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CCBE position paper on the European Commission's 2021 AML package

10/12/2021

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers.

Executive summary

This paper analyses the proposed anti-money laundering package presented by the European Commission in July 2021. Whereas the CCBE supports the efforts of the Commission with regard to AML/CTF, some proposed measures have to be vigorously opposed.

In particular, the CCBE is worried that the new provisions on the oversight by national authorities and by a supranational European body will erode the independence of lawyers and Bars from governments and other state actors. This independence is the key protection for the rule of law and the rights of citizens.

Moreover, while professional criminal money launderers will always target AML-regulated sectors, the AML risk awareness in the legal sector is very high. Professional secrecy/legal professional privilege is a fundamental principle without which there would be no proper protection for clients and must be protected.

Several recommendations are to be drawn from the analysis of the abovementioned points, which include:

- Develop proposals specifically designed to safeguard the rule of law role of the legal profession. It is a flawed approach to treat the legal professionals as any other non-financial sector actors. Ensure harmonisation of AML rules does not damage the independence of lawyers.

- Ensure that neither Member States nor AMLA as the European supervisory body can directly or indirectly interfere with the independence of lawyers which is an integral component of the rule of law and the performance of legal services.

- Any provision which grants AMLA and national supervisory authorities powers to issue legally binding decisions must not be applied to the legal profession, accordingly exceptions must be added to the proposed legislative measures.

- Focus less on directing supervisory bodies and more on helping Member States find the gaps in their own legal systems which allow individuals to operate completely unregulated.

- Add important definitions to the legislative proposals. For example, definition, scope and application of "ascertaining the legal position" should be clarified.

Introduction

…All changed, changed utterly:
A terrible beauty is born…

…Too long a sacrifice
Can make a stone of the heart…

…Are changed, changed utterly:
A terrible beauty is born.

Easter 1916
W.B. Yeats

W.B. Yeats' poem Easter 1916, written in the aftermath of the 1916 Rising in Ireland signals that society and people change with battle. Shortly after the 11 September 2001 attacks, "*All changed, changed utterly: a terrible beauty was born*" when the European legal profession was first brought into the fight against money laundering/terrorism financing (ML/FT); the hope being that this departure from the traditional role of lawyers to clients, the courts and public interest would help prevent FT.

The Council of Bars and Law Societies of Europe (CCBE) is a strong supporter of the fight against money laundering and terrorism financing. In this regard, it welcomes the 2021 anti-money laundering (AML) package published by the European Commission.

AML and countering financing of terrorism (CFT) initiatives have been effective in stemming terrorism and the flow of illicit funds across the European Union (EU). Yet, reports of AML compliance failings will inevitably keep emerging and, in fact, some of the cases that are uncovered can also be seen as proof that the system works.

Whereas the CCBE supports the efforts of the Commission with regard to AML/CTF, some proposed measures of the 2021 AML package have to be vigorously opposed as they infringe upon the rule of law. The suggested rules on national and supranational oversight of lawyers put a cornerstone of democracy at risk: a legal profession which is independent from any suggestion of political interference or other powerful actors. Only an independent legal profession can protect citizens from the arbitrariness of states.

The **presented new proposals for oversight by national authorities and a supranational European body will erode the independence of lawyers from governments and other state actors**. This independence is a key protection for citizens as it maintains the rule of law for all. The CCBE therefore asks all political actors to **renounce the proposed plans to create a "terrible beauty" in the form of the suggested rules for national and European oversight which will undermine the independence of lawyers and the rule of law**. This will be possible with some precise adaptations of the proposals as will be shown later in this paper.

The fragility and nuanced nature of citizens' freedoms should not be trumped in the pursuit of the prevention of ML and TF.

Accordingly, the CCBE addresses a number of recommendations to the European institutions.

A. General comments and observations

The new AML package puts the rule of law at risk

The CCBE has a long history of actively contributing to AML policy and legislative developments within the EU as well as internationally.[1] Furthermore, the CCBE, through its member Bars and Law Societies, continuously supports the legal profession's AML efforts and compliance at national level across Europe.

With this paper, the CCBE is using the opportunity to reflect on the new AML package published by the Commission on 20 July 2021 and on the way the proposals will impact the legal profession. It highlights a number of issues which will hopefully be welcomed by the Commission and will be of interest to the Council and the European Parliament in the forthcoming discussions on the package.

