

**Opinion of the European Economic and Social Committee on the ‘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 — 2016/0413 (COD)]

(2017/C 246/04)

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Legal basis	Articles 114 and 304 of the Treaty on the Functioning of the European Union
Section responsible	Economic and Monetary Union and Economic and Social Cohesion
Adopted in section	6.4.2017
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Outcome of vote (for/against/abstentions)	154/4/4

## 1. Conclusions and recommendations

1.1. The EESC believes that the fight against terrorism and its financing and efforts to combat money laundering and other related forms of economic crime should be permanent EU policy priorities.

1.2. The EESC expresses its support for the measures introduced in the Commission’s proposal repealing the previous regulation of 2005 to adjust it to the current situation and address the shortcomings identified in various studies on its implementation.

1.3. The EESC believes that the expansion of the scope of controls and the competency of the authorities in order to conduct checks and confiscate goods, whenever there is a reasonable indication of illicit activities, will facilitate the discovery of more fraudulent cases and gather more information.

1.4. The EESC considers it necessary to improve cooperation, both between the competent authorities and between Member States, in order to achieve the maximum effect in applying the new regulation. The EESC urges all Member States to make their anti-terrorist databases available to Europol. The Commission should also encourage cooperation measures that enable all Member States to acquire the necessary means to effectively control the various kinds of cash and means of transporting it.

1.5. The EESC proposes that, following a study and extensive consultations, the Commission should put together a plan for reducing the use of cash in the EU. In this regard, the question of whether the compulsory declaration threshold of EUR 10 000 is appropriate needs to be considered.

1.6. The EESC feels that the Commission should go further in setting out the penalties for failure to comply with the obligation to declare. Penalties should be harmonised across Member States and communicated to the Commission in a coherent way, so as to avoid creating loopholes for fraudsters.

1.7. The EESC reiterates its concerns, expressed previously in Opinion ECO/408 <sup>(1)</sup>, that a range of factors may severely limit the effectiveness of the regulation. The main issue is that the tax havens in which the most significant money laundering takes place — and whose cash flows with the EU should in particular be monitored — do not feature in the list of countries and regions considered by the Commission in its proposal for a regulation of 14 July 2016 as presenting a high risk.

1.8. The investigation of criminal cash flows is linked to other offences, particularly tax offences. The EESC therefore proposes that tax authorities should also have access to information collected in the course of cash flow controls.

1.9. The EESC considers that, in addition to gold, other 'highly liquid commodities' should be included in the definition of cash from the moment the new regulation is adopted.

1.10. While acknowledging the social value of prepaid cards across the EU, the EESC draws attention to the threat of further use by criminals and terrorists of such instruments to covertly finance their activities.

1.11. Due to the increase in the amount of data being collected and exchanged between authorities, the EESC recommends strengthening protection of this data and exploring the possibility of applying more serious administrative and criminal penalties for officials and individuals who use it in an inappropriate or unlawful way.

1.12. The problem is international in scale and as a result EU institutions also need to play a full part in the work of international organisations active in this regard.

1.13. The EESC welcomes the removal from circulation of the EUR 500 banknotes starting from 2018, given that it is widely documented that they are used to make cash payments in illicit trafficking, as they are easy to transport and enable large amounts of money to be stored in smaller spaces.

1.14. The EESC reiterates to the Commission that the protection of the European citizens should remain a top level priority, no matter the costs and efforts involved.

## 2. Background and Commission proposal

2.1. In accordance with the Action Plan <sup>(2)</sup> for strengthening the fight against terrorist financing, the Commission is proposing a new regulation on controls of cash entering or leaving the EU from or to third countries, repealing the 2005 regulation <sup>(3)</sup> currently in force.

2.2. The EU adopted the fourth anti-money laundering and terrorist financing package in May 2015, comprising, among other initiatives, the fourth directive on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing (AMLD4) and the regulation on information accompanying transfers of funds <sup>(4)</sup>, which are currently in the transposition phase. The EESC delivered its verdict on the legislative package in its opinion on the anti-money-laundering package <sup>(5)</sup>.

2.3. In February 2016, the Commission published its Action Plan for strengthening the fight against terrorist financing <sup>(6)</sup>, implemented in two legislative phases. In the first (July 2016), the Commission drew up proposals for two Directives: AMLD5, amending various aspects of AMLD4, the Directive on access to anti-money-laundering information by tax authorities <sup>(7)</sup>, and the Commission Delegated Regulation <sup>(8)</sup> to identify high-risk third countries (tax havens), supplementing AMLD4 and AMLD5 <sup>(9)</sup>. The EESC adopted opinions on AMLD5 and the regulation, as well as an opinion on the second directive <sup>(10)</sup>.

