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# European Commission

## DG Internal Market and Services - Budget

## Final Study on the Application of the Anti-Money Laundering Directive

**Service Contract ETD/2009/IM/F2/90**

# Contents

# 1. Executive summary

The study on the application of the Anti-Money Laundering Directive covers (I) an examination of the operation of the AML Directive (and its implementing measures with regard to selected issues; and (II) a specific examination of the impact of the AML Directive on the independent legal professionals and on other legal professionals providing similar services with regard to the corporate sector, the real estate sector and the financial intermediation sector (so called "non-financial professions"). It also provides (III) analytical conclusions.

The preparatory phase consisted of setting up a network for data collection, identifying information sources and selecting stakeholders.

Stakeholders were selected from the following categories: National Financial Intelligence Units (FIUs) and policy makers; competent authorities (including both supervisors e.g. financial and other regulators and self regulatory bodies e.g. professional institutes, bar associations); professional associations and individual stakeholders. A list of respondents is included in annex 5 of this report.

The data collection was organized through desk research, electronic questionnaires, follow-up e-mails and interviews.

The study results in an number of findings related, on the one hand, to the transposition of the Directive in the Member States in relation to the selected issues and, on the other hand, to the practical implementation of the obligations both in the financial sector and in the non-financial professions. The findings lead to the main conclusions described below.

In general, we have not detected important issues with regard to the transposition of the Directive although at the time of the study, the Directive was, in a number of Member States, only recently transposed or even still in the process of transposition. Member States have generally transposed the minimum required provisions of the Directive and the Implementing Directive related to the issues that are the subject of this report. Several Member States have adopted a number of stricter measures.

With regard to implementation practices, the following horizontal issues were identified by stakeholders:

- Different interpretations as regards certain definitions;
- Practical implementation difficulties due to, amongst others, a lack of public reference databases with information on PEPs or beneficial owners;
- Implementation problems for small practices;
- Cost of compliance.

A clear need for additional guidance was formulated, specifically by the non-financial professions.

For non-financial professions some implementation difficulties relate to the specificity of their activities (e.g. reporting issue) and to the size of their practices. Similar issues are present for non-

financial and financial professions regarding the identification of beneficial owners and the implementation of a risk based approach.

Based on the general comment that financial professions are more advanced in detecting suspicious transactions and on the fact that the latest statistics show that the frequency of AML reporting for most non-financial professions in most Member States is still very low, the inherent risk of launderers being tempted to use techniques which involve non-financial professions increases.

A summary of the issue specific conclusions can be found below:

**Application of AML legislation**

Most Member States have implemented in one way or another one or more measures that are stricter than required by the Directive. These stricter measures relate to many different topics and mapping is difficult because the qualification of "stricter" differs. The diversity in implementation of stricter measures can complicate cross border compliance.

In general national legislation follows the Directive closely as far as the minimum requirements of coverage of the non-financial professions are concerned. On the basis of the information received, we have not established gaps regarding the coverage of relevant professions. In most Member States, the activity based scope as determined in the Directive has been transposed in national legislation with no or minor differences.

Only seven Member States have opted to implement the exemption for limited financial activity. In some of these Member States the exemption has to be applied for and in some others like the UK and Ireland the exemption applies automatically upon a self-assessment by the concerned entities. Regarding this exemption it cannot be demonstrated that all requirements of the Directive are met. This is partly caused by the recent application of the Directive in a number of Member States.

Although the risk based approach is present in all Member States, the practical use of it appears sometimes to be difficult. Many stakeholders consider the guidance received on risk based approaches to be insufficient.

Most Member States have a range of possible sanctions/penalties for non-compliance with the AML provisions in their legislation. Public Stakeholders are of the opinion that the range of sanctions provided by the legal framework is sufficient and proportionate to the severity of the respective breaches. A number of private stakeholders are of the opinion that penalties are disproportionate.

There are many differences in the ways Member States organize the monitoring and the supervision of the AML legislation. Similarities can only be identified in a limited number of fields such as monitoring methods.

All Member States perform a review of the effectiveness of their AML systems on the basis of the statistics kept in accordance with the Directive. Some Member States keep additional statistics. Several Member States are currently revising their approach in order to get a more in depth view of the effectiveness of their frameworks to combat against money laundering and the financing of terrorism.

**Customer Due Diligence (CDD)**

The national legislations of all Member States require CDD for occasional transactions of 15.000 EUR and above, whether in a single operation or in several operations. In a number of countries the CDD threshold is set even lower. Few Member States require that cash transactions are reported.

On the matter of simplified CDD there appears to be a large convergence between the Member States as most of them have opted not to expand upon the framework foreseen by the Directive.

All Member States prohibit the keeping of anonymous accounts or passbooks in their national legislation. The majority of the Member States have explicitly stated in their relevant national legislation that covered entities must have special attention for products and transactions that might favour anonymity. To prevent the use of these products or transactions for money laundering or terrorist financing, they are subject to the normal CDD measures.

Regarding the casinos, the relevant legislation of all Member States imposes the registration, identification and verification of customers immediately on or before entry, regardless of the amount of chips purchased.

With a few exceptions, the PEP definitions have been transposed quite literally. Domestic PEPs are not included in the scope of the enhanced CDD (ECDD) rules. There are practical difficulties relating to the lack of public available information on PEPs. Stakeholders are of the opinion that the definition "persons known to be close associates" is too wide. The findings on compliance with existing PEPs obligations show some gaps. The reason for these gaps is not clear on the basis of the information received.

Member States have in general transposed the definition of beneficial owner in an identical way. Few exceptions were identified. The process of identifying a beneficial owner and verifying its identity is not a purely declarative process, depending on the risk based approach. There are many questions on the interpretation of certain aspects of the definitions and suggestions were made for possible modifications. The concept "control" was identified by many stakeholders as unclear. Numerous issues were mentioned regarding the practical problems encountered by covered entities during the process of identification and verification of the identity of beneficial owners. A large number of stakeholders plead for initiatives in the area of availability of information on structures and in connection with this, additional transparency requirements. Stakeholders also agree that there is no need to lower the threshold from 25% to 20%.

While the principle of third party reliance has been widely accepted by the Member States, limitations regarding the scope of the framework have been set in several Member States.

CDD requirements are generally considered to be costly and time-consuming by non-financial professions. Problems to comply with CDD requirements were reported in situations where stakeholders are confronted with constructions of an international dimension.

**Reporting of money laundering suspicions**

According to the latest country statistics, the sectors of trust and company service providers, real estate agents and tax advisors appear the most with zero reports on money laundering suspicions.

Postponement of transactions after reporting is generally perceived as useful and effective by public stakeholders. This opinion is shared by approximately 50% of the responding private stakeholders, the others however express concerns relating to delays and fear for breach of contracts.

Most Member States have taken similar measures to protect employees after they make a suspicious transaction report. Some incidents in relation to confidentiality were reported. With regard to single practitioners, protection measures are difficult to develop. Safeguarding of confidentiality is a high priority.

All the responding Member States have either explicitly or implicitly implemented in their national legislation, the obligation for financial and credit institutions to have systems in place to respond rapidly and fully to enquiries from FIU's and other authorities. A request for better coordination between EU AML and data protection directives has been expressed by stakeholders.

Public stakeholders and lawyers have clearly different views on the role of lawyers in the combat against money laundering and the financing of terrorism. Many lawyers are still of the opinion that the reporting duty needs to be revised. Their opinions on the impact of the AML rules on client's access to legal advice differ. There is recent case law on the confidentiality duty/legal privilege. A further clarification of the reporting duty might be envisaged whereby the situations in which lawyers do not need to report are clarified.

The role of self-regulatory bodies in the reporting process is important for the non-financial professions.

**Extent of the problem**

It is difficult to identify trends because of the limited information available on the extent of the problem. Stakeholders gave us examples of typologies and cases relating to real estate, corporate, financial and business situations. Based on the limited amount of case related information received the before mentioned situations are vulnerable for money laundering. This appears to be an argument in favour of keeping a reporting duty in place for all possible involved non-financial professionals.

It is clear that most Member States and stakeholders share the FATF concern regarding trade-based money laundering. Their measures against this phenomenon currently seem to be heavily tied to the framework of International Sanctions and Terrorism.

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Based on the above alternative measures and recommendations could include:

- Avoid too great a diversity in the implementation of stricter measures between Member States in order to avoid complications of cross-border compliance;
- Increase guidance on the practical use of risk based approaches;
- Support initiatives of Member States reviews in order to get a more in depth view of the effectiveness of the frameworks to combat against money laundering and the financing of terrorism;
- Consider initiatives relating to public information on Politically Exposed Persons and define "persons known to be close associates" to PEPs;
- Consider the implementation of additional transparency requirements and information on group structures in order to facilitate the identification of beneficial owners and define the term "control of an organization";
- Implement tailored CDD requirements for small practices;
- Allow the fulfilment of CDD requirements within a reasonable time frame and not always at the start of the relationship;
- Implement wider possibilities to allow a second entity involved in a transaction to rely on the customer identification procedure of the first reporting entity;
- Consider a better coordination between EU AML and data protection directives to avoid confusion on reporting obligations;

- Consider the further clarification of reporting duties for lawyers and the definition of legal advice;
- Assure the role of self regulatory bodies in the reporting process;
- Establish public private cooperation structures to enable professionals to verify the authenticity of identification documents such as identity cards or acts of incorporation;
- Strengthen the role of FIU's and professional organizations and encourage intelligent AML reporting.

# 2. Introduction

## 2.1 – Acknowledgement

The process of writing a report on a subject of such a vast scope as this is a collaborative experience involving the efforts of many people. Deloitte wants to express its gratitude to all who have cooperated.

We especially wish to thank:

- Our contacts at the European Commission Unit F-2 - Company Law, Corporate Governance and Financial Crime, Internal Market and Services DG, and specifically Mr. Ducoulombier and Mr. Fernandez-Salas for their continuous support and valuable input;
- The members of the Committee for the Prevention of Money Laundering and Terrorist Financing for the information and feedback provided;
- The FIUs, competent authorities and professional associations for answering our many queries and assisting in obtaining information;
- All respondents for their kind cooperation.

## 2.2 – The objectives of the study

### 2.2.1 – The examination of the operation of the AML Directive (and its implementing measures) with regard to selected issues.

The study aims to provide a detailed examination of the operation of the AML Directive (and its implementing measures) with regard to selected issues[1] in the 27 EU Member States.

The examinations objective is to include:

(i) An examination of how Member States have transposed the AML obligations (and those of its implementing measures) with regard to the selected issues; and

(ii) An examination of the practical implementation of those obligations by covered entities with regard to the selected issues.

[1] The selected issues are described in annex 3.

### 2.2.2 – The specific examination of the impact of the AML Directive on identified non-financial professions.

The second aim of the study is to provide an examination of the treatment of the non-financial professions covered by the AML Directive (and its implementing measures) in the 27 EU Member States.

Non-financial professions being understood as referring to auditors, external accountants, tax advisors, notaries, other independent legal professionals, trust and company service providers and real estate agents [see Article 2(1)(a) to (d)].

The examination's objective is to assess: (1) the extent of the problem; (2) the impact of the AML Directive solution with regard to selected issues[2]; (3) the existence and practicability of alternative solutions.

The examination of the existence and practicability of alternative solutions aims to assess whether, as an alternative to the AML Directive rules, there are other options to deal with the money laundering (or terrorist financing) risks that arise in the circumstances in which non-financial professions are involved.

(a) Solutions in third countries. The examination should describe how the non-financial professions (with a special focus on the legal professions) are treated in the AML legislation of Australia, South Africa and Switzerland.

In assessing whether there, are other options, the following issues are considered:

(b) The application of CDD. To what extent would it be desirable to adapt the existing rules on CDD in the AML Directive to the nature and specificities of the non-financial professions? If so, how the rules should be adapted?

(c) The duplication issue. Contrary to credit and financial institutions, non-financial professions will rarely be sole interveners in a transaction. It is likely that other professionals from a different category will be involved (e.g. a lawyer or real estate agent and a notary in the case of real estate transactions) and/or that credit institutions be involved (as financial transactions are needed to launder money). In some cases, this involvement will be consecutive. To what extent is it desirable that all non-financial professions intervening in the same transaction be subject to the same AML obligations: e.g. should notaries and credit institutions keep the reporting obligation and lawyers only a duty to reply to the FIU if asked? If not, what kind of solutions should be envisaged? Should a special rule on reliance on third parties for CDD purposes be imposed on this issue? Would this model be dissuasive enough towards money launderers?

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[2] The selected issues are described in annex 4.

(d) The reporting issue. Should the obligation for non-financial professionals to report on suspicious transactions be reconsidered? In replying to this question, the following issues could be considered: the conclusions of the ECJ in case C-305/05; the fact that the levels of reporting of suspicious transactions by some non-financial professions (in particular lawyers) are low compared to that of credit and financial institutions; the fact that non-financial professionals are not always involved in the financial transactions for their clients and their role would merely be of advisory nature; the actual contribution of professionals to the prevention of terrorist financing; and the impact on the reputation of the professions if they are excluded from the reporting obligation. If the obligation to report suspicious transactions should be reconsidered, should this be for all professions or only for some of them (e.g. legal professionals)? If the obligation to report suspicious transactions should be reconsidered, what should be the role of those professionals in the AML field? Would the fact of maintaining the CDD and record keeping obligations together with an obligation to reply to FIU queries be of sufficient deterrent value? Should more emphasis be put on feedback, training and awareness raising than on reporting? Should professionals be considered risky customers by credit and financial institutions (see next point)?

(e) The possible application of enhanced CDD by credit and financial institutions to non-financial professions. To the extent that non-financial professions are subject to the AML Directive rules, credit and financial institutions, when dealing with customers represented by or manifestly advised by non-financial professionals may be inclined to consider those situations as representing a low risk of money laundering or terrorist financing: i.e. checks are previously applied by non-financial professionals too. However, at the same time, the involvement of non-financial professionals in financial transactions will generally mean that the customer activities are more sophisticated, which in turn could increase the risk of money laundering or terrorist financing. Should there be a shift in risk perception? Which is the perception of risk by credit and financial institutions when non-financial professionals are involved in financial transactions? Should credit and financial institutions be required to apply enhanced CDD to customers represented by or manifestly advised by non-financial professionals? Would this be a way forward if non-financial professions are not required to report to the FIU about suspicious transactions?

Finally, the study aims to provide **analytical conclusions** regarding the above issues.

## 2.3 - General framework of the study

The study relates to the transposition and implementation of the third Anti-Money Laundering Directive. At the time of the study, the Directive was, in a number of Member States, only recently transposed or even still in the process of transposition. This has resulted in a number of Member

States not having sufficiently long experience with the application of certain obligations. Stakeholders in these Member States were for that reason often unable to comment on practices.

Unofficial English translations of national AML/CFT legislation were for the same reason not yet available in a number of Member States. Legislation changes regularly. As a general rule[3], the study is therefore based on the available legislation up to 15 August 2010. Recent changes might therefore not all have been taken into account. Where available an unofficial English translation was used to facilitate research.

It is often difficult to have a clear view on existing guidance and to have access to it. It should be noted that guidance overviews will not be exhaustive.

Although we have done our best efforts in order to have a balanced representation of the different professions taking part in the study, we had a low response rate for certain professions.

[3] When important new legislation was issued after 15 August 2010, we have attempted to include those changes that were, in our opinion, crucial to the content of the study.

# 3. Examination of the operation of the AML Directive

## 3.1 – Issue 1: Financial activity on an occasional and/or limited basis

With regard to the issue "Financial activity on an occasional and/or limited basis", the following questions have been examined:

*Have Member States made use of the possibilities of article 2(2) of the AML Directive (as specified in Article 4 of the implementing measures)? If so, in which circumstances is this exemption applied? Which are the conditions applying nationally (cf. Article 4(1) of the implementing measures)? How have Member States assessed the money laundering or terrorist financing risk (cf. Article 4(2) of the implementing measures)? How have Member States implemented Article 4 (3) of the implementing measures? How are Member States monitoring the use of the exemption (cf. Article 4(4) of the implementing measures?*

### 3.1.1 – Legal framework of the exemption of the financial activity on an occasional and/or limited basis in the Directive and the Implementing Directive

Article 2 (2) of the Directive provides that Member States may decide that legal and natural persons who engage in a financial activity on an occasional or very limited basis and where there is little risk of money laundering or terrorist financing occurring, do not fall within the scope of Article 3(1) or (2) of the Directive

The requirements which Member States have to take into account for the purposes of article 2 (2) of the Directive are determined in article 4 of the Implementing Directive. Member States may consider legal or natural persons who engage in a financial activity to be exempted from applying the Directive when all of the following criteria are fulfilled:

#### *3.1.1.1 – The financial activity is to be limited in absolute terms*

The Implementing Directive requires that the total turnover of the financial activity may not exceed a threshold which must be sufficiently low. That threshold shall be established at national level, depending on the type of financial activity.

#### *3.1.1.2 – The financial activity is to be limited on a transaction basis*

The Implementing Directive requires that Member States apply a maximum threshold per customer and single transaction, whether the transaction is carried out in a single operation or in several operations which appear to be linked. That threshold shall be established at national level, depending on the type of financial activity. It shall be sufficiently low in order to ensure that the types of transactions in question are an impractical and inefficient method for laundering money or for terrorist financing, and shall not exceed 1.000 EUR.

#### *3.1.1.3 – The financial activity is not the main activity*

The Implementing Directive 2006/70/EC requires that Member States shall require that the turnover of the financial activity does not exceed 5 % of the total turnover of the legal or natural person concerned.

#### *3.1.1.4 – The financial activity is ancillary and directly related to the main activity*

With the exception of the activity of natural or legal persons trading in goods, only to the extent that payments are made in cash in an amount of EUR 15.000 or more (whether the transaction is executed in a single operation or in several operations which appear to be linked), the main activity is not an activity mentioned in Article 2(1) of the Directive;

#### *3.1.1.5 – The financial activity is provided only to the customers of the main activity and is not generally offered to the public*

Next to the above mentioned five criteria, the Commission's Implementing Directive provides the following additional guidelines to the Member States when drafting legislation applying article 2 (2) of the Directive:

- In assessing the risk of money laundering or terrorist financing occurring for the purposes of Article 2(2) of the Directive, Member States shall pay special attention to any financial activity which is regarded as particularly likely, by its nature, to be used or abused for money laundering or terrorist financing purposes.
  Member States shall not consider that the financial activities represent a low risk of money laundering or terrorist financing if there is information available to suggest that the risk of money laundering or terrorist financing may not be low.
- Any decision pursuant to Article 2(2) of the Directive shall state the reasons on which it is based. Member States shall provide for the possibility of withdrawing that decision should circumstances change.
- Member States shall establish risk-based monitoring activities or take any other adequate measures to ensure that the exemption granted by decisions pursuant to Article 2(2) of the Directive is not abused by possible money launderers or financers of terrorism.

### 3.1.2 – Overview of the transposition of the exemption of the financial activity on an occasional and/or limited basis throughout all Member States

**Thirteen Member States**[4] (Belgium, Czech Republic, France, Denmark, Finland, Germany, Ireland, Luxembourg, Malta, Portugal, Slovenia, Spain and United Kingdom) have implemented the principle to exempt financial activity on an occasional and/or limited basis into their national legislation.

From this group of thirteen Member States, **seven Member States** (Czech Republic, Denmark, France, Ireland, Malta, Portugal and United Kingdom) have drafted the necessary implementation legislation in order to allow entities subject to the AML legislation to be exempted.

The remaining six Member States (Belgium, Finland, Germany, Luxemburg, Slovenia and Spain) did not yet adopt the necessary implementation legislation next to the principle to exempt financial activity on an occasional and/or limited basis. Therefore, in these Member States legal and natural persons who engage in a financial activity on an occasional or very limited basis cannot be exempted (yet) from applying the Directive obligations on the basis of this exception.

Although no specific AML implementation legislation has been drafted in Belgium, an (old) financial law exemption[5] for currency exchange offices exists and contains similar criteria as the ones in article 4 of the Implementing Directive:

> *"Are not considered to be currency exchange offices, those natural persons or legal persons which are executing currency exchange transactions on behalf of their normal clients when those transactions are directly related to their main activity and in so far as the counter value of the transaction does not exceed 1.500 EUR carried out in a single transaction or in several transactions which appear to be linked, or who accept payments in currencies for the delivery of goods or services."*

In case the criteria are met, the persons carrying out the activity are not considered to be currency exchange offices and as such are indirectly exempted from applying the Belgian AML currency exchange office obligations.

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4 Sweden has a similar exemption that is not a direct application of the exemption possibility in the Directive and as such not as wide as intended in the Directive.

5 Art. 1§2 of the Royal Decree of 27 December 1994.

## Table: Overview of the transposition of the exemption of financial activity on an occasional and/or limited basis in the Member States

| | Member States where the exemption is not transposed into national legislation | Member States where the exemption is transposed but cannot (yet) be applied as no implementation legislation has been issued | Member States where the exemption can be applied |
|---|---|---|---|
| Austria (AT) | X | | |
| Belgium (BE) | | X | |
| Bulgaria (BG) | X | | |
| Cyprus (CY) | X | | |
| Czech Republic (CZ) | | | X |
| Germany (DE) | | X | |
| Denmark (DK) | | | X |
| Estonia (EE) | X | | |
| Greece (EL) | X | | |
| Spain (ES) | | X | |
| Finland (FI) | | X | |
| France (FR) | | | X |
| Hungary (HU) | X | | |
| Ireland (IE) | | | X |
| Italy (IT) | X | | |
| Lithuania (LT) | X | | |
| Luxembourg (LU) | | X | |
| Latvia (LV) | X | | |
| Malta (MT) | | | X |
| Netherlands (NL) | X | | |
| Poland (PL) | X | | |
| Portugal (PT) | | | X |
| Romania (RO) | X | | |
| Sweden (SE) | X | | |
| Slovenia (SI) | | X | |
| Slovakia (SK) | X | | |
| United Kingdom (UK) | | | X |

### 3.1.3 – Implementation of Article 4 of the Implementing Directive in Member States which have effectively transposed the exemption of the financial activity on an occasional and/or limited basis

According to recital 11 of the Implementing Directive, the assessment of the occasional or very limited nature of the activity should be made by reference to **quantitative thresholds i**n relation to the transactions and the turnover of the business concerned.

Below an **overview** is given of the implementation of Article 4 of the Implementing Directive in Member States which have effectively transposed the exemption of the financial activity on an occasional and/or limited basis. Consequently, the following issues are addressed for Czech Republic, Denmark, France, Ireland, Malta, Portugal and United Kingdom:

- Circumstances in which the exemption can be applied (section 1 of article 4 of the Implementing Directive);
- Assessment of the money laundering or terrorist financing risk (section 2 of article 4 of the Implementing Directive);
- Reasons on which the exemption is based (section 3, first sentence of article 4 of the Implementing Directive);
- Withdrawal of a decision to exempt (section 3, second sentence of article 4 of the Implementing Directive);
- Establishment of a risk based monitoring system (section 4 of article 4 of the Implementing Directive).

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| Czech Republic | **<u>Circumstances in which the exemption can be applied:</u>**<br><br>1.<br>The exemption is granted in general. The exemption is not limited to certain categories of covered entities (e.g. companies operating in the tourism sector).<br><br>2.<br>The conditions for the exemption are the following:<br>• "The activity is a non-core activity directly relating to the core activity of the obliged entity, who otherwise under the exemption according to Section 2(2d) is not an obliged entity under this Act, and the activity is provided only as a sideline to the main activity of the obliged entity.<br>• The total annual revenues from this activity do not exceed 5% of the total annual revenues of the obliged entity, and at the same time the total annual revenues from this activity do not exceed the limit set by the Ministry in its decision for the type of activity in question (i.e. between 50.000 and 75.000 EUR).<br>• It is ensured that the value of an individual transaction or of multiple transactions with one customer of the activity referred to in the first paragraph, shall not exceed the amount of 1,000 EUR in the period of 30 consecutive days. Moreover the maximum threshold per customer and single transaction is between 500 and 750 EUR."<br><br>**<u>Assessment of the money laundering or terrorist financing risk:</u>**<br><br>The exemption is only granted on the condition that the risk of exploitation of the exemption for the legitimization of proceeds of crime and financing of terrorism on the part of the obliged entity is eliminated or significantly reduced. |

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| | **Reasons on which the exemption is based:**<br><br>Upon request, the Ministry may decide that an obliged entity who carries out any of the activities listed in Section 2(1) only occasionally or in a very limited scope, and in a way that precludes or significantly reduces the risk of such person being exploited for the legitimisation of proceeds of crime and financing of terrorism, shall not be regarded as an obliged entity under this Act.<br><br>The obliged entity shall attach proofs of compliance with the conditions set in Articles 1 and 2 to the application for an exemption.<br><br>The decisions on exemptions state the reasons on which they are based as according to the AML/CFT Law, the Ministry shall grant the exemption only on the condition that the risk of exploitation of the exemption for the legitimisation of proceeds of crime and financing of terrorism on the part of the obliged entity is eliminated or significantly reduced.<br><br>**Withdrawal of decision to exempt:**<br><br>The decisions can be withdrawn when circumstances change. The Ministry shall revoke the exemption granted under Section 1 when:<br>a) The risk of exploitation of the activity for the legitimisation of proceeds of crime and financing of terrorism has materially changed, or<br>b) The holder of the exemption had violated the specified conditions.<br><br>In any case it should be noted that an exemption may only be granted for a definite period of time. In its decision, the Ministry shall specify any other obligations within the scope of obligations of obliged entities, in order to prevent the exploitation of the exemption for the legitimisation of proceeds of crime and financing of terrorism.<br><br>**Establishment of a risk based monitoring system:**<br><br>A risk based monitoring system has been set up to avoid abuse of the exemption. A special force team/department makes a regularly assessment (less than once a year).<br><br>For the period of validity of the exemption as per Article 1, the obliged entity shall enable the supervisory authority (Section 35(1)) to verify compliance with the specified conditions, and to verify that the exemption is not exploited for activities that would facilitate legitimisation of proceeds of crime and financing of terrorism. Supervisory authorities hold the same powers in this respect as they do for controlling obliged entities.<br><br>**Other remarks:**<br><br>The FIU reported that around 250 requests for exemption have been filed till today. Most of the requests are related to exchange activity carried out at hotels. Approximately 200 exemptions have been granted till today. The supervision and monitoring of this process rests with Czech National Bank and the FIU. |

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| Denmark | **Circumstances in which the exemption can be applied:**<br><br>1.<br>The exemption is granted in general. The exemption is not limited to certain categories of covered entities (e.g. companies operating in the tourism sector). It can however not be applied in the following cases:<br>• In case of financial activities conducted outside Denmark;<br>• In case of money transmission services.<br><br>2.<br>The conditions for the exemption are the following. Obliged entities shall be exempt if they engage in financial activities which:<br>• Do not exceed 1,000 EUR per customer, irrespective of whether the transaction is completed in one or more related transactions;<br>• Do not exceed 5 per cent of the total annual turnover of the legal or natural person concerned;<br>• Are ancillary activities and directly related to the main activity;<br>• Are provided only to the customers of the main activity and are not generally offered to the public, and provided that the main activity is not covered by section 1 of the AML/CFT law .<br><br>**Assessment of the money laundering or terrorist financing risk:**<br><br>When there is a suspicion that the transaction is associated with money laundering or financing of terrorism covered by section 7 of the AML/CFT Law, proof of identity and storage of such identity information shall always be demanded, cf. sections 12 (regular CDD), 19 (enhanced CDD) and 23 (record keeping) of the AML/CFT Law.<br><br>**Reasons on which the exemption is based/ Withdrawal of decision/ Risk based monitoring system:**<br><br>No further information available on the closing date of the report. |
| France | **Circumstances in which the exemption can be applied:**<br><br>1.<br>The exemption is limited to the following activities:<br>• Currency exchange offices;<br>• Insurance brokerage activities.<br><br>2.<br>With regard to the exemption of currency exchange offices, the conditions for the exemption are the following:<br>• Currency exchange activities carried out by persons subject to Article L.561-2 of the MFC[6] - i.e. subject to AML/CFT requirements- other than those mentioned in paragraphs 1° (credit institutions) and 7° (currency exchange businesses) of this Article, if the global value of their transactions (purchase and sale of currencies) does not exceed 100.000 EUR per accounting year; |

[6] MFC = Monetary and Financial Code.

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| | • Currency exchange activities carried out by persons other than those mentioned in Article L.561-2 of the MFC, if the following criteria are fulfilled:<br>a) Currency exchange activities are exclusively destined to the customers of the main activity, and are directly linked to it;<br>b) The global value of transactions (purchase and sale of currencies) is below 50.000 EUR and does not exceed 5% of the total turnover per accounting year;<br>c) The global value of each currency exchange transaction does not exceed 1.000 EUR, whether it is a single or linked transaction.<br><br>With regard to the exemption of insurance brokerage, the conditions for the exemption are the following:<br>• Insurance brokerage activities exclusively consist of presenting, proposing or helping conclude contracts related to insurance products that are only a complement to product or services offered within the framework of the main activity;<br>• The global value of transactions does not exceed over 5% of the total turnover per accounting year;<br>• The insurance premium for each contract and each customer is below 1.000 EUR per year; and<br>• The total value of the turnover for insurance brokerage activities (life and non-life insurance) is below 50.000 EUR per accounting year.<br><br>**Assessment of the money laundering or terrorist financing risk:**<br><br>The exemption is only granted on the condition that the risk of exploitation of the exemption for the legitimization of proceeds of crime and financing of terrorism on the part of the obliged entity is low.<br><br>According to the ACP exemptions have been defined in accordance with the criteria set by Article 4 of the Implementing Directive and with the results of a national assessment performed by the French financial intelligence unit (TRACFIN) and based on the analysis of STRs, which has established the very low level of exposure to AML/CFT risks for the above-mentioned activities.<br><br>**Reasons on which the exemption is based, Withdrawal of decision:**<br><br>No further information available at the closing date of the report.<br><br>**Risk based monitoring system:**<br><br>The ACP[7] explains that each year, persons carrying out occasional currency exchange activities, such as defined in Article D.524-1 of the MFC, must give the ACP an affidavit stating that they do not act as exchange currency businesses and that they meet all the criteria listed in the above-mentioned Article. Following Regulation of 10 September 2009 concerning exchange businesses, this affidavit must be transmitted within a 3 month delay after the closing of the previous year's accounts. It takes the form of a standard model. |

[7] Autorité de Contrôle Prudentiel.

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| | This monitoring takes place more than once a year and there has been no need to revise the exemption as a result of abuse of the exemption. |
| Ireland | **<u>Circumstances in which the exemption can be applied:</u>**<br><br>1.<br>The exemption applies in general. The exemption is not limited to certain categories of covered entities (e.g. companies operating in the tourism sector).<br><br>The Minister can however prescribe classes of persons / entities which cannot benefit from this exemption.<br><br>2.<br>The conditions for the exemption are the following (in line with Article 4 (1) of the Implementing Directive):<br>• The annual turnover of the person's business that is attributable to operating as a credit institution or financial institution is 70.000 EUR or less;<br>• The total of any single transaction, or a series of transactions that are, or appear to be, linked to each other, in respect of which the person operates as a credit institution or financial institution does not exceed 1.000 EUR (or such other lesser amount as may be prescribed);<br>• The annual turnover of the person's business that is attributable to operating as a credit institution or financial institution does not exceed 5 per cent of the business's total annual turnover;<br>• The person's operation as a credit institution or financial institution is directly related and ancillary to the person's main business activity;<br>• The person provides services when operating as a credit institution or financial institution only to persons who are customers in respect of the person's main business activity, rather than to members of the public in general.<br><br>**<u>Assessment of the money laundering or terrorist financing risk:</u>**<br><br>The exemption applies on the condition that the risk that those activities may be used for a purpose of (i) money laundering, (ii) terrorist financing, or (iii) an offence that corresponds or is similar to money laundering or terrorist financing under the law of place outside Ireland is little.<br><br>**<u>Reasons on which the exemption is based:</u>**<br><br>No formal decision is necessary.<br><br>**<u>Withdrawal of decision:</u>**<br><br>No formal decision is necessary to be exempted as covered entities will perform self assessment. Accordingly, no withdrawal is possible. |

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| | **Risk based monitoring system:**<br><br>No risk based monitoring system has yet been set up to avoid abuse of the exemption due to the fact that the new AML legislation is only put in place since a few months.<br>In general, the Irish Minister for Justice and Law Reform may prescribe classes of people that are not permitted to benefit from the exemption if he believes that providing the exemption would create an unacceptable risk of money laundering. |
| Malta | **Circumstances in which the exemption is applied:**<br><br>1.<br>The exemption is granted in general so the exemption is not limited to certain categories of covered entities (e.g. companies operating in the tourism sector).<br><br>2.<br>The conditions for the exemption are the following:<br>• The total turnover of the financial activity does not exceed fifteen thousand euro (15.000 EUR), and the Financial Intelligence Analysis Unit may establish different thresholds not exceeding this amount depending on the type of financial activity;<br>• Each transaction per customer does not exceed five hundred euro (500 EUR) whether the transaction is carried out in a single operation or in several operations which appear to be linked, and the Financial Intelligence Analysis Unit may establish different thresholds not exceeding this amount depending on the type of financial activity;<br>• The financial activity is not the main activity and in absolute terms does not exceed five per centum (5%) of the total turnover of the legal or natural person concerned;<br>• The financial activity is ancillary and not directly related to the main activity[8];<br>• With the exception of paragraph (h) of the definition of 'relevant activity' in the Prevention of Money Laundering and Funding of Terrorism Regulations (L.N. 180 of 2008), , the main activity is not an activity falling within the definition of relevant financial business or relevant activity;<br>• The financial activity is provided only to the customers of the main activity and is not generally offered to the public.<br><br>**Assessment of the money laundering or terrorist financing risk:**<br><br>In assessing the risk of money laundering or the funding of terrorism for the purposes of sub-regulation (1), the Financial Intelligence Analysis Unit shall pay particular attention to, and examine any financial activity which, is particularly likely, by its very nature, to be used or abused for money laundering or the funding of terrorism and the Financial Intelligence Analysis Unit shall not consider that financial activity as representing a low risk of money laundering or funding of terrorism if the information available suggests otherwise. |

[8] The Maltese FIU reported that the term "not directly" was unintentionally used when transposing the implementing directive. The appropriate amendments would be carried out in due course in line with the Commission Directive 2006/70/EC stating that *the financial activity is ancillary **and directly** related to the main activity.*

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| | To date, the FIAU, which is the authority in Malta empowered to grant such exemption, has not applied this exemption and therefore the need to assess the relevant ML/FT risk has not arisen.<br><br>**Reasons on which the exemption is based:**<br><br>In making a determination the Financial Intelligence Analysis Unit shall further state the reasons underlying the decision and shall revoke such determination should circumstances change.<br><br>**Withdrawal of decision:**<br><br>In case circumstances should change, the decision shall be revoked.<br><br>**Risk based monitoring system:**<br><br>No risk based monitoring system been set up to avoid abuse of the exemption. Given the fact that no exemption has been granted to date, the need has never arisen. |
| Portugal | **Circumstances in which the exemption can be applied:**<br><br>1.<br>The exemption has been limited to companies operating in the tourism and travel sector which are authorised to carry out foreign currency exchange transactions[9].<br><br>The companies in the tourism and travel sector are limited to: hotels, travel and tourism agencies, campings and rent-a-car companies.<br><br>2.<br>The conditions for the exemption are the following are the following[10]:<br>• The financial activity is limited to a daily threshold of 500 EUR per client and a monthly threshold of 10.000 EUR;<br>• The financial activity is not the main activity (turnover of max 5% of the total turnover);<br>• The financial activity is ancillary and directly related to the main activity.<br>• The main activity is not in scope of the 3 AMLD (with exception of insurance intermediaries);<br>• The financial activity is provided only to the customers of the main activity and is not generally offered to the public. |

[9] This basic principle is laid down in article 5 of the AML Law.

[10] The conditions are set out in the Decree-Law n. 295/2003 which is only available in Portuguese. The content of the Decree-Law n. 295/2003 is partly copied in the Notice 13/2003 from the Banco de Portugal which we have received in English. Other information on the conditions was directly received from the relevant stakeholder.

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| | **Assessment of the money laundering or terrorist financing risk:**<br><br>The assessment was conducted by an Interdepartmental Working Group of Banco de Portugal. The ML/FT risk is minimized since the foreign exchange operation must be intermediated by a financial entity authorized to conduct this activity, which is subject to the AML/CFT Law (article 13 of Decree-Law 295/2003).<br><br>**Reasons on which the exemption is based:**<br><br>The Banco de Portugal responded that there are legal criteria stated in Article 5 of the AML/CFT Law and Decree-Law 295/2003, of 21 November and Notice of BdP 13/2003 on which the reasons of the exemption should be based.<br><br>**Withdrawal of decision:**<br><br>The decisions can be withdrawn when circumstances change.<br><br>**Risk based monitoring system:**<br><br>The supervision on the exempted companies in the tourism and travel sector is partly performed by covered financial institutions[11]:<br><br>A formal agreement must be passed between a financial institution authorised to carry out exchange transactions and the tourism and travel sector companies authorised to carry out manual exchange operations. A record of all the transactions carried out and the identification of the client is required from the tourism operators and travel agencies. The financial entity is required to monitor the compliance by the tourism and travel sector companies of their duties under the legal and regulatory provisions.<br><br>As long as the contract entered into with the tourism and travel sector companies is binding, the financial entity must guarantee the abidance by the limits and conditions set forth in Notice 13/2003. Thereto, financial entities may ask the tourism and travel sector companies, without prejudice to compliance with professional secrecy, to access the transactions records and their supporting evidence, as well as any explanation deemed necessary.<br><br>Authorised entities must report to Banco de Portugal, as soon as possible, any infringements to the limits and conditions referred to above that come to their knowledge, as well as any guidance given to the tourism and travel sector companies, with a view to overcome such situations. |
| United Kingdom | Circumstances in which the exemption can be applied:<br>1.<br>The exemption is granted in general so the exemption is not limited to certain categories of covered entities (e.g. companies operating in the tourism sector). |

[11] The entire scheme is set out in Notice 13/2003 from the Banco de Portugal.

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| | 2.<br>The conditions for the exemption are the following (in line with Article 4 (1) of the Implementing Directive):<br>• The person's total annual turnover in respect of the financial activity does not exceed 64.000 GBP;<br>• The financial activity is limited in relation to any customer to no more than one transaction exceeding 1.000 EUR, whether the transaction is carried out in a single operation, or a series of operations which appear to be linked;<br>• The financial activity does not exceed 5% of the person's total annual turnover;<br>• The financial activity is ancillary and directly related to the person's main activity;<br>• The financial activity is not the transmission or remittance of money (or any representation of monetary value) by any means;<br>• The person's main activity is not that of a person falling within AML/CFT Law 3(1)(a) to (f) or (h);<br>• The financial activity is provided only to customers of the person's main activity and is not offered to the public.<br><br>The exemptions are not granted by any supervising authority as covered entities will decide themselves whether they can be exempted or not. In other words, covered entities will perform self assessment.<br><br><u>Assessment of the money laundering or terrorist financing risk:</u><br><br>HM Treasury reported that the UK considers that there is little risk of money laundering where all of the above conditions are met. No questions were raised about adoption of this measure during two consultations on implementing the Directive.<br><br><u>Reasons on which the exemption is based:</u><br><br>No formal decision is necessary to be exempted as covered entities will perform self assessment. Accordingly, no reasons have to be given.<br><br><u>Withdrawal of decision:</u><br><br>No formal decision is necessary to be exempted as covered entities will perform self assessment. Accordingly, no withdrawal is possible.<br><br><u>Risk based monitoring system:</u><br><br>Monitoring is carried out in practice by the supervisory staff of the financial regulator. The unauthorised business team of the regulator might learn of businesses that perform activities that should be regulated by the financial regulator but have not registered. The financial regulator might learn about this through whistleblowers, supervisory visits, complaints, intelligence from other firms, and will then be able to take action. |

## 3.2 – Issue 2: Scope – stricter national measures

(Art. 5 AML Directive)

The following questions have been examined:

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| *The examination should particularly include a mapping of the provisions adopted (or retained in force) by Member States and which are stricter than those foreseen by the Directive. The examination should assess which are the implications of the stricter measures for stakeholders, in particular for those operating in more than one Member State.* |

### 3.2.1 – Legal framework of stricter national measures

Article 5 of the Directive 2005/60/EC provides that Member States may adopt or retain in force stricter provisions in the field covered by this Directive to prevent money laundering and terrorist financing.

Consequently, the Directive 2005/60/EC only imposes minimum harmonization requirements at EU level. This allows for different national AML regimes when implementing the Directive 2005/60/EC.

Article 4 section 2 determines that where a Member State decides to extend the provisions of this AML Directive to professions and to categories of undertakings other than those referred to in article 2(1) of the AML Directive, it shall inform the Commission thereof.

When the AML Directive allows for options, the choice of a stricter option is not to be considered as a stricter national measure pursuant to Article 5 of the AML Directive[12].

Scope: stricter national measures (application of Article 5 of the AML Directive). The examination should particularly include a mapping of the provisions adopted (or retained in force) by Member States and which are stricter than those foreseen by the Directive. The examination should assess which are the implications of the stricter measures for stakeholders, in particular for those operating in more than one Member State.

[12] In accordance with the Invitation to Tender no. MARKT/2009/06/F, 24.

### 3.2.2 – Mapping of national stricter measures

The starting point of the mapping of the national stricter measures was the input provided by the stakeholders during the surveys. In addition, a high level scan was performed of the respective basic national AML legislation of the indicated areas of stricter measures. This high level scan was complicated by:

- The fact that in some Member States no up-to-date translation was available due to very recent modifications to the AML legislation;
- The particularities of each law system; and
- The complicated assessment whether a measure is stricter or not.

Therefore, it cannot be guaranteed that the report provides an exhaustive list of all stricter measures in all 27 Member States.

The difficulties deciding whether a measure is a stricter measure or not, can be illustrated by looking at the following example regarding the territoriality of the German AML Law:

*Box 1: Example*
In **Germany**, the territorial scope of the national legislation was reported to be broadened.

The legislation/guidance[13] provides that German credit and financial institutions[14] have to oblige their foreign branches and affiliates (in member states ánd in third countries) to fulfil certain German AML requirements[15].

In case the German CDD measures are legally not admissible or factually not practicable according to the law of the country concerned, the German credit and financial institutions must ensure[16] that their branches or controlled companies do not establish or continue any business relationship in that third country and do not perform any transactions requiring such inadmissible or impracticable measures.

If a business relationship already exists, the German credit and financial institutions must ensure that such relationships are ended by way of termination or otherwise, regardless of other statutory or contractual provisions[17] (section 25g (1) sentence 4 KWG).

In the case of the obligation not to perform a transaction or to terminate or otherwise end an existing business relationship, the principle of proportionality must be observed. The requirements to be met for fulfilment of the CDD duties as part of the decision not to perform a transaction or to end a business relationship are to be interpreted not on the basis of narrowly pre-defined formal criteria but in the light of the risk-based approach of section 3 (4) GwG.
The obligation not to perform a transaction or to end a business relationship always exists if the measures required by section 25g (1) sentence 1 KWG which are not practicable in the third country concerned for legal or factual reasons are material in nature.

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[13] Section 3 (6) of the AML Act, Article 25g Banking Act and the Circular 17/2009 (GW) - Group-wide implementation of prevention measures pursuant to section 25g German Banking Act (Kreditwesengesetz – KWG)
[14] Including capital investment companies and financial holding companies according to section 25g German Banking Act.
[15] Customer due diligence duties pursuant to sections 3, 5 and 6 AML Act and with sections 25d and 25f as well as the duty to make and retain records pursuant to section 8 AML ACT
[16] Pursuant to section 25g (1), sentence 3 of the Banking Act.
[17] Section 25g (1) sentence 4 German Banking Act.

Some stakeholders reported that this measure is indeed a stricter measure and other stakeholders are of the opinion that this measure falls within the scope of article 34 of the AML Directive.

The stricter national measures are various. Consequently, the stricter measures in all Member States have been categorized as follows:

i. Definition of money laundering (article 1 of the AML Directive);
ii. The list of entities subject to the AML legislation (article 2 of the AML Directive);
iii. Beneficial ownership (article 3 of the AML Directive);
iv. Definition of Peps (article 3 of the AML Directive);
v. Cases in which covered entities shall apply customer due diligence measures (article 7 of the AML Directive);
vi. Casino customer identification threshold (article 10 of the AML Directive);
vii. Enhanced due diligence measures (article 13 of the AML Directive);
viii. Third party reliance (article 14 of the AML Directive);
ix. Reporting obligations for covered entities (article 20 of the AML Directive);
x. Prohibition of disclosure (article 28 AML Directive);
xi. Record Keeping (article 30 AML Directive).

