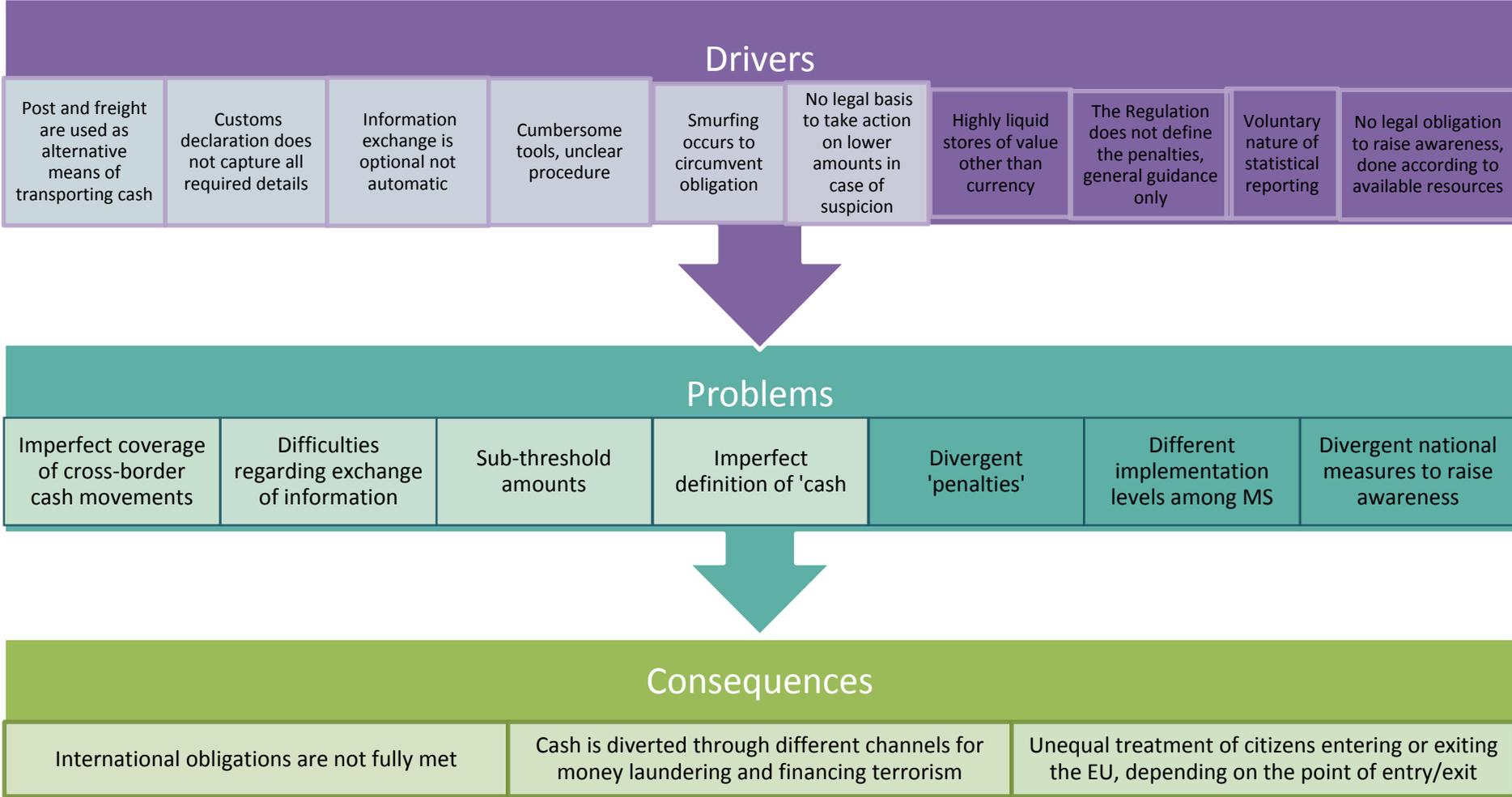
In addition, national experts on cash controls were invited to provide technical feedback on policy options under examination and these were discussed during a session of the Cash Controls Working Group. Additionally and given the potential impact that some options could have on specific categories of economic operators (postal services and express couriers), interest representatives for these sectors (as registered in the EU's transparency register) were specifically invited to provide comments

In line with Commission policy, TAXUD remains available for any comments regarding the revision initiative even beyond the conclusion of the formal public consultation

## **2. Problem definitions and the drivers of the problems**

According to the findings of the evaluation and to the latest developments, a series of problems have been identified. The problem tree below summarises the drivers behind the problems, the main issues and their consequences. The first six drivers and four problems (shaded in light tones) are the ones that are the most important for the current Impact Assessment, but given the holistic approach of the exercise, the remaining three problems, with more limited consequences have been examined as well.

**Table 1. Problem tree**



## 2.1 Problem 1: Imperfect coverage of cross-border cash movements

### 2.1.1 The problem and its drivers

The current Regulation only covers cross external border movements of cash carried by natural persons, its Article 3.1 states:

Any natural person entering or leaving the Community and carrying cash of a value of EUR 10 000 or more shall declare that sum to the competent authorities of the Member State through which he is entering or leaving the Community in accordance with this Regulation. The obligation to declare shall not have been fulfilled if the information provided is incorrect or incomplete.

The notion 'Carrying cash' is indirectly defined through Article 4.1 of the CCR:

In order to check compliance with the obligation to declare laid down in Article 3, officials of the competent authorities shall be empowered, in accordance with the conditions laid down under national legislation, to carry out controls on natural persons, their baggage and their means of transport.

Cash above the declaration threshold which is sent through other means (postal consignment, express freight, commercial courier, cargo, unaccompanied luggage....) is not subjected to the full set of control measures imposed under the CCR, which specifies in its Article 3.2 the data elements to be collected (see table 2 below).

Apart from the Regulation, the only alternative that potentially allows for the capture of information regarding cross-external border cash movements where the cash is not carried by natural persons but crosses the border in postal consignments, courier shipments or freight is the regular customs declaration.

This is problematic for a number of reasons:

- the level of detail captured by a customs declaration falls short of what is required under the CCR, notably because the customs declaration does not contain any information regarding the provenance and intended use of the cash, nor details regarding the identity of the declarant. For the same reasons a regular customs declaration fails to fully meet the objective of FATF Recommendation 32. The table below illustrates, in a simplified manner, the main differences in information required by the two forms.

**Table 2. Comparison between the two declaration forms**

Cash declaration form	Customs declaration form
Declarant, including full name, date and place of birth and nationality	Declarant, including full name, date and place of birth and nationality
Owner of the cash	Not required
Intended recipient of the cash	Not required
Amount and nature of the cash	Amount and nature of the cash
Provenance and intended use of the cash	Not required
Transport route	Transport route
Means of transport	Means of transport

- considerable legal uncertainty exists regarding the nature of cash (currency), notably regarding the question whether cash (in the sense of currency in circulation as a means of exchange) is to be considered a good in the sense of the customs legislation. If it were considered that cash is not a good, then the provisions of the Union Customs Code do not apply and cash would not be subject to a customs declaration.

It is not easily feasible to obtain detailed, reliable and representative data regarding potentially illegal phenomena. Nevertheless, concerning the problem drivers the FATF remark<sup>17</sup>:

'[...] although FATF Recommendation 32 sets standards for the control of physical cross-border transportation of cash by natural persons, cargo and mail, its focus on 'natural persons' may help explain why many jurisdictions seem to consider that their obligations under this recommendation to be limited to having in place a disclosure or a declaration system for transportation of cash by natural persons only.'

### 2.1.2 Consequences and size of the problem

These weaknesses are exploited by criminals who perceive the shipping of cash through postal consignments as a means to avoid an obligation to declare and exploit a lower frequency of controls.

#### **Example 1. USD 89 000 criminal cash in postal packages**

Based on a routine check by customs, an investigation by the joint financial investigation group of police and customs forces in Berlin lead to the discovery of USD 89 000 which were forwarded from the US to Berlin.

Perpetrators, which were unknown to this time, had sent five packages containing electric devices to various beneficiaries in Berlin by post. The money (solely USD 100 bills) was hidden in these devices.

Source: FATF report '[Money Laundering through the Physical Transportation of Cash](#)', p.71

After an information exchange with US authorities it was possible to assign the funds to a group of criminals, which had acquired at least USD 4 200 000 000 through criminal activities (mainly *fraud and cybercrime*). *The money was seized.*

Several control operations undertaken by EU Customs authorities where post and freight consignments were specifically targeted for controls on cash at the external border have detected sometimes very large amounts being sent in postal and freight consignments<sup>18</sup>. In many cases no information regarding the economic origin or the destination of the cash was available as this does not need to be provided on the customs declaration.

The size of the problem is hard to quantify as little systematic study has been performed and the available tools do not offer the possibility to reliably extrapolate. The control operations mentioned as well as surveys and studies performed at international level<sup>19</sup> point to a significant regulatory gap which is being exploited.

<sup>17</sup> [FATF-Report 'Money laundering through the physical transportation of cash'](#), October 2015, p. 4

<sup>18</sup> One Member State reported exports and imports of cash in freight consignments (19<sup>th</sup> plenary meeting of the Cash Controls Working Group) of respectively 20 and 25 billion Euro for 2015, citing concerns about the origin and intended purpose of the operations due to specific circumstances regarding the movements.

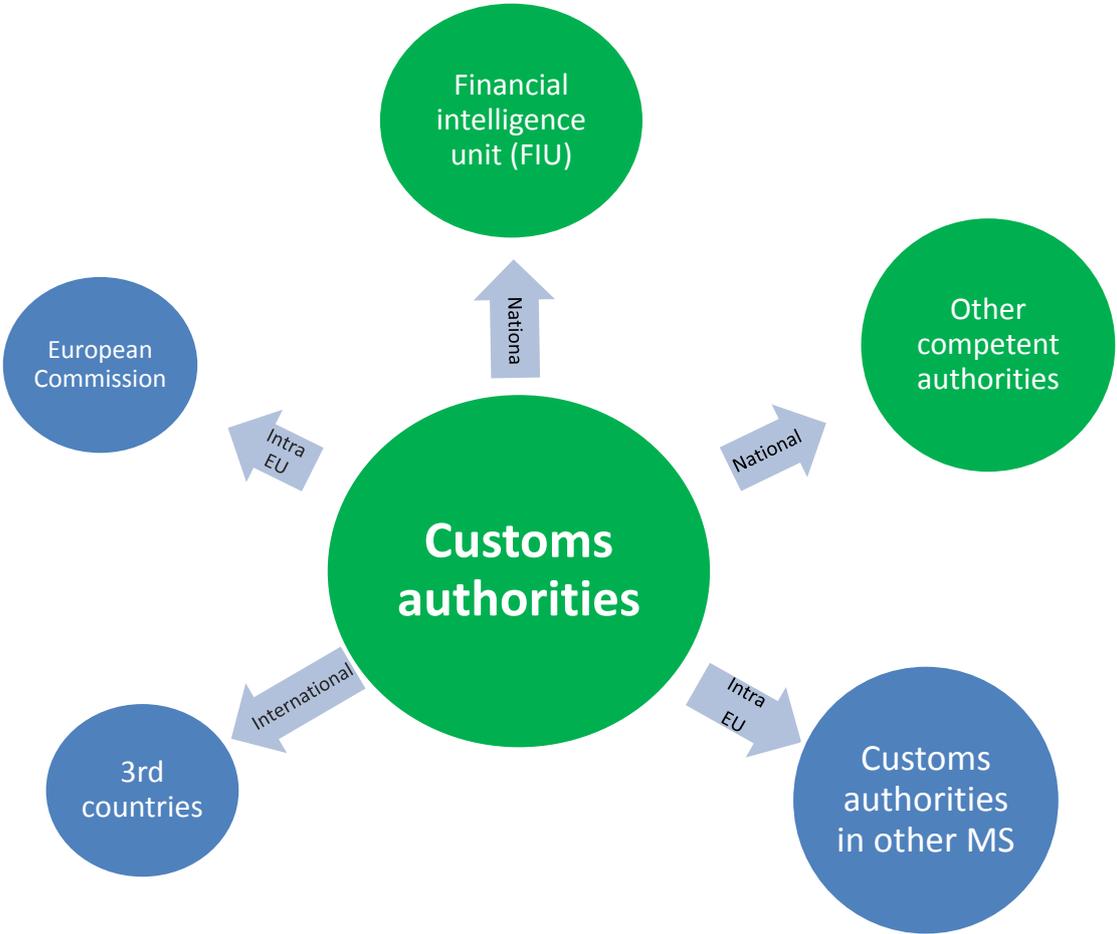
<sup>19</sup> FATF report 'Money Laundering Through the Physical Transportation of Cash' <http://www.fatf-gafi.org/media/fatf/documents/reports/money-laundering-through-transportation-cash.pdf>

Moreover, as FATF Recommendation 32, its interpretative note and the best practices intend all cross-border transfers to be monitored, irrespective of whether the cash is carried by natural persons or shipped and the customs declaration does not adequately capture shipments of cash, it is doubtful if the EU are complying with FATF Recommendation 32, a norm to which it has committed to. Although the FATF-standards are not directly binding, a periodic mutual evaluation system is in place and a finding of non-compliance may result in significant reputational damage for the EU and individual Member States.

**2.2 Problem 2: Difficulties regarding the exchange of information between competent authorities**

Under the Regulation, five major theoretical 'information flows' can be identified and should be clearly distinguished and borne in mind for what follows. The figure below captures the 5 flows, the 3 most significant one being represented by larger spheres. The green circles represent the national flows while the blue ones represent external flows of information.

**Figure 2. Information flows of cash controls data**



a) The making available of information to the FIU: all information collected by the competent authorities (declarations, infractions, indications of illegal activity) is made available to the FIU of that Member State.

b) Information collected by competent authorities in one Member State and communicated to other authorities who did not collect it but have a legitimate interest in obtaining access.

c) Information collected by competent authorities in one Member State and which is made available to other competent authorities in another Member State.

d) Information collected by a competent authority in a Member State which is made available to a third country.

e) Information collected by a competent authority in a Member State and which is made available to the Commission.

## 2.2.1 The problem and its drivers

In order for the CCR to be effective in meeting its objectives, the effective sharing of information is of vital importance. All information from declarations as well as from controls which revealed lower than threshold amounts being transported under suspicious circumstances is made available by competent authorities to the FIU of the Member State where the information was collected. While most<sup>20</sup> Member States understand 'make available' as some form of transmission on the initiative of the competent authorities to the FIU using automated means (XLS-sheet or database), in some cases the FIU has to contact the competent authority who collected the information, while in one case, the physical declaration forms were stored in a secured room and thus 'made available'.

The FIU's have access to<sup>21</sup> all cash control declaration information and use it in their analysis. If the FIU detects anomalies they may decide to contact other competent authorities to launch an investigation. In practice, Member States competent authorities regarding cash control indicate that they rarely receive feedback from the FIU and are relegated to the task of 'data-collectors'.

Under the CCR, 'competent authorities' are customs authorities or other authorities designated by national legislation to apply the cash control regulation. Within one Member State, all 'competent authorities' usually have access to the declaration information. As a consequence, in some Member States the tax authorities have access to the declaration information, while in in other Member States they do not. Further, it is unclear if and to what extent the tax authorities may use the cash control declaration information in order to investigate fiscal crimes (a recognized predicate offence to money laundering) and use the information to levy taxes on undeclared income. This situation leads to divergent treatment of declarants among Member States.

The FATF has repeatedly stated that more attention should be given to the fiscal aspects of Money Laundering / Terrorist Finance. On EU level, the 4<sup>th</sup> Anti-Money laundering directive specifically introduces and defines the notion 'fiscal crime' and specifies, that whatever action the FIU decides to take, this should not prejudice the possibility to exchange and make use of the information obtained based on the AML/TF legislative framework for fiscal purposes.<sup>22</sup>

Cash control information may (facultative) be exchanged between competent authorities of different Member States but only if there are indications of illegal activities as designated in the Anti-Money

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<sup>20</sup> 21 out of 28 Member States provide either direct access to their database to the FIU or periodically transmit the declaration data to the FIU. The other 7 Member States either provide access on demand to electronic data, provide access to the physical declaration forms or only make available information concerning infraction. Cf. the Evaluation report of the Cash Control Regulation.

<sup>21</sup> What is meant by 'access to' depends on how 'make available' is implemented by the Member State in question.

<sup>22</sup> Recital (56) of Directive (EU) 2015/849: 'The exchange of information on cases identified by FIUs as possibly involving tax crimes should be without prejudice to the exchange of information in the field of taxation in accordance with Council Directive 2011/16/EU or in accordance with international standards on the exchange of information and administrative cooperation in tax matters.'

laundrying directive 91/308/EEC (predicate offences to money laundering). Further, the reference in the Regulation to 'the directive' concerns Directive 91/308/EEC - the first iteration of the Anti-Money laundering directive- in which fiscal crimes were not designated as predicate offences. In the current anti-money laundering directive the scope has been considerably enlarged, notably concerning the predicate offences.

The mechanisms for the exchange of cash control (declaration) data have been described by Member States as being cumbersome and unclear.

**2.2.2 Consequences and size of the problem**

A 2014 questionnaire which was sent to Member States regarding the exchange of information between customs authorities of one Member State with other Member states resulted in the following answers:

**Table 3. Information exchange between authorities**

	Yes	No
Customs authorities to custom authorities	16	8
Customs authorities to fiscal authorities	3	16
Customs authorities to other type of authorities	5	n/a
No direct exchange of information	4	n/a

Source: European Commission Questionnaire to Member States 2014

The lack of clarity regarding the modalities for cash declaration data exchange and the lack of flexibility of the tools involved result in practice in very limited sharing of information<sup>23</sup>.

Further, the divergent approach by Member States regarding the sharing of cash control declaration information and the treatment thereof raise concerns regarding unequal treatment of declarants between Member States and impediments as to the maintenance of a 'level playing field' regarding the internal market.

Regarding the sharing of cash control declaration for fiscal purposes, the present situation is unclear, with competent authorities in various Member States not in agreement about the question whether this is legally possible, what data can be exchanged, how the data should flow from the collecting authorities to the fiscal authorities in the same or another Member State, which instrument should be used for the exchange of data etc.

At the end of 2015, 2 Member States (BE and NL) decided to launch a pilot project in order to examine the potential to use cash control data for purposes of fighting against tax evasion and 'fiscal crime'. The pilot project proceeded under the condition that the data exchanged would not be used for taxation purposes, given the legal uncertainty involved. The result of the pilot project are presented in the box below.

<sup>23</sup> See Annex 2 - Evaluation report of the Cash Control Regulation for more details.

### Example 2: Fiscal relevance of cash control data

For the period 2013-2016 the BE authorities provided cash declaration details to NL about 79 individuals who reside in the NL but entered or exited the Union through BE. It should be noted that the data which was transmitted concerns ALL declarations, not only infractions. The total amount declared was 4.2 Mio EUR. Overall, in **52% of cases** the data was found to be relevant for fiscal purposes. Additionally, a number of cases were detected where links could be established to money laundering and criminal activity which had until then not been flagged by the FIU.

For the same time period, BE received from the NL 180 cash declarations lodged in NL by individuals who reside in BE for a total amount of 4.3 Mio Euro.

Initial investigation by fiscal authorities detected that in **65% of cases** the information was relevant for fiscal purposes. Findings include

- a) 43% of all cash declarations were filed by persons involved in the management of an enterprise, 20% of the category in question were involved in bankruptcy proceedings
- b) 6% of all declarants were known by the tax authorities (suspicion of fiscal fraud). One person who declared a substantial amount of cash had outstanding tax debts of 1 Mio Euro
- c) 25% of declarants received pension, unemployment or welfare benefits (which does not per se imply fraud but raises questions regarding the origin of the cash, especially when it is declared as 'income from professional activity') while 16% did not declare any income to the tax authorities for the year in which they filed a declaration relating to a cash movement of > 10 000 Euro.

Source: Pilot project between Belgium and the Netherlands

The above are clear indications pointing to the relevance of the use of cash control declaration information for fiscal purposes.,

In the open public consultation,<sup>24</sup> a large majority of respondents favour facilitating the exchange of cash control information between Member States and between various authorities within one Member State, for tax purposes.

In the course of further analysis it became apparent that for legal reasons it was not possible to tackle this problem through a modification of the Cash Control Regulation. As the data exchange is intended to take place between customs authorities and fiscal authorities, it was determined that the legal basis in primary law to make this exchange possible resides in Arts. 113 and 115 TFEU.

Neither the mechanism for such exchange nor the elaboration of the instrument required are compatible with the legal basis in primary law upon which the CCR is based (Arts. 33 and 114, TFEU) and hence cannot be tackled via this instrument.

As a consequence the possibilities of further regulating the sharing of cash control declaration for fiscal purposes will not be further developed here.

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<sup>24</sup> Cf. Annex 3

## 2.3 Problem 3: Impossibility for competent authorities to temporarily detain sub-threshold amounts

### 2.3.1 The problem and its drivers

Under the current cash control regulation, natural persons carrying cash on their person, in their means of transport or in their luggage are only subjected to the obligation to declare if they carry cash for a value of 10 000 Euro or more when entering or leaving the EU. This follows from a reading of Articles 3 and 4 of the Regulation.

The declaration threshold is evaluated by competent authorities per traveller who physically carries the cash in question. Further, Article 5.2 describes the possibilities for action by competent authorities under the cash control regulation in case they discover amounts of cash lower than the declaration threshold:

*Where it appears from the controls provided for in Article 4 that a natural person is entering or leaving the Community with sums of cash lower than the threshold fixed in Article 3 and where there are indications of illegal activities associated with the movement of cash, as referred to in Directive 91/308/EEC, that information, the full name, date and place of birth and nationality of that person and details of the means of transport used may also be recorded and processed by the competent authorities of the Member State referred to in Article 3(1) and be made available to the authorities referred to in Article 6(1) of Directive 91/308/EEC of that Member State.*

Temporary detention of the suspicious cash is not possible under the Cash Control Regulation if the amount is lower than the threshold to declare. This results in a notification to the FIU but without any way to temporarily stop the cash in case of suspicion.

In this context it should be pointed out that the interpretative note to FATF Recommendation 32 specifies:

*In the following two cases, competent authorities should be able to stop or restrain cash or BNIs for a reasonable time, in order to ascertain whether evidence of money laundering or terrorist financing may be found: (i) where there is a suspicion of money laundering or terrorist financing; or (ii) where there is a false declaration or false disclosure.*

From the context of the wording it is clear that the possibility to temporarily detain should be considered bearing in mind the criterion of suspicions of money laundering (predicate offenses) or terrorist financing, irrespective of the declaration threshold. It is highly doubtful that the objective should be interpreted in the sense that, regardless of any suspicious circumstances, provided that the declaration threshold were not reached and that hence there was no obligation to declare, the person would be free to enter/leave the EU with the cash while the information made its way to the FIU.

Further, in its best practices paper on recommendation 32, the FATF advises<sup>25</sup>:

*'When a false declaration or false disclosure occurs, or when there are reasonable grounds for suspicion of money laundering or terrorist financing, countries are encouraged to consider imposing a reverse burden of proof on the person carrying currency or bearer negotiable instruments (BNI) across borders on the question of the legitimacy of such currency and bearer negotiable instruments. Therefore if, under these circumstances, a person is unable to demonstrate the legitimate origin and*

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<sup>25</sup> FATF Guidance Document 'International best practices Detecting and preventing the cross-border transportation of cash and bearer negotiable instruments', 19 February 2010, p. 12, accessible at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/International%20BPP%20Detecting%20and%20Preventin%20illicit%20cross-border%20transportation%20SR%20IX%20%20COVER%202012.pdf>

*destination of the currency or bearer negotiable instruments, those funds may be stopped or restrained.'*

More than setting up merely a system of declarations, the Cash Control Regulation is part of the EU's AML/CFT framework, its prime objective is to enable authorities to act and trigger investigations in case of suspicion in order to prevent ML/TF

In a number of cases, the suspicious circumstances might trigger (temporary) detention of the cash under (national) legislation outside the cash control regulation, such as when lower than threshold amounts are found in luggage containing narcotics.

It is however problematic that in cases of suspicion, there is no 'backstop' in the cash control regulation allowing authorities to temporarily detain the cash in question. It is also doubtful if the objective of FATF Recommendation 32 is fully reached under these circumstances.

#### **Example 3: Foreign fighters**

A number of cases were detected of persons who were travelling to regions neighbouring ISIS-controlled territory. ISIS propaganda calls for fighters to come, bringing the money they can raise through small loans/sales of assets. Typically these individuals were found in possession of sums ranging between 3000-7000 Euro and they were either detected via intelligence information or identified following controls at borders in possession of ISIS propaganda, guidelines on how to reach the ISIS-held territory and below-threshold amounts of cash.

Source: Information received from Member States

A variant of the problem described above occurs when persons are clearly travelling together (e.g. relatives) with each individual carrying amounts below the threshold while the cumulative amount is higher than the threshold. This is sometimes done with the specific intention to escape the obligation to declare. This type of behaviour is referred to as 'smurfing' or 'structuring' and is regularly mentioned by cash national control experts.

#### **Example 4: Smurfing illustration**

A family of 2 adults and 2 young children (4 and 6 years old) leave the EU. After a control it is determined that every individual is carrying 9500 Euro in cash (500 Euro notes) on their person, carried in the same type of envelope. Additionally, both parents are each carrying approximately 200 Euro in small notes in their wallet, presumably to cover expenses while travelling. They were aware of the regulation, pointed out that they are individually carrying less than the declaration threshold and offer no remotely credible explanation as to what the origin of the cash is and why the children are carrying these amounts.

Source: case example received from one Member State, variants of the mechanism were also mentioned by other Member States during meetings between the Commission and national experts but less detail was provided.

### **2.3.2 Consequences and size of the problem**

Firstly, it is doubtful if the present situation where no temporary detention of the cash is possible in case of lower than declaration threshold amounts under suspicious circumstances is fully compatible with the spirit of FATF Recommendation 32.

Although in many cases a legal basis for (temporary) detention of the cash will be available outside the Cash Control Regulation, the absence of a 'catch-all' clause in the Regulation itself may give rise to

compliance issues. For the sake of transparency it should be noted that thus far, the issue has not yet been mentioned by the FATF, to that extent it remains a theoretical vulnerability.

Secondly, in the course of expert group meetings, Member States regularly mention cases where competent authorities were powerless to act under circumstances such as mentioned under example 3 and 4 and notified the FIU but otherwise had to let the persons in question travel onward in possession of their cash.

Although no concrete cases have been identified in which the lack of possibilities to detain the cash after a control resulted in e.g. the financing of a terrorist attack, it should be noted that the absence of a means provided in regulation itself is a potentially very serious security problem keeping in mind the relatively low amounts carried by foreign fighters or required to finance terrorism.

## 2.4 Problem 4: Imperfect definition of 'cash'

### 2.4.1 The problem and its drivers

As described previously, the definition of 'cash' as used by the FATF does not include gold, jewels or precious commodities which can also be easily used to transfer value.

The interpretative note to Recommendation 32 states:

*For the purposes of Recommendation 32, gold, precious metals and precious stones are not included, despite their high liquidity and use in certain situations as a means of exchange or transmitting value. These items may be otherwise covered under customs laws and regulations.*

Reports from Member States (e.g. France who specifically attracted attention to this phenomenon<sup>26</sup>) and operational information such as the results from operation 'Bingo' which was conducted by French customs and focused on cash and precious commodities shipped in post and freight, have identified shipments of gold which were identified as suspicious.

A number of Member States<sup>27</sup> include precious metals in their definition of 'cash' for intra-community control purposes.

In addition, the Commission Action Plan on terrorism finance specifically lists the expansion of the definition of 'cash' to include highly liquid, high value commodities as an option to be explored.

A customs declaration does not enable competent authorities to obtain all the information which should be collected, notably, there is no obligation to provide information on the provenance or intended use of the goods and in the case of natural persons carrying precious metals and leaving the EU, there is no legal obligation to make a customs declaration on exit.

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<sup>26</sup> Contribution provided by France to the Public Consultation on the Review of Regulation (EC) Nr. 1889/2005 on controls of cash entering or leaving the Community, operation 'Bingo' which was conducted in November-December of 2014 detected gold bullion, cheques and prepaid cards to the amount of 9.2 Mio Euro, sent in parcels and freight. However, it was not possible to isolate the value of the gold.

<sup>27</sup> E.g. France, Germany.

## 2.4.2 Consequences and size of the problem

Member States indicated that they suspect illicit cash (currency) is converted into precious metal prior to exiting or entering the EU with the intention to escape the obligation to declare and in the knowledge that this can be re-converted into cash at minimal cost.

### **Illustration of cash being converted into gold**

Using the rate applicable in June 2016, a person could purchase a Canadian 'Maple Leaf' gold coin for 1167 Euro, paying in cash and staying below the limit above which identity data needs to be recorded in the Member State in question. This operation could be repeated at multiple points of sale. The transaction cost incurred on the sale of such coins would typically not be higher than 4.5% (leaving underlying gold price fluctuations out of consideration). When exiting the EU this individual would not be required to make a customs declaration.

Disclaimer: this is a theoretical case, reflecting actual parameters regarding prices, possibilities for anonymous purchases and spreads. It illustrates the mechanism but does not reflect actual events.

Even though operations and literature<sup>28</sup> provide some indications that criminals may be escaping the obligation to declare by using precious metals as stores of value it has proven to be very hard to quantify this phenomenon. A recent questionnaire<sup>29</sup> which was sent by Commission services to relevant law enforcement authorities, FIU's, customs authorities and Europol indicated however that 67% of all replying authorities had recorded cases where precious commodities were detected on a person entering or leaving the EU which were identified as suspicious with regard to money laundering, terrorist financing or other illegal activity. In 90% of cases gold was mentioned as the high value commodity which was detected. The frequency of occurrence was described as high or medium in about half of the cases (with 18% of all replying authorities describing it as 'high', 30% as 'medium' and 52% as 'low'<sup>30</sup>).

Some Member States have national provisions similar to the obligation to declare cash as regards other commodities such as precious metals or precious stones.

The attractiveness of a commodity for such purpose also depends on the liquidity of the commodity and the ease with which it can be resold without incurring high margin costs. For criminals, the situation becomes much more difficult when other commodities such as diamonds or jewellery are used which are harder to evaluate and carry higher conversion costs.

Currently ongoing supranational risk assessments relating to money laundering and terrorism financing and data from law enforcement authorities have shown risks of money laundering with regard to the cross-border movements of anonymous prepaid cards. Europol has specifically pointed out those risks and issued a public call for the revision of the legal framework.<sup>31</sup>

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<sup>28</sup> FATF report on Money Laundering and Terrorism Financing risks and vulnerabilities associated with gold <http://www.fatf-gafi.org/media/fatf/documents/reports/ML-TF-risks-vulnerabilities-associated-with-gold.pdf>

<sup>29</sup> Questionnaire sent by DG Home in collaboration with DG Taxud, during June 2016. 42 replies were received from authorities in 27 Member States.

<sup>30</sup> For technical and organisational reasons it was impossible to establish a common quantitative definition of the notions 'high', 'medium' and 'low', the appreciation was hence qualitative and left to the appreciation of the individual respondents.

<sup>31</sup> See Europol report "Why cash is still king" <https://www.europol.europa.eu/newsroom/news/cash-still-king-criminals-prefer-cash-for-money-laundering>

From an enforceability perspective, it should be borne in mind that competent authorities need to be able to reasonably quickly determine what is covered in the expanded definition of cash and if so, if the value reaches the threshold for declaration. The technical challenges for doing so and the concern to not cause undue burden to the traveller or the operator involved in the shipment and the legal duty not to infringe the right of free movement and the right to property demands such an expansion be underpinned by clear evidence.

As regards prepaid cards, it appears that technical solutions are possible to ensure the enforceability of a rule providing an obligation to declare them, which could help competent authorities to make reasonably quick decisions. In the US, for example, solutions have been developed for law enforcement such as the Electronic Recovery and Access to Data machine (ERAD).

Therefore the addition of prepaid cards in the definition of cash would not require an immediate and major shift in the enforcement of the rule, but it would contribute greatly to creating the necessary nexus to the work of competent authorities to better identify and be able to take action against a major source of concern: prepaid instruments loaded with considerable amounts issued in third countries with strategic deficiencies in their money laundering and terrorism financing frameworks.

**2.5 Problem 5: Divergent penalties**

**2.5.1. Context**

Article 9.1 of the Cash Control Regulation specifies that:

*Each Member State shall introduce penalties to apply in the event of failure to comply with the obligation to declare laid down in Article 3. Such penalties shall be effective, proportionate and dissuasive.*

It is thus left to the national legislators to specify penalties for non-declaration which respect these criteria.

It should be pointed out that the penalty under Article 9.1 of the Cash Control Regulation concerns solely the failure to declare and in no way prejudices the existence of any predicate offence in connection to the cash which was not declared and any penalties which may be imposed for the commission of that predicate offence, which should be the subject of a separate investigation.

**2.5.2 The problem and its drivers**

When examining the penalties specified by Member States, it becomes apparent that wide differences exist in the level of penalty and whether aggravating/mitigating circumstances taken into account or not. For purposes of illustration, the table below presents a partial overview of Article 9.1 penalties in 9 Member States. The information was provided by Member States to the Commission following a questionnaire sent in 2014:

**Figure 3. Differences in penalties between Member States**

Member state	Minimum penalty	Maximum penalty	Mitigating circumstances	Aggravating circumstances
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MS 1	10%	Amount undeclared	Yes	Yes
MS 2	500 €	100,000 €	Yes	Yes
MS 3	2-21%	1,000,000 €	Yes	Yes
MS 4	600 €	200% of amount undeclared	Yes	Yes
MS 5	660 €	6,600 €	No	No
MS 6	330 €	3,300 €	n/a	n/a
MS 7	0 €	10,000 €	n/a	n/a
MS 8	0 €	46,000 €	n/a	n/a

Source: European Commission Questionnaire to Member States 2014

The level of certain penalties and the way in which they are imposed in jurisdictions indicates that in some cases, Member States competent authorities seem to:

- a) Assume the existence of an underlying offense that needs to be penalised, once a failure to declare has been established  
and/or
- b) The payment of the penalty imposed is 'liberatory' and less emphasis is placed on investigating whether an underlying predicate offence is present.

The Court of Justice of the European Union remarked in a recent judgment where the proportionality of the penalty for non-declaration was at issue<sup>32</sup> that:

*'However, in the light of the nature of the infringement concerned, namely a breach of the obligation to declare laid down in Article 3 of Regulation No 1889/2005, a fine equivalent to 60% of the amount of undeclared cash, where that amount is more than EUR 50 000, does not seem to be proportionate. Such a fine goes beyond what is necessary in order to ensure compliance with that obligation and the fulfilment of the objectives pursued by that regulation.'*

And

*'It should also be noted that Article 4(2) of Regulation No 1889/2005 provides for the possibility to detain, by administrative decision in accordance with the conditions laid down under national legislation, cash which has not been declared in accordance with Article 3 of that regulation, in order, inter alia, to allow the competent authorities to carry out the necessary controls and checks relating to the provenance of that cash, its intended use and destination. Therefore, a penalty which consists of a fine of a lower amount, together with a measure to detain cash that has not been declared in accordance with Article 3 thereof, is capable of attaining the objectives pursued by that regulation without going beyond what is necessary for that purpose. In this case, it is apparent from the file submitted to the Court that the legislation at issue in the main proceedings does not make provision for such a possibility.'*

<sup>32</sup> Judgment in Case C-255/14 (Chmielewsky vs. Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Vám- és Pénzügyőri Főigazgatósága) as well as the opinion of Advocate-general Wathelet.

### 2.5.3 Consequences and size of the problem

The wide divergence in penalties and the way in which these are imposed creates several undesirable consequences:

a) Unequal treatment of European and third country citizens who fail to declare, depending on the Member State through which they were entering or leaving the EU. While leaving the determination of the penalty for non-declaration to the Member States entails a different approach which is not necessarily discriminatory in itself, the extent to which penalties vary in this specific case raises proportionality questions in respect of these differences.

b) As a consequence, the possibility for persons who deliberately fail to declare to engage in 'forum shopping' via the selection of Member States with minimal penalties or who seem to levy a penalty for non-declaration but otherwise take no measures to investigate underlying predicate offences.

c) In case of penalties for non-declaration which are clearly disproportionately high taking into account the objective of the measure, the measure may amount to an infringement of the right to property.<sup>33</sup>

Concerning the size of the problem, no precise quantitative data is available regarding the amounts of penalties imposed in Member States. However, in 2015, approximately 11 000 cases of failure to declare were detected, for a total amount of approximately 338 Mio Euro<sup>34</sup> incorrectly declared cash. In all of such cases, Article 9.1 applies.

## 2.6 Problem 6: Different implementation levels among Member States

### 2.6.1 The problem and its drivers

Further to specific issues relating to the undesired effects of different implementation levels among Member States which were mentioned earlier (e.g. regarding data exchange and level of penalties) a number of specific issues exist.

a) Statistical data.

Under the current cash control regulation, there exists no obligation for the Member States to periodically provide statistical data regarding controls, declarations, infractions and penalties to the Commission. Having such information available, analysing it and acting upon it is essential in order to verify that the Regulation is applied equally in the Member States. For instance parameters such as the number of infractions detected / number of declarations filed and the number of controls performed could help assess the level of implementation of the Cash Controls Regulation.

b) The declaration form

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<sup>33</sup> Article 17, Charter of Fundamental rights of the European Union.

<sup>34</sup> Data provided by Member States to the European Commission on voluntary basis and presented at the 19<sup>th</sup> plenary meeting of the Cash Controls Expert Working Group.

Article 3.2 of the Cash Control regulation specifies the data elements which need to be collected and assessed when a declaration is made. Article 3.3 leaves the way in which the data is collected to the Member States and provides for the possibility of requesting an oral declaration, a declaration in writing or an electronic declaration, albeit with the proviso that the declarant has at all times the right to demand a copy in writing. While all Member States opted for a declaration in writing or an electronic declaration, the Regulation does not lay down a specific form or layout which is to be used.

#### c) The penalties

The regulation specified that all Member States had to inform the Commission regarding the penalties under national legislation for non-declaration. This had to be done by the 15<sup>th</sup> of June 2007 but no provision was made to inform the Commission of any subsequent changes.

