FINANCIAL INCLUSION AND THE "WAR *FOR* CASH"

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Draft as of 17-08-2020

I
INTRODUCTION

When digital payments took the fight for financial inclusion to a new level, cash was seen by many as its most prominent victim.[1] A relic of a not so distant past to be sacrificed on the altar of financial innovation and economic efficiency. The great tech saviours of financial inclusion, products like M-Pesa in Africa, AliPay in China, or PayTM in India, all tried to create a digital ecosystem that has as its main goal the bypassing of the constraints of the cash economy.[2] The ultimate objective for them is to build a totally new financial infrastructure that connects users and merchants while bypassing the limits of the traditional banking and currency systems. Not surprisingly, the big players of the inclusion world, donors like the Gates Foundation or the World Bank, and private investors alike have channelled their efforts into incentivizing the adoption of digital payment solutions, which soon became the big frontier of the economic development agenda.[3]

Roughly at the same time, governments in the United States, Europe, and Asia started a parallel battle to slowly reduce the role of cash in the economy. What some commentators dubbed as the "war on cash".[4] Evidence shows that banknotes are the main vehicle for laundering and storing illegal money. Because of the inherent anonymity of cash transactions, and the impossibility to trace them across the payment system, cash is used to finance all sorts of illegal activities.[5] For the same reason, it is also a major vehicle for tax evasion. In an influential book, *The Curse of Cash*, the Harvard Economist Kenneth Rogoff argued that suppressing cash would also provide fundamental benefits to the conduct of monetary policy, thus giving a new tool to central banks.[6] The war on cash included the deployment of certain policies, such as the abolition of high-

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1 In this essay, cash is the informal way to describe central bank-issued fiat currency in the form of coins and banknotes. Throughout the essay, I will refer to cash, banknotes, and currency to describe the very same concept. Yet, while cash comprises both central banks issued coins and banknotes, most of the problems surrounding the disappearance of cash are related to banknotes.

2 See, for instance, McKinsey Global Institute, Digital Finance for All: Powering Inclusive Growth in Emerging Economies (2016); Visa, Accelerating the Growth of Digital Payments in India: A Five-Year Outlook (2016); The Institute for Business in the Global Context, The Cost of Cash in India (2014)

3 World Bank, Digital Dividends: World Development Report 2016

4 Lawrence H. White, The Curse of the War on Cash, 38 Cato J. 477 (2018).

5 See, Peter Sands, 'Making it Harder for the Bad Guys: The Case for Eliminating High Denomination Notes", Harvard Kennedy School (2016)

6 Kenneth Rogoff, The Curse of Cash: How Large-Denomination Bills Aid Crime and Tax Evasion and Constrain Monetary Policy (2016)

denomination banknotes, limits on the maximum value of cash payments, and more stringent reporting requirements on banks for cash deposits above a certain value.[7]

Despite their efforts, the level of cash circulating in western economies has not reduced in aggregate, spurred on by the desire of users to keep it as a safe asset.[8] A phenomenon particularly relevant during the pandemic, where cash withdrawals increased as a precaution against the fear of a possible malfunctioning of the payment system or an economic collapse; what the Princeton sociologist of money Frederick Wherry calls "comfort-food hoarding".[9] What we see, instead, is a very quick decline of cash payment transactions, in favour of digital payments. In the United Kingdom (UK), for instance, the volume of cash payments has reduced from 60% in 2008 to 28% in 2018 and is projected to decline to 9% in 2028.[10] In the United States, there is also a visible decline in the use of cash payments, albeit not so steep as the UK's.[11] Together with the decline in transactions, we are also witnessing a dismantling of the cash distribution and management network, due to the progressive disappearance of ATMs, and bank branches.[12] The slow disappearance of cash as a retail payment solution was not only the result of a regulatory agenda to suppress cash. It has mostly to do with changing consumer habits in favour of more efficient digital payments.[13] Because cash, indeed, is not efficient. It comes with all sorts of problems, from security risks, withdrawal and distribution costs, and a shrinking infrastructure that reduces the incentive of users to prefer it over the burgeoning mobile and card payment system.

Yet, as I will demonstrate in this essay, the decline of cash transactions – and the slow dismantling of the cash infrastructure - is creating a very serious problem for the poorest and more marginalised parts of society. Those who do not have access to the banking and digital payment system, and who rely on cash to pay for their necessities. Despite its inefficiencies, cash remains a fundamental, albeit neglected, tool in the war for financial inclusion. Parliamentary inquests, central bank reports, and civil society organizations have recently voiced their fear about the impact that a pure cashless economy would have on the most vulnerable parts of our society.[14] So much so that we are now witnessing a return of the regulatory tide in favour of cash; a war *for* cash that strives to keep it alive amidst the social and economic pressure of digital payments.