The stricter national measures in the 27 Member States are set out below.

i. Definition of money laundering (article 1 of the AML Directive)

In Estonia, Hungary, Ireland and in the United Kingdom, a stricter definition of money laundering is in place.

- In **Estonia**, the definition is wider as it does not require a conviction in "serious crimes", reference is made to "criminal conduct" in general.

  (i) "Money laundering means:

  1) Concealment or maintenance of the confidentiality of the true nature, origin, location, manner of disposal, relocation or right of ownership or other rights of property acquired as a result of a criminal activity or property acquired instead of such property;
  2) Conversion, transfer, acquisition, possession or use of property acquired as a result of a criminal activity or property acquired instead of such property with the purpose of concealing the illicit origin of the property or assisting a person who participated in the criminal activity so that the person could escape the legal consequences of his or her actions.

  (ii) Money laundering is also a situation, whereby a criminal activity as a result of which the property used in money laundering was acquired, occurred in the territory of another state[18]."

- In **Hungary** the definition of money laundering is stricter in the sense that negligent money laundering is also considered money laundering and is criminally punishable as such[19].

  Section 303/A of the Hungarian Criminal Code (Act No.IV of 1978) provides*: "(1) Any person who, in connection with a thing obtained from criminal activities, that is punishable by imprisonment, committed by others: a) uses the thing in his economic activities; b) performs any financial transaction or receives any financial service in connection with the thing, and is negligently unaware of the origin of the thing is guilty of misdemeanour punishable by imprisonment of up to two years, community service work, or a fine. (2) The punishment shall be imprisonment for misdemeanour for up to three years if the act defined in Subsection (1): a) involves a substantial or greater amount of money; b) is committed by an officer or employee of a financial institution, investment firm, commodities broker, investment fund manager, venture capital fund manager, exchange market, clearing house, central depository, body acting as a central counterparty, insurance company, reinsurance company, voluntary mutual insurance fund, private pension fund or an institution for occupational retirement provision, or an organization engaged in the operation of gambling activities; c) is committed by a public official in an official capacity.*

[18] Estonian MLTFPA § 4

[19] Whether this stricter measure is indeed a stricter measure depends on the national interpretation of 'knowledge'. In case, according to national law, 'knowledge' is to be interpreted as actual knowledge and 'knowledge which should been known', then this is most likely not a stricter measure as the definition is in line with article 1 (5) of the AML Directive.

- In **Ireland**, the definition of money laundering is wider as the definition does not require that crimes committed are "serious crimes", as indicated in Article 3 (5) of the AML Directive.
  The Irish AML Act provides that "money laundering," means an "offence" (section 2 of the AML Act), where it comprises "criminal conduct" (Section 6 of the AML Act) which in turn relates to the "proceeds of criminal conduct" (Section 7 of the AML Act).
- In the **United Kingdom**[20], the definition of money laundering (in Sections 327, 328, 329 and 340 in the Proceeds of Crime Act 2002[21]) is wider due to the following elements:
  - The intention to launder money is not required to commit a principal money laundering offence, while under the AML Directive, the offence can only be committed if there is intention to launder money.
  - A principal money laundering offence can be committed in the UK on the basis that you merely "suspect" that there is criminal property in a transaction. Under the Directive, suspicion is only relevant to the requirement to report; a principal money laundering offence requires knowledge.
  - In the UK you commit a money laundering offence if you simply convert or transfer criminal property, while under the Directive the offence is only committed if in order to conceal or disguise the criminal property, you convert or transfer it.
  - The definition of "money laundering" includes the proceeds of all crime, not just serious crime. There are no *de minimis* provisions, and the definition includes the proceeds of the offenders own crime.

ii. <u>The list of entities subject to the AML legislation (article 2 of the AML Directive);</u>

The area where most Member States have incorporated stricter measures is the extension of the list of entities subject to the AML legislation.

In this regard Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Hungary, Latvia, Lithuania, Luxemburg, Malta, Poland, Portugal, Romania, Slovakia and Spain have extended the list of covered entities.

- In **Belgium** security companies are subjected to the AML Law (article 2 and 3 of the AML Law);
  No limited activity scope exemption exists for notaries and bailiffs in **Belgium** (article 3 of the AML Law.

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[20] Regarding the "All Crimes regime" in the United Kingdom: see House of Lords Session 2008-09: European Union Committee - Nineteenth Report Money laundering and the financing of terrorism: http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/132/13207.htm

[21] With regard to the definition of Money Laundering, the AML Act (Part 1 Section 2) refers to the Proceeds of Crime Act 2002.

- In **Bulgaria** the list of covered entities has been substantially extended, compared to the AML Directive. The following additional entities are subject to the AML Law (article 3, Para. 2 of the AML Law):
    - Privatization bodies;
    - Persons who organize public procurement orders assignment;
    - Legal persons to which mutual-aid funds are attached;
    - Persons who grant monetary loans in exchange for the deposit of property;
    - Postal services that accept or receive money or other valuables;
    - Leasing partnerships;
    - State and municipal bodies concluding concession contracts;
    - Political parties;
    - Professional unions and organizations;
    - Non-profit legal entities;
    - Bodies of the National Revenue Agency;
    - Customs authorities;
    - Sports organizations;
    - The Central Depository;
    - Dealers in weapons, petroleum and petroleum products;
    - Wholesale merchants.

  The activity based scope of notaries and other independent legal professionals includes fiduciary property management in **Bulgaria** (article 3 AML Law).
- In the **Czech Republic**, compared the AML Directive, at least the following entities are covered as well by the national AML legislation (section 2 of the AML Law)[22]:
    - Person licensed to trade in items of cultural heritage, items of cultural value, or to act as intermediary in such services;
    - A person licensed to trade in used goods, act as intermediary in such trading, or receive used goods in pawn.

[22] The entire list of covered entities is incorporated in Section 2 of the AML Law under "Obliged Entities".

- In **Denmark**, a stakeholder indicated that the Danish AML Act has enhanced the applicability of article 2 of the AML Directive regarding the applicability of the AML Directive on lawyers. The wording of the Danish AML-act suggests a rather broad interpretation as all legal advice by lawyers to business clients in general is brought under the scope of the AML Act (article 1 (2) 13) AML Law).
  The stakeholder and the FIU indicated that it is however unclear to what extent transactions in business matters other than those referred to in the AML Directive are covered by the Danish Act.
- In **Finland** also non-life insurance companies and not only the life insurance companies are subjected to the AML Law (Section 2 AML Law).
- In **France** the AML requirements apply to all insurance companies, i.e. to life as well as to non-life insurance companies (article L561-2 Financial and Monetary Code).
- In **Hungary** the obligations of customer due diligence and reporting shall apply to attorneys - with the exception set out in Subsection (3) - if they hold any money or valuables in custody or if they provide legal services in connection with the preparation and execution of the following transactions in accordance with Subsection (1) of Section 5 of the Attorneys Act:
  - Buying or selling any participation (share) in a business association or other economic operator;
  - Buying or selling real estate properties;
  - Founding, operating or dissolving a business association or other economic operator.
- In **Latvia**, the AML Law applies to a wider scope of persons (e.g. organisers of lotteries and gambling (not only casinos) and persons providing money collection services (article 3 AML Law) who are subject to the AML legislation.
- In **Lithuania**, the AML Law applies as well to bailiffs or persons entitled to perform the actions of bailiffs, companies organising gaming and postal services providers, who provide internal and international postal order services (article 2 AML Law).
- In **Luxemburg**, the activity scope set out in article 2 (3) (b) includes "providing a service of a trust and company service provider".
- In **Malta**, the scope of application of the AML Law has been extended to cover the activities of captive insurance companies.
- In **Poland** the limited activity scope only applies to attorneys, legal advisers and foreign lawyers.

- In **Portugal** the list of entities subjected to the AML Law is extended to[23]:
  - Entities managing or marketing venture capital funds;
  - Credit securitisation companies;
  - Venture capital companies and investors;
  - Companies pursuing activities dealing with contracts related to investment in tangible assets;
  - Investment consulting companies;
  - Operators awarding betting and lottery prizes;
  - Construction entities selling directly real estate;
  - Notaries, registrars, lawyers, solicitadores and other legal professionals acting either individually or incorporated as a company, when they participate or assist, on behalf of a client or otherwise in the operation of acquisition and sale of rights over professional sportspersons.
- In **Romania**, the list of covered entities is extended to[24]:
  - Private pension funds administrators, in their own behalf and for the private pension funds they manage, marketing agents authorized for the system of private pensions;
  - Persons with attributions in the privatization process;
  - Associations and foundations.
- In **Slovakia**, the scope of application of the AML Law is extended to[25]:
  - An entrepreneur (not only trading in goods but also providing services) if carrying out cash transactions in amount of 15.000 EUR at least, regardless of whether the transaction is carried out in a single operation or in several linked transactions which are or may appear to be connected;
  - A gambling game operator;
  - A postal undertaking;
  - A court distrainer;
  - A legal entity or a natural person authorized to provide the services of organizational and economic advisor, the services of public carriers and messengers or forwarding services;

[23] See article 3 and 4 of the AML Law.
[24] See article 8 of the AML Law.
[25] See section 5 of the AML Law.

- A legal entity or a natural person authorized to operate an auction hall, a legal entity or a natural person authorized to trade in works of art, collector's items, antiques, cultural monuments, items of cultural heritage, precious metals or gemstones, a legal entity or a natural person authorized to place products made of precious metals or gemstones on the market or a legal entity or a natural person authorized to operate a pawnshop;
- A legal entity or a natural person authorized to mediate housing savings.

- In **Spain**, all activities for notaries and registrars of property, trade and personal property are included in the activity based scope.

  In addition, according to art. 2.1 of the AML Law, the list of covered entities have been extended as follows:
  - Management companies of venture capital entities and venture capital companies whose management is not assigned to a management company.
  - Mutual guarantee companies.
  - Property developers
  - Professional dealers in jewels, precious stones or metals.
  - Professional dealers in works of art or antiques.
  - Persons whose business activity includes those set down in article 1 of Consumer Protection in the Procurement of Goods with a Price Refund Offer Act 43/2007, of 13 December.
  - Persons engaged in the deposit, custody or professional transfer of funds or means of payment.
  - Persons responsible for the management, operation and marketing of lotteries or other gambling activities in respect of prize payment transactions.
  - Managers of payment systems, clearing systems and those for the settlement of securities and financial derivatives, as well as managers of credit cards or debit cards issued by other entities, under the terms established in article 40.
- In the **Netherlands**, activities in the field of taxation are included in the activity based scope.

iii. Beneficial ownership (article 3 of the AML Directive)

In **Austria**, if a customer indicates that he or she intends to conduct the business relationship or a transaction for the account of or on behalf of a third party, in addition to the requirements set in the AML Directive, the identity of the trustee must be ascertained, exclusively in the physical presence of the trustee. The identity of the trustee may not be ascertained by third parties. The identity of the trustor is to be evidenced by the presentation of the original or a copy of the trustor's official photo identification document (as described in the first paragraph) in the case of natural persons and by the presentation of meaningful supporting documentation (as described in the first paragraph) in the case of legal persons. The trustee must also submit a written declaration to the institution stating that the trustee has ascertained the identity of the trustor (article 40 para 2 Banking Act, article 6 Securities Supervision Act, article 19 para 5 Act on Payment Services, article 98b para 2 Insurance Supervision Act).

In **Bulgaria** a wider definition of beneficial owner exists, i.e. listed companies are not excluded[26]

In **Cyprus**, the threshold limit for the definition of the beneficial owner of a company has been set at 10% plus one share instead of 25% plus one share in the Directive (section 2 (1) of the AML Law).

In **Malta** a wider definition of beneficial owner exists, i.e. long term life insurance business is included[27].

iv. Definition of PEPs (article 3 of the AML Directive)

The definition of immediate family members is wider in **Hungary**[28] than in the Directive. On the basis of Subsection (3) of Section 4 of the Hungarian AML/CFT Act "*close relative*" shall have the meaning set out in Paragraph b) of Section 685 of the Hungarian Civil Code, including domestic partners. Due to Paragraph b) of Section 685 of the Hungarian Civil Code 'close relative' shall mean spouses, registered partners, next of kin, adopted persons, stepchildren, foster children, adoptive parents, stepparents, foster parents, brothers, and sisters.

The definition of PEPs in **Portugal**[29] is somewhat extended: 6) «Politically exposed persons» are natural persons vi) High-ranking officers in the Armed Forces; vii) Members of the administrative and control bodies of State-owned enterprises and public limited companies whose share capital is exclusively or mainly public, public institutes, public foundations, public establishments, regardless of the respective designation, including the management bodies of companies integrating regional and local corporate sectors; viii) Members of the executive boards of the European Communities and of the European Central Bank; ix) Members of the executive boards of international organizations.

In **Spain**[30], the scope of persons entrusted with prominent public functions is expanded to all exercising or having exercised such functions abroad, even if they are resident in Spain. Also, the 1 year timeframe established in art. 2.4 of the Implementing Directive is expanded to two years.

26 Art. 5(3) RILMML.

27 Regulation 2(1) PREVENTION OF MONEY LAUNDERING ACT (CAP. 373) Prevention of Money Laundering and Funding of Terrorism Regulations, 2008

28 Subsection (3) of section 4 of the Hungarian AML/CFT Act

29 Art. 2, 6 (a) Portuguese AML Law

30 Art. 14 of the Spanish AML Act 10/2010

v. Cases in which covered entities shall apply customer due diligence measures (article 7 of the AML Directive)

In Belgium, Bulgaria, the Czech Republic, Denmark, Estonia, France, Italy, Lithuania, Slovakia and Spain national stricter measures exist in relation to the standard customer due diligence measures as set out in article 7 of the AML Directive. In most cases, the threshold for occasional transactions of 15.000 EUR (article 7 (b) of the AML Directive) was lowered by Member States.

- In **Belgium** the occasional transaction threshold is lowered from 15.000 EUR to 10.000 EUR (Art. 7 para. 1 (2) a);
- In **Bulgaria** covered entities shall identify customers whenever establishing business or professional relations as well as whenever carrying out *any* operation or concluding a deal involving more than 30.000 BGN (approximately 15.000 EUR) and also, for the credit and financial institutions, pawn houses, post offices, notaries, leasing companies and legal consultants, when performing an operation or concluding a transaction in cash exceeding 10.000 BGN (approximately 5.113 EUR) (article 4 AML Law).
- In the **Czech Republic** the obliged entity, should it be a party to a transaction exceeding EUR 1,000, shall always identify[31] the customer prior to the transaction, unless stipulated otherwise by the AML Law (Section 7 (1) AML Law);
- In **Denmark** the threshold of 15.000 EUR in case of transactions on an occasional basis is limited to 200,000 Croons or about 13.417 EUR (Section 14 AML Law);
- In **Estonia** the threshold of 15.000 EUR in case of transactions on an occasional basis is limited to 200,000 Croons or about 12.782 EUR (Section 12 AML Law) [32];
- In **France** exchange business services are required to identify and to verify the identity of their customer and, where relevant, of the beneficial owner, for any occasional transactions over 8.000 EUR instead of the 15.000 EUR from the AML Directive (article R.561-10 of the Financial and Monetary Code);
- In **Italy** financial agents acting on behalf of financial intermediaries (e.g., money transfers) have to perform customer due diligence for all transactions disregarding the usual threshold of 15.000 EUR (article 15 of the AML Law);
- In **Lithuania** the following 2 situations are added to the list of situation in which a covered entity has to fulfil customer due diligence obligations:

[31] This identification obligation does not go as far as an entire CDD, as set out in section 9 of the AML Law.
[32] From 1.1.2011 this threshold will be set at EUR 15,000.

- When exchanging cash, when the amount exchanged exceeds EUR 6.000 or the corresponding amount in foreign currency (article 9 AML Law);
- Performing internal and international remittance transfer services, when the sum of money sent or received exceeds EUR 600 or the corresponding amount in foreign currency (article 9 AML Law).

- In **Slovakia** the following 2 situations are added to the list of situations in which a covered entity has to fulfil customer due diligence obligations:
  - The withdrawal of a cancelled final balance of a bearer deposit is added (article 10 AML Law);
  - A 2.000 EUR threshold for all transactions carried out by covered entities, unless the following circumstances apply: a) at the moment of establishment of a business relationship, b) when carrying out an occasional transaction outside a business relationship worth at least EUR 15,000 regardless of whether the transaction is carried out in a single operation or in several linked operations which are or may be connected, c) if there is a suspicion that the customer is preparing or carrying out an unusual transaction regardless of the amount of the transaction, d) when there are doubts about the veracity or completeness of customer identification data previously obtained or e) where concerning withdrawal of a cancelled final balance of bearer deposit (article 10 AML Law).
- In **Spain** the following thresholds are applicable:
  - 3.000 EUR or more for occasional transactions (for financial institutions)[33];
  - 8.0 00 EUR or more for occasional transactions (for non-financial professions)[34] but no threshold for transactions involving auditors, accountants, tax advisors, lawyers and notaries.
  - No threshold for wire transfers.

vi. Casino customer identification threshold (article 10 of the AML Directive)

Article 10 of the Directive stipulates that all casino customers must be identified and their identity verified if they purchase or exchange gambling chips with a value of 2.000 EUR or more.

Six Member States have set a lower threshold than 2.000 EUR:

[33] Article 4 of the Royal Decree Nr. 925/1995 implementing Law 13/1993 concerning specific measures to prevent money laundering (A new Royal Decree implementing article 10(3) of Law 10/2010 will lower the threshold to 1.000 EUR in the near future).

[34] Article 16 of the Royal Decree Nr. 925/1995 implementing Law 13/1993 concerning specific measures to prevent money laundering (A new Royal Decree implementing article 10(3) of Law 10/2010 will lower the threshold to 1.000 EUR in the near future).

- **Belgium**: 1.000 EUR (article 9 AML Law);
- **Czech Republic**: 1.000 EUR, which is not a specific threshold for casinos (Section 7 (1) AML Law);
- **Estonia**: 30.000 Estonian Croon which amounts to about 1.917 EUR (section 16 AML Law) [35];
- **Italy:** 1.000 EUR for online casinos, the threshold for land-based casinos remains at 2.000 EUR (article 24 AML Law);
- **Latvia**: 1.000 EUR (Section 36 AML Law);
- **Poland:** 1.000 EUR (Article 8 AML Law).

vii. Enhanced due diligence (article 13 of the AML Directive)

In the area of enhanced due diligence, Austria, Estonia, Hungary, Latvia, Lithuania and Spain have incorporated stricter measures, e.g.:

- In **Latvia**, besides mentioned cases in Article 13 of the AML Directive, credit and financial institutions should perform enhanced CDD also for the categories of customers established by Financial and Capital Market Commission. The Commission shall establish as well the minimum extent of the enhanced customer due diligence in respect of various categories of customers, the procedure for enhanced monitoring of customer transactions, and the indicators for the services provided by the credit and financial institutions and for the customer transactions that require enhanced customer due diligence when credit institutions and financial institutions uncover them (article 22 AML Law)[36].
- In **Spain** enhanced due diligence measures are extended to all foreign PEPs and not only those residing in another country. Enhanced due diligence is also required in cases of private banking, money remittance and foreign exchange operations.

viii. Third party reliance (article 14 of the AML Directive);

In **Greece**, covered entities may not rely on third parties for obtaining information on the purpose and intended nature of the business relationship or of important transactions or activities of the customer or the beneficial owner, although provided for in art. 14 of the Directive (article 13 section 1 and 23 AML Law).

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[35] From 1.1.2011 this threshold will be set at EUR 2000.

[36] These elements are incorporated in Regulation No. 12 of 27 August 2008, the so called Regulations for Enhanced Customer Due Diligence from which no official translation was available. For more information see: www.fktk.lv/en/law/general/fcmc_regulations.

ix. Reporting obligations for covered entities (article 20 and further of the AML Directive);

In Austria, France, Latvia, Lithuania and Spain some stricter measures were incorporated in the field of the reporting obligations of covered entities:

- In **Austria** the reporting obligations are regulated stricter than in the Directive, as in addition to the requirements of article 22 AML Directive, credit and financial institutions have to report as well if they suspect or have reasonable grounds to suspect that a customer has violated the obligation to disclose fiduciary relationships.

  The reporting regulation is stricter than the Directive as article 41 para 1 no. 2 Banking Act states that credit and financial institutions must report *"that a customer has violated the obligation to disclose fiduciary relationships pursuant to Article 40 para. 2 Banking Act"*.

  Article 22 of the AML Directive solely contains the reporting obligation if the institution or person *"knows, suspect or has reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted"*. A violation of the duty to disclose fiduciary relationship doesn't need to be reported according to the AML Directive.
- In **France**, the legislation specifies the various cases where financial institutions must report suspicious transactions. Although generally speaking suspicious transaction reports (STRs) rely on an individual analysis by financial institutions, some cases of automatic STRs are defined yet strictly framed by Law.
  - Non automatic suspicious transaction reports

    Article L.561-15 I of the Financial and Monetary Code requires financial institutions to report any sum or transaction suspected to be related to an offence sanctioned by more than 1 year imprisonment or related to terrorism financing. Consistently with Article L.561-5 II of the Financial and Monetary Code, they also have to report sums or transactions suspected to be related to tax crimes if one the 16 criteria defined by Decree are met. Eventually, they must envisage reporting unusual or complex transactions referred to in Article L.561-10-2 II of the Financial and Monetary Code (article L.561-15 III).

- Automatic suspicious transaction reports

  Moreover, financial institutions are expected to report any transaction if the identity of the ordering customer, or of the beneficial owner, or of the settler of a trust or any other equivalent structure remains doubtful, despite CDD vigilance (article L.561-15 IV of the Financial and Monetary Code).

  In addition to this, they must give TRACFIN any additional information to invalidate, confirm or modify the elements put into the STR, on a spontaneous basis and without delay (Article L.561-15 V of the Financial and Monetary Code).

  Eventually, financial institutions may be asked by Decree to report any transactions with natural or legal persons, including their subsidiaries and agencies, in States or territories referred to in Article L.561-10 4° of the Financial and Monetary Code, i.e. designated States or territories whose legislation or business practices hinder the application of AML requirements. This Decree will determine the minimum amount of transactions subject to reporting (article L.561-15 VI Financial and Monetary Code).

- In **Latvia** the AML Law stipulates that covered entities shall report not only suspicious transactions, but also unusual transactions (Article 30 AML Law).

  The Cabinet Regulations No 1071 of 22 December 2008 on unusual transaction indicator list and procedure for reporting unusual and suspicious transactions, stipulate to set different thresholds for certain transactions regardless of suspiciousness of clients activity.

- In **Lithuania** the requirement for covered entities, except for notaries, advocates and bailiffs, to report to Suspicious or Unusual Monetary Operations and Transactions is set within 3 working hours, regardless of the amount of the monetary operation or transaction (article 14 AML Law).

- In **Spain,** Financial institutions must report on a monthly basis:

  a) Cash transactions over 30.000 EUR provided that they are not credited or debited in a bank account. The limit for money remittance companies is 3.000 EUR.

  b) Transactions with or from residents or people acting on behalf of a resident in certain risk territories and fund transfers to or from those territories provided that they exceed 30.000 EUR.

  In addition to Ml/TF suspicious transactions, covered entities must report unusual or complex transactions without an apparent legal and economic justification.

- In **Sweden** a stakeholder reported that the new AML Law introduces a right for enquiry for the Swedish Financial Intelligence Unit, and the obligation to provide information applies even where an advocate did not previously report anything[37]. The Swedish Financial Intelligence Unit can also ask questions arising from suspicions which originate from a source other than the advocate. However, it must be deemed to be justified to make an enquiry.

  Before the Swedish Financial Intelligence Unit can request information, the police must have received information of a specific nature, such as through a tip or in connection with another criminal investigation. It is thus not sufficient to have a general suspicion of a certain person or transaction. Accordingly, "phishing expeditions" by the Swedish Financial Intelligence Unit are not permissible according to the stakeholder. According to the preparatory works, the right of enquiry for the Swedish Financial Intelligence Unit is conditional on there being a specific suspicion of money laundering or terrorist financing (see Government Bill 2008/09:70 pages 117 et seq. and 197). According to information from the Swedish Financial Intelligence Unit, a decision regarding obtaining information pursuant to this provision must also be directly sanctioned by high-ranking police officers.

  As a result of this change in the new legislation, the obligation to provide information has been significantly extended for advocates[38].

  Accordingly, the stakeholder is of the opinion that this is an unacceptable enlargement of the reporting obligation and that this obligation goes beyond the Directive (Article 22 1b).

  The stakeholder reported however that it did not yet see any real case where the Swedish Financial Intelligence Unit has requested information from a lawyer (advocate) notwithstanding the fact that the lawyer himself has not found any reason to report.

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[37] The fact whether this is a stricter measure could be subject to interpretation as article 22 section 1 (b) could be interpreted in an extensive manner and a narrow manner. The quoted stakeholder chose to comment in light of the narrow interpretation.

[38] See: Guidance for advocates and law firms on the Act on Measures against Money Laundering and Terrorist Financing, available at: http://www.advokatsamfundet.se/Documents/Advokatsamfundet_eng/Vägledning_penningtvättsregleringen_version_2%20ADVB1-8.pdf , p. 20.

x. Prohibition of disclosure (article 28 AML Directive)

In **Lithuania** only advocates can rely on the exception from prohibition of disclosure to the client, when they seek to dissuade a client from engaging in illegal activity count.

xi. Record keeping (article 30 AML Directive)

In the area of record keeping and registering of transactions, some stricter measures were incorporated in Italy, Poland and Spain.

- In **Italy** all financial intermediaries shall record for ten years all processed transactions above a threshold of 15.000 EUR in an electronic database (the so-called, Archivio Unico Informatico) following standardized procedures set by the Bank of Italy (art. 36 and 37 Legislative Decree 231/2007).
- In **Poland** all entities covered by the AML Law are obliged to register transactions above 15.000 EUR (article 8 AML Law).

*Background information regarding the Polish transaction register from the Polish FIU:*

The FIU reported with regard to the stricter measures (more in particular with regard to the register of transactions) that the FIU accumulates and processes the information obtained from the obligated institutions about above-threshold transactions. In 2009, a dedicated IT system accepted over 82,000 files with data regarding transactions processed in the Polish financial system.

It should be pointed out that each single transaction is subject to verification and analysis therefore is more convenient to identify the trends. Data on transactions which were positively validated were made available for further analysis.

The FIU uses the data about transactions submitted by the obligated institutions in analyses of several types. All transactions are used in the course of searching for connections between the transactions of an analysed entity/ account, implemented in various obligated institutions.

All transactions are analysed with respect to:

1) Occurrence of characteristic features (including occurrence of specific entities/accounts as parties to the transaction, e.g. included in the lists of entities suspected of terrorism or its financing);
2) Occurrence of characteristic sequences of financial flows (on the basis of expert knowledge and models pre-determined on its basis).

Similarly to the previous years, also in 2009 in the course of the conducted analytical proceedings, it was ascertained that the organised criminal groups used previously identified methods of money laundering, and only modified and adjusted them to the current conditions.

The FIU reported as well that as a result of the analyses, data on some transactions are included directly in the conducted proceedings and notifications addressed to the public prosecutor's offices. In 2009 the FIU submitted to the competent prosecutor offices 180 notifications on money laundering.

Apart from notifications submitted to the public prosecutor's offices on the basis of conducted analytical proceedings, the GIFI submitted 84 notifications about suspicious transactions, including 43 notifications to the Fiscal Control Offices and 26 notifications to the Internal Security Agency (including the notifications referred to on page 15), 13 notifications to the Central Bureau of Investigation of the General Police Headquarters, one notification to the Polish Financial Supervision Authority and one notification to the Central Anticorruption Bureau.

- In **Spain** article 25 of the AML Act 10/2010 increases the record-keeping to a minimum of 10 years period, where the AML Directive provides for a period of at least 5 years

### 3.2.3 – Implications of stricter national measures for stakeholders

The Directive 2005/60/EC only imposes minimum harmonization requirements at EU level. This allows for different national AML regimes when implementing the AML Directive, including requirements more stringent that those contained in the AML Directive. In this context, divergent national approaches to regulation can hinder an effective AML preventive effort by e.g. banks acting as a group within the EU[39].

#### *3.2.3.1 – Stakeholder input*

In general, the majority of the private sector layer stakeholders reported that due to the stricter measures there is an impact on ensuring compliance, compliance cost and cross border competition. Only a few stakeholders responded to what extent this impact is experienced. The following opinions were given in this regard:

- In **Germany** various private stakeholders reported that due to the stricter measures regarding the territoriality, there is an impact on ensuring compliance, compliance cost, cross border competition, cross border compliance organization.

- In **Ireland** a private stakeholder reported that due to the wider definition of money laundering, it is possible that designated bodies will have to report a very wide range of offences from very minor criminal offences to the most serious of criminal offences.

  Another stakeholder in **Ireland** stated that given the application of criminal conduct to a wide number of circumstances which could result in direct and indirect financial benefit, solicitors may well find themselves under obligations, and in particular reporting obligations, which are disproportionate in the context of the primary thrust of the Directive to combat money laundering by criminal and terrorist organisations.

[39] Commission Staff Working Paper SEC(2009) 939 final, 4. See also footnote 12 of the Working Paper referring to the *de Larosière* Group which has recently stated that "*for cross-border groups, regulatory diversity goes against efficiency and the normal group approaches to risk management and capital allocation*". For this Group, such diversity is bound to lead to competitive distortions among financial institutions and encourage regulatory arbitrage. De Larosière Group (2009), p.27.

- In **Italy** a public stakeholder is of the opinion that thanks to the enhanced measures applicable to money remitters the misuse of this channel by criminals can be more easily prevented and detected. The competent authority submitted as well that, nonetheless, exploitation in this sector remains considerable.

- In the **United Kingdom** a private stakeholder reported that there is no impact on money laundering trends due to the stricter measures as the UK's threat assessment from SOCA has shown that the threat of money laundering has remained consistent at an estimated 15 billion GBP over the past three years. According to the stakeholder, there is no evidence that these stricter measures have reduced the level of money laundering in the UK.

  Another stakeholder in the **United Kingdom** is of the opinion that there is an impact on the money laundering trends due to the stricter measures, as it is likely that the strict interpretation in the UK of the requirements has driven some international money laundering to other jurisdictions.

  In the **United Kingdom** almost all private sector layer stakeholders are of the opinion that due to stricter measures there is an impact on ensuring compliance and a compliance cost. In this regard a stakeholder is of the opinion that firms are spending large amounts of money on systems and training to ensure compliance. Work which potentially poses higher risks or requires higher levels of compliance could be refused because of the cost and time involved in enhanced due diligence. In light of the fact that the vast majority of the regulated sector in the UK (estimated to be 175,000 entities) is comprised of small to medium businesses, this increased financial burden is experienced as proving problematic in challenging economic times.

The majority of the public sector layer stakeholders, who have responded on this matter, are of the opinion that the stricter measures have impacted the money laundering trends. For example:

- In **Estonia,** a public stakeholder reported that the detection of possible money laundering cases has improved and that the supervision system has improved in Estonia;
- In **France,** a public stakeholder reported that the lowering of the applicable identification threshold in the case of occasional transactions carried out by exchange business services from 15.000 to 8.000 EUR permits to better adapt the level of AML requirements to the nature of economic activities, and to better follow AML risks.

- In **Finland,** a competent authority is of the opinion that the stricter measures impacted the money laundering trends as suspicious transactions reports filed by the non-life insurance services have been helpful in detecting and investigating financial crimes and fraud.
- In **Hungary** a competent authority is of the opinion that the stricter measures have an impact on the money laundering trends as the stricter rule helps awareness-raising of managers and employees of credit and financial institutions thus substantially reducing the danger of money laundering.

Some stakeholders (private layer and public layer) commented on measures, which were no stricter measures according to the AML Directive. These opinions are not incorporated in the report.

*Example*

Some stakeholders in a Member State were of the opinion that the identification of the customer required by national legislation is regulated stricter than in the Directive, as the identity of the customers can only be ascertained by the personal presentation of an official photo identification document by the customer.

As the AML Directive provides a very broad range of possibilities in article 8, this cannot be considered as stricter measure.

Nevertheless a stakeholder commented that this measure considerably slowed down the establishing of a business relationship with clients that are not physically present. According to the same stakeholder, this could entail competitive disadvantages vis-à-vis members of the legal profession in other, especially non-EU-, countries, where they are not subject to such strict measures.

## 3.3 – Issue 3: CDD – the application of the risk-based approach by the covered entities

(Application of Article 8(2) of the AML Directive)

In relation to the application of the risk-based approach by the covered entities, the following questions were examined:

*How does national legislation deal with the risk-based approach concerning CDD? Has this resulted in a diminution of CDD requirements in national law and a corresponding increase of covered entities' responsibility? Do covered entities benefit from specific guidance in this regard? If so, has the FATF guidance been considered? Who has provided the guidance (e.g. governments, supervisory self-regulatory bodies, professional associations, etc.)? How do supervisors (cf. article 37) monitor the application of the risk-based approach by covered entities in the light of the last sentence of Article 8(2). Which is the impact of the risk-based approach from the FIU's perspective: has this resulted in better quality of reports? How is the risk-based approach perceived by the covered entities? Is there a difference between the credit and financial institutions on the one side and the non-financial professions on the other side?*

Article 8(2) of the Directive stipulates that the institutions and persons covered by the Directive must apply each of the customer due diligence requirements described in article 8(1), but may determine the extent of such measures on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction. The covered institutions and persons must be able to demonstrate to the competent authorities, including self-regulatory bodies, that the extent of the measures is appropriate in view of the risks of money laundering and terrorist financing.

### 3.3.1 – Implementation by the Member States

All Member States have incorporated the principle of the risk-based approach as described by article 8(2) of the Directive into their anti-money laundering legislation. In order to make use of the risk based approach, Member States require that covered entities perform risk assessments of their customers using suitable criteria or parameters (e.g. the products involved, the type of customer, the complexity of transactions, business relationship and geography) to determine the risk of money laundering or terrorist financing each of them represents. Based on this assessment covered entities may determine the level of customer due diligence that is applied to a particular customer. Covered entities are required to have adequate and appropriate procedures and customer acceptance policies in place, to ensure that risk assessments are completed when required and in a sufficient manner.

Given the freedom that the risk-based approach offers the covered entities, the Member States emphasize that stringent monitoring of its application is necessary. As such every Member State requires that a covered entity must able to demonstrate to a competent authorities that the measures that are being applied are appropriate in view of the risks of money laundering and terrorist financing attached to a certain situation. In practice this monitoring is conducted by the competent authorities in the following ways[40]:

[40] The use of these monitoring mechanisms is subject to requirements imposed by the relevant national legislation and as such may differ from Member State to Member State and from competent authority to competent authority. As such it is only possible to give a general overview.

- Review of one-off or periodical reports submitted by covered entities regarding their internal policies and procedures;
- AML targeted inspections by competent authorities;
- Inspections upon reported incidents.

The majority of the FIU's/Competent Authorities believe that the introduction of the risk-based approach has not caused a diminishment of the national CDD requirements. The approach has only rationalized the requirements allowing more efficient and effective use of resources proportionate to the risks faced while maintaining minimum requirements that have to be complied with in all situations.

### 3.3.2 – Impact of the risk-based approach on the reporting by covered entities

In general the FIU's/Competent Authorities indicated that the risk-based approach has had a positive impact on the reporting by covered entities in terms of:

- The number of suspicious or usual transaction report being submitted;
- The quality of the reports;
- The effectiveness of the detection of suspicious transactions by covered entities.

Some FIU's/Competent Authorities did however indicate that the impact of the risk-based approach could not yet be assessed as their legislation has just been brought in line with the Directive[41].

Evidence of the reporting trends can be found in the annual reports published by the FIU's. A steady increase in the number of suspicious or unusual transaction reports being submitted in most Member States[42] is noticeable. According to certain FIUs, risk based approach contributes to the increase. Other factors are e.g. an enhanced awareness of anti-money laundering and a more efficient detection of suspicious transactions by covered entities[43].

With regard to the quality of the reports it was indicated that in general information provided by the reporting entities in the suspicious transactions reports is sufficient to enable further analysis without the need to request additional information. This increase in quality is seen as consequence of the increased information gathering, monitoring and recordkeeping requirements under the risk-based approach. Notwithstanding the above, variations in quality between reports remain a problem in some Member States[44]. To obtain a higher reporting quality, respondents suggested that the reporting bodies should receive more feedback from the FIU and participate in training arranged by the competent authorities in cooperation with the FIU[45].

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41 This is the case in for example PL.

42 In 2009 decreases were noted in Member States such as NL, SE.and SI.

43 See for example TRACFIN Annual report 2009, FIU Deutschland Annual Report 2008 and FIU-NL Annual Report 2009.

44 For example SE.

45 See also the European Commission's Study on "Best practices in vertical relations between the Financial Intelligence Unit and (1) law enforcement services and (2) Money Laundering and Terrorist Financing Reporting entities with a view to indicating effective models for feedback on follow-up to and effectiveness of suspicious transaction reports", p. 19. The study is available at http://ec.europa.eu/home-affairs/doc_centre/crime/docs/study_fiu_and_terrorism_financing_en.pdf.

### 3.3.3 – Impact of the risk-based approach on private stakeholders

The majority of the private stakeholders, in particular financial institutions, indicated that the risk-based approach has had impact in terms of:

- Their responsibility as covered entity;
- The number of reports send to the FIU;
- The content of these reports;
- The effectiveness of the detection of suspicious transactions by covered entities;
- Their compliance cost.

In the view of the stakeholders, the increase of responsibility is a normal consequence of the risk-based approach. Risk based approach offers more discretion in regard to the application of customer due diligence. Stakeholders are of the opinion that discretionary powers obviously lead to an increase of responsibility.

To better manage this responsibility and comply with their obligations, most financial institutions have implemented electronic compliance and client data management systems which can also perform automated customers profiling. According to the responding financial institutions these systems together with risk based parameters have allowed them to increase the effectiveness of detection of suspicious transactions and the number of reports submitted. These systems, however, can come at a significant development and implementation cost. A challenge also lies in the setting of the right set of parameters while taking into account the client portfolio and the activities of the covered entity.

*Box 2: Example of IT solution (Italy)*
The Italian banks use a specific software program called GIANOS (acronym for Anomaly Index Generator for Suspicious Transactions) to assist them in identifying and following up on anomalous transactions. This program determines the customer's risk profile through the simultaneous processing of information from three fundamental variables:

1. High-risk transactions, using twelve months of historical data;
2. Transaction history;
3. Anagraphical data and bank relationship data.

The most complete version of the program, called GIANOS 3D, manages customers with series of functions expressly dedicated to "know your customers".

The aforementioned effects of increased effectiveness and reporting appear to be less pronounced in relation to the non-financial professions[46].

Some stakeholders believe that this is caused by the fact that the Directive requirements and to some extent the risk-based approach were developed from the position of financial institutions (and accompanying economics of scale). As such they are not ideally adapted or suitable for non-financial professions.

[46] The relatively low reporting by non-financial professions can also be explained by other factors (see section Reporting issues.)

From an operational point of view, risk assessment is often done manually by non-financial professions as IT solutions are too costly given the often smaller sizes of practices, and not tailored to the specific needs of the non-financial professions. This has resulted in an increased administrative burden and cost.

### 3.3.4 – Perception of the risk-based approach

The majority of the stakeholders, in particular the ones for the financial sector, consider the adoption of the risk-based approach as a step forward in the AML framework.

At least on a conceptual level, it allows for a more efficient allocation of resources and gives the covered entities some flexibility in targeting their systems and controls where required. These elements allow a more effective detection and thus reinforce the preventive nature of the system.

However the stakeholders have raised three main issues that hinder the application of the risk based approach in practice. The first issue is the compliance cost attached to IT systems or to the manual work that comes with the risk assessment.

The second issue raised by the stakeholders relates to a lack of guidance from the competent authorities or FIU regarding the risk based approach. The problem is less pronounced in the financial sector than it is in the non-financial sector[47]. In recent times the financial regulators seem to have made significant efforts to provide covered entities with guidance regarding the AML legislation, including the risk based approach. Some stakeholders did indicate that the guidance could be more detailed with regard to the practical application of the risk based approach.

The situation appears to be more problematic for non-financial professions. Stakeholders have reported that there is a general lack of guidance tailored to the needs of the professions involved, in particular lawyers and notaries. While the FATF guidance on the risk-based approach[48] has been considered, stakeholders have indicated that they prefer guidance which is adapted to their own national situation. Something only the relevant competent authorities can provide.

A final concern of the private stakeholders (specifically the financial professions) is there is a danger that the risk based approach chosen by the entities, is questioned afterwards by the competent authorities in case a suspicious transaction is missed. For this reason covered entities are sometimes also reluctant to make use of the simplified customer due diligence regime but apply normal CDD to all of their customers.

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[47] It should be noted that guidance provided by competent authorities is not always made publicly available. This is in particular the case for guidance provide by self-regulatory bodies such as bar associations. As such not all guidance could be examined.

[48] FATF Guidance for Legal Professionals (available here http://www.fatf-gafi.org/dataoecd/5/58/41584211.pdf), FATF Guidance for Real Estate Agents (available here http://www.fatf-gafi.org/dataoecd/18/54/41090722.pdf), FATF Guidance for External Accountants (available here http://www.ctif-cfi.be/doc/nl/rba/41091859.pdf) and FATF Guidance for Trust and Company Service Providers (http://www.fatf-gafi.org/dataoecd/19/44/41092947.pdf).

## 3.4 – Issue 4: CDD – the question of the beneficial owners

(Application of Articles 8(1) and 3(6))

In relation to the beneficial owners' issue, the following questions were examined:

*How is the question of beneficial ownership dealt with in the national legislation? How does national legislation deal with legal entities and/or legal arrangements, which are unknown in their national law (e.g. in countries where legislation does not allow for the creation of trusts, how are trusts treated if they become customer of a bank in that country? How are covered entities (as regards the non-financial professions, see below) implementing the obligation to identify beneficial owners: do they exclusively rely on information provided by the customer itself? Which are the risk-based and adequate measures generally taken by covered entities to verify the identity of beneficial owners? Which are the adequate measures generally taken to understand the ownership and control structure of the customer? How do covered entities deal with legal entities, which are unknown in their national law? Are there particular difficulties for covered entities to be underlined? Which are the views of the public authorities, in particular supervisors and FIUs on how beneficial owners are identified (and verified) by covered entities?*
*Which are the views of the FIUs as regards the usefulness of these identification/verification requirements for FIUs investigations? Is there evidence supporting these views? Is the definition of beneficial owner in the AML Directive sufficiently clear? Is the scope of the definition of beneficial owner too wide, making it therefore difficult to comply with the obligation? Should the obligation be tightened by establishing a lower threshold in Article 3(6): i.e. from 25%to 20% (cf. Article 43?)? What would be the consequences of such diminution?*

### 3.4.1 – Legislative aspects

In order to understand how the question of **beneficial ownership** is dealt with in national legislation, we asked the input of stakeholders on the following aspects:

- How is the **definition** of beneficial owner transposed in national law?
- Does national legislation include **specific detailed measures** for the identification and verification of beneficial owners and specifically does national legislation/regulation determine **specific measures for legal entities and/or legal arrangements which are unknown in national law** (e.g. in countries where legislation does not allow for the creation of trusts, how are trusts treated if they become customer of a bank in that country?).

### 3.4.2 – Definition

The Directive defines beneficial owner[49] as the natural person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted. The beneficial owner shall at least include:

(a) In the case of corporate entities:
  (i) The natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership of or control over a sufficient percentage of the shares or voting rights in that legal entity, including through bearer share holdings, other than a company listed on a regulated market that is subject to disclosure requirements consistent with community legislation or subject to equivalent international standards; a percentage of 25% plus one share shall be deemed sufficient to meet the criterion;
  (ii) The natural person(s) who otherwise exercises control over the management of a legal entity.

(b) In the case of legal entities such as foundations, and legal arrangements, such as trusts, which administer and distribute funds:
  (i) Where the future beneficiaries have already been determined, the natural person(s) who is the beneficiary of 25% or more of the property of a legal arrangement or entity;
  (ii) Where the individuals that benefit from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates;
  (iii) The natural person(s) who exercises control over 25% or more of the property of a legal arrangement or entity.

