

Public consultation on a review of Regulation (EC) Nr. 1889/2005 on controls of cash entering or leaving the Community

Fields marked with * are mandatory.

Introduction

(1) Over the past decades, the international community has made the fight against money laundering and the financing of terrorist activities a priority, both to protect the integrity of the economy as a whole and the security of nations and citizens.

(2) In order to effectively tackle these complex transnational issues and to coordinate efforts on an international level, the Financial Action Task Force (FATF) was established. It has the primary responsibility to follow up developments and set a global policy standard and criteria that jurisdictions have to adhere to in order to efficiently tackle the issues involved. Currently, the FATF comprises 15 Member States of the EU and the European Commission. FATF Members commit themselves to developing a regulatory framework in their jurisdiction that implements the FATF's Recommendations and are subject to a regular cycle of mutual evaluations.

(3) As the formal financial sector (banking institutions, money changers,...) became more subject to regulation, transactions were assessed with risk-analysis tools and regulatory oversight as well as awareness in certain professions deemed sensitive for money laundering operations increased.

(4) One of the ways in which criminal groups and terrorist organisations transfer the proceeds of their (illicit) activities is by physically transferring cash between countries using either couriers acting as 'mules' for the transfer of money, or other methods such as shipping cash via the mail system, via courier companies or in freight shipments.

(5) 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 Community 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.

(6) 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.

(7) 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.

(8) In order to judge the desirability of potential actions and policy options and to obtain new insights, the Commission Services would like to receive the views of stakeholders on the possible measures to be taken to address the identified gaps.

Stakeholders Questioned

This consultation document is aimed at individual citizens, public authorities, associations and companies, including SME's, both within or outside the EU.

Reference documents

In addition to the information provided in the introduction and the questionnaire itself it might be useful to consult the following documents as they are often referred to in this consultation (click to open the link in a new window):

[Regulation \(EC\) N° 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community.](#)

[Report from the Commission to the European Parliament and the Council On the application of Regulation \(EC\) N° 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community pursuant to article 10 of this Regulation.](#)

[The Financial Action Task Force \(FATF\) Recommendations, more specifically Recommendation 32 and its interpretative note.](#)

Methodology employed for this public consultation

In the first part of this consultation we would like to collect some data about you/ your organisation/ company or the public authority which you represent. **Please make sure you are aware of and agree with the specific privacy and confidentiality statement associated with this consultation which can be consulted at the end of this document.**

Parts of this consultation might not apply to you or you might not feel you have any input to provide; this is not a problem as you have the option to select 'Don't know / No opinion' with each question.

An overview of the current legislation will be provided, accompanied by background information and the policy options which are currently being considered. In case you do not agree with any of the proposed options and have a contribution to make, please do so in the space provided.

If you have a preference for a mentioned policy option, please select it. **In order to help us understand your answer we would also like to learn WHY this particular option carries your preference and although providing this information is optional, we encourage you to succinctly explain your choice in the space provided with each option or alternatively, in a response to the last question of the document in which we enquire if you wish to add any other pertinent information.**

Personal information

Are you responding as*

- An individual citizen
- A private company
- A public authority
- An interest representative (association or professional organisation)

First Name*

Last name*

Country of residence*

Name of organisation or company name*

In which country are you established?*

Are you registered as an interest representative?*

- Yes
- No

If you are registered as an interest representative, please enter your registration number here:*

The Commission asks organisations that wish to submit comments in the context of public consultations to provide the Commission and the public at large with information about whom and what they represent. If an organisation decides not to provide this information, it is the Commission's stated policy to list the contribution as part of the individual contributions. (Consultation Standards, see COM (2002) 704, and Communication on ETI Follow-up, see COM (2007) 127 of 21/03/2007).

We invite you to [consider registration](#), then return to this page to submit your contribution as a Registered organisation.

In case we have questions regarding an answer or remark that you provided, may we contact you?*

- Yes
 No

Please enter your contact details below (these will not be published)

Do you agree to the publication of your answers?*

- Yes
 No

Do you agree to the publication of your name and other personal data?*

- Yes
 No

Definitions

Article 2.2 of Regulation 1889/2005 defines 'cash' as:

(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).

Cash transported in post/courier* and freight shipments.

*= Note:

The term 'courier' as used here has to be understood as meaning a private enterprise engaged in the transport of parcels or documents of all kinds. As used here, 'courier' expressly **does not cover** natural persons.