<sup>(1)</sup> OJ C 34 of 2.2.2017, p. 121.

<sup>(2)</sup> COM(2016) 50 final.

<sup>(3)</sup> Regulation (EC) No 1889/2005 of the Parliament and of the Council (OJ L 309, 25.11.2005, p. 9).

<sup>(4)</sup> Directive (EU) 2015/849 of the Parliament and of the Council (OJ L 141, 5.6.2015, p. 73) and Regulation (EU) 2015/847 of the Parliament and of the Council (OJ L 141, 5.6.2015, p. 1).

<sup>(5)</sup> OJ C 271, 19.9.2013, p. 31.

<sup>(6)</sup> COM(2016) 50 final.

<sup>(7)</sup> COM(2016) 450 final, 2016/0208 (COD) and COM(2016) 452 final, 2016/0209 (CNS).

<sup>(8)</sup> Delegated Regulation (EU) 2016/1675 (OJ L 254, 20.9.2016, p. 1).

<sup>(9)</sup> OJ C 34, 2.2.2017, p. 121.

<sup>(10)</sup> OJ C 34, 2.2.2017, p. 127.

2.4. During the second phase (December 2016), in addition to the regulation referred to in this opinion, the Commission put forward a proposal for a directive on countering money laundering by criminal law <sup>(11)</sup> and a regulation on mutual recognition of criminal asset freezing and confiscation orders <sup>(12)</sup>.

2.5. The 2005 Regulation complements the provisions of the Anti-Money Laundering Directive (AMLD), introducing controls for cash consignments totalling EUR 10 000 and over. The current Commission <sup>(13)</sup> proposal seeks to: plug the gaps in current legislation in the light of investigations conducted by the police, the judiciary and customs authorities; develop and supplement the 4th AMLD Directive <sup>(14)</sup> and the 5th AMLD Directive <sup>(15)</sup> to tackle money laundering and terrorist financing; and adapt EU legislation, bringing it in line with international standards and recommendations, in particular Financial Action Task Force on Money Laundering (FATF) Recommendation No 32.

2.6. The present proposal addresses the imperfect coverage of cross-border cash movements, difficulties in the exchange of information between authorities, the impossibility of retaining sub-threshold amounts (under EUR 10 000), the imperfect definition of cash, divergent penalties for non-declaration in Member States and different implementation levels.

2.7. The proposal for a new regulation to replace the current legislation broadens and sharpens the **definition of cash**, dividing it into four categories: currency, bearer-negotiable instruments (cheques, traveller's cheques, promissory notes and money orders), commodities used as highly liquid stores of value (gold coins and bars) and prepaid cards.

2.8. The proposal introduces an obligation to declare unaccompanied cash, meaning cash sent by **post, courier or freight transport**, amounting to EUR 10 000 or more. Some Member States carry out intra-EU cash controls as well.

2.9. It gives the competent authorities the power to carry out controls on consignments of cash amounting to less than EUR 10 000, as well as reporting and investigating wherever there are serious indications of criminal involvement.

2.10. It authorises the **retention of funds** where **undeclared consignments** of cash amount to EUR 10 000 or more, or where consignments of any value show **signs of criminal involvement**.

2.11. It improves **information exchange** by requiring active communication with FIUs; currently, the competent authorities are required only to make information available. Information about irregular operations must also be made available to the competent authorities of the other Member States and to the Commission, where there are indications of criminal involvement. Under the proposal, the information may also be communicated to third countries, subject to the fulfilment of certain requirements.

2.12. It promotes the introduction of penalties in all the Member States for failure to comply with the obligation to declare, supplementing legal penalties for criminal activity. The sanctions in each Member State must be communicated to the Commission.

### 3. General comments

3.1. The EESC welcomes the continued efforts of the Commission in the global fight against money laundering and terrorism. The EESC also endorses the proposed modifications made by this proposal aimed at improving the legislation in force.

3.2. The Commission and the other EU institutions must work hard to ensure that the European public is fully aware of their willingness to fight against money laundering and terrorism financing, making use of all the necessary legal instruments, intelligence, law enforcement and judicial action. The knowledge that the institutions' efforts in this regard are taking place in cooperation with all Member States will strengthen their credibility and legitimacy. Although not all of them can be published, a set of indicators on money laundering and terrorist financing is already being used.

<sup>(11)</sup> COM(2016) 826 — 2016/0414 (COD).

<sup>(12)</sup> COM(2016) 819 — 2016/0412 (COD).