In recital 9 of the Directive it is explained that a precise definition of 'beneficial owner' is **essential to serve as a basis for specific and detailed provisions** relating to the identification of the customer and of any beneficial owner and the verification of their identity.

Where the individual beneficiaries of a legal entity or arrangement such as a foundation or trust are yet to be determined, and it is therefore impossible to identify an individual as the beneficial owner, it would suffice to identify the class of persons intended to be the beneficiaries of the foundation or trust. This requirement should not include the identification of the individuals within that class of persons.

In several Member States, the definition of beneficial owner has been **transposed literally**.

With regard to Member States that have not transposed the definition literally, **two types of differences** can be distinguished:

1. *Threshold differences*:
   - In Cyprus a lower threshold of **10%** + one share applies, i.e. the beneficial owner shall at least include, in the case of corporate entities the natural person or natural persons, who ultimately own or control a legal entity through direct or indirect ownership or control of a sufficient percentage of the shares, including through bearer share holdings, a percentage of 10% plus one share be deemed sufficient to meet this criterion[50].
   - In some Member States, the threshold is set generally at "**more than 25%**".
2. *Wording differences*: Wording differences are of a various nature. They include clarifications or specifications (be it of a general or country specific nature i.e. cross references to other national legislation), simplifications and generalizations of the definition included in the Directive.

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[49] Art. 3(6) of the Directive.

[50] Article 2(1) Prevention and suppression of money laundering and terrorist financing laws of 2007 and 2010 (unofficial translation made by the Unit for Combating Money Laundering – MOKAS)

### 3.4.3 – Overview of wording differences[51]:

| Member State | Nature of wording difference | Definition |
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| Bulgaria | Widening of the definition i.e. no exclusion of listed companies | Beneficial owner of a customer-legal entity is[52]:<br>1. Natural person or natural persons who directly or indirectly own more than 25% of the shares or of the capital of a customer-legal entity, or of another similar structure, or exercise direct or indirect control over it;<br>2. Natural person or natural persons in favour of which more than 25% of the property is controlled or distributed, whenever the customer if a foundation, a non profit organisation or another person performing trustee management of property or property distribution in favour of third persons;<br>3. A group of natural persons in favour of whom a foundation, or a public benefit organisation, or a person performing trustee management of property or property distribution in favour of third persons is established, or acts, when these persons are not determined but can be determined by specific signs.<br>The legal representatives of a customer-legal entity, the proxies and other natural persons subject to identification in relation to the identification of the customer –legal entity, shall be identified according to Art. 2. |
| Czech Republic | Specification | For the purposes of this Act[53], the beneficial owner shall mean either:<br>a) An entrepreneur as:<br>1. A natural person, having real or legal direct or indirect control over the management or operations of such entrepreneur, indirect control shall mean control via other person or persons;<br>2. A natural person, holding in person or in contract with a business partner or partners more than 25 per cent of the voting rights of such entrepreneur; disposing of voting rights shall mean having an opportunity to vote based on one's own will regardless of the legal background of such right or an opportunity to influence voting by other person; |

[51] The overview does not include minor differences with the Directive's definition.
[52] Art. 5(3) RILMML.
[53] Section 4, Par. 4 Act No. 253/2008 Coll. June 5, 2008 on selected measures against legitimisation of proceeds of crime and financing of terrorism

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| | | 3. Natural persons acting in concert and holding over 25 per cent of the voting rights of such entrepreneur, or<br>4. A natural person, which is, for other reasons, a real recipient of such entrepreneur's revenue,<br>b) A foundation or a foundation fund as:<br>1. A natural person, which is to receive at least 25 per cent of the distributed funds, or<br>2. A natural person or a group of persons in whose interest a foundation or a foundation fund had been established or whose interests they promote, should it yet to be determined who is the beneficiary of such foundation or a foundation fund,<br>c) A natural person, in case of an association under lex specialis, public service organization, or any other person and a trusteeship or any other similar legal arrangement under a foreign law, who:<br>1. Holds over 25 per cent of its voting rights or assets,<br>2. Is a recipient of at least 25 per cent of the distributed assets, or<br>3. In whose interest they had been established or whose interests they promote, should it yet to be determined who is their future beneficiary. |
| Finland | Specification: notion of control | Beneficial owner[54] means a natural person on whose behalf a transaction is being conducted or, if the customer is a legal person, the natural person who controls the customer. (2) A natural person is deemed to exercise control when the person: 1) holds more than 25% of the voting rights attached to the shares or units and these voting rights are based on holding, membership, the articles of association, the partnership agreement or corresponding rules or some other agreement; or 2) has the right to appoint or dismiss the majority of members of the board of directors of a company or corporation or of a corresponding body or a body which has the similar right, and this right is based on the same facts as the voting rights under paragraph 1. |
| France | Specification: Undertakings for Collective Investment | For the purposes of this chapter, the beneficial owner refers to the physical person that controls, directly or indirectly, the customer or for which a transaction is executed or performed activity[55].<br>When the customer, one of the persons mentioned in article 561 – 2, is a corporation, the |

[54] Section 5 par. 6 Act on Preventing and Clearing Money Laundering and Terrorist Financing (503/2008; amendments up to 918/2008 included). The exclusion of listed companies can be found in Section 8 of the law.

[55] Article L561-2-2 CMF - Article R561.1, 2 and 3 CMF – free translation.

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| | | actual beneficiary of the transaction will be the natural persons that hold, directly or indirectly, more than 25% of the capital or the voting rights of society, either have by any other means, control over the management,<br>administrative or management bodies of the company or the General Assembly of its members. When the customer, one of the persons mentioned in article 561 – 2, is an undertaking for collective investments, the actual beneficiary of the transaction is any natural person that either hold, directly or indirectly, more than 25% of the shares, either have control over the administration or management bodies of the undertaking for collective investments or, where appropriate the management company or portfolio management company representing it.<br><br>When the client to one of the persons mentioned in article 561 - 2 is a legal person who is neither a company or an undertaking for collective investments, or when the client intervenes in the context of a trust or other comparable legal device under a foreign law, actual beneficiary of the transaction are the natural persons who meet one of the following conditions:<br>1. They have a vocation, by virtue of a legal act with designated for this purpose, to become beneficiaries of at least 25% of the assets of the legal persons or the property transferred to a trust heritage or other comparable legal device under a foreign law;<br>2. They belong to a group in whose main interest the legal person, trust or any other comparable legal device under a foreign law has been established or operates when natural persons who are the beneficiaries have not yet been designated;<br>3. They are beneficiaries of 25% at least of the legal person, trust or other comparable legal device assets under a foreign law. They are trustee or beneficiary under the conditions laid down in Title XIV of Book III of the civil code. |
| Ireland | Clarification/specification | **26**.—In this Part, "beneficial owner", in relation to a body corporate, means any individual who—<br>(*a*) in the case of a body corporate other than a company having securities listed on a regulated market, ultimately owns or controls, whether through direct or indirect ownership or control (including through bearer shareholdings), more than 25 per cent of the shares or voting rights in the body, or |

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| | | (*b*) Otherwise exercises control over the management of the body.<br>**27**.—In this Part, "beneficial owner", in relation to a partnership, means any individual who—<br>(*a*) ultimately is entitled to or controls, whether the entitlement or control is direct or indirect, more than a 25 per cent share of the capital or profits of the partnership or more than 25 per cent of the voting rights in the partnership,<br>Or (*b*) otherwise exercises control over the management of the partnership.<br>**28**.—(1) In this section, "trust" means a trust that administers and distributes funds.<br>(2) In this Part, "beneficial owner", in relation to a trust, means any of the following:<br>(*a*) any individual who is entitled to a vested interest in possession, remainder or reversion, whether or not the interest is defeasible, in at least 25 per cent of the capital of the trust property;<br>(*b*) in the case of a trust other than one that is set up or<br>operates entirely for the benefit of individuals referred to in *paragraph (a)*, the class of individuals in whose main interest the trust is set up or operates;<br>(*c*) Any individual who has control over the trust.<br>(3) For the purposes of and without prejudice to the generality of *subsection (2)*, an individual who is the beneficial owner of a body corporate that—<br>(*a*) is entitled to a vested interest of the kind referred to in *subsection (2)(a)*, or (*b*) has control over the trust, is taken to be entitled to the vested interest or to have control over the trust (as the case may be).<br>(4) Except as provided by *subsection (5)*, in this section "control", in relation to a trust, means a power (whether exercisable alone, jointly with another person or with the consent of another person) under the trust instrument concerned or by law to do any of the following:<br>(*a*) dispose of, advance, lend, invest, pay or apply trust property;<br>(*b*) vary the trust;<br>(*c*) add or remove a person as a beneficiary or to or from a class of beneficiaries;<br>(*d*) appoint or remove trustees;<br>(*e*) Direct, withhold consent to or veto the exercise of any power referred to in *paragraphs (a)* to *(d)*.<br>(5) For the purposes of the definition of "control" in *subsection*<br>*(4)*, an individual does not have control solely as |

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| | | a result of the power exercisable collectively at common law to vary or extinguish a trust where the beneficiaries under the trust are at least 18 years of age, have full capacity and (taken together) are absolutely entitled to the property to which the trust applies.<br>**29**.—In this Part, "beneficial owner", in relation to an estate of a deceased person in the course of administration, means the executor or administrator of the estate concerned.<br>**30**.—(1) In this Part, "beneficial owner", in relation to a legal entity or legal arrangement, other than where *section 26, 27* or *28*, applies, means—<br><br>(*a*) if the individuals who benefit from the entity or arrangement have been determined, any individual who benefits from at least 25 per cent of the property of the entity or arrangement,<br>(*b*) if the individuals who benefit from the entity or arrangement have yet to be determined, the class of such individuals in whose main interest the entity or arrangement is set up or operates, and<br>(*c*) Any individual who exercises control over at least 25 per cent of the property of the entity or arrangement.<br>(2) For the purposes of and without prejudice to the generality of *subsection*<br>*(1)*, any individual who is the beneficial owner of a body corporate that benefits from or exercises control over the property of the entity or arrangement is taken to benefit from or exercise control over the property of the entity or arrangement. (3) In this Part, "beneficial owner", in relation to a case other than a case to which *section 26, 27, 28* or *29*, or *subsection (1)* of this section, applies, means any individual who ultimately owns or controls a customer or on whose behalf a transaction is conducted.<br>(4) In this section, "arrangement" or "entity" means an arrangement or entity that administers and distributes funds. |
| Latvia | Specification | **Beneficial owner**[56] – a natural person:<br>a) Who owns or directly or indirectly controls at least 25 percent of the share capital or voting rights of a merchant or exercises other control over the merchant's operation,<br>b) Who, directly or indirectly, is entitled to the property or exercises a direct or an indirect |

[56] Art. 1, point 5 Law on the Prevention of Laundering the Proceeds from Criminal Activity (Money Laundering) and of Terrorist Financing

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| | | control over at least 25 percent of a legal arrangement other than a merchant. In the case of a foundation, a beneficial owner shall be a person or a group of persons for whose benefit the foundation has been set up. In the case of political parties, societies and cooperative societies,<br>c) A beneficial owner shall be the respective political party, society or cooperative society,<br>d) For whose benefit or in whose interest a business relationship is established,<br>e) For whose benefit or in whose interest a separate transaction is made without establishing a business relationship in the meaning of this Law. |
| Malta | Widening of the definition: addition of the beneficial owner of long term life insurance business | "Beneficial owner"[57] means the natural person or persons who ultimately own or control the customer and, or the natural person or persons on whose behalf a transaction is being conducted, and<br>(a) in the case of a body corporate or a body of persons, the beneficial owner includes any natural person or persons who-<br>(i) ultimately own or control, whether through direct or indirect ownership or control, including, where applicable, through bearer share holdings, more than 25% of the shares or voting rights in that body corporate or body of persons other than a company that is listed on a regulated market which is subject to disclosure requirements consistent with Community legislation or equivalent international standards or<br>(ii) otherwise exercise control over the management of that body corporate or body of persons and<br>(b) in the case of any other legal entity or legal arrangement which administers and distributes funds, the beneficial owner includes:<br>(i) where the beneficiaries have been determined, a natural person who is the beneficiary of at least 25% of the property of the legal entity or arrangement<br>(ii) where the beneficiaries have not yet been determined, the class of persons in whose main interest the legal entity or arrangement is set up or operates<br>(iii) A natural person who controls at least 25% of the property of the legal entity or arrangement and (c) in the case of long term insurance business, the beneficial owner shall be construed |

[57] Regulation 2(1) PREVENTION OF MONEY LAUNDERING ACT (CAP. 373) Prevention of Money Laundering and Funding of Terrorism Regulations, 2008

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| | | to be the beneficiary under the policy. |
| The Netherlands | Specification | Article 1 (f) WWFT defines the beneficial owner as the:<br>• Natural person who holds a share of more than 25 percent of the issued capital or can exercise more than 25 percent of the voting rights in the shareholders' meeting of a legal person other than a foundation, or can exercise actual control over this legal person, unless this legal person is a company subject to disclosure requirements as referred to in Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC or to requirements of an international organisation which are equivalent to that Directive;<br>• Beneficiary of 25 percent or more of the assets of a foundation or a trust as referred to in the Convention on the Law Applicable to Trusts and on their Recognition (Treaty Series 1985, 141) or the party that has special control over 25 percent or more of the assets of a foundation or trust. |
| Poland | Specification | Beneficial owner, it shall mean:<br>a) A natural person or natural persons who are owners of a legal entity or exercise control over a client or have an impact on a natural person on whose behalf a transaction or activity is being conducted;<br>b) A natural person or natural persons who are stakeholders or shareholders or have the voting right at shareholders meetings at the level of above 25% within such a legal entity, therein by means of block of registered shares, with the exception of companies whose securities are traded within the listed circulation, and are subject to or apply the provisions of the European Union laws on disclosure of information, and any entities providing financial services in the territory of a EU-Member State or an equivalent state in the case of legal entities;<br>c) A natural person or natural persons who exercises control over at least 25% of the asset values - in the case of entities entrusted with the administration of asset values and the distribution of, with the exception of the entities carrying out activities referred to in Article 69 item 2 point 4 of the Act of 29 July 2005 on trading in financial instruments. |

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| Slovakia | Specification | Beneficial owner[58] means a natural person for the benefit of whom a transaction is being carried out or a natural person who<br>1. Has a direct or indirect interest or their total at least 25 % in the equity capital or in voting rights in a customer being a legal entity - entrepreneur including bearer shares, unless that legal entity is an issuer of securities admitted to trading on a regulated market which is subject to disclosure requirements under a special regulation,<br>2. Is entitled to appoint, otherwise constitute or recall a statutory body, majority of members of a statutory body, majority of supervisory board members or other executive body, supervisory body or auditing body of a customer being a legal entity–entrepreneur,<br>3. In a manner other than those referred to in subsections 1 and 2 controls a customer being a legal entity–entrepreneur,<br>4. Is a founder, a statutory body, a member of a statutory body or other executive body, supervisory body or auditing body of a customer being a corporation or is entitled to appoint, otherwise constitute or recall those bodies,<br>5. Is a beneficiary of at least 25% of funds supplied by a corporation, provided the future beneficiaries of those funds are designated or<br>6. Ranks among those persons for whose benefit a corporation is established or operates, unless the future beneficiaries of funds of the corporation are designated. |
| Slovenia | Specification | For the purposes of this Act[59], the term beneficial owner shall include the following:<br>– A natural person who ultimately owns or supervises or otherwise exercises control over a customer (provided the party is a legal entity or other similar legal subject), or<br>– A natural person on whose behalf a transaction is carried out or services performed (provided the customer is a natural person).<br>Pursuant to this Act, the beneficial owner of a corporate entity shall be:<br>1. Any natural person who owns through direct or indirect ownership at least 25% of the business share, stocks or voting or other rights, on the basis of which he/she |

[58] Section 9, b A C T of 2 July 2008 on the Prevention of Legalization of Proceeds of Criminal Activity and Terrorism

[59] Art. 3, 12 and art. 19 PREVENTION OF MONEY LAUNDERING AND TERRORIST FINANCING ACT (ZPPDFT, published in the Official Gazette of the Republic of Slovenia, No. 60 of 6 July 2007, page 8332) (Unofficial translation)

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| | | participates in the management or in the capital of the legal entity with at least 25% share or has the controlling position in the management of the legal entity's funds;<br>2. Any natural person who indirectly provides or is providing funds to a legal entity and is on such grounds given the possibility of exercising control, guiding or otherwise substantially influencing the decisions of the management or other administrative body of the legal entity concerning financing and business operations.<br>(2) For the purposes of this Act, the beneficial owner of other legal entities, such as foundations and similar foreign law entities which accept, administer or distribute funds for particular purposes, shall mean:<br>1. Any natural person who is the beneficiary of more than 25% of the proceeds of property under management, where the future beneficiaries have already been determined or can be determined;<br>2. A person or a group of persons in whose main interest the legal entity or similar foreign law entity is set up and operates, where the individuals that benefit from the legal entity or similar foreign law entity have yet to be determined;<br>3. Any natural person exercising direct or indirect control over 25% or more of the property of a legal entity or similar foreign law entity. |
| Sweden | Generalization | *Beneficial owner*[60] means: a natural person that some other person acts for or, if the customer is a legal person, the party that exercises a decisive influence over the customer. |
| UK | Specification | Meaning of beneficial owner<br>(1) In the case of a body corporate, "beneficial owner" means any individual who<br>(a) As respects any body other than a company whose securities are listed on a regulated market, |

[60] Chapter 1 Section 5, Item 8 Act on Measures against Money Laundering and Terrorist Financing: issued on 12 February 2009 – unofficial translation. In the FATF *Third Mutual Evaluation of Sweden: Fourth Follow-up report* (1 October 2010) paragraphs 30-31, the following is mentioned in relation to the definition: "It is worth noting that the definition of beneficial ownership in the AML Act is slightly different from the standard wording used by the FATF and the 3rd EU AML Directive. While the memorandum refers to those that "ultimately own or control", the definition of the AML Act refers to those that "exercise a decisive influence". However, the explanatory memorandum explains that the Swedish definition should be understood to be the same as the FATF definition. The memorandum also states that the definition should be understood to be in line with the 3rd EU AML Directive). According to Finansinspektionen's Regulations and General Guidelines governing measures against money laundering and terrorist financing (FFFS 2009.1), Chapter 4, Section 9 ) an undertaking shall obtain reliable and sufficient information on a beneficial owner's identity by means of public registers, relevant information from the customer or other information that the undertaking has received. Where the customer is a legal person, the undertaking shall verify:
– direct and indirect natural owners if the holding in the customer amounts to more than 25 per cent, and
– the natural persons that exercise a determining influence over the customer.

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| | | ultimately owns or controls (whether through direct or indirect ownership or control, including through bearer share holdings) more than 25% of the shares or voting rights in the body; or<br>(b) As respects any body corporate, otherwise exercises control over the management of the body.<br>(2) In the case of a partnership (other than a limited liability partnership), "beneficial owner" means any individual who<br>(a) Ultimately is entitled to or controls (whether the entitlement or control is direct or indirect) more than a 25% share of the capital or profits of the partnership or more than 25% of the voting rights in the partnership; or<br>(b) Otherwise exercises control over the management of the partnership.<br>(3) In the case of a trust, "beneficial owner" means--<br>(a) Any individual who is entitled to a specified interest in at least 25% of the capital of the trust property;<br>(b) As respects any trust other than one which is set up or operates entirely for the benefit of individuals falling within sub-paragraph (a), the class of persons in whose main interest the trust is set up or operates;<br>(c) Any individual who has control over the trust. |

### 3.4.4 – Specific detailed measures for identification and verification of beneficial owners and specific measures for legal entities and/or legal arrangements which are unknown in national law

In accordance with article 8 of the Directive, customer due diligence measures shall comprise identifying, where applicable, the beneficial owner and taking risk-based and adequate measures to verify his identity so that the institution or person covered by this Directive is satisfied that it knows who the beneficial owner is, including, as regards legal persons, trusts and similar legal arrangements, taking risk-based and adequate measures to understand the ownership and control structure of the customer.

Recital 10 of the Directive explains that to fulfil this requirement, it should be left to those institutions and persons whether they make use of public records of beneficial owners, ask their clients for relevant data or obtain the information otherwise, taking into account the fact that the extent of such customer due diligence measures relates to the risk of money laundering and terrorist financing, which depends on the type of customer, business relationship, product or transaction.

All Member States have issued or are in the process of **issuing specific detailed measures for the identification and verification of beneficial owners**.

Specific detailed measures are included in:

- Primary legislation;

- Secondary legislation;
- Sector specific regulations and;
- Guidance from regulators.

The situation in relation to specific measures with regard to identification and verification of **beneficial owners of legal entities and/or legal arrangements which are unknown in national law is different**.

The public stakeholders of most Member States indicate that they have not issued **specific measures**. Measures that apply to national legal entities and/or legal arrangements will in that case also apply to legal entities or arrangements which are unknown in national law.

In Czech Republic AML/CFT Law and in French AML/CFT law, explicit reference is made to foreign structures in the **definition** of beneficial owner (see overview above).

In some Member States, **detailed measures** are available with regard to legal entities and/or legal arrangements which are unknown in national law. They can be included in sector specific regulation or guidance.

*Box 3: Example of sector specific regulation and guidance Belgium*[61]

Trusts do not exist in Belgium. The Belgian CBFA Regulations and Circular however contain guidance on identification/verification of the beneficial owners of trusts e.g.:
Article 17 of the CBFA Regulations determines that where the customer is an unincorporated association or any other legal structure without legal personality, such as a trust or a fiduciary, "a natural person or persons who control about 25% or more of the assets of the legal arrangement " should be understood as including the persons that have the power to exercise a significant influence on management, with exception of the persons that are qualified to represent the association.
With regard to trusts, the CBFA considers that for example the "charities commissioners" of the "Charitable trusts", which are responsible to appoint, revoke or replace the trustee, ask for justification and investigate his administration of the trust, are to be considered as ultimate beneficiaries on the basis of the influence that they can exercise on the management of the trust.

*Box 4: Example of sector specific regulation and guidance France*[62]
The general guidelines for the insurance sector include identification and verification requirements for beneficial owners located in off-shore centres, i.e. legal arrangements unknown in France.
E.g. "In the specific case of an entity/ arrangement listed below, obtain the identity of the beneficial (non-exhaustive list of special entities/arrangements):
- International Business Company (Jersey, Guernsey, Isle of Man, Bahamas, Barbados, British Virgin Islands);
- Exempt Company (Jersey, Guernsey, Isle of Man, Gibraltar); -
- Qualifying Company (Bermuda, Cayman Islands);
- Aruba vrijgestelde vennootschap (or VTA);
- Or some form of holding company stock (Anstalt Liechtenstein, Luxembourg or Swiss holding company, Soparfi Luxembourg, Monaco civil society, etc.)."

[61] Circular CBFA_2010_09 on the obligations of customer due diligence, on preventing the use of the financial system for purposes of money laundering and terrorist financing, and on preventing the financing of the proliferation of weapons of mass destruction (06-04-2010), p.32.

[62] Principes d'application sectoriels de l'Autorité de contrôle prudentiel relatifs à la lutte contre le blanchiment de capitaux et le financement du terrorisme pour le secteur des assurances Juin 2010, p. 24.

## 3.4.5 – Practical implementation

### *3.4.5.1 – The practice of covered entities*

The information on practices received from private stakeholders relates to a large extent to the **problems and questions with regard to the definition** of beneficial owners and the **practical difficulties experienced** in implementing the requirements. These issues are treated separately below.

With regard to **measures taken** by covered entities to comply with the identification and verification requirements, the following were mentioned:

3.4.5.1.1. Use of information sources:

The identification and verification process of beneficial owners is in none of the Member States a declarative process. In all Member States, taking into account the risk based approach, declarations have (and are) to be combined with own investigations based on information sources (other than the client).

Covered entities in general therefore do not rely exclusively on declarations made by the customers.

For analysis and verification purposes, covered entities often use the following **sources**:

- Public databases (such as trade registers);
- Commercial databases;
- Legal documentation (incorporation documents, shareholders registers, attendance lists of general meetings of shareholders, etc.);
- Official websites of supervisory authorities;
- Inquiries of other regulated persons;
- Internet searches;
- Letters from entity managers.

3.4.5.1.2. Risk assessment:

In most Member States risk assessment is required in the verification process of beneficial owners. In practice the risk based approach is based on the type of customers (e.g. local or foreign clients, straightforward or complex legal structures) and the type of services and products.

3.4.5.1.3. Training:

Training is an important measure to ensure compliance with the obligations and to create awareness.

## 3.4.6 – The perception of public authorities on steps taken by covered entities/persons to identify and verify beneficial owners

Not all Member States have expressed opinions with regard to this topic.

Public stakeholders in **most Member States are satisfied** with the steps taken by covered entities. One or more authorities of **nine Member States are not satisfied** with steps taken[63]. The reasons stated for this are almost in all cases of an **external** nature:

[63] Austria, Czech Republic, Denmark, Estonia, Germany, Italy, Lithuania, Slovenia and Spain

- Difficulties in gaining access to information of the client;
- Complexity of ownership and legal structures;
- Difficulties with regard to clients that are foreign undertakings or foreign beneficial owners;
- Difficulties with regard to the definition of beneficial owner contained in the Directive (e.g. it is generic; the criteria to identify it are mechanistic, the complexities of ownership and legal structures are ignored).

Some authorities indicate that it is not possible to give a clear yes/no answer. The opinion can vary according to the categories of reporting entities, the way covered entities handle risk assessments, etc.

Suggestions for **additional measures** made by public stakeholders were amongst others:
- Training;
- Obtain additional information on the proper status of the beneficial owner:
  - Establish the economic or personal activity of the beneficial owner;
  - Establish whether the economic or personal activity of the beneficial owner is related to the economic or personal activity of the customer.
- More focused analysis on complex ownership and legal structures;
- More willingness to strictly reject clients with unclear or unknown legal structure, unclear ownership or business profile.

### 3.4.7 – The perception of public stakeholders on deterrent effects and usefulness of requirements

One or more public stakeholders of **only a few Member States[64] are not satisfied with the deterrent effect** of the existing requirements and/or the usefulness of the requirements.

Public stakeholders who are satisfied with the deterrent effect and are of the opinion that requirements are helpful for investigations, indicate the following facts as evidence for this:
- Increased quantity and quality of reporting;
- Favourable site inspections;
- Cases sent for further investigation;
- Quality of responses from covered entities to inquiries of the FIU with regard to beneficial owners.

One of the authorities comments that it is a **balancing act** to create regulations that have a deterrent effect and are still practicable for the covered entities/persons.

Another public stakeholder states that a clear yes or no answer cannot be given.

A competent authority comments that the fundamental problem with these questions is that there is no reliable measure of deterrence and of crimes not committed due to any specific law enforcement measure.

Authorities made the following suggestions for **additional measures**:
- Additional transparency requirements;
- Requirements to identify the address, place of work of natural persons (incl. acquiring evidence on this information, for ex. receipts of communal bills, etc.);
- Need for a definition of beneficial owner that takes into account the complexities of ownership and legal structures;
- Customer duty to fully cooperate with intermediaries in the identification of beneficial owner should be enshrined in law and associated with penalties in case of infringement.

[64] Austria, Germany, Italy

### 3.4.8 – Opinions on definition of beneficial owner

The **opinions** on the definition of beneficial owner **vary** quite a lot in the Member States. In approximately 15 Member States stakeholders agreed that the definition is clear and not too wide. In the other Member States aspects of the definition were questioned although not by each group of stakeholders. Differences in opinion exist quite often between public stakeholders and private stakeholders. Individual stakeholders often also have a particular view on the definition. Financial and non-financial professions have, in general, similar opinions on the difficulties.

Not all of the problems that were identified by the stakeholders are strictly related to the definition. A number of opinions relate more to the practical difficulties that stakeholders have in complying with the obligations.

Suggestions/requests with regard to changes or clarifications in the definition were also made by both public and private stakeholders.

The problems, questions and suggestions that stakeholders identify in relation to the definition mainly concern the **notion of "control", complex and/or multilayered structures and specific legal entities and arrangements. A number of more general questions and comments** were also mentioned.

*Box 5: Examples of problems, questions and suggestions related to the notion **"control"***

- More clarity about how to control a legal entity, if you own less than a percentage of 25% could be helpful.
- The definition is unclear, as the term "under control" is not defined.
- For legal persons, the notion of "control" should be better articulated and coordinated with the definition applicable in other legal sectors (e.g., corporate law; competition law).
- What does "control over the management" exactly mean (see art. 3, § 6, litt. a, sublitt. ii, of the directive)?
- A clear identification of the concept of "control of a legal entity" is necessary.
- The terms "control" and "sufficient" are not otherwise defined. Moreover, the fact of holding a sufficient percentage of shares or voting rights in a society does not mean they control the company.
- Relating to legal entities, the dichotomy provided by the definition ("owns or controls") is not clear because in some cases there is no coincidence of these two situations. Furthermore, the definition of control and beneficial owner should be established on the basis of the national legal rules and principles, instead of referring to presumptive criteria not coordinated with the overall legal system, in order to avoid conflicts of interpretations and/or repetition of the CDD measures.
- How to implement the "control" definition with regard to 25 %?

*Box 6: Examples of problems, questions and suggestions related to **complex and/or multilayered structures***

- The concept of the Directive does not provide clear guidance regarding multi-level and multi-national group structures, nor does it provide guidance on which legal persons (types of entities) are subject to clarification/identification procedures.
- The definition provides no guidance as to how the beneficial owner should be clarified/identified in case of multiple layers of (intermediate) shareholdings.

- The definition is only clear in the case of simple corporate structures/company forms. Where multi-level holding structures are concerned, the definition is too unclear; it should be simplified for identification purposes in the case of multi-level holding structures. In addition, it is sometimes virtually impossible to determine who has de facto control. Moreover, in the case of special national legal forms (such as a partnership under the Civil Code in Germany) there is the problem that there can be a multitude of fully liable partners. For such company forms, requirements should be eased such that, for example, (analogous to the German Fiscal Code) only a certain number of partners have to be identified.
- Generally speaking the definition of beneficial owner in the Directive is clear. Still, it does not provide for clear guidance regarding the level of detail of information to be determined for the beneficial owners of complex multi-level and multi-national group structures.
- How to use the 25 %-Rule in ownership structures with different levels?
- It would be useful to more clearly specify the beneficial owner of legal entities, given that the current system (for example, based on the 25% figure) could be difficult to apply to companies with an international organisation.

*Box 7: Examples of problems, questions and suggestions related to* ***specific legal entities and arrangements***

- Who is beneficial owner of investment funds? (different understanding of banks and attorneys/legal advisers of clients).
- It is unclear what the situation is in relation to funds. In a fund, no single investor may reach the 25% threshold so there is an ambiguity for fund administrators who are tasked with carrying out CDD - if they are supposed to carry out CDD on 'the fund', they might be able to argue they do not have to identify anybody as the ownership of the fund vehicle itself is dispersed among many fund investors owning far less than 25%.
  It should be clarified that a fund administrator has to carry out CDD, collect and maintain records etc, in relation to all the underlying investors in the fund.
- The definition provides no guidance as to which legal persons (types of entities) are subject to beneficial owner clarification/identification procedures.
- Why is there a slight difference between companies and foundations/trusts regarding the minimum share of a beneficial owner/beneficiary: “25 % plus one share” vs. “25 % or more”?
- The definition of beneficial owner is not very clear, especially because there are no cross-references to other laws and no indication/guidance as to the identification in case of shareholders in multi-layered corporate structures and no clear definition which legal person must be checked.
- The definition of beneficial owner contained in the Directive is too wide as far as trust law is concerned.
- A clarification will be required in domestic law especially in will situations.
- The directive is not compatible with Common Law and treats trust as Tax advance mechanisms.
- Because Ireland is a common law jurisdiction where trusts are frequently created or arise by operation of law (especially in relation to wills), the issue has caused considerable difficulty and a lot of the engagement with the Governmental departments as part of the consultation process has been on this issue.
- The definition of beneficial owner does not cover all the types of legal entities. In particular it is not clear whether a beneficial owner must be identified and how to determine the same in legal arrangements, such as association, where property or funds are not a relevant aspect and there is no ownership or control by the associates on the same.
- Who of the different persons involved has to be identified in the case of a discretionary trust?

*Box 8: **General** questions and comments*

- The connection between activities of customer and beneficial owner should be more precisely described. Art 3 (6)(a)(ii) needs to be clarified.
- Who is exactly the "beneficial owner" in case the customer is a natural person?
- What happens if the future beneficiaries are minors? There are jurisdictions in which minors do not have identity documents.
- It is unclear to which depth the CDD and ODD measures are to be taken in order to satisfy the regulators.
- The concept of beneficial owner is not addressed in other important legal areas (civil law, company law, etc.).
- The definition of beneficial owner generates a lot of interpretative difficulties in the everyday practice. It is diffuse and it has no relevance to our national legal system. Beneficial owner is not a legal term in our country, which gives rise to everyday interpretative mistakes.
- We would advise to emphasise the "ultimate" nature of the beneficial ownership in order to avoid terminology problems.

### 3.4.9 – Tightening of threshold to 20%?

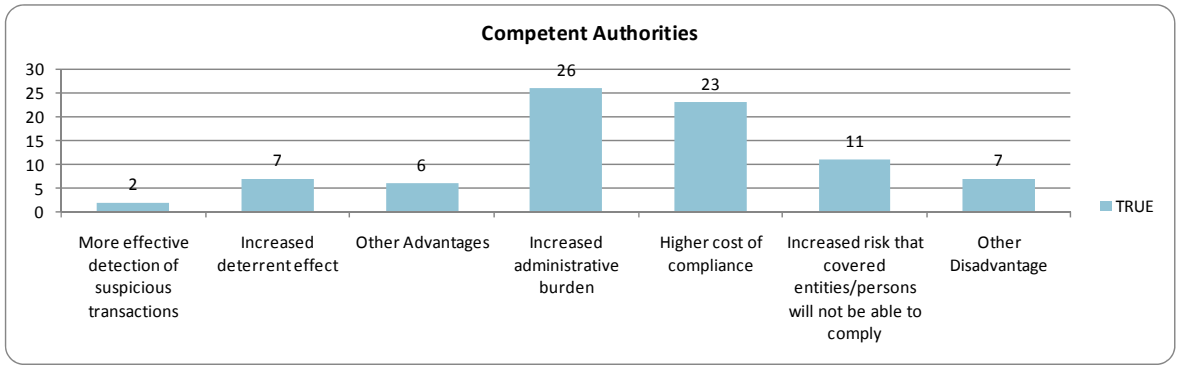
Stakeholders' positions on a possible tightening of the threshold to 20% are, with a limited number of exceptions, the same: **the threshold should not be lowered**.

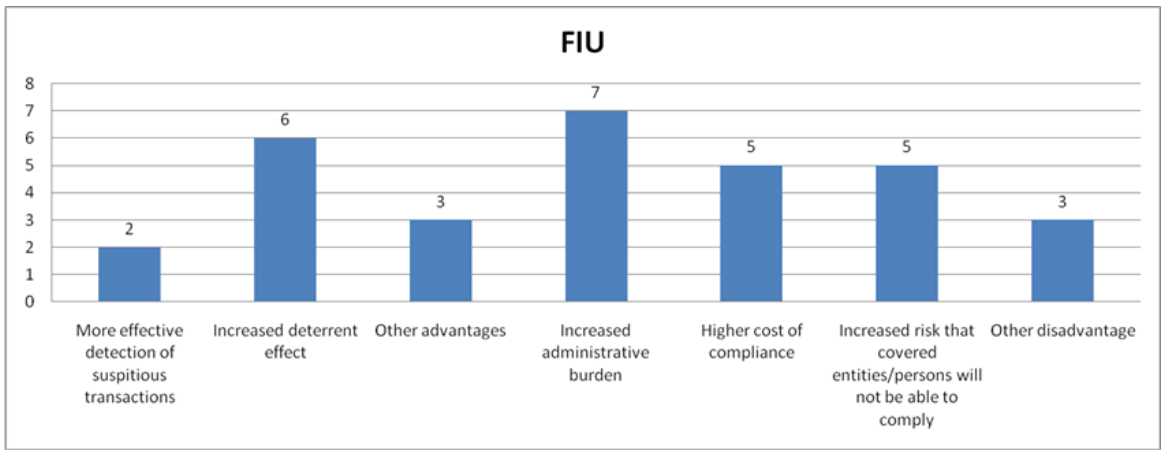
Many **arguments** have been advanced **against** lowering the threshold, of which the following were indicated most frequently:

- A tightening of the threshold would lead to increased administrative burden;
- A tightening of the threshold would give rise to a higher cost of compliance;
- There will be an increased risk that covered entities/persons will not be able to comply;
- The advantages of tightening would not outweigh the disadvantages;
- The effect would be to increase checks when there is no evidence of a compelling case for change;
- A diminution would increase costs, without a consequent increase in the value of STRs received;
- A rigid threshold fails to take account of the risks of different situations;
- In relation to compliance, the questions with regard to the definition as well as the practical problems cited below, demonstrate that the implementation of the obligations already currently presents a lot of difficulties.

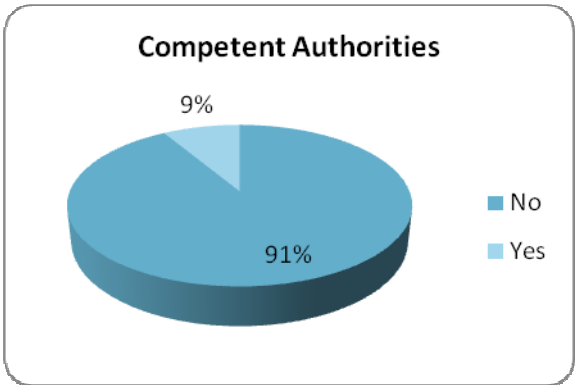
Based on the available information, we noted only Slovakia and Cyprus being clearly in favour of a lower threshold of 20 %. In Austria, Estonia and Hungary differences of opinion in relation to the tightening of the threshold exist between public stakeholders.

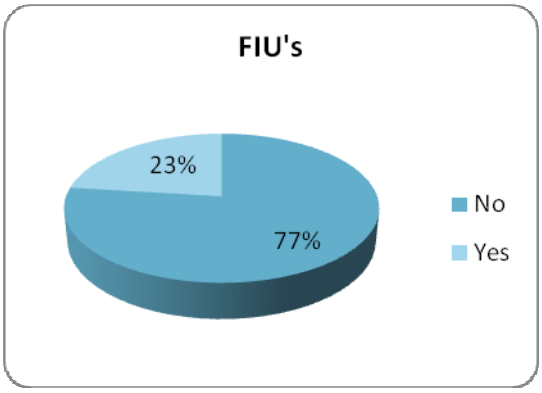
## What would the advantages/disadvantages be of such a diminution?




## Would the advantages outweigh the disadvantages?



### 3.4.10 – Opinions on practical identification process

Many comments were received from covered entities with regard to the **practical difficulties** they experience when identifying and verifying the identity of beneficial owners. Below an overview of comments that were often made and of suggestions for solutions made by stakeholders is presented.

#### *3.4.10.1* – Main difficulties

- Limited information publicly available;
- Time consuming process;
- Clients are reluctant to give the necessary information. This is often the case in smaller, non-listed companies owned by several shareholders;
- Little documentation available from foreign jurisdictions;
- The legal environment and publicly accessible commercial registers (company houses) of the various countries are not always sufficiently transparent and comprehensive and do not include information on the real owner of a company. Lack of knowledge as to the access to foreign listings and owner registers. We often experience difficulties when identifying and verifying beneficial owners of foreign non-EU jurisdictions;
- Difficulties in relation to identification and verification of beneficial owners of foreign customers (because of language problems, different legal documentation, etc.).
- Situations of chain of control;
- Data privacy legislation: In case of foreign beneficial owners privacy legislation does not often allow the transmission/collection of data;
- Data Privacy concerns: Collection of information on beneficial owners is often perceived as being privacy intruding;
- In general in relation to CDD: obligation of result;
- Off-shore registration of entities where there is no the access to commercial registers;
- The law requires people to have skill sets not in any way associated with their sector. Thus, beneficial ownership is an area of potential difficulty for property professionals.

#### *3.4.10.2* – Measures suggested by stakeholders:

- A national unit that will deal with the identification process in each country. Such unit could be asked for help in order to identify the beneficial owner and is obliged to cooperate with respective units in other countries;
- More public available information;
- Foster awareness of this matter within the economy sector (for example articles in well known economy-journals);
- Creation of public available registers with documentation and beneficial owners' information (useful especially for multinational companies);

- A list of which documents are trustworthy if the customer is a foreigner;
- Publishing of a FAQs-collection;
- Laws everywhere should oblige customers to give beneficial owners' information upon opening a bank account;
- The application of one uniform beneficial owners' declaration form;
- Legislation should be harmonized globally in order to ensure that persons performing certain actions (e.g. as bankrupt's estate's trustee) could have access to the information without limitations/restrictions set forth by states on grounds of, e.g. bank secrecy;
- The EU should limit the ability of entities to incorporate within their jurisdiction with unregistered beneficial ownership, subject to consideration of privacy and safety requirements;
- Reconsideration should be given to the application of beneficial ownership requirements to trusts, but this should be undertaken in close consultation with experts in trusts law from the outset;
- Additional transparency requirements;
- Company registries should contain both direct and indirect beneficial ownership data based on a new international standard.

On the subject of transparency requirements, the following specific additional comments and suggestions were made:

- Transparency requirements should be increased (Face to face business: CEO and real beneficial owner have to come together to the reporting entities. The real beneficial owner has to inform the CEO about changes, the CEO has to inform the reporting entities about the changes);
- Governments should work together to increase property transparency and availability of corporate ownership information;
- In Belgium transparency requirements were recently increased. When transposing the Directive, the Belgian legislator has introduced two additional transparency requirements:
  - An obligation for companies, legal entities and legal structures to communicate their beneficial ownership to covered institutions and persons and to provide these institutions and persons with updates on their request. Covered entities need to verify this information (AML law);
  - An obligation for shareholders of non-listed companies that have issued bearer shares or dematerialised shares to notify the respective company when they acquire 25% (company code).

  These requirements were introduced as an aid for identifying beneficial owners.

## 3.5 – Issue 5: CDD Threshold

(Article 7 (b) of the AML Directive)

In relation to the CDD threshold, the following questions were examined:

| |
|---|
| *Do occasional transactions of 15.000 EUR, whether in a single operation or in several operations, require CDD in national legislations/regulations? Does legislation/regulation provide for reports on cash transactions? How does the legislation/regulation define the meaning of "several operations which appeared to be linked"? Are any risk models/tools used to identify linked operations amounting up to 15.000 EUR?* |

### 3.5.1 – Occasional transactions

Article 7 (b) of the Directive requires that covered entities apply customer due diligence measure when carrying out occasional transactions amounting to 15.000 EUR or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked. An occasional transaction can be defined as any transaction other than a transaction carried out in the exercise an established business relationship. As such this provision makes sure that customer due diligence is also conducted in situations where no business relationship is (being) established due to lack of duration of the relationship.