This essay will be divided in two parts. In section II, I explain why the disappearance of cash has a detrimental impact on financial inclusion. Section III and IV introduce and discuss some of the

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[7] Lawrence H. White, The Curse of the War on Cash, 38 Cato J. 477 (2018)

[8] *I*t is important to note that, surprisingly, the total amount of certain currency denominations in circulation – notably, the US Dollar, has not diminished, but it has actually increased. Commentators argue that this is probably the result of increased demand from abroad as a mechanism of saving. See, Morten Bech et al., *Payments Are A-changin' but Cash Still Rules*, BIS Quarterly Review, March 2018

[9] Brendan Greeley, "The Comfort of Cash in Time of Coronavirus", Financial Times (16 July 2020)

[10] UK Finance, UK Cash and Cash Machines Summary 2019, at 3

[11] David Perkins, Long Live Cash: The Potential Decline of Cash Usage and Related Implications, CONG. RES. SERV 1, 23 (2019),

[12] Hundreds of Cash Machines Close as UK Turns to Contactless Payments – _Patrick Collinson in The Guardian 29th June 2018; 1,250 Free ATMs Started Charging Fees in Just One Month – _Josh Robbins in Which 1st May 2019

[13] Access to Cash Review – Cash Essentials 7th March 2019

[14] Access to Cash, Access to Cash Review: Final Report, March 2019, https://www.accesstocash.org.uk; HOUSE OF LORDS SELECT COMMITTEE ON FINANCIAL EXCLUSION, TACKLING FINANCIAL EXCLUSION: A COUNTRY THAT WORKS FOR EVERYONE? (2017); David Perkins, Long Live Cash: The Potential Decline of Cash Usage and Related Implications, CONG.
RES. SERV 1, 23 (2019), https://crsreports.congress.gov/product/pdf/R/R45716; Cash Matters, Virtually Irreplaceable: Cash as Public Infrastructure (2019);

new regulatory trends in favour of cash. Notably, the question of cash discriminations, and the revamp of the structural regulation on cash distribution. While the complexity of the current evolving monetary system would probably need to extend the analysis on cash to the issue of Central Bank Digital Currencies, I will leave this to the myriad of existing publications on the topic.[15] Before concluding, while the goal of this essay is to make a general theoretical contribution to the understanding of the role of cash in western economies, the analysis will be largely based on the UK experience, with some occasional references to the United States'.

II

MONETARY EXCLUSION AND CASH

The debate on financial inclusion has typically categorised the problem of access to financial services into two distinct phenomena. On the one hand, there is a problem of access to credit and savings, which prevents or makes it more difficult for certain categories of individuals and firms to access the formal banking and pension system.[16] On the other hand, financial exclusion can be seen also as a problem of access to payments. In this case, the issue lies in the inability of individuals and firms to extinguish debts by transferring monetary value through one of the various payment instruments, such as bank transfers, cheques, e-money payments, or banknotes, to name just a few.[17] Both these issues can be conceptualized as market failures. Both private payment firms and credit institutions are unable or unwilling to provide to certain parts of the population commercial services that are perceived as social goods.

The disappearance of cash lies perhaps at the intersection between these two areas. I prefer to categorize this as a problem of "monetary exclusion".[18] While coins and banknotes are commonly understood as payment instruments, fiat currency (the technical name for central bank-issued coins and banknotes) is also one of the main forms of money in modern economies.[19] Indeed, currency is an IOU issued by central banks to the rest of the economy. Together with bank deposits and central bank reserves, currency makes up the bulk of the money in our economy. Unlike central bank reserves, which can be accessed only by banks, and bank deposits, which are essentially a service provided by commercial banks for profit, currency is available to everyone. It is the closest thing to a public good we have in our economy.[20] The disappearance of cash is, therefore, much more than a simple market failure of the payment system. On the contrary, it underlines the

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[15] On central bank digital currencies, see BIS, *Central Bank and Payments in the Digital Era*, BIS Annual Economic Report 2020; Tobias Adrian and Tommaso Mancini-Griffoli, *The Rise of Digital Money*, (IMF Fintech Notes, Note/19/01), July 2019

[16] A. Atkinson, *Rethinking Credit as A Social Provision,* 71 STAN. L. REV. 1093 (2019); Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?* 87 MINN. L. REV. 1, 10 (2002); Angela Littwin, *Beyond Usury: A Study of Credit-Card Use and Preference Among Low-Income Consumers,* 86 TEX. L. REV. 451, 458 (2008); Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color,* 17 GEO. J. ON POVERTY L. & POL'Y 165, 187 (2010); LISA SERVON, THE UNBANKING OF AMERICA: HOW THE NEW MIDDLE CLASS SURVIVES 81 (2017); Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1283 (2014).

[17] BIS and World Bank, *Payments Aspects of Financial Inclusion* (April 2016)

[18] On this concept, see Federico Lupo-Pasini, *Is it a Wonderful Life? Cashless Societies and Monetary Exclusion,* Review of Banking and Financial Law (forthcoming, autumn 2020)

[19] Fiat currency is the technical term for central bank issued coins and notes. Micheal McLeay, Amar Radia & Ryland Thomas, *Money in the Modern Economy: An Introduction,* (Q1 Bank of Engl. Quarterly Bulletin) March 14, 2014

[20] See, CASH MATTERS, VIRTUALLY IRREPLACEABLE: CASH AS PUBLIC INFRASTRUCTURE (2019)

broader inability of individuals to access the most basic form of public money, and the parallel retrenchment of the state in the provision of a public good. A place that has been occupied by banks, the gatekeepers to the modern payment world.

