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CCBE Response to the Commission Public consultation on an Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing

26/06/2020

Ensuring effective implementation of the existing rules

Ensuring correct transposition and application of the EU anti-money laundering / countering the financing of terrorism rules is a priority for the Commission. The Commission adopted a tough approachin relation to the transposition of both the 4th and 5th Anti-Money Laundering Directives and launched or will soon launch infringement proceedings against Member States for failure to fully transpose these provisions.

The Commission monitors the effectiveness of Member States' anti-money laundering / countering the financing of terrorism frameworks in the context of the European Semester cycle. In 2020, 11 countries have seen their frameworks assessed.

The European Banking Authority has seen its mandate recently strengthened, and is now responsible tolead, coordinate and monitor AML/CFT efforts in the financial sector. Among its new powers are the performance of risk assessments on competent authorities, the right to request national authorities to investigate individual institutions and adopt measures when breaches are detected. These new powers complement existing powers to investigate potential breaches of Union law.

This section aims to collect stakeholder views regarding the effectiveness of these measures and on whether other measures could contribute to strengthening the enforcement of anti-money laundering / countering the financing of terrorism rules.

How effective are the following existing EU tools to ensure application and enforcement of anti-money laundering / countering the financing of terrorism rules?

at most 1 answered row(s)

	Very effective	Rather effective	Neutral	Rather ineffective	Not effective at all	Don't know
Infringement proceedings for failure to transpose EU law or incomplete/incorrect transposition	○	●	○	○	○	○
Country-specific recommendations in the context of the European Semester	○	●	○	○	○	○
Action following complaint by the public	○	○	●	○	○	○
Breach of Union law investigations by the European Banking Authority	○	○	●	○	○	○
New powers granted to the European Banking Authority	○	○	○	○	○	●

How effective would more action at each of the following levels be to fight money laundering and terrorist financing?

at most 1 answered row(s)

	Very effective	Rather effective	Neutral	Rather ineffective	Not effective at all	Don't know
At national level only	○	○	○	●	○	○
At national level with financial support and guidance from the European Union	○	●	○	○	○	○
At the level of the European Union (oversight and coordination of national action)	○	○	●	○	○	○
At international level	○	●	○	○	○	○
No additional action at any level	○	○	○	●	○	○

Should other tools be used by the EU to ensure effective implementation of the rules?

5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

CCBE Response

It is suggested that the focus of the question should concentrate on the "efficiency" of the implementation of AML rules. Frequently, effective implementation is confused with literal, word-by-word transposition. Of course, effective implementation is more difficult to assess than literal transposition. Effective implementation means, firstly, that the objectives of AML regulation are met. Secondly, it means that of all regulatory means available to reach that objective the least burdensome should be selected. Moreover, when ensuring effective implementation, the heterogeneity both of national legislation and of sectoral regulation should be taken into account. Therefore, it is impossible to achieve "effective implementation" by a "one size fits all" approach.

If the focus is put on efficiency, the tools to be used cannot focus on repression, i.e. sanctioning perceived misconduct. Effective implementation has to reach out to the level of any individual which should comply with the rules. Therefore, we suggest a set of tools which should be used:

1. The setting of new rules at EU level must be slowed down. The political process makes it easy to be perceived as "strong" on AML by setting ever "stronger" rules and then being unsatisfied that the new rules, which emerge annually or bi-annually, are not implemented in time. Therefore, before adopting new rules, the existing rules should be carefully assessed. In order to achieve this, there must be sufficient time – usually several years – to

"digest" the old rules and there must be ample space for public and expert consultations in order to simply determine what is working and what is not working.

2. Rules which introduce or require burdensome administration tend to be less effective than rules which can be applied easily. To date, EU legislation does not fully respect the risk-based approach, which seeks to reduce the administrative burden, but brings about a "tick-the-box" approach. Regulation should therefore be designed on focusing on "guiding by objectives" and leave scope for decision and assessment to the obliged entities.
3. Usually each sector at a national level knows best how to address issues in the most effective and least burdensome way. Therefore, the two pillars of effective implementation lie on inducing exchange of best practice and self-regulation by fully respecting the principle of subsidiarity.
4. A certain level of supervision and sanctioning of misconduct is necessary to achieve compliance and efficiency. However, supervision should take into account the specific features of each sector at a national level. Sanctions should be proportionate.

Additional comments

5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Delivering a reinforced rulebook

While the current EU legal framework is far-reaching, its minimum harmonisation approach results in diverging implementation among Member States and the imposition of additional rules at national level (e.g. list of entities subject to anti-money laundering obligations, ceilings for large cash payments). This fragmented legislative landscape affects the provision of cross-border services and limits cooperation among competent authorities. To remedy these weaknesses, some parts of the existing legal framework might be further harmonised and become part of a future Regulation. Other Union rules might also need to be amended or clarified to create better synergies with the AML/CFT framework.

As criminals continuously look for new channels to launder the proceeds of their illicit activities, new businesses might become exposed to money laundering / terrorist financing risks. In order to align with international standards, virtual asset service providers might need to be added among the entities subject to anti-money laundering / countering the financing of terrorism rules (the 'obliged entities'). Other sectors might also need to be included among the obliged entities to ensure that they take adequate preventive measures against money laundering and terrorism financing (e.g. crowdfunding platforms).

This section aims to gather stakeholder views regarding a) what provisions would need to be further harmonised, b) what other EU rules would need to be reviewed or clarified and c) whether the list of entities subject to preventive obligations should be expanded.

The Commission has identified a number of provisions that could be further harmonised through a future Regulation. Do you agree with the selection?

	Yes	No	Don't know
List of obliged entities	●	○	○
Structure and tasks of supervision	○	●	○
Tasks of financial intelligence units	●	○	○
Customer due diligence	○	●	○
Electronic identification and verification	○	●	○
Record keeping	○	●	○
Internal controls	○	●	○
Reporting obligations	○	●	○
Beneficial ownership registers	●	○	○
Central bank account registers	●	○	○
Ceiling for large cash payments	○	●	○
Freezing powers for financial intelligence units	●	○	○
Sanctions	○	●	○

What other provisions should be harmonised through a Regulation?

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

CCBE Response

None.

What provisions should remain in the Directive due to EU Treaty provisions?

5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

CCBE Response

Most sectors, e.g. the legal profession, are too heterogenous across the EU in order to create the same regulatory environment. Therefore, we suggest a sectoral approach. For rather uniform sectors, such as the banking / finance sector, a regulation might work. For other sectors, in particular the non-financial professions, a directive is the right approach.