The CCBE welcomes this comprehensive package of legislative proposals to strengthen the EU's AML/CFT rules which aims at creating an EU single rulebook on AML, and closing loopholes used by criminals to launder illicit proceeds or finance terrorist activities through the financial system. The CCBE further welcomes the focus on the risk-based approach to AML in the new package and the intention by the Commission to clarify existing AML rules and to further harmonise standards in this area.

The CCBE has already advocated that any considerations and proposals relating to the adoption of a new EU AML regime need to be in line with the principles of proportionality and subsidiarity, as set out in Article 5 of the Treaty on European Union[2]. Otherwise, in an effort to harmonise across sectors, the package could damage the unique role of lawyers for the rule of law and democratic societies.

The principle of independence of lawyers must be respected not only by national authorities, but also by Union bodies and institutions. The powers to issue formal opinions to national supervisory authorities and individual decisions to self-regulatory bodies (SRBs) and the ample powers for national supervisors to interfere with the supervision by SRBs open the door for undue influence by public authorities on the legal profession.

Governments can use the powers which shall be conferred on them to exercise undue pressure on the profession. The wording of the proposals even covers influence on individual cases. It cannot be excluded that more and more populist governments who consider the rule of law as hindrance to their political priorities would misuse the suggested rules as they provide them with ready-made tools to undermine the independence of Bars and – if used strategically – even to get rid of inconvenient lawyers. The proposals therefore seriously harm independence of lawyers which is a key protection of the role of lawyers in the maintenance of the rule of law for all citizens.

The suggested powers of the AMLA are not less harmful. According to the legislative proposals, AMLA can directly instruct Bars when it deems the actions of a national supervising authority be insufficient. The wording does not imply any limits to the content, duration etc of these instructions. Even if they were of a general nature and rightly targeted, they can easily affect concrete cases. The CCBE would like to remind that the principle of the independence of Bars and lawyers does not distinguish between "good" or "bad" institutions, and any European agency or other bodies must fully observe and respect it.

[1] Some recent examples of these activities include: provision of comments and input to the public consultation on *the EC Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing* (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, available here); participation in the 2017 and 2019 Supra-National Risk Assessments conducted by the Commission; and cooperation with the FATF on the revision of the FATF Risk-Based Approach Guidance for the legal profession.

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

Lack of evaluation of current framework

The CCBE notes that in the Explanatory Memorandum sections of the AML Regulation, the AMLA Regulation and the 6th AML Directive, the Commission recognises that:

> *"[A] full ex-post evaluation of the current EU AML/CFT regime has not yet taken place, against the background of a number of recent legislative developments. Directive (EU) 2015/849 was adopted on 20 May 2015, with a transposition deadline for Member States of 26 June 2017. Directive (EU) 2018/843 was adopted on 30 May 2018, with a transposition deadline of 10 January 2020. Transposition control is still ongoing. However, the Commission Communication of July 2019 and accompanying reports referred to above serve as an evaluation of the effectiveness of the EU AML/CFT regime as it stood at that point in time."*

In its submission[3] on the Commission's AML Action Plan, the CCBE recommended that it is crucial for the Commission to follow its "*evaluate first*" principle of Better Regulation[4] and evaluate existing AML legislation before embarking on a complete overhaul of the existing approach to AML/CFT in the Union.

Furthermore, the evaluations provided under the EU Directives follow a specific methodology in order to ensure robustness of their assessments and conclusions[5]. The fact that the new AML package aiming at strengthening the AML rules and overcoming existing loopholes is not based on a full *ex-post* evaluation of the current AML regime is problematic. Even the results of the *Assessment of the concrete implementation and effective application of the 4th Anti-Money Laundering Directive in the EU Member States*[6] conducted by the Council of Europe have not been published yet and the Commission's Report on the implementation of Directive (EU) 2018/843[7] ('5AMLD') shall be submitted to the Parliament and to the Council by 2022.

Controversial findings without empirical basis

The CCBE is concerned that Recital 69 of the Proposal for a 6th AML Directive[8] states that SRBs do not provide adequate and effective control and that there has been none, or close to none, public oversight on the supervisory activities of SRBs. The CCBE is of the opinion that in the absence of a full *ex-post* evaluation of the current AML legislation this assumption is not based on factual data and it does not acknowledge at all the efforts of the CCBE member Bars and Law Societies in detecting and preventing ML.