A. Cash as a Public Good

Since the advent of modern banking in the late 19th century, unbanked individuals or firms willing to make or receive a payment had essentially two means of doing so. On the one hand, they could access bank-issued negotiable instruments, such as cheques. These were for a long time a very important payment tool, which is now disappearing and whose negotiability allowed it to be traded by everyone without having to open a bank account. On the other hand, they could use the other negotiable instrument: banknotes. Banknotes, for a certain time, were also issued by private banks. However, the inefficiency of the private bank note system and the parallel rise in the importance of central banks led to central banks' monopoly in the issue of currency.[21] Thus, fiat money became a public service provided by the state.

Cash has three fundamental legal properties that make it the most inclusive payment method. Banknotes are negotiable instruments which allow an immediate transfer of value once the physical possession of the note is obtained by the payee. The legal attribute of negotiability, and that of transferability associated to it, while quite technical from a legal viewpoint, are what make banknote and coins so freely tradable and accessible to anyone. As Gleeson clearly puts it, negotiability "gives the transferee a claim which is an independent free-standing right not dependent on the performance of the contract in respect of which the payment obligation was owed in the first place".[22] This is because a negotiable instrument is able to embody a legal claim in a commercial receivable - in the case of currency, a claim against the central bank.[23]

Generally speaking, when currency is offered for payment, the payee can rely on the presumption that the payer is the legitimate owner of those chattels, thus avoiding the risk that the good faith payee might be required to return them.[24] This is because the rule of commercial law of *nemo dat quod non habet* has never been applied to cash whenever the transferee got possession of the instrument in good faith, an innovation famously advanced in *Miller v Race*.[25] This specific quality, which make the circulation of banknotes much faster, was succinctly expressed in a well-known obiter dictum by Lord Haldane LC:

> "In most cases money cannot be followed. When sovereigns or bank notes are paid over as currency, so far as the payer is concerned, they cease ipso facto to be the subject of specific title, as chattels. If a sovereign or bank note be offered in payment, it is, under ordinary circumstances, no part of the duty of the person receiving it to inquire

[21] Gary Gorton, *Pricing Free Bank Notes,* 44 J. MONETARY ECONS., Aug. 1999; LAWRENCE H. WHITE, FREE BANKING IN BRITAIN THEORY, EXPERIENCE DEBATE 35-38 (2nd ed. 1995); GARY GORTON, MISUNDERSTANDING FINANCIAL CRISES: WHY WE DON'T SEE THEM COMING (2012); Benjamin Geva, *Bank Money: The Rise, Fall, and Metamorphosis of the 'Transferrable Deposit', in* MONEY IN THE WESTERN LEGAL TRADITION: MIDDLE AGES TO BRETTON WOODS (David Fox & Wolfgang Ernst eds., 2015);
[22] SIMON GLEESON, THE LEGAL CONCEPT OF MONEY (2019), at 107
[23] SIMON GLEESON, THE LEGAL CONCEPT OF MONEY (2019), at 108
[24] SIMON GLEESON, THE LEGAL CONCEPT OF MONEY (2019), at 127-128.
[25] See, Miller v Race (1758) 1 Burr 452.; Charles Proctor, Mann on the Legal Aspect of Money (Oxford University Press, 2012), at 43

> into title. The reason for this is that chattels of such kind form part of what the law recognises as currency and treats as passing from hand to hand in point, not merely of possession, but of property."[26]

Yet, the specific possessory attributes of currency make cash a formidable payment tool as they disentangle cash holders from the complex regulatory requirement for access to banking. In other words, although cash ultimately presumes the presence of the banking and private payment system underneath it to distribute it across the territory, not all users of cash need to have a direct relationship with a bank through a bank account to intermediate it. This is what makes cash accessible to anyone.

Secondly cash is an immediate and final means of payment which does not expose the payee to the risk of default of the payer, thus guaranteeing an immediate and final transfer of value in extinguishment of a debt. Banknotes do not entail any counterparty risk: in other words, holders of banknotes do not need to worry about the solvency of the issuer – a critical aspect in the era of private bank notes which ultimately led to their demise – as they are backed by the State. Indeed, the credibility of cash does not depend on the individual's own credit worthiness or social status, but only on the trust in the entity that issued it: the central bank. This does not apply, for instance, to the other negotiable instrument, the cheque, which always exposes the payee to the insolvency of the account holder. This aspect is also critical for the sustainability of a monetary system, as rumours about the solvability of the money issuer would reduce the appeal of this medium of exchange among users, thus lowering the value of the money transferred.[27] Thirdly, as I will explain below, cash has the property of anonymity, which insulate it from the various identity requirements applicable to other methods.

B. Banks as Gatekeepers and Monetary Exclusion

Cash was for a long time the main retail payment instrument, used by everyone. However, over time, the availability of bank deposits became so widespread that private banks became the main suppliers of retail payment services, alongside their core business of taking deposits and providing credit. As Benjamin Geva said, banks became "paymasters".[28] The rise of the bank-deposit account as the key point of access to the payment system is central to the analysis of the disappearance of cash.