The abovementioned requirement has been transposed in principle by all Member States. 9 Member States have however chosen to impose a threshold that is lower than the required 15.000 EUR for all or some occasional transactions[65]. The following thresholds are used:

| | **Threshold of 15.000 EUR or more** | **Other thresholds** |
|---|---|---|
| Austria (AT) | X | |
| Belgium (BE) | | The following thresholds are applicable[66]:<br>• 10.000 EUR or more for occasional transactions<br>• No threshold for fund transfers in the meaning of Regulation 1781/2006 on information on the payer accompanying transfers of funds |
| Bulgaria (BG) | X[67] | In addition to the threshold of 15.000 EUR the following threshold is applicable[68]:<br>• 10.000 BGN or more (approximately 5.113 EUR) for cash transactions |
| Cyprus (CY) | X | |

[65] BE, BG, CZ, ES, FR, HU, IT, LV and SK.
[66] Article 7, §2 of the Law of 11 January 1993 on preventing the use of the financial system for the purpose of money laundering and financing of terrorism.
[67] The threshold is 30.000 BGN which amounts to approximately 15.339 EUR.
[68] Article 4 of the Law on the Measures against Money Laundering.

| | | |
|---|---|---|
| Czech Republic (CZ) | X | In addition to the threshold of 15.000 EUR the following threshold is applicable:<br>• 1.000 EUR or more for every transaction (The customer only needs to be identified. The other CDD measures do not apply. However, full CDD will have to be applied when the threshold of 15.000 EUR is crossed) [69] |
| Germany (DE) | X | |
| Denmark (DK) | | The following threshold is applicable[70]:<br>• 100.000 DKK (approximately 13.417 EUR) for occasional transactions |
| Estonia (EE) | | The following threshold is applicable[71]:<br>• 200.000 Estonian Croons (approximately 12.783 EUR) for occasional transactions |
| Greece (EL) | X | |
| Spain (ES) | | The following thresholds are applicable:<br>• 3.000 EUR or more for occasional transactions (for financial institutions)[72]<br>• 8.000 EUR or more for occasional transactions (for non-financial professions)[73] but no threshold for transactions involving auditors, accountants, tax advisors, lawyers and notaries.<br>• No threshold for wire transfers. |
| Finland (FI) | X | |
| France (FR) | X | In addition to the threshold of 15.000 EUR the following thresholds are applicable[74]:<br>• 8.000 EUR or more for money exchange transactions<br>• No threshold for fund transfers and asset custody services<br>• No threshold in relations to sums and transaction for which there is a good reason to suspect that they originate from criminal offices punishable with a sentence of 1 year or more or are being used for financing of terrorism. |
| Hungary (HU) | | The following thresholds are applicable:<br>• 3.600.000 forints or more (approximately 13.130 EUR) for occasional transactions[75]<br>• 500.000 forints or more (approximately 1.823 EUR) for money exchange transactions[76] |

[69] Article 7 of Act No. 253/2008 Coll. on selected measures against legitimization of proceeds of crime and financing of terrorism.

[70] Section 14 of the Act on Measures to Prevent Money Laundering and Financing of Terrorism.

[71] Section 12(2),1) of the Money Laundering and Terrorist Financing Prevention Act. As of 1.1.2011 the threshold will be set at 15.000 EUR.

[72] Article 4 of the Royal Decree Nr. 925/1995 implementing Law 13/1993 concerning specific measures to prevent money laundering (A new Royal Decree implementing article 10(3) of Law 10/2010 will lower the threshold to 1.000 EUR in the near future).

[73] Article 16 of the Royal Decree Nr. 925/1995 implementing Law 13/1993 concerning specific measures to prevent money laundering (A new Royal Decree implementing article 10(3) of Law 10/2010 will lower the threshold to 1.000 EUR in the near future).

[74] Articles L561-5 j. R561-10, II of the Monetary and Financial Code.

[75] Section 6 of Act CXXXVI of 2007 on the Prevention and Combating of Money Laundering and Terrorist Financing.

[76] Section 17 of Act CXXXVI of 2007 on the Prevention and Combating of Money Laundering and Terrorist Financing.

| | | |
|---|---|---|
| Italy (IT) | X | In addition to the threshold of 15.000 EUR the following threshold is applicable[77]:<br>No threshold for transactions involving financial agents entered in the list referred to in Article 3 of Legislative Decree 374/1999. |
| Lithuania (LT) | X | In addition to the threshold of 15.000 EUR the following thresholds are applicable[78]:<br>• 600 EUR or more for money exchange transactions<br>• 600 EUR or more when performing internal and international remittance transfer services |
| Luxembourg (LU) | X | |
| Latvia (LV) | X | |
| Malta (MT) | X | |
| Netherlands (NL) | X | |
| Poland (PL) | X | |
| Portugal (PT) | X | |
| Romania (RO) | X | |
| Sweden (SE) | X | |
| Slovenia (SI) | X | |
| Slovakia (SK) | X | In addition to the threshold of 15.000 EUR the following threshold is applicable[79]:<br>• 2.000 EUR or more for all transactions |
| United Kingdom (UK) | X | |

The majority of the Member States have indicated that they have not defined the meaning of "several operations which appeared to be linked" as the term is considered self-explanatory. Eight Member States have however done so by means of including indicators that point to transactions that have been split to avoid customer due diligence in their legislation or guidance[80]. Financial institutions reported that split (or linked) transactions can be detected by the AML/CFT monitoring systems they have in place and as such no specific tools have been developed to deal with the issue.

[77] Article 15(4) of Legislative Decree 231/2007.
[78] Article 9, §1, of the Law No. VIII-275 on the Prevention of Money Laundering.
[79] Section 10, §13 of Act No. 297/2008 on the Prevention of Legalization of Proceeds of Criminal Activity and Terrorist Financing.
[80] DE, DK, HU, IT, LT, MT, NL and RO.

## 3.5.2 – Cash transactions

### *3.5.2.1 – Reporting of cash transactions*

While not required by the Directive eleven Member States[81] require that cash transactions above a certain threshold are reported to the FIU. This reporting threshold differs from Member State to Member State and from profession to profession. The following thresholds are used:

| | **Thresholds** |
|---|---|
| Austria (AT) | Credit institutions have to report all requests to withdraw savings deposits if[82]:<br>• The requests are submitted after 30 June 2002; and<br>• The customer's identity has not yet been ascertained for the savings deposit (i.e. savings accounts opened before 2002); and<br>• The payment is from a savings account which shows a balance of at least 1.000 EUR or an equivalent value. |
| Belgium (BE) | Casinos must report the following cash transactions[83]:<br>• Purchase of chips by a customer amounting to 10.000 EUR or more;<br>• Purchase of chips by a customer amounting to 2.500 EUR or more when paid in foreign currency. |
| Bulgaria (BG) | The covered entities must report any cash payment exceeding 30.000 BGN (approximately 15.339 EUR)[84]. |
| Estonia (EE) | The covered entities with the exception of credit institutions must report any cash transaction exceeding 500.000 Estonian Croons (approximately 31.957 EUR). A credit institution must report every currency exchange exceeding 500.000 Estonian Croons (approximately 31.957 EUR), unless the credit institution has a business relationship with the persons participating in the transaction[85]. |
| Latvia (LV) | The reporting thresholds in Latvia differ from profession to profession[86]:<br>Credit Institutions must report:<br>• Cash transaction in the amount of 40.000 lats (approximately 56.400 EUR)and more (except disbursement of salaries, pensions and social benefits, credits and interbank transactions);<br>• A transaction in the amount of 1.000 lats (approximately 1.410 EUR)and more, where coins or banknotes of a low par value are exchanged for banknotes of a higher denomination (or vice versa) or for other banknotes of the same denomination; |

[81] AT, BE, BG, EE, ES, LV, LT, NL, PL, RO and SI.
[82] Article 41 (1a) of the Banking Act.
[83] Article 2 of the Royal Decree implementing article 26, §2 of the Law of 11 January 1993 on preventing the use of the financial system for the purpose of money laundering and financing of terrorism (only the specific cash related transactions have been mentioned).
[84] Article 11a of the Law on the Measures against Money Laundering.
[85] Section 32 of the Money Laundering and Terrorist Financing Prevention Act, from 1.1.2011 these thresholds will be set at 32,000 EUR. .
[86] Regulation Nr. 1071 on unusual transaction indictor list and procedure for reporting unusual and suspicious transactions.

| | |
|---|---|
| | • A client withdraws 40.000 lats (approximately 56.400 EUR) and more in cash using credit cards or other payment cards within a period of a month;<br>• A client sells or purchases foreign currency in cash without opening an account in the amount the equivalent of which is 5.000 lats (approximately 7.050 EUR) and more.<br><br>Investment broker companies and credit institutions must report when a client of a credit institution or brokerage company pays for services received and for transactions in transferable securities, by making a single payment in cash the amount of which is 10.000 lats (approximately 14.100 EUR) and more.<br><br>Capital companies that buy and sell foreign currency in cash must report when a client buys or sells foreign currency equivalent to the amount of 5.000 lats (approximately 7.050 EUR) and more.<br><br>Money remittance and transfer services providers entitled to provide such services (excluding credit institutions) must report transactions in the amount of 25 000 lats (approximately 35.250 EUR) and more when providing transferring or remitting services.<br><br>Sworn auditors, sworn auditor companies (within the framework of audit volume and sampling) tax advisors, external accountants must report when the client has received a loan from natural persons (including capital company owner) 40.000 lats (approximately 56.400 EUR) or more in cash (for owner of the capital company – when loans to the capital company in cash exceeds the amount of dividends received for 40.000 lats or more).<br><br>Sworn notaries must report when a client deposits cash in the amount of 10.000 lats (approximately 14.100 EUR) and more.<br><br>Sworn advocates and other independent legal services providers must report when a client deposits or receives cash in the amount of 10.000 lats (approximately 14.100 EUR) and more, authorizing to perform financial intermediation.<br><br>Real Estate Agents must report when:<br>• A client purchases real estate and concludes an agreement that foresees payment in one or several instalments in cash in the amount of 15.000 lats (approximately 21.150 EUR) and more;<br>• A client concluding an agreement on cooperation for real estate purchase pays to the merchants cashier cash in the amount of 20.000 lats (approximately 28.200 EUR) and more.<br><br>Car dealers must report when a client purchasing a car pays cash in one or several instalments in the amount of 20.000 lats (approximately 28.200 EUR) and more.<br><br>Merchants dealing with precious metals, precious stones and articles thereof must report when a client purchasing precious metals, precious stones and articles thereof pays cash in the amount of 10.000 lats (approximately 14.100 EUR and more. |

| | |
|---|---|
| Lithuania (LT) | Covered entities, with the exception of lawyers and their assistants, must report every cash transactions exceeding 15.000 EUR or the equivalent in foreign currency[87]. |
| Netherlands (NL) | The reporting thresholds differ from profession to profession[88]:<br><br>Financial institutions must report:<br>• A transaction in the amount of15.000 EUR and more, where currency is exchanged or banknotes of a low value are exchanged for banknotes of a higher denomination;<br>• Money transfers of 2.000 EUR or more where the funds are made available or paid out in cash, unless it is the transaction where a money transfer office uses another money transfer office, subject to a reporting obligation, to execute the transaction.<br><br>Merchant in high value goods must report cash transaction exceeding 25.000 EUR.<br><br>Independent legal advisor, lawyers, notaries, tax advisors, external accountants, corporate advisors, real estate agents and trust offices must cash transactions exceeding 15.000 EUR. |
| Poland (PL) | The covered entities conducting a transaction exceeding the equivalent of 15.000 EUR are required to report such a transaction, also if it is carried out by more than one single operation but the circumstances indicate that they are linked and that they were divided into operations of less value with the intent to avoid the reporting requirement.[89] |
| Romania (RO) | The covered entities must report cash transactions exceeding the equivalent in RON of 15.000 EUR[90] also if carried out by more than one single operation. |
| Slovenia (SI) | The covered entities must report cash transactions exceeding 30.000 EUR[91]. |
| Spain (ES) | Financial institutions must report the following transactions[92]:<br>• Cash transactions exceeding 30.000 EUR or the equivalent in foreign currency, with the exception when the funds are credited or debited the account of a customer<br>• Money exchange transactions exceeding 3.000 EUR or the equivalent in foreign currency.<br>• No threshold for wire transfers<br>• No threshold for transactions involving auditors, accountants, tax advisors, lawyers and notaries |

87 Article 17 of the Law No. VIII-275 on the Prevention of Money Laundering

88 Regulation of 15 July 2008 on the implementation of the Law on the Prevention of Money Laundering and Terrorist Financing.

89 Article 8 of the Act of 16 November 2000 on counteracting money laundering and terrorism financing.

90 Article 3(6) of Law No. 656 of 17 December 2002 on prevention and sanctioning money laundering, as well as for setting up some measures for prevention and combating terrorism.

91 Article 38 of Prevention of Money Laundering and Terrorist Financing Act.

92 Article 7 of the Royal Decree Nr. 925/1995 implementing Law 13/1993 concerning specific measures to prevent money laundering.

### *3.5.2.2 – Prohibition of cash transactions*

Six Member States have gone further than implementing a reporting obligation and have included a prohibition of certain cash transactions[93] in their AML legislation. These cash transaction are:

| *3.5.2.3 –* | **Cash transaction** |
|---|---|
| Belgium (BE) | The following cash transaction are prohibited[94]:<br>• Cash payments exceeding 15.000 EUR or 10% of the purchase price when purchasing real estate;<br>• Cash payment exceeding 15.000 EUR when purchasing one or more goods. |
| Denmark (DK) | Retailers and auctioneers may not receive cash payments of DKK 100,000 or more irrespective of whether payment is effected in one instance or as several payments that seem to be mutually connected[95]. |
| France (FR) | The following cash transaction are prohibited[96]:<br>• Transactions over 3.000 EUR when the debtor has his place of residence in France or acting in a professional capacity;<br>• Transactions over 15.000 EUR when the debtor does not have his place of residence in France or acting in a professional capacity and is not acting in a professional capacity. |
| Italy (IT) | It is forbidden[97]:<br>• For any reason to transfer cash, in euro or foreign currency between different persons when the value of the transaction, even if subdivided, is 5.000 EUR or more in total. Transfers may however be made through banks, electronic money institutions and Poste Italiane;<br>• To transfer cash for amounts of 2.000 EUR or more by means of persons providing payment services in the form of encashment and transfer of funds, solely as regards transactions for which loan and financial brokers are used. Such a transaction is however allowed if the person ordering the transaction gives the intermediary a copy of the documentation necessary to attest the appropriateness of the transaction in relation to such person's own economic profile. |
| Romania (RO) | According to Government's Ordinance 15/1996, amended and completed, payment operations between legal entities shall be made only by non-cash payment instruments (there are certain exemptions regarding payment of wages, payments between legal persons under 10.000 lei, as well as other payments between legal and natural persons). |
| Slovenia (SI) | Persons pursuing the activity of selling goods in the Republic of Slovenia shall not accept cash payments exceeding 15.000 EUR from their customers or third persons when selling individual goods. Persons pursuing the activity of selling goods shall |

[93] BE, DK, FR, IT, RO and SI.
[94] Articles 20 and 21 of the Law of 11 January 1993 on preventing the use of the financial system for the purpose of money laundering and financing of terrorism.
[95] Section 2 of Act on Measures to Prevent Money Laundering and Financing of Terrorism.
[96] Article D112-3 j. L112-6 of Monetary and Financial Code.
[97] Article 49 of Legislative Decree 231/2007.

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|---|---|
| | also include legal entities and natural persons who organise or conduct auctions, deal in works of art, precious metals or stones or products thereof, and other legal entities and natural persons who accept cash payments for goods.[98]. |

Many stakeholders from across all sectors have indicated that it is undesirable to introduce a prohibition of cash transactions above 15.000 EUR in the European Anti-Money Laundering legislation as it might, in their opinion, cause people to use alternative (illegal) circuits with less or no AML measures in place.

[98] Article 37 of Prevention of Money Laundering and Terrorist Financing Act

## 3.6 – Issue 6: CDD – The question of the anonymous accounts

In relation to the issue of anonymous accounts, the following questions were examined:

*Has the prohibition to keep anonymous accounts or passbooks been transposed literally in national legislation/regulation? Have existing anonymous accounts or anonymous passbooks been made the subject of CDD measures? Are there any specific rules on numbered accounts and accounts or passbooks on fictitious names?*

### 3.6.1 – Prohibition of anonymous accounts and passbooks

Article 6 of the Directive requires that Member States prohibit their credit and financial institutions from keeping anonymous accounts or anonymous passbooks. This prohibition has been implemented by all Member States[99].

Making use of the freedom offered to them by the directive, the Members State have implemented the prohibition of anonymous accounts or anonymous passbooks in a number of different ways. The majority of the Members States have almost literally transposed the prohibition of the Directive into their primary or secondary legislation[100]. The other Member States have chosen not include a specific prohibition as the opening of anonymous accounts is already prevented by requiring financial institutions to identify a customer when establishing a business relationship and/or prohibiting the use of names other than the one of the identified customer[101].

A small number of Member States allow the opening of numbered accounts[102]. Notwithstanding the fact that the accounts are numbered, normal customer due diligence will always be conducted when the account is opened. As such the identity of the customer is known by the financial institution where the account is held. The other Member States have indicated that numbered accounts are not part of the banking tradition or only exist in very small numbers.

### 3.6.2 – Existing anonymous accounts or passbooks

A number of Member States have indicated that anonymous accounts or passbooks where already forbidden (long) before the enactment of the Directive and as such are not present in their country[103]. In Member States where anonymous accounts opened before the introduction of the prohibition still exist, the funds on the accounts will only be released to the account holder after customer due diligence has been performed and the account is (re)registered in the customer name[104].

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[99] Some Member States allow the opening of accounts that do not mention the name of the accountholder. In Italy, for example, the legislation allows credit institutions and the Poste Italiane to issue bearer passbook account, provided that the balance does not exceed 5.000 euro[99]. In Austria banking legislation allows credit institutions to issue savings accounts with a certain designation instead of the name of the accountholder[99]. In both cases however the customer is subject to normal customer due diligence (e.g. in Austria neither the opening nor any withdrawal can be conducted anonymously) and monitoring by the financial institutions involved. Therefore these accounts are not qualified as anonymous.
See Article 49, §12 of the Legislative Decree 231/2007 (Italian AML/CFT Law). See also FAFT Mutual Evaluation of Italy of 28 February 2006, p. 5, nr. 25 and FATF Mutual Evaluation Follow-up report of Italy of 27 February 2009, p. 9, nr. 36. Article 32§4 and 40 §1, n°1 of the Bankwesengesetz (Austrian Banking Act). See also FAFT Mutual Evaluation of Austria of 23 June 2009, p. 99, nr. 430.

[100] AT, BE, BG, CY, FR, EL, ES, IE, IT, LV, LT, LU, MT, RO, SI, SE and UK.

[101] CZ, DE, DK, EE, ES, FI, HU, NL, PL and SK.

[102] AT, BE, LU and NL.

[103] BE, CZ, EE, FI, DE, EL, LT, LU, LV, PT, RO, SK and SE

[104] E.g. DK, HU, PL, SI and UK.

## 3.7 – Issue 7: CDD – The question of the casinos

In relation to the issue of identification of casino customers, the following questions were examined:

*Does national legislation/regulation provide for identification of casino customers if they purchase or exchange gambling chips with a value of 2.000 EUR or more? Does national legislation/regulation impose registration, identification and verification of customers immediately on or before entry, regardless of the amount of chips?*

Article 10 of the Directive stipulates that all casino customers must be identified and their identity verified if they purchase or exchange gambling chips with a value of 2.000 EUR or more. Casinos subject to state supervision shall be deemed in any event to have satisfied the customer due diligence requirements if they register, identify and verify the identity of their customers immediately on or before entry, regardless of the amount of gambling chips purchased.

All Member States comply with the abovementioned provision by requiring casinos, which are subject to state supervision, to register, identify and verify customers immediately on or before entry, regardless of the amount of chips purchased[105]. This obligation is generally aimed at preventing, not only money laundering, but also underage gambling. As such the obligation can be contained in sector-specific gambling legislation, the anti-money laundering legislation or both.

In addition to the identification duty before or on entry, sixteen Member States require that casinos perform an identification of their customers when they purchase or exchange gambling chips[106]. In eleven Member States this identification must be performed when gambling chips for a value of 2.000 EUR or more are exchanged or purchased[107]. Six Member States have set the threshold even lower at 1.000 EUR[108]. One Member State, Bulgaria, however maintains a higher threshold of 6.000 Bulgarian Lev which amounts to approximately 3.068 EUR.

In practice it is not always clear if the identification when purchasing chips is still required when the customer has already been identified when he entered the casino. The reason for this is the fact that the identification requirement at entry is sometimes, as already indicated above, prescribed by the gambling legislation which does not take in account the anti-money laundering legislation and vice versa.

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[105] There are no casinos in CY and IE. In Ireland there are however so-called "Private Members' Gaming Clubs" which engage in casino-like activities. These Clubs are regarded as "designated persons" under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 and are subject to the full CDD and reporting requirements. As the clubs are private, they are only accessible to members. These members are identified when they join the club Under the AML Act 2010 these clubs are required to be registered by the Minister for Justice and Law Reform; their future status is under review as part of an overall review of gambling in Ireland.

[106] BE, BG, CZ, FR, DE, EE, ES, IT, LU, LV, MT, PL, PT, RO, SK and UK.

[107] FR, DE, ES, IT, LU, MT, PT, RO, SK and UK. Estonia has set the threshold at 30.000 Estonian Croon which amounts to approximately 1.917 EUR. As of 1.1.2011 the threshold will be set at 2.000 EUR.

[108] BE, CZ, EE, IT (for online casino's), LV and PL.

## 3.8 – Issue 8: Simplified CDD

*(Application of article 11 of the AML Directive and Article 3 of the implementing measures)*

In relation to simplified due diligence, the following questions were examined:

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|---|
| *How does national legislation deal with simplified customer due diligence? In which circumstances is simplified customer due diligence authorized? How has Article 3(4) of Directive 2006/70: EC been applied? How is the question of equivalence of third country rules treated in this context by the Member States? Have white lists of equivalent third countries been established? For all cases of Article 11? What is the difference, in practice, for covered entities between simplified customer due diligence pursuant to Article 11 of the AML Directive and Article 3 of the implementing measures on the one hand, and a low level of CDD resulting from the application of the risk-based approach to normal CDD [pursuant to Article 8(2)] on the other hand?* |

Article 11 of the Directive and article 3 of the Implementation Directive describe types of customers, transactions and products that present a lower risk of money laundering and terrorist financing. For such customers, transactions and products, a simplified customer due diligence regime applies. This regime provides a derogation from the normal customer due diligence requirements in certain well defined situations. However, covered entities are still required to gather sufficient data (e.g. identify the customer) to assess whether a customer meets the requirements for the regime.

### 3.8.1 – Implementation by the Member States

**All Member States** have **implemented simplified customer due diligence**. The situations in which it is allowed, can differ slightly from Member State to Member State.

#### *3.8.1.1 – Low risk customers as defined in article 11(1)-(2) of the Directive and article 3(1)-(2) of the Implementation Directive*

Simplified customer due diligence is possible in relation to the following customers:

- In all Member States: **Credit or financial institutions** covered by this directive or credit or financial institutions situated in a third country which imposes requirements equivalent to those laid down in the Directive and are supervised for compliance with those requirements;
- In 26 Members States[109]: **Listed companies** whose securities are admitted to trading on a regulated market within the meaning of the Markets in Financial Instruments Directive (or national implementation measure) in one or more Member States and listed companies from third countries which are subject to disclosure requirements consistent with Community legislation;
- In 20 Members States[110]: **Beneficial owners of pooled accounts** held by notaries and other independent legal professionals from the Member States, or from third countries provided that they are subject to requirements to combat money laundering or terrorist financing consistent with international standards and are supervised for compliance with those requirements and provided that the information on the identity of the beneficial owner is available, on request, to the institutions that act as depository institutions for the pooled accounts;
- In all Member States: **Domestic public authorities**;

[109] AT, BE, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK and UK.

[110] AT, BE, BG, CZ, DE, DK, EE, FI (Independent legal professional must be located in EEA), FR, IE, LT, LV, LU, MT, NL, PT (The pooled account must be held in Portugal), RO, SE, SK and UK.

- In 23 Member States[111]: **Public authorities or public bodies** who fulfil the criteria of article 3(1) of the implementation measures;
- **Entities that undertake financial activities** outside the scope of article 2 of the Directive and who fulfil the criteria of article 3(2) of the Implementing Directive, in 5 Member States[112]. These 5 Member States have however only transposed the criteria mentioned in the article. They have not defined which additional financial institutions they consider low risk. This assessment is left to the covered entities.

*3.8.1.2 – Low risk products and transactions as defined in article 11(5) of the Directive and article 3(3) of the Implementing Directive*

Following **products and related transaction**s are considered to represent a low risk of money laundering or terrorist financing:

- **Life insurance policies** where the annual premium is no more than EUR 1 000 or the single premium is no more than EUR 2 500, in all Member States;
- **Insurance policies** for pension schemes if there is no surrender clause and the policy cannot be used as collateral, in twenty six Member States[113];
- **A pension**, superannuation or similar scheme that provides retirement benefits to employees, where contributions are made by way of deduction from wages and the scheme rules do not permit the assignment of a member's interest under the scheme, in twenty three Member States[114];
- **Electronic money**, as defined in Article 1(3)(b) of Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions where, if the device cannot be recharged, the maximum amount stored in the device is no more than EUR 150, or where, if the device can be recharged, a limit of EUR 2 500 is imposed on the total amount transacted in a calendar year, except when an amount of EUR 1 000 or more is redeemed in that same calendar year by the bearer as referred to in Article 3 of Directive 2000/46/EC, in twenty four Member States[115] ;
- **Other low risk products and transactions** which fulfil the criteria of article 3(3) of the implementation measures, in thirteen Member States[116].

The thirteen Member States which have implemented article 3(3) of the Implementation Directive have done so in 3 different ways:

1. Eight Member States[117] have limited the transposition of article 3(3) to the criteria mentioned in the article. They have not defined the products that are low risk.
2. Three Member States[118] have decided to define which products fulfil the criteria of article 3(3) themselves without transposing the criteria themselves.

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[111] AT, BG, CY, CZ, DE, DK, EE, FR, EL, HU, IE, IT, LT, LV, LU, MT, NL, PT, RO, SE, SI, SK and UK. Examples of customers, which fulfil the criteria of article 3(1), are, inter alia: EU institutions (the Council, the Parliament, the Commission etc.), EU financial bodies (European Central Bank, European Investment Bank), EU decentralised bodies – agencies (Community agencies, agencies for common foreign and security policy, agencies for judicial cooperation in criminal matters, implementing agencies).

[112] AT (this particular category of SCDD exists only with regard to customers of lawyers), LV, LU, MT and SI.

[113] AT, BE, CY, CZ, DE, DK, EE,EL, ES, FI, FR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK and UK.

[114] BE, CY, CZ, DE, DK, EE,EL, ES, FI, FR, HU, IE, IT, LT, LU, LV, MT, NL, PT, SE, SI, SK and UK.

[115] AT, BE, CY, CZ, DE, DK, EL, ES, FI, FR, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK and UK.

[116] AT, CZ, DE, DK, EE, FR, LU, LV, MT, RO, SE, SK and UK.

[117] CZ, DK, LV, LU, MT, RO, SE and SK.

[118] AT (savings activities for classes of school pupils, under certain conditions - §40a (2), 2 of the Federal Banking Act) – in Austria, the specific framework for savings activities of school pupils is not considered as an application of simplified customer due diligence under Art. 3(3) of the Implementation Directive but rather as a specification of beneficial owners identification and verification requirements, EE (transactions with units of an investment fund and with units of mandatory

3. Two Member States have defined which additional low risk products fulfil the criteria of article 3(3) and transposed the criteria[119].

*3.8.1.3 – Equivalence of third countries*

Article 11 of the Directive (and its national transpositions) only allow simplified customer due diligence to be applied in regard to a customer from third countries if the relevant legislation in the country involved is considered **equivalen**t to certain standards. Article 11(1) requires that third countries involved impose requirements equivalent to those laid down in the Directive. Article 11(2) on the other hand stipulates that listed companies from third countries must be subject to disclosure requirements consistent with Community legislation. Finally article 11(3) only allows simplified customer due diligence with regard to beneficial owners of pooled accounts if the notaries or independent legal professionals from third countries holding the account are subject to requirements to combat money laundering or terrorist or terrorist financing consistent with international standards and are supervised for compliance with those requirements and provided that the information on the beneficial owner is available on request to the institutions that act as depository institutions for the pooled accounts.

Member States have established **lists of third countries which impose requirements** equivalent to those laid down in the Directive. As such in the context of simplified due diligence, the lists, in principle, relate only to article 11(1). A number of Member States[120] have also made the list applicable on article 11(3) by extending the aforementioned standard to the article. In other words, they require that the notaries or independent legal professionals involved are subject to requirements equivalent to those laid down in the Directive instead of international standards.

Twenty five Member States have published a list of such countries in their laws, secondary regulation or guidance[121]. The national lists are all based on the EU Common Understanding between Member States on third country equivalence under the Anti-Money Laundering Directive. The Member States have however indicated that their national list only provides a presumption of equivalence and as such does not override the obligation of covered entities to carry a risk based assessment of each transaction.

Luxemburg has stated that there is no list of equivalent third countries in its legislation or guidance[122].

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pension fund; bank accounts of natural persons, under certain conditions - §4 of the Minister of Finance Regulation No. 11 of 3 April 2008) and FR (accident insurance; health insurance; insurance contracts covering death, risks to the physical integrity of the person, risk related to pregnancy, the risks of incapacity for work or invalidity or unemployment risk and outstanding balance insurance; car insurance; airplane insurance; maritime insurance; transport insurance; fire insurance; Civil liability insurance; credit Insurance; legal expenses insurance; assistance insurance; Financing of physical assets of which the property rights are not transferred to the client or only after termination of the contractual relationship and financial rent does not exceed 15000 euro before taxes per year; consumer credit transaction under certain conditions; securities accounts for the purpose of benefiting from a capital increase by a company, free shares, stock options or the purchase of shares – article R561-16 of the Monetary and Financial Code).

[119] DE (state subsidized, fully funded private pension; capital-forming investment, where the contract meets the conditions for state subsidies; a loan contract, financial leasing contract or installment sale transaction with a consumer; a loan contract as part of a state subsidy program carried out by a federal or state development bank, where the loan amount must be used for a designated purpose; credit contract for installment financing; any other loan contract where the loan account serves the exclusive purpose of repaying the loan and the loan payments are withdrawn from the creditor's account with a credit institution; a savings agreement; a leasing agreement - §25d of the Banking Act) and UK (children trust fund – Article 13 of the Money Laundering Regulations 2007 ) .

[120] BG, DK, FR, LV, MT, NL, RO, SE and SK.

[121] AT, BE, BG, CY, CZ, DE, DK, EE, ES, EL, FI, FR, HU, IE, IT, LV, NL, MT, PL, PT, RO, SK, SI, SE and UK.

[122] Grand-Ducal Regulation of 29 July 2008 which contained the list was repealed at the end of 2009 due to a recommendation from the FATF.

*3.8.1.4 – Risk assessment*

Article 3(4) of the Implementing Directive stipulates that in assessing whether the customer or product and transactions referred to paragraphs 1, 2 and 3 of article 3 represent a **low risk of money laundering or terrorist financing**, the Member States must pay special attention to any activity of those customers or to any type of product or transaction which may be regarded as particularly likely, by its nature, to be used or abused for money laundering or terrorist financing purposes. If there is information available that suggest that the risk of money laundering or terrorist financing is not low, simplified customer due diligence may not be applied.

As indicated above the majority of the Member States that have transposed article 3 of the Implementing Directive, have limited their transposition to the criteria mentioned in the article. They have not defined which customers, product and transactions fulfil the criteria contained in the article. It is left to the covered entities to make this assessment.

Where Member States have decided to define the products that fulfil the criteria of article 3(3) themselves, it is unclear whether the Member States have made risk assessments pursuant to article 3(4).

However all products involved such as a children trust fund and leasing appear to be low risk and not very susceptible to abuse, which indicates that a risk assessment has taken place. Furthermore in Italy and Slovenia, the legislation requires that when determining the types of products and related transactions that do not require normal customer due diligence, the competent authority must conduct the aforementioned risk assessment.

## 3.8.2 – Implementation by stakeholders

**No issues** regarding application of simplified CDD were reported by the stakeholders. They indicated that the regime is part of their normal internal customer due diligence procedures and guidelines.

Some stakeholders did comment that simplified customer due diligence adds a level of complexity to their operations as they have to ascertain if a person falls within the simplified CDD regime. To avoid this added cost, they generally apply normal CDD to all their customers. Others have however stated that the categories are sufficiently clear to allow an efficient and cost effective application.

The stakeholders also indicated that there are, in practice, no significant differences between simplified customer due diligence and low level normal customer due diligence. The main difference between the two regimes is the fact that simplified customer due diligence is limited to the identification of client to assess if he/she meets the requirements for the regime while in case of low level customer due diligence all the due diligence requirements are still applicable, although at a reduced level. As such the covered entities, who make use of the simplified customer due diligence regime, only gather the data required (e.g. identify the customer) to assess whether a customer meets the requirements for the regime.

## Table: Simplified customer due diligence requirements[123]

| Requirements | AT | BE | BG | CY | CZ | DE | DK | EE | EL | ES | FI | FR | HU | IE | IT | LT | LU | LV | MT | NL | PL | PT | RO | SE | SI | SK | UK |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Art. 11(1): the customer is a credit or financial institution | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X |
| Art. 11(2)(a): listed companies | X | X | | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X |
| Art. 11(2)(b): beneficial owners of pooled accounts held by legal professionals | X | X | X | | X | X | X | X | | | X | X | | X | | X | X | X | X | X | | X | X | X | | X | X |
| Art. 11(2)(c): domestic public authorities | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X |
| Art. 11(5)(a): life insurance | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X |
| Art. 11(5)(b): pension schemes | X | X | | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X |
| Art. 11(5)(c): employee Schemes | | X | | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | | X | | X | X | X | X |
| Art. 11(5)(d): e-money | X | X | | X | X | X | X | | X | X | X | X | | X | X | X | X | X | X | X | X | X | X | X | X | X | X |
| Directive 2006/70/EC, Art.3(1): EC/EU institutions | X | | X | X | X | X | X | X | X | | | X | X | X | X | X | X | X | X | X | | X | X | X | X | X | X |
| Directive 2006/70/EC, Art. 3(2): Other financial institutions | X | | | | | | | | | | | | | | | | X | X | X | | | | | | X | | |
| Directive 2006/70/EC, Art. 3(3): low risk products | X | | | | X | X | X | X | | | | X | | | | | X | X | X | | | | X | X | | X | X |

[123] Data compared with the overview of simplified customer due diligence requirements contained on p. 46 of the "Commission Staff Working Paper on Compliance with the anti-money laundering directive by cross-border banking groups at group level". The report is available at http://ec.europa.eu/internal_market/company/docs/financial-crime/compli_cbb_en.pdf.

## 3.9 – Issue 9: Enhanced CDD: politically exposed persons (PEPs)

In relation to this issue, the following questions have been examined (Application of Articles 13 (4) and 3(8) of the AML Directive and Article 2 of the Implementing measures)

*How does national legislation deal with domestic and non-domestic PEPs? How has the definition of PEP been implemented? Do national authorities provide any assistance to covered entities regarding identification of domestic and non-domestic PEPs? How is the PEP issue treated (regarding identification of PEPs, approval of initiation of business relationship with PEP's and monitoring of PEPs activities) by covered entities in practice? Is the purchase of lists of PEPs from data vendors the only solution to PEP identification? How do covered entities deal with existing customers that become PEP's later on? What do covered entities generally do when persons are no longer entrusted with public functions? Are there different approaches between credit and financial institutions on the one hand and non-financial professions or casinos on the other? Do professional associations of covered entities or self – regulatory bodies provide any kind of assistance in this regard?*

### 3.9.1 – Introduction

The Directive[124] defines '**politically exposed persons'** as natural persons who are or have been entrusted with prominent public functions and **immediate family members**, or persons known to be **close associates**, of such persons.

The Implementing Directive describes the **different components of the definition** in detail:

1. 'Natural persons who are or have been entrusted with prominent public functions' shall include the following:
   a) Heads of State, heads of government, ministers and deputy or assistant ministers;
   b) Members of parliaments;
   c) Members of supreme courts, of constitutional courts or of other high-level judicial bodies whose decisions are not subject to further appeal, except in exceptional circumstances;
   d) Members of courts of auditors or of the boards of central banks;
   e) Ambassadors, chargés d'affaires and high-ranking officers in the armed forces;
   f) Members of the administrative, management or supervisory bodies of State-owned enterprises.

None of the categories set out in points (a) to (f) of the first subparagraph shall be understood as covering middle ranking or more junior officials.

The categories set out in points (a) to (e) of the first subparagraph shall, where applicable, include positions at Community and international level.

2. 'Immediate family members' shall include the following:
   a) The spouse;
   b) Any partner considered by national law as equivalent to the spouse;
   c) The children and their spouses or partners;
   d) The parents.

[124] Art. 3 (8)

3. 'Persons known to be close associates' shall include the following:
   a) Any natural person who is known to have joint beneficial ownership of legal entities or legal arrangements, or any other close business relations, with a person referred to in paragraph 1;
   b) Any natural person who has sole beneficial ownership of a legal entity or legal arrangement which is known to have been set up for the de facto benefit of the person referred to in paragraph 1.

Especially in countries where corruption is widespread and applicable to the persons or companies related to them, there is a possibility that PEPs may abuse their public powers for their own enrichment through the receipt of bribes, embezzlement, etc.

The Directive therefore requires institutions and persons covered to apply, on a risk-sensitive basis, **enhanced customer due diligence measures** in respect of transactions or business relationships with politically exposed persons residing in another Member State or in a third country.

Without prejudice to the application, on a risk-sensitive basis, of enhanced customer due diligence measures, where a person has ceased to be entrusted with a prominent public function for a period of at least one year, institutions and persons shall not be obliged to consider such a person as politically exposed.

Institutions and persons covered by the Directive may fail to identify a customer as falling within one of the politically exposed person categories, despite having taken reasonable and adequate measures in this regard. In those circumstances, Member States, when exercising their powers in relation to the application of that Directive, should give due consideration to the need to ensure that those persons do not automatically incur liability for such failure.

The PEP identification requirements constitute **an obligation of means** rather than of result.

The July 2010 FATF GTA[125] considers **PEPs as part of the gatekeeper category**. The paper explains that PEPs, through their position, have access to significant public funds and financial arrangements such as budgets, bank accounts, publicly controlled companies and contracts. In the latter case, their gatekeeper status allows them to be able to award contracts to suppliers in return for personal financial reward. For this reason, PEPs are considered as part of the gatekeeper category.

The FATF GTA report indicates that the 2009 FATF Strategic Surveillance Survey noted that PEPs are considered to be one of the largest categories of high-risk customers for money laundering purposes.

PEP enhanced obligations in accordance with the Directive include:

a) Having appropriate risk-based procedures to determine whether the customer is a politically exposed person;
b) Having senior management approval for establishing business relationships with such customers;
c) Taking adequate measures to establish the source of wealth and source of funds that are involved in the business relationship or transaction;
d) Conducting enhanced ongoing monitoring of the business relationship.

[125] FATF Global Threat Assessment 2010, p. 47-50

The FATF GTA lists a number of additional measures for countries to consider. Some of these measures relate to the position of PEPs themselves e.g. the lifting of immunity from criminal prosecution for certain PEPs. Next to these measures the report reflects on the possible widening of the PEP definition to include **domestic PEPs** while at the same time taking into account the **risk based approach** to make it a more focused and effective tool for identifying high risk PEPs and individuals.

### 3.9.2 – PEP definitions

Practically all Member States have (apart from some wording differences) transposed the PEP **definitions**. The definitions in Hungary, Portugal, Spain and the UK are somewhat different.

- The definition of **immediate family members** is wider in **Hungary**[126] than in the Directive. On the basis of Subsection (3) of Section 4 of the Hungarian AML/CFT Act "*close relative*" shall have the meaning set out in Paragraph b) of Section 685 of the Hungarian Civil Code, including domestic partners. Due to Paragraph b) of Section 685 of the Hungarian Civil Code 'close relative' shall mean spouses, registered partners, next of kin, adopted persons, stepchildren, foster children, adoptive parents, stepparents, foster parents, brothers, and sisters.
- The **definition of PEP in Portugal**[127] is somewhat extended: 6) «Politically exposed persons» ar**e natural persons** ....vi) High-ranking officers in the Armed Forces; vii) Members of the administrative and control bodies of State-owned enterprises and public limited companies whose share capital is exclusively or mainly public, public institutes, public foundations, public establishments, regardless of the respective designation, including the management bodies of companies integrating regional and local corporate sectors; viii) Members of the executive boards of the European Communities and of the European Central Bank; ix) Members of the executive boards of international organisations.
- In **Spain**[128], the scope of persons entrusted with prominent public functions is expanded to all exercising or having exercised such functions abroad, even if they are resident in Spain. Also, the 1 year timeframe established in art. 2.4 of the Implementing Directive is expanded to two years.
- In the UK[129] the **definition of PEP** does not include persons entrusted with a prominent public function by the UK

**No Member State** has extended the enhanced CDD obligations to **domestic PEPs**. On the contrary, a few Member States[130] that had domestic PEPs in scope, have now limited the scope to foreign PEPs.

Domestic PEPs can as a result of a **risk based approach** however be made subject of additional measures.

[126] Act IV of 1959 on the Civil Code of the Republic of Hungary Section 685.
[127] Art. 2, 6 (a) Portuguese AML Law
[128] Art. 14 of the Spanish AML Act 10/2010
[129] Regulation 14(5) MLR 2007
[130] This is at least the case for Belgium and Slovenia.

### 3.9.3 – PEPs in practice:

**Not all responding private stakeholders replied** to all questions relating to PEPs in practice. Figures included relate to a large extent to information received via **professional associations**. Very few stakeholders gave additional comments on practices. Individual stakeholders mostly commented on practical difficulties. The **findings** below therefore should be considered as **illustrative in relation to experienced difficulties rather than as conclusive evidence**.

#### *3.9.3.1 – Tools:*

We have **not** come across any specific tool developed or offered by authorities for the identification of PEPs[131]. Reference was often made by stakeholders to **commercial databases**.

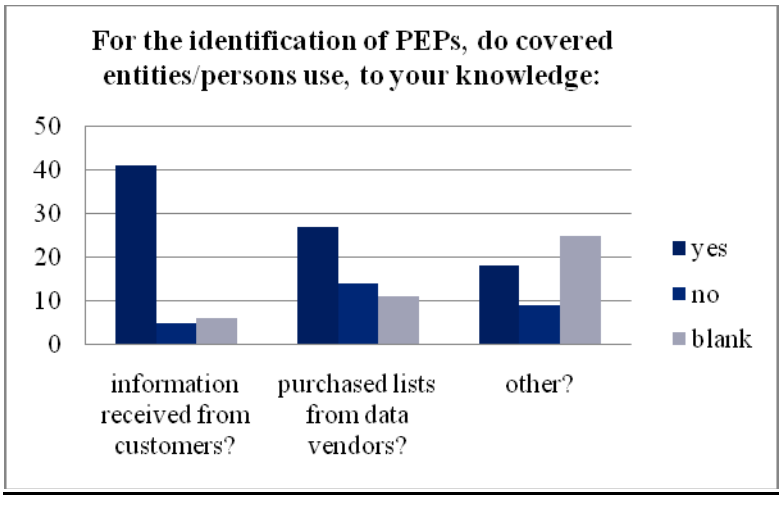
In relation to the identification of PEPs, covered entities/persons in general use different kinds of information sources.

All types of covered entities use information from customers (e.g. written statements), media and general sources available from the internet (referred to as other in the graph below).

Financial institutions in general also use data vendor's lists. Large non-financial professions and casinos also work with vendor's lists. Stakeholders from these two types of professions however indicate that these types of commercial lists are expensive, this being one of the factors that make it difficult to implement PEPs identification and verification (especially for smaller practices and casinos).

We have not come across specific solutions offered by professional associations or self regulatory bodies apart from more general services such as training, assistance with development of procedures and guidance notes.

A few stakeholders have indicated that they apply enhanced CDD for all non resident customers.

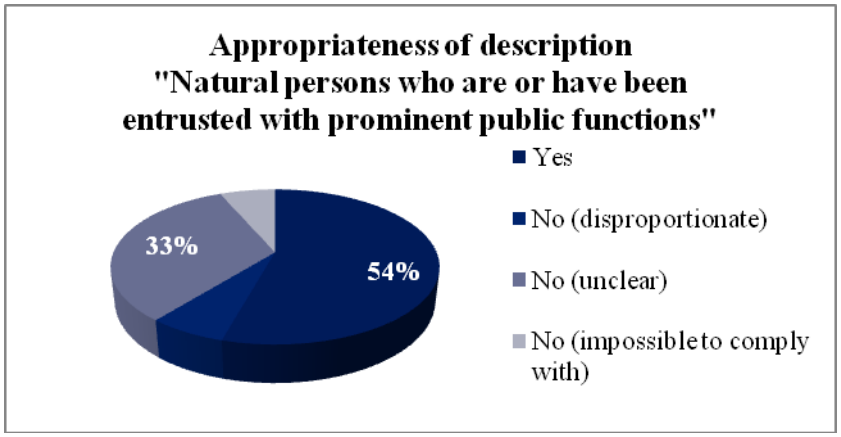



[131] In e.g. Latvia a database of domestic PEPs is publicly available.