### 2.6.2 Consequences and size of the problem

Regarding statistical data, the Commission currently has a non-enforceable agreement with Member States to provide data on the number of cash declarations received and the number of infractions.

These are communicated on a quarterly basis and analysed/ discussed yearly. Information regarding the penalties imposed is however only provided by about 2/3<sup>rd</sup> of Member States, leading to difficulties in the assessment of the effectiveness of the measure.

Regarding the declaration form, on a voluntary basis the majority of Member States (24 out of 28) use a harmonised form which has been developed by the Member States together with the Commission. This form can to some extent be customised to provide the possibility to include specific national elements (e.g. the flag of the Member State, references to national legislation etc).

The use of a harmonised layout has as considerable advantage that travellers benefit from the same 'look and feel' of a declaration regardless of the Member State through which they are entering or leaving the EU and that language problems can be largely avoided, as the fields to be completed match across forms, regardless of the language of the document. Lastly, a harmonised declaration form also facilitates the practical aspects of information exchange. Information regarding penalties for non-declaration is collected periodically by the Commission.

The elements mentioned above do not currently present large problems. This fortuitous situation is a result of the voluntary cooperation of all Member States. Considered from the perspective of good administration, transparency, equality and enforceability the possibility of formalisation should be examined.

## 2.7 Problem 7: Divergent national measures to raise awareness

### 2.7.1 The problem and its drivers

Under the present cash control regulation, there is no obligation for the Member States to provide information to travellers regarding the existence of and their obligations under the Cash Control Regulation. The adage that 'everyone is supposed to know the law' applies.

It should however be recognised that in the context of declarants who are largely private persons, coming from different backgrounds, speaking different languages, from a good administration perspective some effort should be made to make easily understandable information available to the public regarding their obligations.

At the time of entry into force of the Cash Control Regulation, this was achieved through a promotion campaign sponsored at EU-level, with documentation made available to Member States. Currently, in some Member States points of entry or exit, information is provided but this is not a uniform practice.

The Commission maintains a webpage informing travellers of their obligations under the Cash Control Regulation<sup>35</sup>. This webpage has links to the declaration forms used in Member States.

Further, as the obligation to declare cash when entering or leaving the EU is imposed based on EU-legislation, a secondary question arises: could some benefit be derived from presenting the information in a harmonised way in order to achieve the same 'look and feel' regardless of the Member State of entry or exit?

## 2.7.2 Consequences of the problem and size of the problem

The most frequently heard explanation<sup>36</sup> for failure to declare cash is a statement by the traveller expressing ignorance of his/her obligations under the cash control regulation. Regardless of whether such statement reflects reality, it is clear that professing ignorance –and potentially invoking ignorance as a mitigating factor- will be less credible if ample information in easily accessible terms is provided or made available to the traveller.

The initial EU-information and awareness-raising campaign was financed by the Commission and consisted of 'cash suitcases' (large suitcases filled with 'paper money' with a transparent lid that were made available to Member States who could circulate them on luggage conveyor belts, flyers and information booklets in multiple languages, as well as an animation that could be shown on airport monitors.<sup>37</sup> It received very good feedback regarding visibility. Subsequently, stocks of material were distributed to Member States, who were given access to design templates with which they could print additional quantities on a national level. Overall, this did not work with reasons cited such as budgetary constraints, administrative difficulties etc. Currently the Commission has obtained budget to start printing and distributing materials again and is taking 'orders' from Member States who wish to use this.

It is recalled that on an average year, approximately 100 000 cash control declarations are made for a total amount of between 60 and 70 billion Euro. Over the same time period, approximately 11 000 infractions representing a sum average of approximately 300 Mio Euro are detected. The potential target audience for any awareness-raising initiatives is thus significant.

## 3. EU right to act and subsidiarity

### 3.1 Legal basis in primary law

The legal basis for the initiative will continue to be Articles 33 and 114 of the Treaty on the Functioning of the European Union.

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<sup>35</sup> Accessible via the Directorate-general Taxation and Customs Union homepage at [http://ec.europa.eu/taxation\\_customs/customs/customs\\_controls/cash\\_controls/index\\_en.htm](http://ec.europa.eu/taxation_customs/customs/customs_controls/cash_controls/index_en.htm)

<sup>36</sup> As reported by Member States national experts to the Commission.

<sup>37</sup> Accessible via the Directorate-general Taxation and Customs Union homepage at [http://ec.europa.eu/taxation\\_customs/customs/customs\\_controls/cash\\_controls/index\\_en.htm](http://ec.europa.eu/taxation_customs/customs/customs_controls/cash_controls/index_en.htm)

## 3.2 Subsidiarity

### **Regarding Article 114, TFEU:**

The proposal is an element in the EU's Anti-Money laundering / anti-terrorist finance framework. Where the Anti-Money Laundering Directive seeks to provide a harmonised framework of measures with regards to the formal financial sector and certain professions deemed a potential risk, this proposed regulation seeks to address the issue of cash which is being moved, either carried by natural persons or otherwise via freight/parcel/post services, between a Member State of the EU and a third country and vice versa.

The organisation of an internal market with free movement of goods, persons, services and capital necessarily involves measures of harmonisation between Member States in order to ensure an appropriate and equal measure of protection and the maintenance of a level playing field where measures or control are deemed necessary in the public interest.

It would not be possible to achieve this degree of harmonisation based solely on measures taken under national legislation. Money launderers and terrorist financiers could exploit divergences in approaches under national legislation and attempt to move their cash into or out of the EU through the Member States where controls or penalties are weakest. Taking into account the amounts of cash entering or leaving the EU on a yearly basis, such differences would have a distortive effect on the internal market.

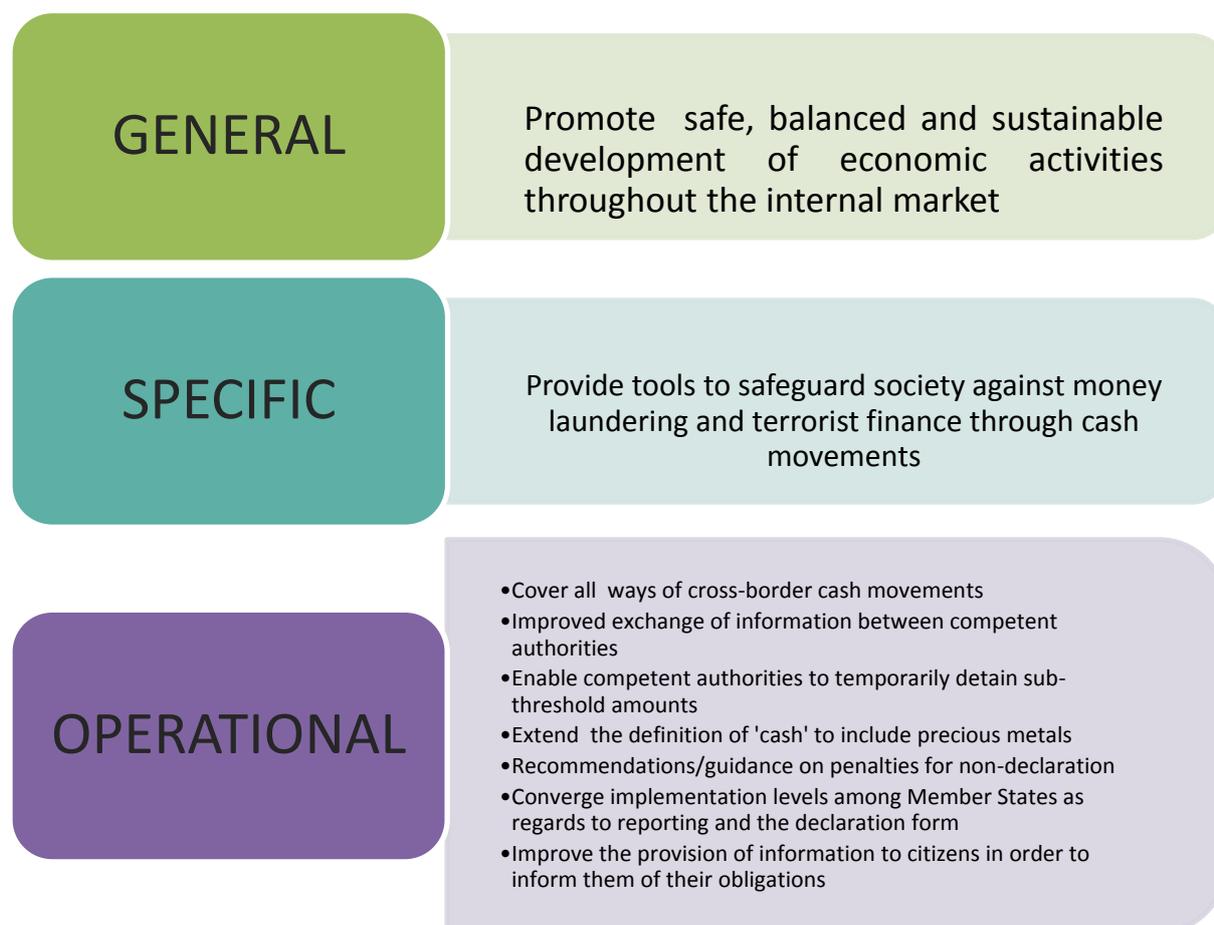
Further, following the provisions existing under the existing Cash Control Regulation, the proposal is without prejudice to any national control measures regarding cash movements which may be laid down pursuant to Article 65, TFEU.

### **Regarding Article 33, TFEU:**

As regards to customs cooperation, the proposal lays down a harmonised approach for customs authorities and other authorities acting as such in the course of controls at the external border to register, process and transfer cash control declarations and perform controls. This approach and its underlying objective are closely related to the internal market principles as noted supra and could not be achieved sufficiently on a national level.

## 4. Objectives of the proposal

Table 4. Objectives of the proposal



## 5. Policy options

### 5.1 Problem 1: Imperfect coverage of cross-border cash movements

#### 5.1.1 Option description

5.1.1.1 Option A BASELINE, no policy change: Do not change the present regulatory system and continue to apply the standard customs declaration system to cash shipped in post and freight. Under the baseline option, the obligation to declare cash above a certain threshold would remain limited to cash carried by natural persons.

5.1.1.2 Option B: Apply the current declaration system for natural persons (obligation for the person to approach authorities and make a declaration) but provide for a disclosure system for cash shipped in post or freight.

Persons or enterprises involved in shipments of cash through post, courier or freight (any cross-external border shipment which does not involve a natural person accompanying the consignment) could be requested by competent authorities to disclose particulars of the cash shipment and submit a (disclosure) declaration if, upon checking, amounts of cash higher than the declaration threshold are found and the competent authorities decide to request additional information.

5.1.1.3 Option C: Provide for a mandatory cash declaration system for all types of movement of cash in amounts over the threshold, irrespective of the method (carried by a person or shipped in parcels or freight).

Under Option C a cash control declaration would have to be systematically filed by natural persons carrying cash over the threshold value as well as by natural or legal persons sending or receiving unaccompanied cash consignments over the declaration threshold. This declaration would come in addition to any customs declaration filed.

5.1.1.4 Option D: Provide for a mandatory cash declaration system for all types of movement of cash in amounts over the threshold but provide for an exemption for registered financial institutions.

This exemption takes into account that those institutions are already covered by AML/CFT rules. However, authorities would have to be able to determine if an exemption applies or not.

5.1.1.5 Option E: Provide for a system which is entirely based on disclosure, both for cash carried by natural persons and for cash sent in post/freight.

Option E can be compliant with FATF Recommendation 32 (when paired with adequate control levels). It would not require any systematic declaration to be made, irrespective of the mode of border crossing. Only in case of controls by competent authorities who request disclosure would a natural person carrying cash or the sender / intended recipient of unaccompanied cash consignments be required to make a declaration.

The open public consultation did not query stakeholder opinion for option E as this option was only taken into account later in the process, following inter-service discussion. For the other options, the vast majority of respondents favour options B or C, with opinions divided almost equally between both options (14 respondents favouring B and 12 favouring C).

## 5.2 Difficulties regarding the exchange of information between competent authorities

As the topic of information exchange is highly complex, involves considerations of a legal, practical and technological nature and has an impact on personal data protection and fundamental rights, please refer to Annex 6 for additional information.

Given that there are five different possible flows of information (as presented in Figure 2) out of which two flows are significant for the current proposal, it has been decided to treat these important flows individually. Thus, the problem of information exchange has been split into two sub-problems.

### 5.2.1 Sub-problem 2.1: Exchange of information between competent authorities

5.2.1.1 Option A: (BASELINE, no policy change) Declaration and infraction data may be shared between competent authorities in different Member States only in case of indications of illegal activity.

5.2.1.2 Option B: Provide for an obligation in the regulation to mandatorily exchange information regarding infractions against the obligation to declare or declarations where there are indications of illegal activity between competent authorities of different Member States.

5.2.1.3 Option C: Provide for an obligation in the regulation to mandatorily exchange information regarding infractions against the obligation to declare or declarations where there are indications of illegal activity between competent authorities of different Member States but keep the sharing of regular declaration information optional

5.2.1.4 Option D: Provide for an obligation in the Regulation to mandatorily exchange both infractions, declarations where there are indications of illegal activity and regular declaration information between competent authorities in different Member States.

Compared to the baseline scenario in current legislation (A), which obtained support from 4 respondents, there seems to be a majority of 25 respondents in favour of increasing the sharing of information regarding declarations or infractions between Member States. The opinion is almost

evenly split between respondents who want to make the sharing of all declaration data mandatory via legislation (13 respondents) and those who only want to impose the sharing of information about infractions but keep the sharing of regular declaration data optional (12 respondents).

For the above options, it should be noted that with 'competent authorities' are meant the authorities designated in a Member State to receive declarations and perform controls. In the large majority of cases these will be the customs authorities.

## **5.2.2 Sub-problem 2.2: Exchange of information between the competent authorities and the FIU**

5.2.2.1 Option A: (BASELINE, no policy change) Declaration data has to be made available by the competent authority to the FIU of its Member State, no definition is given of what 'made available' implies and whether it involves active availability (sending the information, providing access to a database) or passive availability (such as storing the paper declarations in a room where they are accessible to the FIU).

5.1.1.2 Option B: Specify that 'making available' means transmission of the data by electronic means or providing the FIU access to a database which contains all the declaration information.

As these options concern modalities of the exchange of data between the competent authority and the FIU, the consultation did not solicit feedback regarding this point.

## **5.3 Problem 3: Impossibility for competent authorities to temporarily detain sub-threshold amounts**

### **5.3.1 Option description**

5.3.1.1 Option A: (BASELINE, no policy change): Competent authorities may record, process and make available to the FIU a number of details concerning the person and the cash, provided that there are indications of illegal activities concerning the movement of cash. They do not, however, have the authority to temporarily detain the cash based on the cash control regulation.

5.3.1.2 Option B: Lay down an explicit provision which would allow competent authorities to temporarily detain the cash if they judge that indications of criminal activity (predicate offences to money laundering or terrorist finance) are present.

5.3.1.3 Option C: As in Option B but specify a limited list of objective criteria in (delegated) legislation which, if they are present, would allow authorities to temporarily detain the cash.

5.3.1.4 Option D: As in option B but in addition provide a guideline concerning suspicious activities. This guideline would be a non-legislative 'soft law' option. This option would take the middle ground between Options B and C, providing flexibility and preventing circumvention of the norm while at the same time offering some (albeit non-binding) guidance as to the types of circumstances that could constitute indications of criminal activity

Results from the public consultation indicate that a large majority of stakeholders who responded are in favour of 'a' mechanism that enables the authorities to act on in case sub-threshold amounts are detected but there are indications of illegal activity. However, many of those added that some limitation should be provided so as to safeguard against arbitrary temporary detention.

## **5.4 Problem 4: Imperfect definition of 'Cash'**

### **5.4.1 Option description**

5.4.1.1 Option A: (BASELINE, no policy change) Maintain the definition of cash as it is presently worded in the CCR (currency and bearer negotiable instruments) but do not expand the definition to include precious metals / commodities.

5.4.1.2 Option B: Redefine the notion 'cash' in the regulation to include the elements under option A and add gold as a main category. Refer to an annex in the regulation, modifiable by delegated act for the specification of the constitutive elements within each of these categories, leaving open the possibility to expand or amend this taking account of the circumstances and evolution of society.

5.4.1.3 Option C: Expand the definition of 'cash' in the regulation including gold and precious metals and specify this in the revised CCR.

## 5.5 Problem 5: Divergent 'penalties'

### 5.5.1 Option description

5.5.1.1 Option A (BASELINE, no policy change): Maintain the current provision stating that: "each Member State shall introduce penalties to apply in the event of failure to comply with the obligation to declare [...] Such penalties shall be effective, proportionate and dissuasive". In this case the Member States determine the penalty for non-declaration which they deem appropriate and specify if/which mitigating or aggravating circumstances should be taken into account.

5.5.1.2 Option B: Specify in the regulation or in a delegated act provisions on the nature and severity of penalties to be applied for failing to declare.

5.5.1.3 Option C: Maintain the current provision stating that 'Each Member State shall introduce penalties to apply in the event of failure to comply with the obligation to declare [...] Such penalties shall be effective, proportionate and dissuasive, in addition, propose –through a Commission recommendation – guidance on penalties to be applied for failure to declare.

The Commission should then evaluate if the penalties in a Member State are compatible with the decision by the European Court of Justice and if required initiate proceedings to ensure compliance.

There is no majority in favour of establishing harmonised penalties for the failure to declare. It was explicitly mentioned in the questionnaire that these penalties would be intended to deal with the failure to declare only and have no relation with the licit or illicit origin or destination of the cash.

Nevertheless, according to the results of the open public consultation, the largest group of respondents (17) is favouring an initiative to harmonise the sanction regime to some extent, with a minority of 9 respondents being opposed to harmonisation initiatives and an equal group holding no strong opinion on the matter.

Further to this, following discussions with Member States national experts who discussed the issue of approximation of penalties, approximately half were in favour of a legislative approach toward approximation while the other half were opposed to this and proposed an approach –if any- through a guideline. The single element on which universal agreement was expressed was that whatever system was chosen, it should be transparent and simple to apply in practice.

## 5.6 Problem 6: Different implementation levels among Member States

### 5.6.1 Option description

5.6.1.1 Option A: (BASELINE, no policy change): The CCR does not lay down obligations to use a standard declaration form nor to provide any statistical data or performance metrics regarding controls to the Commission, other than the obligation to notify the Commission about the penalties for non-declaration (one time event, no-follow up on modifications).

5.6.1.2 Option B: Make it mandatory for Member States to use a harmonised declaration form, the model of which is to be determined in implementing legislation, lay down an obligation to periodically provide statistical information to the Commission on declarations registered, controls made on cases where a declaration is made, controls made in the absence of declaration and the results of the controls performed. Statistical information should also refer to penalties imposed for non-declaration including any amendments to those penalties.

This option is to be split in three parts: a) harmonisation of the declaration form, b) systematic provision of statistical documentation to the Commission and c) informing the Commission of penalties under national legislation for failing to comply with the obligation to declare (or disclose, depending on the path chosen for problem 5.1) and of any modifications in the penalties regime.

**Important note:** During the open public consultation, stakeholder opinion was only solicited regarding the harmonisation of the cash declaration form, not regarding any provision which would impose an obligation on Member States to provide statistical data and performance metrics to the Commission.

A majority of 19 respondents are in favour of using a standardised form, the format of which should be specified in the legislation. Another 10 respondents are in favour of maintaining the present system, where the large majority of Member States use the same form (which can be modified to reflect national elements) but without there being binding legislation to do so.

## 5.7 Problem 7: Divergent national measures to raise awareness

### 5.7.1 Option description

5.7.1.1 Option A (BASELINE, no policy change): no legal obligations nor guidelines to raise public awareness.

5.7.1.2 Option B: Provide for an obligation to Member States to raise awareness/inform stakeholders about their obligations, but allow them to determine the most appropriate way to achieve this.

5.7.1.3 Option C: Provide for an obligation to Member States to raise awareness and harmonise the measures as regards to form and content.

5.7.1.4 Option D: Do not lay down harmonised provisions for awareness-raising, but encourage Member States via guidelines to inform stakeholders of their obligations (non-regulatory option).

According to the open public consultation, 20 respondents support a policy option where it would be made mandatory for Member States to inform the public about the duty to declare cash movements. An additional 7 consider that an explicit reference should be made about awareness-raising in the legislation by means of a recommendation to the Member States, not an obligation. Maintaining the current framework, where no mention about awareness-raising is made in the legislation, is supported by 5 respondents.

Only in case respondents indicated that a reference to awareness-raising should be made the question was asked if this should be harmonised. 20 respondents were in favour of one harmonised approach.

## 6. Impacts and option comparison

This section assesses the options outlined above in terms of their **effectiveness, efficiency (focusing on administrative burden/costs)** and **coherence (with the legislative framework related to fundamental rights and data protection)** in reaching the specific objectives, which contribute to the general objectives of promoting a harmonious, balanced and sustainable development of economic activities throughout the internal market.

The preferred option has been highlighted in green in each summary table, to facilitate reading.

From a methodological point of view it makes sense to assign a value of “0” (neutral) to the baseline option, relative to which the other options are weighed. However, a value of “-” (negative) has sometimes been assigned where the baseline option fails the criterion and is ineffective.

### 6.1 Problem 1: Imperfect coverage of cross-border cash movements

#### 6.1.1 Option impact analysis.

##### 6.1.1.1 Option A (Baseline option): no policy change

As option A is not compliant with an international norm to which the EU has committed itself, to the extent that it does not cover cash shipped via other methods than carried by natural persons, it is considered not to be viable.

**6.1.1.2 Option B:** Apply the current declaration system for natural persons but provide for a disclosure system for cash shipped in post or freight.

**Effectiveness:** Such approach would maintain the baseline regarding cash carried by natural persons, which has been evaluated as largely satisfactory. A disclosure system is compliant with FATF Recommendation 32, which also allows a disclosure-based approach (when paired with adequate control levels). A disclosure system allows flexibility, as authorities could perform risk-based controls and selectively decide if/when to request additional information which would add to a customs declaration and capture details not present on the customs declaration.

The disadvantage of a disclosure system is that no systematic details regarding such shipments would be collected through declarations and would be available for analysis by the Member States Financial Intelligence Units. For cash not carried by natural persons, the effectiveness will –for the disclosure system- depend on the implementation of controls and the evaluation and follow-up. Option B was the option preferred by most stakeholders responding to the public consultation.

**Administrative burden/ Cost:** Concrete estimates are difficult. It is to be expected that authorities will mostly request a disclosure to be made in case of suspicion that a predicate offence to money laundering or terrorist finance may exist, based on risk analysis and an appreciation of elements of the case. The main additional burden for the administrations will likely consist of additional work on risk analysis to try to target the right consignments, some level of extra controls and administration regarding the request for a declaration. It should be borne in mind however that an international norm imposes controls on any type of cross-external border movement. This form of control would be the least intrusive one to comply with the international standard. Compared to option C the administrative burden would be smaller since the amount of declarations that needs to be handled is less extensive. The burden will also be smaller for the consigner/consignee who will only have to make a declaration upon request, not in a systematic way.

In addition to the above it should be remarked that most postal/parcel operators expressly prohibit the sending of cash or valuable commodities in their general conditions of carriage. This effectively renders it impossible to ensure such consignments against loss. These disadvantages make that only a very limited number of economic operators (except for large financial institutions who negotiate

separate arrangements and are already covered by AMLD provisions) use this channel to send or receive important quantities of cash and the administrative cost for the postal /parcel operators should therefore be small. If a consignment with cash is found the competent authority will keep the consignment while waiting for a disclosure declaration or until it can be sent to its addressee and this will consequently not render any significant administrative burden or cost for the postal/parcel operators.

For the purpose of trying to quantify the administrative burden and costs related to the introduction of the 'disclosure declaration' principle for unaccompanied cash, the following overview presents potential EU-wide costs per year. It is important to understand that this estimate makes a number of assumptions which in the opinion of the authors are realistic for scenario 1. However, no verifiable data is available and modification of the variables may have an important impact on total costs<sup>38</sup>. Scenario 2 is intended to illustrate a 'highest-cost' scenario but is deemed unlikely due to the facts mentioned above regarding that most postal/parcel operators expressly prohibit the sending of cash or valuable commodities. Neither scenario takes into account the potential income for the Treasury as a result of penalties imposed for failure to declare.

### **Assumptions:**

1. Average EU-wide hourly labour cost of both persons performing the controls as those completing the declaration is estimated at 25.00 Euros/hour<sup>39</sup>.
2. The average time to complete a declaration is estimated at 10 minutes, filing and sending the document takes another 20 minutes<sup>40</sup>.
3. The average time for an initial control is estimated at 3 minutes/consignment. In case a declaration is requested, follow-up (counting the cash, sending the declaration form accompanied by instructions) is estimated to take another 30 minutes/file. Infractions are estimated to require 2 hours of follow-up per file (on the level of authorities who perform controls and receive declarations).
4. The controls will be performed by competent authorities in the course of their regular duties (controls on parcels).
5. Time for detection: 3 minutes/package.
6. Follow up on the disclosure declarations: 30 minutes/file.
7. In 25% of cases where disclosure is requested, no answer or an incorrect answer would be forthcoming so further enquiries are initiated and these take 2 hours/case.
8. Filing of declaration for operators 30 min/ declaration.

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<sup>38</sup> The figure of 10 000 detections under scenario 1 represent 10% of the amount of declarations made by natural persons. The figure of 10% is reasonable in light of the fact that most operators prohibit the shipping of large amounts of cash through their systems, hence it cannot be insured for losses.

<sup>39</sup> [http://ec.europa.eu/eurostat/statistics-explained/index.php/Hourly\\_labour\\_costs](http://ec.europa.eu/eurostat/statistics-explained/index.php/Hourly_labour_costs)

<sup>40</sup> Internal average measured when persons unfamiliar with the process were requested to perform these actions, not statistically significant, for information purposes only.

## Quantification of costs

	Time for detection	Follow up on the disclosure declarations	Further enquiries	Total cost for authorities	Total cost for operators who need to complete a declaration	Overall total per year
<b>Scenario 1:</b> 10 000 detections, disclosure requested in 80% of cases:	30 000 min/ 500 hours at 25 €/h =  <b>12 500 €</b>	8000 cases * 0.5 h * 25 €/h =  <b>100 000 €</b>	2000 cases * 2 h * 25 €/h =  <b>100 000 €</b>	<b>212 500 €</b>	8000 cases * 0.5 h /declaration * 25 €/h =  <b>100 000 €</b>	<b>312 500 €</b>
<b>Scenario 2:</b> 50 000 detections, disclosure requested in 100% of cases	150 000 min/2500h at 25 €/h =  <b>62 500 €</b>	50 000 cases * 0.5 h * 25 €/h =  <b>625 000 €</b>	12500 cases * 2 h * 25 €/h =  <b>625 000 €</b>	<b>1 312 500 €</b>	50000 cases * 0.5 h/ declaration * 25 €/h =  <b>625 000 €</b>	<b>1 937 500 €</b>

**Coherence with data protection/fundamental rights<sup>41</sup>:** A provision allowing for obligatory disclosure would interfere with the rights to private life (Article 7 of the Charter of Fundamental Rights of the EU) (henceforth: CFR) and the freedom to conduct a business (Article 16 CFR; any regulation affecting the conduction of business interferes with this right). As this option would involve the collection of personal data, Art. 8 CFR is also impacted. At the same time the justification conditions of Article 51 I CFR would need to be fulfilled. The aim of the restriction of the rights at hand is one recognised by the EU (detect cash movements linked to Money laundering offences or the financing of terrorist activities). Being of less intrusive character compared to an automatic obligatory declaration of all shipments the measure would be proportionate to its objective. The regulation would need to explicitly list the legal basis for the action envisaged.

**6.1.1.3 Option C:** Provide for a mandatory cash declaration system for all types of movement of cash in amounts over the threshold.

**Effectiveness:** The benefit of this option is that it captures in principle all cross-external border movements and allows for a great quantity of information to be collected and analysed. This theoretical advantage is however negated to a large extent as the principal targets of the control system (criminals) will likely not declare and ultimate effectiveness would still be dependent on controls.

**Administrative burden/Cost:** The administrative burden for the consigners/consignees would be higher than option B, as a systematic declaration obligation would be imposed on all cross-border movements. This would add to the obligations under a customs declaration which might apply and double declarations would be necessary in some cases. Moreover, as explained above, it is probable that this burden would largely be shouldered by persons and enterprises who seek to comply with the law whereas criminals are not likely to comply. For the administrations there would be an extra burden associated with the handling of declarations but also for performing controls.. Extra resources would need to be allocated.

<sup>41</sup> The Charter of Fundamental Rights of the European Union can be consulted here: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN> Additional information can be obtained here: [http://ec.europa.eu/justice/fundamental-rights/charter/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm)

**Coherence with data protection/fundamental rights:** The impact on the fundamental rights to private life and protection of personal data (Articles 7 and 8 CFR) would be stronger than in option B as a lot of data will be systematically collected. If statistics regarding declarations vs infractions for cash carried by natural persons may be extrapolated, in <10%<sup>42</sup> of the total number of controls would infractions against the obligation to declare be found, while also the 90% of compliant<sup>43</sup> declarants would have to provide personal data and details about the transaction.

**6.1.1.4 Option D:** Provide for a mandatory cash declaration system for all types of movement of cash in amounts over the threshold but provide for an exemption for cash sent by registered financial institutions.

**Effectiveness:** As it is not always possible to determine<sup>44</sup> in a reasonable time whether a company is indeed a registered financial institution, this would negatively impact effectiveness.

**Administrative burden/costs:** As in option C, with an additional burden on the authorities who need to determine in a short time if an exemption applies. In addition, access to a comprehensive list would need to be provided to competent authorities in the field, which would incur extra costs.

**Coherence with data protection/fundamental rights:** similar to option C.

**6.1.1.5 Option E:** Provide for an entirely disclosure-based system, both for cash carried by natural persons and cash shipped through post/express courier or freight.

**Effectiveness:** Would be wholly dependent on implementation of controls and evaluation of control measures. The effectiveness would be difficult to evaluate and prone to divergent levels of controls between Member States. Such divergent approach would increase the risk of forum shopping by criminals and therefore diminish the effectiveness of the control regime.

**Administrative burden / costs:** Low as it does not require any systematic declaration to be made.

**Coherence with data protection / fundamental rights:** This option would be least intrusive on the fundamental right to a private life (Article 7 CFR) and the freedom to conduct a business (Article 16 CFR) however it would still negatively impact those rights, albeit to a lesser degree than the other options.

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<sup>42</sup> For cash carried by natural persons crossing the external border, there are +-10% failures to declare, considered vs the total number of declarations. This is not the same as 10% of the controls performed which are positive, as no exact data are available concerning the controls performed that were ‘non-positive’ (persons carrying amounts lower than the threshold who were controlled). It is however certain that the total number of controls performed are higher than the declarations and detections reflected in the statistics.

<sup>43</sup> Compliant as regards the obligation to declare, not necessarily compliant in the sense that no predicate offences to money laundering or terrorist finance are present, as it has been demonstrated in the BE-NL pilot project that for at least a substantial fraction of declarants who declared in a Member State other than their own, there were indications of potential ‘fiscal crime’.

<sup>44</sup> Communication between DG Taxud and DG ECFIN regarding the existence and accessibility of a reliable database with a list of all ‘financial institutions’ worldwide.

## 6.1.2 Summary and preferred option selection<sup>45</sup>

Objective/Impact	Option A	Option B	Option C	Option D	Option E
<b>Effectiveness</b>	- -	<b>+</b>	+	-	--
<b>Cost/Burden</b>	0	<b>0</b>	-	--	+
<b>DP/FR impact</b>	0	-	--	-	0
<b>Conclusion</b>	--	<b>0</b>	--	----	-

**Option B** (Apply the current declaration system for natural persons but provide for a disclosure system for cash shipped in post or freight.) is the preferred option since it is compliant with FATF Recommendation 32 (when paired with adequate control levels). The benefit compared to option A is that authorities will have the power to demand a cash control declaration which would capture details that cannot be provided on a customs declaration when finding suspicious consignments. The information collected can also be used for future risk analysis purposes and increase the accuracy of the risk assessment regarding these types of consignments.

Compared to option C the administrative burden on authorities would be smaller for option B since the amount of declarations that needs to be handled is less extensive. The burden will also be smaller for the consigner/consignee who will only have to make a declaration upon request. Option D is not to be favoured since it imposes an extra burden on the competent authorities who have to make a determination on the legitimacy of exemption requests by purported financial institutions, without adding enough value.

Option E could easily give rise to divergent implementation and unequal treatment in various Member States, and is therefore not considered as effective as option B. Most Member States have also indicated not being in favour of option E which they would consider a step backwards where it concerns natural persons.

Option B was the option favoured by most stakeholders responding to the public consultation and seems most proportionate, keeping in mind the pursued effectiveness, acceptable level of administrative burden and the lowest impact on fundamental rights and personal data protection. For all these reasons it is the preferred option.

## 6.2 Problem 2: Difficulties regarding the exchange of information between competent authorities

As the topic of information exchange is highly complex, involves considerations of a legal, practical and technological nature and has an impact on personal data protection and fundamental rights please refer to Annex 6 for additional information.

### 6.2.1 Option impact analysis sub-problem 2.1: Exchange of information between competent authorities

<sup>45</sup> It should be noted that the 'rating' of various options depicted in the table above is based on a 'reasonable effort' approach and not exact science as it involves the interpretation of many variables, most of which defy quantification. Further to this, it is impossible to objectively weigh the relative importance of the categories. The attribution of a weighting factor would only introduce a false sense of precise quantification. The reader should keep this in mind while evaluating the comparison tables

**6.2.1.1 Option A:** (BASELINE, no policy change) Declaration and infraction data may be shared between competent authorities in different Member States only in case of indications of illegal activity.

**Effectiveness:** As demonstrated in the problem description, the present situation is unclear and leads to little sharing of information and is unequally applied. For this reason it is deemed ineffective.

**Administrative burden/cost:** The instruments to be used for data exchange are unclear and their use burdensome, they require inputting the information repeatedly in a variety of applications. The sharing of data is severely impacted by this lack of clarity and the lack of standards for doing so.

**Coherence with data protection/fundamental rights:** Unequal application and uncertainty regarding procedures and the legal framework lead to issues regarding fundamental rights and equal treatment.

**6.2.1.2 Option B:** Provide for an obligation to mandatorily exchange information regarding infractions against the obligation to declare or declarations where there are indications of illegal activity between competent authorities of different Member States.

**Effectiveness:** It is important for the effectiveness of the regime that all Member States share the same information, using the same format. Information regarding persons who are known to have committed an infraction is highly relevant to competent authorities performing controls in other Member States. However, it should be noted that in some cases it can also be relevant for authorities to be aware of persons who have complied with their obligations but where indications of illegal activity exist such as in cases where persons declare large amounts of cash but can provide no credible information as to the economic origin or the purpose of the movement. For this reason the obligation to share information regarding declarations where there are indications of criminal activity adds to the effectiveness of the control regime and contributes to the fight against money laundering and terrorist financing. In the open public consultation, together with option C, this was the preferred approach.

**Administrative burden/cost:** The information would have to be stored in a database but the extra cost vs the storing of the regular declaration which is submitted to the FIU would be marginal, provided an appropriate technical solution is chosen. For the traveller or economic operator, there would be no extra burden, except that those who committed infractions might be submitted to extra controls.

**Coherence with data protection/fundamental rights:** Although this option negatively impacts the rights described in Arts. 7 and 8, CFR, this has to be balanced by the legitimate purpose for which the data was collected and the proportionality of the transmission. The exchanged information would concern persons who are known to have committed a prior infraction or where there are indications of illegal activity and would hence be proportionate, keeping into account the objective of the regulation.

**6.2.1.3 Option C:** Provide for an obligation in the regulation to mandatorily exchange information regarding infractions against the obligation to declare or declarations where there are indications of illegal activity between competent authorities of different Member States but keep the sharing of regular declaration information optional.

**Effectiveness:** As under B, there is no certainty regarding the sharing of regular declaration information which may cause unequal application. The unequal sharing of regular declaration information while some do will be detrimental to the overall effectiveness.

**Administrative burden/cost:** As under B but with the extra burden of handling regular declarations that some Member States might share while some will not.

**Coherence with data protection/fundamental rights:** As under B but risk of unequal application and unequal treatment regarding the exchange of personal data of persons who made a regular declaration. The question of proportionality arises but may be mitigated by technology, which allows decentralised sharing of information without systematically transferring personal data. cf. annex 6.

**6.2.1.4 Option D:** Provide for an obligation in the Regulation to mandatorily exchange both infractions, declarations where there are indications of illegal activity and regular declaration information between competent authorities in different Member States.

**Effectiveness:** As under B for the infractions, the information regarding regular declarations would allow risk analysis to extend to persons who declare as required but regularly enter or leave the Union carrying large amounts of cash.

**Administrative burden/cost:** As under B but with the extra burden of sharing all regular declarations.

**Coherence with data protection/fundamental rights:** Negative in comparison with other options, as the volume of data collected would be higher and impact more declarants. Moreover, a large part this increased volume of data exchange would concern regular declarations for which no underlying suspicion of wrongdoing is present, raising issues of proportionality with regard to the effectiveness and the objective of the Regulation.

## 6.2.2 Summary and preferred option selection

Objective/Impact	Option A	Option B	Option C	Option D
<b>Effectiveness</b>	-	+	+	+
<b>Cost/Burden</b>	0	-	-	-
<b>DP/FR impact</b>	-	+	-	--
<b>Conclusion</b>	--	+	-	--

Option B (mandatory exchange of infraction data and cases where there are indications of illegal activity) is the most effective and proportionate option for this type of exchange. It is important that the Member States are able to share declarations where there are indications of illegal activity but as mentioned earlier the use of sharing all declarations, even those where no indications of illegal activity are present, might not be proportionate, keeping in mind fundamental rights aspects. Considering that the effectiveness of option B, C and D are similar but that the proportionality and coherence with fundamental rights and data protection is better for option B this is the preferred option,

### 6.2.2.3 Option impact analysis sub-problem 2.2: Exchange of information between the competent authorities and the FIU

**6.2.3.1 Option A: (BASELINE, no policy change)** Declaration data has to be made available by the competent authority to the FIU of its Member State.