Regulation 1889/2005 currently only applies to natural persons carrying cash on their person, in their accompanying luggage or in their means of transport; the present 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.'

[...]

FATF Recommendation 32 and its interpretative note however, apply not only to natural persons carrying cash equal to or in excess of the threshold but to any physical cross-border transportation of cash:

[...]

any in-bound or out-bound physical transportation of currency or BNIs from one country to another country. The term includes the following modes of transportation: (1) physical transportation by a natural person, or in that person's accompanying luggage or vehicle; (2) shipment of currency or BNIs through containerised cargo or (3) the mailing of currency or BNIs by a natural or legal person. [...].

Explanation: Member States have reported cash being detected in post/courier/freight shipments. In some cases this mode of transport was possibly chosen in order to escape the declaration requirements and controls for cash transports by natural persons under Regulation 1889/2005.

National legislation regarding the admissibility of sending cash via these modes of transport varies widely, as do the regulations and rules imposed by postal authorities and courier companies. Some prohibit the shipment of cash, others only allow it in insured/tracked shipments up to a certain amount etc. For the amounts of cash to which Regulation 1889/2005 applies (equal or more than 10 000 Euro), a customs declaration has to be filed by the exporter or importer of the cash per the customs legislation. Provided this customs declaration is filed and is truthful, there would i.a. be no information on the economic origin of the cash and its intended use. We are currently exploring if it is desirable to amend Regulation 1889/2005 to explicitly apply to cash sent via post/courier/freight. If modification is desirable, various mechanisms are conceivable. We would like to obtain your opinion on which approach would be most appropriate. In order to provide some guidance, a brief summary of possible alternatives is mentioned below; this list is by no means limitative and you are invited to mention alternative approaches if you deem these more appropriate.

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?*

- 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.
- 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.
- Option C:** Make the filing of a cash declaration (separate and in addition to the customs declaration) mandatory for any cash amounts greater than or equal to 10 000 Euro entering or leaving the EU.
- 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.
- Other** (please specify)
- Don't know / No opinion**

Please explain your preferred option below:

Optional: Please tell us WHY you provided this answer.

Processing of information and information exchange

In order to be effective, it is essential that information obtained through cash controls (declarations, control results) be recorded, processed and made available to competent authorities in the Member State where it is collected, in other Member States and under certain conditions, to the Commission or to competent authorities of third countries.

Between Member States

Under the present Regulation 1889/2005, the processing of information is handled in the following way:

'Article 5

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.'

Explanation: Articles 3 and 4 refer to, respectively, information obtained from declarations by natural persons and information obtained after controls. The authorities referred to in Article 6(1) of Directive 91/308/EEC are the Financial Intelligence Units (FIU) of the Member State where the declaration was filed.

Typically, the FIU will screen the declarations and act as a focal point to coordinate possible judicial action.

The passenger declaration can be made in writing and sometimes orally. The declarations are registered by the competent authorities in paper or electronic form and in practice, the vast majority of Member States make written or electronic declaration forms available to travellers.

In line with the Commission recommendation in its report to the Parliament and the Council on the implementation of Regulation 1889/2005, a standardized declaration form has been developed that can be customized (Name + flag of the country and references to national legislation), to make it easier for travellers to file a declaration and for competent authorities to exchange information. This form is currently in use in most Member States.

Question : Should a standardized written declaration form be used in all Member States?*

- Yes, on a voluntary basis, as it happens presently
- Yes, but with the format of the declaration specified in legislation
- Other (please explain below)
- Don't know / No opinion

Please explain your preferred option below:

Optional: Please tell us WHY you provided this answer.

In addition to the above, the existing Regulation 1889/2005 specifies that:

[...]

'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.'

[...]

Explanation: Under current law the exchange of information from declarations or controls between Member States' competent authorities is optional and only applies in case there are indications (a lower standard than legal proof) of illegal activity associated with the movement of the cash in question.

From the perspective of improving risk analysis by competent authorities it could be argued that a mechanism allowing for more systematic transmission and sharing of data would be beneficial; we would like to learn your opinion on this.

In order to illustrate some practical problems with the current system please consider the following:

- a) For the purpose of risk analysis, it might be interesting if competent authorities were able to detect if a person has already previously filed declarations in other Member States or had already made a false declaration in another Member State.
- b) In order for a national Financial Intelligence Unit to determine if an individual under scrutiny had filed cash declarations or been apprehended in other Member States, the Financial Intelligence Unit has to contact each counterpart in the other Member States, which is an extremely laborious and time consuming process.