Therefore, a regulation can have the following content:

1. Definition of obliged entities.
2. Definition of ML/TF
3. Rules covering FIUs as well as their tasks and their cooperation
4. Rules for Union-wide tools, such as beneficial ownership and central bank account registers
5. Rules specific for the banking / financial sector

All other provisions covering all other sectors should remain in a directive.

What areas where Member States have adopted additional rules should continue to be regulated at national level?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

CCBE Response

Supervision and regulation of the non-financial professions must remain at national level due to the heterogenous structure of those professions.

Should new economic operators (e.g. crowdfunding platforms) be added to the list of obliged entities?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

CCBE Response

If new operators which transfer large amounts of funds emerge, they should be added to the list of obliged entities.

In your opinion, are there any FinTech activities that currently pose money laundering / terrorism financing risks and are not captured by the existing EU framework? Please explain

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

CCBE Response

Don’t know.

The Commission has identified that the consistency of a number of other EU rules with anti-money laundering / countering the financing of terrorism rules might need to be further enhanced or clarified through guidance or legislative changes. Do you agree?

	Yes	No	Don't know
Obligation for prudential supervisors to share information with anti-money laundering supervisors	○	●	○
Bank Recovery and Resolution Directive (Directive 2014/59/EU) or normal insolvency proceedings: whether and under what circumstances anti-money laundering grounds can provide valid grounds to trigger the resolution or winding up of a credit institution	○	○	●
Deposit Guarantee Schemes Directive (Directive 2014/49/EU): customer assessment prior to pay-out	○	○	●
Payment Accounts Directive (Directive 2014/92/EU): need to ensure the general right to basic account without weakening anti-money laundering rules in suspicious cases	○	○	●
Categories of payment service providers subject to anti-money laundering rules	○	○	●
Integration of strict anti-money laundering requirements in fit&proper tests	○	○	●

Are there other EU rules that should be aligned with anti-money laundering / countering the financing of terrorism rules?

5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

CCBE Response

None.

Additional comments

5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

CCBE Response

In our view, full harmonisation can never be achieved, as any EU rule – directive and regulation – requires national legislation to create the necessary adaptations in existing national law. Therefore, even a regulation needs to be implemented. Even with an EU regulation, AML rules will be different in various Member States.

Differences will also continue to exist, as the regulated sectors / obliged entities are heterogenous in Member States. For example, there exist different legal professions, i.e.

lawyers, notaries, solicitors and barristers, who perform different tasks and duties in their respective Member States. Moreover, the structures of law firms vary as well as the organisation of the profession.

Hence, a regulation is not useful if the principle of subsidiarity and proportionality are taken seriously and will not achieve the intended outcome of full harmonisation.

The CCBE also wishes to alert the Commission to the fact that the national implementation of a Directive can create enormous difficulties. The CCBE believes that Member States can approach the implementation of EU legislation in a direction other than that intended by the EU legislators and sometimes contrary to the aim and purpose of the EU legislation. The CCBE is concerned that this trend will continue in the future. Certain Directives provide national governments with the possibility to implement legislaton un a menner which far exceeds the aim of a specific Directive. It also allows governments to attempt to justify such extensions as being a requirement of the EU Directive which is not the case in many cases. Such an approach causes practical difficulties, and frequently an impacted sector does not have the possibility to explain to the relevant Ministry that the crucial points of the EU legislation are being interpreted wrongly, and if the possibility to communicate this does exist, the relevant Ministry may not entertain such views.

A further significant consequence is created arising from the wrong implementation of a Directive insofar as sector's can have great difficulty explaining to their members that the problems do not arise as a result of the EU legislation itself, but rather from the national implementation.

With respect to the above, the CCBE believes that any further measures require clear limits regarding what Member States should be permitted to introduce during the national implementation process. The CCBE also believes that stakeholders would benefit if the Commission established a preventive mechanism enabling not only Member States, but also other relevant stakeholders to request within the implementation process explanations regarding unclear provisions of a Directive and questions regarding whether the national implementation measures are in conformity with the Directive, for example by issuing non-binding opinions on the problematic points. We believe this approach would not breach the competence of the CJEU as being the only EU institution to provide binding interpretation. At the moment there is no preventive instrument in place and we believe that the consequences of the wrong implementation could be irreversible before the case would be brought before the CJEU, if at all.

Bringing about EU-level supervision

Supervision is the cornerstone of an effective anti-money laundering / countering the financing of terrorism framework. Recent money laundering cases in the EU point to significant shortcomings in the supervision of both financial and non-financial entities. A clear weakness is the current design of the supervisory framework, which is Member-State based. However, supervisory quality and effectiveness are uneven across the EU, and no effective mechanisms exist to deal with cross-border situations.

A more integrated supervisory system would continue to build on the work of national supervisors, which could be complement, coordinated and supervised by an EU-level supervisor. The definition of such integrated system will require addressing issues linked to the scope and powers of such EU-level supervisor, and to the body that should be entrusted with such supervisory powers.

Effective EU level-supervision should include all obliged entities (both financial and non-financial ones), either gradually or from the outset. Other options would rest on the current level of harmonisation and provide for a narrower scope, i.e. oversight of the financial sector or of credit institutions only. These options would however leave weak links in the EU supervisory system.

Linked to the issue of the scope is that of the powers that such EU-level supervisor would have. These may range from direct powers (e.g. inspection of obliged entities) to indirect powers (e.g. review of national supervisors' activities) only, either on all or some entities. Alternatively, the EU-level supervisor could be granted both direct and indirect supervisory powers. The entities to be directly supervised by the EU-level supervisor could be predefined or regularly reviewed, based on risk criteria.

Finally, these supervisory tasks might be exercised by the European Banking Authority or by a new centralised agency. A third option might be to set-up a hybrid structure with decisions taken at the central level and applied by EU inspectors present in the Member States.

What entities/sectors should fall within the scope of EU supervision for compliance with anti-money laundering / countering the financing of terrorism rules?

- ☐ All obliged entities/sectors
- ☐ All obliged entities/sectors, but through a gradual process
- ☑ Financial institutions
- ☑ Credit institutions

What powers should the EU supervisor have? *at most 1 choice(s)*

- ☐ Indirect powers over all obliged entities, with the possibility to directly intervene in justified cases
- ☐ Indirect powers over some obliged entities, with the possibility to directly intervene in justified cases
- ☐ Direct powers over all obliged entities
- ☐ Direct powers only over some obliged entities
- ☐ A mix of direct and indirect powers, depending on the sector/entities

How should the entities subject to direct supervision by the EU supervisor be identified?