**Effectiveness:** Not totally effective considering that there are cases where the declaration information is either made available to the FIU with a long delay or the forms are merely stored and thus 'available', which respects the letter but not the spirit of the legislation and does not allow the FIU to perform adequate analysis. The possibility to use the data for risk assessments or in other ways analyse it electronically is not ensured in this option, which makes it ineffective regarding the objectives of the CCR.

**Administrative burden/cost:** The FIU should receive the information in some form. At the moment the information is encoded in a national system in most Member States. The lack of harmonisation of standards or compatibility results in an additional burden on the FIU's who need to use various tools in order to be able to import the data in question.

**Coherence with data protection/fundamental rights:** FIU's are pivotal instruments in the overall AML/TF framework and their operation is subject to strict limitations on the way in which personal data is used and how and under what circumstances it can be made available to FIU's in other Member States or to other authorities.

**6.2.3.2 Option B:** Specify that 'making available' means transmission of the data by electronic means or providing the FIU access to a database which contains all the declaration information.

**Effectiveness:** The active duty to 'make available' data by electronic means will ensure that the FIU receives all relevant data in a form that is easy and effective to handle and use for electronic analysis of the data. The effectiveness of option B compared to option A is much higher.

**Administrative burden/cost:** The cost would be largely dependent on the system which is chosen. This selection should be the subject of technical analysis. The administrative burden would be borne by the authorities who encode the information and maintain the IT system. However, as the present situation already requires coding the information and making it available to the FIU, the additional burden should be marginal in most Member States. Without prejudice to any solution chosen it seems likely that the largest cost would be setting up an IT-system, with a recurrent hardware cost and staff costs. Such harmonisation may however generate economies of scale. Notably, if a compatible solution can be retained, the administrative burden on FIUs could be much smaller with this option as it might negate the need for dual data input.

**Coherence with data protection/fundamental rights:** As under option A.

6.2.4 Summary and preferred option selection.

Objective/Impact	Option A	Option B
<b>Effectiveness</b>	-	<b>+</b>
<b>Cost/Burden</b>	0	-
<b>DP/FR impact</b>	0	<b>0</b>
<b>Conclusion</b>	-	<b>0</b>

As shown in the evaluation the current situation is not as effective as it could be. The significant value that cash control data can have in money laundering/terrorist financing investigations makes it desirable to conduct a study on the technological aspects and modalities with which such exchange of data should be conducted. Measures need to be taken to ensure that the FIU receive all pertinent data in a timely and effective manner. Option B is the preferred option.

6.3 Problem 3: Impossibility for competent authorities to temporarily detain sub-threshold amounts

6.3.1 Option impact analysis

**6.3.1.1 Option A (BASELINE, no policy change):** Competent authorities may record, process and make available to the FIU a number of details concerning the person and the cash, provided that there are indications of illegal activities concerning the movement of cash. They do not, however, have the authority to temporarily detain the cash based on the cash control regulation.

**Effectiveness:** It is doubtful if the absence of an option to allow temporary detention of sub-threshold amounts in case there are indications of illegal activity is in conformity with the letter and spirit of FATF Recommendation 32 to which the EU has committed itself. Additionally, this issue was specifically flagged by both Member States and the Commission<sup>46</sup> as a weakness to be addressed. For this reason it is determined that option A needs to be discarded as it does not fully reach the objectives.

**6.3.1.2 Option B:** Lay down an explicit provision which, in addition to the baseline scenario, would allow competent authorities to temporarily detain the cash in accordance with national

<sup>46</sup> In the [Terrorism Finance Action Plan](#), as indicated before.

legislation if they judge that indications of criminal activity (predicate offences to money laundering or terrorist finance) are present.

**Effectiveness:** This option would be able to provide a 'catch-all' provision in case no legal basis outside the cash control regulation is present to (temporarily) detain the cash but there are reasons to do so pending further investigation. The possibility to temporarily detain sub-threshold amounts would increase the effectiveness of the regulation. The approach would however, not be totally harmonised in all Member States as it is based on national legislation which will by definition differ.

A clear majority of stakeholders responding to the public consultation was in favour of competent authorities being empowered to temporarily detain cash amounts below the threshold of 10 000 Euros if there are indications that illegal activities are associated with the movement of the cash.

**Administrative burden/Cost:** Not quantifiable, essentially this would be the cost of administration and of the security arrangements associated with physically storing the cash. The number of cases where action is taken specifically based on this provision is expected to be low as the mechanism is conceived as a 'catch all' instrument, to be used if no legislation outside the cash control regulation allows (temporary) detention of the cash. Under present legislation competent authorities already have the option to temporarily detain higher than threshold amounts of cash in case these were not declared and there are indications of illicit activities, hence the necessary infrastructure will already be present. The impact on the owner/carrier of the cash may however be substantial in the event that the FIU decides there were no grounds for suspicion and decide that the is to be refunded. In an extreme scenario this could mean having to travel in order to retake possession of his/her money.

**Coherence with data protection/fundamental rights:** The initial appreciation of 'indications of criminal activity' lies solely with the competent authority. The fundamental rights mentioned in Arts. 7, 8 and 16, CFR would be negatively impacted, as would be the right to property enshrined in Art. 17, CFR. This is mitigated to some extent as a) this would be a strictly time-limited detention pending a decision by the FIU or other authority, b) the competent authority will be required to substantiate its action in the documentation submitted to the FIU and the owner or carrier of the cash. And c) the threshold for action is 'indications of criminal activity', not merely 'illegal activity', raising the bar for intervention. Further, the objective of the regulation and the legitimate interests and right to safety of society need to be taken into account while considering this aspect.

**6.3.1.3 Option C:** As Option B but with a limited list of objective criteria specified in (delegated) legislation which, if they are present, would constitute indications of criminal activity and would allow authorities to temporarily detain the cash.

**Effectiveness:** As option B, however, a limitative list opens the door to circumvention behaviour and negatively impacts effectiveness.

**Administrative burden/cost:** As option B.

**Coherence with data protection/fundamental rights:** As option B but offering more guarantees for impartial and proportionate treatment as the circumstances that constitute 'indications of criminal activity' would be imitatively determined in a binding legal instrument that would comply with relevant legislation and be harmonised among Member States. The diversion behaviour that might be triggered by a positive list could negatively impact the objectives of the regulation and the interests of society.

**6.3.1.4 Option D:** As in option B but in addition, providing a guideline concerning suspicious activities. This guideline would be a non-legislative 'soft law' option.

**Effectiveness:** As option B, however this guidance would necessarily be of a non-binding nature, hence not enforceable yet might trigger legal problems when challenged. In its decision on the Digital Rights Ireland case<sup>47</sup>, the European Court of Justice made clear that where the EU institutions offer a legal base to restrict fundamental rights (i.a. the right to property which could be impacted), they also have an obligation to clearly regulate the conditions of such restrictions. Guidelines do not meet this criterion.

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<sup>47</sup> CJEU case C-293/12 and C-594/12, paras. 54, 63, 64

**Administrative burden/cost:** As option B, additionally there would be a one-time administrative burden on behalf of the competent authorities who would have to analyse the guidelines and translate them into administrative instructions.

**Coherence with data protection/fundamental rights:** This option takes the middle ground between Options B and C, however, due to the factors mentioned under the paragraph relating to effectiveness, from a legal perspective the option is not to be retained.

6.3.2 Summary and preferred option selection.

Objective/Impact	Option A	Option B	Option C	Option D
<b>Effectiveness</b>	- (0)	++	-	--
<b>Cost/Burden</b>	0	-	-	-
<b>DP/FR impact</b>	0	-	+	+
<b>Conclusion</b>	<b>0</b>	<b>0</b>	-	--

As option A represents the baseline, it should be assigned the value (0). However it was assigned (-) as it is not in conformity with a norm to which the EU has committed itself and due to stakeholder opinion indicating that a balanced possibility to act against lower than threshold amounts needs to be found. As compared to baseline any approach will result in higher costs (even though very limited) so this parameter is weighed negatively in the other approaches. Option A was discarded as it does not fully reach the objectives. Option B is the most effective option since it is ensuring formal compliance with the FATF norm while giving the authorities a possibility to temporarily detain sub-threshold amounts. Option B is placing the bar for detention reasonable high at the same time as it prevents evasive behaviour that could be possible under option C. Option D presents a legal problem due to the aforementioned judicial ruling and fails for reasons of effectiveness. Because of the above mentioned option B is considered the most effective at the same time as it is considered to be in coherence with proportionality regarding data protection and fundamental rights.

6.4 Problem 4: Imperfect definition of 'cash'

6.4.1 Option impact analysis

**6.4.1.1 Option A: (BASELINE, no policy change)** Maintain the definition of cash as it is presently worded in the CCR (currency and bearer negotiable instruments) but do not expand the definition to include precious metals / commodities.

Option A does not modify the existing definition with which most declarants are familiar. Further, it is compliant with what the FATF requires as a minimum. A consequence of this approach is that criminals might continue using commodities that can act like highly liquid stores of value to escape the obligation to declare. As such evasion tactics have been demonstrated, modifying the definition in the regulation to address such developments would require a revision of the regulation. Additionally it is not inconceivable that the technological evolution creates some carriers of value that are not currently considered under the definition or that may not even exist.

**6.4.1.2 Option B:** Redefine the notion 'cash' in the regulation to include the elements under option A and add gold as a main category. Refer to an annex in the regulation, modifiable by delegated act for the specification of the constitutive elements within each of these categories, leaving open the possibility to expand or amend this taking account of the circumstances and evolution of society.

**Effectiveness:** As in A, but taking into account data that demonstrates that gold is used as a medium to transfer value and escape the obligations to declare. The solution to put the definition of commodities acting as liquid stores of value in an annex modifiable by a delegated act, is effective in

that way that it ensures practical enforceability and future-proofs the instrument against possible new evidence arising regarding what commodities are being used to circumvent the CCR. Until further evidence of evasion or the use of new mechanisms emerges, the annex would only include gold coins and high-purity gold bars. Any expansion of the annex should take into account considerations regarding the demonstrated necessity to act, practical enforceability in the field and proportionality.

**Administrative burden/ Costs:** As in A. It is not expected that the enlargement of the definition of the categories that are to be considered as cash (e.g. certain forms of gold) will result in large scale increases of declarations, considering that the value carried would still need to be equal to or higher than 10 000 Euro. It should be noted that in certain cases the obligation to declare could lead to an obligation to make both a customs declaration and a cash controls declaration. This additional burden needs to be weighed against the objective of the regulation.

**Coherence with data protection/fundamental rights:** As in A. The rights listed in Arts. 7, 8 and 16, CFR are impacted. Enlargement of the definition would lead to more persons having to make a declaration but this would be subject to the same safeguards regarding the use of the data as under option A. In order to provide sufficient guarantees regarding fundamental rights and with regard to both applicability and the provision of information to citizens it is important to precisely and positively describe the exact commodities or forms of the commodities (e.g. in the case of gold: gold coins and bars, thus excluding jewelry) included in the definition and to strictly adhere to a fact-based and proportionate approach before modifying the annex.

**6.4.1.3 Option C:** Expand the definition of 'cash' in the regulation including gold and precious metals and specify this in the revised CCR.

**Effectiveness:** As under option 'B', however, there would be no possibility to later flexibly amend the list of commodities covered by the definition. Any change would require a revision of the regulation and a lengthy legislative process, undermining the effectiveness as the regulation would not be 'future-proofed'.

**Administrative burden/ costs:** higher than A, cf. description under B in the hypothesis of enlarging the definition, the larger or less described the categories falling under the definition would be, the higher the potential number of declarations.

**Coherence with data protection/fundamental rights:** As under option B.

6.4.2 Summary and preferred option selection

Objective/Impact	Option A	Option B	Option C
<b>Effectiveness</b>	0	+	0
<b>Cost/Burden</b>	0	0	-
<b>DP/FR impact</b>	0	0	0
<b>Conclusion</b>	<b>0</b>	<b>0/+</b>	-

In summary, the present baseline option A meets with international requirements but does not take into account study results that demonstrate the use of highly liquid stores of values such as gold to transfer value across borders while escaping the obligation to declare or disclose resting on currency. The case for enlarging the definition of cash in the regulation itself would result in a lack of flexibility and future-proofing of the norm. A hard-coded, positive list could also in itself stimulate diversion behaviour. Hence option C is negatively evaluated. The argument in favour of option B is that it takes into account data which indicates that highly liquid stores of value (i.c. gold ) present a problem yet this approach allows for flexibility and for a reasonably fast modification of the definition of cash should a demonstrable need arise. For this reason it is the preferred option.

### **Addendum:**

During internal consultation and after new evidence had been presented, following further analysis it was deemed useful and appropriate to add and define the category 'Commodities used as highly liquid stores of value' in the Regulation. The definition would read as follows: 'commodities used as highly liquid stores of value' means goods that present a high ratio between their value and their volume and that can easily be converted into currency through accessible trading markets whilst incurring only modest transaction costs'. Instances of such commodities are to be specified in Annex 1 to the Regulation, which currently will include (1) Coins with a gold content of at least 90%; and (2) Bullion such as bars, nuggets or clumps with a gold content of at least 99.5%, instead of listing the different types of gold included in the Regulation itself. The approach chosen allows for future-proofing and flexibility in case evidence were to be presented that demonstrates the use of other types of commodities to avoid the obligation to declare. Any future amendment of the Annex by delegated act will only happen after a thorough analysis of available data and following an impact assessment.

It was also deemed appropriate to include 'prepaid cards' in the definition of cash in the legislative proposal. The reasons for this approach are twofold: 1) indications of abuse and high potential for abuse associated with this relatively novel phenomenon (cf. *infra*) and 2) legal analysis which concluded that it would be doubtful if –in the absence of a specific provision in the Regulation relating to prepaid cards- these instruments could potentially be included under the category 'bearer negotiable instruments'. Organisations such as the FATF indicate that the possibility for inclusion under 'bearer-negotiable instruments' should be considered.<sup>48</sup> However, the commonly accepted legal definitions of 'negotiable instruments' refer (possibly for historical reasons) only to documents, not to cards.

The proposed definition of 'prepaid card' would read: 'a non-nominal card storing monetary value or funds which can be used for payment transactions, for acquiring goods or services or for redemption of currency and which are not linked to a bank account.'. The definition of 'cash' for the category 'prepaid cards' refers to an annex, modifiable by delegated act in which the constitutive elements (types of prepaid cards to be subjected to the obligation to declare) will be specified. At the time of writing, this annex is left blank, which implies that it will act as a placeholder but not have any practical effect until specific types of cards are included. Determination of the types of cards to be included will be the subject of further analysis and be based on the evaluation of relevant data in the context of an Impact Assessment..

As prepaid cards were not included in the original scope of this Impact Assessment, for methodological reasons a brief overview regarding the phenomenon is presented in this separate section.

#### **1. Background concerning prepaid cards**

Prepaid cards are one of the more recent developments in the world of consumer electronic money (including electronic payments). Beginning as an electronic replacement for paper gift certificates, so-called gift cards have become especially popular with consumers and are marketed by retail merchants. Recent innovations to prepaid cards have led to their integration into the payment card networks, significantly expanding the range of applications beyond the simple gift card concept. These

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<sup>48</sup> An approach also explored by the Financial Action Task Force: 'Countries should also consider whether Recommendation 32 applies to certain prepaid access products, such as prepaid cards, that would qualify as bearer negotiable instruments.', FATF Guidance for a risk-based approach: prepaid cards, mobile payments and internet-based payment providers, 2013, p. 16, Cf.

<http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-RBA-NPPS.pdf>

network-branded prepaid card programs are now gaining traction as attractive alternatives for traditional paper-based solutions such as payroll payments, cross-border remittances, government assistance programs, and many other emerging applications.

Prepaid card have an obvious potential to more efficiently and effectively deliver financial services to the unbanked and underserved segments of society. Unfortunately, many of the same features that make prepaid cards such a positive payment innovation make them attractive to criminals interested in exploiting this new payment form to facilitate money laundering.

## 2. Prepaid card types

The prepaid card market is a complex aggregate of niche products, presenting different characteristics in different jurisdictions in terms of financial size, products or distribution channels. Prepaid cards can be offered as one-off solutions (typically in limited networks as technology based on magnetic stripe, not electronic chip) or reloadable cards.

A large payment card company has defined 3 types of prepaid cards, according to the services and functionalities they offer, and to their AML regime:

1. Many prepaid cards are used in **limited networks**, for instance prepaid fuel cards for use at a given brand of petrol station, or cards whose use would be limited to a chain of retail stores (closed loop prepaid cards), or to a given shopping centre (semi-open loop prepaid cards), or to buy lunch.

2. **Gift cards** are also an important market segment for prepaid cards (representing EUR 6 billion in the UK only). Gift cards can generally be used domestically only, cannot be used to withdraw cash at ATMs and are sometimes not allowed for online use. All these parameters are defined by the e-money issuer. The acceptance of a foreign gift card by a merchant would require that the latter be equipped with an online terminal capable of reading the card (like for a pre-authorized debit card), which would be too complex and costly for the acquirer.

3. Besides these closed loop or semi-open loop prepaid cards, there are **general-purpose (reloadable or non-reloadable) prepaid cards** (also called open-loop cards). According to EMA, this segment would represent about 5% of the total prepaid card market. The **reloadable cards** sold by certain card companies can accept up to 20.000 euro. Their holder is subject to customer due diligence (CDD).

**Non reloadable prepaid cards** usually carry fixed amounts of 10, 20, 50 or 100 EUR. The maximum value often is of 250 euro as a result of the rules defined by the 3<sup>rd</sup> AML Directive. Below that amount the cardholder is not subject to CDD requirements.

There are some **niche exceptions** such as travel money cards which are a substitute to paper-based travellers cheques (for instance in the UK), often for larger amounts (up to 5000 euro), but where customer due diligence is carried out upfront.

Some prepaid cards are linked to an IBAN number. They emulate a bank account and are fully subject to CDD requirements.

## 3. The risks associated with prepaid cards

The anonymity that certain prepaid cards (i.e. CDD-exempted prepaid cards) confer to their holder is seen as an advantage by those people who are very attached to protect their privacy, which has become an increasing issue on the web. Whilst these concerns are legitimate, anonymity can also be sought or abused to conduct illegal actions.

The terrorism financing risk posed by prepaid cards is essentially linked to CDD-exempted general purpose (reloadable or non-reloadable) prepaid cards that run on domestic or international schemes. The challenge is how to address the concerns raised by anonymity of those general purpose cards, without undermining their convenience and their availability.

Prepaid cards are as transferable as cash. While even a classical debit or credit card is transferable when the original cardholder passes his PIN code to the new holder. A difference however lies in the fact that the original holder of a debit or credit card has been subject to CDD – which would not necessarily be the case for a prepaid cardholder.

Prepaid cards provide a compact, easily transportable, and potentially anonymous way to store and access cash value. General purpose prepaid cards lower the barrier to the Union payment system, allowing individuals without a bank account to access illicit cash via ATMs globally. When used for illicit purposes, branded general purpose reloadable prepaid debit cards have been associated with cashing out the proceeds of fraud and are being used as an alternative to cash in much the same way that money orders, travellers' checks, and nonbank wire transfers are used.

Prepaid card programs often accept applications online, via fax, or through local check cashing outlets, convenience stores, and other retailers. Programs that lack customer identification procedures and systems to monitor transactions for suspicious activity present significant money laundering vulnerabilities, particularly if there are liberal limits or no limits on the amount of cash that can be prepaid into the card account or accessed through ATMs. Offshore banks also offer stored value cards with cash access through ATMs internationally.

Further, programs designed to facilitate cross-border remittance payments often allow multiple cards to be issued per account so that friends and family in the receiving country can use the cards to access cash and make purchases. These programs can also be used to launder money if effective AML policies, procedures, and controls are not in place.

EUROPOL has specifically pointed out those risks ("in today's world, cash and prepaid instruments share striking similarities, and there is a clear trend in criminal circles to revert to the use of prepaid cards for obvious ease of transportation") and issued a public call for the revision of the legal framework.<sup>49</sup>

#### **4. Union AML legal framework**

E-money issuers are subject to AML/CFT requirements in conformity with EU law (Second Directive on electronic money and 4<sup>th</sup> AMLD). Whilst card schemes are not per se subject to AML requirements; to protect their brand, they have developed a set of rules and AML/CFT guidelines which the e-money issuers they work with have to respect.

It should be noted that the AML legislation is territorial by nature and the EU directives are of minimum harmonisation whilst the directives on payment services and electronic money are essentially of maximum harmonisation.

By extending the definition of cash under the Regulation to prepaid cards, coherence is ensured with the 4<sup>th</sup> AMLD – and its proposed amendments – which constitutes the other important element in the legal framework for the prevention of money laundering, as well as with the undergoing supranational risk assessment relating to money laundering and terrorism financing undertaken by the Commission.

#### **5. International efforts**

The Financial Action Task Force (FATF) released its "Report on New Payment Methods," which reviews prepaid cards and other new payment methods that allow for electronic cross-border fund transfers that might also facilitate money laundering. Examining the structure of prepaid card processing, the FATF highlighted programs that incorporate offshore card issuers and access to cash at ATMs as environments with the greatest risk for money laundering abuses. Concurrently, the private-sector side of the payments industry is also actively examining these same issues in an attempt to better understand prepaid cards' vulnerability to abuse by money launderers and to develop appropriate risk mitigation strategies

In the United States, both the Financial Crimes Enforcement Network (FINCEN), part of the Department of Treasury, responsible for anti-money laundering and the U.S. Department of Justice's (DOJ) National Drug Intelligence Centre (NDIC) have highlighted the vulnerability of prepaid cards to money laundering and are seeking to set out and enforce rules similar to those proposed under the Regulation.

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<sup>49</sup> Europol report "Why cash is still king" <https://www.europol.europa.eu/newsroom/news/cash-still-king-criminals-prefer-cash-for-money-laundering>

## 6.5 Problem 5: Divergent 'penalties'

### 6.5.1 Option impact analysis.

**6.5.1.1 Option A: (BASELINE, no policy change)** Maintain the current provision stating that 'Each Member State shall introduce penalties to apply in the event of failure to comply with the obligation to declare [...] Such penalties shall be effective, proportionate and dissuasive.

**Effectiveness:** It is up to the judiciary to decide whether a specific penalty is indeed effective. Considered in conjunction with the elements 'proportionate' and 'dissuasive' and taking into account the wide variation in penalties for non-declaration and the occasional conflation of penalties for failing to declare and a –potential but at that point not yet established- underlying predicate offence, it can be doubted if the present situation is wholly satisfactory. Effectiveness may also be undermined as a result of 'forum shopping' where criminals could have an incentive to choose Member States with seemingly low penalties. As was demonstrated in the problem description, the present situation leads to highly divergent approaches.

**Administrative burden/cost:** Highly variable in function of national procedures.

**Coherence with data protection/fundamental rights:** The inequality in treatment resulting from an approach which leaves the determination of penalties to the Member States is inherent to this mechanism and by itself not illegal. However, given the observed divergences the question arises whether the variance can still be considered proportionate. Recent jurisprudence<sup>50</sup> indicates that some penalties as applied in the Member States do not seem to be in compliance with the limits set out by the European Court of Justice.

**6.5.1.2 Option B:** Specify in the regulation or in a delegated act provisions on the nature and severity of penalties to be applied for failing to declare.

Such approach would provide for a more approximated treatment of infraction cases and could specify outer boundaries as to the penalty to be applied by Member States. If modifiable through a delegated act this would allow for flexibility and the rapid taking into account of jurisprudence. If a penalty or a range of penalties were to be mentioned in the Regulation itself, the risk exists that the judiciary might rule against these at some point, which might not be easy to remedy. For this reason if option B is chosen it seems preferable to specify a range of penalties in an annex, modifiable by delegated act and supervised by the Council and the Parliament.

**Effectiveness:** Better than option A as more approximation would reduce the opportunities for 'forum shopping' and offer more guarantees for a proportionate treatment which takes only the failure to declare into account.

**Administrative burden/cost:** Member States would need to take account of such provisions and possibly modify or repeal existing legislation and administrative procedures/instructions, leading to a relatively high initial burden.

**Coherence with data protection/fundamental rights:** Determined by the level or range of penalties but a higher degree of approximation would increase overall equality of treatment and achieve greater compliance with the limits established by the judiciary.

**6.5.1.3 Option C:** Maintain the current provision stating that 'Each Member State shall introduce penalties to apply in the event of failure to comply with the obligation to declare [...] Such penalties shall be effective, proportionate and dissuasive, in addition, propose –through a Commission recommendation – guidance on penalties to be applied for failure to declare.

**Effectiveness:** Dependent on the degree of de facto approximation which would be achieved through this approach which would not be directly binding for the Member States. The guidance would mainly consist of explaining the possible approaches as regards penalties for failure to declare and explain

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<sup>50</sup> Judgment by the ECtJ in case C-255/14, op. cit. supra.

existing jurisprudence on the matter. Also dependent on follow-up by the Commission and initiation of proceedings against Member States who fail to comply with established jurisprudence.

**Administrative burden/cost:** Between option A and B. The additional administrative burden would also be shouldered by the Commission who would need to provide continuous follow-up and if necessary initiate action against Member States.

**Coherence with data protection/fundamental rights:** Dependent on the penalties applied, their proportionality/effectiveness and the degree of approximation and follow-up by the Commission.

## 6.5.2 Summary and preferred option selection.

Objective/Impact	Option A	Option B	Option C
<b>Effectiveness</b>	0	+	+
<b>Cost/Burden</b>	0	-	0
<b>DP/FR impact</b>	0 (-)	+	0
<b>Conclusion</b>	-	0/+	<b>0/+</b>

Option A is the present baseline but does not seem satisfactory in view of the large variance in penalties applied and the undesired effects this may generate. Option B achieves approximation but reduces the liberty of Member States to act, generates a higher administrative burden and is not favoured by stakeholders. Option C is a non-legislative option which would leave the prerogatives of the Member States to decide on appropriate penalties intact while the Commission could provide guidance on the level of penalties that are compliant with established jurisprudence. If anomalies are detected which are not corrected, a letter of formal notice could be sent by the Commission and followed up on, thereby achieving a measure of approximation in line with jurisprudence. Option C places the administrative burden for evaluation and follow-up largely with the Commission but is the preferred option as it also respects the principle of subsidiarity to the largest extent while balancing this with a proportional approach based on guidance by the judiciary.

## 6.6 Problem 6: Different implementation levels among Member States

### 6.6.1 Option impact analysis

**6.6.1.1 Option A: (BASELINE, no policy change):** The CCR does not lay down obligations to use a standard declaration form nor to provide any statistical data or performance metrics regarding controls to the Commission, other than the obligation to notify the Commission about the penalties for non-declaration (one time event, no-follow up on modifications).

**Effectiveness:** In practice regarding the declaration form 25/28 Member States<sup>51</sup> already use a harmonised form (which allows for some flexibility to include national elements) that provides the same 'look and feel' to declarants<sup>52</sup>, regardless of the Member State of entry or exit. This approach is effective but dependent on the goodwill of the Member States. Statistical information is voluntarily submitted in an agreed upon format but the level of detail provided is not equal among Member States, especially regarding infractions and penalties.. No systematic updates are sent to inform the Commission in case penalties are modified.

<sup>51</sup> The three Member States who do not use the 'standard' form state as reasons a) a large stock of pre-printed 'old' forms which have to be used up first, b) an electronic declaration form which is submitted online and includes national elements and c) a form that combines cash control regulation elements with national elements.

<sup>52</sup> Cf. [http://ec.europa.eu/taxation\\_customs/customs/customs\\_controls/cash\\_controls/how\\_to\\_declare\\_en.htm](http://ec.europa.eu/taxation_customs/customs/customs_controls/cash_controls/how_to_declare_en.htm)

**Administrative burden/cost:** The data fields which have to be collected are specified in the cash control regulation. In practice the use of a single form provides the same 'look and feel'.

**Coherence with data protection/fundamental rights:** The right to protection of personal data of Art. 8, CFR is impacted. However, the data fields which have to be collected are specified in the cash control regulation which is based on the FATF norm. No superfluous information is collected. The collected information does not go beyond the elements which are internationally recognized as the minimum set required in the fight against money laundering /terrorist finance.

**6.6.1.2 Option B:** Make it mandatory for Member States to use a harmonised declaration form, the model of which is to be determined in implementing legislation, lay down an obligation to periodically provide statistical information to the Commission on declarations registered, controls made on cases where a declaration is made, controls made in the absence of declaration and the results of the controls performed. Statistical information should also refer to penalties imposed for non-declaration including any amendments to those penalties.

**Effectiveness:** This approach is more effective on all levels as a formalisation would imply enforceability of the declaration format (allowing for national elements), submission of statistics and the provision of information on penalties.

Both the disclosure obligation on cash moved in post and freight and the preferred option for data exchange between competent authorities and the FIU can only be effectively measured and evaluated if data is provided in a standardized way as regards to procedure and elements to be provided. The most effective approach and the only approach which offers legal guarantees and is enforceable is a standardised declaration form.

This was the option preferred by more than half the stakeholders in the public consultation..

**Administrative burden/cost:** In practice the same as under A except for the three Member States who would have to change their declaration forms and face a one-time burden. A harmonised approach would also provide benefits in terms of information exchange and standardisation.

**Coherence with data protection/fundamental rights:** As under option A but while offering legal certainty to the declarant regarding the form which is to be used, certainty for the Commission and other Member States as to the submission of statistical data and the provision of up to date penalties information which will assist the detection of ineffective or disproportionate penalties systems.

6.6.2 Summary and preferred option selection

Objective/Impact	Option A	Option B
<b>Effectiveness</b>	0	+
<b>Cost/Burden</b>	0	0
<b>DP/FR impact</b>	0	+
<b>Conclusion</b>	<b>0</b>	<b>++</b>

\*: Stakeholder opinion was only queried regarding the harmonisation of declaration forms, not regarding the provision of statistical information to the Commission nor about the obligation to provide information on penalties.

The Commission recognises that –except possibly regarding the point on providing information on penalties- no problems exist in practice. The argument for a formalized approach toward the harmonisation which largely exists in practice is based on the concern to provide the same declaration form -be it in writing or electronic- to all declarants which will also allow for easy information exchange and to be able to offer a legal guarantee that what is currently voluntarily provided will remain available in the future and enable evaluation. For this reason, option B is the preferred option.

## 6.7 Problem 7: Divergent national measures to raise awareness

### 6.7.1 Option impact analysis

**6.7.1.1 Option A (BASELINE, no policy change):** no legal obligations, nor guidelines to raise public awareness.<sup>53</sup>

**6.7.1.2 Option B:** Provide for an obligation to Member States to raise awareness/inform stakeholders about their obligations, but allow them to determine the most appropriate way to achieve this.

**Effectiveness:** Better than the baseline but the lack of harmonisation or specificity could result in divergent approaches and unequal levels of implementation. Enforceability could be problematic as Member States could e.g. limit themselves to a reference on the website of their customs administration or on the EU website concerning cash controls. The larger problem would be that a legal norm is self-standing and after publication, knowledge of the norm is implied; deviating from this approach by specifying measures to raise awareness risks complications where non-declarants could argue about the effectiveness of the measures and argue that the obligation to provide information was not fulfilled by the authorities. The duty to raise awareness can be considered a good practice but not as a prescriptive element.

**Administrative burden/cost:** In function of measures undertaken, the administrative burden and the cost of production would be borne by the Member States.

**Coherence with data protection/fundamental rights:** Dependent on the level of implementation. Qualitatively any information provided would be better than doing nothing. Formally, ignorance of the law could never be an excuse for non-compliance but at least a passive moral obligation exists to make stakeholders aware of their rights and obligations under the law.

**6.7.1.3 Option C:** Provide for an obligation to Member States to raise awareness and harmonise the measures as regards to form and content. This might be achieved by specifying the design of posters, flyers, through EU-campaigns etc.

**Effectiveness:** As option B but with better guarantees for recognisability and with the benefit of presenting a similar looking approach in all Member States. The same remark regarding enforceability, the exact scope of the measures and the consequences in case the obligation to raise awareness were not respected would apply.

**Administrative burden/cost:** The cost would be borne by the Member States or by the Commission. A preliminary estimate of yearly 'maintenance' costs for all Member States is estimated at approximately 20 000 Euro, provided that basic materials (posters etc are used).

**Coherence with data protection/fundamental rights:** Dependent on the level of implementation. Qualitatively any information provided would be better than doing nothing. Formally, ignorance of the law can never be an excuse for non-compliance but at least a passive moral obligation exists to make stakeholders aware of their rights and obligations under the law.

**6.7.1.4 Option D:** Do not lay down harmonised provisions for awareness-raising, but encourage Member States via guidelines to inform stakeholders of their obligations (non-regulatory option).

**Effectiveness:** Would depend on Member State participation. Judging by historical data<sup>54</sup> it requires a continued effort to stimulate awareness-raising measures and to ensure that these are implemented.

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<sup>53</sup> It should be mentioned that although the legislation does not provide for any obligation to inform the public nor are there any official guidelines, in practice a system has been developed between the Commission and the Member States which mitigates the impact of this situation, cf. below.

Practice has shown that the realities in the field and administrative hurdles make it very difficult to follow up on these campaigns solely on Member State level. Better results could be obtained if the Commission were to produce material and organises the logistics to make this available to the Member States on request.

**Administrative burden/cost:** as in option C, to be borne by the Commission.

**Coherence with data protection/fundamental rights:** as in option C.

6.7.2 Summary and preferred option selection.

Objective/Impact	Option A	Option B	Option C	Option D
<b>Effectiveness</b>	0	-	0	<b>+</b>
<b>Cost/Burden</b>	0	-	-	<b>-</b>
<b>DP/FR impact</b>	0	+	+	<b>+</b>
<b>Conclusion</b>	<b>0</b>	-	<b>0</b>	<b>+</b>

Stakeholder opinion favours a legal obligation to provide information, which would argue in favour of options B and C. Nevertheless a legal obligation to provide information, while positive from a fundamental rights perspective, also opens the door to legal challenges where persons who did not declare could argue that the authorities did not fulfil their (unquantifiable) obligation to provide information. Experience has shown that Member State based awareness-raising campaigns (option B) based on a guideline meet with substantial logistic problems if the Member States themselves have to produce the materials. From a subsidiarity / proportionality viewpoint a harmonised approach, laid down in legislation such as under option C appears disproportionately heavy, given the objective which is to be attained (informing the public). Considered from this perspective, an approach such as under option D where a guideline is established meets the objective, provided that the Commission makes available the material to the Member States. This has the added benefit of ensuring a harmonised approach. For this reason, option D is the preferred option.

6.8 Summary of preferred options

Problem	Preferred option	Impacts	Assessment of effectiveness helping combating crime
<b>Problem 1:</b> Imperfect coverage of cross-border cash movements	Option B: Apply the current declaration system for natural persons but provide for a disclosure system for cash shipped in post or freight.	Preferred option would maintain the baseline, which has been evaluated as largely satisfactory and also be compliant with FATF Recommendation 32. A disclosure system allows flexibility combined with the benefit that authorities will have the power to demand a declaration when finding	Administrations will be able to collect more data than under the current CCR when it comes to cash shipped in post or freight. This will increase the possibilities of investigating the origin of the shipped cash and in that way also possibly be

<sup>54</sup> Cf. Problem description under point 2.7.

		suspicious consignments. The information collected can be used for future risk analysis purposes and in the long run increase the accuracy of the risk assessment regarding these types of consignments.	helpful when investigating crime.
<p><b>Problem 2:</b> Difficulties regarding the exchange of information between competent authorities</p> <p>Problem 2.1 Exchange of information between competent authorities</p>	<p>Option B: Provide for an obligation to mandatorily exchange information regarding infractions against the obligation to declare or declarations where there are indications of illegal activity between competent authorities of different Member States.</p>	<p>Preferred option will ensure that all Member States share the same information and in the same format regarding infractions. The information regarding persons who are known to have committed an infraction is highly relevant to competent authorities performing controls in other Member States and it will be useful for them to receive this information. Also information regarding persons who have complied with their obligations but where indications of illegal activity exists will be possible to share which adds to the effectiveness to combat money laundering and terrorist financing.</p>	<p>The increased amount and the harmonized format of shared information will be helpful in performing risk analysis and to target the right consignments and persons who may be entering or leaving the European Union through various Member States in order to make detection more difficult. It will also be helpful when investigating money laundering and financing of terrorism.</p>
<p><b>Problem 2.2:</b> Exchange of information between the competent authorities and the FIU</p>	<p>Option B: Specify that 'making available' means transmission of the data by electronic means or providing the FIU access to a database which contains all the declaration information.</p>	<p>Preferred option will ensure that the FIU receives all relevant data and in a form that is easy and effective to handle and use for electronic analyses of the data.</p>	<p>The cash control data can have a significant value in money laundering/terrorist financing investigations. The fact that the FIU:s will receive all pertinent data in a timely and effective manner can be helpful when combating criminal activities.</p>

<p><b>Problem 3:</b> Impossibility for competent authorities to temporarily detain sub-threshold amounts</p>	<p>Option B: Lay down an explicit provision which, in addition to the baseline scenario, would allow competent authorities to temporarily detain the cash in accordance with national legislation if they judge that indications of criminal activity (predicate offences to money laundering or terrorist finance) are present.</p>	<p>The favoured option would provide a 'catch-all' provision in case no legal basis outside the cash control regulation is present to (temporarily) detain the cash when there are reasons to do so because of indications of criminal activity.</p>	<p>The possibility to temporarily detain sub-threshold amounts would increase the effectiveness of the regulation since it would offer a possibility to temporarily detain cash pending investigation. Today this is not the case and sub-threshold amounts that cannot be detained based on legislation outside the CCR would have to be released despite indications of criminal activity.</p>
<p><b>Problem 4:</b> Imperfect definition of 'cash'</p>	<p>Option B: Redefine the notion 'cash' in the regulation to include the elements under option A and add gold as a main category. Refer to an annex in the regulation, modifiable by delegated act for the specification of the constitutive elements within each of these categories, leaving open the possibility to expand or amend this taking account of the circumstances and evolution of society.</p>	<p>The solution to put the definition of commodities acting as liquid stores of value in an annex modifiable by a delegated act, will ensure practical enforceability and future-proof the instrument against possible new evidence arising regarding what commodities are being used to circumvent the CCR. Until further evidence of evasion or the use of new mechanisms emerges, the annex would only include gold coins and high-purity gold bars.</p>	<p>The inclusion of gold in the regulation will increase the possibility of combating money laundering and financing of terrorism where gold is used instead of cash.</p>
<p><b>Problem 5:</b> Divergent 'penalties'</p>	<p>Option C: Maintain the current provision stating that 'Each Member State shall introduce penalties to apply in the event of failure to comply with the obligation to declare [...] Such penalties shall be effective, proportionate and dissuasive, in addition, propose –through a Commission recommendation – guidance on penalties to be applied for failure to declare.</p>	<p>The prerogatives of the Member States to decide on appropriate penalties will be left intact while the Commission could provide guidance on the level of penalties that are compliant with established jurisprudence. If anomalies are detected which are not corrected, a letter of formal notice could be sent by the Commission and followed up on, thereby achieving a measure of approximation in line with jurisprudence.</p>	<p>An appropriate national penalty for failure to declare will stimulate compliance with the obligation to declare and facilitate oversight on cross-external border movements of cash.</p>
<p><b>Problem 6:</b></p>	<p>Option B: Make it</p>	<p>A harmonized declaration form</p>	<p>Harmonisation of the</p>

Different implementation levels among Member States	mandatory for Member States to use a harmonised declaration form, lay down an obligation to periodically provide statistical information to the Commission on declarations, controls and the results of the controls performed. Statistical information should also refer to penalties imposed for non-declaration including any amendments to those penalties.	would be more effective on all levels as a formalisation would imply enforceability of the declaration format (allowing for national elements), submission of statistics and the provision of information on penalties.  The draft regulation also proposes expanded and harmonized possibilities for information exchange between competent authorities in different member states and between competent authorities and the FIU which a harmonized declaration form would help facilitate.	declaration form and modalities for statistical data reporting will facilitate oversight and the maintenance of a level playing field among Member States which reduces the possibility of 'forum shopping'.
<b>Problem 7:</b> Divergent national measures to raise awareness	Option D: Do not lay down harmonised provisions for awareness-raising, but encourage Member States via guidelines to inform stakeholders of their obligations (non-regulatory option).	Flexibility maintained for Member States. The impact of the preferred option would depend on Member State participation. No extra burden would be put on the authorities, unlike the regulatory options.	The preferred option has no direct effect on the possibility to combat crime.