Additionally it can be remarked that the European Union effectively functions as a single entity regarding the control and enforcement of cash transfers entering or leaving its territory; a case could be made to give competent authorities in all Member States access to all the data available, regardless of the point of entry or leaving the EU, while respecting data protection provisions.

In the review process of Regulation 1889/2005, the following options –some of which require legislative revisions as they are not possible under the current provisions- are considered for the exchange of information between Member States:

Question : Regarding the sharing of information between Member States, would you be in favor of:*

- 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.
- Option B:** Make the sharing of information regarding infractions mandatory between Member States via legislation but keep the sharing of regular declaration data optional.
- Option C:** Make the sharing of information regarding infractions and regular declarations between Member States mandatory via legislation.
- Other** (Please specify below)
- Don't know / No opinion**

Please explain your preferred option below:

Optional: Please tell us WHY you provided this answer.

Acting on amounts lower than the declaration threshold

Currently, Art. 5.2 of Regulation 1889/2005 allows Member States' competent authorities who perform controls and find sums of cash below the 10 000 Euro threshold and where there are indications of illegal activities associated with the movement of that cash, to also record this information , process it and make it available to the FIU:

[...]

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.

[...]

However, under the current legislation temporarily detaining the cash pending a review and decision by the FIU is not possible (though it might be possible to do so under national provisions).

The reason for this is that the obligation to declare mentioned in Art. 3 only applies to natural persons carrying 10 000 Euro or more, which is not the case in this example. Member States have informed us that they have seen cases where large amounts were on purpose divided among individuals travelling together so that each individual carried less than the declaration threshold.

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?*

Temporary detention of the cash is a strictly administrative measure which enables the authorities to retain control over the sums carried for a limited period of time, in principle the time the FIU and/or judicial authorities require to make a decision. If no decision is reached in a timely manner or in case of a decision to release the cash, this is again made available to the traveller. In case the judicial authorities decide to investigate further, they are required to seize the cash based on national provisions.

- Yes
- No
- Don't know / No opinion

Optional: Please tell us WHY you provided this answer.

Sharing information with tax authorities.

In a number of cases where competent authorities controlled persons carrying important quantities of cash, there was no link to illicit activities that might have generated the income (such as dealing in narcotic substances) nor was there a link to terrorism financing.

However, upon further analysis there were strong indications that the cash being carried had not been declared to the tax authorities in the country of fiscal residency.

National legislation in some Member States makes it possible for competent authorities to share cash declaration or control information with the national tax authorities. Furthermore, based on national legislation in a number of Member States, the tax authorities have explicitly been designated as competent authorities under the provisions of Regulation 1889/2005. In addition, the provisions of Directive 2011/16/EU on administrative cooperation in the field of taxation provide for the possibility of spontaneous exchange of information that may be useful to the competent authorities of other Member States.

In order to support the fight against tax fraud and to ensure a level playing field between Member States, it might be beneficial to regulate this aspect.

Some possible approaches are listed below. In case you do not agree with any of them, do not hesitate to specify an alternative approach. Please note that when we refer to 'tax authorities' below, we only refer to the tax authorities of the EU Member States.

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)?

- Yes
- No
- No opinion / Don't know

Optional: Please tell us WHY you selected this answer.

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?*

- 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.
- 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.
- Option C:** Make the sharing of information regarding infractions and regular declarations mandatory via legislation.
- Other** (please explain)
- Don't know / No opinion**

Optional: Please tell us WHY you provided this answer.

Please explain your preferred option below:

Other measures to be considered

Informing the public

Currently, Regulation 1889/2005 does not foresee any measures regarding information to be provided to the public about the requirements to file a declaration when entering and/or leaving the EU carrying cash equal to or in excess of 10 000 Euro or its equivalent.

Communication material such as leaflets, booklets, posters and an EU-wide communication campaign have been made available to the Member States in various EU and other languages. Apart from these initiatives, some Member States have also developed their own awareness-raising initiatives.

The Commission report to the Parliament and the Council on the implementation of Regulation 1889/2005 recommends:

[...]

'inserting a compulsory requirement to raise awareness on the cash declaration obligation. At present all communication actions are taken on a voluntary basis;'

[...]