Recommendation

Ensure the new AML Package is developed in response to recent evaluations comprising evidence-based reform recommendations which are independent of reactionary, political, or merely popular opinions.

[3] See supra note 1.

[4] Commission staff working document, SWD (2017) 350 – Better Regulation Guidelines, pp. 50-66, available here.

[5] Commission staff working document, SWD (2017) 350 – Better Regulation Guidelines, pp.50-52, available here.

[6] Council of Europe, Assessment of the concrete implementation and effective application of the 4th Anti-Money Laundering Directive in the EU Member States JUST/2018/MARK/PR/CRIM/0166, Project Summary, available here.

[7] 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

[8] Proposal for a 6th AML Directive, available here.

B. Safeguarding the independence of lawyers from Member State or supranational interference

Independence of the legal profession

Since the overnight designation of the independent legal professionals as obliged entities for the purposes of AML as part of the responses to the 11 September 2001 attacks, the CCBE has used every opportunity to raise awareness of the specific characteristics of the legal profession by comparison to other obliged entities. The CCBE has always emphasised the need for any AML initiatives affecting legal professionals to consider the different legal systems within the EU. This is essential because lawyers are acting within each individual Member State's national legal system. The legal profession is an essential component of every Member State's own legal system and, as such, their operation and supervision must have regard to each State's unique legal system and rule of law mechanism.

The CCBE also reiterates that no AML measure should interfere with the independence of the legal profession. The independence of lawyers is an integral component of the right to a fair trial as enshrined in Article 6 of the European Convention on Human Rights (ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union (EUCFR). As the Charter of core principles of the European legal profession sets out,

> "*a lawyer needs to be free – politically, economically and intellectually – in pursuing his or her activities of advising and representing the client. This means that the lawyer must be independent of the state and other powerful interests […]. The lawyer's membership of a liberal profession and the authority deriving from that membership helps to maintain independence, and bar associations must play an important role in helping to guarantee lawyers' independence. Self-regulation of the profession is seen as vital in buttressing the independence of the individual lawyer.*"[9]

Independence serves as a guarantee to clients that lawyers will defend the clients' rights, and act without "*undue [internal or external] hindrance*", in order to advise, represent and defend their clients effectively.[10] In this way, lawyers uphold the rule of law.

A necessary and essential corollary to the independence of lawyers is an independent Bar.[11] The importance of independent lawyers and an independent Bar has been recently recognised by the European Commission in its 2021 Rule of Law Report:

> *"Legal professions play a fundamental role in ensuring the protection of fundamental rights and the strengthening of the rule of law. An effective justice system requires that lawyers be free to pursue their activities of advising and representing their clients, and bar associations play an important role in helping to guarantee lawyers' independence and professional integrity."*[12]

[9] CCBE, Charter of core principles of the European legal profession, available here.

[10] ECtHR, 24 March 2004, Elci and others v. Turkey, §669. See also § 3 of the Reply to the recommendation 2121 (2018) of the parliamentary assembly of the Council of Europe (DoC. 14825, 5 February 2019: "*The Committee of Ministers agrees with the Assembly that lawyers play a vital role in the administration of justice and that the free exercise of the profession of lawyer is indispensable to the full implementation of the fundamental right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights. In this respect, the Committee of Ministers is concerned by the threats, in certain national contexts, to the safety and independence of lawyers as well as to their ability to perform their professional duties effectively. This is particularly the case for defence lawyers in criminal proceedings.*"

[11] ECtHR, 23 November 1983, Van der Mussele v. Belgium, §29.

[12] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2021 Rule of Law Report. The rule of law situation in the European Union COM(2021) 700 final, p. 5, available here.

Self-regulatory bodies as supervisors and national public authorities' oversight

The importance of self-regulation and its relation to the fundamental rights is recognised in Recital 80 of the proposed AML Regulation:

> *"…. In accordance with the case-law of the European Court of Human Rights, a system of first instance reporting to a self-regulatory body constitutes an important safeguard for upholding the protection of fundamental rights as concerns the reporting obligations applicable to lawyers. Member States should provide for the means and manner by which to achieve the protection of professional secrecy, confidentiality and privacy."*

Yet, Article 38 of the proposed 6th AML directive provides that Member States must ensure that the activities of SRBs which supervise AML compliance are subject to oversight by a public authority.