<sup>(13)</sup> COM(2016) 825 final — 2016/0413 (COD).

<sup>(14)</sup> Directive (EU) 2015/849 (OJ L 141, 5.6.2015, p. 73).

<sup>(15)</sup> Proposal for AMLD5.

3.3. The EESC calls upon the EU and the Member States to promote continued cooperation at international level in combating terrorism, money laundering and the serious crimes associated with these. All EU institutions should work to ensure that the measures proposed by the Commission are also adopted at the international level. This is one way of making them more effective.

3.4. The proposal for a new regulation aims to combat illegal cash flows between the EU and third countries. In order for it to succeed, the European Commission needs to cooperate with the Member States so as to ensure that their competent authorities are equipped with the most effective technical and human resources, as well as any other necessary resources (e.g. trained sniffer dogs).

3.5. Terrorist financing schemes can be very diverse, varying from abuse of legal businesses or legitimate non-profit organisations to criminal activities or abuse of the international trade system. Terrorist organisations continuously evolve their financing methods in order to avoid the existing legislative stipulations, and therefore continuous updates to the legal framework are clearly needed. Differences in legislation across Member States are usually exploited by criminals and terrorists, who choose the countries where the legislation is weakest to carry out their financial transactions.

3.6. As a result of the development of the European Agenda on Security<sup>(16)</sup>, the response to the terrorist attacks perpetrated in Europe and elsewhere, as well as public interest in money laundering, tax fraud and tax avoidance operations carried out through tax havens, the Commission has adopted a great many legislative initiatives over the past two years.

3.7. According to the FATF Report<sup>(17)</sup>, cash is widely used in the criminal economy and remains the most significant resource for financing terrorism. The volume of money 'laundered' this way is difficult to estimate, but the FATF Report estimates that it is 'between hundreds of billions and a trillion US dollars per year'.

3.8. An analysis of the effectiveness of the current regulation has revealed that the number of cash consignments entering and leaving the EU remains high. However, cash controls are limited in number (100 000 per year in all the Member States put together) and vary from country to country, and the number of suspicious cases investigated varies considerably. Only nine countries participated in the most recent consultation on the subject and data concerning both the number of cases and analyses thereof was disparate and limited.

3.9. Loopholes in the current regulation mean that cash sent in the post, via courier or by freight is not subject to enough targeted controls. On a number of occasions, the competent authorities have lacked the necessary tools to carry out sufficient controls.

3.10. Extending the scope of the controls and giving the competent authorities the power to conduct checks and confiscate goods where criminal involvement is suspected, even below the EUR 10 000 threshold, will enable the discovery of more fraudulent cases and the gathering of more information. The information obtained is currently not used as it should be. Information is made available passively in certain Member States and no measures are in place to ensure that it is processed correctly. Communication between the competent authorities must be improved as a matter of necessity: between the customs authorities, for the most part in charge of carrying out the controls and the FIUs in charge of receiving and analysing the information; between the FIUs and the tax and judicial authorities; between the competent authorities in the Member States and those in third countries, particularly those that are responsible for increased flows of illegal cash to and from the EU, as is the case with tax havens.

3.11. The penalties applied under the current regulation for failure to declare cash have not been harmonised and the analyses carried out would appear to show that they do not have the dissuasive effect intended. The new regulation requires Member States to introduce penalties for failure to comply with the obligation to declare, irrespective of whether criminal involvement is suspected or whether the cash is linked to investigations into other crimes or infringements; these penalties must be communicated to the Commission. The EESC suggests that a common communication procedure for all Member States should be set up. However, each Member State is free to determine its own penalties. The penalties laid down under Article 13 must be harmonised so as not to create windows of opportunity for criminals working through particular countries.

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<sup>(16)</sup> COM(2015) 185 final.

<sup>(17)</sup> FATF Report: Money Laundering: Through the Physical Transportation of Cash (2015).

3.12. Implementing the regulation and the above-mentioned anti-money laundering measures will greatly increase the amount of personal data collected, stored and made available to the competent bodies and authorities in the fight against money laundering and terrorist financing. If we are to uphold the fundamental rights of individuals, in particular with regard to the protection of personal data, it is important to assess the need for new protection mechanisms, to introduce them where necessary, and to promote heavier criminal sanctions for public officials and other individuals who use the information illegally.