## 7. Preferred options and cohesion

The following preferred options have been identified:

### Coverage of cross-border cash movements

Option B: Apply the current declaration system for natural persons but provide for a disclosure system for cash shipped in post or freight.

### Exchange of information between competent authorities

#### Exchange of information between competent authorities

Option B: Provide for an obligation in the regulation to mandatorily exchange information regarding infractions against the obligation to declare or declarations where there are indications of illegal activity between competent authorities of different Member States.

#### Exchange of information between the competent authorities and the FIU.

Option B: Specify that 'making available' means transmission of the data by electronic means or providing the FIU access to a database which contains all the declaration information.

### **Use of cash control declaration information for fiscal purposes**

Option A: Member States are to designate competent authorities and to determine the modalities for the exchange of data for fiscal purposes, provided that the legal prerequisites for data exchange have been met.

### **Sub-threshold amounts**

Lay down an explicit provision which, in addition to the baseline scenario, would allow competent authorities to temporarily detain the cash in accordance with national legislation if they judge that indications of criminal activity (predicate offences to money laundering or terrorist finance) are present.

### **Definition of 'Cash'**

Option B: Redefine the notion 'cash' in the regulation to include the elements under option A and add gold as a main category. Refer to an annex in the regulation, modifiable by delegated act for the specification of the constitutive elements within each of these categories, leaving open the possibility to expand or amend this taking account of the circumstances and evolution of society.

### **Penalties**

Option C: Maintain the current provision stating that 'Each Member State shall introduce penalties to apply in the event of failure to comply with the obligation to declare [...] Such penalties shall be effective, proportionate and dissuasive, in addition, propose –through a Commission recommendation – guidance on penalties to be applied for failure to declare.

### **Implementation levels of Member States**

Option B: Make it mandatory for Member States to use a harmonised declaration form, the model of which is to be determined in implementing legislation, lay down an obligation to periodically provide statistical information to the Commission on declarations registered, controls made on cases where a declaration is made, controls made in the absence of declaration and the results of the controls performed. Statistical information should also refer to penalties imposed for non-declaration including any amendments to those penalties.

### **Measures to raise awareness**

Option D: Do not lay down harmonised provisions for awareness-raising, but encourage Member States via guidelines to inform stakeholders of their obligations (non-regulatory option).

### **Coherence and conclusion**

The preferred options which have been selected to tackle the identified problems are intercompatible. They would contribute to the realisation of the objectives of the cash control regulation through:

- correct implementation of FATF Recommendation 32 on cash couriers through measures based on disclosure for cash sent in freight and courier consignments which, coupled with adequate controls and evaluation of effectiveness would provide insight and control without the additional burden of systematic declaration.
- streamlining and clarifications with regard to the exchange of data, the identification of the actors and the procedure to be applied. It should be noted that for technical-legal reasons no satisfactory solution can be proposed in the CCR for the exchange of cash control declaration information between customs- and fiscal authorities. Any provision enabling this exchange could be based on the same legal basis as Council Directive 2011/16/EU on administrative cooperation in the field of taxation (Articles 113 and 115 TFEU), and could also be inserted in that Directive, rather than in a separate instrument. All aspects of such an approach will be examined when the Directive in question is declared open for revision.
- explicitly allow for detention of sub-threshold amounts based on national legislation with a sufficiently high threshold for action.
- redefining 'cash' based on objective elements, yet future-proofed by allowing a possibility to incorporate new elements through delegated legislation, under the supervision of Council and Parliament.

- keeping penalties the purview of the Member States, but with the Commission assisting them by providing guidance on the boundaries set out by the judiciary and taking corrective action if required.
- formalising a number of other supportive elements such as the provision of statistics, a harmonised declaration form and reporting on penalties for non-declaration which mostly have happened on a voluntary basis, providing guarantees for the quality of future evaluations and offering better legal certainty to stakeholders.
- guidelines to Member States to provide information to the public and stakeholders with assistance by the Commission, by making materials available.

## **8. Monitoring and evaluation**

### **8.1 Monitoring arrangements**

The Commission would monitor the implementation of the legal proposal and its application in close cooperation with the Member States. Monitoring in a continuous and systematic way would allow identifying whether the policy proposal is applied as expected and addressing implementation problems in a timely manner. Collection of factual data of the suggested monitoring indicators (i.e. the statistical information to the Commission on declarations registered, controls made on cases where a declaration is made, controls made in the absence of declaration and the results of the controls performed, statistical information on penalties imposed for non-declaration) would also provide the basis for the future evaluation of the regulation.

### **8.2 Evaluation**

An evaluation report would be prepared by the Commission and submitted to the Parliament and the Council 5 years after the entry into force of the regulation and every 5 years subsequently. The evaluation of the Regulation should assess the extent to which the outlined objectives have been met. The evaluation results could be communicated to other European Institutions in a form of a report.

## List of annexes to the Impact Assessment report

[Annex 1. Regulation \(EC\) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community](#)

[Annex 2. Evaluation of Regulation \(EC\) No 1889/2005 on controls of cash entering or leaving the Community](#)

[Annex 3. Public consultation report](#)

[Annex 4. Procedural information](#)

[Annex 5. Who is affected by the initiative and how](#)

[Annex 6. Fundamental rights and exchange of information](#)

## **Annex 1. Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 95 and 135 thereof,

Having regard to the proposal from the Commission [\(1\)](#),

After consulting the European Economic and Social Committee,

Acting in accordance with the procedure referred to in Article 251 of the Treaty [\(2\)](#),

Whereas:

- (1) One of the Community's tasks is to promote harmonious, balanced and sustainable development of economic activities throughout the Community by establishing a common market and an economic and monetary union. To that end the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.
- (2) The introduction of the proceeds of illegal activities into the financial system and their investment after laundering are detrimental to sound and sustainable economic development. Accordingly, Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [\(3\)](#) introduced a Community mechanism to prevent money laundering by monitoring transactions through credit and financial institutions and certain types of professions. As there is a risk that the application of that mechanism will lead to an increase in cash movements for illicit purposes, Directive 91/308/EEC should be supplemented by a control system on cash entering or leaving the Community.
- (3) At present such control systems are applied by only a few Member States, acting under national legislation. The disparities in legislation are detrimental to the proper functioning of the internal market. The basic elements should therefore be harmonised at Community level to ensure an equivalent level of control on movements of cash crossing the borders of the Community. Such harmonisation should not, however, affect the possibility for Member States to apply, in accordance with the existing provisions of the Treaty, national controls on movements of cash within the Community.
- (4) Account should also be taken of complementary activities carried out in other international fora, in particular those of the Financial Action Task Force on Money Laundering (FATF), which was established by the G7 Summit held in Paris in 1989. Special Recommendation IX of 22 October 2004 of the FATF calls on governments to take measures to detect physical cash movements, including a declaration system or other disclosure obligation.
- (5) Accordingly, cash carried by any natural person entering or leaving the Community should be subject to the principle of obligatory declaration. This principle would enable the customs authorities to gather information on such cash movements and, where appropriate, transmit that information to other authorities. Customs authorities are present at the borders of the Community, where controls are most effective, and some have already built up practical experience in the matter. Use should be made of Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters [\(4\)](#). This mutual assistance should ensure both the correct application of cash controls and the transmission of information that might help to achieve the objectives of Directive 91/308/EEC.
- (6) In view of its preventive purpose and deterrent character, the obligation to declare should be fulfilled upon entering or leaving the Community. However, in order to focus the authorities' action on significant movements of cash, only those movements of EUR 10 000 or more should be subject to such an obligation. Also, it should be specified that the obligation to declare applies to

the natural person carrying the cash, regardless of whether that person is the owner.

- (7) Use should be made of a common standard for the information to be provided. This will enable competent authorities to exchange information more easily.
- (8) It is desirable to establish the definitions needed for a uniform interpretation of this Regulation.
- (9) Information gathered under this Regulation by the competent authorities should be passed on to the authorities referred to in Article 6(1) of Directive 91/308/EEC.
- (10) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [\(5\)](#) and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [\(6\)](#) apply to the processing of personal data by the competent authorities of the Member States pursuant to this Regulation.
- (11) Where there are indications that the sums of cash are related to any illegal activity, associated with the movement of cash, as referred to in Directive 91/308/EEC, information gathered under this Regulation by the competent authorities may be passed on to competent authorities in other Member States and/or to the Commission. Similarly, provision should be made for certain information to be transmitted whenever there are indications of cash movements involving sums lower than the threshold laid down in this Regulation.
- (12) Competent authorities should be vested with the powers needed to exercise effective control on movements of cash.
- (13) The powers of the competent authorities should be supplemented by an obligation on the Member States to lay down penalties. However, penalties should be imposed only for failure to make a declaration in accordance with this Regulation.
- (14) Since the objective of this Regulation cannot be sufficiently achieved by the Member States and can therefore, by reason of the transnational scale of money laundering in the internal market, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.
- (15) This Regulation respects the fundamental rights and observes the principles recognised in Article 6(2) of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular in Article 8 thereof,

HAVE ADOPTED THIS REGULATION:

## Article 1

### Objective

1. This Regulation complements the provisions of Directive 91/308/EEC concerning transactions through financial and credit institutions and certain professions by laying down harmonised rules for the control, by the competent authorities, of cash entering or leaving the Community.
2. This Regulation shall be without prejudice to national measures to control cash movements within the Community, where such measures are taken in accordance with Article 58 of the Treaty.

## Article 2

### Definitions

For the purposes of this Regulation:

1. 'competent authorities' means the customs authorities of the Member States or any other authorities empowered by Member States to apply this Regulation;
2. 'cash' means:

(a) bearer-negotiable instruments including monetary instruments in bearer form such as travellers

cheques, negotiable instruments (including cheques, promissory notes and money orders) that are either in bearer form, endorsed without restriction, made out to a fictitious payee, or otherwise in such form that title thereto passes upon delivery and incomplete instruments (including cheques, promissory notes and money orders) signed, but with the payee's name omitted;  
(b) currency (banknotes and coins that are in circulation as a medium of exchange).

## Article 3

### Obligation to declare

1. Any natural person entering or leaving the Community and carrying cash of a value of EUR 10 000 or more shall declare that sum to the competent authorities of the Member State through which he is entering or leaving the Community in accordance with this Regulation. The obligation to declare shall not have been fulfilled if the information provided is incorrect or incomplete.

2. The declaration referred to in paragraph 1 shall contain details of:

- (a) the declarant, including full name, date and place of birth and nationality;
- (b) the owner of the cash;
- (c) the intended recipient of the cash;
- (d) the amount and nature of the cash;
- (e) the provenance and intended use of the cash;
- (f) the transport route;
- (g) the means of transport.

3. Information shall be provided in writing, orally or electronically, to be determined by the Member State referred to in paragraph 1. However, where the declarant so requests, he shall be entitled to provide the information in writing. Where a written declaration has been lodged, an endorsed copy shall be delivered to the declarant upon request.

## Article 4

### Powers of the competent authorities

1. In order to check compliance with the obligation to declare laid down in Article 3, officials of the competent authorities shall be empowered, in accordance with the conditions laid down under national legislation, to carry out controls on natural persons, their baggage and their means of transport.

2. In the event of failure to comply with the obligation to declare laid down in Article 3, cash may be detained by administrative decision in accordance with the conditions laid down under national legislation.

## Article 5

### Recording and processing of information

1. The information obtained under Article 3 and/or Article 4 shall be recorded and processed by the competent authorities of the Member State referred to in Article 3(1) and shall be made available to the authorities referred to in Article 6(1) of Directive 91/308/EEC of that Member State.

2. Where it appears from the controls provided for in Article 4 that a natural person is entering or leaving the Community with sums of cash lower than the threshold fixed in Article 3 and where there are indications of illegal activities associated with the movement of cash, as referred to in Directive 91/308/EEC, that information, the full name, date and place of birth and nationality of that person and details of the means of transport used may also be recorded and processed by the competent authorities of the Member State referred to in Article 3(1) and be made available to the authorities referred to in Article 6(1) of Directive 91/308/EEC of that Member State.

## Article 6

### Exchange of information

1. Where there are indications that the sums of cash are related to any illegal activity associated with the movement of cash, as referred to in Directive 91/308/EEC, the information obtained through the declaration provided for in Article 3 or the controls provided for in Article 4 may be transmitted to competent authorities in other Member States.

Regulation (EC) No 515/97 shall apply *mutatis mutandis*.

2. Where there are indications that the sums of cash involve the proceeds of fraud or any other illegal activity adversely affecting the financial interests of the Community, the information shall also be transmitted to the Commission.

## Article 7

### Exchange of information with third countries

In the framework of mutual administrative assistance, the information obtained under this Regulation may be communicated by Member States or by the Commission to a third country, subject to the consent of the competent authorities which obtained the information pursuant to Article 3 and/or Article 4 and to compliance with the relevant national and Community provisions on the transfer of personal data to third countries. Member States shall notify the Commission of such exchanges of information where particularly relevant for the implementation of this Regulation.

## Article 8

### Duty of professional secrecy

All information which is by nature confidential or which is provided on a confidential basis shall be covered by the duty of professional secrecy. It shall not be disclosed by the competent authorities without the express permission of the person or authority providing it. The communication of information shall, however, be permitted where the competent authorities are obliged to do so pursuant to the provisions in force, particularly in connection with legal proceedings. Any disclosure or communication of information shall fully comply with prevailing data protection provisions, in particular Directive 95/46/EC and Regulation (EC) No 45/2001.

## Article 9

### Penalties

1. Each Member State shall introduce penalties to apply in the event of failure to comply with the obligation to declare laid down in Article 3. Such penalties shall be effective, proportionate and dissuasive.

2. By 15 June 2007, Member States shall notify the Commission of the penalties applicable in the event of failure to comply with the obligation to declare laid down in Article 3.

## Article 10

### Evaluation

The Commission shall submit to the European Parliament and the Council a report on the application of this Regulation four years after its entry into force.

Article 11

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply from 15 June 2007.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 26 October 2005.

For the European Parliament

The President

J. BORRELL FONTELLES

For the Council

The President

D. ALEXANDER

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(1) [OJ C 227 E, 24.9.2002, p. 574.](#)

(2) Opinion of the European Parliament of 15 May 2003 ([OJ C 67 E, 17.3.2004, p. 259](#)), Council Common Position of 17 February 2005 ([OJ C 144 E, 14.6.2005, p. 1](#)), Position of the European Parliament of 8 June 2005 and Council Decision of 12 July 2005.

(3) [OJ L 166, 28.6.1991, p. 77.](#) Directive as amended by Directive 2001/97/EC of the European Parliament and of the Council ([OJ L 344, 28.12.2001, p. 76](#)).

(4) [OJ L 82, 22.3.1997, p. 1.](#) Regulation as amended by Regulation (EC) No 807/2003 ([OJ L 122, 16.5.2003, p. 36](#)).

(5) [OJ L 281, 23.11.1995, p. 31.](#) Directive as amended by Regulation (EC) No 1882/2003 ([OJ L 284, 31.10.2003, p. 1](#)).

(6) [OJ L 8, 12.1.2001, p. 1.](#)



## **Annex 2. Evaluation of Regulation (EC) No 1889/2005 on controls of cash entering or leaving the Community**

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## EXECUTIVE SUMMARY

Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community, (further, 'the Cash Control Regulation') applies from the 15th of June, 2007.

The Cash Control Regulation builds upon the supra-national framework which has been established by the Financial Action Task Force ('FATF') in its Recommendation 32 and the accompanying interpretative note which specify the nature of measures that countries should take to control cross-border cash movements.

It establishes an EU-wide system of harmonised control measures on natural persons who are entering or leaving the EU carrying 10 000 EUR or more in cash or bearer negotiable instruments and is an important complement to the EU's existing Anti-Money Laundering and Counter Terrorist Finance framework. The Cash Control Regulation only applies to cash which is moved by natural persons between a Member State and a third country or vice versa. It does not prejudice the possibility that Member States have to set up a system of intra-community controls, provided that these stay within the framework of Art. 63 (freedom of movement of capital) of the Treaty on the Functioning of the European Union.

The Cash Control Regulation establishes a definition of 'cash' which mirrors the FATF-standard and defines cash as currency and/or bearer-negotiable instruments. Items such as gold, precious stones etc. are outside of the scope of application of the cash controls regulation. The Cash Control Regulation lays down an obligation on natural persons carrying cash equal to or in excess of 10 000 € to declare this with competent authorities at the Member State of entry or exit of the EU.

Cash which is not carried by natural persons but shipped in mail or freight is not subject to the provisions of the Cash Control Regulation but rather of general customs provisions. The same applies for precious stones and metals.

Most Member States have voluntarily agreed to use a standardised declaration form to accept the declarations, which are then made available to the Financial Intelligence Units (FIU) of the Member State for further analysis. Member States also voluntarily provide statistical data regarding the number of declarations, irregularities etc. to the Commission.

In cases where indications of illicit activity are present the declaration data may be exchanged with other Member States or with third countries, subject to personal data protection guarantees. In case no declaration was filed but cash equal to or in excess of 10 000 € was found, authorities have the possibility to administratively detain cash as a temporary measure, and they have the obligation to provide for a penalty, which is established under national legislation.

The main purpose of the evaluation of the Cash Control Regulation is to gather evidence on how it has been implemented by the Member States, and to analyse to what extent it contributes to the prevention of and fight against money laundering and terrorist financing in the EU.

The analysis and evaluation exercise was conducted by the Commission, based on earlier review documents, analysis of statistical data, interaction with national experts from Member States and data available from various other sources.

The evaluation has been produced internally by Commission Services. Given that the work on the review of the Cash Control Regulation started already in 2014, the process did not follow all the steps set out in the new Commission Better Regulation Guidelines adopted in May 2015. The evaluation has been conducted back-to-back to the work on the impact assessment with no separate open public consultation covering the retrospective elements.

While it is a challenging task to try judging the extent to which legislation is effectively implemented and to judge the impact legislation has on an illegal phenomenon (something which, by its very nature, is difficult to collect accurate data on), the cross-matching of data from various independent sources offers assurances of robustness to the analysis and evaluation.

The review process focussed on the following main aspects:

The **relevance** of measures in the area of anti-money laundering and terrorist financing is demonstrated based on statistical analysis and reports about the number of declarations / irregularities which show that cash remains more than ever a favourite medium used to transfer value by money-launderers. While all Member States apply the Cash Control Regulation, the level of implementation may not be the same in each Member State, particularly in the areas concerning the exchange of information where various tools are available, each subject to its own strengths and weaknesses, occasionally exacerbated by provisions which allow discretionary interpretation and introduce variability between Member States. The latter becomes particularly visible in the area of penalties which are laid down in national legislation and are highly variable in type, severity and application.

**Effectiveness of implementation** where illicit activity is concerned is hard to judge, yet feedback received from various sources (national FIUs, prosecutors, law enforcement agencies) as well as statistical analysis indicate that the overall level of effectiveness of the Cash Control Regulation is satisfactory. There is, however, room for improvement, especially in the field of data exchange and the aspect of controls on cash sent in mail and freight which is currently outside the scope of application of the Cash Control Regulation.

**The efficiency** with which the information required by the Cash Control Regulation is collected is facilitated by the voluntary use of the EU Common Declaration Form by most Member States. This Form is – in terms of nature of the information collected and complexity – in line with international practice.

The information, which is captured by authorities via the declaration system, allows to achieve the goals set out by the Cash Control Regulation and the **utility** of this information is judged to be good. Various sources made the remark that the aspect 'fiscal fraud' as a predicate offence for money laundering has gained importance over the last years and noted that the information obtained through cash control declarations could be useful to tackle this aspect. However the current Cash Control Regulation and the national implementation of the provisions contained therein as well as in other legal norms leads to substantial divergence between Member States regarding the possibilities to make use of this information for fiscal purposes.

As to the coherence and **conformity with international norms** and newly emerging challenges, this aspect of the Cash Control Regulation is judged to be good in terms of definition of cash and the measures as they apply to cash carried by natural persons. Data on cash shipped in mail and freight is currently imperfectly captured via the customs declaration and an increasing emphasis towards more and more efficient data exchange and the use of cash declaration data for fiscal purposes needs to be taken into account.

In conclusion, while the overall performance of the Cash Control Regulation for the parameters described above is adequate, consideration should be given to the possibility of more in-depth analysis to improve the following aspects:

- **Consider including cash movements by mail and freight at EU external borders within the scope of the Cash Control Regulation;**
- **Consider widening and harmonising the possibilities for information exchange between Member States:**
  - a. **By including all cash control information (including non-suspicious voluntary declarations);**
  - b. **By setting clear procedures and providing effective tools for the exchange of information;**

- **Consider to explicitly provide for the possibility of using cash declaration information for tax purposes, including the fight against tax fraud and evasion;**
- **Consider a level of approximation of cash control penalties applied by Member States at EU external borders.**

## 1. INTRODUCTION

### 1.1. Purpose of the Evaluation

The main purpose of the evaluation of the Regulation (EC) No 1889/2005 on controls of cash entering or leaving the Community (Cash Control Regulation) is to gather evidence on how the Cash Control Regulation has been implemented by the Member States of the European Union (EU), and to analyse to what extent it contributes to the prevention of and fight against money laundering and terrorist financing in the EU.

The evaluation makes recommendations on how to improve the current legal framework and implementation of cash controls at the external borders of the EU, in order to ensure that cash controls are an effective tool in the fight against money laundering and terrorist financing in the EU, and are in line with international standards.

### 1.2. Scope of the evaluation

The evaluation focuses exclusively on the measures set out in the Cash Control Regulation to fight and prevent money laundering and terrorist financing, as implemented by the 28 Member States at the EU's external borders.

National measures to control cash movements within the EU are not evaluated as they are not covered by the Cash Control Regulation, although certain information related to such movements is presented when considered relevant for achieving a better understanding of cash movements in the EU.

As the Cash Control Regulation is part of the EU's anti-money laundering/combating the financing of terrorism (AML/CFT) legal framework, the framework itself is also presented to describe the legal, political and operational context in which the EU Member States implement the Cash Control Regulation.

The evaluation covers the period starting from 2007, when the Cash Control Regulation became applicable, until and including 2014, subject to availability of most recent data.

## 2. BACKGROUND TO THE CASH CONTROL REGULATION

### 2.1. Situation prior to the Cash Control Regulation

Prior to the introduction of the Cash Control Regulation, the level of cross-border cash movements in the EU Member States was first examined by the Operation "Money Penny" (Money Penny).

Money Penny was a joint operation carried out by the then 15 Member States' customs services in the period September 1999 to February 2000, to monitor cash movements across EU's internal and external borders in excess of EUR 10 000. It examined whether the scale of such movements indicated a threat that the controls applied by financial institutions to prevent money laundering could be circumvented by cross-border movements of cash.

Although the final Money Penny report did not distinguish between intra and extra-EU cash movements, and included only limited input from 9 Member States that did not apply specific controls on cash at their borders (cash discovered through general customs controls), it nevertheless revealed:

- The significant scale of cross-border cash movements in the EU with the total means of payment recorded during the six month period of the operation in the amount of EUR 1.6 billion, EUR 1.35 billion of it in cash;
- The substantial differences in the controls applied by Member States, with most not having any requirement to declare cash being carried across the border, or rights to perform checks to monitor cross-border cash movements.

Although it was not possible to gauge the exact scale of money laundering via cash movements, the Commission considered that:

- The volume of cash being transported was such that it presented a potential risk to the EU and national interests;
- Existing controls to prevent money laundering were undermined by the disparate nature of controls on cross-border cash movements, as they left open loopholes for criminals to exploit;
- As controls on money movements via financial institutions had been tightened since the events of 11 September 2001, there could be increasing recourse to cash as an alternative solution;
- The differences in the control systems applied by the Member States also raised questions from the standpoint of the single market, as depending on the Member State whose borders they were crossing, travellers would find themselves subject to rules that were divergent and thus difficult to understand.

Therefore, in June 2002 the Commission presented to the Council its "Proposal for a Regulation of the European Parliament and the Council on the prevention of money laundering by means of customs co-operation".

The Commission proposed that the Anti-Money Laundering Directive<sup>1</sup> should be complemented by a Regulation introducing controls on large sums of cash crossing the EU's external border. For the controls to be effective, a system would also be needed whereby the Member States could exchange information on suspicious movements with each other and the Commission.

## 2.2. Description of the Cash Control Regulation and its objectives

The Cash Control Regulation entered into force on 15 December 2005 and is applicable since 15 June 2007. It provides for an EU-wide approach to controlling cash movements into or out of the EU. It was a decisive step in the EU policy aimed at the strengthening of measures to prevent money laundering, terrorist financing and other illegal activities.

### 2.2.1. Money Laundering and Terrorist Financing

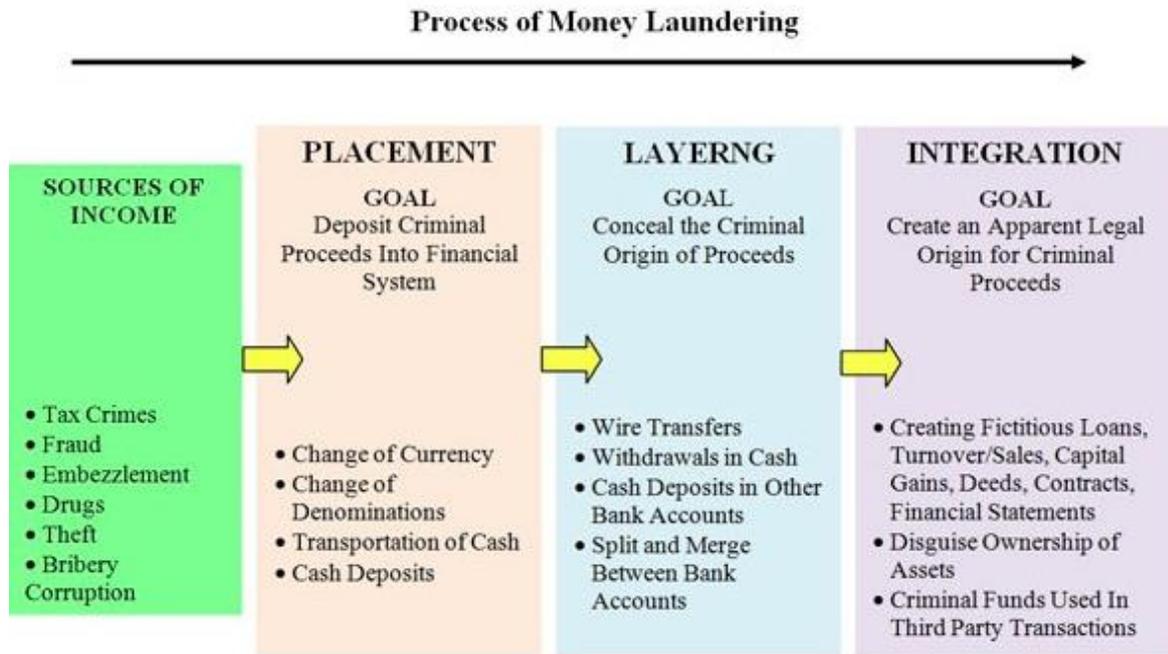
**Money laundering**<sup>2</sup> concerns activities related to assets which have a criminal or illicit origin. Criminals engaged in money laundering will therefore attempt to conceal or disguise the true nature, source or ownership of the assets in question and transform them into seemingly legitimate proceeds. If dirty money is allowed to flow through the financial system, the stability and reputation of the financial sector can be seriously jeopardised - which in turn could undermine the integrity of the single market.

Picture 1. Money Laundering process

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<sup>1</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

<sup>2</sup> Definition as used in the Impact Assessment accompanying the Proposal Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering, including terrorist financing, p. 8, to be consulted at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013SC0021&from=EN>



Source: OneStopBrokers.com

**Terrorist financing**<sup>3</sup> on the other hand concerns the provision or collection of funds to carry out any of the offences defined in Council Framework Decision 2002/475/JHA on combating terrorism. Terrorist activities can be funded through legitimate as well as criminal activities and terrorist organisations engage in revenue-generating activities which in themselves may be, or at least appear to be, legitimate. There is a clear risk to the integrity, proper functioning, reputation and stability of the financial system, and with potentially devastating consequences for the broader society.

### 2.2.2. EU anti-money laundering and counter-terrorist financing legislation

The EU considers the AML/CFT framework as crucial for ensuring the successful functioning of the single market and safeguarding the security of citizens.

The EU legal framework to prevent money laundering is composed of Directive 2005/60/EC<sup>4</sup>, of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (and directive 2006/70/EC) as amended by Directives 2007/64/EC, 2008/20/EC and 2009/110/EC and Regulation (EC) No 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfer of funds.

Equally relevant are Council Decision 2000/642/JHA concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information, and

<sup>3</sup> Op. Cit. supra, p. 9

<sup>4</sup> As of May 20, 2015, Directive (EU) 2015/849 of the European Parliament and of the Council 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> Anti-Money Laundering Directive') was adopted. It is currently being transposed into national legislation by Member States, who have until June 26<sup>th</sup>, 2017 to implement its provisions.

Council Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.

Complementary to this framework, the EU counter-terrorist financing strategy<sup>5</sup> points at measures aiming to improve the results in the fight against terrorist financing.

The current 4<sup>th</sup> Anti-Money Laundering Directive and its legal predecessors going back to 2005 contain an EU mechanism to prevent money laundering and terrorist financing by monitoring transactions through credit and financial institutions and certain types of other non-financial professions.

The risk that the application of this mechanism which applies to transfers of money through the formal financial system would be circumvented by cash movements for illicit purposes or for terrorist financing led to the need to complement this measure by a control requirement for cash entering/leaving the EU.

The Cash Control Regulation was adopted for this purpose and seeks to reconcile the fundamental principle of free movement of goods, persons, services and capital with the prevention of money laundering and terrorist financing in the context of the single market and an economic and monetary union.

### 2.2.3. International context

A major partner in ensuring the effectiveness of the Cash Control Regulation is the Financial Action Task Force (FATF)<sup>6</sup>, an inter-governmental body set up by the G7 Summit held in Paris in 1989 in response to mounting concern over money laundering.

As an international standard setter, the FATF has primary responsibility for developing and promoting global policy standards, both at national and international level, to prevent money laundering and combat terrorist financing. It works to generate the necessary political will to bring about legislative and regulatory reforms in these areas, and for this purpose it has adopted 40 recommendations.

The European Commission (Commission) is a member of the FATF and is therefore committed to implementing its recommendations, including Recommendation 32 on cash couriers, adopted as the FATF recognises the use of cash couriers as an important method for criminals to move funds. Recommendation 32<sup>7</sup> is partially transposed into EU law by the Cash Control Regulation.

The FATF Recommendation 32 states that: *“countries should have measures in place to detect the physical cross-border transportation of currency and bearer negotiable instruments, including through a declaration system and/or disclosure system. Countries should ensure that their competent authorities have the legal authority to stop or restrain currency or bearer negotiable instruments that are suspected to be related to terrorist financing, money laundering or predicate offences<sup>8</sup>, or that are falsely declared or disclosed. Countries should ensure that effective, proportionate and dissuasive sanctions are available to deal with persons who make false declaration(s) or disclosure(s). In cases where the currency or bearer negotiable instruments are related to terrorist financing, money laundering or predicate offences, countries should also adopt measures, including legislative ones*

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<sup>5</sup> <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST+14469+2005+REV+4>

<sup>6</sup> Information about the FAFT, its recommendations and all related documents is available on the public web- pages of the FATF: <http://www.fatf-gafi.org>

<sup>7</sup> In 2012, the FATF revised all recommendations. Recommendation 32 is an amendment of the former Special Recommendation IX which refers to cash controls.

<sup>8</sup> A “predicate offence” is an offence whose proceeds may become the subject of a money laundering offence, source: United Nations Office on Drugs and Crime.

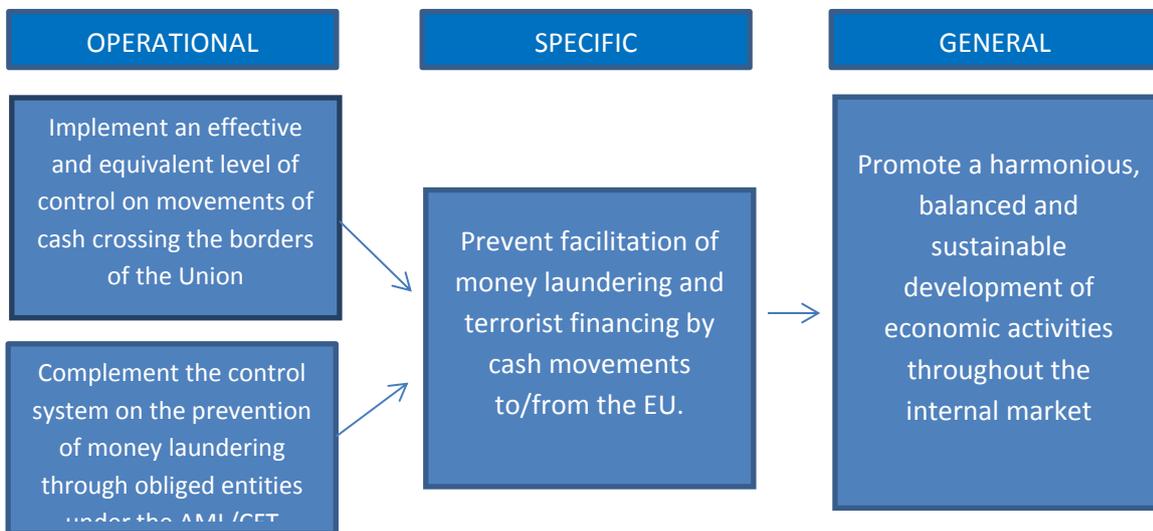
consistent with Recommendation 4, which would enable the confiscation of such currency or instruments.”

15 EU Member States are also full members of the FATF in their own right, while the countries that joined the EU from 2004 onwards are represented in the Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL), FATF's affiliated regional body.

Starting with its own members, the FATF monitors countries' progress in implementing AML/CFT policies by rating their compliance with its recommendations and measuring the effectiveness of their AML/CFT systems, via a mutual evaluations procedure and by reviewing anti money laundering and combatting terrorist financing techniques and relevant counter-measures.

#### 2.2.4. The objectives of the Cash Control Regulation

The objectives of the Cash Control Regulation, as described in the text of the Regulation are presented in the diagram below.



The provisions designed to meet these objectives were codified in the Cash Control Regulation in line with the requirements of the FATF's Recommendation 32 on cash couriers, with the view of aligning EU practices with the highest global AML/CFT standards<sup>9</sup>.

#### 2.2.5. The main provisions of the Cash Control Regulation

The main provisions of the Cash Control Regulation can be presented in terms of activities leading to outputs needed to meet the objectives outlined above. Each activity is subsequently described in more detail.

<sup>9</sup> The revision of the FATF Recommendations was adopted and published in February 2012, whereby Special Recommendation IX on cash couriers became FATF Recommendation 32 on cash couriers.



### Definition of cash

The definition of cash in the Cash Control Regulation matches the definition used by the FATF for Recommendation 32 on cash couriers and includes:

- Currency, i.e. banknotes and coins that are in circulation as a medium of exchange.
- Bearer-negotiable instruments (BNI), including monetary instruments in bearer form such as travellers cheques;
- Negotiable instruments (including cheques, promissory notes and money orders) that are either in bearer form, endorsed without restriction, made out to a fictitious payee, or otherwise in such form that title thereto passes upon delivery;
- Incomplete instruments (including cheques, promissory notes and money orders) signed, but with the payee's name omitted;

As the Cash Control Regulation mirrors the definition of 'cash' used in the supra-national standard (FATF recommendation 32), gold, precious metals or stones, electronic cash cards and casino chips are not included in the definition of cash. These items are covered by Customs Code provisions.

### The obligation to declare

The Cash Control Regulation establishes a uniform EU approach towards cash controls based on a mandatory declaration system.