However, **each Member State's legal profession is governed and well regulated by national law and national supervisory or self-regulatory bodies**. Those bodies issue very clear and encompassing guidance, take their regulatory duties seriously and provide extensive training. Moreover, there is also guidance and ethical rules at a national, European and international level. While there are some similarities across lawyer regulation models in Europe, differences do exist. The suggested rules on national supervision will disrupt the current rule of law balance necessary to deliver lawyer regulation which is independent of Member State interference.

For the legal sector, independence is a cornerstone of a functioning democratic society - it is not simply a convenient State-outsourced model.

It is important that the EU's plans segregate the legal profession out from other SRBs as this is the only way to ensure protection of the rule of law role of lawyers.

It is evident that the AML package viewed AML supervision in isolation with no regard for the extent to which general legal profession supervision across Europe already delivers its supervisory goals. It is clear that a gap analysis was not done on the manner in which the current approach might be enhanced without the creation of an entirely new AML supervisory mechanism for the legal profession. National systems in charge of controlling any flow of client money are not taken into account (e.g. CARPA system in France) or the regulatory system designed to protect client money in Ireland. It seems that the Commission has not taken into consideration the existing regulations applying to the legal profession and the measures put in place by Bars.

Similarly, regulatory approaches such as co-regulation with members of the judiciary, existing in some Member States (e.g. in Ireland), seem to be ignored. In this regard, the CCBE deems it necessary to stress that in these systems, where the judge is a regulator of lawyers, the supervisory framework proposed by the Commission risks to impact the independence of judges as well.

Self-regulation, especially independence of Bars, implies freedom from state intervention. Yet, according to the proposal for the 6th AMLD public authorities shall have ample responsibilities and shall be granted "adequate powers"- whatever this might be. Also, they may issue instructions to a self-regulatory body for the purpose of remedying an alleged failure to perform its functions or to comply with the requirements or to prevent any such failures.

As already pointed out, the powers conferred to national supervisors in the area of AML/CFT may be abused to harm the independence of lawyers. We have seen cases where charges for money laundering were used to get rid of uncomfortable lawyers, in particular by populist governments.[13] National legislation on the basis of the proposed AMLD can be used as a pretext to exercise control over the legal profession.

[13] "Top lawyer critical of Polish govt arrested", Euractiv, 16.10.2020, available here.

Hence, the powers conferred to a national public authority by Article 38 of the proposed 6th AML Directive are incompatible with the independence of bars. The framework of the powers and the responsibilities conferred to a national public authority by Article 38 of the proposed 6th AML Directive do not provide effective guarantees that said authority would enjoy the necessary independence from any State interference in the course of their duties, which can exclude any suspicion that the above services can be in a dependent relationship with the bodies of the executive and that they may receive, directly or indirectly, instructions or interventions in a specific case. The powers conferred to a national public authority annihilate the powers of any self-regulatory body relating to the administration of the profession and the power to prosecute and sanction breaches. The suggested competences are an invitation to infringe on the traditional balance between state powers and independence of Bars.

Even in tandem with protection for legal professional privilege or privacy, the supervision by a national authority, interferes with the independence of lawyers to a degree which damages the rule of law. Safeguards for legal professional privilege or confidentiality are no substitutes for the necessary independence from State interference.

Independence for clients from State interference is put at risk. Thus, it must be made clear that such rules cannot apply to the independent legal profession. **The CCBE therefore asks the legislators to amend the wording of Article 38 par.3 accordingly with an exception for the legal profession.**

The CCBE is of the opinion that in order to preserve the Bars' role and independence, the Commission should have due regard to the necessity to protect the independence of the legal profession when designing its policies, including in the area of AML/CTF.