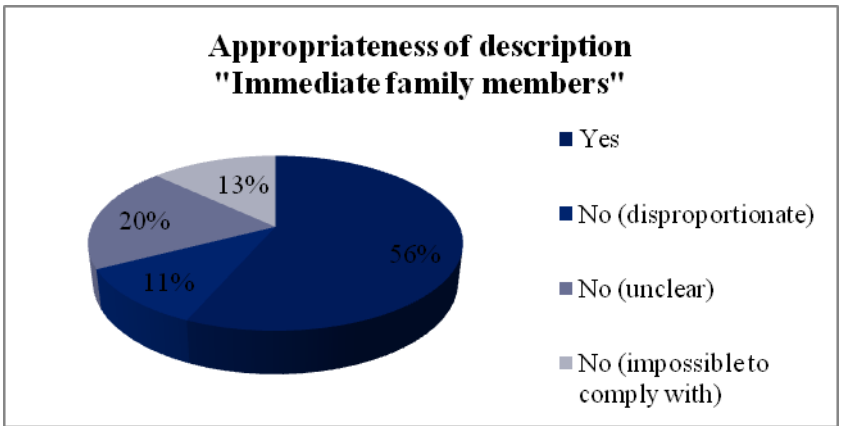
We understand that there are at least 3 providers of PEP listings. Based upon the information received it appears that there are no standard price lists. Prices per consultation depend off the total number of consultations during a certain period. The prices for up to 1 million consultations provided to us by 2 providers range from 25.000 to 45.000 EUR per year.

### *3.9.3.2 – The appropriateness of the definitions*

Opinions on the **appropriateness of the descriptions** in the Implementing Directive of "natural persons who are or have been entrusted with prominent functions", "immediate family members" and "persons known to be close associates" differ. A majority of stakeholders are of the opinion that the definitions are appropriate, a significant number find that they are unclear, disproportionate or impossible to comply with.

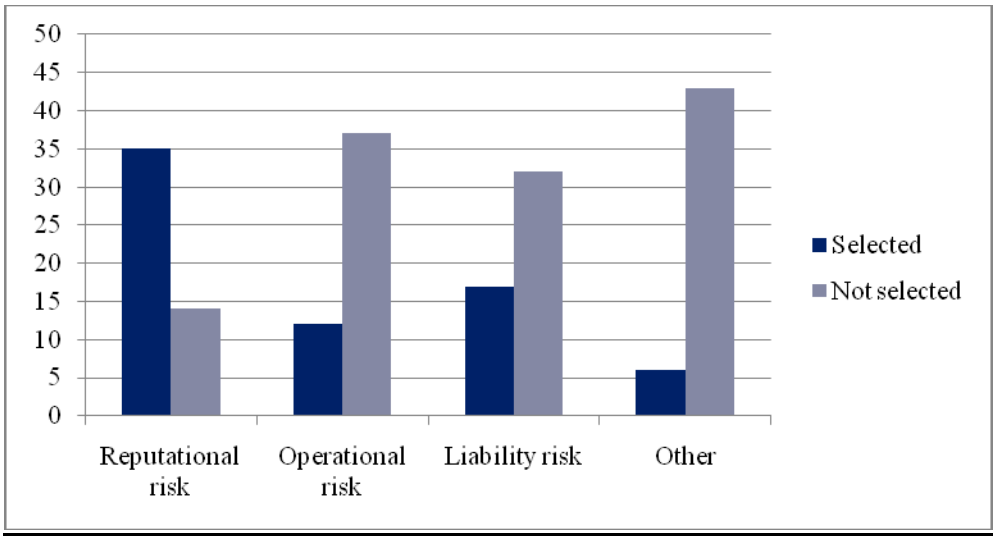


Most comments received from private stakeholders (both financial, non-financial professions and casinos) relate to the inclusion of the category of "close associates" and "relatives". These categories regularly cause problems as far as systematic identification of such persons in course of the monitoring process is concerned. Stakeholders have observed that because the definition is very broad and the fact that there are no searchable databases, it makes the legislation, in their opinion, inefficient.




### *3.9.3.3 – Risk related to possible non compliance*

When asked what the risks are related to possible non compliance with enhanced customer due diligence rules for PEPs, stakeholders mostly selected the options, reputational risk and liability risk.
The regulatory risk of non compliance with financial regulator's systems and controls requirements was mentioned as other risk.

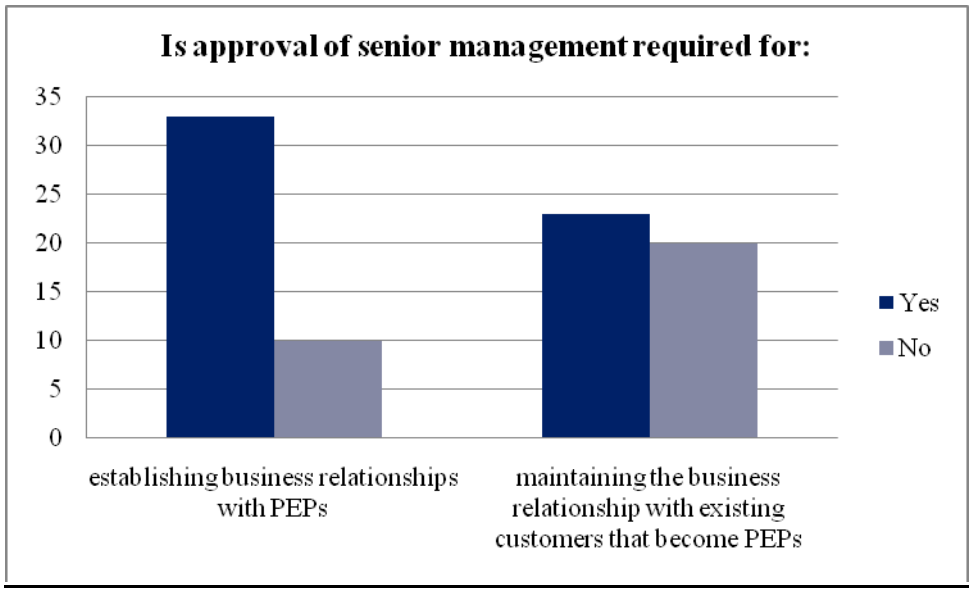


### 3.9.4 – Treatment of PEP issues by covered entities/persons

#### *3.9.4.1 – Approval of senior management*

A large majority of stakeholders indicated that **approval of senior management** is required for establishing business relationships with PEPs. Stakeholders that indicated that this was not the case, mostly belonged to the non-financial professions. We have however no view on the size of the practices of the stakeholders that replied negatively. The size of the practice i.e. the absence of different management levels could have an impact on the practical fulfilment of the requirement.

Approval of senior management in these situations is not a requirement of the Directive[132] but is included in the FATF recommendations. Despite this, approximately half of the stakeholders confirmed that approval of senior management for maintaining the business relationship with existing customers that become PEPs is requested in practice.




#### *3.9.4.2 – Measures to establish source of wealth and funds*

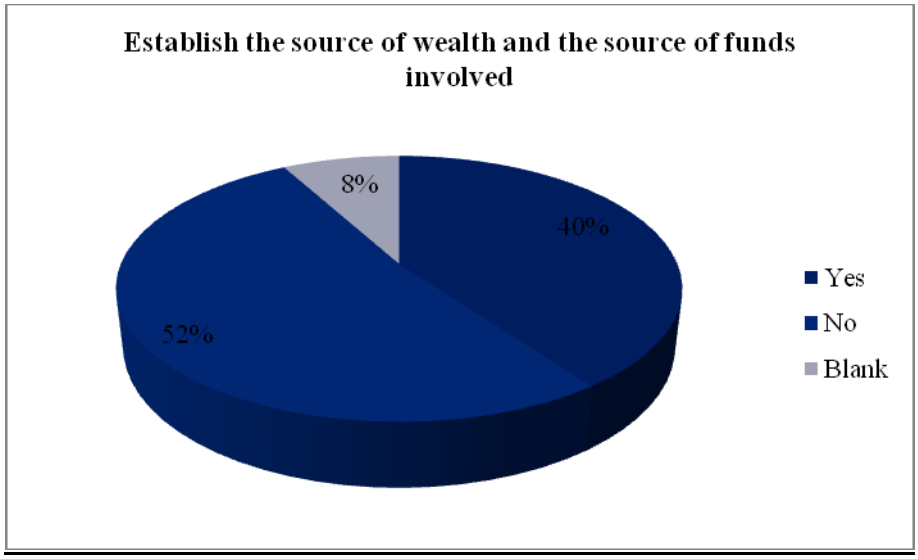
52% of the stakeholders (most of them belonging to the financial sector) replied that they **apply measures to establish the source of wealth and the source of funds** involved.

It is not possible to clearly identify the origin of the 'no' answers. Some stakeholders indicate 'no' to the general question but then confirm that they ask confirmations/declarations from their clients with regard to the source of wealth and funds. A number of stakeholders also indicate that due to the activities practised they do not encounter PEPs in their business.

[132] We have not come across stricter national measures in that area.

As to the methods used to establish the source of wealth and funds, confirmations/declarations from clients are most often used. On the basis of the information received confirmations from third parties are seldom obtained. Other evidence i.e. copies of documents evidencing the source of wealth and funds is sometimes used.

In general, stakeholders comment that this is an area where it is very difficult to obtain information. Some stakeholders indicate a lack of practical guidance.

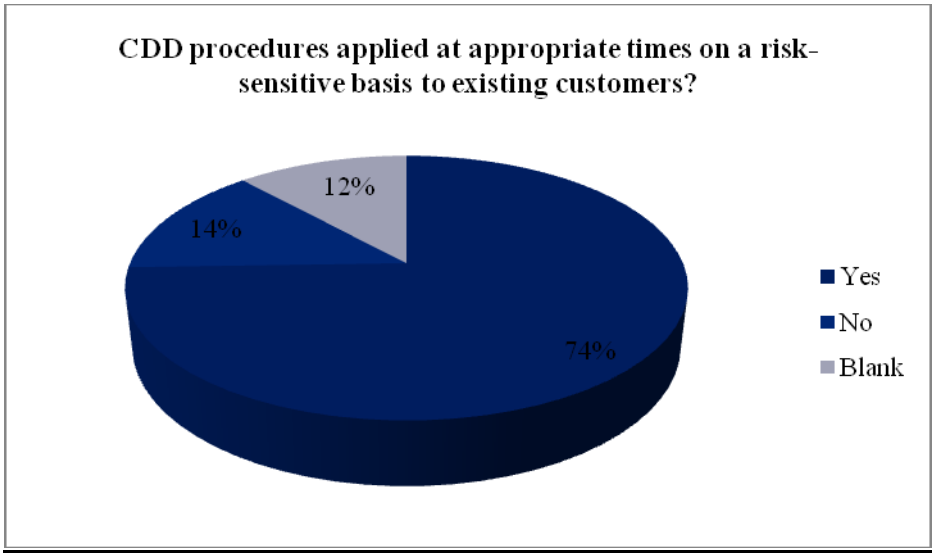


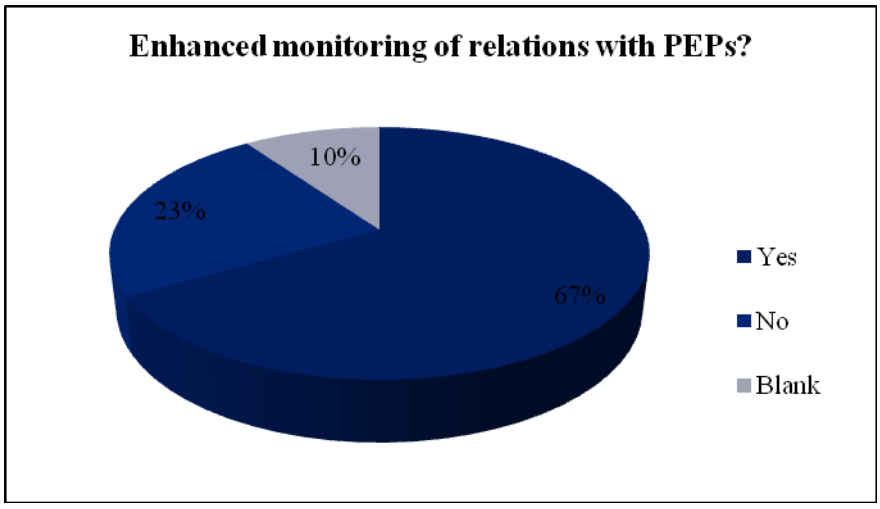

*3.9.4.3 – CDD Procedures applied at appropriate times to existing customers*

14% of the stakeholders responded 'no' to the question whether, to their knowledge, the CDD procedures are applied **at appropriate times on a risk-sensitive** basis to existing customers. 23 % indicated that they do not have enhanced monitoring of relations with PEPs in place.

Again it is not possible to clearly identify the origin of the 'no' answers. A number of stakeholders also indicate that due to the activities practised they do not encounter PEPs in their business. A possible cause could also be that for small practices monitoring is more difficult to implement in practice.

According to stakeholders enhanced due diligence procedures are often not abandoned when customers are no longer PEPs.


CDD procedures applied at appropriate times on a risk-sensitive basis to existing customers?
12%
14%
74%
Yes
No
Blank


Enhanced monitoring of relations with PEPs?
10%
23%
67%
Yes
No
Blank

### 3.9.5 – Main difficulties

The difficulties in relation to enhanced CDD of PEPs have been described in several studies and papers[133]. Difficulties are often cited in relation to **compliance with the requirements under the legislation a**s well as with regard to the **proportionality of the requirements**.

In terms of main difficulties the responses of the private stakeholders can be summarized as follows:

- **Difficulties with regard to the definitions**: A set out above, in the opinion of stakeholders, difficulties do not really relate to the primary definition of PEPs, but to the definition of family members and the close associates. Several stakeholders are of the opinion that these definitions are too wide. In the opinion of stakeholders, commercial databases often do not contain family members and close associates;
- Issues related to the **quality and cost of databases**: Vendor lists are experienced as not always being fully reliable. Information in the system might be belated. Sometimes the PEP designation is wrongly applied which results in false hits. The commercial databases are costly especially for smaller firms and practices;
- **Lack of public available data**: In relation to the above, official PEP lists exist that could be used without cost;
- **Disproportion between cost and effectiveness**: As indicated above, stakeholders experience commercial databases to be costly. It is also indicated that it is very time consuming to detect existing customers who become PEPs after establishing a business relationship, which also has an effect on costs. When comparing costs with the actual identification rate of PEPs, some stakeholders argue that this is disproportionate.

[133] Only recently in the results of the call for evidence of the UK HM Treasury in relation to the review of the money laundering regulations – March 2010 as well as in all contributions to the call.

## 3.10 – Issue 10: Enhanced CDD: international trade-related transactions

*(Application of Article 13 (1) of the AML Directive of the AML Directive)*

In relation to simplified due diligence, the following questions were examined:

*Have Member States dealt with TBML in their national legislation transposing the AML Directive? In particular, are trade transactions considered to be of higher risk pursuant to Article 13(1) of the AML Directive? How are covered entities (in particular credit institutions) dealing with the question of trade transactions from the perspective of the monitoring of the business relation (Article 8(1) of the AML Directive)? Have credit institutions developed particular enhanced CDD measures or any expertise in this regard that allows them to identify trade transactions and monitor them with a view to discover TBML? Are these solutions of interest to discover trade transactions that could result in financing of terrorism? Also, are these solutions of interest to discover trade transactions that could result in illegal trading activity (such as proliferation of weapons of mass destruction)?*

### 3.10.1 – General

The FATF Typology Report on Trade Based Money Laundering explains that there are **three main methods which are used by criminal organizations and terrorist financiers** to launder the proceeds of their illegal activities and inject them into the formal economy. The first method involves the movement of funds through the financial system via financial transactions. The second method involves the physical movement of money itself. The report sets out that the **third method is based on the physical movement of goods through the international trade system**. Given the growth of the world trade, the Financial Action Task Force (FATF) has identified this trade-based money laundering (TBML) as an increasingly important money laundering and terrorist financing vulnerability[134].

The FATF **defines trade-based money laundering** as "the process of disguising the proceeds of crime and moving value through the use of trade transactions in an attempt to legitimize their illegal origins or finance their activities". TBML schemes include among others the misrepresentation of the price, overpriced or underpriced invoices[135], quantity or quality of imports or exports, money laundering through fictitious trade activities and/or through front companies[136]. In practice these schemes are often a complex combination of money laundering techniques such as the use of cash, front companies, currency exchange, and the purchase and shipment of goods with illicit proceeds. Banks and other financial institutions may unknowingly be involved in these schemes by providing trade financing for these shipments.

*Example of TBML - Over- and Under-Invoicing of Goods[137]:*

Company A (a foreign exporter) ships 1 million widgets worth $2 each, but invoices Company B (a colluding domestic importer) for 1 million widgets at a price of only $1 each. Company B pays Company A for the goods by sending a wire transfer for $1 million. Company B then sells the widgets on the open market for $2 million and deposits the extra $1 million (the difference between the invoiced price and the "fair market" value) into a bank account to be disbursed according to Company A's instructions.

[134] FATF Typology Report on Trade Based Money Laundering (23 June 2006), p. 1 and p. 25.
[135] FATF Global Threat Assessment Report July 2010, p. 29-31.
[136] FATF Best Practices Paper on Trade Based Money Laundering (20 June 2008), p. 1.
[137] FATF Typology Report on Trade Based Money Laundering (23 June 2006), p. 6. .

The FATF Global Threat Assessment Report reflects that entirely legitimate trade can be used to move value. In this case, the report explains, debts incurred with legitimate companies are placed under control of the money launderer and these debts are then settled using value from criminal groups. The company may not be aware of the source of the funds used for the settlement of the debts.

A third type of TBML are the VAT carousels.

In addition to its use for money laundering, the international trade system can also be (ab)used as a **conduit for the proliferation,** where international trade-related transactions are used to the transfer and export of weapons of mass destruction or WMD's (nuclear, chemical or biological weapons), their means of delivery and related materials. Furthermore the FATF has indicated that there is a growing range of goods and technology that have commercial applications as well as applications for WMD and WMD delivery systems (the so-called "dual-use" goods). There is also a growing trend of individuals or entities engaged in proliferation purchasing or selling more basic components instead of entire systems which makes their operations more difficult to trace [138].

Proliferation of WMD's is inherently tied to so-called proliferation financing which consist of "wittingly or unwittingly providing financial services for the transfer and export of such weapons, their means of delivery and related materials". While this mostly involves, the financing of trade in proliferation sensitive goods, all financial support to proliferators, is targeted[139].

### 3.10.2 – Measures taken by the Member States

**None of the Member States have explicitly identified (international) trade-related transactions** as a high risk in their primary anti-money laundering legislation. As such no trade specific enhanced customer due diligence measures exist. However the majority of them[140] have indicated that these kinds of transactions can be considered as **high risk-transactions** via the provisions transposing article 13(1) of the Directive if certain red-flag indicators are present. With regard to the high risk character of trade-based transactions public stakeholders mentioned the following indicators:

- Transactions that have connections with countries with significant levels of corruption or other criminal activity;
- Transactions concerning high-value, low volume goods (e.g. (blood) diamonds and antiques);
- Possible involvement of persons or organizations linked to terrorism (e.g. Usama bin Laden, the Al-Qaida Network and the Taliban);
- Transactions linked to persons and/or countries subject to sanctions and trade restrictions (e.g. Iran, North Korea Somalia, Sudan and Zimbabwe);
- Transactions involving dual-use goods (in combination with the above mentioned indicators);
- Transactions involving the use of front (or shell) companies;
- Shipment sizes appear inconsistent with the scale of the exporter or importer's regular business activities (in the case of import/export financing).

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[138] FAFT Proliferation Financing Report (18 June 2008), p. 3.
[139] Idem.
[140] AT, BE, BG, CZ, DE, FI, FR, ES, IE, HU, IT, LV, LU, PL, PT, RO and UK.

It needs to be noted that when a transaction is linked to countries subject to sanctions or persons suspected of terrorism additional enhanced measures will be applicable via the legal framework in relation to International sanctions.

### 3.10.3 – Measures taken by the covered entities

A large number of covered entities, especially in the financial sector, and professional associations have indicated that they are **aware of the risks** associated with international trade-based transactions. To mitigate these risks they have implemented measures such as **training programs and internal measures.** These internal procedures mostly entail the development of specific guidelines and monitoring mechanism to identity trade related (financial) transactions and monitor them (just like any other transaction) with a view to discover money laundering, terrorist financing, circumvention of sanctions or proliferation (financing). With regard to the detection of money laundering, covered entities, in practice, mostly focus on the circumstances surrounding the transaction (e.g. which companies are involved, what is their normal trade volumes/transactions amounts, which countries are involved, etc) to determine if a transaction is suspicious as the nature of the goods involved can rarely be adequately verified due to insufficient knowledge regarding nature of the underlying goods or lack of expertise (e.g. in regard to speciality items such antiques). To combat terrorist financing, circumvention of sanctions or proliferation (financing) covered entities mostly rely on and screen against list containing names of terrorists and countries and/or persons subject to sanctions (e.g. UN sanctions list[141], EU sanctions lists[142], OFAC-list[143], terror watch lists).

In relation to **the effectiveness of AML measures in the battle against illegal trading**, the opinions of the stakeholders were divided. Some commented that anti-money laundering measures enable them to discover trade transactions that pose a money laundering or proliferation risk as these measures require thorough analysis of the transactions. Other have however indicated that **these anti-money laundering measures on their own are not sufficient.** It was stated that AML measures are an important supplement to, but not a substitute for, effective export controls. Stakeholders indicated that **without the implementation of international export controls, effective proliferation finance measures are not workable**. This is mostly due to the fact that it is very difficult to ascertain the nature of the goods involved through financial measures alone.

The FATF Global Threat Assessment Report comments likewise on the fact that AML/CFT measures have been developed with traditional financial sector practices in mind and have not been built around trade finance, whereas understanding of TBML is still immature in both public and private sectors.

The report sets out a number of measures for consideration including, amongst others:

- Training of global trade services departments of financial institutions and of other concerned parties;
- Development of programmes aimed at building expertise and raising awareness with authorities;
- Disseminating typologies, indicators and sanitized case studies.

Transparency measures (international exchange of data, transparency between goods and value for financial service providers and sharing of information between agencies).

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[141] See http://www.un.org/sc/committees/index.shtml.
[142] See http://ec.europa.eu/external_relations/cfsp/sanctions/index_en.htm
[143] See http://www.ustreas.gov/offices/enforcement/ofac/.

## 3.11 – Issue 11: ECDD Anonymity

(Article 13 (6) of the AML Directive)

In relation to the issue of ECDD Anonymity, the following questions were examined:

*Has the rule relating to specific attention for products and transactions that might favour anonymity, been transposed literally in national legislation/regulation? Is the national legislation focused on products or transactions regardless of the use of technology or only on new or developing technologies? What products or transactions could favour anonymity? What measures are taken by covered entities/persons to prevent the use of products or transactions that might favour anonymity for money laundering?*

### 3.11.1 – Transposition in national legislation

Article 13.6 of the Directive requires that covered entities pay special attention to any money laundering or terrorist financing threat that may arise from products or transactions that might favour anonymity, and take measures, if needed, to prevent their use for money laundering or terrorist financing purposes.

The majority of the Members States have almost literally transposed the above mentioned provision of into their primary or secondary legislation and as such explicitly require covered entities to have special attention for products and transactions require that might favour anonymity[144]. In the other Member States the requirement is implemented via the general rule that covered entities must have enhanced monitoring in place of transactions that by their nature might pose a higher risk of Money Laundering or terrorist financing[145].

### 3.11.2 – Technology and anonymity

New money laundering threats may emerge as new or developing technologies provide entities or persons with new ways to stay anonymous while conducting transaction. To counter this threat all Member States have indicated that the risk-based approach requires covered entities to have specific attention for these technologies[146]. Several Member States did however emphasize that established technologies must also stay in focus as the Directive and their national legislation requires that specific attention is paid to all products or transactions that might favour anonymity.[147].

[144] BG, CY, DK, FR, EL, ES IE, IT, LT, LU, MT, PL, PT, RO, SE, SK and UK.
[145] AT, BE, CZ, EE, FI, DE, HU, LV, NL and SI.
[146] It needs be noted that only 7 Member States (CY, EE, ES, LV, MT, RO and SK) explicitly require this in their national legislation. The other member states see it as an inherent aspect of the risk-based approach and article 13.6 of the Directive.
[147] AT, BE, BG, CY, CZ, DE, DK, EE, EL, IE, IT, LU, PL, SI and UK.

### 3.11.3 – Anonymity practices

According to stakeholders the following products or transactions could favour anonymity:

- Sale of Jewellery, artworks and furniture;
- Cash transactions or equivalent bank products (e.g. bankers' draft, bearer deposit books when allowed by law[148]);
- Transactions with bearer notes and shares;
- Trades conducted between consumers;
- Loans by private persons;
- Auctions;
- OTC transactions with non-account customers below CDD thresholds;
- Off-shore investments and trusts;
- Use of off-shore companies as legal owners.

To prevent the use of products or transactions that favour anonymity for money laundering or terrorist financing, private stakeholders will in general apply enhanced customer due diligence and monitoring measures.

[148] This is the case in Italy.

## 3.12 – Issue 12: Reliance on third parties

In relation to the third party reliance issue, the following questions were examined:

*Has the principle of reliance on third parties been transposed in national legislation/regulation? Has the definition of "third parties" been transposed literally in national legislation/regulation? Have other Member States and the European Commission been informed of cases where they consider a third country meeting the requirements? Are outsourcing and agency relations, when considered as part of the covered entity/person, excluded? Does the national legislation include any specific rules/limitations for reliance on the third parties, in relation to the scope of the principle, the conditions and the procedures? Do non-financial professions often make use of the possibility of third party reliance? Is third party reliance allowed and used only within professions (e.g. auditor to auditor) or also across professions (e.g. auditor to tax advisor). Does third party reliance give rise to specific privacy/professional secrecy issues? Is there a need for a specific third party performance framework for non-financial professions given the fact tha non-financial professions will rarely be the sole interveners in a transaction?*

### 3.12.1 – General

All Member States have transposed the principle of third party reliance into their national legislation. The Member States have however made use of the freedom afforded to them by the Directive to develop their own approach to the regime, as the overview below will show.

### 3.12.2 – Scope of application of third party reliance[149]

#### *3.12.2.1 – Categories of third parties on which reliance is allowed*

The Member States have recognized a variety of persons and institutions as third parties for the purpose of article 16 of the Directive. Those considered as a third party include:

- Credit institutions by all Member States;
- Financial institutions by 25 Member States[150];
- Legal or natural persons acting in the exercise of their professional activities by 17 Member States[151]:
  - Auditors, external accountants and tax advisors by 16 Member States[152];
  - Independent legal professionals[153] by 17 Member States[154];
  - Trust or company service providers by 7 Member States[155];
  - Other by 4 Member States[156].

Money transfer institutions and/or money exchange offices cannot be relied upon as a third party in 20 Member States[157]. This is also true for outsourcing and agency relations, when on the basis of a

[149] To allow better comparison with the 3L3 Compendium Paper on the supervisory implementation practices across EU Member States of the Third Money Laundering Directive [2005/60/EC] a similar layout is used. The report is available at http://www.c-ebs.org/getdoc/8369a533-cf27-41cc-9a84-0dffdd707577/Compedium-Paper-on-the-supervisory-implementation-.aspx.

[150] AT, BE, CY, CZ, DE, DK, EL, ES, FI, FR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE. SI, SK and UK.

[151] AT, BE, CY, DE, ES, FI, FR, HU, IE, IT, LT, LU, MT, NL, SE, SI and UK.

[152] AT, BE, CY, DE, ES, FI, FR, HU, IE, IT, LT, LU, MT, NL, SE and UK

[153] This category contains notaries, lawyers and other independent legal professionals.

[154] AT, BE, CY, DE, ES, FI, FR HU, IE, IT, LT, LU, MT, NL, SE, SI and UK.

[155] CY, ES, IE, LT, LU, MT and NL.

[156] EE, ES, LT and MT.

contractual arrangement, the outsourcing service provider or agent is to be regarded as part of the institution or person covered. These are excluded from third party reliance-regime in 20 Member States[158].

**Table 1:**

| | Credit Institutions | Financial Institutions | Auditors, external accountants and tax advisor | Independent legal professionals | Trust and company service providers | Other | Exclusion of money transfer institutions and/or money exchange offices | Exclusion of outsourcing and agency relations |
|---|---|---|---|---|---|---|---|---|
| Austria (AT) | X | X | X | X | | | X | X |
| Belgium (BE) | X | X | X | X[159] | | | | X |
| Bulgaria (BG) | X | | | | | | X | X |
| Cyprus (CY) | X | X | X | X | X | | X | |
| Czech Republic (CZ) | X | X | | | | | X | |
| Germany (DE) | X | X | X | X | | | X | X |
| Denmark (DK) | X | X | | | | | X | X |
| Estonia (EE) | X | | | | | X | X | |
| Greece (EL) | X | X | | | | | X | X |
| Spain (ES) | X | X | X | X | X | X | | X |
| Finland (FI) | X | X | X | X | | | X | X |
| France (FR) | X | X | X | X | | | X | X |
| Hungary (HU) | X[160] | X | X | X | | | X | X |
| Ireland (IE) | X | X | X | X | X | | X | X |
| Italy (IT) | X | X | X[161] | X | | | | X |
| Lithuania (LT) | X | X | X | X | X | X | | X |
| Luxembourg (LU) | X | X | X[162] | X | X[163] | | | X |
| Latvia (LV) | X | X | | | | | X | |
| Malta (MT) | X | X | X | X | X | X | X[164] | X |
| Netherlands (NL) | X | X | X | X | X | | X | |
| Poland (PL) | X | X | | | | | | X |
| Portugal (PT) | X | X | | | | | X | X |
| Romania (RO) | X | X | | | | | X | X |
| Sweden (SE) | X | X | X[165] | X[166] | | | | X |
| Slovenia (SI) | X | X | | X[167] | | | X | X |
| Slovakia (SK) | X | X | | | | | X | X |
| United Kingdom(UK) | X | X | X | X | | | X | X |

[157] AT, BG, CY, CZ, DE, DK, EE, EL, FI, FR, HU, IE, LV, MT, PT, RO, SI, SK, NL and UK.
[158] AT, BE, BG, DK, EL, ES, FI, FR, HU, IE, IT, LT, LU, MT, PL, PT, RO, SK, SI, SE and UK.
[159] Not including notaries.
[160] Hungary: Credit and Financial institutions can only rely on similar institutions for their CDD.
[161] Italy: Professionals are only recognized as a third party in respect to other professionals.
[162] Luxemburg: The legislation only allows the use of auditors as third parties
[163] Luxemburg: Only when trust and company service providers are also lawyers.
[164] Malta: The exclusion of money transfer institutions and/or money exchange offices in relation to other money transfer institutions and/or money exchange offices.
[165] Sweden: Tax advisors are excluded from being relied on as a third party.
[166] Sweden: Only lawyers that have a licence or are registered in a special professional register are recognized as third parties
[167] Slovenia: Besides credit and financial institutions only notaries can be relied upon as third parties.

### *3.12.2.2 – Categories of covered persons and institutions which can make use of third party reliance*

The categories of covered persons and institutions which can make use of the third party reliance differ from Member State to Member State. In general the following covered entities can make use of the regime:

- Credit institutions in 27 Member States[168];
- Financial institutions in 27 Member States[169];
- Legal or natural persons acting in the exercise of their professional activities in 22 Member States[170]:
  - Auditors, external accountants and tax advisors in 22 Member States[171];
  - Independent legal professionals in 21 Member States[172];
  - Trust or company service providers in 19 Member States[173];
  - Other in 21 Member States[174].

**Table 2:**

| | Credit Institutions | Financial Institutions | Auditors, external accountants and tax advisor | Independent legal professionals | Trust and company service providers | Other |
|---|---|---|---|---|---|---|
| Austria (AT) | X | X | X | | | |
| Belgium (BE) | X | X | X | X | | X |
| Bulgaria (BG) | X | X | | | | |
| Cyprus (CY) | X | X | X | X | X | X |
| Czech Republic (CZ) | X | X | X | X | X | X |
| Germany (DE) | X | X | X | X | X | X |
| Denmark (DK) | X | X | X | X | X | X |
| Estonia (EE) | X | X | X | X | X | X |
| Greece (EL) | X | X | | | | |
| Spain (ES) | X | X | X | X | X | X |
| Finland (FI) | X | X | X | X | X | X |
| France (FR) | X | X | | | | |
| Hungary (HU) | X | X | X | X | | X |
| Ireland (IE) | X | X | X | X | X | X |
| Italy (IT) | X | X | X | X | X | X |
| Lithuania (LT) | X | X | X | X | X | X |
| Luxembourg (LU) | X | X | X | X | X | X |
| Latvia (LV) | X | X | X | X | X | X |
| Malta (MT) | X | X | X | X | X | X |
| Netherlands (NL) | X | X | X | X | X | X |
| Poland (PL) [175] | X | X | | | | |

[168] AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK and UK.
[169] AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK and UK.
[170] AT, BE, CY, CZ, DE, DK, EE, ES, FI, HU, IE, IT, LT, LU, LV, MT, NL, RO, SE, SI, SK and UK.
[171] AT, BE, CY, CZ, DE, DK, EE, ES, FI, HU, IE, IT, LT, LU, LV, MT, NL, RO, SE, SI, SK and UK.
[172] BE, CY, CZ, DE, DK, EE, ES, FI, HU, IE, IT, LT, LU, LV, MT, NL, PL, RO, SE, SI, SK and UK.
[173] CY, CZ, DE, DK, EE, ES, FI, IE, IT, LT, LU, LV, MT, NL, RO, SE, SI, SK and UK.
[174] BE, CY, CZ, DE, DK, EE, ES, FI, HU, IE, IT, LT, LU, LV, MT, NL, PL, RO, SE, SI, SK and UK.
[175] PL: Third party reliance can only be used when covered entities are conducting a transaction on the basis of an order or a disposition accepted or received by an entity providing financial services.

| | | | | | | |
|---|---|---|---|---|---|---|
| Portugal (PT) | X | X | | | | |
| Romania (RO) | X | X | X | X | X | X |
| Sweden (SE) | X | X | X | X | X | X |
| Slovenia (SI) | X | X | X | X | X | X |
| Slovakia (SK) | X | X | X | X | X | X |
| United Kingdom (UK) | X | X | X | X | X | X |

In 26 Member States third party reliance is allowed and used across professions[176]. Nevertheless stakeholders in most Member States have reported that non-financial professions do not often make use of the regime. The reason for this can be found in the fact that the covered entities which make use of the reliance remain responsible for the correct fulfilment of the CDD requirements. To limit their liability they rather conduct the CDD themselves then rely on someone whose information can be potentially incorrect.

Notwithstanding the above, many non-financial professionals such as lawyers and notaries have indicated that they see the need for the creation of a specific framework for non-financial professionals to avoid duplication if financial institutions are involved. According to them financial institutions are much better equipped to carry out the customer due diligence obligations and intervene in most situations. As such CDD performed only by them should be sufficient to detect any money laundering.

### 3.12.3 – Conditions for third party reliance

Article 16 of the Directive states that "third parties shall mean institutions and persons who are listed in article 2, or equivalent institutions and persons situated in a third country, who meet the following requirements:

a) They are subject to mandatory professional registration, recognised by law;
b) They apply customer due diligence requirements and record keeping requirements as laid down or equivalent to those laid down in this Directive and their compliance with the requirements of this Directive is supervised in accordance with Section 2 of Chapter V, or they are situated in a third country which imposes equivalent requirements to those laid down in this Directive".

Member States shall inform each other and the Commission of cases where they consider that a third country meets the conditions laid down in paragraph 1(b).

#### *3.12.3.1 – Location of the third party*

All 27 Member States allow cross border third party reliance when the third party involved is located in a Member State of the EAA or the EU. In addition, 25 Member States[177] also permit reliance on a third party located in a third country, providing that the anti-money laundering legislation in that country is considered equivalent to the Directive or their national legislation. Some Member States

[176] AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LT, LU, LV, MT, NL, PT, RO, SE, SI, SK and UK.
[177] AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LT, LV, LU, NL, PL, PT, RO, SE, SI and UK.

explicitly refer to the membership of organisation such the Financial Action Task Force (FATF) as an indicator for a sufficient high standard of anti-money laundering legislation[178].

In one Member State, namely Denmark, a somewhat different methodology is applied as this country allows reliance on a third party located in a third country with which the EU has entered into an agreement for the financial area without the need to check regulatory equivalence. If such an agreement is however not in place, reliance is only possible if the third party involved is subject requirements similar to the Directive. While article 16 requires Member States to inform each other and the Commission of cases where they consider that a third country meets the necessary conditions, only twelve Member States have indicated that they have done so[179].

### *3.12.3.2 – Subject to mandatory registration*

The legislation of eighteen Member States[180] explicitly requires that the third party on which is relied is subject to a mandatory registration, recognized by Law.

### *3.12.3.3 – Subject to equivalent regulation*

As mentioned above most Member States permit reliance on a third party located in a third country, providing that the anti-money laundering legislation in that country is considered equivalent. Twenty six Member States have published a list of such countries in their laws, secondary regulation or guidance[181]. The national lists are all based on the EU Common Understanding between Member States on third country equivalence under the Anti-Money Laundering Directive. The Member States have however indicated that the list only provides a presumption of equivalence and as such does not override the obligation of covered entities to carry a risk based assessment of each transaction.

Luxemburg has stated that there is no list of equivalent third countries in its legislation or guidance[182].

### *3.12.3.4 – Subject to supervision*

According to the legislation of sixteen Member States[183] reliance on a third party located outside the EU is only allowed when the party involved is subject to supervision regarding its compliance with the applicable anti-money laundering legislation.

**Table 3:**

| | Third party located in EEA or EU | Third party located in third country with equivalent legislation or FATF Member | List of equivalent countries | Subject to mandatory registration | Subject to supervision |
|---|---|---|---|---|---|
| Austria (AT) | X | X | X | X | X |
| Belgium (BE) | X | X | X | X | X |
| Bulgaria (BG) | X | X | X | | |
| Cyprus (CY) | X | X | X | X | X |
| Czech Republic (CZ) | X | X | X | X | X |
| Germany (DE) | X | X | X | X | X |
| Denmark (DK) | X | X | X | X | X |
| Estonia (EE) | X | X | X | X | |

[178] EL, IT (only for banks and branches of Italian banks and of banks of other FAFT member countries) and MT.
[179] AT, BG, CY, CZ, FI, FR, HU, LU, PL, PT, RO and UK.
[180] AT, BE, CY, CZ, DE, DK, FI, EL, HU, IE, IT, LT, LU, MT, PT, RO, SE and UK.
[181] AT, BE, BG, CY, CZ, DE, DK, EE, ES, EL, FI, FR, HU, IE, IT, LT, LV, NL, MT, PL, PT, RO, SK, SI, SE and UK.
[182] Luxemburg: Grand-Ducal Regulation of 29 July 2008 which contained the list was repealed at the end of 2009 due to a recommendation from the FATF.
[183] AT, BE, CY, CZ, DE, DK, EL, FI, HU, IE, IT, LU, MT, RO, SE and UK

| | | | | | |
|---|---|---|---|---|---|
| Greece (EL) | X | X | X | X[184] | X[185] |
| Spain (ES) | X | X | X | | |
| Finland (FI) | X | X | X | X | X |
| France (FR) | X | X | X | | |
| Hungary (HU) | X | X | X | X | X |
| Ireland (IE) | X | X | X | X | X |
| Italy (IT) | X | X | X | X | X |
| Lithuania (LT) | X | X | X | X | |
| Luxembourg (LU) | X | X | | X | X |
| Latvia (LV) | X | X | X | | |
| Malta (MT) | X | X | X | X | X |
| Netherlands (NL) | X | X | X | | |
| Poland (PL) | X | X | X | | |
| Portugal (PT) | X | X | X | | |
| Romania (RO) | X | X | X | X | X |
| Sweden (SE) | X | X | X | X | X |
| Slovenia (SI) | X | X | X | | |
| Slovakia (SK) | X | | X | | |
| United Kingdom (UK) | X | X | X | X | X |

### 3.12.4 – Procedure

Article 18 of the Directive requires that "third parties shall make information requested in accordance with the requirements laid down in Article 8(1)(a) to (c) immediately available to the institution or person covered by this Directive to which the customer is being referred. Relevant copies of identification and verification data and other relevant documentation on the identity of the customer or the beneficial owner shall immediately be forwarded, on request, by the third party to the institution or person covered by this Directive to which the customer is being referred".

All Member States require that the third party involved makes all information required to enter into a business relationship immediately available to the requesting covered entity. In twenty Member States[186] the third party must also, upon request of the requesting forward copies of the identification and other relevant info on the identity of the customer. Five Member States[187] require the transmission of the information without request.

### 3.12.5 – Privacy or professional secrecy issues

In general stakeholders have indicated that third party reliance will not give rise to any significant privacy or professional secrecy issues. They did however mention that there could be data protection and privacy issues in cross border situations involving third countries due to differences in relevant legislation. A number of bar associations also indicated that third party reliance is not in accordance with the standard of professional secrecy of lawyers.

[184] Greece: The requirement of registration is contained in secondary legislation issued by the competent authorities.
[185] Greece: The requirement of supervision is contained in secondary legislation issued by the competent authorities.
[186] AT, BE, BG, DE, DK, FI, FR, EL, ES, HU, IE, IT, LU, LV, MT, PL, RO, SE, SI and UK.
[187] CY, CZ, NL, SK and LT.

### 3.12.6 – Conclusion

It is clear that the Directive , by providing a specific third party reliance regime, has created a greater degree of harmonization in regards to the possibility of covered entities to rely on customer due diligence performed by other covered entities. However differences between Members States remain. This is in particular the case for categories of third parties on which reliance is allowed.

While a large majority of Member State allows reliance on credit and financial institutions, such a convergence is not present regarding the reliance on legal or natural persons acting in the exercise of their professional activities (other than credit and financial institutions).

The same is true for the conditions for third party reliance, where only a small majority of Member States has literally transposed all the conditions of article 16 of the Directive into their national legislation. There is however a large degree of convergence regarding the requirement for the transfer of data and documents.

While in most Member third party reliance is allowed across professions, stakeholders have indicated that non-financial professions do not often make use of the regime. This notwithstanding many non-financial professionals such as lawyers and notaries having indicated that they see the need for the creation of a specific framework for non-financial professional to avoid duplication. According to these professionals, financial institutions are much better equipped to carry out the customer due diligence and intervene in most situations. This position is however not shared by the financial sector as many regulated business are very reluctant to put their liability on the line by providing customer due diligence confirmations.

In general stakeholders have indicated that third party reliance will not give rise to any significant privacy or professional secrecy issues. This opinion is not shared by a number of bar associations.

## 3.13 – Issue 13: Reporting obligations: postponement of transactions

*(Application of Article 24 of the AML Directive)*

In relation to this issue, the following questions were examined:

| |
|---|
| *How has article 24 of the AML Directive been transposed into national law? Are instructions given not to carry out transactions? By which authority? Which is the role of the FIUs in this regard? Is this kind of measure effective from the perspective of FIUs or other authorities? Is there any objective evidence of this? Which is the borderline between postponement orders and freezing orders in practice? How MS are dealing with requests for postponement orders from other EU/EEA countries? Is this part of the FIU cooperation? How do covered entities deal with this situation? Are there differences between credit and financial institutions on the one side and non-financial professions on the other side? What is the perception of covered entities about the requirement in Article 24(1): useful or unnecessarily burdensome? Is the possibility provided for in Article 24 (2) widely or rarely used?* |

In accordance with article 24 of the Directive, Member States shall require the institutions and persons covered by this Directive to refrain from carrying out transactions which they know or suspect to be related to money laundering or terrorist financing until they have completed the necessary action in accordance with Article 22(1)(a). In conformity with the legislation of the Member States, instructions may be given not to carry out the transaction.

Where such a transaction is suspected of giving rise to money laundering or terrorist financing and where to refrain in such manner is impossible or is likely to frustrate efforts to pursue the beneficiaries of a suspected money laundering or terrorist financing operation, the institutions and persons concerned shall inform the FIU immediately afterwards.

### 3.13.1 – Possibility to postpone/give instructions not to carry out transactions

According to our information, all but three countries have included a postponement/consent regime in their legislation. Only in **Greece, Spain and the Netherlands** such a possibility does not exist.

In **Greece and Spain**[188], the relevant legislation includes the general principle of refraining from suspicious transactions unless refraining is not possible or may hinder the investigations. No postponement possibility exists.

The **Dutch AML legislation** does not include a direct postponement possibility either.

The **mechanism of postponement can differ**. There are essentially two regimes, i.e. a real postponement regime and a consent regime.