If a natural person<sup>10</sup> entering or leaving the EU (including transiting) transports cash of a value of EUR 10 000 or more, he/she must declare these funds. It is the total value in EUR equivalent of all cash transported by the natural person that determines if the threshold of EUR 10 000 is exceeded.

The EUR 10 000 threshold is considered high enough not to burden the majority of travellers and traders with disproportionate administrative formalities.

However, when there are indications of illegal activities linked with movements of cash lower than EUR 10 000, the collecting and recording of information related to these movements is also authorised.

This provision was introduced in order to limit the practice of "smurfing", the act of carrying amounts lower than the threshold with the intention to escape the obligation to declare. Smurfing is often related to money laundering, terrorist financing, fraud or other financial crimes and should therefore be monitored by the competent authorities.

### Designation of powers of the competent authorities<sup>11</sup>

In order to ensure compliance with the obligation to declare, the national competent authorities are empowered to:

- Request, accept, check and certify a cash declaration;
- Check compliance with the obligation to declare;
- Carry out controls on natural persons, their baggage and their means of transport

### Recording and processing of information

Member States must record and process all information they obtain through declarations or controls, and make this information available to the national authorities competent for fighting money laundering and terrorist financing.

These authorities are designated as national Financial Intelligence Units (FIUs), central national units responsible for receiving and analysing information and suspicious transactions received from authorities or private sector operators, analysing them and if there are reasons to suspect that illicit activity may be going on, to notify the competent (judicial) authorities.

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<sup>10</sup> The Regulation also applies to natural persons crossing the border as professional cash couriers, i.e. employees of cash-in-transit (security) companies that specialise in the physical transport of cash.

<sup>11</sup> As in most Member States the national customs authorities are competent authorities for the implementation of the Cash Control Regulation, the terms 'competent authorities' and 'customs authorities' are used interchangeably in the evaluation, depending on context.

FIUs therefore play a key role in ensuring that the information collected through cash declarations and cash controls, is properly analysed and where appropriate, used effectively to investigate suspicions of money laundering and terrorist financing.

It should be noted that all information obtained through the Cash Control Regulation is confidential. All personal information must be dealt with in accordance with the relevant data protection provisions. Where considered necessary, rules for the classification of the information to guarantee the security of the data apply.

#### Exchange of information

Where there are indications that the sums of cash are related to any illegal activity associated with the movement of cash, exchange of information may take place with competent authorities in other Member States. Information adversely affecting the financial interests of the EU must also be transmitted to the Commission.

Under the framework of existing agreements on mutual administrative assistance, information obtained under the Cash Control Regulation may also be communicated to a third country, subject to compliance with relevant national and EU provisions on the transfer of personal data to third countries.

#### Penalties

Member States are required to provide for penalties against persons who fail to declare EUR 10 000 or more in cash when crossing EU external borders. The penalties resulting from such proceedings must be effective, dissuasive and proportionate to the offence<sup>12</sup>, so as to have a deterrent effect.

### **2.2.6. Control of cash movements within the European Union**

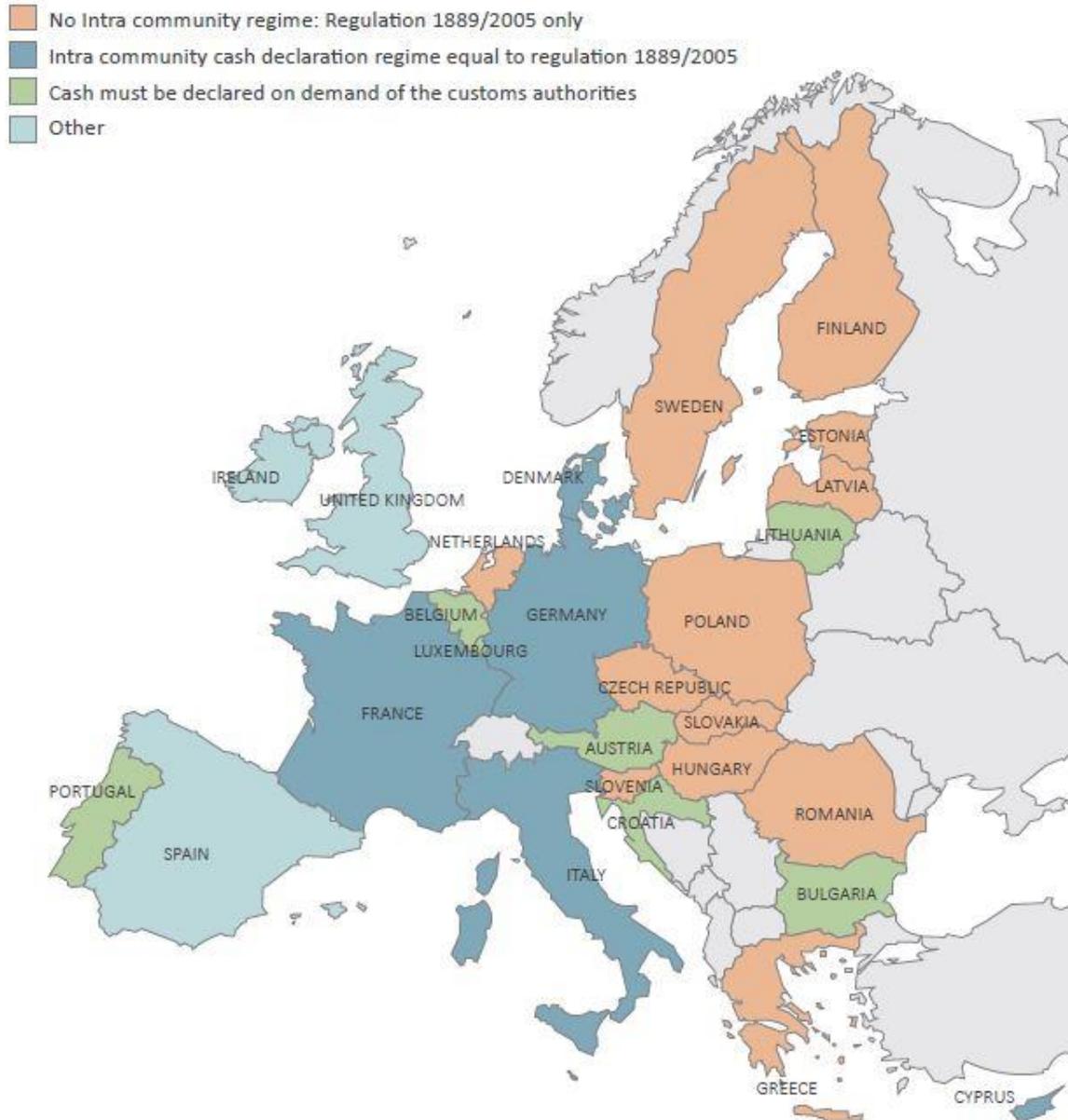
The Cash Control Regulation does not cover cross-border movements of cash within the EU. Member States are however entitled to apply national measures to control cash movements within the EU, at their national borders and or on national territory, provided that such measures comply with Article 65 of Treaty on the Functioning of the European Union (TFEU).

Article 65 empowers MS to establish procedures for the declaration of cash movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security, provided that the measures and procedures applied do not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital.

16 Member States apply some form of cash controls at their borders with other Member States.

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<sup>12</sup> Offence refers to the mere failure to declare and is not related to any underlying illicit activity concerning the money.



Source: Europol report 'Why is cash still King', op. cit., p. 25.

### 3. EVALUATION QUESTIONS

In order to structure the evaluation exercise, the current analysis sets out to answer a series of questions that will provide insight into the effects produced by the Cash Control Regulation, and to investigate to what extent it has made a contribution towards reaching the intended objectives (see section 2.2.4 above). The following questions address each of the five main evaluation criteria that the Commission's Evaluation Guidelines recommend for consideration:

1. To what extent is the current scope of the Cash Control Regulation still relevant for preventing money laundering and terrorist financing? (relevance)
2. To what extent do the current provisions of the Cash Control Regulation guarantee proper control of cash movements to prevent money laundering/terrorist financing? What is the value added of acting at EU level? (effectiveness/EU added value)

3. Is the information collected in an easy and burden-free manner? To what extent is the information exchanged timely and accurately, with the national FIU and with other Member States and third countries? (efficiency)
4. How extensive is the information collected under the Cash Control Regulation and how useful is it for preventing money laundering/terrorist financing at national level/EU level? To what extent does it allow customs to gather all possible information to assist in the prevention of money laundering/terrorist financing? (effectiveness/utility)
5. To what extent are the current provisions of the Cash Control Regulation in line with the latest developments in the EU and at the international level to prevent money laundering /terrorist financing? (coherence)

#### **4. METHOD/PROCESS FOLLOWED**

##### **4.1. Process/Methodology**

The evaluation serves both a summative (i.e. focus on the effectiveness of the Cash Control Regulation in the EU by providing an objective assessment of its quality or value) and a formative purpose (i.e. facilitate learning in order to prepare for a new legislative proposal which could replace or up-date the current Cash Control Regulation).

##### Data collection

For the purpose of answering the evaluation questions, different sources of data have been used. An active effort was made in order to “triangulate” the data used throughout the analysis. This means that all findings presented in the evaluation are supported by evidence from different data sources. Any contradicting evidence has been weighed according to its strength and quality before reaching conclusions.

##### Desk research

A broad review of national, EU and international reports was conducted. The review covered a variety of policy and operational documents, evaluation/progress reports, economic data, court decisions etc. The list of sources can be found in Annex 1.

##### Statistical data

Regular statistics provided to the Commission by Member States on cash declarations and recordings (failures to declare or to declare correctly) since 2007, and on penalties, cash detentions, cash seizures and cash confiscations since 2010, have been analysed.

##### The 2010 Report on the implementation of the Cash Control Regulation

As per the requirement of Article 10 of the Cash Control Regulation, in August 2010 the Commission submitted a "Report on the implementation of the Cash Control Regulation" to the Council and the European Parliament (2010 Report).

Since the Cash Control Regulation had been in force for a short amount of time, the focus of the 2010 Report was mainly on assessing whether appropriate structures had been established and adequate procedures developed by Member States to allow for a uniform implementation of the Cash Control Regulation.

The 2010 report has been an important source of information for the current evaluation.

##### Questionnaires to Member States

In June 2014, a questionnaire (2014 Questionnaire) was sent to Member States in order to get an update on how they implemented the provisions of the Cash Control Regulation and to cover any missing gaps in data. The 2014 Questionnaire provides data on the general implementation of provisions, as well as the extent to which cash movements in post and freight were covered by the national legislations.

Answers to earlier questionnaires sent to Member States by the Commission were also taken into account as regards information not covered in the 2014 Questionnaire.

Furthermore, a new questionnaire on the exchange of information on cash declarations and results of cash controls (cash control information) for the purpose of fighting tax fraud and evasion (Tax Questionnaire) was sent to Member States in January 2015 and also informs sections of the evaluation.

#### Operational information from other sources

Useful data has been obtained through responses to information requests by relevant national and EU institutions that deal with the fight against money laundering and terrorist financing.

A number of national FIUs provided feedback on their use of cash control information. In addition, Europol (EU's law enforcement agency) agreed to provide examples of criminal investigations resulting from controls of cash by EU Member States.

#### **4.2. Limitations – robustness of findings**

Some limitations of the data used in this evaluation exist; they are stemming from:

- Lack of complete statistics linking cash controls to criminal investigations and court decisions on money laundering or terrorist financing, as feedback is often not provided by the national FIUs to the competent authorities that collect the relevant information;
- Variation in the amount and quality of information provided by the Member States in response to Commission's questionnaires and information requests, an example being the 2014 Questionnaire to which 4 Member States provided no answers and several Member States provided partial or incomplete answers;
- Lack of first-hand observation/monitoring by the Commission of cash controls procedures and results in the Member States.

However, the evaluation analysis made efforts to overcome these limitations by relying on:

- A significant number of examples of how cash controls have initiated criminal investigations on money laundering/terrorist financing and resulted in convictions by courts, as well some statistical data on the use of cash controls provided by several national FIUs;
- Numerous discussions with Member States' cash control experts at the plenary meetings of the Cash Control Coordination Group (CCCG) which take place several times a year, as well as ad-hoc project groups on cash control issues, which provide an opportunity for Member States to exchange detailed information on their procedures and practices and complement the data provided via official information requests;
- Regular and complete statistical data provided by Member States according to Commission's guidelines and standard templates, which enable a detailed insight into the practical implementation of the main provisions of the Cash Control Regulation.

## **5. IMPLEMENTATION STATE OF PLAY (RESULTS)**

The implementation of the Cash Control Regulation by the Member States is monitored by the European Commission mainly through:

- Collecting and analysing the statistics on cash declarations and recordings (failures to declare correctly) as well as on penalties imposed, sent regularly by all the Member States on a voluntary basis.
- Communication with cash control experts in the Member States:
  - At plenary meetings of the CCCG, an expert group set up by the Commission which meets several times a year to discuss pertinent cash control issues;
  - By setting-up smaller project groups of experts to deal with ad-hoc projects related to cash controls.
- Taking note of mutual evaluations by the FATF (or MONEYVAL) of EU Member States, with the focus on recommendations relating to their systems of cash controls.
- Obtaining information from the Member States by way of Commission questionnaires on cash controls.

The following sections will provide an overview of the current state of the implementation of the Cash Control Regulation by looking at its main provisions and illustrating:

- How each provision should be interpreted and applied by the competent authorities in the Member States;
- Where relevant, an overview of implementation efforts since the introduction of the Cash Control Regulation;
- The current state of play in relation to the implementation of each provision.

### 5.1. Definition of cash

As foreseen in the Cash Control Regulation, all Member States follow the definition of cash established by the FATF which refers to financial and monetary instruments whose value can be transferred from one person to another, i.e. whose origin and destination are anonymous or which can be endorsed and transferred successively by several recipients.

Several Member States also have national provisions similar to the obligation to declare cash as regards gold and/or precious metals and stones (Austria (on its territory), Bulgaria, Cyprus, the Czech Republic, Germany, Italy and Poland). In addition, Germany has national provisions to declare electronic money.

### 5.2. Obligation to declare

Competent authorities of the Member States have to ensure the necessary organisational facilities are in place at the points of EU entry and exit, including airport transit zones, so that natural persons can fulfil their obligation to declare.

This should be achieved by guiding the natural person via communication material to the relevant customs control posts or other equivalent technical facilities (on-line declaration possibility), where the declaration forms are readily available. Sufficient staffing of the customs control posts/technical facilities at the external borders of the EU should be ensured and staff should have the authority and technical competence to accept declarations.

#### 5.2.1. Raising awareness on the obligation to declare

The Cash Control Regulation does not lay down any awareness-raising measures. Nevertheless, the Commission has stimulated Member States to undertake initiatives in order to inform the public of their obligations and has undertaken specific actions since the coming into force of the Regulation.

#### Current state of play

In order to harmonise the communication on cash controls, common communication material is developed by the European Commission. Such material has been either made directly available, or provided in the form of templates that can be used by Member States, and includes: cash control leaflets, posters, advertorials, alternative advertising (suitcases), animated clips, roll-ups, internet banners, web pages etc. Similar tools are also issued at the national level.

In May 2014, the Commission asked the Member States to report on whether they had started using updated cash control communication templates, designed and provided by the Commission to ensure a uniform EU visual identity of communication actions.

Most of the Member States reported not yet using the templates but nevertheless continue to use the material previously directly provided by the Commission.

The Commission emphasised that a uniform EU-wide communication on cash control was crucial and passengers should be adequately informed at points of entry and exit, as well as via internet, in a consistent manner. The Member States were advised to use the External Communication Network, the Commission's platform for coordination of communication activities, to raise specific issues and obtain support in ensuring that a uniform EU message on cash declaration obligation reaches passengers.

### 5.2.2. Place to declare

The declaration has to be completed and lodged with the competent authorities at the point through which the natural person is entering or leaving the EU.

The 2010 report showed that for air transit<sup>13</sup> passengers, the obligation to declare cash at the first point of entering or the last port of leaving the EU was difficult to comply with due to the variations in airport transit infrastructure. There were few or different facilities provided for declaring cash in transit zones and there was often not enough time between flights.

A Project Group of Member States experts analysed the transit issue in 2011 and concluded that an amendment to the Cash Control Regulation would not provide a solution to the practical problems encountered, as the combined use of the Cash Control Regulation and the implementing provisions of the EU Customs Code formed a sufficient base to perform controls.

This was confirmed by an opinion of the European Commission's Legal Service, which indicated that transit was only one method of entering or leaving the EU, and terms entering and leaving were already specified in Article 3 and should be interpreted literally.

#### Current state of play

Following the conclusion of the 2011 Project Group of Member States' cash experts that non-legislative measures were more appropriate for transit passengers, the Commission updated the Handbook of Guidelines on Cash Control to include more/better references to transit and made available the updated version to all Member States.

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<sup>13</sup> The term 'transit' as used here means either a movement from one third country to another via the territory of a Member State but without clearing immigration and customs controls or entering the EU via the territory of one Member State with an ultimate destination in another Member State or departing in one Member state to another Member State, from which the EU is exited.

The introduction of a new transit-specific CDF<sup>14</sup> was not considered necessary due to the introduction of a new general EU-CDF, which is applicable for transit passengers as well.

The recent discussions at plenary meetings of the CCCG however indicate that a number of Member States continue to experience practical problems with cash declarations and controls in relation to transit passengers.

### 5.2.3. Methods to declare

The Cash Control Regulation does not prescribe the method of the declaration. As a result the declaration can be presented in written, oral or electronic form depending on the requirements laid down by national legislation. The minimum information to be provided includes:

- The declarant (name, date and place of birth, nationality, etc.);
- The owner of the cash;
- The intended recipient of the cash;
- Description of the cash (nature, amount, currency);
- Provenance and intended use of the cash;
- The transport route;
- The means of transport.

The acceptance of the declaration should include at the minimum a check on:

- The readability of the data (in combination with a check on the acceptability of the form used and the language used to complete the data); and
- The completeness of the declaration (the minimum required boxes are completed);
- The identity of the natural person that submits the cash declaration (the data to identify the declarant as completed on the declaration form should conform to the passport or travel documents the natural person can provide as proof of his/her identity).

Any further control action on the validity of the data in the declaration is not required by the Cash Control Regulation. As a result, an accepted declaration never proves the legal status, the origin or destination of the funds and can never be accepted as a substitute for verifying the source of funds.

The competent authorities should nevertheless carry out a reasonable number of random and/or targeted controls and investigations to ensure that natural persons respect not only the completeness but also the correctness of the cash declarations presented.

Most Member States had opted to require written declarations. Only three Member States allowed for an oral declaration, which would then be written up by a customs officer. Three Member States also allowed for electronic declarations to be lodged (one only for professional cash couriers).

In almost all Member States, cash declarations could be completed in the official languages of the country in which one had to declare, and also in English. Some Member States accepted and allowed the cash declaration form to be completed in other widely spoken EU languages.

The initial implementation phase showed that making use of a common declaration form would be an important contribution to improve the (electronic) exchange of information on cash declarations. Furthermore it would also enhance the understanding by international travellers on what is expected from them, thus improving compliance with the requirements.

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<sup>14</sup> Common Declaration Form, a harmonised declaration form used by most Member States on a voluntary basis and elaborated in cooperation with the Commission, cf. infra.

For that purpose, a European Common Declaration Form (EU-CDF) was developed in collaboration between the Member States Experts and the Commission services in the CCCG framework. This process was initiated in 2008 and the current form is regularly reviewed in order to determine if it still meets current needs.

#### Current state of play

The competent authorities of 24 Member States require the use of the EU-CDF and have accommodated it to include a national flag, references to national legislation and where applicable, intra EU cash controls procedures.

4 Member States have not yet implemented the EU-CDF:

- The United Kingdom (UK) has approved the EU-CDF but is still using the old stock of national cash declaration forms until these are depleted;
- Spain is waiting for the adoption of national regulation related to IT system requirements, implementation is expected in January 2016;
- Italy is waiting for a decision by the Ministry of Finance in relation to the cost of the required IT solution (estimate of timing not given);
- France does not use the EU-CDF due to national legislation provisions.

Spain and France offer the possibility of submitting a (currently national) cash declaration form online. 7 Member States offer the possibility to fill in the EU-CDF form online and then print it for submission in paper form, while 4 Member States are currently developing IT solutions for the EU-CDF.

#### **5.2.4. Statistics on cash declarations/recordings**

There is no explicit requirement in the Cash Control Regulation for Member States to provide statistics to the Commission. However, in the technical working group on cash controls to prepare the original proposal for the Cash Control Regulation, the Member States agreed that the collection of statistics on cash controls would be an important element in the follow-up of an effective implementation of the Cash Control Regulation.

#### Current state of play

Since 15 June 2007, when the Cash Control Regulation became applicable, all Member States have been sending in statistics on the cash declarations submitted and control results obtained to the Commission. Incorrect cash declarations or findings as a result of controls are referred to as "recordings" in the statistics.

The Commission, with support of Member States' cash control experts, has developed a Guide for Cash Control Statistics, which is annexed to the Handbook of Guidelines on Cash Controls and provides detailed guidance to the Member States on how to complete the standard Excel spreadsheet.

The statistics demonstrate that cash declarations are processed and controls are carried out on passengers, the luggage and the means of transport, by all Member States. However, there are significant differences in the levels of declarations submitted and controls results reported by different Member States.

These results will be presented and discussed in section 6.

#### **5.3. Designation of powers of the competent authorities**

Article 4 of the Cash Control Regulation provides the legal basis for competent authorities to carry out controls on natural persons, their baggage and their means of transport in accordance with national legislation.

Controls according to the Cash Control Regulation should include:

- Control on the obligation to declare - check whether a natural person entering or leaving the EU (including transiting) and carrying cash of a value of EUR 10 000 or more has fulfilled his/her obligation to declare.
- Control of natural persons - upon request the declarant is obliged to submit his/her identity papers in order to prove his/her identity; in cases of possible concealing of cash by persons, they may be subject to a 'personal search' depending on national legislation.
- Control of the baggage - check the baggage of the natural persons concerned; officials should ensure to check or gather information on all baggage of a natural person (hand and hold baggage), both during targeted controls as well as during random checks.
- Control of the means of transport and cargo - check whether natural persons entering or leaving the EU carry cash in their means of transport; this includes the possibility to search vehicles, containers in the vehicle or within the structure and fabric of the vehicle.

To ensure a comprehensive control approach for cash entering or leaving the EU, controls should take place on all transport modes (maritime, road, rail, air), and should be targeted based on risk analysis and include a random element.

The following control techniques should be used:

- Risk management;
- Questioning and procedures at the border;
- Use of special (detection) equipment;
- Advance passenger information (API) – data concerning passengers and flight details provided by the carrier prior to the start of travel;
- Common and national databases;
- Exchange of information with other Member States and third countries, including information specific to passengers in transit;
- Cooperation and coordination with law enforcement authorities;
- Feedback from the FIU.

In the event of failure to comply with the obligation to declare, cash may be detained by an administrative decision in accordance with the conditions laid down under the national legislation. Cash should be detained where there are indications of money laundering or terrorist financing and/or where there is a need to gather further relevant information on a cash border movement. For example, cash can be detained to determine the value of the cash transported and/or to await further declaration information to be provided by the passenger.

The competent authority should record the detained cash and gather evidence to assist with the investigation, taking into account the links to wider criminality e.g. drug trafficking, money laundering, terrorist financing etc. The information should be made available to the authorities responsible for combating money laundering and terrorist financing in the Member State where the information is collected, and to the Commission.

### Current state of play

Currently all Member States perform controls of cash movements at the external borders, even though the numbers and types of controls differ between Member States, depending on national circumstances and priorities.

All Member States reported performing controls, including physical verifications, of cash movements at the external borders, focusing on the submitted declarations, passengers, luggage and the means of

transport. Nearly all Member States made use of scanning equipment, while the use of trained sniffer dogs for cash controls was reported by 4 Member States.

12 Member States reported on the use of a specific national strategy related to cash controls, while others reported on the use of risk analysis criteria for cash control in the main points of entrance and exit. 17 Member States indicated they applied risk profiling for cash control and 18 made use of intelligence alerts on cash controls, either by receiving and/or issuing these kinds of alerts. 4 Member States reported that they organised national joint targeting actions with other competent authorities.

16 Member States reported that they applied specific controls on movements of sums of cash under the threshold of 10 000 € where there are indications of illegal activities associated with the movement of cash, commonly referred to as smurfing. This possibility is provided for by article 5.2 of the Cash Control Regulation.

The discussions at the plenary meetings of CCCG indicate that the overall levels and types of controls remain similar to those reported in 2010. Nevertheless, recent discussions of the CCCG reveal that more Member States are introducing sniffer dogs for cash controls.

Risk management techniques continue to be used but they depend on national access by customs authorities to API or national PNR.. The Commission has been working with the Member States to develop and implement a Common Risk Management Framework, which is also applicable for cash controls.

A resource already established to identify and analyse the risk within the EU is the Risk Information Form (RIF) module within the electronic EU Customs Risk Management System (CRMS). The aim of RIF is to exchange risk information to raise the awareness of the relevant competent authorities with regard to a potential irregularity or concealment trend. This exchange of information can be done very quickly and enables customs authorities to be informed rapidly about a potential risk.

As such, the RIF is a simple and effective tool to raise awareness of new risks and support the national implementation of risk analysis at the external borders on cash control. It enables competent authorities to provide to, or receive from, other Member States information on identified routes, flights, ships, concealment methods that are considered high-risk because of known or possible links to money laundering, terrorist financing or other illicit financial transactions.

Common EU risk indicators have also been established in order to improve the vigilance to the physical movement and transportation of cash, and have been disseminated to the Member States as guidance. Where a link between particular risk indicators and any natural person, means of transport etc. is established, competent authorities carry out additional verification and check the compliance with the Cash Control Regulation.

Since 2010, all Member States have been providing yearly statistics on the sanctions imposed on natural persons in cases where controls of cash at the external EU border identify a failure to meet the obligation to declare or indicate a link to illegal activity. These include penalties, cash detentions, cash seizures and cash confiscations.

#### **5.4. Recording and processing of information**

The information collected from cash controls must be recorded in a specific database and processed by the competent authorities in a timely and effective manner. This information must be made available to the FIU of the Member State, in the manner established by national regulations.

The first objective of the Cash Control Regulation is that customs authorities make all the cash-declaration related data available to their national FIU for the assembly, analysis and investigation of information that might indicate money laundering, terrorist financing or other illegal activity.

The information that customs authorities must make available to the FIU includes:

- Details from cash declarations;
- Details concerning cash not declared, incorrect declarations and incomplete declarations;
- Facts established during cash controls carried out on natural persons, their baggage and their means of transport that provoke suspicions on money laundering and terrorist financing;
- Any other facts related to movements of cash which provoke suspicions of money laundering or terrorist financing;
- Details concerning cash detained;
- Any additional information which could be useful in accordance with the procedures established by national legislation.

Data collected in the case of smurfing may also be recorded, processed and made available to the FIU, including a detailed description of particular suspicions and circumstances of the case.

In 2010, all Member States reported that they registered information on cash declarations. Half of the Member States registered this information in an automated central database, which was in most cases a stand-alone database at central level sometimes directly accessible for the national FIU, while for 2 Member States it was actually held by the national FIU. In most cases, the information registered was not directly retrievable by other competent authorities such as the national FIU. The Member States that reported not having automated registration of cash declarations, most commonly referred to the use of excel files or a local database.

25 Member States reported that they registered and processed the information obtained from the controls of cash carried out. One Member State reported not to file this type of information despite article 5 of the Cash Control Regulation explicitly requiring Member States to do so. One Member State notified that only the irregularities detected were registered and another registered only the results of thorough controls.

21 Member States made all information on cash declarations spontaneously available to their national FIU. Only 3 Member States reported to make this information available on demand, whereas 2 Member States provided only information on suspicious cases to the national FIU.

The information was made available to the FIU via official letter or immediate access to the database of cash declarations. Periodicity of providing this information varied from immediate transmission via direct access to the databases, to daily, weekly, monthly or quarterly bases. Some Member States reported faster procedures to inform national FIU's when the information related to the detection of a suspicious cash movement.

### Current state of play

All Member States register information on cash declarations and results of cash controls. The methods in which this information is registered still vary and reflect the descriptions provided in the 2010 report. This is due to the organisational differences of the national competent authorities.

In response to the 2014 Questionnaire, 20 Member States answered questions on providing registered information to national FIUs.

The results showed that, out of the 20 respondents, 18 Member States provide both regular cash declaration data and data linked to potential money laundering or terrorist financing activities to national FIUs. Greece reported only providing information linked to money laundering/terrorist financing, while Latvia referred to providing only operational data. 8 Member States also reported providing data related to tax fraud/evasion to their national FIUs.

The information is provided to FIUs in a number of ways based on national legislation and procedures, which include the use of databases, IT systems, secure internet networks etc.

## 5.5. Exchange of Information

The exchange of information in the area of cash controls is an important tool for better targeting controls and supporting money laundering/terrorist financing investigations.

### 5.5.1. Exchange of information with other Member States.

Under Art. 6 of the Cash Control Regulation, the information obtained from cash declarations and results of cash controls may be exchanged with other Member States' competent authorities in cases where there are indications that the sums of cash are related to any illegal activity associated with the movement of the money;

A number of provisions in other EU legislation complement Art. 6 of the Cash Control Regulation regarding information exchange:

- Council Regulation (EC) No 2913/92 of 12 October 1992 establishing the Community Customs Code;
- Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC amended by Council Directive 2014/107/EU of 9 December 2014 as regards mandatory automatic exchange of information in the field of taxation;
- Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (Mutual Assistance Regulation);
- Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information.

In addition, the Naples II Convention is used by Member States to exchange cash control information at the prosecution/conviction stage.

In summary:

- Currently, the Regulation only mentions the exchange of information where there are indications of illicit activities but there is no legal basis for the exchange between Member States of regular cash declaration data voluntarily submitted by natural persons.

Exchange of information with third countries.

With regards to the exchange of cash control information with third countries, Article 7 of the Cash Control Regulation provides that information can be exchanged under the framework of existing agreements on mutual administrative assistance. No detailed quantitative information is available on information exchange with third countries but from Member States national experts comments it seems that such exchange rarely takes place.

The exchange of cash control information between Member States and third countries includes exchange of personal data and Member States must ensure compliance with the national laws implementing the Data Protection Directive 95/46EC. Where the Commission's IT systems are used to exchange such information, the Commission must ensure compliance with Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

### 5.5.2. Means for information exchange.

The following common databases and means of information exchange are available to Member States:

- *RIF (Risk Information Form) system – as described in section 5.3*
  - Managed by Commission's Directorate-General for Taxation and Customs Community(DG TAXUD);
  - A RIF should raise the awareness of the customs control offices and national risk analysis centres with regard to a potential irregularity/risk related to movements of cash across EU external borders;
  - For example, a RIF can be prepared following a finding of an irregularity (for example an incorrect declaration or finding of concealed undeclared cash), giving information on the technique used to find the irregularity (e.g. use of cash sniffer dogs or pre-analysis of routing information);
  - A RIF can also be prepared to disseminate risk trends (for example with regard to unusual routing or method of concealment of cash) observed in a Member State that can be of relevance to other Member States;
  - As it is directly available in most customs control points, it permits rapid, direct and secure exchange of information;
  - The RIF system can be used to target a limited group of users (e.g. risks addressed to airports only), or to all members of the RIF system;
  - The applicable legal basis currently does not allow storing personal data, such as names, dates of birth, personal numbers (identity card/passport number) etc. obtained through cash controls.
  - The system is meant to be used reciprocally, e.g. the risks found should be recorded into the system but, at the same time, information from the system should be used, for example, for risk analysis in the field of cash controls.
- *FIDE (Files Identification Database)*
  - Managed by the European Anti-Fraud Office (OLAF);
  - An EU-wide index of investigation records generated by Member States' customs and other investigation authorities for administrative purposes and for purposes of criminal investigations and prosecutions in the customs area;
  - Information related to investigations has to be introduced into the system by the Member States (including personal data), so that the system can be used to verify whether a person (or business) has been subject of a criminal or administrative investigation in one of the Member States;
  - In the area of cash controls, FIDE can be used:
    - Where there are indications that the sums of cash are related to any illegal activity associated with the movement of cash,
    - Where there is non-compliance with the Cash Control Regulation (a criminal background, such as money laundering or intent, is not required),
    - When a person is suspected to have split transports of cash into sums below the threshold and there are indications of illegal activity concerning these cash movements (smurfing).
- *CIS (Customs Information System)*
  - Managed by OLAF;

- A database in which information is stored for the purposes of "discreet surveillance", "specific controls", "sighting and reporting", "operational analysis" and "strategic analysis";
- CIS is a personal data - processing system which aims to assist in preventing, investigating and prosecuting operations which are in breach of customs legislation;
- In the area of cash controls, CIS can be used as follows:
  - To store information on cash detained, seized or confiscated in a Member State
  - To prevent, investigate and prosecute operations which do not comply with the Cash Control Regulation (CIS can be used to monitor persons crossing the internal borders of the Member State with the intention of crossing the external borders of the EU without complying with the obligation to declare).
- *24H and Central contact points*
  - In a number of cases communications may be made by telephone, fax or e-mail in order to share precise and quick ad-hoc information;
  - In order to facilitate such exchanges for competent officers in the area of cash controls, lists of 24-hour and central contact points have been established;
  - The 24h contact points are to be used when immediate ad-hoc exchange of information is needed, while central contact points are to be used for policy and other operational issues;
  - Member States can also add to this list direct contact details of relevant major airports/ports/road border posts to facilitate the exchange of urgent operational information.
- *Agreements on cooperation*
  - The EU has signed customs cooperation and mutual administrative assistance agreements (with Canada, China, Hong Kong, India, Japan, Korea and US) which provide for the possibility of information exchange with third countries.
  - The EU also has Partnership and Co-operation Agreements with a number of countries, including Russia and Ukraine, which cover customs co-operation and include a protocol on mutual administrative assistance.
- *Working meetings*
  - Participation in working groups and regular working meetings at national and international level helps improve cooperation concerning exchange of experience, presentation and introduction of new requirements, difficulties with cash controls, elaboration of procedures and control measures etc.;
  - At the level of Commission, cash control experts from Member States have the opportunity to participate in the work of:
    - Cash Controls Coordination Group (CCCG), which meets several times a year to discuss issues related to the control of cash movements at external EU borders,
    - Project Groups convened on an ad-hoc basis to elaborate solutions to practical problems related to the implementation of the Cash Control Regulation in the EU.
- *Statistical information – as described in section 5.2.4.*
  - The statistics submitted by the Member States are summarised by the Commission and contribute to the collection of information on cash movements across the EU border and provide a good basis for risk analysis. This statistical information however is rather a quantitative approach and further improvement is required with information on the origin and destination of cash movements (with results from random and targeted controls as well as of cases for which there is a pending decision from Justice). It will enable FIUs

and/or other competent authorities to map clearly the cash movements around the world. Such information is undoubtedly important for risk analysis purposes.

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- *Joint operations*
  - Participation in joint operations (national, regional or international) and reports on their results offer the opportunity to achieve significant results in a short period of time and based on regular exchange of information.

#### Current state of play

The most recent information on the exchange of cash control information was collected via the Commission's 2014 Questionnaire. The questionnaire primarily focused on finding out whether Member States make available the information collected at their external borders to other Member States and third countries, rather than whether they receive such information in return.

This information is complemented by references to previous questionnaires and analyses to minimise any gaps in data.

In relation to the exchange of cash control information (by customs authorities) with other Member States:

- 16 Member States exchange information with customs authorities of other Member States, 8 Member States do not, others have not provided an answer;
- 3 Member States exchange information with tax authorities of other Member States, 16 Member States do not, others have not provided an answer;
- 5 Member States exchange information with other authorities of other Member States, but do not specify which authorities;
- 4 Member States confirm that they don't directly exchange cash control information with any authorities in other Member States.

In relation to the exchange of cash control information (by customs authorities) with third countries:

- 12 Member States exchange information with customs authorities of third countries, 6 Member States do not, others have not provided an answer;
- 2 Member States exchange information with tax authorities of third countries, 14 Member States do not, others have not provided an answer;
- 2 Member States exchange information related to money laundering and terrorist financing with other authorities of third countries, but do not specify which authorities;
- Member States which exchange information with third countries, do so on the basis of bilateral agreements with relevant countries;
- 2 Member States confirm that they don't directly exchange cash control information with any authorities in third countries.

In addition, available information on the exchange with other Member States and third countries shows that:

- Reasons for not exchanging information include: exchange is the responsibility of the national FIU (2 Member States), no requests for information have been received (2 Member States);
- The type of information exchanged also varies significantly and includes: regular cash declaration data, data linked to money laundering or terrorist financing, data linked to tax fraud/evasion, risk information and data on cash seizures;

- Member States exchange information using a wide range of means, from official letters to common databases and email and telephone communication;

The results of the 2014 Questionnaire show that 21 Member States use at least one of the common databases (RIF, FIDE, CIS) or 24H contact points. However, at the CCCG plenary meeting in January 2013, the Commission informed the Member States that, although almost all had all reported making use of the common databases (RIF, FIDE, CIS) for information purposes, only 9 Member States had uploaded cases in RIF, only 12 had uploaded cases in CIS and only 8 had uploaded cases in FIDE.

The majority of Member states actively participate in and contribute to the work of the CCCG, and nominate experts to take part in ad-hoc Project Groups set up by the Commission. In addition, several Member States have organised national or joint cash controls operations, and participate in international joint operations, such as the Joint Customs Police Operations "Athena", which target cash couriers, including criminal investigations in cases where EU and Member States' laws on the declaration and transportation of large amounts of cash are violated.

All Member States provide regular statistics to the Commission on cash declarations and results of cash controls (recordings), as well as penalties, cash detentions, cash seizures and cash confiscations imposed in cases where cash controls identify a failure to meet the obligation to declare or indications of illegal activity.

## 5.6. Penalties

According to Article 9 of the Cash Control Regulation, each Member State must introduce penalties for cases of failure to comply with the obligation to declare. Such penalties applied by each Member State must be prescribed in the national legislation and, in line with the FATF Recommendation 32, should be effective, proportionate and dissuasive.

A failure to comply with the obligation to declare should be treated as an administrative offence and/or as a criminal offence. Penalties may be monetary or may include forfeiture or expropriation of the detained cash.