AMLA as European supervisor (also) for the non-financial professions

Chapter II Section 5 (Articles 31 & 32) of the AMLA Regulation is dedicated to the oversight of the non-financial sector. The powers of AMLA as regards the non-financial sector go far beyond a mere coordination of (national) supervision. AMLA has not only tasks and powers that are geared towards completing the single rulebook and introducing common supervisory standards and achieving supervisory convergence. While policy and regulatory work (technical standards, guidelines and recommendations) are the tools for completing the single rulebook, there are further powers that impact on national supervision. The tools, that aim to improve convergence directed towards public authorities that are entrusted with supervision of non-financial sector entities or oversight of SRBs (such as thematic reviews, AML/CFT database and peer reviews, breach of Union law procedures), may encroach on the independence of Bars and individual obliged entities. Even if there is no direct interaction between AMLA and individual non-financial obliged entities, **individual decisions of AMLA may nevertheless have indirect impact on specific cases and individual obliged entities.**

In spite of reassurances presented by the European Commission during recent exchanges, the CCBE believes that AMLA's *de facto* supervisory competence regarding lawyers creates risks in terms of interference in individual cases and infringes the principle of independence of Bars.

According to the proposal for an AMLA regulation, the AMLA shall have full discretion to establish a breach of Union law. AMLA shall have powers over supervisory authorities (Article 32(1)):

> *"where a supervisory authority in the non-financial sector has not applied the Union acts or the national legislation referred to in Article 1(2), or has applied them in a way which appears to be a breach of Union law, in particular by failing to ensure that an entity under its supervision or oversight satisfies the requirements laid down in those acts or in that legislation."*

AMLA may therefore act as soon as there "*appears*" to be a breach of Union law. Hence, AMLA can decide itself if such a breach of Union law – which is not limited to legislation on AML/CFT, as can be seen from

Article 1(2) – "*appears*" to have taken place. This competence is very broad and is neither limited to the introduction of a single rulebook nor to common supervisory standards or supervisory convergence.

Moreover, AMLA will have access to information without any limitation. As soon as there appears to be such a breach in the view of AMLA (Article 32(2)):

> *"the supervisory authority shall, without delay, provide the Authority with all information which the Authority considers necessary for its investigation including information on how the Union acts or in that legislation referred to in Article 1(2) are applied in accordance with Union law.*
>
> *Whenever requesting information from the supervisory authority concerned has proven, or is deemed to be, insufficient to obtain the information that is deemed necessary for the purposes of investigating an alleged breach or non-application of Union law, the Authority may, after having informed the supervisory authority, address a duly justified and reasoned request for information directly to other supervisory authorities.*
>
> *The addressee of such a request shall provide the Authority with clear, accurate and complete information without undue delay."*

Therefore, it is up to AMLA to decide which information is deemed necessary, **which may include also information on specific cases without any limitation.** More specifically, according to the wording of the proposal, such information may also include individual cases and there is no protection as regards professional secrecy/legal privilege.

Furthermore, **AMLA has powers to directly intervene with supervisory authorities and SRBs**. Article 32(3) provides AMLA with the power to issue a "*recommendation*" to the supervisory authority, which is *de facto* binding, as the supervisory authority has to inform AMLA within ten working days about the steps taken to comply with the recommendation. The wording "*recommendation*" is therefore misleading.

If the supervisory authority does not comply with the recommendation, AMLA can request that the Commission issues a "*formal opinion*" directed to the supervisory authority (Article 32(4)), which should be issued within three months after the recommendation. The supervisory authority has to comply within ten working days (Article 32(5)).

If the supervisory authority does not comply, it is again up to **AMLA to take action, this time by issuing an "*individual decision*" directed to an SRB (Article 32(6)).**

Therefore, **AMLA has direct powers to issue individual decisions towards SRBs (such as Bars and law societies). Such decisions may also include individual cases and may – for example – include steps the SRB has to take as regards a specific case or towards a specific law firm.** Even if the scope of individual decisions was limited, the CCBE would like to remind that there is a way of phrasing general interpretations of Union law which will still aim *de facto* at individual cases (see judgements of the European Court of Justice in its preliminary rulings).

If the SRB deems a decision by AMLA unjustified, there might be a legal remedy, but **the AMLA Regulation does neither provide any details on such a remedy (supposedly it must be directed to the CJEU) nor on its admissibility or on its suspensive effect.**

Any concerned SRB has to comply with such an individual decision by AMLA and there are only provisions for only an *ex-post* control by the court assessing whether such a decision was legal and justified. Moreover, it seems that there are no efficient remedies for a non-financial professional him/herself who is concerned by such a decision.[14]

[14] However, even if there were *ex ante* or third party- remedies, the competence of AMLA to issue binding decisions infringes the independence of bars.