The importance of the deposit account (sometimes referred to as the "transaction account") rose slowly and steadily so much so that the deposit account is now the key to every payment service. A product, without which no other mainstream payment method except cash is accessible. Initially, the benefit of the deposit account could only be seen for larger non-retail payments, as banked individuals and firms had to visit a branch to benefit from the speed and network effects of the

[26] Sinclair v Brougham [1941] AC 398, 418

[27] In other words, because payees would not trust that the entity issuing the money would back its promise to redeem it, the actual value of the money traded would be lower than its face value. The problem of trust applies only partially to bank deposits, as deposit insurance schemes guarantee public backing against the bank's default. However, it can apply sometimes to non-bank e-money and e-payments, which are not always subject to the same public backstop of bank deposits.

[28] BENJAMIN GEVA, BANK COLLECTIONS AND PAYMENT TRANSACTIONS: A COMPARATIVE LEGAL ANALYSIS (2001).

bank-led payment network. The advent of credit and debit cards, which are operated by private firms but nonetheless linked to a bank account, made the bank-based retail payment system even more convenient for retail payments. Finally, when banks started to set up their digital payment infrastructures through websites or phone apps, making a payment became even simpler as the need to visit a bank branch was totally removed.

Crucially, the importance of the deposit account extends also to the various digital payment mechanisms, like ApplePay, Venmo, or PayPal. The digital aspect of payment is probably the most innovative phenomenon in retail finance in the last few years as new incumbents managed to disrupt the long-standing bank monopoly on retail payments and offer faster and cheaper payments to consumers.[29] Yet, with the exception of cryptocurrencies, which are used in a very tiny fraction of retail payments, e-money products and all electronic payment facilities still require users to have a bank account.[30] Indeed, in order to open a private e-money account it is necessary to buy e-money which can only be done by exchanging e-money for deposit money. On top of that, while digital payments generally provide large benefits for the financial system, as they allow faster and cheaper access to payments, thus bypassing some of the constraints of the standard bank retail payments and cash, they do come with their own challenges. As clearly shown by the UK Access to Cash review and by new studies, digital payments are inaccessible for a minority of the population.[31] This is due to a number of reasons ranging from digital illiteracy, lack of access to broadband and internet, and idiosyncrasy in operating digital devices.

So, what's left in terms of payments for the unbanked? Very little, unfortunately. In developing countries, the agent banking system does allow cash to be converted into e-money products, although even agent banking requires identity verifications.[32] However, agent banking is basically absent in western countries. A few card providers do allow cash to be converted into digital money. However, those cards do not have an extensive network to tap into, thus reducing their economic effect for the unbanked. On top of that, neither of these solutions solves the underlying problem of exclusion. If cash disappears, no conversion of official money into e-money will be possible. The unbanked will be simply locked out of the payment system.

The centrality of the bank deposit in our retail payment system essentially makes banks the gatekeepers to the payment world. A position of quasi-monopolist that is challenged only by cash and some fringe cryptocurrencies. The importance of the deposit account is nothing new. In a seminal research paper on the payment aspects of financial inclusion, the Bank for International Settlements warned that access to a transaction account is a key element in the fight for financial inclusion.[33] Yet, while the importance of the deposit account increased, individuals were still experiencing the same problems in accessing it. In the United States, profitability is still an issue, as application for retail accounts for low-income individuals are sometimes refused by banks. Very

[29] See Adam J. Levitin, Pandora's Digital Box: The Promise and Perils of Digital Wallets, 166 U. Pa. L. Rev. 305

[30] Izabella Kaminska, *The Finance Franchise and FinTech (Part 2),* FINANCIAL TIMES, August 18, 2017; Izabella Kaminska, *Why There is No Such Thing as A Trustless Financial System*, FINANCIAL TIMES, July 31, 2017; Robert C. Hockett & Saule T. Omarova, *The Finance Franchise,* 102 CORNELL L. REV. 1143 (2017), at 1202; Morgan Ricks, Money as Infrastructure, 3 COLUM. BUS. L. REV. 757, (2018)., at 833-836

[31] ACCESS TO CASH REVIEW (2019), at 19, 49

[32] What is called "branchless banking" or "agent banking". For a brief description see, CGAP, "Use of Agents in Branchless Banking for the Poor: Rewards, Risks, and Regulation", CGAP Focus Note No 38 (October 2006)

[33] BIS and World Bank, *Payments Aspects of Financial Inclusion* (April 2016)

basic financial literacy is also a problem, especially for those individuals with cognitive disabilities or little education.

Yet, by far the most important barrier to banking access is probably the presence of regulatory requirements on identity verification. At present, financial institutions are required to comply with anti-money laundering (AML) and combating the financing of terrorism (CFT) regulations, which prevent them from opening anonymous accounts to customers. In the House of Lords Financial Exclusion Committee Report, know-your-customers regulations were identified as one of the key issues preventing access to a bank account.[34] Certain groups, like homeless people, people with mental disabilities, illegal immigrants, or people that are fleeing their home might find it extremely challenging to provide the documentation required to open a bank account.[35] The same problem extends also to mainstream digital payment providers, as access to the digital payment system, with the exception of cryptocurrencies, needs users to be vetted. This makes it impossible for anonymous users to access the cashless payment system. The recent Bank of England discussion paper on Central Bank Digital Currencies admits that identity verification will be necessary even if the Bank of England were to issue its own digital currency, thus making anonymous payments impossible.[36] Thus, in our financial system, identity guarantees access.