Question: In your opinion, should an explicit reference to awareness-raising of the public be made in the legislation?*

- No, the current framework suffices
- Yes, as a recommendation to Member States
- Yes, as an obligation to Member States
- Other (please explain)
- Don't know / No opinion

Optional: Please tell us WHY you provided this answer.

Please explain your preferred option below:

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?*

- Yes
- No
- Don't know / No opinion

Optional: Please tell us HOW you feel this could best be achieved.

Optional: Please tell us WHY you provided this answer.

Expanding the definition of 'cash'

Article 2.2 of Regulation 1889/2005 defines 'cash' as:

(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).

FATF Recommendation 32 and its interpretative note use the same functional definition as Regulation 1889/2005.

It should be noted that neither the definition of cash in Regulation 1889/2005 nor FATF recommendation 32 and its interpretative note cover gold, precious stones or any other high-value commodities. Indeed, the FATF's interpretative note specifically states that:

[...]

'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 and for transmitting value. These items may be otherwise covered under customs laws and regulations. '

[...]

Explanation: Under the current provisions of Regulation 1889/2005, natural persons bringing in or out of the EU 10 000 Euro (or its equivalent) in cash as defined above are required to file a specific declaration with the competent authorities (usually customs) which is distinct and in addition to the regular customs declaration which may apply to goods they are carrying.

The Commission report to the European Parliament and the Council on the implementation of Regulation 1889/2005 mentions for this point that:

[...]

'The definition of cash in the Cash Control Regulation is taken over from the definition used by the FATF in SR IX and covers bearer negotiable instruments or currency. So far, MS have not reported major problems in applying this definition. Gold, precious metals or stones are not included in the definition. '

[...]

Question: Would you consider it useful to expand the definition of 'cash'?*

- Yes
- No
- Don't know / No opinion

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:

(Optional): Please tell us WHY you selected this option.

Harmonization of administrative penalties

The current legislation states in Art. 9 that:

[...]

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.

[...]

Explanation: The penalties can be imposed by competent authorities in the Member States for the mere fact that the obligation to declare has not been met, irrespective of whether the cash involved was the product of illicit activity or not or meant to finance such activities or not.

While the penalties imposed have to act as a credible deterrent, they should be proportionate to the gravity of the infraction, taking into account individual circumstances.

Member States have reported to the Commission which penalties are applied in their jurisdiction.

The Commission report to the Parliament and the Council on the implementation of Regulation 1889/2005 observes:

[...]

All MS have introduced requirements that establish penalties in the event of failure to comply with the obligation to declare. The penalties of most MS can be considered proportionate, dissuasive and effective, except for a few MS where the amount of the administrative penalty seems too low to be dissuasive. The COM has asked these MS to quickly rectify this situation.

18 MS can apply further penalties than the strict administrative penalties as stipulated by article 9 of the Cash Control Regulation. These sanctions include seizure or retention of cash in case of suspicion of illegal activity, (higher) fines, imprisonment or confiscation of the cash.

MS are not required to send statistics on penalties imposed to the COM. However the ad hoc information that is available confirms that most MS have actually imposed penalties.

[...]

In practice, some Member States do not impose a mandatory minimum penalty (presumably to allow for cases in which the non-declaration was manifestly unintentional), while others impose a minimum penalty corresponding to either a percentage of the sum involved or a fixed amount.

As an illustration, the minimum penalty for non-declaration can range from none to up to 60% of the non-declared sum in case the traveller is carrying more than 50 000 Euro. The same wide disparity exists regarding the applicable maximum penalty.

Although the definition of the penalties is primarily the responsibility of the Member States and ultimately subject to judicial review, such wide variance can generate undesired effects, such as a de facto unequal treatment of passengers committing a similar infraction, or persons shifting their point of entry or exit into the EU to a Member State where the penalty levied is lower.

Question: In your opinion, should a regulatory review address this issue with the intention of establishing greater harmonization of penalties applied by Member States?*

- Yes
- No
- Don't know / No opinion

Please explain below how, in your opinion, this could be achieved:

Optional: Please tell us WHY you provided this answer.

Additional information

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.

Privacy and handling of personal data

Received contributions, together with the identity of the contributor, will be published on the Internet, unless the contributor objects to publication of the personal data on the grounds that such publication would harm his or her legitimate interests. In this case the contribution may be published in anonymous form.

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