- ☐ They should be predetermined
- ☐ They should be identified based on inherent characteristics of their business (e.g. riskiness, cross-border nature)
- ☐ They should be proposed by national supervisors

Which body should exercise these supervisory powers? *at most 1 choice(s)*

- ☐ The European Banking Authority
- ☐ A new EU centralised agency
- ☐ A body with a hybrid structure (central decision-making and decentralised implementation)
- ☐ Other

Additional comments

5000 character(s) maximum

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CCBE Response

Again, a sectoral approach is necessary. The European Banking Authority may perform AML supervisory tasks for the banking / financial sector. For most sectors, supervision must remain at the national level:

1. In every Member State, there are many non-financial professions which are supervised by their respective supervisory authorities. A single supervisory authority would have to be an enormous body to cover all those professions.
2. A single EU body would violate the principle of subsidiarity.
3. Some sectors are independent from state regulation. In order to safeguard their independence, which is protected by fundamental rights, self-regulation is the only permissible way of regulation (e.g. for the legal profession).

Establishing a coordination and support mechanism for financial intelligence units

Financial intelligence units (FIUs) play a key role in the detection of money laundering and identification of new trends. They receive and analyse suspicious transaction and activities reports submitted by obliged entities, produce analyses and disseminate them to competent authorities.

While financial intelligence units generally function well, recent analyses have shown several weaknesses. Feedback to obliged entities remains limited, particularly in cross-border cases, which leaves the private sector without indications on the quality of their reporting system. The cross-border nature of much money laundering cases also calls for closer information exchanges, joint analyses and for a revamping of the FIU. net – the EU system for information exchange among financial intelligence units. Concerns regarding data protection issues also prevent Europol, under its current mandate, to continue hosting this system.

An FIU coordination and support mechanism at EU level would remedy the above weaknesses. Currently, the only forum available at EU level to coordinate the work of FIUs is an informal Commission expert group, the FIU Platform.

This section aims to obtain stakeholder feedback on a) what activities could be entrusted to such EU coordination and support mechanism and b) which body should be responsible for providing such coordination and support mechanism.

Which of the following tasks should be given to the coordination and support mechanism?

- ☐ Developing draft common templates to report suspicious transactions
- ☐ Issuing guidance
- ☐ Developing manuals
- ☐ Assessing trends in money laundering and terrorist financing across the EU and identify common elements
- ☐ Facilitating joint analyses of cross-border cases
- ☐ Building capacity through new IT tools Hosting
- ☐ the FIU.net

Which body should host this coordination and support mechanism? ***at most 1 choice(s)***

- ☐ The FIU Platform, turned into a formal committee involved in adopting Commission binding acts
- ☐ Europol, based on a revised mandate
- ☐ A new dedicated EU body
- ☐ The future EU AML/CFT supervisor
- ☒ A formal Network of financial intelligence units

Additional comments

5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Enforcement of EU criminal law provisions and information exchange

Recent actions have increased the tools available to law enforcement authorities to investigate and prosecute money laundering and terrorist financing. Common definitions and sanctioning of money laundering facilitate judicial and police cooperation, while direct access to central bank account mechanisms and closer cooperation between law enforcement authorities, financial intelligence units and Europol speed up criminal investigations and make fighting cross-border crime more effective. Structures set up within Europol such as the Anti-Money Laundering Operational Network and the upcoming European Financial and Economic Crime Centre are also expected to facilitate operational cooperation and crossborder investigations.

Public-private partnerships are also gaining momentum as a means to make better use of financial intelligence. The current EU framework already requires financial intelligence units to provide feedback on typologies and trends in money laundering and terrorist financing to the private sector. Other forms of partnerships involving the exchange of operational information on intelligence suspects have proven effective but raise concerns as regards the application of EU fundamental rights and data protection rules.

This section aims to gather feedback from stakeholder on what actions are needed to help public-private partnership develop within the boundaries of EU fundamental rights.

What actions are needed to facilitate the development of public-private partnerships?

- [x] Put in place more specific rules on the obligation for financial intelligence units to provide feedback to obliged entities
- [ ] Regulate the functioning of public-private partnerships
- [x] Issue guidance on the application of rules with respect to public-private partnerships (e.g. antitrust)
- [x] Promote sharing of good practices

Additional comments

5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Draft CCBE Response

The CCBE believes that all stakeholders would benefit from clear guidance, especially with regard to GDPR rules and fundamental rights, as 1) not all data can be exchanged/merged/forwarded to third parties, and 2) the CCBE wishes to stress that PPPs will only be successful if the administrative burden is not too high.

Strengthening the EU's global role

Money laundering and terrorism financing are global threats. The Commission and EU Member States actively contribute to the development of international standards to prevent these crimes through the Financial Action Task Force (FATF), an international cooperation mechanism that aims to fight money laundering and terrorism financing. To strengthen the EU's role globally, and given the fact that the EU generally translates FATF standards into binding provisions, it is necessary that the Commission and Member States speak with one voice and that the supranational nature of the EU is adequately taken into account when Member States undergo assessment of their national frameworks.

While FATF remains the international reference as regards the identification of high-risk jurisdictions, the Union also needs to strengthen its autonomous policy towards third countries that might pose a specific threat to the EU financial system. This policy involves early dialogue with these countries, close cooperation with Member States throughout the process and the identification of remedial actions to be implemented. Technical assistance might be provided to help these countries overcome their weaknesses and contribute to raising global standards.

This section seeks stakeholder views on what actions are needed to secure a stronger role for the EU globally.

How effective are the following actions to raise the EU's global role in fighting money laundering and terorrist financing?

at most 1 answered row(s)

	Very effective	Rather effective	Neutral	Rather ineffective	Not effective at all	Don't know
Give the Commission the task of representing the European Union in the FATF	○	○	●	○	○	○
Push for FATF standards to align to EU ones whenever the EU is more advanced (e.g. information on beneficial ownership)	○	●	○	○	○	○

Additional comments

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Additional information

Should you wish to provide additional information (for example a position paper) or raise specific points not covered by the questionnaire, you can upload your additional document here.

Please note that the uploaded document will be published alongside your response to the questionnaire which is the essential input to this open public consultation. The document is an optional complement and serves as additional background reading to better understand your position.

The maximum file size is 1 MB.
You can upload several files.
Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

Additional Information

1. CCBE Position Paper: “Proportionality in anti-money laundering regulation: Balancing the fight against laundering proceeds of crime with protective rights of the citizen”

2. CCBE Position Paper: “Efficiency in anti-money laundering regulation – The path to combating the laundering of proceeds of crime effectively”

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Proportionality in anti-money laundering regulation: Balancing the fight against laundering proceeds of crime with protective rights of the citizen

26/06/2020

1. Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents the Bars and Law Societies of 32 countries (including the 28 EU Member States and Norway, Iceland, Liechtenstein and Switzerland) and a further 13 associate and observer countries, and through them more than 1 million European lawyers.

