CCBE RESPONSE TO FATF CONSULTATION PAPER "THE REVIEW OF THE STANDARDS, PREPARATION FOR THE 4TH ROUND OF MUTUAL EVALUATIONS"

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CCBE response to FATF consultation paper "The review of the standards, preparation for the 4th round of mutual evaluations"

General remarks

1. The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

2. In the view of the CCBE, the requirements on a lawyer to report suspicions regarding the activities of clients based upon information disclosed by clients in strictest confidence is a violation of a fundamental right. For this reason the CCBE continues to call for the removal of the reporting requirement in relation to members of the legal profession.

3. The CCBE appreciated the invitation to participate in the FATF Consultation on 22 November 2010 in Paris regarding the consultation paper on "The review of the standards, preparation for the 4th round of mutual evaluations" ("Review") as these are important topics that are of mutual concern.

   However, at the end of the day we left with the impression that decisions had already been made and that the comments of the private sector representatives may not have a real chance of being of influence to the final version.

4. Further, the Review proposes several adjustments, the scope of which highly depends on their final elaboration which has not yet been presented by the FATF. The FATF consultation paper announces, for instance:

   – exemptions "in strictly limited and justified circumstances" (Review paragraph 7.b.iv);

   – "giving a more detailed and balanced list of examples of lower/higher ML/TF risk factors" (Review, paragraph 9);

   – "FATF has prepared a set of examples of both higher and lower ML/TF risk factors"(Review, paragraph 16);

   – "new text is being considered relating to "Risk Variables" (Review, paragraph 17);

   – "the information that is necessary" in relation to the identification and the verification of the identity of legal persons or arrangements (Review, paragraph 18).

   One needs to know the wording of these announced proposals in order to be in a position to make substantive comments on the effects these changes will have in practice. The CCBE would request an opportunity to comment on further proposed changes within a timeframe that enables stakeholders to provide substantive comments.

5. The CCBE supports the FATF recommendations insofar as they aim to prevent the DNFBP's from becoming involved in money-laundering. From the consultation, the impression has risen that many of the suggested changes do not add (sufficient) value to the ultimate aim compared to the disproportionate increase in the administrative burden that would result from these changes. The CCBE takes the position that changes should only be made if it is absolutely clear that such a change is necessary and proportionate and no other alternative measure could lead to the same result.

Risk Based Approach

6. The CCBE understands, as is referred to in paragraph 5 of the consultation paper, that the risk-based approach (RBA) has been included (in 2003) "*in a manner that would allow resources to be allocated in the most efficient way to address the most pressing ML/TF risks"* to introduce flexibility into the FATF Recommendations. Thus, the RBA would allow the institutions to select the transactions/services/customers which have a (lower/higher) risk to ML/TF, thus enabling the institutions to conduct made-to-measure cdd and monitoring.

7. Flexibility and the made-to-measure approach do not benefit from introducing new interpretative notes or from «*giving a more detailed and balanced list of examples of lower/higher ML/TF risk factors as well as examples of simplified/enhanced cdd measures*". RBA allows the institutions to conduct their cdd obligations in a made to measure manner, thus addressing the most pressing ML/TF risks. Introducing more and more lists of detailed examples will bring us back more and more to a rule-based "*ticking the box*" manner of cdd, which will lack the awareness of the institutions that may be so valuable in combating ML/TF risks. Increasing the alertness and awareness of those who may be confronted with anti-money-laundering is a far more efficient way to address the most pressing ML/TF risks. It is likely that lists of examples will result in more reports, not because the transaction involved actually has a ML/TF risk, but merely because one is afraid that in retrospect it could be argued that a mistake has been made.

8. It is the CCBE's opinion that a new interpretative note on the RBA will not increase the required awareness, but rather may lead to (more) unnecessary administrative burdens and will not assist the institutions to focus their efforts on cases that require attention.

Supervising and monitoring of the implementation by lawyers

9. As the money laundering risks experienced by each sector covered by the standards vary, so to will the application of the risk based approach between sectors. We believe that the relevant self-regulatory organisations will be better placed than the competent authorities to properly judge the adequacy of the risk assessments being made within their own sector and the effectiveness of the policies and procedures put in place to mitigate those risks. While the relevant Bars and Law Societies can review such material and still protect the fundamental rights around legal privilege, a competent authority cannot. As the FATF and courts across Europe have recognised the importance of legal privilege applying in the context of anti-money laundering compliance, we believe that only self-regulatory organisations should be permitted to supervise the legal sector for compliance with the risk-based approach.

(Domestic) politically exposed persons (Recommendation 6, 35)

10. Due to the very broad definition of the PEP, the obligation to determine whether or not the client is a PEP in practice is hard to fully comply with, even if one has the support of a professional private service provider that provides a PEP list.

11. Taking into account that the institutions already have the obligation to identify and verify their customers and, where applicable, the customer's beneficial owner in a risk-based manner, there does not seem to be any doubt that a person who would qualify as a PEP will be already identified and monitored carefully in the risk-based verification of the identification of the client and/or the beneficial owner. This goes all the more for a domestic person with governmental influence. Consequently, inclusion of the domestic PEP is not necessary.

    The CCBE therefore does not see any added value in such an inclusion. It is clear, however, that such a measure would disproportionately increase the administrative burden.