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[188] Greece: Art. 27 §2 of the Greek AML Law: "The obligated persons must refrain from carrying out transactions, engaging in activities or providing any services, which they know or suspect to be related to the offences set out in Article 2, unless refraining in such manner is impossible or likely to frustrate efforts to pursue the customers, the beneficial owners or the persons on behalf of whom the customers may be acting; in the latter case the obligated persons shall execute the aforementioned operations and simultaneously inform the Commission".
Spain: Article 19 of the Spanish AML Law "Abstention from execution.
**1.** The institutions and persons covered by this Act shall refrain from carrying out any transaction of those referred to in the previous article. However, when such abstention is not possible or may hinder the investigation, the institutions and persons covered by this Act shall be free to perform it notifying the Executive Service immediately thereafter in accordance with the provisions of article 18. The notification to the Executive Service shall, in addition to the information referred to in article 18.2, indicate the grounds for executing the transaction".

The *postponement regime* allows the competent authority to temporarily postpone the transaction pending further investigation (and possible further court freezing actions). In the *consent regime* covered entities/persons need to obtain the consent of the competent authority in order to be able to carry out the transaction[189].

In general the same rules on postponement/consent apply to all types of covered entities/persons.

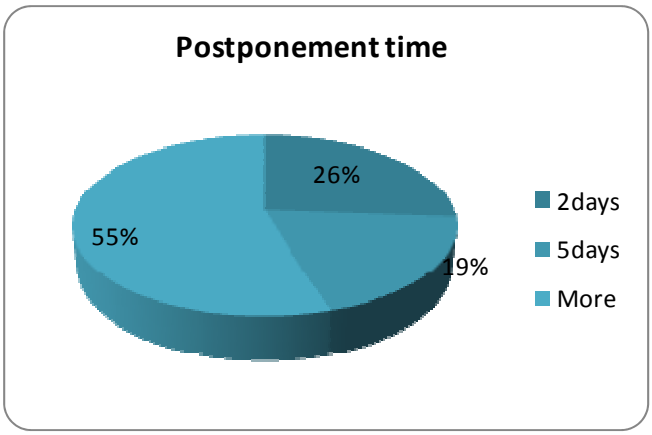
In almost every Member State the **FIU** has the authority to consent/postpone. In the following Member States another authority has the power to postpone. The fact that another authority has the power to postpone/consent does not as such change the fundamental tasks of the FIU.

| **Country** | **Postponement/consent authorities** | **FIU** |
|---|---|---|
| Bulgaria | Minister of Finance upon a proposal by the Chairperson of the State Agency for National Security | The reporting entity/person reports to the Financial Intelligence Directorate of the State Agency for National Security. The Financial Intelligence Directorate of the State Agency for National Security shall notify the Prosecutor's Office immediately of the stay on the transaction or deal. |
| Czech Republic | Ministry of Finance | The Ministry receives the suspicious transaction report via the Financial Analytical Unit, which is a part of the organizational structure of the Ministry. |
| Germany | The public prosecutor's | The reporting person/entity needs to report to the competent law enforcement agency with a copy to the Federal Criminal Police Office – Financial Intelligence Unit. |
| Portugal | Attorney General | The reporting person/entity needs to report to both the FIU and the Attorney-General of the Republic that they have refrained from executing the operation. |

### 3.13.2 – Maximum time for postponement/consent

The maximum time for postponements/consents differs significantly (e.g. from 2 to 60 days). In the graph below the different maximum postponement times are demonstrated. In practice there is a difference between the maximum postponement time and the actual postponement time. The differences are not related to the type of postponement mechanism.

[189] A consent regime applies for instance in Denmark (financing of terrorism), Germany, UK.



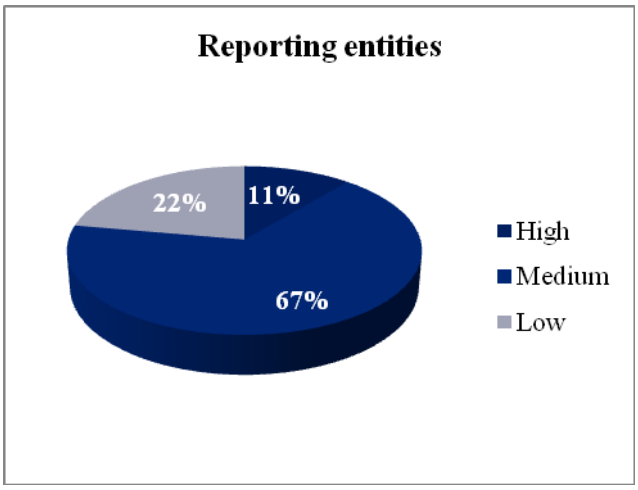

### 3.13.3 – Postponement orders from other EU/EEA countries

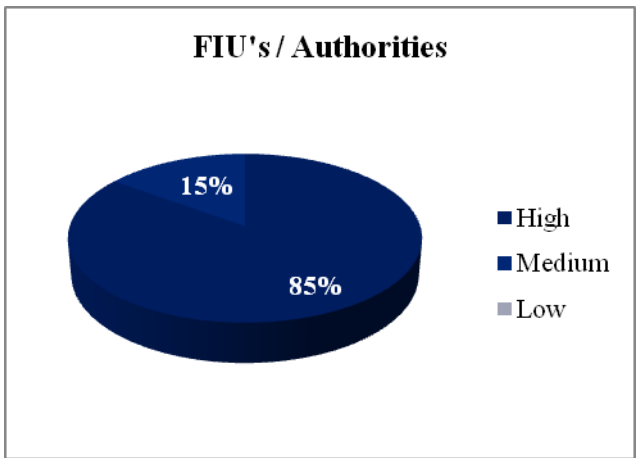
A number of FIUs have not yet been involved in a cross border postponement order. Practical experience is therefore very limited and anecdotal.

In most Member States these orders are handled in the same way as on a national level. In e.g. Denmark, authorities comment that such a request can only be dealt with if it is similar to seizure and decided by law enforcement authorities.

### 3.13.4 – Degree of effectiveness of postponement measures

The degree of effectiveness is in experienced differently by FIU's/authorities (in general high) and by reporting entities (in general medium). No evidence was presented.






### 3.13.5 – Borderline between postponement orders and freezing orders in practice

Many public and private stakeholders commented on the different legal framework for postponement and freezing orders i.e.:

- Different authorities order postponement and freezing;
- The legal procedure is different;
- Stricter time limits for postponement;
- Postponement of transactions can be ordered in cases of grounded suspicions of ML/TF. For freezing orders there needs to be at least a criminal investigation underway, and law enforcement must convince the judge that there is a good arguable case.

As to practical aspects, public stakeholders express the following differences:

- A court freezing order in practice often follows immediately after a postponement; coordination between authorities is often involved;
- Postponement of a transaction is sometimes requested to enable the gathering of the required evidential material for an application to the court for a freezing order;
- Postponement of transactions is aimed at postponing the execution of a particular transaction for a definite period whereas account freezing, albeit having the same effect, in practice refers to all funds. Account freezing seems to be more effective in counteracting money laundering as it prevents people involved, from carrying out further transactions.

Private stakeholders experience the following practical differences:

- A difference in disclosure rules between postponement and freezing orders;
- Postponement is related to a transaction i.e. the temporary restriction of the use of money by making it impossible to conduct a transaction. Blockage/freezing of an account means making it impossible to transfer money or conduct transactions in general.

### 3.13.6 – Perception of covered entities about the requirement to refrain from carrying out suspicious transactions and postponement/consent measures

The perception of covered entities about the requirement to refrain from carrying out suspicious transactions and the postponement/consent measures differs to a large extent. About 50 % of the respondents who replied to the question were of the opinion that the framework was useful, the other approximately 50 % were of the opinion that the measures were unnecessary burdensome.

Few further comments on these opinions were expressed. The difference of opinion is not related to the type of profession. The only trend that could be observed is the fact that covered entities submitted to a consent regime were more of the opinion that the measures are unnecessary burdensome than the respondents that have to comply with a pure postponement framework.

Respondents that are covered by a consent regime commented that the consent procedures delay the client's access to services (i.e. legal advice). Waiting for approval can also be stressful. Service providers may find themselves in breach of contract because transactions can be delayed significantly. There is a risk of civil action[190].

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[190] Some stakeholders referred to the UK court Case Shah v HSBC [2010] EWCA Civ 31. The case Mr. Shah v HSBC Private Bank (UK) Ltd concerned a number of instructions given by Shah ("the claimant") concerning the transfer of funds out of accounts he held with HSBC ("the defendant"). Mr. Shah, a businessman with interests in (among other places) Zimbabwe, had an account with HSBC. Due to a problem with identity fraud he transferred a large sum of money to HSBC from another account he held with Crédit Agricole.
A few months later he instructed HSBC to make four payments out of the account. In all four cases he was told that the transfers would be delayed. These delays were the result of disclosures the bank had made to the Serious Organised Crime Agency ("SOCA") pursuant 327 to 329 and 338 of the Proceeds of Crime Act 2002 ("POCA") because it suspected that the money was criminal property. Although SOCA eventually granted permission to proceed with the transfers, each payment was subject to a number of days' delay. HSBC explained the delays to Mr. Shah by saying that it was complying with its UK statutory obligations. Mr. Shah relayed this explanation to one of the intended payees, which led to rumours spreading in Zimbabwe that Mr. Shah were suspected of money laundering. Zimbabwean officials demanded an explanation from Mr. Shah about the funds. He asked HSBC for more information and was told that he had been under investigation but that this was now completed. Shah's solicitors sought a further explanation but the bank refused, relying on the offence of tipping off in section 333 of the POCA.
As Mr. Shah could not provide the information they wanted, Zimbabwean authorities proceeded to seize $331 million of Mr. Shah's assets creating a huge losses in interest. To recover these loses Mr. Shah brought a claim against HSBC arising out of HSBC's failure to comply with their payment instructions and to provide them with information as to why it had not honoured its mandate. HSBC argued they had a suspicion that the requested transfers involved funds which were criminal property. In the light of that suspicion they were compelled under POCA to make an authorised disclosure under section 338 and seek appropriate consent under section 335. Shah countered by alleging that the suspicion was irrational, negligently self-induced and mistaken, and, having been generated by a computer, not capable of being held by a human being.
Based on evidence provided by HSBC, each of Mr. Shahs' assertions mentioned above were rejected by the Court. After having done so, the Court concluded that, in order to impugn the HSBC's decision to make an authorised disclosure under POCA and the consequent failure to execute their customer's instructions, Mr. Shah had to challenge the good faith of the bank and its employees. Since Mr. Shah did not seek to challenge the good faith of HSBC, there was, in the court's view, no real prospect of Mr. Shah establishing that the failure to execute his instructions was a breach of duty on the part of the bank and it accordingly dismissed his claim. Shah appealed this summary judgement.
As in first instance the Court of Appeal rejected the assertions that HSBC's suspicion had been irrational, negligently self-induced and mistaken, and, having been generated by a computer, not capable of being held by a human being. The Court confirmed the low threshold of suspicion under the POCA. It is sufficient that party thinks that there is a possibility, which is more than fanciful, that the relevant facts (i.e. money laundering) exist. The POCA does not require the suspicion to be based on reasonable grounds.
The Court however disagreed with the assertion that arguing that HSBC had acted in bad faith was the only way to challenge its conduct. It emphasised that banks' decisions to report suspicions of money laundering under POCA could be tested and investigated by the Court. The Court made it clear that banks may consequently be ordered to disclose confidential communications and/or documents.
Further, it was possible for banks to be liable to customers even if they had disclosed their suspicions in good faith:
A bank's duty of care to its customer is not completely excluded by the POCA and, in principle, an unreasonable delay in making a relevant disclosure to the authorities might be a breach of that duty;
A bank's agency duty is also not completely excluded by the POCA. An agent is (arguably) obliged to keep the principal informed as to the state of his principal's affairs especially if his principal requests information about them, even where a

Specifically in cross border transactions, covered entities are of the opinion that potential clients can seek to avoid involving professionals submitted to a consent regime.

### 3.13.7 – Main issues met in practice in respect of postponement of a suspicious transaction - Differences between credit and financial institutions on the one side and non-financial professions on the other side?

The main issues met in general are client issues and operational issues. These issues are irrespective of the nature of the profession of the covered person/entity.

Stakeholders indicate that due to the prohibition of disclosure it is often extremely difficult to execute postponement without informing the customer of the true reason of the delay. This is experienced by all professions but, based on the input from stakeholders, it is mostly emphasized by the real estate and legal professionals. Stakeholders refer to risk of civil action .

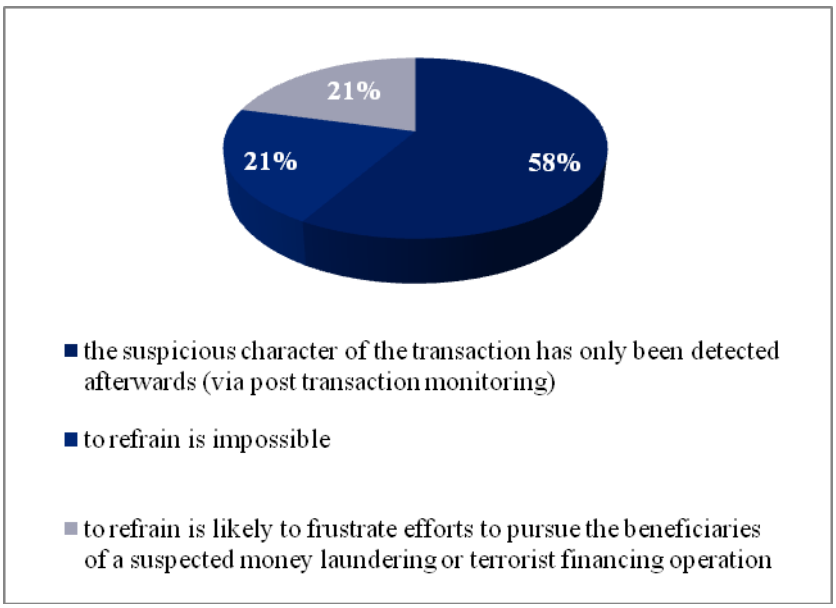
One stakeholder from the financial sector referred to possible contradictions in regulations and states that "in the near future SEPA rules will allow banks 1 business day to execute payment transactions. On the other hand, AML legislation sets out the requirement to postpone a transaction in case of a STR for two days. This contradiction has to be resolved".

report has been made to a relevant authority under the POCA. The offence of tipping-off in section 333 of the POCA only justifies a bank's refusal to inform a customer about an investigation throughout the seven day notice period, during which the authorities can refuse permission to continue with the requested transaction, and the 31 day moratorium period, which applies where permission is refused, and during which the authorities can obtain an order freezing the account. After the expiry of those periods, the offence of tipping off does not automatically justify such refusals.

### 3.13.8 – Use of the possibility to inform the FIU immediately after a transaction in certain circumstances

A very clear majority of reporting persons/entities indicate that they refrain from carrying out a transaction until reporting.

The main reason for reporting transactions after they are carried out, is that the suspicious character of the transaction has only been detected afterwards.



## 3.14 – Issue 14: Protection of employees after reporting

(Application of Article 27 of the AML Directive)

In relation to this issue, the following questions were examined:

*How has Article 27 been transposed into national legislation? Have specific measures related to AML reporting been taken (in addition to normal rules on protection of witnesses in criminal proceedings)? How is protection organized in practice by reporting entities? What do covered entities do in this regard? Are there differences between credit and financial institutions and casinos on the one hand, and non-financial professions on the other hand? Are there differences between large entities and single practitioners? How are single practitioners protected? Are there best practices in relation to protection of employees? What is the perception of stakeholders (such as trade unions)? Which is the experience of national authorities with the application of Article 27?*

### 3.14.1 – Introduction

In the recitals[191] of the Directive, reference is made to a number of cases of employees who upon reporting their suspicions of money laundering were subjected to threats or hostile action. Although the Directive cannot interfere with Member States' judicial procedures, protection of employees is considered a crucial issue for the effectiveness of the anti-money laundering and anti-terrorist financing system. Article 27 therefore requires Member States to take all appropriate measures in order to protect employees of the covered entities who report suspicious transactions either internally or to the FIU.

Two different provisions are concerned. The first one constitutes an important novelty in the Directive. It requires Member States to take all appropriate measures in order to protect employees of the persons who report the suspicions of money laundering or terrorist financing either internally or to the financial intelligence unit[192] from threats or hostile action. This provision has been particularly welcomed by the European Economic and Social Committee.

The second provision relates to the protection from liability in case of disclosure in good faith pursuant to a report filed in accordance with the directive[193]. Such a report shall not constitute a breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, and shall not involve the person or its directors or employees in liability of any kind. There is no substantial change, as regards this provision, compared to the previous directive[194].

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[191] See Recital 32 – Article 27 is one of the two provisions in the Directive that aim to protect reporting persons/entities. Article 26, the second provision, relates to the protection from liability in case of disclosure in good faith pursuant to a suspicious transaction report. (See Mariano FERNÁNDEZ SALAS "The third anti-money laundering directive and the legal profession" [*OCTOBER 2005*]).

[192] See Article 27 and recital 32.

[193] See Article 26.

[194] See Article 9 of the first directive, as amended.

### 3.14.2 – Measures taken by the Member States

The majority of Members States have included one or more of the following protective measures in relation to the implementation of article 27 of the Directive:

1. Confidentiality measures:
   - A confidentiality obligation in relation to the report and its content (including the name of the reporter);
   - Report not to be made part of the criminal dossier in case of prosecution;
   - Name of reporter not disclosed to judicial authorities or competent authorities.
2. Possibility of anonymous reporting;
3. Obligation for covered entities to implement internal safeguards for the protection of reporting employees.

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| Austria[195] | A joint action plan by the authorities and the financial sector was agreed early November 2008 containing measures to promote the protection of reporting entities and their employees (awareness raising campaigns both among the law enforcement authorities, public prosecutors, judges and the private sector; ordinances by the MoJ and the Federal Chancellery, anonymity of suspicious transaction reports, information on protective mechanisms contained in the code of criminal procedures etc). Accordingly, a Federal Ministry of Justice ordinance of November 11, 2008 gives guidelines regarding the protection of employees or reporting credit and domestic financial institutions. |
| Belgium | In case of prosecution, the suspicious transaction report and additional information provided by reporting entities or persons will not be part of the criminal dossier. Even when members of the FIU, employees of the FIU, police officers, detached officers and external experts are called as witnesses, it is forbidden to reveal the identity of the writer of the report. (Art. 36 AML/CFT Law) |
| Bulgaria | Officers of the FIU are not allowed to disclose or use for their own benefit or for the benefit of any persons related to themselves any information or facts constituted of official, banking or commercial secrets that they have become aware of in the performance of their office. (Art. 15 AML Law)<br>A similar provision is contained in the Measures Against Financing of Terrorism Act. This Act stipulates that the competent authorities who have received information in connection with the application of the Act shall not disclose the identity of the persons who have provided any such information. (Art. 10 TF Law) |
| Cyprus | The FIU explained that it was decided that practical measures could be elaborated and adopted without the need to be contained in the law.<br>Such practical measures are the following:<br>• SARs to be signed by the Head of Compliance and not by the individual bank employee who identified the suspicion and filed the Report internally;<br>• The form of the SARs is never to be presented in any court proceedings; |

[195] Source: FATF Mutual report on Austria, 2009, p. 71.

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| | • In the course of the analysis and investigation the fact that an SAR has been filed with the FIU is never revealed;<br>• In case of a criminal prosecution based on SARs the power of issuing a court disclosure order to get the necessary evidential material is used;<br>• The members of the FIU are bound by confidentiality rules and are liable for any infringement.<br>Section 48 of the AML/CFT Law regarding offences in relation to the disclosure of information has been amended in order to cover clearly the prohibition of disclosing that an SAR has been submitted to the FIU. |
| Czech republic | • A suspicious transaction report shall not reveal any information about the obliged entity's employer or contractor who had disclosed the suspicious transaction;<br>• (1) Unless provided otherwise in this Act, the obliged entities and their employees, employees of the Ministry, employees of other supervisory authorities and natural persons, who, based on other than an employment contract with an obliged entity, the Ministry or another supervisory authority, shall be obliged to keep secret the facts relating to suspicious transaction reports and investigation, steps taken by the Ministry or the obligation to report a suspicious transaction stipulated Section 24.<br>(2) A transfer of the persons referred to in Article 1 above to another job, termination of their employment or other contractual relationship to the obliged entity, the Ministry or other supervisory authority, or the fact that the obliged entity had ceased to perform activities listed in Section 2 shall not cause the obligation of secrecy to expire.<br>(3) Any person who learns the facts referred to in Article 1 shall be obliged to keep secret.<br>(Section 18 §3 and Section 38 of the AML/CFT law) |
| Denmark | An agreement exists covering all who are required to report, that the suspicious transaction report does not have to contain the name of the person who had the suspicion. The name of that person will only be obtained if needed for an investigation. |
| Estonia | The Financial Intelligence Unit shall not disclose personal data of the person performing the notification obligation or a member or employee of the directing body of the obligated person. (§43, 5 of the AML/CFT Law) |
| Finland | Parties subject to the reporting obligation shall take appropriate and adequate measures to protect those employees who submit a suspicious report. (Art. 34 Finnish AML/CFT Law) |
| France | The Monetary and Financial Code states that the suspicious transaction reports are confidential. In addition the Monetary and Financial Code stipulates that a suspicious transaction report will not be part of the criminal dossier in case of prosecution. (Article L561-19 and article L561-24 the Monetary and Financial Code) |
| Germany[196] | The information contained in a suspicious transaction report may be used only for criminal proceedings specified in Section 15(1) and 15(2) of the AML Act, for criminal proceedings related to a criminal offense liable to maximum punishment of more than three years imprisonment, for taxation proceedings, for the supervisory |

[196] Source: FATF Mutual Evaluation Report Germany 2010, p. 167

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| | tasks of competent authorities pursuant to Section 16(2) of the Money Laundering Act, and for the purpose of threat prevention (Section 11(6) of the AML Act).<br><br>The names and personal details of reporting persons are protected in two ways:<br><br>• Access to the criminal investigation file, of which the suspicious transaction reports automatically become part, is restricted to a very limited number of persons;<br><br>• The personal data of reporting parties are not stored at the FIU or at the State Criminal Police Offices in researchable files. The only information recorded is the designation of the party making the report (e.g. the name of the credit institution) and the reference number used by the party, but not the names of the reporters;<br><br>As an additional measure, the financial regulator requires financial institutions to file suspicious transaction reports only through the ML compliance officer without disclosing the officer‘s name or the names of any members of staff of the financial institution involved in the respective case. |
| Greece | The law requires covered entities or persons to apply appropriate measures to protect the Compliance Officer reporting unusual or suspicious transactions to the AML/CFT Commission, as well as their employees filing internal reports of their suspicions of attempt or commission of ML/FT, including by keeping their anonymity vis-à-vis reported customers or any third parties, other than the persons or authorities specified by law. Furthermore following the analysis of the suspicious transaction reports, the FIU will, when it submits the case to the judicial or other law enforcement authorities, ensure the anonymity of the reporting entities. (Art. 30 AML/CFT Law) |
| Hungary | Pursuant to the AML Act suspicious transaction reports shall be reported to the FIU through the designated person, so the name or other personal data of the person (customers of service provider, executive officer, employee or a contributing family member) noticing any information, fact or circumstance indicating money laundering or terrorist financing is not included in the report and is kept anonymous. (Service providers are required to notify the FIU concerning the name and the position of the designated person.)<br>With exception of certain cases, the reporting persons and the FIU shall not provide information to the customer concerned or to other third persons on the fact that a report has been transmitted to FIU, on the contents of the report, or on the fact that the transaction order has been suspended, on **the name of the reporting persons**, or on whether a money laundering or terrorist financing investigation is being or may be carried out on the customer. The FIU is required to ensure that the filing of the report, the contents thereof, and the identity of the reporting persons remain confidential (Section 23 (2) and 27 of the AML/CFT law). |
| Ireland | FIU (and Revenue) treat STR’s in as confidential a manner as possible and procedures are in place in this respect.<br><br>A report (for example made by a bank employee) made under Chapter 4 of Part 4 shall not be disclosed, in the course of proceedings under section 17 or 19, to any person other than the judge of the District Court concerned.<br><br>(1) Without prejudice to the way in which a report may be made under section 42 or 43, such a report may be made in accordance with an internal reporting procedure established by an employer for the purpose of facilitating the operation of the section concerned. (2) It is a defence for a person charged with an offence under section 42 or 43 to prove that the person was, at the time of the purported offence, an employee who made a report under that section, in accordance with such an internal reporting |

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| | procedure, to another person. (Section 22 and 44 AML/CFT law) |
| Italy | The person with reporting obligations, the professional associations, the FIU, the Finance Police and the Bureau of Antimafia investigation should adopt adequate measures to ensure the maximum protection of the identity of the individual making a suspicious transaction report. The identity of natural persons can only be revealed when the judicial authority deems it indispensable for the purpose of ascertaining the crimes that are subject of proceeding. (Article 45 of the AML/CFT law) |
| Latvia | The FIU is not allowed to disclose data about the persons who have made a suspicious transaction report (article 30 §5 AML/CFT Law) |
| Lithuania | The law ensures that persons, who provided information to the FIU and helped to disclose money laundering or terrorist financing facts, stay anonymous (article 15, 4 AML Law). For that purpose financial and other institutions, providing information about suspicious transactions to the FIU, are not obliged to indicate the person that reported the suspicious money transactions. |
| Luxemburg | The identity of the reporting employees of professionals shall remain confidential as long as its revelation is not necessary to ensure due process or the correctness of the facts on which the prosecution is based. (Article 5 §1 of the AML/CFT Law) |
| Malta | Any investigating, prosecuting, judicial or administrative authority and reporting entities shall protect and keep confidential, the identity of persons and employees who report suspicions of money laundering or the funding of terrorism either internally or to the FIU. (Regulation 15 §4 of the AML/CFT Regulations)<br>The officers of the FIAU, whether still in the service of the FIAU or not, are also bound by confidentiality obligations in relation to any information on the affairs of the FIAU or of any person, which they have acquired in the performance of their duties or the exercise of their functions. (Article 34 §1 of the AML/CFT Act). |
| Poland | Any information received and provided by the financial information authority, as provided for in the Act, shall be subject to the protection as required by separate laws governing the rules for their protection.<br>Anyone who came into possession of information is required to protect the information protected by law, according to the principles and procedures laid down in separate regulations. Maintenance of confidentiality also applies after employment termination, performing activities under the contract or termination of civil service.<br>The obligation to maintain the confidentiality about the information obtained on the basis of the Act, to which the provisions of separate laws governing the protection do not apply, also covers the personnel of the obligated institutions, commerce chambers associating the obligated institutions, banks associating cooperative banks and all the persons performing activities on their behalf under civil law contracts.<br>Maintenance of confidentiality also applies after termination of employment or cessation of activities based on civil law contracts. (Article 30, 33 of the AML/CFT law) |
| Portugal | The Portuguese FIU makes a final report in relation to every STR received from the entities subject to the AML/CFT law. This final report may have two destinations: it is filed in case of an unconfirmed suspicion or it is sent to the competent authorities (the Police, the Public Prosecutor) for further investigation. In both cases, the final report makes no mention of the person who signed the STR, but only mentions the entity that filed the report. The form sent by the entity having filed the report (usually signed by |

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| | the Head of Compliance) does not accompany the final report produced by the FIU; therefore it is not possible to know the identity of the individual that forwarded the STR. (article 16, 2 of the AML/CFT Law confidentiality of the reporting person). |
| Romania | The identity of the natural person which, in accordance with Art. 14 para (1) (persons with responsibilities in applying the present law), notifies the Office may not be disclosed in the content of the notification to the prosecutor's office. In addition to this the law states that the personnel of the Office must not disseminate the information received during the activity other than under the conditions of the law. (Article 6§1.1 and 18 of the AML/CFT Law) |
| Slovakia | An unusual transaction report must not include data about the employee who detected the unusual transaction. (Section 17 §4 of the AML/CFT Law) |
| Slovenia | The FIU, when notifying the competent authority, shall not state information about the employee and his/her respective organisation which made the report, unless there are reasons to suspect that the organisation or its employee committed the criminal offence of money laundering or terrorist financing, or if such data are necessary in order to establish facts during criminal proceedings and if the submission of the said data is requested in writing by the competent court. (Article 61 §2 of the AML/CFT Law) |
| Spain | Suspicious transaction reports are confidential and the identity of the person who made the report is not to be disclosed. (Art. 46 §1 of the AML/CFT Law). In addition, intelligence reports cannot be directly incorporated to criminal dossiers, which further preserves the anonymity of the reporting entity.<br>Covered entities are obliged to preserve the confidentiality of the identity of the person who has reported internally (art. 30.§1 of the AML/CFT Law). |
| Sweden | A party engaged in activities shall have procedures and take other measures that may be required to protect employees from threats or hostile action as a consequence of them reviewing or reporting suspicions of money laundering or terrorist financing. (Charter 5 section 2 of the AML/CFT) |
| The Netherlands | Data or information provided in accordance with Sections 16 or 17 may not serve as the basis for or be used in a criminal investigation or prosecution on suspicion of, or be used as evidence on a charge of money laundering or terrorist financing by the institution that provided this data or information.<br>Data or information provided on the reasonable assumption that the provision fell under Sections 16 or 17 may not serve as the basis for or be used in a criminal investigation or prosecution on suspicion of, or be used as evidence on a charge of breach of Section 272 of the Criminal Code, by the institution that provided this data or information. |
| UK[197] | The UK FIU enforces the confidentiality of SAR originator details. All persons involved in the use of SAR intelligence receive appropriate training. The Home Office issued guidance to the police in December 2005 (HO Circular 53/2005) about the need to protect the identity of members of staff who make reports. The guidance is applied by other criminal justice and law enforcement agencies that handle reports. In addition SOCA has established a telephone line for the reporting sectors to raise any concerns about the inappropriate use of reports by law enforcement agencies. |

[197] Source: FATF Mutual Evaluation Report UK 2007, p. 144.

### 3.14.3 – Measures taken by practitioners

#### 3.14.3.1.1. *Financial institutions - non-financial professions – casinos*

In all types of large covered entities, the following basic measures, irrespective of the type of profession, are usually taken:

- Adequate training of staff and clear internal reporting procedures;
- Designation of a compliance officer or money laundering reporting officer who will:
  - Receive the internal reports made by employees;
  - Decide on the actions to take;
  - Draft and submit the suspicious transaction reports.

  National legislation often includes the obligation for covered entities to designate a money laundering responsible officer. The purpose of this obligation is to appoint someone who has the duty to ensure compliance with anti-money laundering obligations. This person will, in general, also draft and submit STRs. Although the objective of this kind of obligation is as such completely different, the measure has the effect that the initial reporter is protected and that his/hers name is not mentioned.
- Confidentiality: Confidentiality includes keeping the anonymity of the original reporter protected internally, towards clients and towards third parties. In some cases the possibility of filing an anonymous report to the compliance officer is given.

The above measures can be considered as **standard best practices**[198]. Ideally these practices can be combined with the possibility **to report anonymously to the FIU or by using only code**.

Additionally, for **non-financial professions,** the channelling of the **reporting through a self regulatory body** is often also experienced by stakeholders as having a protective effect. It creates a second layer between the reporter and the authority responsible for the analysis of the suspicious transaction reports.

**Casinos** point out that complete anonymity and secrecy of reporting is crucial. In order to protect employees, decisions with regard to transactions that have been reported internally, are only known by management. Employees will be informed that action will be taken but the actual content of the decision and the nature of the action will not be disclosed.

#### 3.14.3.1.2. *Large practices – single practitioners*

For single practitioners it is more difficult to effectively minimize the risk associated with reporting suspicious transactions. This could be explained by:

- The often more personal nature of the relationship between a single practitioner and his client;
- The absence of a money laundering reporting officer or compliance officer in single or very small practices.

[198] An association of trade unions confirmed that the representation of the measures was reasonable.

### 3.14.4 – Perception of stakeholders

According to reporting stakeholders the following activities need to be considered risky:

- Signing reports for the FIU;
- Acting as witness in trials.

In general, financial institutions do not see the risks mentioned as obstacles for the reporting duty. They have sufficient internal safeguards in place to protect their employees. They also noted that hostile actions and threats from customers with regard to money laundering are quite rare.

The independent legal professionals have different opinions. Some of them indicated that the risk associated with reporting would not prevent them from complying with their obligation to report while others have commented that these risks could form an obstacle for the reporting duty. Most professionals did however report that they have had no issues so far.

Problems were described in relation to casinos where employees and managers have been threatened by criminals because the origin of the suspicion was mentioned to the suspected clients by police or judiciary authority members. This has also occurred in other sectors.

Other than the fact that it is not easy to include legal provisions on "threats or hostile action", authorities did not comment specifically on their own experiences with the principle of protection of employees, but gave examples of how covered entities in practice deal with protection of employees. These examples are identical to the ones mentioned by covered entities.

In a number of countries' complaints have been made by reporting entities/persons, as their employees often felt exposed to potential threats or hostile action because they fear that their identity may become disclosed. The replies to the survey of authorities often mention the commitment to safeguard anonymity.

## 3.15 – Issue 15: Internal organisation: replies to FIUs and other authorities by credit and financial institutions

(Application of Article 32 of the AML Directive)

In relation to the internal organizational measures taken by credit and financial institutions to reply to FIUs and other authorities, the following questions were examined:

*How has Article 32 been transposed into national legislation? Which authorities have the right to ask for information? How are credit and financial institutions organized in practice to cope with the requirements of Article 32? Is the system used? How rapidly are replies provided? Are credit and financial institutions in a position to provide information not just on the account holder but also on the (where applicable) beneficial owner? Are there other tools at the disposal of public authorities, such as a centralized bank account registry?*

Pursuant article 32 of the Directive Member States must require credit and financial institutions to have systems in place that enable them to respond fully and rapidly to enquiries from the FIU, or from other authorities, in accordance with their national law, as to whether they maintain or have maintained during the previous five years a business relationship with specified natural or legal persons and on the nature of that relationship.

### 3.15.1 – Measures taken by the Member States

The obligation for credit and financial institutions to have systems in place that enable them to respond fully and rapidly to enquiries from the FIU, or from other authorities is explicitly prescribed by the legislation of 13 Member States[199]. The remaining 14 Member States[200] have chosen to transpose the requirement via a combination of the following obligations:

- The obligation (to be able) to respond to requests of information from the FIU or other authorities;
- The obligation to retain the documents relating to customer due diligence for at least 5 years;
- The obligation to establish adequate and appropriate policies, systems and procedures to fully comply with the requirements imposed by anti-money laundering legislation.

In addition to the above credit and financial institutions in **Italy** are required to set up a so-called "Archivio Unico Informatica". This is a single computerized and standardized database which contains substantial information on all transactions above a threshold of 15,000 EUR and makes it possible to quickly respond to enquiries from the FIU or competent authorities[201]. In **Germany** credit institutions are obligated to maintain core information about client accounts (e.g. account numbers, name of account holders and the name of beneficial owner but no transaction data) in a separate database which can be accessed by BaFin, the financial supervisors, by means of automated procedures[202]. The FIU only has indirect access to this system via BaFin.

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[199] AT, CY, EL, ES, IE, LT, LU, MT, PT, RO, SE, SK and UK.
[200] BE, BG, DE, DK, CZ, EE, FI, FR, HU, IT, LV, NL, PL and SI.
[201] Article 37 of Legislative Decree 231/2007.
[202] Article 24c of the Banking Act.

Ten Member States have indicated that their financial supervisory authority has set specific requirements as to the system that has to be in place, by means of guidance and/or secondary legislation[203]. These requirements mostly determine which information must be provided and/or the basic system requirements that have to be complied with. These system requirements are in most cases the same as those for the setting up of general AML compliance systems. This is because the ability to respond to enquiries in a timely manner is seen as an inherent element or function of the general (electronic) compliance systems. As explained above, in Italy and Germany however, the competent authorities have issued specific technical guidelines in regards to the functioning of the electronic databases mentioned above.

## 3.15.2 – Modalities

### *3.15.2.1 – Information that can be requested*

All Members States have indicated that the FIU and other competent authorities can request the following information from covered entities:

- Customer information;
- Information on products and transactions;
- Beneficial owner information;
- Proxy information.

In addition to the information mentioned above, the FIU is authorized in all Member States to request, in accordance with its national law, all the additional information from covered entities it requires fulfilling its duties. The Member States also indicated that the FIU and other competent authorities have access, either direct or indirect, to the necessary administrative and law enforcement information to perform their functions of analyzing suspicious transaction reports or conducting money laundering/terrorist financing investigations (e.g. access to criminal records, to intelligence databases, to the company register, to customs registers, to the real estate register). The information gathering is further improved by subscriptions to commercial and open source databases. In this regard however it needs be noted that only five Member States have a centralized bank account registry[204]. In the other Member States more ad hoc solutions have been worked out to obtain account information. For example in the **Netherlands** account information is obtained via the Dutch Banking Association who will direct the request to the relevant bank.

### *3.15.2.2 – Authorities competent to request information*

All the FIU's/Competent Authorities have reported that in their Member States the following authorities, in accordance with their national law, can request information from covered entities:

- The FIU;
- The competent authorities;
- The judicial authorities.

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[203] AT, BE, CZ, DE, EL, FR, HU, IT, RO and SE.
[204] ES, FR, IT, RO and SI.

It is important to note that the legal basis for requesting the information is not necessarily contained in the national anti-money laundering legislation itself. Often information can also be requested on basis of provisions which can be found in e.g. the Judicial Code or in laws regarding the supervision of the financial sector such as the Banking or Insurance Code.

#### *3.15.2.3 – Timeframe in which to reply*

**In thirteen Member States** the legislation does not determine the exact timeframe in which the covered entities have to respond to the request for information. According to the FIU's/Competent Authorities the covered entities have to respond without delay[205]. In nine Member States, the timeframe in which to respond is determined by the FIU or competent authority and set on a case by case basis[206]. In five Member States the time frame to reply in general to requests for information is determined by law[207].

In practice the actual response time varies. Not all FIU's gave specific information on actual response times. Two FIU's responded that it takes the covered entities in general less than 2 days to respond to requests. In 9 Member States the average response time is between 2 days and 1 week. Finally it takes the covered entities in 5 Member States on average longer than 1 week to respond.

### 3.15.3 – Use of the "system"

It was found that in general FIU's do not very often make use of the possibility to request additional information as the information provided by the reporting entities in the suspicious transactions reports is often sufficient for further analysis [208]. In complex cases or when a suspicious transaction report is incomplete additional information is requested more frequently. It was indicated that the possibility is used more extensively by the judicial authorities during investigations. No particular evidence supporting this position or the opposite can be presented.

### 3.15.4 – Measures taken by private stakeholders

As already indicated above the ability to respond to enquiries in a timely manner is considered to be an inherent function of a general AML compliance system. The stakeholders did emphasize the importance of the compliance officer in the entire process. He/she is the human element in the system who can, when necessary, ensure and verify communication between the requesting authority and the covered entity.

In regards to complying with a request for information no major issues where reported. In principle all internal information is provided upon request of FIU's according to stakeholders.

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[205] AT, CY, DE, DK, EE, EL, HU, IE, LU, PL, PT, SE and SK.

[206] BE, BG, CZ, ES, FI, FR, IT, NL and UK.

[207] LT (within 14 working days after request), LV (within 7 days after the request),, MT (within 5 working days after request), RO (in case of FIU's requests for information, maximum 30 days, for reply to other authorities' requests nu timeframe is set) and SI (within 15 working days after the request, shorter time frame can be set by FIU). In case of inquiries from judicial authorities and/or court orders additional time frames can apply.

[208] For example: In 2007 the Austrian FIU made 105 requests for additional information to banks. The total amount of STR's by banks that year was 1.045 (FATF Mutual Evaluation Report of Austria), in Q1 of 2010 the Dutch FIU made 58 requests for additional information to financial institutions and in 2009 the French FIU made 1.222 request for information to covered entities and public authorities. The total amount of STR's that year was 17.310.

Some financial institutions indicated that in many cases the external information requested cannot be verified e.g. the authenticity of identification documents such as an identity card or act of incorporation, information on beneficial ownership etc.

Some specific operational issues were raised such as unclear specifications of natural or legal persons involved, the number of requests for information during large scale investigations and timeframes for answering. Some stakeholders also mentioned general issues regarding IT implementation and compliance cost. These last issues are inherent to the setting up of general AML compliance systems.

## 3.16 – Issue 16: Penalties

(Application of Article 39 of the AML Directive).

The following questions have been examined:

*How has Article 39 (1) of the AML Directive been transposed into national legislation? Which types of penalties are applied for failing to comply with the AML obligations in the national law transposing the AML Directive? Administrative measures, criminal sanctions? How has Article 39 (2) of the AML Directive (in relation to credit and financial institutions) been transposed into national legislation? How has Article 39 (3) and (4) of the AML Directive been transposed into national legislation? Are penalties foreseen in national legislation pursuant to Article 39 comparable across Member States? Are penalties applied in practice? In which cases have penalties been applied? Are the foreseen and applied penalties sufficiently dissuasive?*

### 3.16.1 – Transposition of article 39 (1) and 39 (2) of the AML Directive in the respective Member States.

According to article 39 (1) of the AML Directive, Member States shall ensure that natural and legal persons covered by the AML Directive can be held liable for infringements of the national provisions adopted pursuant to this Directive. The penalties must be effective, proportionate and dissuasive.

Article 39 (2) provides that Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions can be imposed against credit and financial institutions for infringements of the national provisions adopted pursuant to this Directive. Member States are entitled to impose criminal sanctions, but are however not obliged to incorporate them into their national legislation.

Member States have transposed article 39 (1) of the AML Directive as follows:

- All Member States have incorporated administrative penalties, as prescribed by article 39 (2) of the AML Directive.
- All Member States have incorporated administrative measures as well.
- Although no obligation exists for Member States to foresee criminal sanctions in case of non-compliance with the national AML legislation, twenty Member States have incorporated criminal sanctions.

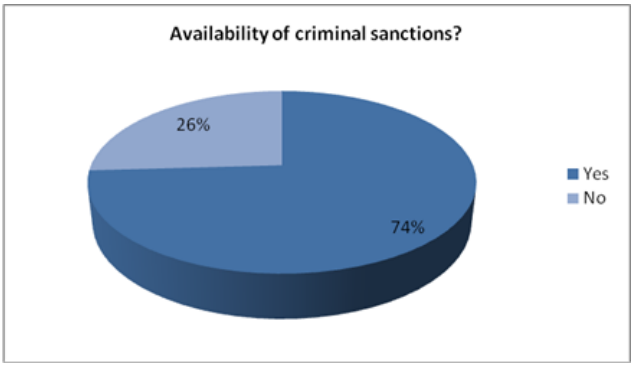

**Table: Overview of administrative penalties, administrative measures and criminal sanctions in Member States**

| | Administrative penalties | Administrative measures | Criminal sanctions[1] |
|---|---|---|---|
| Austria (AT) | X | X | - |
| Belgium (BE) | X | X | - |
| Bulgaria (BG) | X | X | X |
| Cyprus (CY) | X | X | - |
| Czech Republic (CZ) | X | X | X |
| Denmark (DK) | X | X | X |
| Estonia (EE) | X | X | X |
| Finland (FI) | X | X | X |
| France (FR) | X | X | X |
| Germany (DE) | X | X | - |
| Greece (EL) | X | X | X |
| Hungary (HU) | X | X | X |
| Ireland (IE) | X | X | X |
| Italy (IT) | X | X | X |
| Latvia (LV) | X | X | - |
| Lithuania (LT) | X | X | - |
| Luxembourg (LU) | X | X | X |
| Malta (MT) | X | X | X |
| Netherlands (NL) | X | X | X |
| Poland (PL) | X | X | X |
| Portugal (PT) | X | X | X |

[1] Article 39 is not about penalties for committing the money laundering offence itself. Many stakeholders responded in their surveys that there were criminal sanctions based upon the fact that criminal sanctions can be imposed in case the money laundering offence itself is committed. Therefore, a high level scan of the respective basic national AML legislation and/or criminal code has been performed. This high level scan was complicated by the fact that in some Member States no up to date translation was available due to very recent modifications to the AML legislation and the particularities of each law system.

| | | | |
|---|---|---|---|
| Romania (RO) | X | X | X |
| Slovenia (SI) | X | X | - |
| Slovakia (SK) | X | X | X |
| Spain (ES) | X | X | X |
| Sweden (SE) | X | X | X |
| United Kingdom (UK) | X | X | X |

### 3.16.2 – Transposition of article 39 (3) and 39 (4) of the AML Directive

In accordance with article 39 (3) and 39 (4) of the AML Directive legal persons can be held liable for infringements committed for their benefit.