Criminal penalties are established by national regulations and added to administrative penalties. In serious cases, they can include expatriation of the person committing the offence from a Member State, as well as refusal to enter the territory of a Member State (if the national legislation enables such a sanction), or in case of suspicion of serious infringement of the law or of terrorist financing, an arrest of the person concerned.

An imposed penalty should be:

- Effective - e.g. in case an amount is not declared by a particular person repeatedly punishment should be punitive, compared to a person making a similar offence obviously unintentionally just because of lack of awareness of the regulations.
- Proportionate - e.g. it should correspond to the relevance of the infringement of the law, so that the amount of the fine should depend on relevant circumstances, such as the amount of undeclared cash, the person's cash control history and any other relevant circumstances (the person is a traveller, a professional courier etc.)
- Dissuasive - e.g. it should point out consequences a person may face in case he/she intends to fail to comply with the obligation to declare; such penalties should dissuade a person from committing further illicit activities.

### Current state of play

All Member States have introduced systems of penalties to deal with failures by natural persons of meeting the obligation to declare amounts of cash of 10,000 EUR or more when entering or leaving the EU through their national borders.

However, the types and levels of imposed penalties differ significantly between Member States<sup>15</sup>. Discussions at CCCG meetings confirm that Member States have very different interpretations of the meaning of terms "effective", "proportionate" and "dissuasive", resulting in substantial variation of treatment of natural persons who failed to declare.

For illustrative purposes only, the table below provides an anonymised overview of the penalties applied in a limited number of Member States which had been contacted. The table also shows whether mitigating or aggravating circumstances are taken into account. The left column shows the minimum penalty (before taking into account particular circumstances, if applicable) levied in case of failure to declare (either as a % of the undeclared sum or a fixed fine). The same reasoning applies to the 'Max penalty' column. Lastly, the right hand columns indicate if mitigating or aggravating circumstances particular to the case are taken into account when determining the penalty. Jurisdictions who do not take into account such circumstances consider failure to declare a 'strict liability'<sup>16</sup> offence.

Table 1 – Penalties applied by Member States for failure to declare

	Min penalty (sum or %)	Max penalty	Mitigating circumstances	Aggravating circumstances
2				
3	10%	Amount undeclared	Yes	Yes
4	500 €	100 000 €	Yes	Yes
5	2-21%	1000 000 €	Yes	Yes
6	600 €	200% of amount undeclared	Yes	Yes
7			No	No
8	661,38 €	6613,76 €	No	No
9	331,93 €	3319,39 €		
10	0 €	10136 €		
11	0 €	46 587 €		

Source: Responses to Commission questionnaire sent to the Member States in 2014.

3 Member States have not introduced administrative penalties but treat the failure to comply with the obligation to declare as criminal offence.

## 6. ANSWERS TO THE EVALUATION QUESTIONS

### 6.1. To what extent is the current scope of the Cash Control Regulation still relevant for preventing money laundering/terrorist financing?

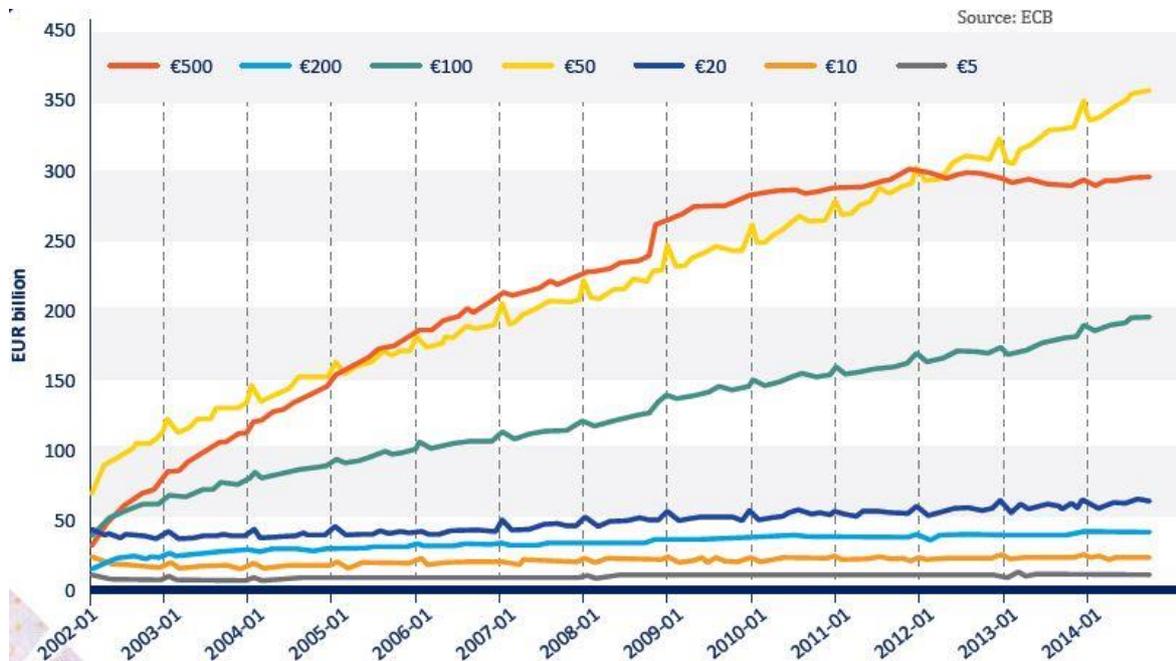
In order to analyse the relevance of the current scope of the Cash Control Regulation, firstly the sustained use of cash as a convenient and anonymous means of payment will be briefly touched upon, secondly statistical data provided by the Member States will be analysed to paint a quantitative picture of the current situation. Thirdly, it will be shown that cash controls contribute to the fight against Money-laundering and Terrorist Finance which both remain important phenomena that need to be tackled.

<sup>15</sup> A questionnaire sent to Member States in August 2014 indicated that where pecuniary penalties are imposed, these ranged from zero (in cases where authorities took into account mitigating circumstances) to fines up to twice the undeclared amount. Some Member States levy a fixed amount fine, others a percentage of the sum undeclared or use an approach which takes into account the undeclared amount.

<sup>16</sup> Simply put, the notion of 'Strict liability' implies that no fault, negligence or intent needs to be established to assign responsibility for an infraction..

In recent times, cash has lost the status of the main means of payment in the EU, with non-cash payment methods such as debit/credit cards and e-payment taking over. Other relevant innovations that have experienced growth in the EU include pre-paid cards and virtual currencies.

However, despite such growth in the volumes of non-cash transactions and new types of payment methods, the graph below illustrates the global increase in value of various denominations of Euro notes in circulation between 2002-2014.<sup>17</sup>



In the Eurozone, the amount of cash in circulation per inhabitant nearly doubled between 2002 and 2011.<sup>18</sup>

There are several causes of the increase in the use of cash as means of payment, but the one that calls for strong cash controls at EU's external borders is that cash largely remains an anonymous and easy to value means of payment, indicating that there is a risk of criminals and terrorists using cash to avoid increasingly stringent AML/CFT rules in the financial sector.<sup>19</sup>

### 6.1.1. Statistics on cash declarations and cash controls

The voluntary statistics provided by the Member States to the Commission show that more than 120 000 voluntarily declared cash declarations by natural persons are recorded at the EU borders by customs every year, totalling around 60-70 billion EUR in cash annually. Customs also report cash results on around 10 000 random and targeted customs controls per year.

The diagrams below show the accumulated statistics on cash declarations and recordings from July 2007 (Q3 2007) to December 2014 (Q4 2014).

<sup>17</sup> Graph from the Europol 'Why is cash still King', report, o.c., p. 14, based on ECB statistical data available at: <https://www.ecb.europa.eu/stats/money/euro/circulation/html/index.en.html>

<sup>18</sup> Idem World Payments Report 2013. Trend confirmed in ECB statistics on euro banknotes and coins in circulation: <http://www.ecb.europa.eu/stats/euro/circulation/html/index.en.html>.

<sup>19</sup> Cf. 'Why is cash still King?', Europol report of 08 July 2015: <https://www.europol.europa.eu/content/cash-still-king-criminals-prefer-cash-money-laundering>

Diagram 1 – Number of cash declarations from Q3 2007 to Q4 2014<sup>20</sup>

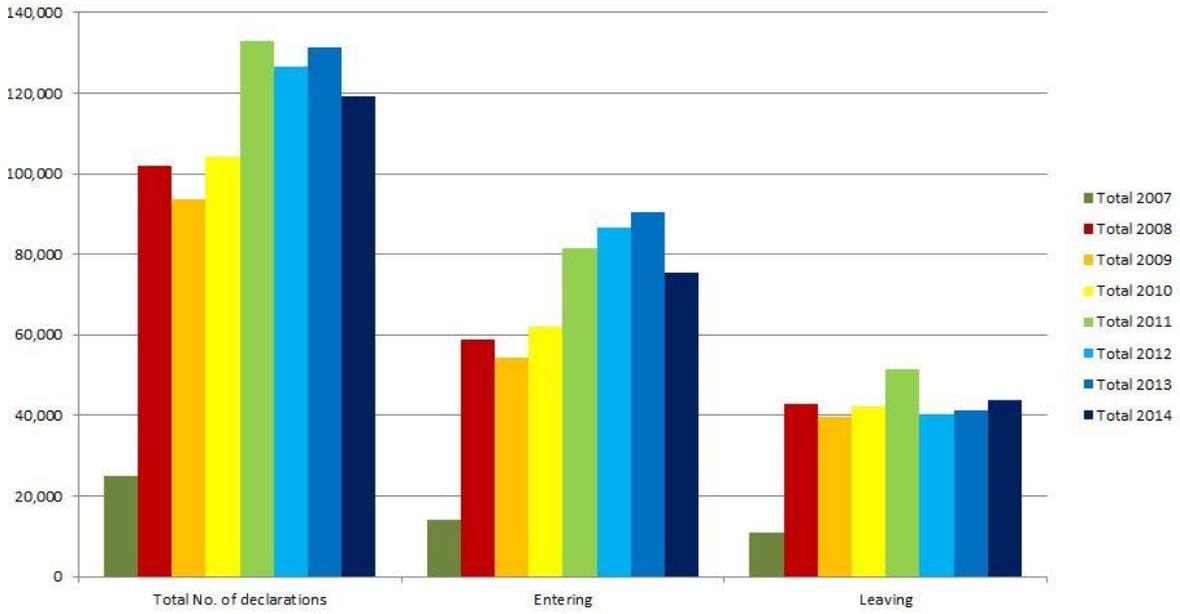


Diagram 2 – Number of recordings<sup>21</sup> from Q3 2007 to Q4 2014

<sup>20</sup> Unless explicitly mentioned otherwise, all diagrams shown are based on anonymous statistical declaration data delivered quarterly to the Commission by Member States, then further analysed.

<sup>21</sup> A 'recording' is a declaration which was registered when the obligation to declare was not fulfilled, either following a customs control which detected non-declared cash or if a control showed that the declaration made was incomplete or incorrect (e.g. wrong amount)

## Evaluation of the Cash Control Regulation

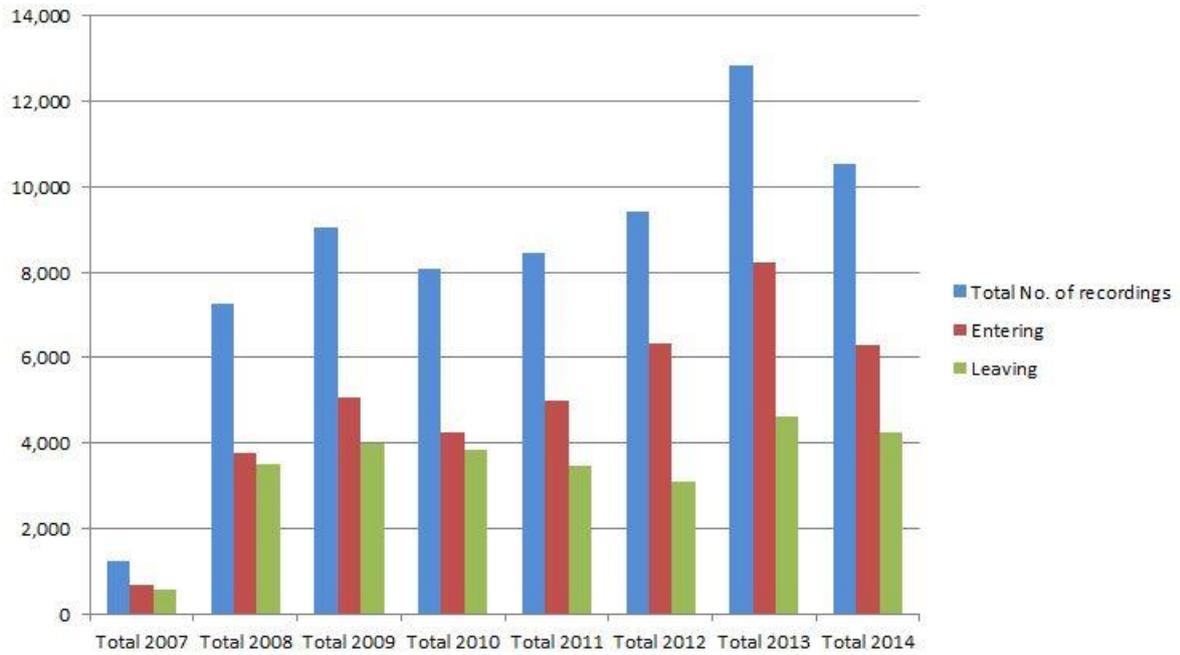


Diagram 3 – Value of cash declarations in EUR from Q3 2007 to Q4 2014

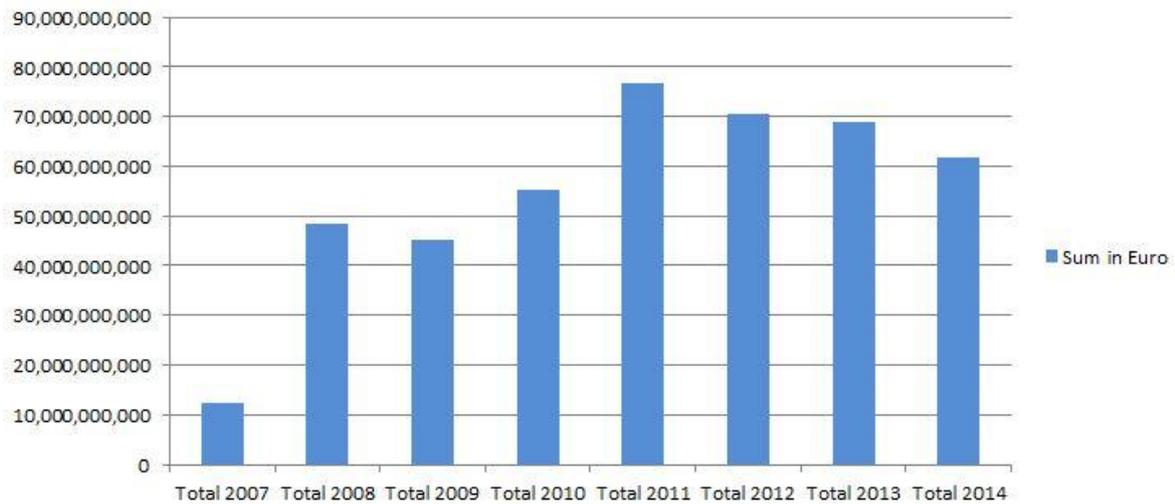
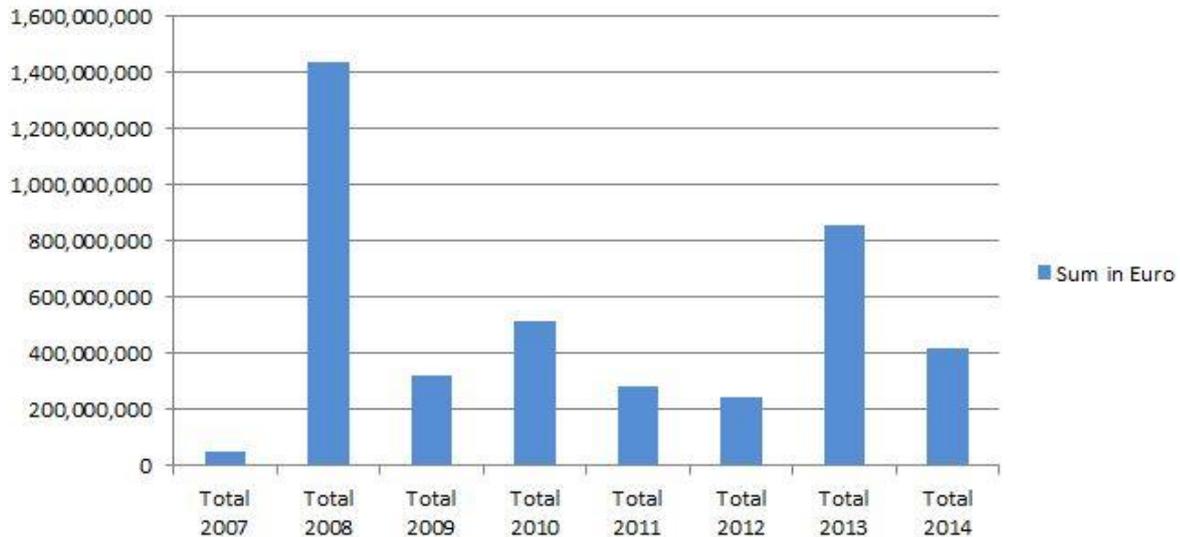


Diagram 4 – Value of recordings in EUR from Q3 2007 to Q4 2014



While the data in the diagrams needs to be interpreted with caution<sup>22</sup>, and it must be kept in mind that the data for 2007 cover only Q3 and Q4 for all diagrams shown, diagram 1 shows a sustained, high level of cash declarations over the years. Diagram 2 shows a significant increase in the number of recordings at the EU border in recent years, while diagrams 3 & 4 illustrate a less marked increase in the amounts of cash declared or recorded in the same period.

It is difficult to pinpoint the exact combination of reasons behind these trends based on the available data. Possible factors include higher numbers of travellers in general, more frequent controls by customs authorities, cash being used as an alternative means of payment due to increased regulation in the financial sector etc.

**Relevance / Effectiveness of cash controls as a tool to prevent money laundering and terrorism financing**

It is often difficult to link a conviction for money laundering or terrorist financing to a customs control on cash, due to lack of feedback from law enforcement agencies and/or FIUs to customs authorities that provided the information, as well as the fact that cash controls frequently form only part of the evidence in a particular case.

In response to the Commission's 2014 Questionnaire, only 8 Member States provided examples (not complete statistics) on investigations/convictions that can be attributed to the implementation of the Cash Control Regulation between 2011 and 2013:

- Austria – 36 convictions (type of offence not specified);
- Bulgaria – 72 convictions for money laundering;
- Estonia – 58 convictions for money laundering
- France – 176 judicial enquiries for money laundering (69 related to narcotics), out of which customs authorities can confirm 11 convictions (results of most investigations unknown or investigations still on-going);
- Germany – 6 convictions for money laundering and 2 for other illegal activities;
- Greece – 3 pending court cases on money laundering charges;
- Lithuania – 17 convictions for other illegal activities;

<sup>22</sup> Illustrative for the caution required while interpreting the data is e.g. one single detection for a value of 1.1 billion EUR which accounts for the spike in value of recordings shown in diagram 4 for 2008

- Malta – 11 convictions (type of offence not specified);
- The Netherlands – 105 cases (2013) of money laundering prosecutions.

Other Member States either do not have available statistics, have not recorded any investigations/convictions or have not provided an answer.

At the meeting of the EU FIU Platform (an expert group set up by the Commission to bring together Member States' FIUs and help them coordinate with each other) in Brussels on 18 November 2014, DG TAXUD asked the FIUs to provide information on how they use the information on cash declarations/controls made available to them by the customs authorities of their Member State.

14 FIUs provided their responses by email (without differentiating between the cash controls at internal and external EU borders):

- 6 FIUs emphasised the significant value of cash control data in money laundering/terrorist financing investigations,
- 1 FIU (Sweden) reported that cash control data generally does not lead to significant results in relation to AML/CFT investigations;
- 4 FIUs described the procedures relating to receiving and processing the cash control data;
- 3 FIU provided additional statistics on the use of cash control data:
  - Hungary – received 55 cash declarations in 2014 based on suspicion of money laundering,
  - Latvia – sent 8 cash declarations in 2011 and 3 cash declarations in 2014 to national police authorities for further investigation,
  - The Netherlands - 256 criminal investigations were initiated in 2014 as a result of suspicious cash declarations or absence of cash declarations;
- 3 FIUs provided examples of investigations resulting from cash controls.

These examples, in addition to those obtained from the customs authorities of Member States in response to Commission's 2014 Questionnaire, complement the limited statistical information presented above and demonstrate further the usefulness of information obtained through cash controls for subsequent investigations.

A selection of relevant examples is presented below, including results of controls at EU's internal borders as they also illustrate the value of cash controls for reaching AML/CFT objectives.

#### Example 1 – Terrorist financing investigation (Belgium)

Over a period of three consecutive days, three different individuals declared a total amount of 90 000 EUR in cash to customs officials at the airport in Zaventem. The funds were said to originate from a non-profit organisation (NPO) in Germany as part of humanitarian aid for Burundi, Benin and Zimbabwe. All three couriers were Belgian nationals and had been living in Belgium for a long time.

All three individuals had bank accounts to which money was transferred from a Belgian coordinating body of a radical Islamic organisation. Over a period of one year, a total amount of nearly 20 000 EUR had been withdrawn in cash. Around 10 000 EUR was transferred to Turkey.

According to the German FIU, the NPO was one of the largest Islamic organisations in Germany and was said to be linked with an organisation that had been banned in Germany for allegedly supporting a terrorist group. All board members of this organisation also played a major role in the NPO. Information from the Belgian intelligence services indicated that all three individuals were known to be involved in local branches of a radical Islamic organisation.

Given the conflicts in the African countries for which the cash was intended, the potential links with a banned organisation and its links with a terrorist group, it was deemed probable that at least part of these funds would have been used to support terrorist activities, and that the individuals involved had been used as cash couriers to provide financial support for terrorist activities.

#### Example 2 – Money laundering investigation (Slovenia)

Slovenian customs performed a routine control of a person leaving Slovenia to Croatia (before joining EU) in a car. Passenger raised suspicion since he was a Serbian national traveling alone, in possession of a Portuguese passport and driving a car owned by third person with Italian registration plates.

During the control, Customs discovered a bag on the rear seat, which included 400 banknotes of 20 EUR, more than 400 banknotes of 100 EUR and more than 8 000 banknotes of 50 EUR, totalling more than 500 000 EUR.

The passenger claimed that the money related to the proceeds of his second-hand car sales business in Portugal. Since the passenger had not made a declaration and the origin of cash was considered suspicious, the cash was seized and a suspicious transaction report (STR) was sent to the Slovenian FIU.

The FIU notified the Police and the Public Prosecutor of the suspicion of money laundering derived from drug trafficking (relatively small denominations are red flags for cash derived from street sales of drugs). The FIU then proceeded to collect more information on the origin of cash from Portugal and Italy, and although neither drug trafficking nor money laundering could be proven, the cash was not returned as insufficient information was provided regarding the car-sales business in Portugal.

After some time, the FIU was notified that the person was in an Italian prison following a conviction on drug trafficking. As a result, the outcome of the criminal procedure in Slovenia is uncertain. However, the customs authorities have seized the entire consignment of undeclared cash according to national regulation.

#### **6.1.2. Usefulness of cash controls in the fight against tax fraud/evasion**

It should be noted that cash controls have also led to findings of art-robbery, corruption, arms smuggling, cyber-crime and tax fraud.

In particular, based on discussions at recent CCG meetings as well as the answers provided by the Member States to a number of recent questionnaires, identified instances of cash smuggling (transporting cash across EU borders while intentionally not declaring or incorrectly declaring the relevant amount) are often linked to tax evasion or tax fraud.

In March 2014, FATF launched a study on Money Laundering through the Physical Transportation of Cash. All Member States, as members of the FATF or its regional body, the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) were asked to respond to the questionnaire.

While the analysis of all the responses to the questionnaire is still on-going at the FATF level, 26 Member States have made available their responses to the Commission for the purpose of this evaluation. In response to the question on the offences with which smuggled cash at their borders is associated with, 13 Member States listed tax fraud/evasion, making it the most frequent response followed by other types of fraud, drugs trafficking, human and arms trafficking etc.

Since the decision by banks in Switzerland<sup>23</sup>, Luxembourg, Liechtenstein and Monaco to loosen the rules of secrecy governing accounts held by foreigners, the number of instances of undeclared cash associated with tax related offences being discovered through cash controls has increased even further. Individuals who had previously not declared accounts held in these countries to the tax

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<sup>23</sup> In a 2014 report, PriceWaterhouseCoopers estimated total asset outflows from Swiss banks since the start of 'adverse' publicity regarding banking secrecy to be 350 billion USD, 250 billion of which are estimated to be 'final' repatriations. While the importance of cash in these asset outflows is undetermined it is reasonable to assume that individuals who wish to avoid detection by authorities in their home countries will tend to avoid transfers via the formal banking system. The full report can be consulted at: [https://www.pwc.ch/user\\_content/editor/files/publ\\_bank/pwc\\_private\\_banking\\_switzerland\\_from\\_yesterday\\_to\\_the\\_day\\_after\\_tomorrow.pdf](https://www.pwc.ch/user_content/editor/files/publ_bank/pwc_private_banking_switzerland_from_yesterday_to_the_day_after_tomorrow.pdf)

authorities in their country of residence now faced the risk of the financial institutions disclosing these accounts on their behalf. Many therefore resorted to withdrawing their money in cash and moving it elsewhere.<sup>24</sup>

In their response to the Commission's 2014 Questionnaire, 18 Member States provided information on the exchange of information between their national customs and tax authorities:

- 10 Member States reported exchanging all cash control data between national customs and tax authorities;
- 3 Member States reported exchanging only cash control data linked to potential tax evasion/fraud offences between national customs and tax authorities;
- 5 Member States reported that their customs authorities do not exchange any cash control data with national tax authorities;

Furthermore, 11 out of 18 Member States supported the proposal to add a provision in the Cash Control Regulation that would explicitly allow the recording, processing and exchanging of cash control information for the purpose of fighting tax fraud/evasion. 2 Member States encouraged further legal analysis but offered a positive view of the proposal, while 5 Member States did not support the addition of such a provision as they consider that sufficient legal basis already exists.

The proposal has also been supported by the majority of Member States' tax experts, who recognised the usefulness of information available on cash declarations and obtained through cash controls.

Article 9 of the Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation (Tax Directive) provides the legal basis for spontaneous exchange of cash control information between tax authorities of different Member States (customs can also designate liaison departments or competent officials for this purpose) that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning taxes (VAT, customs duties and excise duties being excluded).

However, only the Netherlands and Lithuania referred to using the Tax Directive as the appropriate legal base for the exchange of cash control information with the tax authorities of other Member States in their responses to the 2014 Questionnaire. Considering the evident and significant differences in the level and legal/administrative set-up of the exchange of cash control information between customs and tax authorities at national and EU level, the Commission asked the Member States for more detailed information in relation to their national legislative frameworks and internal procedures.

In January 2015, a questionnaire addressed to both cash control and tax experts requesting joint answers, was sent to Member States. Replies from all Member States have been received and some of the relevant findings can be summarised as follows:

- In 15 Member States customs and tax authorities are part of the of the same administration;
- 20 Member States have a national legal basis for the provision of information on cash movements by the customs authorities to national tax authorities, with 17 making use of this legal basis and 13 positively evaluating the exchange process;
- Out of the 8 Member States that do not have such a legal basis, 6 noted that the Cash Control Regulation should explicitly provide a legal basis for the exchange of cash control information for tax purposes (including at national level);

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<sup>24</sup> <http://www.newsweek.com/2014/09/26/why-europes-super-rich-are-resorting-smuggling-cash-271540.html>

- 5 Member States have a national legal basis for the provision of cash control information by the customs authorities to the tax authorities of other Member States, with 3 doing being able to do so directly and 2 indirectly via national tax authorities;
- Out of the 23 Member states that do not have such a legal basis, 14 consider that the Tax Directive provides a sufficient legal basis for the exchange of cash control information with the tax authorities of other Member States (even though only a few customs authorities report using it), while 8 consider that the current EU legislative framework does not allow such exchange;
- 26 Member States consider that exchange of cash control information for tax purposes is justified and necessary for the following reasons: fighting tax fraud/evasion (22), enhancing tax compliance (5), recovering tax debts (6), use in risk analysis as evidence of wealth (2), prevention of money laundering (2);
- Several Member States provided figures illustrating the usefulness of cash control information for initiating or supporting tax investigations:
  - Greece reported 78 cash control cases submitted for further tax investigation (with tax discrepancies found in 28 cases 19 ongoing investigations) just in 2013;
  - Portugal confirmed the usefulness of cash control information for the detection of tax debtors and commencing recovery proceedings;
  - In the Netherlands, the extra collected tax on the basis of exchanged cash control information amounted to 1 100 000 EUR in 2014;
- On the other hand, the usefulness of cash control information has so far not been noted to such an extent in Hungary, or is recognized specifically in the context of VAT fraud in Austria.

### 6.1.3. Cross-border cash movements in post and freight

In 2013, the FATF Interpretative Note on Recommendation 32 on cash couriers made clear that the obligation to establish a control system on cash should cover cash moved through all modes of transport, including post and freight.

However, the Cash Control Regulation applies only to natural persons (including professional cash couriers<sup>25</sup>) carrying cash across the EU external borders. Cash movements through post and freight (i.e. not accompanied by a natural person) are not included.

The Community Customs Code and/or national legislation generally apply for the movements of cash in post and freight at the Member States' borders. This means that, in most Member States, cash has to be declared on a customs declaration form for a particular parcel, container etc.

However, the information required on the customs declaration form is significantly less comprehensive than the data required on the EU-CDF and does not include the desired level of detail required for AML/CTF purposes (e.g. owner of cash, provenance and intended use of cash).

Although customs authorities have the competence to carry out further controls on cash discovered during regular controls on goods based on the Community Customs Code, there are no specifically designed provisions in the Community Customs Code for controls on cash, neither for a systematic exchange of information on cash with the national FIU in order to prevent money laundering and terrorist financing.

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<sup>25</sup> Meant are natural persons carrying or physically accompanying cash consignments on behalf of third parties in a remunerated capacity, not postal services, shipping companies etc.

As cash is generally treated in accordance with customs procedures for any other good, it is also difficult for Member States to impose effective, proportionate and dissuasive penalties to prevent money laundering and terrorist financing.

On the other hand, operational work by the Member States and information gathering and analysis by the Commission have resulted in a number of reports on findings of bulk cash in post and freight:

- *Project Pecunia (the Netherlands) - cash flows in air cargo (Oct 2009 – Mar 2010)*
  - Total value of cash declared in the control period amounted to approximately 1,85 billion EUR, with a significant amount relating to cash transfers between banks;
  - No undeclared cash was discovered but many consignments raised suspicions (e.g. shoddy packaging, new banknotes, 500 EUR banknotes, unknown recipient/sender/owner, strange combination of currencies etc.);
- *Operation Bingo (France) - cash movements in post and freight (Nov-Dec 2014)*
  - Monitoring and information gathering operation at Charles de Gaulle Airport (freight area) with the same goals as Project Pecunia;
  - 90 detections of transported means of payment (9 million EUR in value) were made, predominantly in express freight;
  - No undeclared means of payment were discovered but a detection linked to tax evasion and counterfeit notes (20 000 EUR) linked to drug trafficking were found;
  - The lack of national and EU (Cash Control Regulation) legal basis prevented the French customs to make further inquiries regarding detections.
- *FATF Questionnaire on Money Laundering through Physical Transportation of Cash (2014)*
  - A significant number of Member States indicated finding suspicious consignments of cash sent in parcel or freight;
- *Commission Questionnaire as part of the Report of the Project Group "To support the Commission in preparing the assessment report to the Council" (2011):*
  - Overall large variation in the extent to which sending cash in post or freight consignments was authorised and which restrictions apply.;
  - Variation in national legal implementation of UPC for sending cash leads to divergent approach
  - 2014 follow-up confirmed findings and issues
  - Some (limited in number) cases of cash smuggling in post or freight were reported by Member States

It should also be noted that, while Germany has reported separate instances of cash being discovered in post and freight, it did not detect any cash when conducting Operation Pylon, a 3-day operation focusing on express cargo at two relevant airport cargo hubs - Cologne-Bonn and Leipzig-Halle.

Although 11 000 parcels and document shipments were selected by customs and controlled, mostly by using mobile scanning units and cash dogs (5% were also opened and inspected physically), no detections were made.

The above demonstrates that although there are indications of substantial amounts of cash in post and freight being moved across borders, authorities experience difficulties in getting a full grasp on the issue, notably due to divergent legal provisions and a lack of clarity on the formalities to be complied with. Without a specific control system on cash moved by post and freight across EU external borders, the likelihood of regularly finding cash moved in this manner, reporting it to the national FIU and dealing with it effectively to prevent money laundering and terrorist financing is significantly diminished.

In this context it is relevant to add that after the adoption of the Cash Control Regulation, the FATF issued an interpretative note to its Special Recommendation IX<sup>26</sup> on cash couriers, clarifying that the Special Recommendation applies to any cross-border movement, not only to cash carried by natural persons.

#### 6.1.4. Conclusion

The EU AML/CFT framework certainly benefits from a control system on cash movements at the EU external border. As the regulatory framework in the financial sector has become more stringent, the controls of cross-border cash movements play an even more important role in limiting the extent to which cash is used by criminals as an alternative means of payment enabling them to stay outside the scope of the financial sector's regulatory framework.

The regular statistics on cash declarations and recordings provided by the Member States indicate that large amounts of cash continue to be moved by natural persons across the EU external borders, and that cash controls on natural persons are needed to ensure that these cash movements are not related to criminal or terrorist activities.

Although limited, statistical data and case descriptions provided by Member States in relation to investigations and court judgements on money laundering and terrorist financing cases resulting from or using cash controls information demonstrate the relevance of the EU system of cash controls and the contribution of the Cash Control Regulation towards the achievement of EU's AML/CFT objectives.

In addition, cash controls have proven to be very useful in the fight against tax fraud and evasion in some Member State even though the Cash Control Regulation does not explicitly provide that cash control information may be processed and exchanged for tax related purposes.

However, although based on a small number of targeting operations and random controls, findings of large amounts of cash being moved across the EU external border by post and freight emphasise a weakness of the Cash Control Regulation in relation to its main objective.

As its provisions do not impose an obligation to declare, nor designate powers to control the movements of cash amounts of 10 000 EUR or more by post or freight, and since only a few Member States have such national legislation, the Cash Control Regulation does not address the risk of money laundering or terrorist financing cash being moved across EU borders in post and freight. Thus it can be concluded that the Regulation is still of high relevance in the current environment, but the existing scope does not fully cover all the risks for preventing money laundering and terrorism financing.

#### 6.2. To what extent do the current legal provisions of the Cash Control Regulation guarantee proper control of cash movements to prevent money laundering/terrorist financing?

In order to judge the effectiveness of the current legal provisions of the cash controls regulation, firstly the definition of cash and its ease of implementation along with remarks made by Member States regarding problems will be touched upon, secondly the declarative process is investigated along with statistics regarding implementation results in various Member States.

It should be borne in mind that the statistics and results which were already mentioned under point 7.1 where the relevance of the cash control regulation was analysed also should be considered but are not duplicated under this section for reasons of brevity and in order to avoid useless duplication.

Thirdly, the implementation in the Member States will be considered along with the question of whether competent authorities dispose of sufficient powers to adequately implement the legal provisions along with the powers of those authorities to use and transfer the declarative and infraction data collected.

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<sup>26</sup> Subsequently renumbered, presently Recommendation 32.

Lastly, attention will be paid to the raising of public awareness regarding the obligation to declare and to the penalties imposed for non declaration as both elements have significant bearing on the overall effectiveness. In order for a legal provision to be respected, it should firstly be known, secondly, non-respect should be discouraged through appropriate penalties.

### 6.2.1. Definition of cash

The Cash Control Regulation clearly defines the payment instruments considered to be cash and thereby provides clarity and consistency with regards to the subject of controls and assists in the selection of control methods (e.g. dogs trained to sniff banknotes).

A few Member States have in recent years voiced an opinion that the definition of cash should be expanded to include additional payment instruments such as gold and other precious metals (as well as e-money, casino chips etc.).

However, upon joint analysis by the Commission and Member States of the advantages and disadvantages of including gold and other precious goods under the definition of cash in 2011, it was concluded that, as the existing definition follows that used by the FATF and the majority of Member States did not support expanding it, the definition of cash as per the Cash Control Regulation – currency and bearer-negotiable instruments, should not be amended.

The following disadvantages of expanding the current definition of cash were identified as part of the analysis:

- It is difficult to draw a line on where to stop when considering the widening of the definition as there will always be new instruments that could require inclusion; the minority of Member States in favour of widening the definition have different viewpoints on what should be covered (gold and precious metals, stones, stored value cards etc.).
- There is at present no tendency at international level to widen the scope of the cash definition; widening the definition at the Commission's own initiative would create a divergent approach from FATF and its members on AML/CFT;
- The implementation of a wider definition would entail extra staff and administrative costs for the customs authorities.

### 6.2.2. Obligation to declare

Although the statistics on cash declarations/recordings in Member States should be interpreted cautiously and there are indications of diversity in the level of controls in Member States, the obligation for natural persons to declare cash amounts of 10 000 EUR as well as the examples of cash control results, contribute to the development and application of consistent and effective controls of cash moved by travellers across the EU external border.

#### Raising awareness

Communication actions by the Commission and the Member States have significantly contributed to the awareness by travellers of the obligation to declare cash (the 2011 information campaign reached 60% of target audience and markedly increased the number of voluntary declarations).

However, only 4 Member States report monitoring the results of the communication campaigns and no Member States use monitoring tools to measure the efficiency or effectiveness of the campaigns.

Some Member States also see the need for including an obligation to raise awareness on cash controls in the Cash Control Regulation, as this would ease contacts with relevant authorities (e.g. airports) to display the awareness raising material.