In this light, we can see how the anonymity of cash and the fact that it does not require any identification to use it make it the most equal payment instrument and a real vehicle of financial inclusion. The attributes of negotiability and transferability inherent in banknotes separate the user's identity from the value of the instrument offered in discharge of debt. They do so by linking that value to the identity (and the credit) of the issuing entity, either a private bank or the central bank. In essence, they make currency anonymous. This third key attribute of currency was clearly identified in a very famous judicial decision, *Moss v Hancock*, in which money is described as:

> "that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted *equally without reference to the character or credit of the person who offers it*…".

Yet, identity regulation is not simply a question of checks and risks, as a superficial analysis of AML and CFT requirements might suggest. On the contrary, it underpins a much deeper vision of which category of individuals a monetary system considers worthy of protection. Depending on the design of those rules and their scope, access could be open to anyone, including homeless persons or illegal migrants, which is characteristic of cash, or limited to those who have a legal proof of identity and residence, as required by bank deposits. This is an important consideration if central banks will indeed decide to issue central bank digital currencies to offset the decline of cash. Without disentangling digital currencies from identity verification, no digital cash will be possible.[37]

To conclude, the availability of different payment mechanisms and a new type of money was heralded by the economic development and financial literature as a steppingstone for financial

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[34] Select Committee on Financial Exclusion, *Tackling Financial Exclusion: A Country That Works for Everyone?*, House of Lords (25 March 2017), at 59-62

[35] Select Committee on Financial Exclusion, *Tackling Financial Exclusion: A Country That Works for Everyone?*, House of Lords (25 March 2017), at 206

[36] Bank of England, *Central Bank Digital Currency: Opportunities, Challenges and Design* (March 2020)

[37] On this point, see this recent study from the European Central Bank, *Exploring Anonymity in Central Bank Digital Currencies,* In Focus Issue No 4, December 2019

inclusion. However, the progressive disappearance of cash is creating a hole in the monetary and payment system that deprives unbanked individuals from their only means of payment. In the end, the contemporary disappearance of cash, the difficulty in accessing bank products, and the rise of bank-led payments creates a triple whammy that locks the most disadvantaged parts of the society out of the economy.

III

CASH DISCRIMINATIONS

The disappearance of cash, particularly visible in the UK and other advanced cashless economies, have shown how our societies rely on this basic and yet somehow fundamental form of money. As a result, a movement to preserve cash started to gain traction, propelled by civil society and consumer groups organizations. In the United Kingdom, a parliamentary enquiry, the *Access to Cash Review* was set up to look at the issues raised by the disappearance of cash and the reasons behind it. [38] A similar initiative was implemented in the United States with *Long Live Cash*, a US Congress report on the decline of banknotes.[39] As a result, we are now entering a new phase in the regulation of cash, which for the first time looks at how to keep it alive. In this section and the next, I will discuss two key regulatory trends: the rebooting of legal tender legislation to address cash discriminations, and the structural reforms on cash supply and distribution.

A. Rebooting Legal Tender

In the free market of payments, network externalities often determine the success of one payment instrument over another. A payment system finds one of its core strengths in the scope of the network that users can rely on to discharge their debts.[40] The more users choose a specific form of payment to settle their debts, the higher the value of that payment network. The same also applies to money. Since money is a claim, the more people trust that money will keep its value, the higher the chance that payees will accept it in discharge of debts and use it themselves to settle their debts. In the case of currency, the success of this medium of exchange is based on trust that the token or the claim will be redeemable or transferred on to someone else without losing value. Economic history shows that it is ultimately the market that decides whether a specific form of money is successful or not. If this is not the case, either because users do not trust the issuer's pledge to keep the value of the money stable over time, or because of other difficulties in using that type of money, the money will lose its strength as a medium of exchange. Yet, Governments have for a long time tried to nudge users to choose a specific form of money – the state fiat currency – over others.[41] One way to do so was to prohibit payees from refusing currency when tendered for payments by payers, and from accepting anything other than the designated currency – the so-called "legal tender".

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[38] Access to Cash, *Access to Cash Review: Final Report* (March 2019), https://www.accesstocash.org.uk
[39] David Perkins, Long Live Cash: The Potential Decline of Cash Usage and Related Implications, CONG. RES. SERV 1, 23 (2019),
[40] John A. Weinberg, *Network Externalities and Public Goods in Payment Systems*, RES. DEPT. FED. RES. BANK OF RICHMND November 1996.
[41] See, SIMON GLEESON, THE LEGAL CONCEPT OF MONEY (OUP, 2019), at 133