All Member States[209] have incorporated this principle into their respective national legislation.

### 3.16.3 – Comparability of the penalties

A high level scan of administrative penalties, administrative measures and criminal penalties indicates that penalties throughout Member States are, with the exception of administrative measures, hardly comparable:

- Administrative measures: in general the order for appropriate measures and warning letters are commonly incorporated in the legislation of Member States.
- Administrative penalties: in general two types of administrative penalties are commonly incorporated in the legislation of Member States:
    - Administrative fines: the range in administrative fines is very large e.g. in the Netherlands and in Belgium, fines up to 4.000.000 EUR and EUR 1.250.000 are possible; in Estonia and Italy, fines can only amount to a maximum of 500.000 croon (31.955 EUR)[210] and 50.000 EUR.
    - Other administrative penalties: the possibility to suspend or revoke a licence and/or impose a public warning are retrieved commonly throughout Member States.
- Criminal sanctions: both imprisonment sentences and/or fines are found throughout the Member States:
    - Imprisonment sentences are foreseen in for example: Denmark, Greece, Hungary, Ireland, Poland, Slovakia, the Netherlands and the United Kingdom. In Slovakia an

[209] The criminal liability for legal persons in Slovakia has become effective on September 1, 2010.
[210] As of 1.1.2011, the amount will be set at 32.000 EUR.

imprisonment sentence up to 8 years is foreseen in case an unusual business operation was not reported in breach of a person's duty[211].

- Fines are foreseen in for example: Estonia, Ireland Luxemburg, the Netherlands and the United Kingdom.

### 3.16.4 – Publication and application of penalties in practice

In almost all Member States[212] penalties can be published and therefore penalties can be publicly available.

The publication is however not an automatism due to the fact that:

- In some Member States, the publication must be ordered separately (see further: e.g. Belgium);
- In some Member States, the publication is only performed in case of the most serious infringements (see further: e.g. Italy);
- In some Member States, the publication is directly related to the nature of the sanction itself (see further: e.g. Spain).

*Example: publication by separate order of publication (Belgium)*

Article 40 AML Law

*Without prejudice to other laws or regulations, the competent authority referred to in Article 39 may, in case of non-compliance by institutions or persons referred to in Articles 2, § 1, 3 and 4 of the Articles 7 to 20, 23 to 30 and 33 of this Law, with Regulation No 1781/2006 of the European Parliament and the Council of 15 November 2006 on information on the payer accompanying transfers of funds or with their implementing decrees:*

*1 ° publish, in accordance with terms it determines, the decisions and measures it shall adopt;*

*2 ° impose an administrative fine of not less than 250 EUR and no more than 1.25 million EUR, equal after hearing the defence of the institutions and persons or at least having duly summoned them…*

*Example: publication only for the most serious infringements (Italy)*

Article 57 AML Law

*1. Unless the act constitutes a crime, failure to comply with the suspension measure referred to in Article 6(7)(c) shall be punished with a fine of from €5,000 to €200,000.*

[211] According to article 234 of the Penal Code.
[212] No publication possibilities were reported in Bulgaria, Czech Republic, Germany, Latvia, Slovenia

*2. Failure to create the single electronic archive referred to in Article 37 shall be punished with a fine of from €50,000 to €500,000. In the most serious cases, taking account of the gravity of the violation inferred from the circumstances in which it occurred and from the value of the suspicious transaction that was not reported, the provision imposing the sanctions shall be accompanied by an order that the persons fined publish, at their own initiative and cost, the decree imposing the sanction in at least two newspapers distributed nationwide, of which one shall be a financial paper.*

*3. Failure to set up the customer register referred to in Article 38 or to adopt the recording procedures referred to in Article 39 shall be punished with a fine of from €5,000 to €50,000.*

*4. Unless the act constitutes a crime, failure to report suspicious transactions shall be punished with a fine of from 1 to 40 per cent of the amount of the non-reported transaction. In the most serious cases, taking account of the gravity of the violation inferred from the circumstances in which it occurred and from the value of the suspicious transaction that was not reported, the provision imposing the sanction shall be accompanied by an order that the persons fined publish, at their own initiative and cost, the decree imposing the sanction in at least two newspapers distributed nationwide, of which one shall be a financial paper.*

*5. Violations of the disclosure requirements in respect of the FIU shall be punished with a fine of from €5,000 to €50,000.*

*Example: publication which is directly related to the nature of the sanction (Spain)*

Article 56 AML Law

*1. For the commission of very serious offences, the following penalties may be imposed:*

*(a) Public reprimand.*

*(b) Fine between a minimum of EUR 150,000 and a maximum amount that may be imposed up to the highest of these figures: 5 percent of the net worth of the institution or person covered by this Act, twice the economic substance of the transaction, or EUR 1,500,000.*

*(c) In the case of institutions requiring administrative authorisation for their operation, withdrawal of this authorisation.*

*The penalty provided for in point (b), which will be compulsory in all events, shall be imposed simultaneously with one of those listed in points (a) or (c).*

*2. In addition to the applicable penalty to be imposed on the institution or person covered by this*

*Act for the commission of very serious offences, one or more of the following penalties may be imposed on those responsible for the offence, having held administrative or management positions in the entity:*

*(a) Fine for each of between EUR 60,000 and EUR 600,000.*

*(b) Removal from office, with disqualification from holding administrative or management positions in the same entity for a maximum period of ten years.*

*(c) Removal from office, with disqualification from holding administrative or management positions in any entity of those covered by this Act for a maximum period of ten years.*

*The penalty provided for in point (a), which will be compulsory in all events, may be simultaneously imposed with one of those listed in points (b) and (c).*

The public availability of penalties in practice is limited. Moreover, throughout our surveys we have noticed that figures on the imposed penalties were practically never provided. Information on the facts on the infringements which gave rise to the penalties is also very scarce.

The fact that penalties are applied in practice is supported by a study from the *Universita Degli Studi di Trento* and the *Universita Cattolica del Sacre Cuore* (2007) [213].

Application in practice was also confirmed by a number of other indications:

- E.g. an Italian public layer sector stakeholder who reported that penalties are applied in practice in 2010. The Italian legal system has an extensive range of (criminal and administrative) sanctions to punish infringements of AML rules.
  The Bank of Italy, as supervisory authority, has made an extensive use of administrative sanctions, both pecuniary and coercive (e.g., prohibitions, bans, etc.), following to controls on supervised entities.
- A desk research on the number of imposed penalties[214] and reports from other stakeholders confirmed as well that penalties are applied in practice throughout Member States[215].

Contrary to the above, the FATF reported with regard to a Member State where (only) a low number of warning letters were sent by the supervisor (supervisor over a very large number of controlled entities) and in the absence of administrative fines, that it is unlikely that there is such a very high level of compliance with AML/CFT measures.

### 3.16.5 – Effect of penalties

Almost all **public layer sector stakeholders** reported that the available sanctions are sufficient and proportionate to the severity of the breach e.g.:

- In **Germany**, a stakeholder emphasized the importance of administrative sanctions and measures for the supervisory authorities.
- In **Hungary**, a stakeholder reported that in its own experience the existing range of sanctions and measures is appropriate to the level of actual threat.

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[213] Report on Cost Benefit of Transparency Requirements in the Company/Corporate Field and Banking Sector Relevant for the Fight Against Money Laundering and Other Financial Crime (2007), 103 (available at: http://transcrime.cs.unitn.it/tc/fso/publications/CBA-Study_Final_Report_revised_version.pdf) .

[214] A high level scan of recent FATF and Moneyval country reports and recent reports from FIUs was performed.

[215] Hungary (penalties imposed for an amount of 1 100 000 HUF in 2009), Slovakia (30 imposed penalties in 2009), Sweden (in 2008: 2 banks were sanctioned with a fine of 50 million SEK for major non-compliance, source FATF report Sweden 2010, p. 14) Poland (16.000 PLN in 2010), Romania (Non financial banking institutions – 200 000 RON; Companies – 50 000 RON, Real estate sector – 37 000 RON Auditors – 15.000 RON in the period 2009-2010).

- In **Luxemburg**, it was reported that the severity of the penalties would be increased in a new draft law.
- In **Poland**, a stakeholder reported that penalties should have a deterrent effect and therefore the penalties must be severe. The same stakeholder confirmed that this is the case in Poland.
- In **Portugal**, a stakeholder quoted the background of the national sanctions: the range of sanctions has been proposed by a working group with representatives from the supervisory authorities, the Finance Ministry, the Justice Ministry and the FIU, with the aim to ensure its effectiveness, taking also into due account existing administrative sanctioning regimes.
- In **Slovakia**, a stakeholder reported that the penalties are proportionate and dissuasive as the range of sanctions provides for an adequate supervisory response to the existing legal infringements and cases of non-compliance. In each case the following elements are considered: the severity, if the breach has occurred repeatedly, for how long the law has been violated and all other relevant circumstances.
- In **Slovenia**, it was reported that during the fourth round of Moneyval evaluation it was noted that the level of fines in Slovenia is significantly higher than in many of the surrounding countries (of Slovenia's immediate neighbours only Italy applies higher level of fines for legal persons).
- In the **United Kingdom**, a stakeholder is of the opinion that the range of sanctions available is appropriate and proportionate. Sanctions under the Regulations complement criminal sanctions for the principal money laundering offences in the Proceeds of Crime Act.

**Covered entities** who gave an opinion on this matter (all non-financial professions) clearly have different views. Some stakeholders indicated that the available sanctions are not proportionate to the severity of the breach. Others have indicated the opposite.

- In **Germany** and in **Cyprus**, stakeholders reported that due to the wide range of administrative sanctions, a suitable penalty can be imposed in every case.
- In **Ireland,** a stakeholder reported that it considers the sanctions to be excessive in the relation professional - client;
- In **Poland**, a stakeholder reported that the sanctions are certainly dissuasive due to the disproportionate criminal sanctions;
- In **Spain**, a stakeholder reported that the sanctions are extremely severe;
- In the **United Kingdom**, different stakeholders commented on the existing criminal sanctions expressing the opinion that the criminal sanctions are disproportionate. Some respondents question the fact whether the regime itself has led to more convictions of principal offenders.

In a very recent report from HM Treasury (United Kingdom)[216] on the review of money laundering regulation, the following was stated regarding the effect of criminal sanctions:

*"Many believe that the threat of a criminal penalty under the Regulations discourages a risk based approach and encourages businesses and Money Laundering Reporting Officers to adopt a zero tolerance policy. However there some responses make the case for the continued provision of a criminal penalty, including the deterrence effect and the opportunities provided for supervisory and law enforcement activity."*

[216] Review of the Money Laundering Regulations: summary of the call for evidence (March 2010) – HM Treasury, p. 12

## 3.17 – Issue 17: Member States review of the effectiveness of their AML systems

*(Application of Article 33 of the AML Directive).*

In relation to the review by Member States of the effectiveness of their AML System, the following questions were examined:

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| *Have the Member States reviewed the effectiveness of their AML systems pursuant to the AML Directive? How do the Member States define effectiveness? What are the methodologies used by the Member States to assess the effectiveness of their AML regime? Are they relevant? In doing so, what type of indicators do Member States use to assess the effectiveness of their AML regime? Are they relevant? Are there best practices that could be identified?* |

Article 33 of the Directive stipulates that the Member States must ensure that they are able to review the effectiveness of their anti-money laundering systems by maintaining comprehensive statistics on matters relevant to the effectiveness of such systems. These statistics must as a minimum cover:

- The number of suspicious transactions reports made to the FIU;
- The follow-up given to these reports;
- The number of cases investigated on an annual basis;
- The numbers of persons prosecuted;
- The number of persons convicted for money laundering or terrorist financing.

### 3.17.1 – What is effectiveness?

The Directive does not define effectiveness. National legislation in general does not include a definition either. An example of a clear definition of effectiveness can however be found in the UK governments report "The financial challenge to crime and terrorism". In the report effectiveness of an AML/CTF system is defined as making "a maximum impact on the criminal and terrorist threat" [217]. The definition sets out how an AML/CTF system should work in practice. To have the maximum impact possible:

- It is required that the underlying threats are sufficiently understood, examined and that direct action is taken to mitigate them. Continuous monitoring is key;
- There must be an adequate and efficient legal framework in place;
- The system must have maximum practical impact and be assessed regularly to ensure that it does.

### 3.17.2 – Review of the effectiveness

The responses from the Member States and our research have indicated that all the Member States perform a basic review of the effectiveness of their AML systems within the context of their AML annual reports and based on the collection of statistics. It is however unclear if all Member States systematically conduct full, complete and comprehensive reviews of their AML systems that exceed the basic analysis of statistics. A fact which has also been criticized by the FATF and Moneyval in their mutual evaluations reports of some Member States.

[217] The financial challenge to crime and terrorism, (February 2007, p. 9-11. The report is available at http://www.hm-treasury.gov.uk/media/C/B/financialchallenge_crime_280207.pdf.

*Box 9: Example of Effectiveness Review (United Kingdom)*

To achieve the "maximum impact possible", the UK is currently conducting a review of the effectiveness and proportionality of its AML/CFT Regulations which includes sector wide consultations to assess the more practical impact of the system and make improvements where necessary[218]. It is a detailed programme to assess the legislation and make policy and legislative proposals.

In this context, assessments of money laundering/terrorist financing risks, threats or vulnerabilities should be mentioned which are designed to provide a strategic and longer term view of threats. These assessments are based on typologies and combines both quantitative and qualitative information in an attempt to predict certain trends and counter them whenever possible. The FATF has indicated in its 2010 Global Money Laundering & Terrorist Financing Threat Assessment that these national assessments have only been conducted by a limited number of countries. The FATF is in the process of developing international best practices to assist in conducting assessments at the national level as such assessments are vital to maintaining the effectiveness of the system by making pro-active intervention possible, the FATF's initiative can only be supported[219].

### 3.17.3 – Statistics

Our research has shown that all Member States measure the effectiveness of their AML systems by collecting the basic statistics mentioned above. Additionally statistics are kept on[220]:

- International requests for co-operation and/or assistance, by most Member States[221]
- On-site examinations conducted by supervisors relating to or including AML/CFT and any sanctions applied, in a few Member States [222];
- The predicated criminal offices, in several Member States[223].

These types of additional statistics are used by the FATF in its Methodology for Assessing Compliance with the FATF Recommendations. As such they can be considered relevant for measuring the effectiveness of AML systems and their collection as best practice[224].

Evidence of the abovementioned can be found in the annual reports published by the FIU's which are publicly available in 23 Member States and contain an overview of collected data and accompanying analysis notes[225].

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[218] See http://www.hm-treasury.gov.uk/fin_crime_review.htm for more information.

[219] FATF Global Money Laundering & Terrorist Financing Threat Assessment (July 2010), p. 60.

[220] Please be aware that not all statistics are published in the Annual Reports. As such the list cannot be considered exhaustive.

[221] For example: AT, BE, BG, EE, EL,LU, IT, MT, NL, PL, RO, SE, SI and UK.

[222] For example: BG, CY, EE, IT, MT, NL, PL, RO, SE, SI, SK.

[223] For example: AT, BE, DE, DK, FR, EE, IE, IT, LU, MT, PL, RO, SK

[224] FATF Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF9 special recommendations (24 February 2004, as updated), p. 38.

[225] AT, BE, BG, CZ, DE, DK, EE, ES, FR, FI, EL, HU, IT, LT, LU, MT, NL, PL, RO, SE, SI, SK and UK.

A number of Member States[226] conducted a more detailed (qualitative) analysis of the statistics than others as they tried to determine the probable cause of the yearly fluctuations (e.g. previously unknown vulnerabilities being exploited, market trends, increased AML awareness, etc) and made predictions for the next year[227]. While such an analysis is not always easy given the high number of different factors that have to be taken in account, it is a valuable tool for stakeholders, including policy makers, to gain a deeper insight in the money laundering issue and act accordingly.

The following examples include descriptions of review frameworks and methodologies as described by Member States:

*Box 10: Example review of effectiveness framework ( Spain)*

The Spanish Prevention of Money Laundering and Terrorist Financing Act (Act 10/2010 of 29 April 2010) does not contain a definition of effectiveness. The effectiveness of the AML system is measured on the basis of good statistics. In this regard article 44.n) of Act 10/2010 empowers the Commission for the Prevention of ML to develop statistics on ML/TF, for which all competent authorities must provide their support. There are four crucial authorities which have been officially requested to provide their help in the development of appropriate statistics according to the requirements of international standards:

1. The Office of Internal Security Studies ("Gabinete de Estudios de Seguridad Interior", GESI), to support, through statistics, studies and research on the status and trends of safety, senior and executive bodies of the Ministry of Interior in the drafting of policies and in making decisions related to this matter.
2. Judicial Commission of Statistics: Art. 44 n) of the AML Law explicitly states that the National Judicial Commission will provide statistics on cases on ML and TF (including in relation to international co-operation).
3. Sepblac also publishes statistics that currently comprise STRs received by the various reporting parties, outcome of the STRs, requests for information from the various domestic competent authorities, international co-operation, on-site inspections, off-site inspections, number of corrective measures requested during the year and corrective measures subject to monitoring, reports on ML/TF issued for the consideration of the prudential supervisors before granting approval for the creation of a new financial entity, reports issued on ML/TF at the acquisition of significant holdings; etc. All of these appear in the Annual Report.
4. The Commission Secretariat, as a body responsible for collecting information relating to cross border cash movements, should also collect statistics.

*Box 11: Example Review of effectiveness framework (The Netherlands)*

In the Netherlands, the government publishes the outcome of an AML program in a report which contains case examples (for example the results of the Programme for Reinforcement of Measures against Financial and Economic Crime (*FINEC programme)).* Other results of the AML policies are visible in annual reports of individual agencies and institutions, in which they have included statistics and other factual information related to the realization of policy objectives.

The FINEC programme is aimed at lowering levels of financial crime, arming citizens and companies against financial crime and strengthening the possibilities to confiscate proceeds of crime.

[226] For example FR, ES, IT, NL and UK. A similar analysis is also conducted in third countries such as Switzerland and Australia.

[227] Also Commission Staff Working Paper on the application to the legal profession of Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering (SEC(2006)1793, p. 23, nr. 42.

Furthermore, part of the FINEC programme is the FINEC-join, through which statistics on effectiveness are collected and analysed. The instrument is under construction and will be available soon. The instrument is like a black box filled with information that can be questioned. In relation to confiscation these statistics will, for example, be available:

- Amount based on arrangements (*schikkingen*);
- Imposed amount of special confiscation;
- Collected amount of special confiscation;
- Estimated illicit benefit.

Currently the Netherlands is also developing a policy monitoring tool (*Witwasmonitor*) that should result in a systematic and overall review of the effectiveness of AML policies and programmes. This policy monitoring tool (*Witwasmonitor)* will consist of several performance indicators. Performance indicators measure the performance in all stages of the AML-chain, including the feedback stage. These indicators could make use of available quantitative and qualitative information. Information that is currently already available in annual reports of the individual agencies and institutions will be involved. Results in the different stages of the AML-chain cannot always be compared to each other. Following up on the work of the Court of Audit, the Ministries of Finance and Justice are setting up performance indicators, which will be used in policy monitoring. A baseline measurement will contribute to the interpretation of these performance indicators. The policy monitoring tool will be developed by a research institute. Currently tenders are invited. The selected institute will consider the performance indicators of the Ministries and produce a baseline measurement before the end of 2010. Both the NTA and the *Witwasmonitor* will lead the reviews, and in conjunction with a more focussed and prioritised approach, adequately mitigate the risks and thus improve the national co-ordinated approach of AML/CFT policies in the Netherlands.

*Box 12: Example Review of effectiveness framework (Cyprus):*

Effectiveness is not defined in the Cypriot AML Law. It is "measured" or "evaluated" using various factors, the most important of which are the practical results of the implementation of the system, i.e. the SARs received, cases opened, prosecutions/convictions, freezing and confiscation of court orders. The latter include the registration and enforcement of foreign court orders for freezing and confiscation which of course is not contained in the 3rd AML Directive but in Framework Decision of the E.U.

Another very important way of measuring effectiveness is the work of the Advisory Authority for Combating Money Laundering. This is a coordinating and policy making body composed of representatives of both the public and private sector which is responsible for formulating the general policy applied against money laundering and terrorist financing. The body also advises the government of measures which should be taken for improving the effectiveness of the AML/CFT system.

Another important source used for evaluating "effectiveness" are the results of the on-site inspections conducted by the Supervisory Authorities of the financial sector, regarding the implementation of the obligations of supervised entities

Finally, effectiveness can be examined through the various training seminars organized for the financial sector, as well as professionals, police, prosecutors, etc.

*Box 13: Example review of effectiveness framework (Germany):*

Most of the measures implementing the 3rd AML Directive into German law constitute trade law and are of a preventive nature. As it is the case for all preventive measures the effectiveness of the AML/CFT preventive measures is difficult to assess.

As well as the annual report of the BKA`s Financial Intelligence Unit (FIU) - which implements Art. 33 by maintaining *inter alia* the relevant STR statistics – both the auditing of the annual accounts of a financial institution and AML-/CFT-related external audits on behalf of BaFin always include the essential findings resulting from the implementation of AML-duties and could therefore provide indictors for a possible deficient implementation of the 3rd AML Directive.

Therefore, at least, the indicators derived from the supervisory analysis of all annual audit reports of financial institutions as well as from special audit reports of audits performed on behalf of BaFin. If the analysis of the BaFin finds that improper implementation is not only connected with deficiencies in a single case but is widespread and therefore reflects more systemic problems, the deficiency and the need for proper compliance with the AML/CFT requirements would be published in the BaFin annual report and subject to regular meetings with Associations of the Financial Sector in Germany.

In addition, other examples of the regular assessments of the existing system relating to the prevention of ML and TF carried out by the authorities involved in prevention:

- The FIU publishes an annual report providing an overview of the suspicious operations notified as well as an indication of the financial entities, non-financial businesses and professions that are most active on this issue. Part of the report is dedicated to the implementation of the Third EU Money Laundering Directive.
- In order to ensure the proper implementation of the German AML/CFT provisions, there are periodical meetings between the authorities and financial and non-financial bodies (*Verbände und Kammervertretungen*) to discuss the potential difficulties in applying existing legal provisions. These meetings have led to improvements in procedures, such as the feedback for entities which notify the authorities of suspicious or unusual operations.
- There are also regular meetings of the German delegation to the FATF which, in its regular form, include representatives from the Federal Ministry of Finance, the supervisory authorities for the financial system (the BaFin and *Bundesbank*), the Federal Ministry of Economics and Technology, the Federal Ministry of the Interior, and the FIU where there is discussion of the system as it stands, work on projects aimed at improving procedures and work on projects for modifying legislation, with suggestions passed on to the Government. The delegation has also been heard on proposals to amend legislation on the subject of money laundering.
- Once a year, the German Government requests the completion of surveys by the federal authorities about the implementation of government measures relevant to combating terrorism. These surveys also cover measures and projects to combat terrorist financing.

## 3.18 – Issue 18: Supervision and monitoring

(Application of Article 37 of the AML Directive)

The following questions have been examined:

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| *How is the supervision architecture in the Member States? Are the same authorities responsible for the supervision and monitoring of all covered entities? Are credit and financial institutions supervised differently than the non-financial professions[228] or the casinos? How is Article 37(4) been transposed into national law and implemented in practice? Are self-regulatory bodies allowed to perform supervisory tasks? What are the differences in practice regarding normal monitoring pursuant Article 37(1) and enhanced supervision of credit and financial institutions and casinos pursuant to Article 37(3)? How are casinos supervised? Which are the differences between the supervision of land based casinos and on-line casinos? Which are the differences between privately owned casinos and publicly owned casinos?* |

### 3.18.1 – Supervision architecture in the Member States (including the difference in supervision between casinos and credit and financial institutions)

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| Austria | <u>Supervision of financial institutions</u><br><br>The supervisory structure in Austria for credit and financial institutions according to the Austrian Banking Act consists of the Financial Market Authority as well as of the Austrian National Bank and can be split up into a fact-finding function (overall risk assessment) and a decision-making function (official decisions). The Austrian National Bank is in charge of fact finding, while the Financial Market Authority handles decision making.<br><br>For life assurance undertakings (Insurance Supervision Act), payment institutions (Act on Payment Services), investment firms and investment service providers (Securities Supervision Act) the supervision is carried out by the Financial Market Authority only.<br>Insurance intermediaries fall within the responsibility of the Federal Ministry of Economy, Family and Youth (MoE) and the state governors, local district authorities are responsible for the licensing and prudential supervision of all activities conducted under the GewO.<br><br><u>Non-financial professions</u><br><br>• Tax advisors: Chamber of Chartered Public Accountants and Tax Consultants/Parity Commission for the Accountancy Professions (under supervision of Ministry of Economy, Family and Youth );<br>• Real estate agents: Under the responsibility of the Federal Ministry of Economy, Family and Youth (MoE) and the state governors; local district authorities are responsible for the licensing and prudential supervision of all activities conducted under the GewO;<br>• Notaries: the Chamber of Notaries;<br>• Other legal independent professionals (lawyers): Bar association; |

[228] i.e. the non-financial professions falling within the remit of the study.

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| | • Auditors: Chamber of Chartered Public Accountants and Tax Consultants/Parity Commission for the Accountancy Professions (under supervision of Ministry of Economy, Family and Youth);<br>• External Accountants: Chamber of Chartered Public Accountants and Tax Consultants/Parity Commission for the Accountancy Professions (under supervision of Ministry of Economy, Family and Youth);<br>• Trust and company service provider (TCSP) (Management consultants): Under the responsibility of the Federal Ministry of Economy, Family and Youth (MoE) and the state governors, local district authorities are responsible for the licensing and prudential supervision of all activities conducted under the GewO;<br><br>Casinos<br><br>Federal Ministry of Finance |
| Belgium | Supervision of financial institutions<br><br>Financial and credit institutions are supervised by the Banking Finance and Insurance Commission. Other professions are supervised by their self regulatory body or their administrative supervision body. Some reporting entities are supervised by the Ministry of Economy or Ministry of home affairs.<br><br>Non-financial professions<br><br>• Auditors: Institute of Auditors;<br>• External Accountants: Institute of Chartered Public Accountants and Tax Consultants;<br>• Tax advisors: Institute of Chartered Public Accountants and Tax Consultants;<br>• Notaries: Chamber of notaries;<br>• Other independent legal professions (lawyers): bar association(s);<br>• Real estate agents: Ministry of Economy.<br><br>Casinos<br><br>Gambling commission |
| Bulgaria | Supervision of financial institutions<br><br>Money laundering supervision of all categories is performed by the FIU.<br><br>The AML Law stipulates that the general supervisors (prudential supervision) of the financial institutions carry out checks for the implementation of the AML measures within their regular inspections and report to the FIU any AML/CTF infringements found.<br><br>The prudential supervision is performed by the Financial Supervision Commission (insurance, pension funds, investment intermediaries and securities trade) and the Bulgarian National Bank (credit and financial institutions). |

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| | Non-financial professions<br><br>• Tax advisors: FIU;<br>• Trust or company service providers: FIU;<br>• Real estate agents: FIU;<br>• Notaries: FIU;<br>• Other legal independent professionals: FIU;<br>• Auditors: FIU.<br><br>Casinos<br><br>State Commission on Gambling |
| Cyprus | Supervision of financial institutions<br><br>Article 59 of the AML Law designates the following supervisory authorities in relation to financial business:<br><br>• The Central Bank of Cyprus:<br>(i) For banks, including branches of banks which hold an operational license granted by a competent authority of a member state, in relation to activities determined by the Banking Law;<br>(ii) For electronic money institutions, including branches and agents of electronic money institutions, which hold a relevant operational license granted by a competent authority of a member state, in relation to the activities determined by the Electronic Money Institutions Law, as it stands, for which supervisory responsibilities have been assigned to the Central Bank;<br>(iii) For payment institutions, including branches and agents of payment institutions, which hold a relevant operational license granted by a competent authority of a member state, in relation to the activities determined by the Payment Services Law, as it stands, for which supervisory responsibilities have been assigned to the Central Bank;<br>(iv) for the persons supervised by the Central Bank , in relation to the activities determined by the Central Bank of Cyprus Law or any other law and for which the Central Bank exercises supervision.<br><br>• The Commissioner of the Authority for the Supervision and Development of Cooperative Societies in relation to the activities determined by the Co-Operative Societies laws, as amended or in any other Law that assigns supervisory powers to the Commissioner;<br>• The Securities and Exchange Commission:<br>(i) Regarding the services and activities that are provided by the Investment Firms as these are defined in the Investment Services and Activities and Regulated Markets Law, as amended; and |

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| | (ii) Regarding the services and activities that are provided by the Management Companies and Investment Companies as these are defined in the Open-Ended Undertaking for Collective Investment in Transferable Securities (UCITS) and Related Issues Law, as amended.<br>• The Insurance Commissioner in relation to the activities determined by the Law on Insurance Services and other related Issues 2002-2005.<br><br>Non-financial professions<br><br>• Auditors: The Institute of Certified Public Accountants;<br>• External Accountants: The Institute of Certified Public Accountants;<br>• Trust or company service providers: A draft law designates the Cyprus Securities and Exchange Commission;<br>• Lawyers: Cyprus Bar Association;<br>• Real estate agents: The FIU.<br><br>Casinos<br><br>No casinos exist in Cyprus |
| Czech Republic | Supervision of financial institutions<br><br>The Ministry of Finance is the supervisory authority performing the administrative supervision of the compliance with obligations set out in the AML/CFT Act on the part of the obliged entities; the Ministry at the same time controls whether obliged entities do not legitimize the proceeds of crime and finance terrorism. The following institutions also supervise the compliance with obligations set out in the AML/CFT Act:<br>a) The Czech National Bank in respect of persons subject to its supervision,<br>b) Administrative authorities with powers to supervise the compliance with the legislation regulating lotteries and other similar games, and in respect of holders of licences to operate betting games listed in Section 2(1c),<br>c) The Czech Trade Inspection in respect of persons listed in Section 2(1j) and (1k).<br><br>The Ministry of Finance also exercises control of the compliance with obligations according to the directly applicable instrument of the European Communities, which stipulates the obligation to attach the payer's details to any money transfer transaction; the Czech National Bank shall exercise control of the compliance with obligations under the same instrument in respect of persons subject to its supervision[229]<br><br>Non-financial professions<br><br>• Auditors: respective self-regulating body;<br>• External Accountants: Ministry of Finance; |

[229] Article 35 AML Law

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| | • Tax advisors: respective self-regulating body;<br>• Notaries: respective self regulating body;<br>• Other independent legal professionals (lawyers and judicial executors): respective self-regulating bodies[230];<br>• Real estate agents: Ministry of Finance.<br><br>Casinos<br><br>Respective department of the Ministry of Finance |
| Denmark | Supervision of financial institutions<br><br>The Danish FSA ensures that undertakings and persons covered by section 1(1), nos. 1-10 and 12 of the AML/CFT Act (financial and credit institutions) comply with the Act, the regulations issued pursuant hereto, the Regulation of the European Parliament and of the Council on information on the payer accompanying transfers of funds, and regulations containing rules on financial sanctions against countries, persons, groups, legal entities, or bodies [231].<br><br>Non-financial professions[232]<br><br>• Auditors: The Danish Commerce and Companies Agency;<br>• External Accountants: The Danish Commerce and Companies Agency;<br>• Tax advisors: The Danish Commerce and Companies Agency;<br>• Other independent legal professions: the Danish Bar and Law Society;<br>• Real estate agents: The Danish Commerce and Companies Agency.<br><br>Casinos<br><br>Danish Gaming Board |
| Estonia | Supervision of financial institutions<br><br>The following bodies and authorities are the main bodies and authorities involved in combating money laundering or financing of terrorism:<br>• The Estonian Financial Intelligence Unit (FIU) is a police-type FIU. The core function of the Unit is the collection, registering, processing, analysing and dissemination of information received from reporting parties concerning possible money laundering and terrorist financing. An important element of its competencies is the supervision of the activities of obligated persons, incl. those financial institutions, that are not under the supervision of EFSA; |

[230] Section 37 Special Provisions Relating to Administrative Supervision of a Lawyer, Public Notary, Auditor, Licensed Executor, and a Tax Advisor

(1) Provisions of this Chapter do not apply to lawyers, public notaries, auditors, licensed executors, and tax advisors.

(2) Based on a written motion from the Ministry, the relevant professional chamber shall be obliged to check compliance with the obligations imposed by this Act on a lawyer, public notary, auditor, licensed executor or a tax advisor, and notify the Ministry of the results within the deadline specified by the Ministry.

[231] Article 34 AML Law

[232] The only notaries are county court judges who do not provide services to clients.

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| | • The Estonian FSA exercises the supervision of credit institutions (including foreign banks' branches) investment firms, fund management companies, life insurance companies, life insurance brokers, payment service providers and electronic money providers concerning their fulfilment of the requirements arising from the MLTFPA.<br><br>Non-financial professions<br><br>• Auditors: the FIU;<br>• External Accountants: the FIU;<br>• Trust or company service providers: the FIU;<br>• Real estate agents: the FIU;<br>• Notaries: Ministry of Justice or the Chamber of Notaries[233];<br>• Attorneys at law: the Estonian Bar Association;<br>• Other legal independent professionals (lawyers): the FIU.<br><br>Casinos<br><br>FIU |
| Finland | Supervision of financial institutions<br><br>The Financial Supervisory Authority is the sole supervisor for financial, securities and insurance sector and payment institutions (incl. money transfer services, new act enters into force on 1 May 2010).<br>The regional administration is responsible for registration of trust and company service providers and certain consumer lending companies which do not require a license from the FSA.<br><br>Non-financial professions<br><br>• Auditors: the Auditing Board of the Central Chamber of Commerce and the Auditing Committees of the Chambers of Commerce in respect of auditors and audit firms that are to be supervised by them under the Auditing Act;<br>• External Accountants: the State Provincial Office;<br>• Tax advisors: the State Provincial Office;<br>• Other independent legal professions: the Bar association in respect of Advocates – the State Provincial Office in respect of other bodies that provide legal services;<br>• Trust or company service providers: The State Provincial Office of Southern Finland;<br>• Real estate agents: the State Provincial Office.<br><br>Casinos<br><br>The National Board of Police. |

233 The Ministry of Justice may delegate supervisory powers to the Chamber of notaries (Section 47 (4) AML Law).

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| France | Supervision of financial institutions<br><br>The ACP is responsible for licensing and supervising both banking and insurance sectors.<br>The ACP was created by Legislative Decree n°2010-76 of 21 January 2010, resulting from the merging of the 4 former supervision and licensing authorities: the Commission bancaire (supervision of the banking sector) and the Comité des Etablissements de Crédit et des Entreprises d'Investissement (licensing of the banking sector) on one hand ; the Autorité de Contrôle des Assurances et des Mutuelles (supervision of the insurance sector) and the Comité des Entreprises d'Assurance (licensing of the insurance sector) on the other hand.<br><br>The AMF (Autorité des Marchés Financiers) is responsible for the supervision of investment firms, portfolio management firms, financial advisors and traders.<br><br>Non-financial professions<br><br>• Auditors: Haut Conseil du Commissariat aux Comptes<br>• External Accountants: Order of Certified Accountants;<br>• Notaries: Chamber of notaries;<br>• Real estate professions: General Directorate for Competition Policy, Consumer affairs and Fraud control (DGCCRG)<br>• Casinos: Central Direction of the Judicial Police (DCPJ)<br>• Auctioneers: Conseil des ventes Volontaires<br>• Lawyers: bar associations<br>• Bailiffs: Chamber of bailiffs.<br>• Games on line: ARJEL |
| Germany | Supervision of financial institutions<br><br>The Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) is the federal supervisor for virtually all financial institutions in Germany like credit institutions, financial service institutions, domestic branches of credit institutions and financial services institutions with head offices abroad, investment companies and investment management companies.<br><br>The sector laws have provisions which, in general, give the BaFin a broad range of traditional prudential regulatory tools. The BaFin is authorized to perform audits at institutions with or without cause, and this power may be delegated to the Bundesbank.<br>Therefore, the BaFin is the designed competent AML/CFT supervisory authority with the powers to apply sanctions for noncompliance with the AML Act and sector-specific laws.<br><br>Non-financial professions<br><br>• Auditors: Chamber of Public Accountants;<br>• External accountants: Chamber of Public Accountants;<br>• Notaries : Federal Chamber of Notaries and the president of the regional court of the district where the notary is based; |

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| | • Other independent professions (lawyers): German Federal Bar and the competent bar association on state level;<br>• Trust or company service providers: "authority responsible under federal or state (Land) law" (section 16 (2) no. 9 MLA);<br>• Real estate agents: "authority responsible under federal or state (Land) law" (section 16 (2) no. 9 MLA);<br>• Other natural or legal persons trading in goods : "authority responsible under federal or state (Land) law" (section 16 (2) no. 9 MLA);<br>• Tax advisor: Federal Chamber of Tax Advisers.<br><br><u>Casinos</u><br><br>Authority responsible under federal or state (Land) law" (section 16 (2) no. 9 MLA) |
| Greece | <u>Supervision of financial institutions</u><br><br>The Bank of Greece supervises:<br>• Credit institutions;<br>• Leasing companies;<br>• Factoring companies;<br>• Bureaux de change;<br>• Intermediaries in funds transfers;<br>• Credit companies;<br>• The undertakings of point jf of paragraph 3 of Article 4 hereof; and<br>• Postal companies, only to the extent that they act as intermediaries in funds transfers. The Bank of Greece, in supervising these companies.<br><br>The Hellenic Capital Market Commission supervises:<br>• Portfolio investment companies in the form of a société anonyme;<br>• Management companies of mutual funds;<br>• Management companies of mutual funds investing in real estate;<br>• Management companies of mutual funds for venture capital;<br>• Investment firms; and<br>• Investment intermediary firms.<br><br>The Hellenic Private Insurance Supervisory Committee supervises insurance companies and insurance intermediaries.<br><br><u>Non-financial professions</u><br><br>• Auditors: Accounting and Auditing Supervisory Commission;<br>• External Accountants: Ministry of Economy and Finance (General Directorate for Tax Audits);<br>• Trust or company service providers: Accounting and Auditing Supervisory Commission;<br>• Tax advisors: Ministry of Economy and Finance (General Directorate for Tax Audits);<br>• Real estate agents: Ministry of Economy and Finance (General Directorate for Tax Audits);<br>• Notaries: Ministry of Justice; |

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| | • Other legal independent professionals (lawyers): Ministry of Justice.<br><br>Casinos<br><br>Gambling Control Commission |
| Hungary | Supervision of financial institutions<br><br>The Hungarian Financial Supervisory Authority (as the supervisory body for financial institutions and enterprises) ensures that AML/CFT requirements are fulfilled within the financial sector. Due to Section 5 of the new AML/CFT Act the Hungarian Financial Supervisory Authority is charged with supervising all financial service providers [Paragraph a)-e) and l) of Section 1 (2) of the new AML/CFT Act) with the exception of cash processors, which are supervised by the National Bank of Hungary.<br><br>Non-financial professions<br><br>• Auditors: Chamber of the Hungarian Auditors;<br>• External Accountants: the FIU;<br>• Tax advisors: the FIU;<br>• Real estate agents: the FIU;<br>• Notaries: the competent regional chamber at which the notary public in question is registered;<br>• Other legal independent professionals (lawyer): the competent regional bar association at which the lawyer in question is registered.<br><br>Casinos<br><br>State Tax Authority |
| Ireland | Supervision of financial institutions<br><br>There is a single regulatory model to supervise all credit and financial institutions, i.e. a part of Central Bank.<br><br>Non-financial professions<br><br>• Auditors: a designated accountancy body;<br>• External Accountants: a designated accountancy body;<br>• Tax advisors: For the purposes of the AML Act 2010 (a) the competent authority for tax advisors who are members of a prescribed accountancy body is the relevant prescribed accountancy body (b) the competent authority for tax advisors who are solicitors/barristers is the Law Society or the Bar Council (c) the competent authority for tax advisors who do not fall within (a) or (b) is the Minister for Justice";<br>• Other legal independent professionals (solicitor/barrister): Law society of Ireland and the General Council of the Bar of Ireland;<br>• The Minister for Justice is also the competent authority for other designated persons who do not come under any existing supervisory or self regulatory body - e.g. accountants who are not members of a prescribed accountancy body. |

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| | Casinos<br><br>No casinos exist in Ireland, only private members clubs which provide casino like services. Since the new AML Law (2010), these are covered entities as well. These private member clubs require to be registered by the Minister for Justice and Law Reform who is the competent authority. |
| Italy | Supervision of financial institutions<br><br>The Bank of Italy (BoI) is the public authority responsible for supervision of credit institutions, Bancoposta, nonbank financial intermediaries (i.e., securities firms, asset management companies), financial intermediaries registered under Articles 107 and 106 of the Banking Law (i.e., for granting loans, foreign exchange trading, securitization, issuers of credit and payment cards and guarantees), loan brokers and financial agents.<br>The BoI shares prudential responsibilities on nonbank financial intermediaries with the "Commissione Nazionale per le Societa e la Borsa" (Consob). Consob is responsible for ensuring transparency and correct behaviour of securities market participants (e.g. investment firms, financial salesman, etc.). The Insurance Supervisory Authority, the ISVAP (Istituto Superiore di Vigilanza sulle Assicurazioni Private e di Interesse collettivo), is the body authorized to supervise insurance and reinsurance undertakings as well as all the other bodies subject to the regulations on private insurance, insurance agents and brokers included. It is responsible for ensuring the stability of the insurance market and undertakings as well as the solvency and efficiency of market participants in the interests of policyholders and consumers. In the area of AML/CTF preventive systems, the supervisory Members, in agreement among themselves, issue provisions on the manner of fulfilling the obligations concerning adequate customer verification, internal organization, record keeping, procedures and controls intended to prevent the use of intermediaries and other persons performing financial activities. Financial sector supervisory Members cooperate with each other and with the FIU, including by exchanging information, in order to facilitate the performance of their respective functions.<br><br>Financial sector supervisory Members have to inform the FIU of possible cases of failure to make suspicious transaction reports and of every fact that could be connected with money laundering or terrorist financing[234].<br><br>Non-financial professions [235]<br><br>• Auditors: designated accountancy body supervised by Ministry of Justice;<br>• External Accountants: designated accountancy body supervised by Ministry of Justice;<br>• Tax advisors: designated accountancy body supervised by Ministry of Justice;<br>• Notaries: Chamber of notaries supervised by Ministry of Justice;<br>• Other legal independent professionals: bar association supervised by Ministry of Justice. |

[234] CEBS report (2009), 3L3 Anti Money Laundering Task Force Compendium Paper on the supervisory implementation practices across EU Member States of the Third Money Laundering Directive [2005/60/EC], 57.

[235] Article 8 AML Law.

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| | Casinos<br><br>Sectoral supervisory authorities[236] |
| Latvia | Supervision of financial institutions<br><br>Financial institutions are supervised by a single regulator being the Financial and Capital Market Commission. Only currency exchange offices are not supervised by the Financial and Capital Market Commission. They are supervised by the Bank of Latvia.<br><br>Supervision of compliance of the different non-financial professions with AML legislation/regulation<br><br>• Auditors: Latvian Association of Certified Auditors;<br>• External Accountants: State Revenue Service;<br>• Tax advisors: State Revenue Service;<br>• Trust or company service providers: State Revenue Service;<br>• Real estate agents: State Revenue Service;<br>• Notaries: Latvian Council of Sworn Notaries;<br>• Other legal independent professionals: Latvian Council of Sworn Advocates.<br><br>Casinos<br><br>Lotteries and Gambling supervisory inspection |
| Lithuania | Supervision of financial institutions<br><br>Credit institutions: the Bank of Lithuania;<br>Insurance undertakings and insurance broking undertakings: the Insurance Supervisory Commission;<br>Financial brokerage firms, investment companies with variable capital, management companies, close-end investment companies and depository: the Securities Commission;<br><br>Supervision of compliance of the different non-financial professions with AML legislation/regulation<br><br>• Auditors: Lithuanian Chamber of Auditors;<br>• External Accountants: the FIU;<br>• Tax advisors: the FIU;<br>• Trust or company service providers: the FIU;<br>• Real estate agents: the FIU;<br>• Notaries: the Chamber of Notaries;<br>• Other legal independent professionals: the Lithuanian Bar Association/ the Chamber of Bailiffs. |

[236] Article 24 AML Law.