#### Place to declare

Some Member States report that practical problems continue in relation to accepting cash declarations and performing cash controls in airport transit areas, despite the guidance provided by the

Commission so far, and consider that an amendment to the Cash Control Regulation would be necessary to improve the current situation.

Methods to declare

As part of the Commission's 2014 Questionnaire, Member States' feedback was requested on the use of the EU-CDF since its introduction:

- The feedback from the 24 Member States that responded to the questionnaire was overwhelmingly positive, both with regards to the practicality of use for the competent authorities and the simplification and consistency offered to travellers;
- The sole criticism related to minor practical issues, such as the size of boxes to be filled in and the clarity of explanations on the form;
- A few Member States suggested that the format of the EU-CDF should be included in the Cash Control Regulation, making it obligatory and ensuring consistent use in the EU.

Statistics on declarations/recordings

Although the statistics show that all Member States apply the Cash Control Regulation at their external EU borders, there are also significant differences in the numbers of declarations accepted and controls performed between Member States<sup>27</sup>.

Diagram 5 – Total number declarations (Q3 2007 – Q4 2014) by Member State

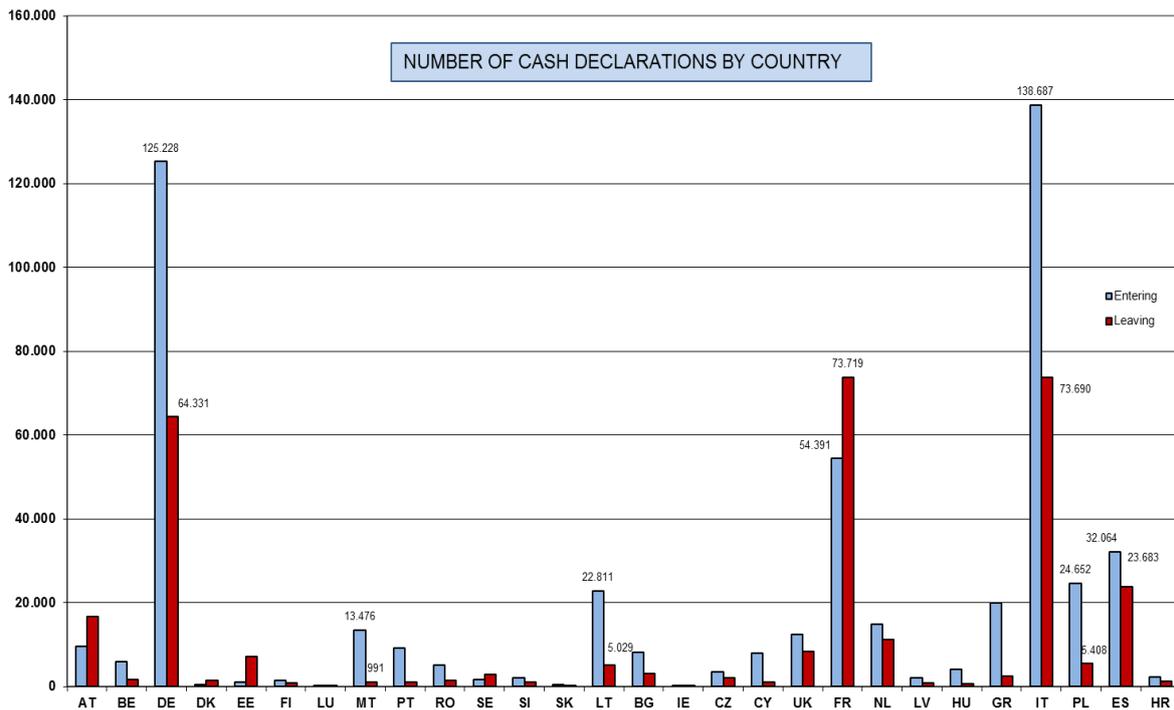


Diagram 6 - Total number of recordings (Q3 2007 – Q4 2014) by Member State

<sup>27</sup> It should be noted that Croatia joined the EU in July 2013 and its total statistics are not comparable with other Member States, who have been providing statistics since July 2007.

Evaluation of the Cash Control Regulation

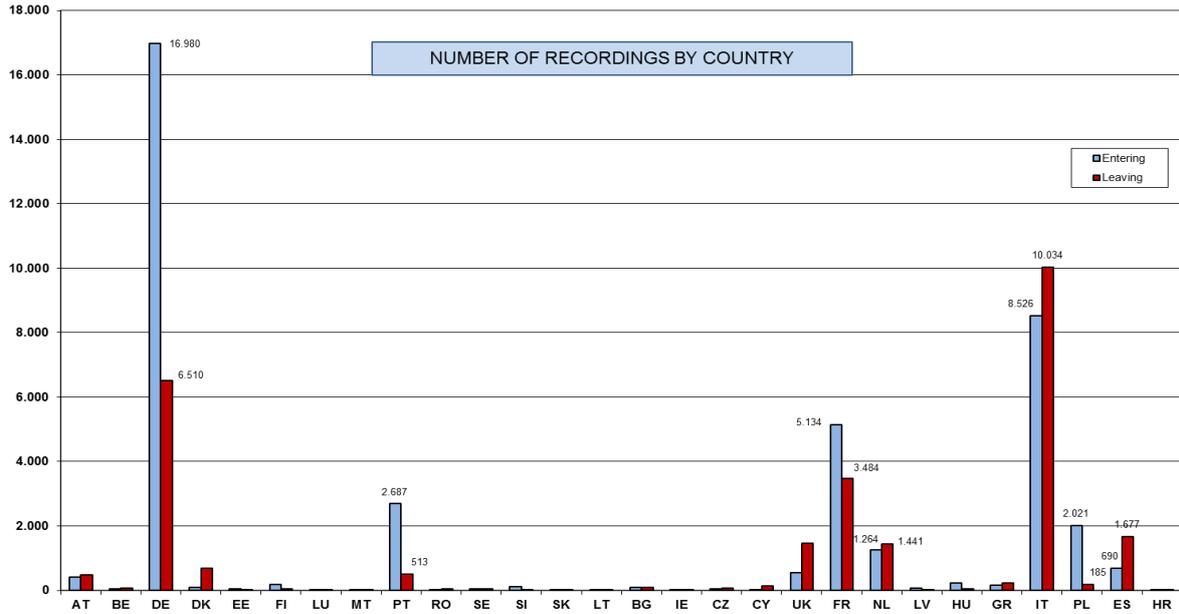


Diagram 7 – Ratio of total number recordings per declarations (Q3 2007 – Q4 2014) by Member State

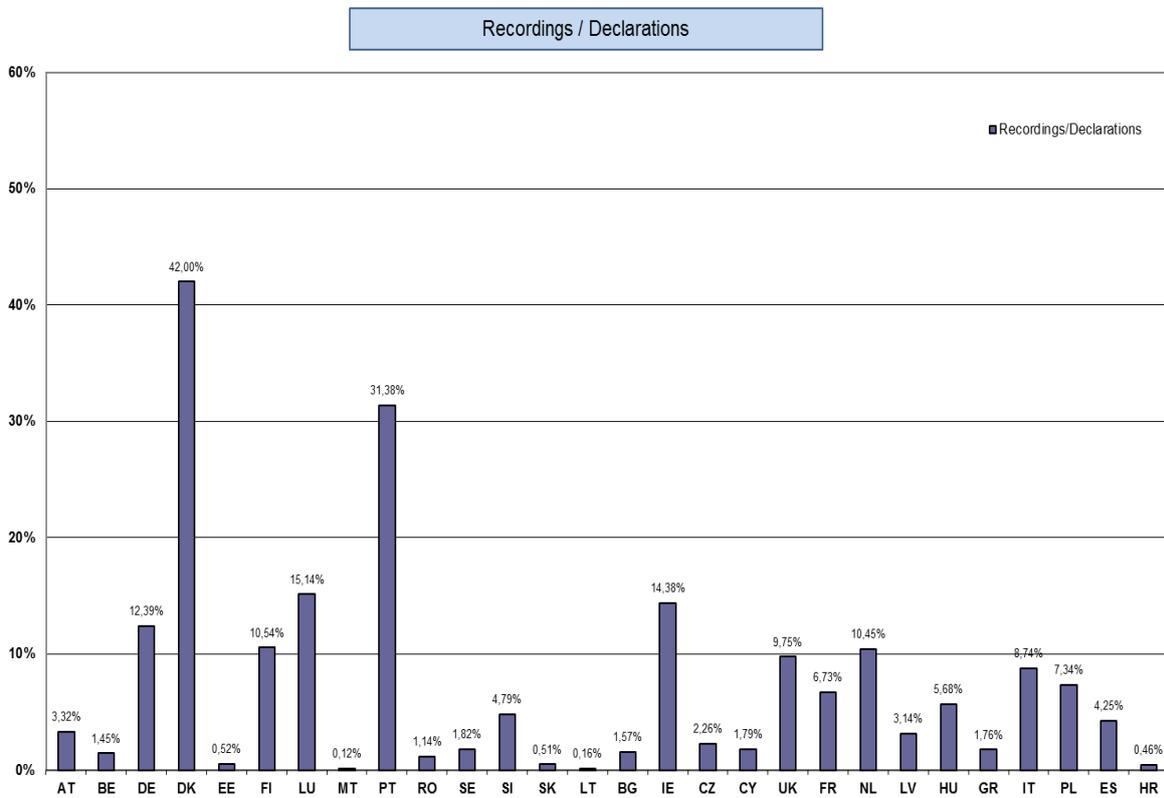
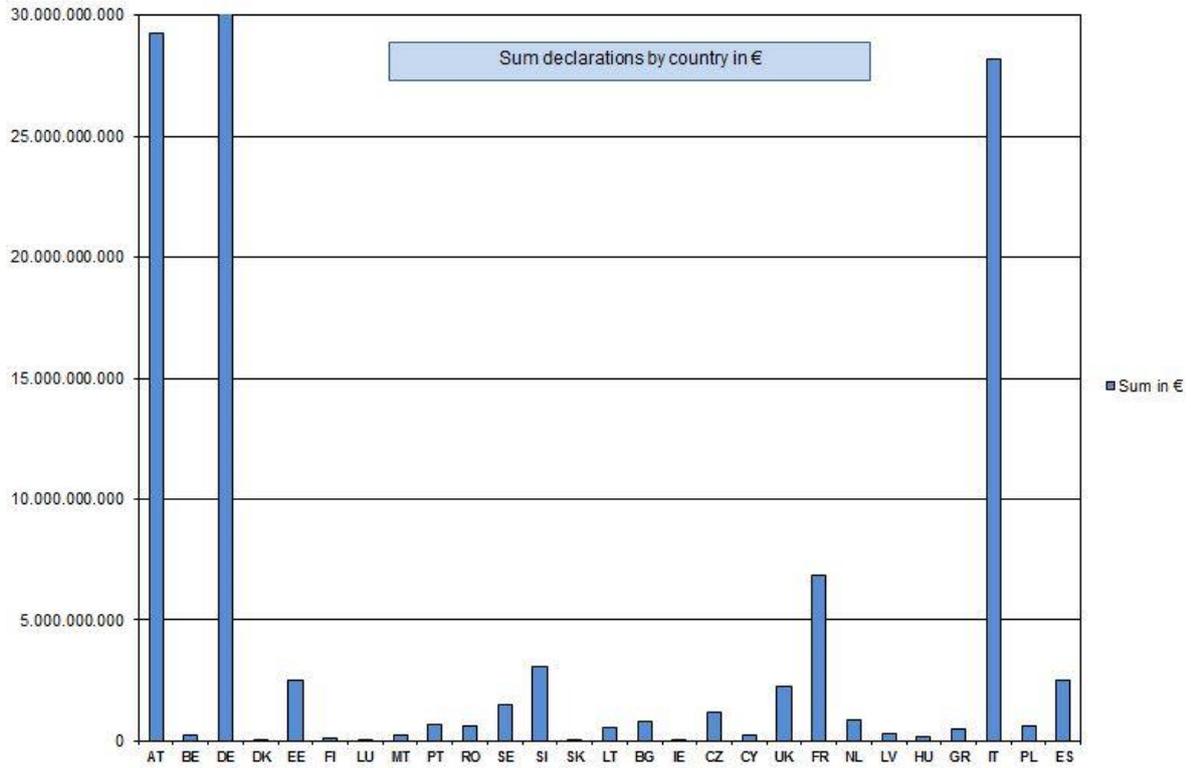


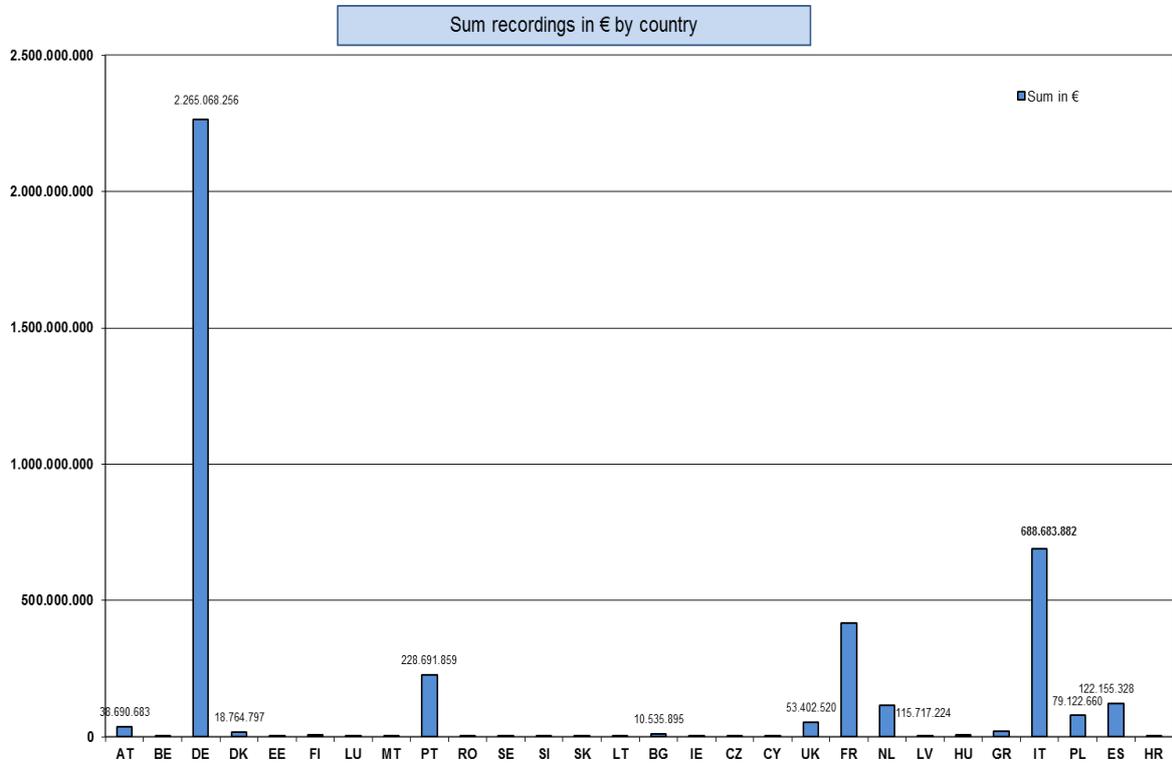
Diagram 8 – Total EUR amount of declarations (Q3 2007 – Q4 2014) by Member State

Evaluation of the Cash Control Regulation



Remark for diagram 8: Data for Germany truncated to maintain legibility. The total for DE was > 300 billion EUR.

Diagram 9 - Total EUR amount of recordings (Q3 2007 – Q4 2014) by Member State



### 6.2.3. Designation of powers to competent authorities

Based on available data and Member States opinions, the Cash Control Regulation designates adequate powers to customs officers to perform proper control of cash movements at the external borders of the EU.

However, as shown by diagrams 6 and 9 above, the majority of the total recordings are accounted for by a handful of Member States. While some of the differences may be accounted for by national circumstances (levels of cross-border trade, existence of external land borders, number of ports/airports, levels of passenger traffic etc.), the figures clearly indicate significant differences between Member States with regards to the implementation of cash controls at EU external borders.

A lack of closer monitoring by Commission services does not allow for regular detection and follow-up of particular differences in control approaches between Member States, which would in turn allow for adjustments to ensure uniform implementation of the control approaches considered as optimal.

### 6.2.4. Processing and recording of information

The requirement to record, process and make available cash control data to national FIUs is met by Member States, even though the relevant procedures vary based on national legislation and administrative set-up in each Member States.

The information on cash controls obtained by national FIUs results in a significant number of investigations coordinated by the FIUs, as well as in court convictions on money laundering and other criminal activities, as demonstrated by the statistical information and examples presented in section 6.1.2.

As the Cash Control Regulation does not explicitly provide for cash information to be recorded, processed and exchanged for the purpose of fighting tax fraud and evasion, only the customs authorities of some Member States exchange such information with the national tax authorities or tax authorities of another Member State.

### 6.2.5. Exchange of information

Article 6 of the Cash Control Regulation contributes to proper control of cash movements by allowing exchange of cash control information for the purpose of money laundering, terrorist financing or other criminal investigations.

However, it also hinders better targeting of cash controls by not allowing for the exchange of regular cash declaration data between Member States that would enable global data analysis to detect new trends. This conclusion is in line with some of the objectives of the Commission Communication on Customs Risk Management<sup>28</sup>, calling for a comprehensive analysis of the data necessary for the different authorities involved in risk analysis (customs, investigation and prosecution) and the respective roles of these authorities both at national and EU (28 MS) level.

Article 7 of the Cash Control Regulation also contributes to proper control of cash movements by allowing exchange of cash control information with third countries under certain conditions (e.g. meeting data protection requirements). Such exchange is generally based on bilateral agreements between Member States and third countries.

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<sup>28</sup>[http://ec.europa.eu/taxation\\_customs/resources/documents/customs/customs\\_controls/risk\\_management/customs\\_eu/com\\_2012\\_793\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/risk_management/customs_eu/com_2012_793_en.pdf)

A limited number of examples where information exchange of cash controls has led to or assisted money laundering or terrorist financing investigations have been provided by Member States. These include:

### Example 1

Around 1 million EUR was seized at Brussels National Airport after Belgian Customs received a tip from French Customs on two passengers leaving for Lebanon.

The control on the passengers was performed together with the Belgian police, during which 980 000 EUR of undeclared cash was found in checked-in luggage. The Police also controlled the passengers just before boarding the plane and found 19 700 EUR of undeclared cash in their hand luggage. The case was further investigated by the Belgian Police.

### Example 2

A joint investigation of police and customs authorities in Berlin led to the discovery of 89 000 USD which were forwarded from the United States (US) to Germany by post.

Perpetrators, which were unknown at the time, had sent 5 postal packages containing electric devices to various beneficiaries in Berlin. Cash in the form of 100 USD banknotes was hidden in the electrical devices.

After an exchange of information with the US authorities, it was possible to link the cash to a group of criminals which had acquired more than 4 million USD through criminal activities, mainly fraud and cybercrime.

However, no Member States report using the provisions of the Cash Control Regulation to exchange cash control data with other Member States or third countries for tax purposes, although tax fraud and evasion fall under the definition of illegal activity and tax fraud is recognised as a predicate offence for money laundering.

Considering the potential contribution information exchange can make to money laundering, terrorist financing and even tax fraud/evasion investigations, as well as risk analysis and targeting of controls by customs authorities, the current legal framework and procedures don't encourage the utilisation of the full potential of information exchange on cash controls between Member States.

### **6.2.6. Penalties**

Penalties imposed by the Member States contribute to proper control of cash movements by signalling to natural persons the disadvantages of failing to meet the declaration obligation and reducing the reward/risk ratio of failing to declare.

However, significant differences<sup>29</sup> in types and levels of penalties, visible in Member States' yearly statistics, may potentially reduce their effectiveness at EU level and lead to unequal treatment of citizens. In addition, these differences may increase the risk of "customs shopping" whereby cash smugglers choose to cross the EU border where the penalties are the lowest<sup>30</sup>.

Several Member States are currently involved in judicial proceedings following legal actions brought by natural persons over the level of penalties imposed. In addition, a number of Member States have so far received comments as part of FATF's mutual evaluations that their penalties were not effective, proportionate or dissuasive.

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<sup>29</sup> Cf. table listing comparative differences in penalties applied by Member States, p. 29.

<sup>30</sup> Other drivers related to the Cash Control Regulation may be the perceived differential in control probability between Member States, rather than the consequences of a control if this takes place.

### 6.2.7. Conclusion

One of the Union's tasks is the promotion of harmonious, balanced and sustainable development of economic activities throughout the Union by establishing a common market and an economic and monetary union. To that end the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. Disparities in legislation are detrimental to the proper functioning of the internal market and the equal treatment of citizens. The basic elements should therefore be harmonised at EU level to ensure an equivalent level of control on movements of cash crossing the borders of the EU. This is without prejudice to Member States' competence to provide for intra-community controls on cash, provided these are in accordance with the provisions of Art. 63, TFEU.

Overall, the provisions of the Cash Control Regulation enable proper controls of cash movements by natural persons at EU external borders and remain relevant for the fight against money laundering and terrorist financing.

However, it is clear that the controls are not implemented by the Member States in a fully uniform way.

In addition, significant improvements in relation to using the exchange of cash control information to improve the effectiveness of cash controls and contribute even more to money laundering, terrorist financing and tax fraud/evasion investigations can be made based on a comprehensive analysis of the data necessary for the different authorities involved (customs, investigation, prosecution) and their respective roles both at national and EU level.

Finally, the fact that penalties imposed for a failure to declare differ significantly between Member States may result in inconsistent communication to EU citizens on the matter. Depending on the itinerary one chooses to take, exiting or entering the EU via one Member State rather than another can have radically different consequences in terms of the penalty which is applied in case of non-declaration. While the severity of the penalty may not be the only driver, this situation may increase the risk of customs shopping and unequal treatment of EU citizens.

### 6.3. Is the information collected in an easy and burden-free manner? To what extent is the information exchanged timely and accurately, with the national FIU and with other Member States and third countries?

As described in section 5.4, all Member States have set up systems and procedures to register and process cash control information.

The Commission does not dispose of validated quantitative information regarding the administrative burden associated with filing a cash controls declaration; however:

- The voluntary use in most Member States of the EU-CDF presents a highly harmonised interface which makes filling in the document easier in cases where persons regularly have to file declarations while entering or leaving through different Member States.
- The level of detail and data elements which are collected from travellers pursuant to the Cash Controls Regulation are in line with what is specified in FATF recommendation 32 and its interpretative note.
- The form and information collected are comparable in type and complexity with what is collected in many third countries<sup>31</sup>.

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<sup>31</sup> For comparison see [FATF recommendation report](#), FinCen Form 105 which is used in the United States and can be compared with the EU-CDF in annex 2.

- On the occasion of meetings with national experts, the EU-CDF is regularly scrutinised and discussion takes place on possible modifications. The present structure of the form is supported by a large majority of Member States.

The exchange of information with national FIUs takes place in all Member States but the procedures differ according to the type of information (even though the Cash Control Regulation clearly specifies the type of information that should be made available), as well as timing and method of exchange, which are based on national legislation.

The information received directly from FIUs, as presented in section 6.1.2, confirms that FIUs indeed receive or have access to cash control information for analysis and investigation purposes.

While most Member States practice some type of information exchange with other Member States, the legal bases, methods and frequency differ significantly as shown in section 5.5.

However, it should also be noted that the Member States' use of the Commission's existing information databases applicable to cash control information (RIF, CIS, FIDE) is considered less than satisfactory.

Member States have provided very limited feedback regarding the reasons for not using the available databases to a larger extent. Some suggested that their national risk analysis centres do not input risk information related to cash controls into the RIF database on a regular basis. One Member State referred to the limitations of the RIF database in relation to the possibility of uploading personal data, while another Member State considered the CIS database to be too complex and not sufficiently adapted for uploading cash control information.

In their responses to the 2014 Questionnaire, in relation to the exchange of information with other Member States:

- 5 Member States reported that they had satisfactory procedures for information exchange;
- Other Member States stated the need for a specific and clear legal base for the exchange of information (including for tax purposes and cash movements by post and freight) and better cooperation and uniform implementation among Member States;
- Member States informed that the main hindrances to further formalisation of information exchange include data protection issues and a lack of legal base, with some Member States suggesting that the Cash Control Regulation should be amended to allow the exchange of regular cash declaration information, including for the purpose of fighting tax fraud and evasion.

As part of the 2014 Questionnaire, Member States also provided information in relation to the exchange of information with third countries:

- 6 Member States reported that they had satisfactory formal procedures for information exchange;
- 2 Member States informed that the exchanges of cash information with third countries are the responsibility of the national FIU;
- Other Member States stated the need for bilateral agreements and clear legal base in the Cash Control Regulation, including in relation to cash movements in post and freight;
- Member States informed that the main hindrances to further formalisation of information exchange include differences in data protection rules, exclusive FIU competence and need for bilateral agreements and better cooperation between Member States;
- Out of the Member States which exchange information with third countries:
  - 5 were satisfied with the efficiency and effectiveness of their procedures for information exchange with third countries;

- Others reported that exchange took place only upon request, there was a small number of cases of information exchange, the exchanges were not registered and/or were made by FIUs which often did not provide feedback;
- Member States which do not exchange information with third countries reported the following reasons: no legal base, no requests so far, personal data protection issues, exclusive FIU competence;
- 6 Member States plan to exchange information with third countries in the future if there is an EU legal base and based on future bilateral agreements;

No Member States reported issues regarding the timeliness and correctness of exchanged cash information.

### 6.3.1. Conclusion

Overall, the evidence collected shows that basic cash control information is collected regularly without undue administrative burden. It is made available to the national FIU in a manner regulated by national legislation and exchanged with other Member States and third countries within the existing legal framework which limits the exchange of all cash declaration information (e.g. indication of illegal activity or usefulness for risk analysis has to be established before exchange with another Member State can take place).

### 6.4. How extensive is the information collected under the Cash Control Regulation and how useful is it for preventing money laundering/terrorist financing at national level/EU level? To what extent does the regulation allow customs to gather all possible information to assist in the prevention of money laundering/terrorist financing?

The information collected under the Cash Control Regulation includes information provided on the EU-CDF (outlined in section 5.2.3) and the results of cash controls. Member States may also request data from other Member States in order to obtain additional information relevant to their investigations.

As shown in previous sections, the information collected by customs authorities often plays an important role in investigations of money laundering or terrorist financing.

The procedures in place for the recording and processing of data, as well the designated powers of competent officials to request additional information as a result of controls, ensure that extensive and accurate information is provided to other national authorities or other Member States.

However, even though other legal bases in addition to the Cash Control Regulation are also used (e.g. Community Customs Code for the exchange of risk information), there is no legal basis to freely exchange all regular (daily, non-suspicious and voluntary) cash control information between Member States.

The benefits of exchanging regular cash declaration information between Member States would include:

- The customs authority in the Member State where the cash declaration is submitted or control performed would not have to make a judgement on the existence of a legal basis for spontaneous exchange with another Member State, removing the risk of potentially useful information not being exchanged;
- Investigations of money laundering and terrorist financing operations (which are mostly transnational in nature) would benefit from access to all cash control data collected across the EU, enabling easier tracking of relevant cash movements to/from the EU. This would include access to information on cash declarations that did not raise immediate suspicion at the time of submission (therefore not exchanged with other Member States and difficult to identify/obtain under the current provisions of Article 6 of the Cash Control Regulation), but become relevant at later stage (e.g. in order to determine the origin and point of entry of illicit cash discovered in the EU);

- Since information on a person's previous failures to meet the obligation to declare or to prove legitimate origin of cash carried when crossing external EU borders elsewhere, is often not available to the Member State whose external EU border this person subsequently crosses, free exchange of/access to all cash controls information at EU level would make it easier for the customs authorities to identify such individuals and adjust their controls accordingly (e.g. search of luggage, request for additional proof of legitimacy etc.);
- A significant increase in the amount of cash controls data available to customs authorities of Member States would benefit their data analysis and risk profiling efforts, enabling better targeting of controls based on data on routings, cash smuggling methods, successful controls in other Member States etc.

Due to the fact that the main purpose of cash controls is to prevent money laundering and terrorist financing, the collaboration between customs, FIUs and other law enforcement authorities is of major importance. It is a necessary link to ensure the usefulness of cash control data in meeting AML/CFT efforts.

Furthermore, in response to Commission's Tax Questionnaire, the customs and tax experts of a few Member States have jointly suggested that a requirement to provide the tax residence of the owner of cash should be added to the EU-CDF.

This would ensure that, when exchanged for tax purposes (information foreseeably relevant to the administration and enforcement of the tax domestic laws of Member States, including the fight against tax fraud and tax evasion), cash declaration information would be exchanged with tax authorities of the correct Member States (provided the information is correct, which should be verified by the relevant tax authority).

### 6.4.1. Conclusion

The cash control information currently collected and exchanged by customs authorities, both with other national authorities and other Member States, is extensive and makes a valuable contribution towards the fight against money laundering and terrorist financing.

However, availability of regular cash declaration information would enable that better decisions are made by appropriate officials based on a more complete body of cash control information, resulting in better targeting and more effective cash controls at the EU external borders.

### 6.5. To what extent are the current provisions of the Cash Control Regulation in line with the latest developments in the EU and at the international level (FATF) to prevent money laundering /terrorist financing?

The Cash Control Regulation is an integral part of the EU's AML/CFT framework, complementing the controls that apply to the transfers of capital through the formal financial sector<sup>32</sup> through the implementation of control measures on cash physically transported across external borders by natural persons and implements FATF Recommendation 32 on cash couriers in the EU.

The following provisions of the Cash Control Regulation exactly or closely follow FATF Recommendation 32 and/or relevant FATF methodology:

- Definition of cash;

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<sup>32</sup> The formal sector comprises, inter alia, wire transfers performed through financial institutions, controls on 'high risk' professions which mainly take place through the implementation in national legislation of the EU' anti-money laundering directives (cf. supra).

- Obligation to declare for natural persons carrying cash of 10 000 EUR<sup>33</sup> or more across external EU borders;
- Designation of powers to competent authorities;
- Recording and processing of cash control information;
- Requirement to impose effective, proportionate and dissuasive penalties for failures to meet the obligation to declare;

The following aspects/provisions of the Cash Control Regulation do not entirely follow FATF Recommendation 32 and/or relevant FATF methodology:

- Exchange of information between Member States;
  - FATF has recognised the EU a supranational authority, which means that there should exist free exchange of cash information within its territory;
- Exchange of information with third countries;
  - FATF encourages high levels of information exchange as a tool for fighting money laundering and terrorist financing;
- Movements of cash in post and freight should be regulated as per the FATF Interpretative to Recommendation 32;
- Lack of approximation<sup>34</sup> of penalties to ensure they are effective, proportionate and dissuasive across the EU.

#### 6.5.1. Conclusion

The current provisions of the Regulation are mostly in line with the latest international developments; However, in order for the Commission, as an FATF member, to fully comply with its Recommendation 32 on cash couriers, which is also the global standard, it has to regulate movements of cash in post in freight across its external borders, as well as enable free exchange of cash control information between Member States.

The latter is especially important considering the recognition of the EU as a supranational organisation for evaluation purposes by the FATF.

## 7. CONCLUSIONS

Overall, the EU AML/CFT framework certainly benefits from a control system on cash movements at the EU external border. As the regulatory framework in the financial sector has become more stringent, the controls of cross-border cash movements play an even more important role in limiting the extent to which cash is used by criminals as an alternative means of payment enabling them stay outside the scope of the financial sector's regulatory framework.

The regular statistics on cash declarations and recordings provided by the Member States indicate that large amounts of cash continue to be moved by natural persons across the EU external borders, and that cash controls on natural persons are needed to ensure that these cash movements are not related to criminal or terrorist activities.

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<sup>33</sup> FATF Recommendation 32 specifies a maximum threshold of 15 000 USD/EUR before control measures should apply. With 10 000 EUR, the EU is in line with the commonly applied threshold which hovers around 10 000 USD.

<sup>34</sup> It should be noted that the typical audience of the FATF are individual countries, the recommendation and interpretative note do not take into account the legal specificity of the EU as an entity in which circulation of capital and persons are in principle free but where certain areas remain the competency of the individual Member States.

Although limited, statistical data and case descriptions provided by Member States in relation to investigations and court judgements on money laundering and terrorist financing cases resulting from or using cash controls information demonstrate the usefulness of the EU system of cash controls and the contribution of the Cash Control Regulation towards the achievement of EU's AML/CFT objectives. In addition, cash controls have proven to be very useful in the fight against tax fraud and evasion in some Member State even though the Cash Control Regulation does not explicitly provide that cash control information may be processed and exchanged for tax related purposes.

However, although based on a small number of targeting operations and random controls, findings of large amounts of cash being moved across the EU external border by post and freight emphasise a weakness of the Cash Control Regulation in relation to its main objective. As its provisions do not impose an obligation to declare, nor designate powers to control the movements of cash amounts of 10 000 EUR or more by post or freight, and since only a few Member States have such national legislation, the Cash Control Regulation does not address the risk of money laundering or terrorist financing cash being moved across EU borders in post and freight.

The provisions of the Cash Control Regulation enable proper controls of cash movements by natural persons at EU external borders and remain relevant for the fight against money laundering and terrorist financing. However, it is clear that the controls are not implemented by the Member States in a fully uniform way.

In addition, significant improvements in relation to using the exchange of cash control information to improve the effectiveness of cash controls and contribute even more to money laundering, terrorist financing and tax fraud/evasion investigations can be made based on a comprehensive analysis of the data necessary for the different authorities involved (customs, investigation, prosecution) and their respective roles both at national and EU level.

The fact that penalties imposed for a failure to declare differ significantly between Member States may result in inconsistent communication to EU citizens on the matter. The existing differences in penalties regimes result in wide variations in the level of penalties to which the public is exposed in case of failure to declare, depending solely on the Member State through which they enter or leave the EU. The lack of approximation may increase the risk of customs shopping.

Basic cash control information is collected regularly without undue administrative burden. It is made available to the national FIU in a manner regulated by national legislation and exchanged with other Member States and third countries within the existing legal framework which limits the exchange of all cash declaration information (e.g. indication of illegal activity or usefulness for risk analysis has to be established before exchange with another Member State can take place).

The cash control information currently collected and exchanged by customs authorities, both with other national authorities and other Member States, is extensive and makes a valuable contribution towards the fight against money laundering and terrorist financing. However, availability of regular cash declaration information would enable that better decisions are made by appropriate officials based on a more complete body of cash control information, resulting in better targeting and more effective cash controls at the EU external borders.

Finally, In order for the Commission to fully comply with FATF's Recommendation 32 on cash couriers, it has to regulate movements of cash in post in freight across its external borders, as well as enable free exchange of cash control information between Member States.

## 8. RECOMMENDATIONS

### Main recommendations :

- **Consider including cash movements by mail and freight at EU external borders within the scope of the Regulation;**
- **Consider widening and harmonising the possibilities for information exchange between Member States:**

- a. **By including all cash control information (including non-suspicious voluntary declarations),**
  - b. **By setting clear procedures and providing effective tools for the exchange of information.**
- **Consider to explicitly provide for the possibility of using cash declaration information for tax purposes, including the fight against tax fraud and evasion;**
  - **Consider a level of approximation of cash control penalties applied by Member States at EU external borders.**

**Secondary issues for consideration:**

- Consider streamlining the cash declaration exchange process as it pertains to FIUs;
- Consider modifying the definition of cash to also include gold and precious stones;
- Consider the development of a mechanism to ensure a sufficient and equal level of implementation in the Member States

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## **Annex 3. Report on the outcome of the Public Consultation on the review of Regulation (EC) Nr. 1889/2005 on controls of cash entering or leaving the Community**

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## 1. Introduction

Regulation 1889/2005 on the controls of cash entering and leaving the Community came into force in 2007. It establishes a framework in line with the present FATF recommendation 32 on cash couriers. It imposes, inter alia, an obligation for physical persons entering or leaving the European Union who carry cash or cash-equivalents of 10 000 Euro or more to file a declaration with customs or other competent authorities. It enables competent authorities to temporarily hold the cash in case of non-declaration or incorrect declaration pending further investigation and possible confiscation/forfeiture after judiciary intervention. It provides for the possibility of sharing information with competent authorities in other Member States, with the Commission or with third countries under certain circumstances. Finally, the Regulation imposes Member States to provide for penalties in case of non-declaration, even if after investigation there are no indications of illicit activity. Regulation 1889/2005 does not apply to natural persons carrying cash or cash equivalents between two Member States.

Pursuant to Article 10 of Regulation 1889/2005, the Commission submitted a report to the Council and the European Parliament on the application of the Regulation in 2010. The report concluded that generally, the Regulation is meeting its objective and adequately transposes FATF recommendation 32 in EU law. However, possible improvements in several areas were mentioned.

Discussions with Member State experts in cash controls on the implementation of the Regulation as well as international developments lead the Commission to believe that there may be a scope for improvement in the regulatory framework and/or the implementation procedures.

In order to judge the desirability of potential actions and policy options and to obtain new insights, the Commission Services initiated a public consultation to receive the views of stakeholders on the possible action to be taken to address the identified gaps.

## 2. Setting the scope and defining objectives

### 2.1 Identification of key policy areas susceptible to possible improvement for which stakeholder input is relevant.

Based on input provided by the 2010 report by the Commission to the European Parliament and the Council, feedback from national experts and the outcome of an ex-post evaluation on the implementation which was conducted as part of the review process for Regulation 1889/2005, the following key areas susceptible to modification and for which stakeholder input was required were identified:

1. Cash shipped in post and freight shipments
2. Exchange of cash declaration information between competent authorities
3. Use of cash declaration data for taxation purposes
4. Allowing authorities to act upon and detain amounts lower than the ordinary declaration threshold in case of suspicious circumstances
5. Awareness-raising of the public
6. Enlarging the definition of 'cash'
7. Harmonization of administrative penalties

## 2.2 Identification of stakeholders

Input gained from the 2010 evaluation report, the review roadmap, feedback from national experts and statistical data regarding declarations filed and infractions recorded allowed for the identification of the following categories of stakeholders:

1. Private persons carrying cash on their person, in their luggage or conveyance or shipping/receiving shipped cash
2. Companies or entities involved in shipping cash (courier companies, financial institutions, shipping companies, the official mail services)
3. Professional associations and interest representatives
4. Public authorities

## 2.3 Selection of the consultation instrument

Considering the wide range of stakeholders and the technical nature of certain questions, it was decided to develop an open public consultation based on the 'EU Survey' template which was going to be available via the internet after publication via 'My Voice in Europe' and could be completed by any interested party. The use of the EUSurvey template allows for the introduction of certain dynamic elements such as not showing sub-options in case respondents indicated that they did not have a view on or did not wish to answer a previous, more general question. At the same time it allows a certain extent of input validation and easy analysis of results.