The CCBE commends the Commission in taking steps to ensure a robust and comprehensive approach to combatting money laundering and terrorist financing. It welcomes the opportunity to provide its views in response to the public consultation launched as part of the European Commission's Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing. In particular, the CCBE wishes to provide observations on the Commissions' proposal to turn certain parts of the AML Directive into directly applicable provisions set out in a Regulation along with the creation of a new dedicated EU AML supervisory body.

The CCBE is mindful that this consultation is taking place at an unprecedented time in history, where, as a result of the Covid -19 pandemic, economic and financial markets are in serious upheaval. While the CCBE is aware that there have been reports of increased criminal activity, it suggests that the Commission should take both an efficient and pragmatic approach, taking proper account of the additional challenges that many legitimate professionals and businesses are facing in navigating these volatile times.

2. Application of the proportionality principle

The CCBE recommends that any proposals must be assessed within the context of the proportionality principle that regulates the exercise of powers by the European Union (EU). This principle seeks to set actions taken by EU institutions within specified limits. Under the principle, the action of the EU must be limited to what is necessary to achieve the objectives of the Treaties. The rule is set out in Article 5 of the Treaty on European Union. The criteria for applying it are laid down in the Protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the Treaties.

The principle of subsidiarity is of close relevance and is also set down in Article 5 of the Treaty on European Union. It provides that the EU does not take action (except in the areas that fall within its exclusive competence), unless it is more effective than action taken at national, regional or local level. This has particular resonance within the existing AML framework at both national and EU level.

3. Specific areas of conflict

3.1 Fundamental rights

Fundamental rights are the core values of the European Union enshrined within the EU Charter of Fundamental Rights. They are the basic rights and freedoms that belong to everyone in the EU. The European Commission adopted guidelines on taking account of fundamental rights in impact assessments. This Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments specifically acknowledges that the EU Charter is accorded the same value as the Treaties and that '[r]espect for fundamental rights is a legal requirement, subject to the scrutiny of the European Court of Justice. Respect for fundamental rights is a condition of the lawfulness of EU acts.' The Court of Justice has the power to find a provision of EU legislation invalid if it does not comply with the Charter.

Some of the fundamental rights which the AML Action Plan brings into focus include Article 8, involving the right to protection of personal data together with Articles 47 to 50 of the Charter under Title VI on Justice. These include the right to an effective remedy and to a fair trial, the right to be presumed innocent and the right of defence, and the principle of legality and proportionality of criminal offences.

Article 47 of the Charter and Article 6 European Convention of Human Rights clearly show that access to an independent lawyer who provides legal representation constitutes a fundamental right. Article 47 of the Charter of Fundamental Rights states: "Everyone shall have the possibility of being advised, defended and represented." Article 6 of the European Convention of Human Rights foresees a minimum standard for procedural rights in criminal proceedings. As explained by the FRA: "Article 6 (1) of the ECHR provides for the right to a fair trial, guaranteeing equality of arms and the right to adversarial proceedings, (…) Article 6 (3) includes specific aspects of fair trial rights and sets out the five minimum rights that an accused person has in criminal proceedings: (…) to defend oneself in person or through legal assistance of one's own choosing (…)".1

Only independent lawyers who can *effectively* invoke legal privilege/ professional secrecy can provide such legal representation in an effective manner.

If such measures as the proposed Regulation and AML supervisory body are introduced, there is a real and genuine threat to respect for these fundamental rights. Such a threat would seriously undermine the ability of the legal profession to perform their professional duties and provide legal assistance with the trust of their clients.

[1] "Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings", European Union Agency for Fundamental Rights, 2019

Further, it would also pose serious concerns around personal data and the extent to which this was shared and utilised in criminal investigations and for the purpose of information sharing amongst various EU and domestic bodies.

3.2 Procedural safeguards

Procedural safeguards are those protections afforded to a defendant in the defence of criminal proceedings. These include the right to notification of rights and the right to legal assistance. These protections are vital to ensure that the right to a fair trial is upheld and respected. Where such procedural safeguards are undermined or threatened, there are serious concerns around the proper functioning of the Rule of Law and an interference with fundamental rights, as outlined in the preceding paragraph.

If clients are reluctant to seek legal assistance for fear that their information will not remain confidential and will be communicated for the purposes of information sharing, this may in turn result in inadequate representation and weaken procedural safeguards available in criminal proceedings. The CBBE wishes to express its apprehension that any steps that undermine the relationship between the lawyer and the client and existing procedural safeguards, would have serious implications for the legal profession and for the rights of all EU citizens.

As the Commission itself has acknowledged in its communication Strengthening the Rule of Law within the Union: A Blueprint for Action, '[r]ecent rulings of the European Court of Justice have continued to underline that the rule of law is central to the EU legal order'. Thus any steps that undermine or threaten the rule of law may have a significant effect on the proper functioning of legal order at an EU level.

3.3 Data Protection

As already outlined, the CCBE has significant reservations around the impact of the proposed actions within the AML Action Plan on the protection of personal data. This is particularly within the context of the Regulation as well as an EU supervisory body and increased information sharing. The CCBE is concerned that such measures might involve a lack of proportionality, with significant and unnecessary risks for the individual rights to privacy and data protection.

The European Court of Justice (ECJ) in the *Digital Rights Ireland C-293/12* case found that the fight against international terrorism and serious crime does constitute an objective of general interest. However, it also found that since the measures taken to pursue the objective interfere with fundamental rights including data protection and privacy, it is necessary to assess the proportionality of those measures.

The European Data Protection Supervisor (EDPS) has issued guidelines on assessing the proportionality of measures that limit the fundamental rights to privacy and to the protection of personal data. The CCBE calls upon the Commission to have due regard to these guidelines and recommends that the Commission request the EDPS to provide specific guidance regarding the proportionality and necessity of the measures being proposed.

In the Opinion of the EDPS '1/2017 on a Commission Proposal amending Directive (EU) 2015/849 and Directive 2009/101/EC', it expressed its concern that the need for FIUs to obtain information would not be triggered only on the basis of suspicious transaction report (STRs) but by its own intelligence and analysis. This it warned would shift it from a targeted investigation to what could be termed 'data mining' with obvious consequences for data protection.

The CCBE proposes that this concern also applies within the context of the AML Action Plan and the proposal to further increase information sharing amongst FIUs and to enhance their information collection capacity. It raises issues of proportionality in terms of the legitimate aim being pursued and whether this is being achieved with as little interference to the right as possible.

3.4 Professional privilege/secrecy

Legal professional privilege and professional secrecy are universally accepted concepts which are core elements of the rule of law.