3.13. The type of channels and procedures used to tackle money laundering and terrorist financing, including illegal cash consignments, have led the Commission, quite rightly, to adopt legislative measures that extend to both crimes. Both are connected with others of similar or greater magnitude. Close coordination through the appropriate mechanisms between all the authorities and national bodies concerned and the Member States is essential to ensure the effective implementation of the regulation and the other relevant legislative measures. It must be said that cooperation between the various authorities and institutions in the Member States — police, intelligence, judicial, customs and tax — is far from optimal. The EESC is particularly concerned at the lack of cooperation between the national police forces and Europol, as demonstrated by the fact that most Member States have not made their anti-terrorist databases available to the European law enforcement agency. The EESC therefore calls on the EU authorities and on the Member States to put an end to this situation.

3.14. Another considerable obstacle to the effective application of the regulation and the other relevant legislative provisions to tackle money laundering and terrorist financing is the lack of any real political will to eradicate tax havens. The most compelling evidence for this is the list of 'high-risk third countries with strategic deficiencies', which appears in the Annex to Regulation (EU) 2016/1675, supplementing AMLD4 and AMLD5. Not one of the tax havens which account for the majority of illegal transactions, in particular the cash flows discussed in the proposal for a regulation, appears on the list. The EESC is forced to reiterate the call made in Opinion ECO/408: the Commission should propose a new list of tax havens, merging it into a single list of third countries and territories not cooperating in the prosecution of financial crimes and terrorist financing.

#### 4. Specific comments

4.1. Terrorist financing has a clear globalised component, meaning that terrorist operations in one country are often financed by criminal activities in another. Cash controls and intensive legislative changes are needed in order to block cash movements, track and limit financial operations, as well as facilitate important information about terrorists and their funders. As it is fully aware of the external dimension of terrorist financing, the EESC recommends the full involvement of all EU institutions across all relevant international organisations, where represented, in order that similar measures may be implemented worldwide.

4.2. Cash consignments continue to be the main channel through which money launderers and other financial criminals operate<sup>(18)</sup>. The EESC recommends that, having carried out a comprehensive study, consulted all the parties concerned, and established a close working relationship with the Member States, the ECB and the National Banks, the Commission should draw up a plan to reduce cash use in the EU. The suppression of EUR 500 bills is a step in the right direction. As part of this study, the question of whether the compulsory declarations threshold of EUR 10 000 is appropriate should be considered.

4.3. The EESC asks the European Commission to increase its efforts to have the outcomes of the Warsaw Convention<sup>(19)</sup> ratified across the EU in a coherent manner. So far, only 17 Member States have ratified it, although 26 have signed it.

4.4. The EESC acknowledges that the proposed regulation could bring significant improvements to the tools we use to fight terrorism financing, while at the same time having a minimal impact on European small and medium-sized enterprises.

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<sup>(18)</sup> 'Why is cash still king? — A strategic report on the use of cash by criminal groups as a facilitator for money laundering', Financial Intelligence Group, Europol, 2015.

<sup>(19)</sup> Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 2005.

4.5. The EESC believes that developing financial cooperation policies with neighbouring countries and those that account for particularly heavy migratory flows towards the EU is essential in order to facilitate transparent financial transactions and lower costs. The barriers and high cost of transferring money into and out of these countries encourage the use of cash consignments and opaque transactions, and thus the use of these methods for criminal purposes.

4.6. Recent attacks on EU soil show that prepaid cards have been used by terrorists to pay for hotel rooms, for example (e.g. the Paris attacks, 13 November 2015). While the social value of these instruments is obvious, in that they allow vulnerable or excluded people to make payments both online and offline, the EESC draws attention to the threat of further use of such instruments by criminals or terrorists.

4.7. The illegal transportation of cash is linked to other types of offence: tax offences, money laundering and terrorism financing. The Commission's proposal for a regulation does not make it possible to exchange regular cash declaration data for fiscal purposes. The EESC feels that the prosecution of these offences should be carried out in a comprehensive way. In particular, it takes the view that the exchange described above ought to be allowed to take place, given the clear link between tax fraud and money laundering activity, in many cases involving the movement of cash.

4.8. While Articles 2.2 and 14 of the proposed regulation give the Commission the power to adopt delegated acts to amend the annex, particularly the section specifying which 'commodities used as highly liquid stores of value' are considered to be forms of cash, the EESC believes that there is no reason to limit this category to gold alone from the outset. Other particularly valuable commodities, such as precious metals or gemstones (whether raw or cut), could be included in the first list approved by Parliament and the Council.

4.9. The EESC reiterates the fact that ensuring the security of our citizens should remain one of the main concerns of both the EU and Member States, no matter the amount of effort needed.

Brussels, 27 April 2017.

*The President*  
*of the European Economic and Social Committee*  
Georges DASSIS

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