Third party reliance (Recommendation.9)

12. The CCBE welcomes the proposal to extend the third parties that can be relied upon to all types of institutions, businesses or professions as long as they are subject to AML/CFT

requirements and to effective supervision or monitoring. The purpose of this recommendation is to prevent double, and therefore unnecessary, customer due diligence.

13. As a consequence preventing double cdd and the fact that the party that can be relied on is a regulated party implies that the relying person can assume that the regulated party has carried out the cdd with sufficient effort and according to proper procedures. The relying person can also rely on the regulated party's risk-based approach, unless there is evidence to the contrary.

14. This should also imply that the relying person should not be held responsible if afterwards it turns out that the party that can be relied upon has made a mistake, unless the relying person should have been aware thereof. The relying party stays, of course, responsible insofar as new circumstances have occurred after the moment he relied on the other party.

Tax crimes as a predicate offence for money-laundering

15. The CCBE does not see any added value in including tax crimes as a predicate offence for money-laundering. It would frequently lead to difficult discussions regarding the line between a tax crime and legitimate tax planning. It would further lead to a lot of AML reports that would not result in further criminal investigations and, therefore, would not contribute to the FATF's purpose of mitigating serious crimes and preventing proceeds of serious crimes from being transferred, concealed and/or invested in the legal economy as if its sources were legitimate.

16. As the response of the Law Society of England and Wales clearly explains[1], money-laundering focuses on assets directly or indirectly derived from a predicate offence and a further act dealing with those assets for a specific purpose. According to FATF recommendation 1, countries should apply the crime of money-laundering to all serious offences and most countries comply with this recommendation. As a result, all conversion or transfer of assets for the purpose of concealing or disguising the illicit origin and all concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to or ownership of those assets are considered to be money-laundering if the perpetrator knows that those assets are, directly or indirectly, derived from a serious offence. The FATF recommendations and the AML regulations aim at preventing assets that have an illicit origin being concealed (etc.) or invested in the legal economy as if its origin was legitimate.

17. If a person dishonestly fails to declare money from a legitimate income to the Revenue, that money (asset) has not been derived, directly nor indirectly, from a criminal offence and therefore does not fulfil the definition of money-laundering. He may commit a tax crime by not fully declaring his assets to the revenue, as a result of which he has retained (legally derived) money that he is no longer entitled to due to the tax regulation. The mere fact that this person does not comply with his obligation to declare his income fully to the Revenue, does not make the origin of the income illegal.

In addition, though punishable, these kinds of tax crimes can hardly be considered similar to serious, organised offences the recommendations aim at.

18. Furthermore, retaining money that a person is no longer entitled to due to his tax obligations leads to complex discussions as to which part of the person's income (asset) can be considered the specific part that has been retained as a result of the incorrect declaration. Ascertaining that a specific part seems to be a prerequisite of the definition of ML, it should be established whether that specific asset has been derived from a crime. Should it be accepted that retaining money that should have been paid to the Revenue leads to all income being tainted as derived from the tax crime, then every further expenditure from the income would qualify as ML. This would make it almost impossible for that person ever to conduct his affairs lawfully again.[2]

19. We appreciate that there are other types of serious tax crimes which occur when people submit false declarations for the purpose of obtaining payments from the revenue which they

[1] http://www.lawsociety.org.uk/productsandservices/antimoneylaundering/consultations.page
[2] See further as explained in the Law Society's response, page 22.

are not entitled to. MTIC fraud is one such example. Fraud is already listed as a predicate offence for money laundering in most countries and the money received can properly be described as being derived from the crime. Therefore the inclusion of tax crimes as a predicate offence in the standards is not required to ensure that money laundering charges can be brought against perpetrators of such crimes.

20. Furthermore, it should not be forgotten that most countries already impose significant penalties for all tax offences. This allows criminals to be sent to jail for lengthy terms, back taxes to be collected with interest and improperly claimed amounts to be recovered

21. Inclusion of tax crimes as a predicate offence in the view of the CCBE would not add any value to the combating of money-laundering, but would, on the other hand, lead to a lot of complex discussions as to whether or not, and to what part, an asset could be considered to be derived from an offence and as to whether or not it concerns legal tax planning instead of illegal tax evasion. Such inclusion would therefore unnecessarily increase the burden on the institutions.

Non-face-to-face business

22. While it is clear that a money-launderer might prefer not to be on the front stage and therefore may tend to limit his contacts to non-face-to-face contacts, it cannot be denied that at the same time legitimate non-face-to-face business and legal advice is not only a reality, but takes place daily to a very large extent. It is neither unusual nor suspicious. Considering mere non-face-to-face contact to be a high risk under all circumstances therefore seems to be incredibly disproportionate. The risk-based approach, included in 2003 to increase the flexibility of the recommendations, can play a very efficient role here and enable the private sector to focus on those cases that really represent a higher risk by combining a non-face-to-face contact with other circumstances or indications, such as the risk of the branch the client is working in, the risk of the service/product to be rendered/delivered etc. Focusing on cases where higher risks are expected will result in a more mindful monitoring of those actual higher risk cases and prevent a "ticking the box" mind which is far less efficient.

Conclusion

23. The CCBE will appreciate an early opportunity to comment on the next stage of the FATF consultation. In the meanwhile, please do not hesitate to contact us should the FATF require any further information or clarification on the above-mentioned comments.