The United Nations recommend in their "Basic Principles on the Role of Lawyers": "Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential."[2]

The Council of Europe states: "All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client-relationship." It then goes further and requests: "Exceptions to this rule should only be allowed if compatible with the rule of law."[3]

In addition, the CCBE Model Article on Confidentiality 02/12/2016, **provides** that confidentiality is a fundamental principle of justice and serves to protect the Rule of Law.

Confidentiality underpins the distinctive relationship between a solicitor and his/her client. Clients must be able to disclose freely and candidly information to their solicitor, without fear it will be revealed without their consent. If that trust does not exist, the lawyer is unable to discharge their duty of providing legal assistance, which is essential to the proper functioning of the Rule of Law.

In EU law, the protection of confidentiality has the status of a general legal principle in the nature of a fundamental right and common value according to Article 2 TEU. Confidentiality is currently recognised in all Member States of the European Union. Article 4 of the Right of Access to a Lawyer Directive (Directive 2013/48/EU) provides:

> *"Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law."*

[2] Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, para 22.

[3] Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, Principle I, para 6.

Although the Directive relates specifically to criminal law, it demonstrates the inviolability of the right as it is recognised as an absolute one. The protection of confidentiality also derives from Article 8(1) of the European Convention on Human Rights (ECHR) (protection of correspondence) in conjunction with Article 6(1) and (3)(c) of the ECHR (right to a fair trial).

All EU countries have provisions to protect the right and duty to keep clients' matters confidential. However, different jurisdictions take divergent approaches in how this right is protected. In some jurisdictions this is protected through legal professional privilege, while in others it is protected through professional secrecy. In certain European countries, violation of professional secrecy by a lawyer is a criminal offence that can be punished with imprisonment.

Without this relationship of trust, the fundamental right of EU citizens to legal representation is seriously undermined. Where citizens are reluctant to consult lawyers for fear that the personal information that they disclose may be shared, this has serious consequences for the Rule of Law. Article 19 para I TFEU provides that: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." Legal protection seizes to be "effective" when citizens cannot share anymore relevant information with their lawyers. In this regard it has to be considered that nowadays legal environment is highly complex. A client who holds back even tiny pieces of information cannot be correctly advised, represented or defended according to Article 47 Charter of Fundamental Rights.

The variance of approaches as to the circumstances in which a lawyer is entitled or even obliged to disclose information poses certain obstacles in drafting a harmonised EU Regulation. The CCBE suggests that the Commission would face significant difficulty in attempting to define uniform measures, due to the divergence of approaches in various European countries. This would have particular implications where lawyers were being compelled to disclose information under the proposed EU AML Regulation as individual legal systems have different rules for allowing disclosure of confidential information.

The CCBE does not support any lawyer who is engaged with a client in furtherance of a criminal activity and those lawyers do not enjoy the protection of confidentiality/privilege/secrecy.

3. 5 Impact on rule of law and proportionality

The European Court of Justice has acknowledged the role of lawyers in and for the justice system since its judgement in *AM & S Europe v Commission* [4] and defined the role of lawyers as "collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs"[5]

When referring to the proportionality of AML and CTF policies, one cannot underestimate which impact some of the measures discussed in the Action Plan would have on the rule of law concerning the role of lawyers. These impacts alone constitute enough grounds to deem certain measures in violation of the principle of proportionality.

[4] See C-155/79.

[5] See *Akzo Nobel Chemicals and Akcros v Commission*, C-550/07 P, para 42.

For example, establishing an EU supervisory authority with direct or indirect competences with regard to the legal profession is one such measure.

The necessity of the independence of the legal profession through self-regulation by bars and law societies is recognized not only in the EU context, but internationally.[6] And this for a good reason. Only independent lawyers who do not need to fear pressure from the state, or in this case from a Union of states, can advise, represent and defend their clients effectively.

An EU supervisory authority who could directly or indirectly interfere with the supervision of lawyers poses a great threat to the principle of self-regulation and therefore the rule of law – and would also set an example for other developments to follow.

In this context it is important to note that the protection of the legal profession from interference necessarily needs to be reflected in the structure of the supervision of the profession as the sheer possibility of state interference can create a chilling effect. Real independence is only possible when this is underpinned by truly independent structures as provided by bars and law societies. These structures, of course, must ensure supervision of lawyers in full compliance with EU law.

The CCBE would like to remind that in its communication "Strengthening the Rule of Law within the Union: A Blueprint for Action", the Commission emphasised that '[t]hreats to the rule of law … challenge the legal, political and economic basis of how the EU works.'

4. Recommendations

The CCBE commends the Commission in taking steps to ensure a more harmonious and effective system. However, it wishes to highlight that attempts to harmonise through an AML regulation may in fact have the unintended effect of disrupting countries from focusing on assessing risk in a manner which takes proper account of their own unique economic, legal and financial profile.

A study Improving Anti-Money Laundering Policy published in May 2020 by the European Parliament, found that it may be significantly more challenging to achieve national political consensus for regulation rather than for directives. In this regard, the study advised that such challenges might manifest in the form of delays or else resistance to how it is implemented in practice. Instead, it suggests that '[a] softer way to reach harmonisation is through mutual learning, benchmarking and pointing out deficiencies to the Member States.' The CCBE would remind the Commission that there is much to be gained from focusing on what is already in place and improving how this is understood and implemented before moving to introduce greater regulation.

[6] For example, the Council of Europe recommends self-governance and stresses its importance for the independence of the profession, see: *Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer*, especially under point V., adopted by Committee of Ministers, 25 October 2000.

In advance of the Commission taking steps to progress the Action Plan, the CCBE has a number of specific recommendations which it proposes the Commission should ensure to undertake. These include as already advised that the Commission request the EDPS to provide specific guidance regarding the proportionality and necessity of the measures being proposed as well as the following steps.

4.1 Expert group

The CCBE is aware that the Commission may from time to time consult with external experts to gain further knowledge and expertise on specialist matters. The CCBE believes that the broad ranging and significant impact of the Action Plan warrants such an approach in this instance. It calls upon the Commission to undertake such consultation in light of the balance that needs to be drawn between interference with fundamental rights and the fight against anti-money laundering.

4.2 Fundamental rights agency

The EU Agency for Fundamental Rights (FRA) helps defend the fundamental rights of all people living in the EU. It may issue opinions and conclusions to EU institutions and Member States on specific thematic topics. Moreover, several of the institutions including the European Commission can request the FRA to deliver opinions on EU legislative proposals "as far as their compatibility with fundamental rights are concerned". This specific task contributes to the FRA's overall objective to support EU institutions and Member States to fully respect fundamental rights.