The use of legal tender as a monetary tool is not uniform around the world. While certain countries, like France, have kept the refusal of cash payments punishable by an administrative fine, most legal tender legislations have lost their original purpose, and are now nothing more than a nudge to vendors. In the United Kingdom, the concept of legal tender only obliges the payee to accept Bank of England notes and coins as discharge of debt when tendered for payment by the payer. However, it does not oblige the parties to pay only with legal tender, as they routinely do when paying with cheques, bank transfers, or bank cards. Nor does it excuse a payer from paying with a different payment method when that was agreed in the contract or when the creditor refuses it. A creditor is still free to sue on the debt in court after he has refused a valid tender. But he will be barred from claiming the interest accruing on the debt after the date of tender and he will have to pay the costs of the action.[42] As Gleeson points out, legal tender is nowadays useful in English law only as a strategic litigation device that allows debtors to claim a breach of contract.[43]

In the United States, legal tender legislation is similarly in favour of payees, who have the right to refuse cash. Indeed, while the Coinage Act of 1965 stipulates that "United States coins and currency are legal tender for the all debts, public charges, taxes, and dues",[44] there is no federal law mandating that shops, individuals, and businesses must accept currency for payments.[45] Despite legal tender laws making it illegal to refuse a payment in cash, payers can circumvent this requirement by posting a sign saying that payments will only be accepted by cards, or by making the contractual performance only after the customer pays, as most fast food restaurants do.[46]

While for most of modern history legal tender was largely ignored as a legal tool, it might make a surprising comeback as a result of the rise of cash discriminations. Since mobile payments took hold, a few shops have started to refuse cash for payment, perhaps because of the risk of robberies or as a part of the shop's broader shift towards technology. The issue is not confined to some trendy hipster bars, but also extends to certain gig-economy services such as Uber, which specifically require payment through debit cards. The problem of cash discriminations, however, was exacerbated further during the Covid-19 pandemic. A lot of news establishments reported that shops in UK, France, and the US refused or openly discouraged cash due to the fear that it would transmit the disease.[47] The problem was so widespread that the Bank for International Settlement issued a report on the effective transmission risks attached to banknotes.[48]

The disappearance of cash led to a backlash from civil society organizations, which raised awareness of the impact that the cashless economy has on the weakest parts of the population. As a result, we are now witnessing a new regulatory trend to reboot legal tender legislation and to enforce it more heavily. We can see the first real signs of this regulatory trend in the United States,

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[42] I thank the anonymous commentator on an earlier draft of this article for this point..
[43] Simon Gleeson, The Legal Concept of Money (OUP, 2019), at 140
[44] 31 U.S.C. § 5103 (2018) ("United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues."); 31 C.F.R. § 100.3 (2019)
[45] Samuel Erlanger, A Cashless Economy: How to Protect the Low-Income, 2019 Cardozo L. Rev. De-Novo 166 (2019), at 170; See also, US Departmenr of Treasuty, Resource Center, Legal Tender Status, available at https://www.treasury.gov/resource-center/faqs/Currency/Pages/legal-tender.aspx
[46] Samuel Erlanger, A Cashless Economy: How to Protect the Low-Income, 2019 Cardozo L. Rev. De-Novo 166 (2019), at 191
[47] Izabella Kaminska, "How Covid-19 Has Reframed the War on Cash", Financial Times (24 June 2020)
[48] Raphael Auer, Giulio Cornelli and Jon Frost, "Covid-19, Cash, and the Future of Payments", BIS Bulletin No 3 (2020)

which is paradoxically the most cash friendly among western economies. In 2019, two different bills, the *Cash Always Should Be Honored Act 2019*, and the *Payment Choice Act 2019*, were introduced concomitantly to address the problem of cash discrimination. If approved, those bills would make the refusal of cash illegal and allow customers to sue any retail establishment that does not accept cash as a mean of payment.[49] Similar laws were issued at the state level. For instance, a recent law promulgated by the State of Massachusetts, states: "No retail establishment offering goods and services for sale shall discriminate against a cash buyer by requiring the use of credit by a buyer in order to purchase such goods and services. All such retail establishments must accept legal tender when offered as payment by the buyer."[50] The effect of these laws would be to forcibly keep the demand for cash up, thus artificially maintaining the network externalities that cash needs in order to survive. The marginalised groups that rely on cash as a mechanism of payment will therefore be included in the economic system.

In Sweden, where cashless payments led to the quasi-disappearance of cash, consumer and pensioners groups lobbied heavily to raise awareness on the cost of cash discriminations.[51] As a result, the Sveriges Riksbank, the national central bank, has called upon regulators to amend the legislation on legal tender to make cash acceptance mandatory for all shops and retail establishments selling vital goods and services in order to protect those social groups that rely mostly on cash. At present, in Sweden cash acceptance is mandatory only in states of heightened alert such as in the event of war, natural disasters, and other similar events. Interestingly, the opinion of the Sveriges Riksbank argues that keeping cash alive is a strategic economic interest as it would be very difficult to get the cash system to function during emergencies if it was not already in use during normal times.[52] In France, where the legislation makes refusal to accept cash payments an administrative violation punishable by a fine, the French Competition Authority has decided to open a number of investigations on the widespread violation of legal tender law.[53]

B. The European Court of Justice Case

The question of the role of legal tender in protecting against cash discrimination is currently being discussed in a high-profile case at the European Court of Justice, the highest court in European Union law. The case arises from a complaint initially litigated in German courts by a cash activist, Johannes Dietrich, against the German public broadcaster, which does not allow subscribers to pay their annual fee in cash. The plaintiff alleges that the inability to pay the TV licence in cash is in violation of the European Union law, which sets an unconditional and unrestricted obligation to accept Euro banknotes as a means for the settlement of monetary debts.[54] While in the

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[49] Cash Should Always be Honored (CASH) Act, H.R. 2630, 116 th Cong. (2019); Payment Choice Act of 2019, H.R. 2650, 116 th Cong

[50] General Law of the Commonwealth of Massachusetts, Title IV, Chapter 255D, Section 10A.