With regard to SRBs, AMLA also appears as both an administrative body and judge as the AMLA itself can issue legally binding decisions whenever it deems it necessary (even if a national supervisor acted, but – in their opinion – not in an adequate way). This is **a clear breach of the principle of separation of powers**.

N important fact was omitted by the Commission in all its communication on the AML package which is that **even without a decision directed to SRBs, the Commission could always launch an infringement procedure when they suspect a breach of Union law**.

Last but not least, the CCBE is of the opinion that there is no evidence that European supervision would be better and more effective than national level supervision and supervision by Bars. One of the major assets of self-regulation of the legal profession is that SRBs have a much better understanding of the profession than public authorities or even the proposed AMLA, the latter being a super-supervisor of many financial and non-financial obliged entities. Therefore, an authority such as AMLA risks being a cost-intensive but inefficient additional supervisory authority.

Recommendations

Avoid the temptation to adapt a simplistic one-size-fits-all solution when nuances of our freedoms merit tailored approaches. The independence of lawyers is as equally important a value to preserve as the securitisation promise of AML/CFT.

Develop proposals specifically designed to safeguard the rule of law role of the legal profession. It is a flawed approach to treat the legal professionals as any other non-financial sector actors.

Ensure harmonisation of AML rules does not damage the independence of lawyers. Recognise that the legal profession has duties to clients, the courts and the public interest which are not amenable to harmonisation in the same manner as other professions.

Ensure that neither Member States nor AMLA as the European supervisory body can directly or indirectly interfere with the independence of lawyers as an integral component of the rule of law and the performance of legal services.

Any provision which provides AMLA and national supervisory authorities with powers to issue legally binding decisions must not be applied to the legal profession, accordingly exceptions must be added to the proposed legislative measures. Based on the current wording of the proposals, it cannot be excluded that there is a risk of interference in individual cases and also the structural independence of Bars is compromised.

C. Professional criminal money launderers will always target AML-regulated sectors

It is not possible for legal professionals, or any obliged entity, to prevent all money laundering activities in their own sector. This is simply not feasible considering the ever-evolving nature of ML. Sophisticated

typologies, clever approaches and different types of fraud are becoming more and more prevalent in an effort to target all obliged entities to handle illicit money.

It is important for EU and international policy makers to appreciate that it will never be possible for any sector to be 100% effective because of the existence of sophisticated money laundering frauds. This is the very basis of the development of the risk-based approach, which aims at balancing the risks of being unwittingly abused with the administrative burden for the obliged entities. The Financial Action Task Force (FATF) 2013 Report on the Vulnerabilities of Legal Professionals[15] explains the manner in which the legal professionals tend to not be complicit in ML and rather they can on occasion be the victims of professional money launderers. If the Commission is to succeed in its goal of preventing criminals to launder illicit proceeds or finance terrorist activities through the financial system, this will in turn reduce the current risk to the legal sector who does not typically handle money in the first instance and receive funds from other gatekeepers. However, individual sectors cannot do this on their own and increasing the compliance burden together with supra-national regulatory supervision is also unlikely to solve the problem.

The CCBE has raised awareness on a number of occasions and would like to reiterate again the extent of AML compliance efforts and measures implemented by the legal profession across Europe, including policy, outreach and supervisory measures. In the CCBE submission on the EC 2019 Supranational Risk Assessment[16], it was emphasised that **the level of AML risk awareness in the legal sector is very high and that CCBE member Bars and Law Societies are very active in taking measures to detect, prevent and raise awareness of ML risks**. The same is valid for the sector's supervision which the CCBE would regard as currently being at a high level.

Recommendations

Manage expectations with regard to the AML Package's potential because professional money launderers will adapt irrespective of the extent of harmonisation and supervision. Also, legislative AML measures on the European level cannot substitute adequate law enforcement resources in the fight against money laundering.

The cost to obliged entities should be managed in the context of what can realistically be achieved according to a risk-based approach.

It is possible also that, even if the AML package is implemented, some professional actors may remain unregulated or not supervised for AML compliance at all.

Recommendations

It would be much more valuable for the Commission or AMLA, in the future, to focus less on directing supervisory bodies and more so on helping Member States identify the gaps in their own legal systems which allow individuals to operate completely unregulated.