The CCBE is of the view that the Commission should request that the FRA deliver an opinion on the proposed Regulation and creation of a new, dedicated EU AML supervisory body. These two proposals involve potential conflicts with a number of fundamental rights including data protection and privacy, confidentiality and secrecy. By way of example, in 2014, following a request from the European Parliament the FRA gave an Opinion on a proposal to establish a European Public Prosecutor's Office. The proposal raised questions related to several fundamental rights issues, particularly with regard to the complex and at times unclear interaction between the national and EU level.

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Efficiency in anti-money laundering regulation The path to combating the laundering of proceeds of crime effectively

26/06/2020

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Introduction

Anti-money laundering (AML) efforts have been high on the European Union's agenda for the last 30 years, with already four updates and revisions of the initial Directive from 1991.

Nevertheless, the substantive AML efforts and legislative measures adopted at EU level, the EU institutions and Member States have recently indicated on several occasions that they are not satisfied with the current AML regime due to perceived significant loopholes and divergences within national AML frameworks. Moreover, the recent stark examples of financial institutions' failures in the fight against money laundering have prompted actions at EU level which aim at improving and further strengthening the EU AML rules and supervision.

The most recent initiative in this direction is the *"Communication from the Commission on an Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing"*[1], issued on 7 May 2020. With this document, the European Commission (EC) outlined its plans for a more harmonized set of AML rules to be announced in 2021, as well as different options for strengthening AML supervision at EU level. Although the EC has not explicitly stated whether the Action Plan will lead to an AML Regulation, it has indicated that this decision will be "*[...] subject to a thorough analysis to ensure that [it] reaches as high a level of harmonization as possible*".[2]

Taking stock of these developments, in this paper, the CCBE aims to address the effectiveness and efficiency of AML regulation at EU level and explores, from the legal profession's perspective, some potential issues that could arise from the adoption of a new regulatory regime in this area.

The paper further aims to highlight the benefits of the risk-based approach to AML and why a change of focus on certain predicate offences has the potential to result in more effective and efficient prevention of money laundering.

Effectiveness and efficiency of AML regulation

According to existing research, a policy is considered legally effective when the norms are implemented and followed. Thus, legal effectiveness is achieved when a rule is in force and functions. To achieve effectiveness, legal norms also need to be meaningful and should contribute to specific policy goals.[3] In the context of AML, the key policy goals are:

- the prevention of money laundering and terrorist financing and crime in general – by developing systems that hinder potential launderers and financiers of terrorism from actually laundering money or funding terrorism – and
- the reduction of money laundering, terrorist financing or crime in general.[4]

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1 C(2020) 2800 final

2 European Commission (2020): *Questions and Answers – Commission steps up fight against money laundering and terrorist financing*. [Online] Accessible at https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_821

3 Project 'ECOLEF' (2013):*"The Economic and Legal Effectiveness of Anti- Money Laundering and Combating Terrorist Financing Policy"*. Final Report, Utrecht University (NL), pp.59-60

4 *Ibid.*

At the same time efficiency in policy and regulation is about making the best use of resources to achieve best outcomes with less input/costs.
The literature focusing on the economics of AML/CFT regulation shows that it aims to justify resources (tax money) spent on AML policies and guide lawmakers so that they can formulate appropriate responses to money laundering and terrorist financing, pursuing both effectiveness and efficiency of AML regulation and enforcement.[5]

The current AML regime across the European Union is based predominantly on the AML directives. The EU directives require member states to achieve a certain result but leave them a degree of discretion to select the means for achieving the intended results. EU member states are required to transpose EU directives into national law in order to achieve their prescribed objectives,[6] thus resulting in heterogeneous approaches to the implementation of directives among member states. At the same time, this does not necessarily mean that an entirely heterogeneous outcome is achieved within each member state following transposition.

The AML rules at EU level have not only incorporated the best international standard for AML (the Financial Action Task Force Forty Recommendations)[7], they have enshrined these Recommendations as a common EU basis and, the EU AML rules have gone even further. Recent developments in the EU AML legislation (including the Fifth AML Directive[8]) have aimed to further strengthen the EU anti-money laundering and countering the financing of terrorism framework.

Despite the current robust set of EU AML Rules, the European Commission, together with the European Parliament and the Council, are of the opinion that the framework needs to be improved and that major divergences in the way it is implemented and enforced should be addressed.[9] Some of the measures outlined by the EC include proposals to achieve better implementation of existing rules, a more detailed and harmonised rulebook, improved and consistent supervision, including a potential delegation of specific supervisory tasks to an EU body.

The CCBE would like to focus specifically on the proposals related to the establishment of a harmonised AML rulebook and an EU supervisory body and how they will impact the effectiveness and efficiency of the AML framework.

The European Commission has argued that the EU AML/CFT legislation needs to become more detailed, more precise and less subject to diverging implementations/transposition by member states. In order to achieve this goal, the EC has suggested that certain provisions of the AML Directives should become directly applicable by transforming them into a Regulation.

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5 Borlini, L. and Montanaro, F. (2017): *"The Evolution of the EU Law Against Criminal Finance: The 'Hardening' of FATF Standards within the EU"*. Georgetown Journal of International Law, Vol.48, 2017, p.1018 [Online] Accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3010099

6 European Commission *Types of EU Law.* [Online] Accessible at https://ec.europa.eu/info/law/law-making-process/types-eu-law_en

7 FATF (2012): *"The FATF Recommendations"* [Online] Accessible at http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html

8 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (Text with EEA relevance), OJ L 156, 19.6.2018

9 Communication from the Commission on an Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing, C(2020) 2800 final, 7.05.2020, p.2

The CCBE has identified potential difficulties with the proposed approach and doubted to what extent the adoption of an AML Regulation would address the perceived loopholes, lead to better harmonization and improve the efficiency of the current framework.

Firstly, EU directives provide for more flexibility than EU regulations. According to Borlini and Montanaro (2017)[10], such flexibility, as provided for instance in the FATF Recommendations[11], is very important in the area of AML where national laws and their enforcement must constantly develop to keep pace with emerging money laundering risks and typologies. Furthermore, flexibility is needed in terms of transposition approach so as to take account for the fact that AML applies across so many divergent business sectors which are already regulated in a variety of manners by different regulators with regard to the business activity they engage. For example, AML applies across many business sectors to designated bodies/obliged entities which include not only some legal services provided by the legal profession identified as being vulnerable to money laundering but also financial service providers, gambling providers, accountants, estate agents, dealers in high value goods etc.