[51] Maddy Savage, *The Swedes Rebelling Against a Cashless Society*, BBC NEWS (Apr. 6, 2018)

[52] Separate statement of opinion by Christina Wejshammar Sveriges Riksbank. Available at https://www.riksbank.se/en-gb/press-and-published/notices-and-press-releases/notices/2019/proposed-new-sveriges-riksbank-act/

[53] Guillaume Lepect, "France: Controversy over Stores Refusing Cash Steps up" , CashEssentials (28 May 2020), available at https://cashessentials.org/france-controversy-over-stores-refusing-cash-steps-up/

[54] The Articles of European Union law are Article 128(1) TFEU, the third sentence of Article 16(1) of Protocol (No 4) on the statute of the European System of Central Banks and of the European Central Bank and the second sentence of Article 10 of Council Regulation (EC) No 974/98 of 3 May 1998. See, Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Eurozone there is a common legislation on the role of Euro as the official currency, there is no definition of what legal tender means in practice, thus leaving member states a certain flexibility in drafting the local payment legislation, including exemptions for non-cash payments.[55] The ECJ, which sat as a Grand Chamber, was asked by the German Federal Court to provide a preliminary ruling on a few points of European Union law on the freedom of EU member states to decide the ambit of application of legal tender legislation. While the specific legal questions to be clarified by the ECJ are quite technical and concern the role of the Euro banknotes as a mean of payment in the Eurozone, they nonetheless deal with a very basic question: whether EU members have the right to set legislation that limits the practical application of legal tender legislation and, in turn, the use of Euro banknotes as mean of payment. [56]

The importance of this judgment cannot be understated. Far from being a dispute on an arcane provision of EU monetary law, the ECJ case has the potential to reframe the role of fiat currency across the entire Eurozone, thus forcing the harmonization and strengthening of legal tender legislation in all Euro counties. Moreover, it would also for the first time allow the highest court of EU law to properly flesh out the relationship between cash discriminations and the fundamental rights enshrined in EU legislation. According to sources, the European Commission's representative argued that the ability to pay in banknotes or coins was a fundamental right of every EU citizen, which should not be restricted unduly. This position echoed what said not long before by Yves Mersh, a member of the Executive Board of the European Central Bank, thus formally representing the ECB's view on the topic. In a speech on the role of Euro banknotes as legal tender he said that:

> "Cash, as a medium of transaction in many instances, opens the way for the exercise of many fundamental rights… such as the right to "informational self-determination", freedom of action and freedom of speech…. The store-of-value function of cash is directly linked to property rights. The easy accessibility to cash, especially for the elderly, the socially vulnerable or minors, allows people to participate in society and, for example, allows children to learn how to handle money. In particular, when socially vulnerable people use cash, they face none of the barriers involved in applying for a credit card or, despite all their efforts, opening a current account.?"[57]

IV

ADDRESSING STRUCTURAL REGULATIONS

Addressing the demand side of cash alone would not guarantee its survival. Very deep structural problems in the distribution of cash make its supply very challenging. This is particularly evident in the United Kingdom, where the overly complex ATM distribution network was identified as

[55] Neither the TFEU, or the Statute of the ESCB and the ECB, nor Regulation No 974/98 clarify what the term "legal tender" means when referred to Euro banknotes.

[56] https://cashessentials.org/cash-legal-tender-and-the-future-of-euro-banknotes/

[57] Yves Mersch, "The Role Of Euro Banknotes As Legal Tender", speech given at the 4th Bargeldsymposium of the Deutsche Bundesbank, Frankfurt am Main (14 February 2018.) The full speech is available at https://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp180214.en.html#:~:text=As%20the%20central%20bank%20which,its%20usability%20as%20legal%20tender

the main challenge in the war *for* cash.[58] Indeed, while cash can be used by anyone, it is private banks and ATM providers (and their customers) that bear the direct costs of its distribution, effectively subsidizing the social cost of cash for the unbanked. However, in a private market, the functioning of the cash distribution system is predicated on its profitability, which was until recently guaranteed by the volume of cash withdrawals. Yet, as soon as the reduction in the total demand of cash reached a trigger point, the entire edifice of cash distribution started to crumble.