[15] FATF, Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals, June 2013, available here.

[16] CCBE Comments on the Report from the Commission on the assessment of the risk of money laundering and terrorist financing affecting the internal market and relating to cross-border activities (SWD (2019) 650 final accompanying {COM(2019) 370 final}), 20.11.2019, pp.8-9, available here.

Focus first on working with Member States to identify the unregulated activities and actors who are providing services vulnerable to ML across the EU; increasing AML duties, harmonisation and supervision reform alone will not suffice.

D. Legal professional privilege/professional secrecy

Legal professional privilege/professional secrecy of lawyers ("LLP") is a fundamental principle without which there would be no proper protection for clients and lawyers could not practice. The relationship of LPP covers everything a client confides in a lawyer, whatever its nature, in order to be best advised and defended.

As regards professional secrecy, the European Court of Human Rights (ECtHR) has underlined its importance for the respect of private life and the rights of defence:

> *"[Article 8 ECHR] affords strengthened protection to exchanges between lawyers and their clients. This is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants. Yet lawyers cannot carry out this essential task if they are unable to guarantee to those they are defending that their exchanges will remain confidential. It is the relationship of trust between them, essential to the accomplishment of that mission, that is at stake. Indirectly but necessarily dependent thereupon is the right of everyone to a fair trial, including the right of accused persons not to incriminate themselves. […]*
>
> *[Professional secrecy] is of great importance for both the lawyer and his client and for the proper administration of justice. It is without a doubt one of the fundamental principles on which the administration of justice in a democratic society is based."*[17]

In the same vein, the CJEU ruled that:

> "*lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, if they were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations. In that case, clients would be deprived of the rights conferred on them by Article 6 ECHR."*[18]

LPP both in its defense and advisory dimensions, is essential to the functioning of justice and to the protection of the rule of law, of which it is inseparable. Yet, the recent legislative developments in many EU Member States show that lawyers must constantly defend their LPP. The EU must take part to this defense. Enshrining the LPP protection in the AML package and provide lawyers with a protection that is not dependent on national legislative developments is the utmost duty of the EU. By assigning the analysis of the parts of the AML package to its LIBE Committee, the European Parliament made no mistake and clearly spotted what is at stake with these proposals and that is the rule of law.

The CCBE welcomes the fact that the proposed AML Regulation preserves the protection of the well-developed and recognised principle of LPP as provided for by the existing AML directive(s) and national law. However, the CCBE is deeply concerned by the fact that, as the text currently stands, the two categories of "judicial proceedings" and "ascertaining the legal position" will lead to obvious gaps.

[17] ECtHR, 6 December 2012, Michaud v. France, §§118 and 123.
[18] CJEU, 26 June 2007, C-305/05, §32.

Recommendation

The CCBE suggests that some important definitions be added to the legislative proposals. For example, the definition, scope and application of "ascertaining the legal position" should be clarified by taking into account the applicable case law of the ECtHR and the CJEU and by providing for the highest standards in respect of the preservation of the rule of law.

E. Feedback of FIUs

The CCBE commends the measures in the AML package aimed at an obligation for FIUs to provide feedback to obliged entities which would potentially improve the obliged entities' ability to detect and identify suspicious transactions and activities and enhance the overall reporting mechanisms (see Recital 49 of the proposed 6th AMLD).

Recommendation

The flow of information from the FIU to SRBs needs to be enhanced, including alerts on current ML schemes.

F. Conclusion

Clearly the legislative proposals of the AML Package's, in their current version, do not appreciate some key nuances and specific characteristics of the legal profession and potentially threaten rule of law role of lawyers. The CCBE calls upon the Commission to recognise the importance of the structures which have evolved across Europe to ensure that the legal profession is independent and that those same structures and mechanisms are put at risk with the current proposals.

The CCBE urgently requests that the provisions in the proposals which provide AMLA and national supervisors with powers to issue opinions, decisions or any other form of binding rulings as regards the legal profession must be removed. There must be specific safeguards and clear exemptions for the legal profession from any binding power conferred to national and EU authorities.

Recommendation

Ensure that a "*terrible beauty*" is not born: "*beauty*" being harmonised rules which will enhance AML, *"terrible*" being the damage to the fragile mechanisms which protect the independence of lawyers in democracies.