Secondly, under Article 288 of the Treaty on the Functioning of the EU (TFEU), EU regulations apply directly and uniformly to all EU member states with an immediate effect after they enter into force. Regulations are binding in their entirety on all EU countries and should not be transposed into national law[12]. However, regulations often might allow Member States to enact national implementing measures aimed at facilitating their effective application. The implementing measures can be either related to the establishment of an institutional framework in charge of the application of the Regulation or to introduce procedural rules necessary for the implementation of the Regulation.[13] Due to such provisions which are obligatory for member states,[14] regulations might potentially lead to incomplete harmonization of rules in EU member states and achieve no more than what is already achieved by the Directive-led approach

Another efficiency issue which might arise from the adoption of an AML Regulation is related to the different legal systems within the European Union belonging to the common and civil law. The adoption and implementation of an AML Regulation might cause conflicts with national rules not least because of differences in legal tradition, terminology, principles and styles of legal discourse of these legal systems.[15] Accordingly, the current Directive-led approach may reduce the potential for conflict between an EU AML Regulation and a feature of common-law which could be respected and accommodated when transposing an EU AML Directive.

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10 *See supra note 4,* p.1011

11 *See supra note 6*

12 EUR-Lex *Sources of European Union law* [Online] Accessible at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14534

13 Somssich, R. (2015): *"Cohabitation of EU Regulations and National Laws in the Field of Conflict of Laws"*, ELTE Law Journal [Online] Accessible at https://eltelawjournal.hu/cohabitation-eu-regulations-national-laws-field-conflict-laws/

14 Capeta, T. (2010): *"Harmonisation of National Legislation with the Acquis Communautaire"*. Report, European Commission for Democracy Through Law (Venice Commission). Accessible at https://www.venice.coe.int/webforms/documents/?pdf=CDL-UDT(2010)017-e

15 Taylor, S. (2011):*"The European Union and National Legal Languages: an Awkward Partnership?"*. Revue française de linguistique appliquée 2011/1 (Vol. XVI) [Online] Accessible at https://www.cairn.info/revue-francaise-de-linguistique-appliquee-2011-1-page-105.htm

Specific issues relating to effectiveness and efficiency

Timing of regulatory measures

Typically, EU regulations consist of comprehensive and complete regulatory measures, meaning that they make all necessary regulatory choices and allocate rights and obligations to particular groups or institutions.[16]

The detailed and highly technical nature of regulations require a great amount of care and time for their formulation. Because of these characteristics, one of the arguments against an AML Regulation is that the adoption process would cause policy and procedural delays in the introduction of a new AML regime at EU level. It may be ambitious to believe that existing Directives can simply be converted to a Regulation because the Directives have never had to take account of differing regulatory choices, differing allocation of duties and rights, differing sectors as well as different regulatory regimes for each sector within each member state. It has already been observed that the political process for reaching consensus and adopting the anti-money laundering directives took a very long time. There have also been huge delays with the implementation of the AML Directives[17] and it is not necessarily the case that a Regulation would result in delay if ultimately what is enacted is not practical, legal or feasible within a sector in a member state.

In addition, the time spent by member states interpreting Directives and transposing them in practical and workable ways for industry may be passed instead to industry itself which will result in even less harmonisation that the current Directive-led approach.

Last but not least, because regulations are directly applicable and binding in their entirety, this might necessitate significant adjustments in member states' laws which could potentially result in further delays and inefficiency of the anti-money laundering regulation.

Accordingly, the Regulation-led approach may not be the panacea it is currently hoped it will be. There is the risk too of 'throwing the baby out with the bathwater' by departing from the tried and trusted Directive-led system which might be better served by evidence-based reform to realise the EU's objectives in enhancing AML.

The risk-based approach

The risk-based approach (RBA) in AML represents part of a more general trend and shift in regulation away from prescriptive and compliance-based approaches[18] with the aim being to "*address the problems inherent in prescriptive regulatory approaches: over-regulation leading to excessive compliance costs, inflexibility and consequent poor regulatory performance, and a focus on legalism rather than regulatory effectiveness*".[19]

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16 *See supra note 12*, p.7

17 European Parliament (2020): *"Improving Anti-Money Laundering Policy, Blacklisting, measures against letterbox companies, AML regulations and a European executive"*. Study requested by ECON Committee, p.49

18 Ross, S. and Hannan (2007): *"Australia's New Anti-Money Laundering Strategy"*, Current Issues in Criminal Justice, Vol.19, N.2, November 2007, p.142 "Paolo Baffi" Centre on Central Banking and Financial Regulation
"Paolo Baffi" Centre Research Paper Series No. 2012-125

19 Ross, S. and Hannan, M. (2007): *"Money laundering regulation and risk-based decision-making"*, Journal of Money Laundering Control, Vol. 10, Issue 1, p. 107

The history and evolution of the EU's AML policy has demonstrated that the rule-based approach – that is a set of top-down and rigid rules not taking into consideration the divergent nature and risk characteristics of regulated entities – is not very effective in the prevention of money laundering.

In contrast, the RBA implies that the components of the AML system as a type of regulation, compliance and control should be developed by considering the risks that they are aimed to address.[20]

According to the FATF,[21] the goal of a risk-based AML regulation is to adjust measures to the risk, meaning that the highest money laundering risk should receive the maximum resource allocation in order to strengthen regulatory results.

Moreover, the FATF[22] have defined the RBA as meaning that "countries, competent authorities, and banks identify, assess, and understand the money laundering and terrorist financing risk to which they are exposed, and take the appropriate mitigation measures in accordance with the level of risk. This flexibility allows for a more efficient use of resources, as banks, countries and competent authorities can decide on the most effective way to mitigate the money laundering/terrorist financing risks they have identified. It enables them to focus their resources and take enhanced measures in situations where the risks are higher, apply simplified measures where the risks are lower and exempt low risk activities. The implementation of the risk-based approach will avoid the consequences of inappropriate de-risking behaviour."

Therefore, risk-based regulation transfers responsibility from regulatory institutions to regulated entities that have the expert knowledge, experience and tools to develop and implement effective regulatory strategies.[23] As a result, the RBA has contributed to a more flexible AML regulation but at the same time has intensified the responsibilities of designated bodies.[24]

Since the adoption of the Third AML Directive,[25] and more specifically following the revision of the FATF Recommendations in 2012, there has been a significant shift towards and an increased emphasis on the risk-based approach to anti-money laundering in the EU.[26] As a result, risk, risk assessment and risk management have all become important elements of the EU AML framework.