In the UK, users can get cash from five different sources: paid ATM, free ATM, stored (commonly known as "cashback"), the Post Office, and in bank branches. None of these options is free from costs for the consumers and the providers. The ATM network is managed by private providers – in the UK, LINK, Mastercard, and Visa – which charge banks around 25p for every time a bank customer withdraw cash in one of the many ATMs in the network.[59] The interchange fee is what makes the cash system profitable for the providers, but competition between providers and the need to cut costs have put pressure on the sustainability of the system. LINK has over time tried to subsidise the ATM in deprived areas and reduced the fees. A study from the University of Bristol shows that the closure of ATMs affects precisely those geographical areas where the percentage of cash-dependent users is higher.[60] However, given that ATMs have fixed and variable costs that make the cost per transaction higher than the fee, unless they are used frequently, they do not make a profit. [61]

Various solutions were proposed by consumer groups and the industry to address the rising cost of cash and disappearance of ATM. One option was for the Payment System Regulator to intervene directly to set the interchange fees in a way that would have guaranteed the geographical spread of the ATM network and the protection of vulnerable cash users. This option was not accepted due to the reluctance of the UK regulator to intervene in a private market issue. Another was to impose a universal service obligation on banks and payment system providers which would have them intervene by providing cash free of charge in those areas where the costs are higher. A similar strategy was adopted in Sweden, where a new law – the *Obligation for Certain Credit Institutions to Provide Cash Services*, was enacted in early 2020. The law, which requires banks to guarantee access to cash withdrawal and deposit services for all citizens was one of the first moves by the Swedish government to protect the role of cash in the economy, after years in which the focus was on growth of the digital payment system.

With no agreement between, the PSR, the banks, and the other private firms involved, the solution was for a long-time evading. At the core of the problem was the absence of an overarching statutory framework on the protection of cash, similar to that applied to other financial services. Until very recently, cash was subject to very light touch regulation, which only covered the competition and consumer protection aspects of the cash disbursement network.[62] This meant

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[58] Access to Cash, at 12-15; Financial Conduct Authority, Guidance Consultation: Branch and ATM Closures and Conversions, July 2020

[59] Unless the consumer withdraws cash from the bank's own ATM, in which case is free. See, Which?, "The Issue of ATMs", mimeo (2019)

[60] http://www.bristol.ac.uk/media-library/sites/geography/pfrc/Mapping%20The%20Availability%20of%20 Cash%20-%20Final%20report.pdf

[61] Payment System Regulator, "Considering the incentives to deploy free-to-use ATMs in the LINK network", Review of the Structure of LINK interchange fees: Call for Views CP19/5 (June 2019)

[62] This covered the LINK interchange fees, which was based on an individual exemption by the Office of Fair Trading (OFT) under the Competition Act 1998. See, Payment System Regulator, "Considering the incentives to deploy free-

that there was no overarching statutory obligation on any of the various financial authorities in the UK to look at the financial inclusion implications of the disappearance and cost of cash.

The pressure caused by the Covid-19 crisis on the UK economy somehow made the need to protect cash and speed up some of the more daring regulatory reforms more visible. In the 2020 Budget, the Chancellor of the Exchequer has announced that the Government will put forward legislation to guarantee access to cash and to ensure that the UK's cash infrastructure is sustainable in the long-term.[63] As a first move in that direction, HM Treasury, the Bank of England, the Financial Conduct Authority (FCA) and the Payment Systems Regulator (PSR) have set up the Joint Access to Cash Strategy (JACS) Group, which oversees the strategy for cash in the UK.[64] As a second move, in July 2020, the FCA published a draft guidance to firms on maintaining access to cash for customers. According to the Guidance, when firms decide to reduce the access to cash for their customers, either by closing an ATM or a branch, they need to inform the regulator and evaluate the impact that the closure will have on customers, and vulnerable customers in particular.[65] Yet, at present, it is impossible to say whether the UK strategy will work, or whether more interventions will be required. Given the complexity of the entire economic environment in the UK as a result of the Covid-19 pandemic, only time will tell.

V

GOODBYE CASH?

In this essay, I have shown that cash is still a fundamental aspect of the armoury for financial inclusion. Despite the security risks and overall management costs attached to it, cash presents properties that are simply not replicable in any other monetary instrument, from bank deposits to e-money or even central bank digital currencies. The anonymity of cash, while certainly posing a problem of tax evasion and security, nonetheless guarantees the highest level of inclusion. Cash allows the most disadvantaged parts of the population to access the monetary system and participate to the economic life of the society they live in. Yet, it is subject to an inevitable decline that will soon make its costs too high to bear for banks and cash distribution providers. At one point, a choice will have to be made about the level of exclusion we are ready to accept in our society. For those who believe that illegal migrants, homeless persons, or any other undocumented individual have the same right to pay for their food as anybody else, the preservation of cash is mandatory. Even if it comes at a cost. Perhaps, it is time for central banks to consider their public role and be ready to simply subsidize the cost of cash.

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to-use ATMs in the LINK network", Review of the Structure of LINK interchange fees: Call for Views CP19/5 (June 2019), Annex 1, at 18-19

[63] Jim Pickard and Nicholas Megaw, "Rishi Sunak acts to preserve access to cash for the vulnerable", Financial Times (March 6, 2020)

[64] Financial Conduct Authority and Payment System Regulator, "The FCA's and PSR's joint approach to Access to Cash", (16 June 2020), https://www.fca.org.uk/news/statements/fca-psr-joint-approach-access-cash

[65] Financial Conduct Authority, "GC 20/2: Branch and ATM Closures or Conversions: Guidance Consultation" (July 2020)