## 3. The consultation

### 3.1 Concept

The consultation was conceived as a multi-page document where an introduction was given about the subject, information was provided about the consultation itself as well as background documents (links to legislation and international norms).

Subsequently there were sections on

1. Identification of respondent (stakeholder category, personal data, authorization to seek contact and/or publish the contribution etc).
2. Technical questions regarding policy areas for which input was sought
3. A final section where any opinions on any subject not queried in the previous questions could be expressed by the respondent if he/she thought this relevant.

### 3.2 Question methodology

After a brief introduction to the question, the questions were asked in a 'closed/multiple choice' format with the choices corresponding to the major policy options under consideration. In each instance an option corresponding to a baseline (no change vs. current situation) scenario was proposed. Providing an answer to each question except for the final one was mandatory and checked via input validation. In order not to restrict answers to policy alternatives that were envisaged by the Commission or to overburden respondents who might feel very strongly about one aspect but hold no opinion on other topics, the following provisions were made:

- It was possible to select 'Don't know / no opinion' with each question.
- After each question, an optionally-fillable free text field asked 'Please tell us WHY you selected this option'; it was explained to contributors that knowing the reasoning behind their choice would facilitate understanding and interpretation of the results.
- With each question an option was provided where the respondent could select 'Other' as answer and formulate an own contribution in a free text field (unrestricted length).
- Certain main questions were of a highly technical nature. In order not to overburden respondents, follow-up questions to these were only shown if a respondent provided any other answer than 'No opinion/don't know'.
- A final question at the conclusion of the survey invited respondents to provide any remarks on topics that were not previously addressed in the survey but which they considered relevant for the review process.

### 3.3 Consultation methodology

The open public consultation was developed using the 'EU Survey' template and published on the 'My voice in Europe' webpage in three language versions in order to ensure a good public reach/expenditure ratio: English, French, German.

An introduction to the publication in the same three languages on the DG Taxud webpage was also published, with a direct link to the online consultation document.

Additional publicity measures:

- Publication on 'My voice in Europe' triggers an automatic alert to any registered entity, more specifically the interest representatives. Moreover, the consultation is visible to the public via the 'My voice in Europe' webpage.
- DG Taxud sent out a Twitter message regarding the publication of the consultation.
- Web search engine providers were notified about the consultation. A Google/Bing search on 'cash controls consultation' and related queries resulted in a list of search results with the consultation survey on number one.
- The consultation was announced to meetings of the 'Cash Controls Experts Group', the 'FIU-platform meeting' and the 'Risk Analysis Experts Group' accompanied by an invitation to provide input either in a private capacity or as public authority.

### 3.4 Timeframe

The consultation ran from February 28, 2015 until and including May 31<sup>st</sup>, 2015, for a total of 14 weeks.

### 3.5 Limitations

Any public consultation is subject to a number of limitations, some inherent to the process, others to the methodology chosen. Some of these limitations as they pertain to this consultation are:

- The results of this public consultation cannot in any way be interpreted as correctly representing overall public opinion. Representativeness cannot be achieved without rigorous definition of the queried group, both qualitatively and quantitatively. Achieving these objectives through an open public survey is not possible.

- Despite selecting the languages in which the consultation was held in function of reaching as wide an audience as possible while keeping costs under control, this measure excludes a significant number of potential contributors.
- The format chosen (internet survey) precludes participation by persons who do not have access to this medium.
- Potential for manipulation: although we do not have any indication of this happening, it cannot be rigorously excluded that attempts were made to steer answers in a certain direction. Reasonable measures (use of 'Captcha' technology) were taken to prevent automatic form submission.

Nevertheless, despite the limitations associated with the consultation mechanism chosen, we believe that on balance the concept allowed us to reach a substantial part of the population and gain valuable insights into the opinions of the respondents.

## 4. Consultation results

### 4.1 Number of contributions received.

In total, 31 contributions were received via the online application. In addition, 4 contributions were received via e-mail sent to the functional mailbox associated with the consultation. After consultation of the 4 contributors and obtaining their approval, their contributions (which strictly followed the online template structure) were encoded so as to allow analysis.

A total of two contributions were eliminated from consideration, one due to the nature of the responses (the term 'test' filled into each field, no contact name or address given) and one consisting of a reply which was saved as 'draft' but not submitted and for which the contact person did not reply to a mail in which it was explained that he had to formally submit the draft document or explicitly allow us to do so on his behalf.

### 4.2 The respondents.

#### Are you responding as

		Answers	Ratio
An individual citizen		27	77.14 %
A private company		1	2.86 %
A public authority		4	11.43 %
An interest representative (association or professional organisation)		3	8.57 %

The majority of respondents indicated that they were doing so in a capacity of individual, private citizens. The number of contributions by public authorities (3 Member States, one local public

authority) was rather limited, as was participation from the private sector. Two out of three interest representatives were registered as such and provided their identification number.

Finally, although 90% of respondents (n=32) agreed to the publication of their contribution, only 40% (n=14) consented to the publication of their name and personal data.

### 4.3 The questions and answers provided.

In what follows an overview will be provided of the questions as they were asked in the consultation document itself, followed by the answers per policy option. Where 'other' was selected or additional comments were made, these will be mentioned explicitly.

#### 4.3.1 Question 1

**Question : Which option do you consider most appropriate for treating cash amounts greater than or equal to 10 000 Euro shipped in post/courier/freight?**

		Answers	Ratio
Option A: Do not change the present regulatory framework and continue to apply the regular customs declaration system to cash in post/courier/freight shipments.		4	11.43 %
Option B: Apply the standard customs declaration system with the additional possibility for the competent authorities to request the sender or recipient of the cash to disclose information related to that cash.		14	40 %
Option C: Make the filing of a cash declaration ( <u>separate and in addition to the customs declaration</u> ) mandatory for any cash amounts greater than or equal to 10 000 Euro entering or leaving the EU.		11	31.43 %
Option D: As option C but with a declaration exemption for shipments of cash from one registered financial institution (e.g. a bank) to another as well as for companies acting strictly as a transporter of cash between financial institutions.		4	11.43 %
Other (please specify)		0	0 %
Don't know / No opinion		2	5.71 %

40% of respondents favor an approach where the competent authorities have the right to request additional information from the sender in case cash is sent through mail/courier company/in freight.

In addition, 31.43% are in favor of a system where a mandatory cash declaration would have to be filed in addition to the regular customs declaration, thereby imposing an extra administrative burden.

An additional 11.43% of respondents are in favor of filing a mandatory extra declaration but would mitigate the administrative burden by providing for an exemption for financial institutions as well as for companies acting strictly as a transporter of cash.

In the 'why did you provide this answer?' field associated with this question, representative remarks were:

- 'There really is no good reasons for transfer of large cash amounts in the 21st century.' (sic).
- Choices for Option B (disclosure obligation) or option D (additional declaration but with exemptions for financial institutions and transporters) were mainly motivated by respondents acknowledging that additional controls are in their opinion required but no extra administrative burden should be imposed ('Good balance between adequate control and limitation of paperwork').
- Some respondents who opted for option 'C' (mandatory extra declaration in addition to the customs declaration) motivated their choice by pointing out that the customs declaration itself does not contain all pertinent information and that filing an additional declaration was an acceptable burden ('A separate declaration would make things simpler and clearer.') (sic).

It should be noted that only a small minority of respondents favored maintaining option A (to maintain the present legislative framework: only an obligation to declare by natural persons carrying 10 000 EUR or more).

**4.3.2 Question 2.**

**Question : Should a standardized written declaration form be used in all Member States?**

		Answers	Ratio
Yes, on a voluntary basis, as it happens presently		10	28.57 %
Yes, but with the format of the declaration specified in legislation		18	51.43 %
Other (please explain below)		5	14.29 %
Don't know / No opinion		2	5.71 %

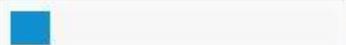
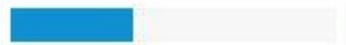
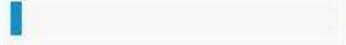
An absolute majority (51%, n=18) of respondents are in favor of using a standardized form, the format of which should be specified in the legislation. Another 28.6% of respondents are in favor of maintaining the present system, where the large majority of Member States use the same form but without there being binding legislation to do so.

In the 'why did you provide this answer' field associated with this question, some representative remarks were:

- 'One same approach in all countries is better'.
- '1 EU, 1 form'.
- 'If the present system works there is no need to impose it by law'
- A remark made by a couple of contributors was that Member States should have the option of customizing the form to take into account additional information regarding domestic cash controls or national legislation'.

### 4.3.3 Question 3.

Question : Regarding the sharing of information between Member States, would you be in favor of:

		Answers	Ratio
Option A: Maintain the sharing of information regarding declarations filed and infractions detected at the level presently foreseen in Regulation 1889/2005: only in case there are indications of illicit activity AND with the information sharing being optional.		4	11.43 %
Option B: Make the sharing of information regarding infractions mandatory between Member States via legislation but keep the sharing of regular declaration data optional.		13	37.14 %
Option C: Make the sharing of information regarding infractions and regular declarations between Member States mandatory via legislation.		13	37.14 %
Other (Please specify below)		4	11.43 %
Don't know / No opinion		1	2.86 %

Compared to the baseline scenario in current legislation (A), which obtained support from 11.5% (n=4) of respondents, there seems to be a clear majority of 72.28% (n=26) respondents in favor of increasing the sharing of information regarding declarations or infractions between Member States. The opinion is evenly split between respondents who want to make the sharing of all declaration data mandatory by legislation and respondents who only want to impose the sharing of information about infractions.

In the 'why did you select this answer' field associated with this question, some remarks were:

- 'I cannot believe this was not yet possible, with the IT systems that exist'.
- 'There is one legal basis, it makes sense that all information is shared.'
- 'Respect the privacy of declarants who follow the law'.
- 'This is the only effective way to ensure transparency and tackle fraud'.

#### 4.3.4 Question 4.

**Question :** In your opinion, should competent authorities of Member States be empowered to temporarily detain cash amounts below the threshold of 10 000 Euro if there are indications that illegal activities are associated with the movement of the cash?

		Answers	Ratio
Yes		26	74.29 %
No		8	22.86 %
Don't know / No opinion		1	2.86 %

A clear absolute majority of 74% (n=26) of respondents are of the opinion that in cases where authorities have indications of illicit activities associated with the cash in question or with the movement, they should be empowered to temporarily detain the cash in question even in case the amount is lower than the threshold value.

However, it should be noted that many of those respondents further elaborated upon their opinion with the qualification that the temporary detention should under no circumstances be arbitrary and that some guidelines need to be laid down in order to better describe what type of element can be considered as indicative of illegal activity.

Additionally, some other elements which were mentioned in the comments to the question:

- 'To prevent circumvention of the rule. It should however be clear that the indications have to be sufficiently clear and objective'.
- 'This already exists in the UK under national legislation and works very well.'
- 'Indications of illegal activities" is too low a bar. In extremis this could lead to a pensioner's purse being emptied simply on the basis of a vague 'suspicion'. (sic).

#### 4.3.5 Question 5

**Question:** Would you consider it useful to facilitate the exchange of information on cash controls for tax purposes (administration and enforcement of domestic laws of the Member States concerning taxes)?

		Answers	Ratio
Yes		29	82.86 %
No		4	11.43 %
No opinion / Don't know		2	5.71 %

A large majority of almost 83% (n=29) of respondents are in favor of the facilitation of cash control information between Member States and within one Member States between various authorities for tax purposes.

Additionally, some other elements which were mentioned in the comments to the question:

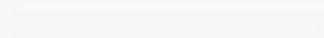
- 'Because there are more tax dodgers than terrorists but they also undermine society'.
- 'Fight against tax fraud should be a priority in Europe.'

- 'Not at this level (10 000 EUR), risk of divergent and discriminatory treatment among Member States'.
- 'Too high administrative burden'

#### 4.3.6 Follow-up question to question 5.

**Important remark:** The following question was shown only in case any other answer than 'No opinion/don't know' or 'No' was provided to question 5. The percentages mentioned are relative to the original group who answered question 5, hence do not add up to 100%.

**Question :** As you replied 'Yes' to the previous question, in your opinion, which are the modalities according to which Member States' tax authorities should be granted access to cash declaration / infraction data for tax purposes, including the fight against tax fraud and tax evasion?

		Answers	Ratio
Option A: Maintain the sharing of information regarding declarations filed and infractions detected at the level presently foreseen: it is up to Member States to designate competent authorities under Regulation 1889/2005 and to determine which authorities gain access to the declaration data.		3	8.57 %
Option B: Make the sharing of information regarding infractions between Member States' competent authorities and tax authorities mandatory via legislation but keep the sharing of regular declaration data optional.		14	40 %
Option C: Make the sharing of information regarding infractions and regular declarations mandatory via legislation.		12	34.29 %
Other (please explain)		0	0 %
Don't know / No opinion		0	0 %

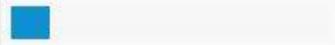
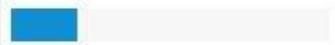
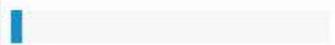
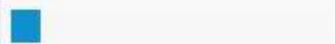
A small minority of respondents favor maintaining the present status quo where the sharing of information of declaration data for tax purposes should be left to national legislation.

Of the approximately 75% (n=26) of respondents who are in favor of further steps to facilitate the exchange of declaration data for taxation purposes in the Member State in question or between Member States, opinions are almost split (40% vs 34%) on whether all available information (declarations + infractions) should mandatorily be shared or if the mandatory sharing of information should be restricted to data regarding infractions, with the sharing of regular declaration data being left to national legislation modalities.

Considered in combination with the answers provided to the previous question there does seem to be a clear will to further facilitate and develop the sharing of declaration or infraction data for taxation purposes.

#### 4.3.7 Question 6

**Question: In your opinion, should an explicit reference to awareness-raising of the public be made in the legislation?**

		Answers	Ratio
No, the current framework suffices		4	11.43 %
Yes, as a recommendation to Member States		7	20 %
Yes, as an obligation to Member States		20	57.14 %
Other (please explain)		1	2.86 %
Don't know / No opinion		3	8.57 %

An absolute majority of 57% (n=20) of respondents supports a policy option where it would be made mandatory for Member States to inform the public about their duty to declare. An additional 20% (n=7) considers that an explicit reference should be made about awareness raising in the legislation but that this should be on the basis of a recommendation to the Member States, not an obligation. Maintaining the current framework where no mention about awareness raising is made in the legislation is supported by 11.5% (n=4) of respondents.

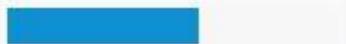
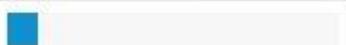
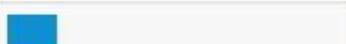
Additionally, some other elements which were mentioned in the comments to the answer given:

- 'Because a law is obeyed if it is known and then there is no excuse about ignoranz.' (sic)
- 'people have to respect the law but they need to know it first'
- 'Unnecessary additional expenditure should be avoided. The issue is currently well understood by travellers'
- 'Ignorance can never be a defence but people have to explicitly be made aware of their duty to declare.'(sic).

#### 4.3.8 Follow up question to question 6.

**Important remark:** The following question was shown only in case any other answer than 'No opinion/don't know' or 'No' was provided to question 6. The percentages mentioned are relative to the original group who answered question 6, hence do not add up to 100%.

**Question: Should any publicity / awareness raising campaigns be harmonized so as to present the same 'look and feel' to travelers, irrespective of the Member State through which they enter or leave the EU?**

		Answers	Ratio
Yes		20	57.14 %
No		3	8.57 %
Don't know / No opinion		5	14.29 %

An absolute majority of respondents are in favor of a harmonized approach across Member States. Arguments offered in support mostly revolved around the idea that, as the legislation is

harmonized in the EU, so should campaigns for awareness raising be harmonized. Respondents were of the opinion that this would improve comprehension and recognition of the information, regardless of the Member State of entry or exit.

The respondents who answered negatively were of the opinion that Member States should be free to determine the way in which this is achieved.

Optionally, respondents were offered the possibility to explain HOW such harmonized campaigns could in their opinion best be realized. Some answers provided were:

- 'Ads in airports, on the internet, folders, information provided by plane/boat operators....'
- 'It could be achieved via an international graphic design contest.'
- 'By delegating responsibility for those campaigns to the EC - surely Commission is capable of running one campaign'
- 'By internet ads on travel sites, ads on airplanes/ships. In airport.'

#### 4.3.9 Question 7

Question: Would you consider it useful to expand the definition of 'cash'?

		Answers	Ratio
Yes		13	37.14 %
No		17	48.57 %
Don't know / No opinion		5	14.29 %

The consultation document explains that the current definition of 'cash' as used in Regulation 1889/2005 follows the international standards. However, it is not inconceivable that criminal groups could attempt to escape the obligation to declare by converting cash into other goods that can easily be carried yet do not have to be declared via a cash declaration (though they might be subject to a normal customs declaration).

From the answer it seems that while most respondents favor not modifying the definition (48.57%, n=17), a large minority of 37.14% (n=13) is in favor of expanding the definition.

Additionally, some other elements which were mentioned in the comments to the question:

- 'The definition of 'cash' should stick to international standards'
- 'Enlarging the definition is easy, but where does one stop? What to include, what not to include?'
- 'It would be best to keep this in line with international standards'
- 'Yes, the definition should be enlarged, but only if this can happen on international level'.

The respondents who answered 'Yes' to the question concerning expanding the definition of cash were asked an additional question: 'Please explain briefly why you answered 'YES' and tell us which elements (which goods, commodities etc) should, in your opinion, be included in the new definition'.

Answers to this optional question include:

- 'Only legally obtained travelers cheques and bank drafts should be eliminated. By that I mean elements which can be proved as having been obtained through legal means.'(sic).
- 'It is difficult to adequately define but all high value and liquid assets should be included so certainly gold and jewels should be included'.
- In past, the Czech AML legislation included obligation to declare commodities of high value, such as precious metals or stones, in the value of EUR 10,000 or higher. Based on recommendation of the European Commission that such items are covered by customs legislation, we have changed national legislation and repealed the provisions concerning obligation to declare commodities of high value, such as precious metals or stones. Movement of mentioned goods cross borders of EU is monitored by customs declarations.

#### 4.3.10 Question 8

**Question: In your opinion, should a regulatory review address this issue with the intention of establishing greater harmonization of penalties applied by Member States?**

		Answers	Ratio
Yes		16	45.71 %
No		9	25.71 %
Don't know / No opinion		10	28.57 %

There is no absolute majority in favor of establishing harmonized penalties for the failure to declare. It was explicitly mentioned in the questionnaire that these penalties would be intended to deal with the failure to declare only and have no relation with the licit or illicit origin or destination of the cash.

Nevertheless, the largest group of respondents (45.71%, n=16) are in favor some initiative to harmonize the penalties regime to some extent, with a minority of 25.71% (n=9) being opposed to harmonization initiatives and a slightly larger group of 28.57% (n=10) holding no strong opinion either way.

In the 'why did you select this answer' field associated with this question, some remarks were:

- 'member states should not have their independence compromised in this area.'
- 'A harmonizing would lead to an equal procedure in EU, but I think it is up to the MS national legislation.'
- 'National competence of the individual states'

#### 4.3.11 Follow-up question to question 8

**Important remark:** Answering the following question was optional. It was displayed only in case question 8 was answered with 'Yes' .

Please explain below how, in your opinion, this could be achieved.

Some answers provided:

- 'At least minimum and maximum sanctions should be provided'
- 'Plain level field concerns require an effective harmonization'(sic)
- ' If the same rules apply all over the EU, the penalty (at least for non-declaration) should also be equal'
- 'Devise a common set of rules to treat non-declaration and enshrine these in legislation'

From the feedback provided it seems that concerns about equal treatment of persons in the same situation, regardless of the Member State of entry or exit is the driving force behind the opinion that harmonization of penalties should be considered.

#### 4.3.12 Question 9

**Question:** Are there any other remarks you would like to make regarding the review process or do you wish to share additional information which might be beneficial to our review process of Regulation 1889/2005? If yes, please specify below.

The question was conceived as an open-ended, facultative text field of unlimited length. Only three responses were received, as the question is intended to cover any aspects not treated by other questions but which were deemed relevant by the contributors we represent the answers in full (translated to English where required). One lengthy contribution dealt largely with intra-community and national measures concerning cash payments which fall outside the scope of the review and the questionnaire. It has been substantially redacted for reasons of brevity and relevance.

- ' Consider a differentiated cash limit. Lower cash limit for bringing cash in (perhaps 5000 Euro), reducing the ability to fund illegal activity within the EU and encouraging greater use of electronic means.'
- Abbreviated and redacted comment: Respondent remarked that in their sector (purchase and sale of new and second hand vehicles) in many cases the buyers are African businessmen operating in conditions where the local banking system is neither as transparent nor as performant as in the EU, as a consequence many transactions are paid for in cash, which might cause problems regarding the legislation.
- 'France supports the legal recognition of the concept of 'community of interests' in EU legislation as far as the obligation to declare is concerned. This notion allows to add up and consider as one amount sums carried by two persons that are linked by kinship or professionally. The notion allows to consider that, once a common interest is established, whether this be through kinship (parents with underage children), marriage (married or through legal partnership) the threshold of 10 000 EUR be applied to the community and not to each individual considered separately. When they travel together, spouses would then be individually obliged to declare sums carried that are equal to or greater than 10 000 EUR even if each of them carries less than 10 000 EUR. This 'common interest' notion would extend to other couples than spouses: employer and employees, employees of the same company travelling together using the same means of transport.'

## 5. Annexes and additional information.

- Information regarding this public consultation as published on the webpage of DG Taxud can be accessed here:  
[http://ec.europa.eu/taxation\\_customs/common/consultations/customs/cash\\_2015\\_02\\_en.htm](http://ec.europa.eu/taxation_customs/common/consultations/customs/cash_2015_02_en.htm)

The full consultation document can be accessed as a .pdf-file from the link above, as can the background documents.

- The detailed results of the consultation with individual replies (where permitted by the authors) can be accessed here: [link to be inserted]

## Annex 4. Procedural information

This annex presents the procedural information concerning the process to prepare the impact assessment report and the related initiative.

### 1. Lead DG, Agenda Planning and Work Programme

The cash controls impact assessment was prepared under the lead of Directorate General for Taxation and Customs Union. Within the Agenda Planning of the European Commission, the project is referred to under item 2016/TAXUD/001. In the 2016 [Action Plan to strengthen the fight against terrorist financing](#), the Commission committed to put forward a legislative proposal against illicit cash movements at the latest by 4th quarter 2016.

### 2. ORGANISATION AND TIMING

Work on the revision of the Cash Controls Regulation started in September 2014, with the evaluation of the Regulation. These works were followed by the impact assessment which was kicked off in April 2016.

An Inter-services Steering Group assisted DG Taxation and Customs Union in the preparation of this Impact Assessment report. The Steering Group was set up in September 2014 and included colleagues from DG Migration and Home Affairs (HOME), DG Financial Stability, Financial Services and Capital Markets Union (FISMA), DG Economic and Financial Affairs (ECFIN), - DG Internal Market, Industry, Entrepreneurship and SME's (GROW), the European Anti-fraud Office (OLAF), DG Justice and Consumers (JUST), the Legal Service and the Secretariat-General.

The Steering Group met on five occasions between September 2014 and October 2016. The last meeting of the Steering Group took place on the 26<sup>th</sup> of October 2016. At each occasion, the members of the Steering Group were given the opportunity to provide comments in writing on the draft versions of the documents presented.

### 3. CONSULTATION OF THE REGULATORY SCRUTINY BOARD

The Impact Assessment report was reviewed by the Regulatory Scrutiny Board on *the 12<sup>th</sup> of October 2016*. A positive opinion was issued. Based on the Board's recommendations, the Impact Assessment has been revised in accordance with the following points:

<p><b>(1) Better present the evidence on the effectiveness of the existing cash control regulation and present more clearly the context into which the regulation is placed.</b></p> <p>The report should use information (including from the annexes) to speak to the cash control system's usefulness in detecting and preventing criminal activity. It should also better present the context of cash controls regulation and surrounding measures that address illicit trafficking (such as anti-money laundering legislation and customs declarations) by mapping potential avenues of trafficking and the measures in place to address them.</p>	<p>Chapter 1.2, 1.6 and 1.7 amended</p>
<p><b>(2) Clarify the trade-offs linked to a possible expansion of the regulation into substitutes for cash. Explain to what extent the proposal can be made future proof by leaving flexibility to include future emerging cash substitutes.</b></p> <p>The report should explain why non-cash stores of value were not included in declaration requirements earlier, why this is now being reconsidered and what practical consequences this would have. What are the relevant policy tradeoffs? This should include considerations about the pertinence and the possibility of including other possible future trafficking items (e.g. electronic means of payment), but also other high value suspicious commodities (e.g. raw or cut diamonds), as well as the implications for the future-proofing of the regulation and for the amount of 'double' declarations incurred.</p>	<p>Chapter 2.4, 5.4 and 6.4 amended</p>

<p><b>(3) Strengthen the assessment of options. More should be done to explain the types of costs and benefits of each option and of the package of preferred options. Overall consistency should be ensured in the comparison of the different options and the rationale for choosing the preferred package. There is also room to make more use of stakeholders' views. The relevance of including the option to use cash control declarations for fiscal purposes should be clarified. Assess non-regulatory options to harmonise declaration forms.</b></p> <p>The discussion and assessments of policy options should be further elaborated.</p> <p>The Cash Control Declarations for fiscal purposes cannot be addressed under the Cash Control Regulation. The report should clarify whether this matter will be addressed under the administrative cooperation between tax authorities. If there is no such commitment, the issue may be acknowledged but should be discarded from the outset and not elaborated in the report. Concerning the declaration form, a non-regulatory option should be assessed given the existing close co-operation with Member States in this area and the fact that 24 Member States require already the use of the EU-Common Declaration Form. The report should better underpin conclusions on costs and benefits by adding further explanations, evidence and stakeholders' views. The report should better explain where the compliance and administrative costs for different actors lie (on declarations, disclosures, controls or exchanges and IT investments and handling) and include (quantified) estimates where possible. The cost implications for postal and parcel handling – and for their operators - should be made clearer. Overall consistency should be ensured in the comparison of the different options and the rationale for selecting the preferred package further elaborated. Summarise the overall impacts of the preferred options in a table that also assesses their envisaged effectiveness in helping to combat criminal activities, including financing of terrorism. Stakeholder views should be presented throughout the report and used more effectively to underpin the assessment of the different options.</p>	<p>Chapter 2.2 and 6.1- 6.6 amended to strengthen the assessments of options, to explain where the compliance and administrative <u>costs for different actors</u> lie and further make use of stakeholders' views. Under almost each option in chapter 6 information about administrative burden/cost has been added to explain the types of costs and benefits.</p> <p>Chapter 2.2, 5.2, 6.2 and Annex 6 have been amended to change and clarify the inclusion of information regarding the use of cash control declarations for fiscal purposes.</p> <p>Chapter 6.6 has been amended to clarify options regarding declaration forms.</p>
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#### 4. External Expertise

DG Taxation and Customs Union made use of the expertise provided by Member States' national experts who implement the Regulation. This interaction was both ad hoc and structural, with 2 annual meetings of the 'Cash Controls Working Group' held under the aegis of the Customs 2020 programme. However, no separate external study has been carried out for the purpose of this impact assessment.

## Annex 5. Who is affected by the initiative and how

The objective of this annex is to set out the practical implications of the initiative for the actors that will be impacted by this initiative: natural persons, economic operators and public authorities.

**Natural persons** carrying cash across the external EU borders will continue to remain subject to the current provisions. However, in case they will be carrying also gold, in the shape and form described by the revised Regulation, they will have to declare it, or risk being sanctioned according to the national laws of the Member State where they are required to declare.

**Natural persons or economic operators** who send cash or gold through post or freight will not be affected significantly given that the Regulation provides for a disclosure system. In practice this will mean that only the suspicious parcels or shipments will be selected by the authorities, and the burden to declare will only fall on a limited number of cases, depending on the intensity of controls decided by the authorities. In certain cases the obligation to declare could lead to an obligation to make both a customs declaration and a cash controls declaration.

**Competent authorities (in most cases these are the custom authorities of the Member States)** will have to allocate extra resources for controls. The burden for the administrations will most importantly be more work on risk analysis to try to target the right consignments, some level of extra controls and administration regarding the request for a declaration. As an international norm imposes controls on any type of cross-external border movement, this form of control would be the least intrusive one to comply with the international standard. This would require resource allocation by competent authorities and hence a burden.

Each Member State authority will have to provide their respective national **Financial Intelligence Unit (FIU)** with access to a database which contains all the cash controls declaration information. Dependent on the technical system chosen, the administrative burden would be borne by the authorities who encode the information and maintain the IT system. However, as the present situation already requires coding the information and making it available to FIU, the additional burden should be marginal in most Member States. The largest cost would be setting up an IT-system, with a recurrent hardware cost and staff costs. Such harmonisation may generate economies of scale. The administrative burden for FIUs would be much smaller with this option.

In the case of sub-threshold amounts, the Regulation would allow competent authorities to temporarily detain the cash in accordance with national legislation if they judge that indications of criminal activity (predicate offences to money laundering or terrorist finance) are present. Essentially this would lead to costs of administration and of the security arrangements associated with physically storing the cash. The number of cases where action is taken specifically based on this provision is expected to be low as the mechanism is conceived as a 'catch all' instrument, to be used if no legislation outside the cash control regulation allows (temporary) detention of the cash. Under present legislation competent authorities already have the option to temporarily detain higher than threshold amounts of cash in case these were not declared and there are indications of illicit activities, hence the necessary infrastructure will already be present. The impact on the **owner/carrier of the cash of sub-threshold amounts** may however be substantial in the event that the FIU decides there were no grounds for suspicion and decide that the owner/carrier is to be refunded. In an extreme scenario this could mean having to travel in order to retake possession of his/her money.

The obligation for competent authorities to use a harmonised declaration form would impact three Member States who currently do not use it and who would have to change their declaration forms and face a one-time burden. However these costs would be offset by the benefits in terms of information exchange and standardisation that a harmonised approach would provide.

## Annex 6. Fundamental rights and exchange of information

### Exchange of information

#### 1. Introduction

Under Regulation 1889/2005, five major theoretical 'information flows' can be identified and should be clearly distinguished and borne in mind for what follows:

- a) The making available of information to the FIU: all information collected by the competent authorities (declarations, infractions, indications of illegal activity) is made available to the FIU of that Member State.
- b) Information collected by competent authorities in one Member State and communicated to fiscal authorities in that same Member State.
- c) Information collected by competent authorities in one Member State and which is made available to other competent authorities in another Member State.
- d) Information collected by a competent authority in a Member State which is made available to a third country.
- e) Information collected by a competent authority in a Member State and which is made available to the Commission.

In practice information flows d) and e) do not pose any significant problems at this point and b) is discarded for legal reasons as explained in section 2.2.2. These will not be considered in this document.

As described in the evaluation of the cash control regulation and under point 2.2 of the problem description in the impact assessment, there are a number of problems associated with items a) and c).

This annex will examine those items, provide additional information that would be out of the scope of the Impact Assessment document itself but is essential to understanding the issue, the policy options examined and the choices made.

It shall be clearly established for each type of information flow:

- a) who these 'competent authorities' authorities are;
- b) what type of information shall be exchanged;
- c) under which circumstances;
- d) for what purpose;
- e) according to what procedure;
- f) how respecting personal data protection provisions and fundamental rights are evaluated and balanced with the legitimate interests of society as a whole, given the overall objective of the CCR.

Further, it will briefly describe the mechanics of such data-exchange.

## 2. Making available information to the FIU.

Article 5 of regulation 1889/2005 specifies:

*1. The information obtained under Article 3 and/or Article 4 shall be recorded and processed by the competent authorities of the Member State referred to in Article 3(1) and shall be made available to the authorities referred to in Article 6(1) of Directive 91/308/EEC of that Member State.*

*2. Where it appears from the controls provided for in Article 4 that a natural person is entering or leaving the Community with sums of cash lower than the threshold fixed in Article 3 and where there are indications of illegal activities associated with the movement of cash, as referred to in Directive 91/308/EEC, that information, the full name, date and place of birth and nationality of that person and details of the means of transport used may also be recorded and processed*

The reference to Directive 91/308/EEC is to be construed as a reference to the Anti-Money Laundering Directive which currently applies.<sup>1</sup> For the sake of brevity it shall be referred to as 'AMLD4'.

The Financial Intelligence Units (FIU) are entities established based on recommendations of the Financial Action Task Force (FATF) which the EU has committed itself to. In the EU legal order, the establishment of the FIUs is organised through AMLD4. The FIU is established on Member State level, it is intended as the hub element that receives and analyses information<sup>2</sup> from a variety of sources in order to assess whether or not there are grounds to suspect ML/TF. If such suspicions are present, the FIU may notify competent (judicial) authorities that may subsequently start an investigation.

The functioning of the FIU is subject to strict conditions of data confidentiality. Extremely simplified, the FIU is an independent entity which receives information from sources that would not be able to pass this data directly to other authorities, collates this data, analyses it and then determines if there are grounds for suspicion and further action. Only in the latter case will the FIU contact other authorities, hence it acts as a filter for the information provided.

It has been established that next to abuse of the financial system, cross border movements of cash are another major element in ML/TF. The CCR covers this aspect and imposes a declarative obligation and other formalities. The CCR states explicitly in its objectives that (Article 1):

*1. This Regulation complements the provisions of Directive 91/308/EEC concerning transactions through financial and credit institutions and certain professions by laying down harmonised rules for the control, by the competent authorities, of cash entering or leaving the Community.*

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<sup>1</sup> DIRECTIVE (EU) 2015/849 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing which has entered into force and has to be transposed by the Member States by 26 May 2017.

<sup>2</sup> E.g. Suspicious Transaction Reports from financial institutions and other obliged entities or professions such as determined by the AMLD.

It follows that the intended objective of the CCR has to be considered within the framework of the fight against ML/TF, like the AMLD.

In order for the FIU to perform its role, it is indispensable that it also has access to cash control declarations and infraction / suspicious activity data. It can then take this into account and compare it with information received from other sources in order to screen for activities related to AML/TF.

In the context of the CCR, the competent authorities are (Article 2):

'competent authorities' means the customs authorities of the Member States or any other authorities empowered by Member States to apply this Regulation;

With this are meant the authorities who record and process cash control declarations and perform controls on passengers, their luggage and means of transport in order to detect if cash above the declaration threshold is carried. In the vast majority of cases this will be the customs authorities, not e.g. the tax authorities, even if tax authorities and customs both operate under one entity such as a Ministry of Finance.

Those competent authorities have to 'make available' the information mentioned to the FIU.

The impact assessment proposes to more clearly define that 'make available' implies recording and processing the information followed by actively giving the FIU access to the information stored in a secured electronic system, not merely by providing access to physical declaration forms stored in a room.

Considering the purpose for which the declarative information is collected (AML/TF), the function of the FIU and the safeguards built in to the legislation governing the functioning of the FIU, **appropriate safeguards exist** to guarantee respect for fundamental rights and data protection, while the proportionality of the measure is clear.

### 3. Information collected by competent authorities in one Member State and which is made available to other competent authorities in another Member State.

In most cases this will concern the exchange of information from a customs authority in one Member State to a Customs Authority in another Member State.

The exchange of such information is useful where it might help customs with the detection of potential infractors, such as in the case of persons who have already failed to declare in another Member State.

For customs authorities, it is important to be able to determine transactional risk and, from that, the appropriate level of controls. It is not important to have full time access to all information on all declarations that were made in the Member State of control and of other Member States but it is highly relevant –from the perspective of determining whether or not a declaration is truthful or if additional controls are required- to have access to a system which might inform them, given input of the name of a person or the identity document reference, if this person is known in another Member State for infractions against the obligation to declare or if the person makes recurring declarations on a regular basis in various Member States. A solution exists (cf. infra, Match3 technology) which makes this possible without the bulk exchange of personal data which is systematically accessible.

For the purposes of information exchange (or rather 'information availability' ) between customs authorities, the appropriate contact points for customs administrations of a Member State would be the

designated national contact point for the application of Regulation 515/97 on customs mutual administrative assistance.

Considered in conjunction with a technological approach such as explained below, this allows authorities quick access to relevant data while simultaneously safeguarding fundamental rights of the individual.

#### 4. Technology for data exchange.

The appropriate means to manage the various data flows is to be determined through a study.

In this context it should be remarked that the FIU's already use established technology to transfer information between Member States through FIU.net<sup>3</sup>.

FIU.net is based on the principle of distributed data storage where each Member State keeps control of his own data but shares an encrypted but searchable 'filter' with other Member States. Member State 'B' may perform a search on the name, identity document number or a combination of factors in this filter and if a result is found, this will mark as a 'hit' in the system, indicate which Member State holds the information but not per definition automatically make this available. Availability is controlled by the Member State holding the data. Regarding the 'making available' of cash control declaration data between customs authorities in different Member States, such a system holds promise.

Further, this would have the added benefit of building on existing technology and potentially ensure interoperability with FIU systems.

Regarding the data provision to FIU's the most appropriate system (subject to confirmation by technical specialists) might be a harmonised database that allows for the encoding of cash control declarations / infraction / suspicious activity data, which is made available to the FIU of the Member State in question and then integrated in the FIU's secure system for analysis.

Lastly, data exchange tools and modalities for the exchange of data between fiscal authorities in one Member State and their counterparts in another Member State are described in Directive (EU) 2011/16.

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<sup>3</sup> Basic information is accessible on the site of Europol, who host the technology: <https://www.europol.europa.eu/content/fiunet-financial-investigation-units>