Moreover, the flexibility of the RBA has become a central tenet of AML policy. Money launderers will always seek out the gaps and the current Directive-led approach empowers countries, competent

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20 See *supra note 4,* p.1040

21 FATF (2007): *"FATF Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing - High Level Principles and Procedures"* Accessible at https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatfguidanceontherisk-basedapproachtocombatingmoneylaunderingandterroristfinancing-highlevelprinciplesandprocedures.html

22 FATF (2014): *"Risk-Based Approach for the Banking Sector"* Accessible at https://www.fatf-gafi.org/documents/documents/risk-based-approach-banking-sector.html

23 Pieth, M. and Aiolfi, G. (2003): *"Anti-Money Laundering: Levelling the Playing Field"*, the Basel Institute on Governance Working Paper Series, ISSN: 2624-9650, p.15 [Online] Accessible at https://www.baselgovernance.org/publications/working-paper-1-anti-money-laundering-levelling-playing-field

24 *See supra note 4,* p.1040

25 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (Text with EEA relevance) *OJ L 309, 25.11.2005*

26 Koster, H. (2020): *"Towards better implementation of the European Union's anti-money laundering and countering the financing of terrorism framework"*. Journal of Money Laundering Control, Vol.23, N.2,2020, p.380

authorities and designated bodies to adopt this RBA in order to be alert, nimble and agile in their response to the particular risks to which they are vulnerable.

Accordingly, an EU Regulation to prevent money laundering may never be able to achieve harmonisation to any greater degree than a Directive because, in order to be successful in achieving the risk-based approach, AML must itself be agile.

While a Regulation-led approach may be successful for increasing data protection compliance or other regulation objectives in other areas and while it may enhance technical AML compliance, there is the risk it may fundamentally weaken the actual prevention of money laundering by over-emphasising compliance with rules rather than compliance with the more bespoke RBA. Therefore, the current Directive-led approach is inherently more suited to money laundering prevention because it is a more efficient mechanism with which to implement the risk-based approach while coincidentally and effectively preventing money laundering.

The CCBE further considers that the European Commission proposals for the adoption of an AML Regulation represent a shift away from the risk-based approach. Consequently, a Regulation-led harmonised approach will remove the agile ability of countries and designated bodies to respond to 'on-the-ground' vulnerabilities and risks particular to individual industries, member states and localities.

The principle of proportionality and self-regulation

The CCBE is of the opinion that any proposals and considerations relating to the adoption of a new EU AML regime need to be in line with the principle of proportionality, as set out in Article 5 of the Treaty on European Union.[27] In this regard, we refer to the CCBE paper on "*Proportionality in anti-money laundering regulation: Balancing the fight against laundering proceeds of crime with protective rights of the citizen"* (see annex).

By following this fundamental principle, embedded also in the European Commission's 'Better Regulation' Guidance,[28] any action in the area of AML should be at the appropriate level of governance, proportionate and not going beyond what is strictly needed.

The CCBE also believes that no AML measure should interfere with the independence of the legal profession which is necessitated by the rule of law. The independence of the legal profession is an essential aspect of the rule of law. Self-regulation is a necessary and natural requirement for this independence. It addresses the collective independence of the members of the legal profession and is nothing less than a structural defence of the independence every individual lawyer.

In light of this important characteristic of the legal profession, any possible consideration for an EU AML supervisory body for the non-financial sector could not extend to the legal profession as it would be of significant concern for the rule of law. The underlying arguments against delegating EU-level AML supervisory powers for the legal profession are: first, self-regulation means freedom from state intervention; second, without free and independent self-regulation there can be no free and independent

[27] Consolidated version of the Treaty on European Union OJ C 202, 7.6.2016

[28] European Commission: Better regulation: guidelines and toolbox [Online] Accessible at https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en

legal profession; and last but not least, only strong self-regulation can guarantee a robust independence of the legal profession as part of the administration of justice[29].

The European Parliament's *Resolution on the legal professions and the general interest in the functioning of legal systems*[30] emphasizes "the importance of rules which are necessary to ensure the independence, competence, integrity and responsibility of members of the legal professions so as to guarantee the quality of their services, to the benefit of their clients and society in general, and in order to safeguard the public interest".

The potential risk to the rule of law posed by an EU-wide supervisor for AML with authority over the legal profession would be of serious concern to the CCBE as it would, by design, have the ability to interfere with the maintenance of the independence of the legal profession from State and, for the first time, multiple Member States as well as EU Institutions.

Focus on predicate offences

Anti-money laundering initiatives have the objective of preventing money laundering; that is the prevention of criminals being able to benefit from the profits of their crimes. Originally, AML was targeted towards organised crime and subsequently extended to the financing of terrorism.

However, over the years, AML has been re-orientated to also target the profits of non-organised crime including white collar crime. The fight now includes tax evasion and many minor crimes.

This broadening of the scope of the predicate offence for money laundering diminishes the resources with which organised crime and terrorism can be fought. In addition, while AML initiatives have become beneficial sources of intelligence for white collar crimes, the potential privacy encroachments may not be proportional to potential low-scale crime.

The current discretion reserved to member states to designate additional offences as criminal activities for the purposes of the AML directives has been always objected to by the CCBE because it goes far beyond the scope and purpose of the fight against money laundering.

Accordingly, the CCBE recommends reducing the scope of the predicate offence of money laundering to improve the efficiency of current AML initiatives in Directives.

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[29] See judgement *Akzo Nobel Chemicals and Akcros v Commission*, C-550/07 P, para 42, where the European Court of Justice defined the role of lawyers as "collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs".

[30] European Parliament Resolution on the legal professions and the general interest in the functioning of legal systems, 23.03.2006, point 4. Accessible at https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0108+0+DOC+XML+V0//EN

CCBE Recommendations

Based on the above overview of effectiveness and efficiency of AML regulation and recent developments in the area of AML at the EU level, the CCBE has formulated the following recommendations:

- **Recommendation 1:** Any new legislative developments in the area of anti-money laundering at EU level should avoid overly prescriptive and detailed rules and instead embed and strengthen the application of the risk-based approach by also accommodating the huge diversity of regulated entities.

- **Recommendation 2:** In order to be effective and efficient, any new EU AML rules need to provide a certain degree of flexibility to designated bodies/obliged entities and enable them to adjust and respond adequately to constantly evolving money laundering risks and typologies.

- **Recommendation 3:** The principles of independence and self-regulation of the legal profession must remain intact, something which requires strict adherence to the current regulatory processes within each Member State aimed at preserving independence from State interference and maintaining the rule of law.

- **Recommendation 4:** The scope of the predicate offence of money laundering should be limited in order to improve the efficiency of current AML initiatives.

- **Recommendation 5**: Before embarking upon a complete overhaul of the existing approach to AML/CFT and proposing a Regulation, it is crucial for the EC to follow its "evaluate first" principle of Better Regulation and evaluate existing legislation. The EC needs to analyse whether all avenues for harmonization of the EU AML/CFT rules are exhausted and to what extent a new regulatory regime would effectively address the perceived issues and loopholes in the current framework to any greater extent.