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| | Casinos<br><br>State Gaming Control Commission |
| Luxembourg | Supervision of financial institutions<br><br>The Commission de Surveillance du secteur Financier is the competent authority for the whole financial sector except insurances. The Commissariat aux Assurances is the competent authority for the insurance sector.<br><br>Supervision of compliance of the different non-financial professions with AML legislation/regulation<br><br>• Auditors: Institute for Auditors;<br>• External Accountants: Accountants association;<br>• Trust or company service providers: Commission de Surveillance du Secteur Financier;<br>• Notaries: Chamber of Notaries;<br>• Other legal independent professionals: Bar association.<br><br>Casinos<br><br>Ministry of Justice |
| Malta | Supervision of financial institutions<br><br>While, the Malta Financial Services Authority, as a single regulator, is entrusted with the prudential supervision and licensing of financial institutions, it is the FIAU which supervises financial institutions for compliance with AML/CFT obligations. In fulfilling its compliance monitoring function the FIAU may request the MFSA:<br>(a) to provide information which the MFSA may become aware of in the course of its supervisory functions which indicates that a subject person falling under its competence may not be in compliance with AML/CFT requirements; and<br>(b) to carry out, on behalf of the FIAU, on-site examinations on subject persons falling under the competence of the MFSA with the aim of establishing that person's AML/CFT compliance.<br><br>Supervision of compliance of the different non-financial professions with AML legislation/regulation<br><br>• Tax advisors: the FIU;<br>• Trust or company service providers: the FIU;<br>• Real estate agents: the FIU;<br>• Notaries: the FIU;<br>• Other legal independent professionals: the FIU;<br>• Auditors: the FIU;<br>• External Accountants: the FIU. |

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| | Casinos<br><br>FIU |
| Poland | Supervision of financial institutions<br><br>In accordance with Article 21 of the AML/TF Act the inspections of banking sector, capital sector and insurance sector to the extent of compliance with anti-money laundering and counter terrorism financing responsibilities is carried out by the single entity the Polish Financial Supervision Authority, acting in accordance with the Act of 21 July 2006 on supervision of the financial market.<br><br>Supervision of compliance of the different non-financial professions with AML legislation/regulation<br><br>• Tax advisors: National Chamber of Tax Advisors;<br>• Trust or company service providers: National Chamber of Commerce;<br>• Real estate agents: the Real-Estate Agents Chamber;<br>• Notaries: Notaries Chamber;<br>• Other legal independent professionals: National Bar of Advocates National Chamber of Legal Counsellors;<br>• Auditors: National Chamber of Auditors;<br>• External Accountants: National Board of Certified Chartered Accountants.<br><br>Casinos<br><br>Department for Customs and Excise Duty Control and Games Control (Ministry of Finance) |
| Portugal | Supervision of financial institutions<br><br>The Portuguese financial system is supervised by three main regulators:<br>• Bank of Portugal (BdP),<br>• Portuguese Insurance Institute (ISP); and<br>• Portuguese Securities Market Commission (CMVM).<br><br>The prudential supervision of credit institutions, investment firms and other financial companies and other defined institutions is undertaken by the BdP; the regulation and supervision of insurance, reinsurance, insurance intermediaries and pension funds is the responsibility of the Insurance Institute (ISP). The Securities Market Commission (CMVM) regulates and supervises the securities markets, including public offers, the activities of all the market operators and securities issuers; financial intermediaries in securities and collective investment institutions.<br><br>Since 2000, the National Council of Financial Supervisors (Conselho Nacional de Supervisores Financeiros) (set up by decree law 228/2000 has been an integral part of the supervisory system aimed at institutionalizing and organizing co-operation among the three supervisors, facilitating of information, promoting development of supervisory rules and mechanisms for financial conglomerates, adopting of co-ordinated policies with foreign entities and international organizations. |

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| | Co-ordination efforts in relation to financial supervision are managed by the National Council of Financial Supervisors that aim to provide consistency where issues affect all areas of supervision; which includes Money Laundering and Terrorist Financing issues.<br><br>Supervision of compliance of the different non-financial professions with AML legislation/regulation<br><br>• External accountants: Chamber of Chartered Accountants;<br>• Real estate agents: The Institute for Construction and Real Estate;<br>• Notaries and registrars: The Institute for Registrars and Notaries;<br>• Other legal independent professionals: The Bar Association (with regard to lawyers); the Chamber of Solicitadores (with regard to *solicitadores)*;<br>• Auditors: The Order of Statutory Auditors.<br><br>Casinos<br><br>General Inspectorate for Gambling |
| Romania | Supervision of financial institutions<br><br>The competent authorities in Romania having AML/CTF supervision attributions over the financial institutions specified as reporting entities under the Law no. 656/2002, are:<br><br>• National Bank of Romania - for credit institutions, credit cooperatives, payment institutions and non-banking financial institutions registered in Special Register;<br>• The FIU - for non-banking financial institutions registered in the General and Evidence Registers;<br>• Insurance Supervision Commission - for insurance and reinsurance companies;<br>• National Securities Commission - for capital market companies;<br>• National Commission for Supervision of Private Pensions Funds - for private pension sector.<br><br>Supervision of compliance of the different non-financial professions with AML legislation/regulation<br><br>• Auditors: the FIU;<br>• External Accountants: the FIU;<br>• Tax advisors: the FIU;<br>• Trust or company service providers: the FIU;<br>• Real estate agents: the FIU;<br>• Notaries: the FIU and National Union for Public Notaries in Romania;<br>• Other legal independent professionals (lawyers): National Union of Bars from Romania and the FIU. |

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| | Casinos<br><br>FIU |
| Slovakia | Supervision of financial institutions<br><br>Control of compliance to obligations of obliged entities laid down by the AML/CFT Act is be performed by the Financial Intelligence Unit. Control of compliance to obligations laid down by this Act shall also be also performed by the National Bank of Slovakia with obliged entities subject to supervision by the National Bank of Slovakia under a special regulation, ) and with obliged entities subject to surveillance by the Ministry under a special regulation, ) also by the Ministry.<br><br>Supervision of compliance of the different non-financial professions with AML legislation/regulation<br><br>• Auditors: the FIU;<br>• External Accountants: the FIU;<br>• Tax advisors: the FIU;<br>• Trust or company service providers: the FIU;<br>• Real estate agents: the FIU;<br>• Notaries: the FIU;<br>• Other legal independent professionals: the FIU.<br><br>Casinos<br><br>FIU |
| Slovenia | Supervision of financial institutions<br><br>In relation to the supervision of financial institutions in Slovenia, there are three competent authorities:<br>• Bank of Slovenia;<br>• Insurance Supervision Agency;<br>• Securities Market Agency.<br><br>Supervision of compliance of the different non-financial professions with AML legislation/regulation<br><br>• Tax advisors: the FIU;<br>• Trust or company service providers: the FIU;<br>• Real estate agents: Market Inspectorate;<br>• Notaries: the Chamber of Notaries;<br>• Other legal independent professionals: Bar Association;<br>• Auditors: Agency for Public Oversight of Auditing, Slovene Institute of Auditors;<br>• External Accountants: the FIU. |

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| | Casinos<br><br>Office of the Republic of Slovenia for Gaming Supervision |
| Spain | Supervision of financial institutions<br><br>Financial institutions are supervised by the Central Bank (Banco de España), Investment Services Companies are supervised by CNMV (National Commission for the Securities Market) and Insurance Companies are supervised by General Directorate of Insurance.<br>The FIU is however in charge for the AML/CFT supervision of all covered subjects. In order to ensure a more extensive and effective supervision, the Spanish Act 10/2010 foresees that agreements can be signed with the different prudential financial supervisors enabling them to also monitor the compliance of the AML/CFT requirements by the reporting entities.<br><br>Supervision of compliance of the different non-financial professions with AML legislation/regulation<br><br>• Tax advisors: the FIU;<br>• Trust or company service providers: the FIU;<br>• Real estate agents: the FIU;<br>• Notaries: the FIU/ Chamber of Notaries;<br>• Other legal independent professionals: the FIU;<br>• Auditors: the FIU;<br>• External Accountants: the FIU.<br><br>Casinos<br><br>FIU |
| Sweden | Supervision of financial institutions<br><br>Finansinspektionen (The Swedish FSA) is the central administrative authority that supervises and monitors companies operating in the Swedish financial markets.<br>Finansinspektionen's operations cover three main areas:<br><br>• Supervision and analysis;<br>• Regulations;<br>• Permits/licences and notifications.<br><br>Finansinspektionen is divided in four operational departments: Legal Department, Markets, Insurances and Investment Funds and Banking and Securities. Each department is divided in several units.<br><br>Finansinspektionen has three prudential supervision departments, *Insurance and Investment Funds, Banks and Investment Firms and Markets*. The Market Conduct Supervision Department, *Markets*, has a focus on financial market players, consumer protection and conflicts of interest. |

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| | At *Markets* there is a special unit with AML/CFT experts who support the other departments on AML/CFT issues. The unit also conducts thematic and specialized AML/CFT inspections.<br><br>Supervision of compliance of the different non-financial professions with AML legislation/regulation<br><br>• Tax advisors: Länsstyrelsen (The County Administrative Board);<br>• Trust or company service providers: Länsstyrelsen (The County Administrative Board);<br>• Real estate agents: Fastighetsmäklarnämnden (The Swedish Board of Supervision of Estate Agents);<br>• Notaries and other legal independent professionals: Länsstyrelsen (The County Administrative Board) and Sveriges Advokatsamfund (Swedish Bar Association) (regarding Lawyers and associates at advocate law offices);<br>• Auditors (meaning professional activities relating to bookkeeping services or auditing services): Länsstyrelsen (The County Administrative Board)<br>• External Accountants: Revisorsnämnden (The Supervisory Board of Public Accountants).<br><br>Casinos<br><br>Lotteriinspektionen (Gaming Board for Sweden) |
| The Netherlands | Supervision of financial institutions<br><br>DNB (Dutch National Bank) is the central bank and the prudential and integrity supervisor for banks and other (financial) institutions in accordance with the Wft, WWFT, Wgt, Wtt, the Pension Act and the Sanctions Act.[237] DNB supervises compliance with AML/CFT legislation and regulation of a range of institutions: banks, life insurance companies, bureaux de change, payment institutions (e.g., money transfer offices, creditcard companies), trust and company services providers and casinos.<br><br>Supervision of compliance of the different non-financial professions with AML legislation/regulation<br><br>• Tax advisors: Bureau Financial Supervision (BFT);<br>• Real estate agents: Netherlands Tax and Customs Administration (BHM)<br>• Notaries: Bureau Financial Supervision (BFT);<br>• Other legal independent professionals: Bureau Financial Supervision (BFT)<br>• Auditors: Bureau Financial Supervision (BFT);<br>• External Accountants: Bureau Financial Supervision (BFT);<br>• Dealers in precious stones: Netherlands Tax and Customs Administration (BHM);<br>• Trust and Company Service Providers: Dutch National Bank (DNB). |

[237] See http://www.dnb.nl/en/home/index.jsp

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| | Casinos<br><br>Dutch National Bank |
| United Kingdom | Description of the entire supervision architecture[238]<br><br>In the United Kingdom there are 28 separate supervisors, 6 public bodies and 22 professional bodies.<br><br>Where there is more than one supervisory authority for a covered person, the supervisory authorities may agree that one of them will act as the supervisory authority for that person[239].<br><br>The 6 public bodies are the following:<br><br>• The Financial Services Authority (FSA) is the supervisory authority for:<br>o Credit and financial institutions which are authorised persons;<br>o Trust or company service providers which are authorised persons;<br>o Specific ally listed financial institutions in annex of the AML Act.<br><br>• The Office of Fair Trading is the supervisory authority for:<br>o Consumer credit financial institutions;<br>o Estate agents;<br>o Each of the professional bodies listed in Schedule 3 is the supervisory authority for relevant persons who are regulated by it.<br><br>• The for Her Majesty's Revenue and Customs are the supervisory authority for:<br>o High value dealers;<br>o Money service businesses which are not supervised by the Authority;<br>o Trust or company service providers which are not supervised by the Authority or one of the professional bodies;<br>o Auditors, external accountants and tax advisers who are not supervised by one of the professional bodies.<br><br>• The Gambling Commission is the supervisory authority for casinos.<br><br>• Department of Enterprise, Trade and Investment in Northern Ireland is the supervisory authority for<br>o Credit unions in Northern Ireland;<br>o Insolvency practitioners authorised by it under article 351 of the Insolvency (Northern Ireland) Order 1989.<br><br>• The Secretary of State is the supervisory authority for insolvency practitioners authorised by him under section 393 of the Insolvency Act 1986. |

[238] Due to the very complex supervision architecture in the United Kingdom, firstly the entire architecture is set out without making the distinction between financial institutions, non-financial professions and the casinos.

[239] Article 23 section 2 AML Act.

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| | The 22 professional bodies are the following:<br><br>• Association of Chartered Certified Accountants;<br>• Council for Licensed Conveyancers;<br>• Faculty of Advocates;<br>• General Council of the Bar;<br>• General Council of the Bar of Northern Ireland;<br>• Institute of Chartered Accountants in England and Wales;<br>• Institute of Chartered Accountants in Ireland;<br>• Institute of Chartered Accountants of Scotland;<br>• Law Society;<br>• Law Society of Scotland;<br>• Law Society of Northern Ireland;<br>• Association of Accounting Technicians;<br>• Association of International Accountants;<br>• Association of Taxation Technicians;<br>• Chartered Institute of Management Accountants;<br>• Chartered Institute of Public Finance and Accountancy;<br>• Chartered Institute of Taxation;<br>• Faculty Office of the Archbishop of Canterbury;<br>• Insolvency Practitioners Association;<br>• Institute of Certified Bookkeepers;<br>• Institute of Financial Accountants;<br>• International Association of Book-keepers.<br><br>Each of the professional bodies is the supervisory authority for relevant persons who are regulated by it;<br><br>***Summary:***<br><br>Supervision of financial institutions<br><br>In general, most financial institutions are supervised by the FSA.<br><br>Supervision of compliance of the different non-financial professions with AML legislation/regulation<br><br>In general all different non-financial professions are supervised by their respective professional bodies.<br><br>Casinos<br><br>Gambling Commission |

### 3.18.2 – Transposition and implementation of article 37 (4) AML Directive

Regarding the non- financial professions, Member States may allow that the monitoring and taking of necessary measures with a view to ensuring compliance with the requirements of AML Directive are performed on a risk-sensitive basis (article 37 (4) AML Directive).

Most Member States have transposed this possibility under the AML Directive[240]. In Austria (only one stakeholder) and in Ireland, stakeholders reported that it is not allowed to perform monitoring and ensuring compliance on a risk-sensitive basis. In the Member States were this is allowed, stakeholders referred to the following criteria and application methods:

*Box 14: Criteria and application methods for the risk-sensitive basis*

A stakeholder reported that a risk assessment and a monitoring plan are made based upon the off-site analysis of covered entities. Depending on the outcome of this analysis, it is decided whether or not an on-site inspection will be conducted.

Another stakeholder reported that the risk-sensitive basis is constituted based upon on the size, nature and complexity of operations of supervised entities and the assessed money laundering threat.

Several stakeholders stated that another criterion that is used is the quality of the STR, which is at risk being abused for money laundering purposes.

Other criteria which have been reported are the location of the client or his relations (e.g. clients who are located or doing business in countries that are on the list of the FATF non-cooperative countries) and the service structure which could indicate that the main focus is on activities that are likely to disguise suspicious funds (e.g. fiduciary activities or property management).

The FATF guidance for a risk-sensitive basis reported as well by a stakeholder as a criterion to assess the risk.

The documented sector specific risks are reported to be taken also into account by some stakeholders.

### 3.18.3 – Self-regulated bodies with supervisory tasks

In accordance with article 37 (5) of the AML Directive, Member States may allow that the monitoring and taking of necessary measures with a view to ensuring compliance with the requirements of AML Directive are performed by self-regulatory bodies in relation to the following professions:

- Auditors;
- External accountants;
- Tax advisors;
- Notaries;
- Other independent legal professionals (mainly lawyers).

[240] For example this is the case in Belgium, Bulgaria, Estonia, Germany, Greece, Hungary, Lithuania, Luxemburg, Malta, the Netherlands, Poland, Romania, Slovakia, Spain, United Kingdom.

Twenty one Member States (Austria[241], Belgium, Cyprus, Czech Republic, Denmark, Estonia[242], Finland[243], France, Hungary[244], Ireland, Italy[245], Latvia[246], Lithuania, Luxemburg, Poland, Portugal, Romania[247], Slovenia[248], Spain[249], Sweden[250] and the United Kingdom) have allowed at least one or more self-regulatory body to have supervisory powers.

### 3.18.4 – Differences in practice regarding normal monitoring pursuant Article 37(1) AML Directive and enhanced supervision of credit and financial institutions and casinos pursuant to Article 37(3) AML Directive

Article 37 (3) AML Directive foresees that for credit and financial institutions and casinos, competent authorities must have enhanced supervisory powers, notably the possibility to conduct on-site inspections.

Stakeholders from almost all Member States have reported that on-site inspections are performed for credit and financial institutions and casinos.

*Box 15: Examples of enhanced supervisory powers*

In **Belgium** a stakeholder reported that the Gambling Commission (casino supervisor) is authorized to enter at any time of the day or night, into establishments, spaces and rooms where components of the information system are located which are used for the operation of the games of chance and areas to which they must have access in order to perform their tasks.

In **France** a stakeholder reported that on-site controls aim at checking the accuracy of the information transmitted by the financial institution and at examining its organization, management, risks and financial situation at regular intervals, through an analysis of the quality of the organization and procedures and through verifications on customer files and operations by sampling methods. They can have different scopes according to their object: general investigations are meant to check the implementation of all legal and regulatory texts, including AML-CFT; specific investigations are limited to a selected field; thematic investigations aim at examining a single object but in several financial institutions. For instance, the supervisor carried out FT inspections in 70 financial institutions after 11 September 2001.

In **Portugal** it was reported that the three supervisory authorities have the competence to regulate the activity of the entities subject to their supervision as well as wide powers of monitoring, supervision and enforcement. The supervisory authorities have the powers, among others, to: (i) have access to any document in any form whatsoever and to receive a copy of it; (ii) demand information from any person and if necessary to summon and question a person with a view to obtain information; (iii) require auditors to provide information; (iv) require special auditing.

[241] Only with regard to lawyers and notaries.
[242] Only with regard to advocates and notaries.
[243] Only with regard to advocates.
[244] Only with regard to lawyers, notaries and auditors.
[245] The self-regulated bodies are as such supervised by the Ministry of Justice.
[246] Only with regard to advocates and notaries.
[247] Only with regard to lawyers and notaries.
[248] Only with regard to lawyers and notaries.
[249] Only with regard to notaries.
[250] Only with regard to lawyers.

### 3.18.5 – Casinos

**Online casinos** are not allowed in most Member States. In case online casinos are allowed, in some countries they are obliged to hold **a land based** license as well. This allows supervisors to hold a grip on the land based and the "online version" of the casino.

In general, several stakeholders raised the fact that money laundering in land based casinos has become very difficult. In this regard, the FATF report from March 2009 "Vulnerabilities of Casinos and Gaming sector" mentioned that at least in Europe, casinos are not being used for money laundering of bigger amounts. Stakeholders raised the fact that on the other hand, the risk of money laundering in (illegal) online casinos is considerable, certainly with regard to off-shore casinos.

Two types of measures from States against illegal off-shore casinos were explained by stakeholders: (i) blocking the websites of the online casinos for citizens and (ii) prohibiting payments to these casinos through cooperation of and/ or obliging own national banks not to perform the payments to the illegal casinos.

There were no relevant differences reported or noted between privately owned casinos and publicly owned casinos.

# 4. Specific examination of the impact of the AML Directive

## 4.1 – The extent of the problem

The objective of this part of the study is to describe the money laundering (and terrorist financing) typologies where non-financial professionals, in the exercise of their professional activities, are directly and indirectly involved, by examining the following situations:

1. Real estate situations: acting on behalf and for their client in real estate transactions; intermediation[251] in real estate transactions;
2. Business related situations: acting on behalf and for their client in the selling of business entities; intermediation[252] in selling of business entities;
3. Financial related situations: acting on behalf and for their client in financial transactions; intermediation[253] between clients and credit or financial institutions regarding management of clients' money, accounts and assets, or opening or management of bank, savings or securities accounts;
4. Corporate related situations: acting on behalf and for their client in corporate transactions related to the creation, operation and management of legal entities and trusts as well as the organisation of contributions necessary for the creation, operation or management of companies[254]; intermediation[255] in the creation of legal entities and trusts; intermediation[256] in the operation and management of legal entities and trusts; intermediation[257] in the organisation of contributions necessary for the creation, operation or management of companies.

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[251] Understood as encompassing the following: advising the client; intermediate between persons or intervening in the transaction or formalising transactions.

[252] Understood as encompassing the following: advising the client; intermediate between persons, intervening in the transaction or formalising transactions.

[253] Understood as encompassing the following: advising the client; intermediate between persons, or intervening in the transaction.

[254] Including: acting as director or secretary of a company, a partner of a partnership or a similar position in relation to other legal persons; acting as trustee of an express trust or a similar legal arrangement; acting as nomineed shareholder for another person (other than a listed company).

[255] Understood as encompassing the following: advising the client; formalising transactions; forming companies or other legal persons;

[256] Understood as encompassing the following: advising the client; assisting in the execution of transactions; arranging for another person to act as a director or secretary of a company, a partner of a partnership or a similar position in relation to other legal persons; arranging for another person to act as a trustee of an express trust or similar legal arrangement; arranging for another person to act as a nominee shareholder for another person (other than a listed company).

[257] Understood as encompassing the following: advising the client and assisting in the execution of transactions.

The aim of the examination is to assess the attractiveness of these situations for money laundering (and terrorist financing), from the perspective of the ease in which money can be moved, property can be concealed etc. For instance, the use of bearer shares, sleeping partners etc. could be considered. The focus should be on the infiltration of proceeds of crime in the financial system by using schemes involving the above situation. The examination should include the identification and systematic presentation of cases before the national judiciary authorities and/or FIUs involving the type of situations described above[258].

## 4.1.1 – Introduction

### *4.1.1.1 – Approach*

We have decided in favour of a phenomenological approach for this part of the study. This approach is based on an analysis of information on typologies and money laundering methods associated with the different situations, thereby trying to conclude on specific transactions, related to the four situations which involve professionals where money laundering may occur.

A more theoretical approach would have involved examining the services the different types of non-financial professions render in relation to the situations, in order to identify the possible involvement of these professions in possible money laundering schemes.

It is however beyond the scope of this study to map all the different possible services that are commonly offered by the various non-financial professions in the relevant situations in the different Member States.

[258] N.B. the question to be examined is not on whether "professionals" are guilty of money laundering offences (or, *mutatis mutandis*, terrorist financing) because they were involved in money laundering schemes but rather whether in money laundering cases real estate laundering schemes or corporate vehicles are systematically used – irrespective of whether professionals were prosecuted for money laundering.

### *4.1.1.2 – Information gathering*

The information gathering process on the extent of the problem was organised on a number of different levels:

1. Desk research: The desk research focused on analysis of publicly available information on typologies available in recent annual reports and/or typologies reports of a selection of international organisations and FIU's[259]. A selection of other reports and reviews[260] was also examined.
2. Questionnaire: Through the questionnaires we attempted to gather further quantitative and qualitative information from FIU and other public stakeholders as well as from private stakeholders with regard to the money laundering methods they encounter in relation to the situations.
3. Follow up questions: On the basis of information received, a number of stakeholders were contacted directly with follow up questions.

Obtaining both **the identification of quantitative and qualitative information** on money laundering methodologies and typologies on the basis of the above described "situations approach" **has proven to be quite difficult and in some cases impossible**. Very little information on "the extent of the problem" is publicly available.

When questioned, a large number of respondents stated that they did not **have information/relevant experience on/with regard to the subject, they were not to be able to give information because the information is not recorded on the basis of the relevant situations or were not to disclose information due to confidentiality reasons.**

In its Global Money Laundering & terrorist Financing Threat Assessment, **the FATF** also comments on the difficulties of information gathering. It has experienced that the collection and assessment of reliable and quantitative data on current money laundering/terrorist financing threats is difficult. The FATF would welcome efforts to improve the amount and quality of data in order to gain a better understanding of the threats and might consider introducing more stringent requirements about what data on crime, proceeds of crime and money laundering/terrorist financing jurisdictions should collect, collate and publish[261].

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[259] FATF and Moneyval typology reports, (most) recent annual reports (when available in English/French – some exceptions) of the FIU's of the following Member States: Austria, Belgium, Bulgaria, Denmark, Czech Republic, Estonia, France, Germany, Greece, Italy, Luxemburg, Malta, Poland, Romania, Slovakia, Slovenia, Spain, Sweden, The Netherlands, UK. A selection of cases from recent annual reports of the FIU of the three third countries included in the study i.e. Australia, South Africa and Switzerland, is included in the annexes 6,7 and 8 of the report.

[260] For example the Cost Benefit analysis of transparency requirements in the company/corporate field and the banking sector relevant for the fight against money laundering and other financial crime. http://transcrime.cs.unitn.it/tc/fso/publications/CBA-Study_Final_Report_revised_version.pdf); the OCTA 2009 EU Organised crime and threat assessment http://www.europol.europa.eu/publications/European_Organised_Crime_Threat_Assessment_(OCTA)/OCTA2009.pdf, Most recent FATF and Moneyval Country evaluation reports (parts on general Situation of Money Laundering and Financing of Terrorism)

[261] FATF report Global Money Laundering & terrorist Financing Threat Assessment, July 2010, nr. 322.

*Quantitative information*

We have **not been able to identify quantitative information** of money laundering (and terrorist financing) typologies related to the specific situations, where non-financial professionals, in the exercise of their professional activities, are directly and indirectly involved in.

FIU's maintain statistics based on several indicators such as STR's based on the types of covered professions (recent statistics included in annex of the report), underlying criminal activity etc. but not in relation to the specific situations[262].

International organisation such as Europol, FATF, Moneyval have not published statistics on typologies related to these situations.

We understand that Eurostat will be publishing money laundering statistics. These statistics were not yet available at the time of the drafting of the report.

In annex of the report, anecdotal information is included on the basis of answers given by FIUs, competent authorities and professional associations on the question if they yet had come across certain money laundering/terrorist financing techniques related to the different situations. Given the scope of the examination, the survey questions were focused on techniques related to the situations and not on traditional banking operations.

*Qualitative information*

Some qualitative information can be found in typologies reports and case examples of international organisations such as the FATF, Moneyval and the Egmont group. Annual reports of some FIUs list case studies of which some provide an insight in possible involvement of the non-financial sector in the different situations. Some examples of typologies related to these situations have been identified through follow up answers of FIUs and some competent authorities.

In many cases the FATF typologies and case studies are however used at national level as guidance for covered entities. Overall **the information available therefore remains limited**.

Available information can also often be categorized under **more than one situation**. This is specifically the case for business related situations. This type of situation is very difficult to identify as it is in practice nearly always linked to corporate related situations.

In addition, it is also often **difficult to extract the exact role and the degree of involvement of the non-financial professional** from the information. Cases mostly focus on the industry involved and on the general indicators rather than on the specific role of gatekeepers. There are different types of involvement of professionals, i.e.:

- They can be involved in the criminal activity itself;
- They can become suspicious and terminate their services (with or without reporting to the FIU);

[262] Reference is made to Article 33, 2 of the Directive that requires Member States to maintain statistics. Such statistics shall as a minimum cover the number of suspicious transaction reports made to the FIU, the follow-up given to these reports and indicate on an annual basis the number of cases investigated, the number of persons prosecuted, the number of persons convicted for money laundering or terrorist financing offences and how much property has been frozen, seized or confiscated.

- They can unknowingly be involved and have no suspicion that criminal activity is occurring.

### 4.1.2 – The role of gatekeepers in general

Over the years several international and national reports have described how, because of the increased cooperation of the financial sector to the preventive anti-money laundering framework, criminals are forced to develop other money laundering techniques and shift their activities to other sectors. This section aims to provide a selection of general information available on this trend i.e. the misuse of gatekeepers in money laundering.

#### *4.1.2.1 – Information from international organisations*

4.1.2.1.1. FATF Report on Money Laundering typologies 2003-2004

The FATF report on Money laundering typologies 2003-2004 already included a chapter[263] related to gatekeepers and money laundering. In the report it was explained that as anti-money laundering measures are implemented in financial institutions, the risk of detection becomes greater for money launderers to use the banking system for laundering criminal proceeds. Therefore, money launderers increasingly look for advice or services of specialised professionals to help facilitate their financial operations.

This **trend towards the involvement of various legal and financial experts, or gatekeepers, in money laundering schemes** had already been documented previously by the FATF. The revised FATF Forty Recommendations published in June 2003 addressed this issue.

The report further comments on the fact that solicitors, notaries, accountants and other similar professionals render services that help clients organise and manage their financial affairs such as:

- Advice to individuals and businesses in such matters as investment, company formation, trusts and other legal arrangements;
- Optimisation of tax situation;
- Preparation and filing by legal professionals of necessary paperwork for the setting up of corporate vehicles or other legal arrangements;
- Holding or paying out funds relating to the purchase or sale of real estate on behalf of their clients.

The report reflects on the fact that these services may be requested by organized crime groups or individual criminals with the intention to profit from the expertise of such professionals in setting up schemes that will help to launder criminal proceeds.

4.1.2.1.2. FATF report on money laundering and terrorist financing through the real estate sector

In the FATF report on money laundering and terrorist financing through the real estate sector[264], the FATF confirmed the **possible role of non-financial professionals**. The FATF explained that research had shown that when governments take action against certain methods of money laundering, criminal activities tend to migrate to other methods.

[263] FATF report on money laundering typologies 2003-2004, 23-27.
[264] FATF report on money laundering and terrorist financing through the real estate sector June 2007, 9-11.

Money launderers are forced to develop elaborate schemes to work around AML/CFT controls. This has often meant seeking out the experience of professionals such as lawyers, tax advisors, accountants, financial advisors, notaries and registrars in order to create the structures needed to move illicit funds unnoticed. The FATF considers that these professionals act as gatekeepers by providing access to the international financial system, and knowingly or not, can also facilitate concealment of the true origin of funds.

#### 4.1.2.1.3. FATF Global money Laundering & Terrorist Financing Threat Assessment report

The recently published FATF Global money Laundering & Terrorist Financing Threat Assessment report[265] (hereafter "GTA") presents a global overview of the systemic money laundering and terrorist financing threats and the ultimate harms they can cause. The GTA is based on the in-depth typologies studies and the Strategic Surveillance Initiative[266].

The report initially summarizes **identifiable global trends**. It highlights that in both 2008 and in 2009 strategic surveillance exercises showed that a significant proportion of the money laundering and terrorist financing activity involved **cash**. Cash couriers and cash smuggling continue to be used and cash placement is still an important activity for money launderers and terrorist financiers.

The GTA indicates that the 2009 survey showed some **emerging issues** in relation to money laundering i.e. the **increased use of internet based systems, new payment methods and in some jurisdictions new or an increased use of complicated commercial structures and trusts.**

The report however remarks that where new activity or increasing methods are observed, it is not always because the activity is new or occurring at a higher rate. It may be that the activity is being detected more effectively. This is the case for the reported increasing use of cash in some jurisdictions.

With regard to the movement of terrorist funds, the main techniques identified in the 2008 and 2009 survey were physical movement of cash, wire transfers involving cash deposits and withdrawals and alternative remittance systems.

Some jurisdictions reported new techniques and methods in 2009 such as use of new payment methods, involvement of transactions related to the purchase and export of cars, involvement of a property holding company to collect funds and disguise their final destination, a link with trafficking in weapons and trade-based activities. The report stressed that these new methods and techniques do not necessarily represent a trend.

Secondly, the GTA sets out **five key features that are abused by money launderers and terrorist financiers**. One of the five key features described in the report is the **abuse of gatekeepers** in general[267]. Other parts of the report reflect specifically on third party business structures and real estate.

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[265] FATF report Global Money Laundering & terrorist Financing Threat Assessment, July 2010.

[266] The Strategic Surveillance Initiative is a mechanism established in 2008 with the objective to (1) detect and share information on the types of criminal or terrorist activities that pose an emerging threat to the financial system, and (2) develop a more strategic and longer term view of these threats.

[267] In different earlier reports, such as, the June 2007 report on money laundering and terrorist financing through the real estate sector, the FATF already commented on the role of non-financial professionals. The FATF explained that research has shown that when governments take action against certain methods of money laundering, criminal activities tend to migrate to other methods. In part, this reflects the fact that more aggressive policy actions and enforcement measures increase the risk of detection and therefore raise the economic cost of using these methods.
Money launderers are forced to develop elaborate schemes to work around AML/CFT controls. This has often meant seeking out the experience of professionals such as lawyers, tax advisors, accountants, financial advisors, notaries and registrars in

**Gatekeepers are defined in the report as "individuals that protect the gates to the financial system, through which potential users of the system, including launderers, must past to be successful[268].** As a result of their status they have the ability to furnish access to the various functions that might help criminals to move or conceal their funds". For the purpose of the report both **professionals that are able to provide financial expertise (such as lawyers, accountants, tax advisors and trust and company service providers) as well as professionals[269] that have control or access to the financial system in other respects, are considered as gatekeepers**. The summary below focuses on the first category of professionals.

According to the report, the **personal position or reputation of the gatekeeper can be useful** for the launderer to minimise suspicion with regard to his criminal activities mainly for two reasons:

- The position of the gatekeeper lends a certain amount of credibility in the eyes of other parties because of the ethical standards presumed to be associated with such persons and professions;
- The gatekeeper's expertise allows him to undertake transactions or make arrangements in a way that avoids suspicion.

It is stated in the report that gatekeepers undertake either self-laundering or third-party laundering. Professionals tend to launder for third parties, either knowingly or unwittingly.

According to the GTA **lawyers, notaries, accountants and other professionals offering financial advice** are a common element seen in complex money laundering systems. The report explains that these professionals often play a key role in helping to set up such schemes, particularly company formation agents and managers of these structures.

The report refers to the **2009 FATF Strategic Surveillance Survey in which an increased involvement of professional advisers, including lawyers and complicit bankers, in money laundering schemes was noted**.

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order to create the structures needed to move illicit funds unnoticed. The FATF considers that these professionals act as *gatekeepers* by providing access to the international financial system, and knowingly or not, can also facilitate concealment of the true origin of funds.

[268] See also http://transcrime.cs.unitn.it/tc/fso/publications/CBA-Study_Final_Report_revised_version.pdf), Chapter 13.

[269] GTA, p. 44 this includes insiders, who have knowledge and understanding of the businesses within which they operate and can access financial systems and provide expertise through their position of employments.

The **motives for the abuse** of gatekeepers are considered in the report to be:

- Obtaining expertise on how to undertake transactions in order to successfully conceal ownership or other aspects of transactions;
- The intervention of a legal professional in jurisdictions where for the purchase of real estate it is necessary to pass via a legal professional;
- In some cases, seek to take advantage of professional secrecy obligations;

As **enablers of misuse of gatekeepers**, the following factors are listed in the report:

- Poor controls on information;
- Inadequate codes of conduct and ethics;
- Low likelihood of disciplinary action;
- Sales- driven remuneration packages used as motivational tools;
- Non-disclosure and secrecy rules that apply to the relationship between gatekeepers and their clients.

In relation to the abuse of gatekeepers, the report finally sets out **measures for consideration**, e.g.:

- Consider the guidance issued by the FATF on the risk-based approach for legal professionals (October 2008) and for accountants (June 2008);
- Raising awareness on money laundering and terrorist financing within the relevant professional sectors;
- Creation of advanced tools to allow for effective monitoring of STRs by FIUs and the creation of a dedicated function responsible for receiving and analysing STRs from each profession;
- Develop strong codes of conduct and codes of ethics for these professionals (supported by supervisor and regulatory bodies and have corresponding disciplinary action and publication of this action;
- Assess the extent to which the privilege of confidentiality in lawyer/client communication have a detrimental impact on AML/CFT effectiveness in their context and where possible take steps to mitigate this impact.

In the conclusions of the report, the FATF considers that few countries have to date conducted a national assessment of the money laundering/ terrorist financing risks, threats or vulnerabilities. The FATF **encourages all jurisdictions to conduct their own national assessment** and may consider introducing an explicit requirement thereto.

### *4.1.2.2 – Information from Member States*

#### 4.1.2.2.1. Information from stakeholders

A number of stakeholders **commented in a general manner on the involvement of gatekeepers** and on situations that they come across (through the surveys and follow up questions). As indicated, **no specific or quantitative data were received in relation to the four situations and the involvement of gatekeepers.**

A FIU commented that the financial sector has been involved longer in the preventive anti-money laundering framework than the non-financial sector and thus has more experience in setting up systems and measures to prevent its involvement in money laundering. The financial sector in general is being perceived as being cooperative to the preventive money laundering framework. As a result money launderers are forced to develop other money laundering techniques and move towards other sectors.

Some FIUs believe that **the four types of situations can be shown to be vulnerable** in relation to money laundering. Non-financial professions can be involved in the four situations and therefore authorities are in general of the opinion [270]that their role in the preventive anti-money laundering framework is useful. Some authorities are of the opinion that the non-financial professionals are not all sufficiently aware of their vulnerability and therefore the extent of their cooperation is not optimal yet.

With regard to the different situations, a FIU commented that **real estate situations are attractive for money launderers as they involve large amounts of money**. In relation to **business and corporate related transactions, the FIU is of the opinion, that often only non-financial professions have a clear view on the underlying financial construction.**

The same FIU commented on the **differences between the situations in terms of involvement of the financial and non-financial sector**. In financial related situations (when the client is introduced by a non-financial professional to the bank), financial institutions in general exercise a degree of vigilance. Money launderers, can however, in the opinion of the FIU also make use of pooled accounts of non-financial professionals and in this case the risk is higher that money laundering transactions are not detected.

In corporate related transactions a corporate finance department of a bank often intervenes which could lead to an easier detection of money laundering transactions.

A few FIU's commented generally on the type of situations they come across:

- A FIU explains that STRs reported by notaries are mostly in relation to real estate transactions;
- A FIU identifies as most common "modus operandi", off-shore transactions in all four situations;
- Another FIU comments that the most common "modus operandi" concern financial related situations;
- A FIU is of the opinion that corporate related situations in the field of money laundering, tax evasion and other crimes (as a channel to provide for the other described situations) are most common;
- Another FIU identifies business related situations in the field of terrorist financiers.

On the question **"Which are the most common "modus operandi"** of money launderers/terrorist financiers involving: a) real estate situations, b) business related situations, c) financial related situations, d) corporate related situations", only a few stakeholders commented specifically identifying the following methods:

Real estate situations:

- Overpricing of property sale;
- Seemingly legal business activity is used in hiding illegal activity (e.g. construction business).

[270] Nevertheless some public stakeholders are of the opinion that the role for e.g. lawyers in the AML framework is not useful given the limited STRs that they make.

Financial related situations[271]:

- Use of off-shore accounts;
- Use of financial loans among related persons;
- Frequent transfer of large funds to and from banks abroad without obvious economic reason and without matching with their declared revenues or professional activity;
- So-called "mule" activity;
- Payment transactions;
- Money transfers;
- Cash payments and deposits in cash;
- Early repayments of credits or other contracts.

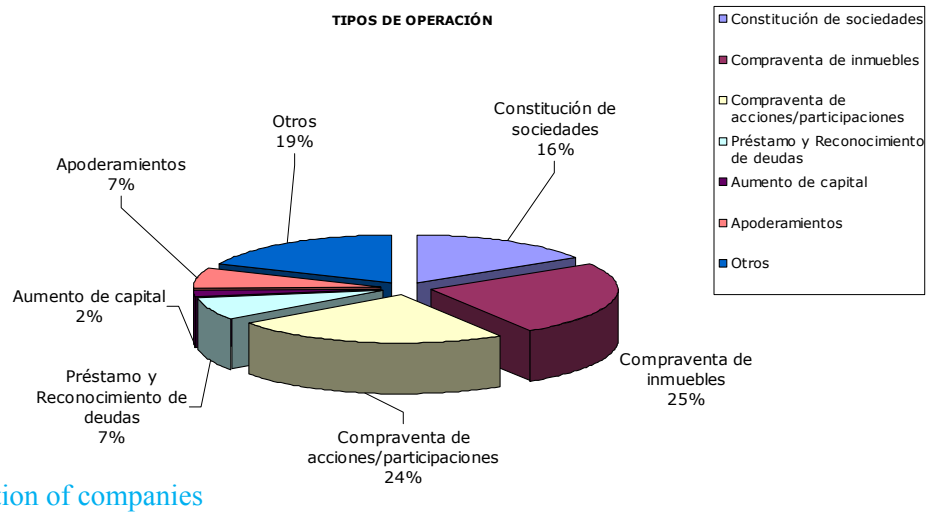
Corporate related situations:

- Use of shell companies;
- Transfers of shares;
- Money transferred to suspicious countries in connection with establishing capital for new companies;
- Off-shore companies' accounts with disguise of the beneficial owner;
- Use of corporate structures for the purposes of financial crime;
- Transfers involving off-shore jurisdictions or complex business structures or trusts.

[271] Some of these techniques qualify as pure banking operations.

**Specific information**

Specific information was received from the Spanish Centralized Prevention Body (OCP - Organo Centralizado de Prevencion) on the types of operations reported by notaries. The graph below demonstrates that notaries in Spain submit reports related to several of the types of situations.




- Incorporation of companies
- Sale of properties
- **Purchase shares / participations**
- Loan and debt recognition
- Capital increase
- Takeovers
- Other

In annex of this section, **anecdotal information**[272] is included on the basis of answers given by FIUs, competent authorities and professional associations to the question whether they had yet come across certain money laundering/terrorist financing techniques related to the specific situations.

On the basis of the anecdotal information, we can conclude that the techniques related to corporate related situations and real estate related situations[273] were most often indicated by FIUs.

In relation to corporate related situations, formation and/or use of off-shore and shell companies received the highest scores. For real estate situations, manipulation of the appraisal or valuation of a property and use of cash were indicated the most.

For both situations the other techniques also got high scores.

[272] Business related situations are not mentioned as a separate category in the table as the questions related to the techniques were the same as the ones included in the section on corporate related situations.

[273] This information should, given the limited responses and the absence of further clarifications ore comments, only be considered as illustrative. Please also note that in the category « Financial related situations » techniques relating to pure banking operations such as cash transactions, money transfer transactions were not included given the scope of the examination.

Both the non-financial competent authorities and the non-financial professional associations indicated real estate situations the most.

For the following specific questions relating to the abuse of non-financial professions in the different situations, stakeholders indicated slightly more that they have come across misuse of non-financial professions in relation to purchase or sale of property.

Non- financial professions: intermediation in business transactions;

Non-financial professions: management or administration of companies by non-financial professions;

Non-financial professions: assistance by non financial professions in the purchase or sale of property;

Non- financial professions: use of non-financial professions to obtain access to financial institutions.

#### 4.1.2.2.2. Information extracted from most recent FATF/Moneyval Country evaluation reports

The FATF/Moneyval Country evaluation reports cover a section in which the general situation of money laundering and financing of terrorism in the country is described. The information included in these sections depends largely on the available information in the countries.

On the basis of the review of these parts of the most recent reports, the following interferences can be made in relation to money laundering methods:

- In a large number of reports **cash and money transfer transactions** are still an important activity used by money launderers and terrorist financing. Banks, money exchange offices (bureaux de change), and money remitters are still often used[274];
- In several reports **investments in high value goods**, e.g. expensive vehicles, boats, art, antiquities, jewels and specifically **real estate**[275] **and company structures/use of off-shore companies/accounts**[276] are mentioned as emerging methods;
- In a number of reports reference is also made to money laundering techniques using **company structures – use of off-shore companies/accounts**;
- In some reports the abuse of "gatekeepers" is explicitly mentioned[277].

[274] E.g. most recent evaluation reports of AT, BE, CZ, DE, DK, EE, ES, IE, IT, LU, PT, SE, UK.
[275] E.g. BE, BG, EE, IE, IT, LV, PL, SE, UK.
[276] E.g. AT, BE, BG, IE, UK, ES.
[277] E.g. BE, IE, IT, LU, UK, IT.

### 4.1.3 – Presentation of typologies and case examples related to the relevant situations

This chapter aims to provide a selection of available typology information and cases relating to the relevant situations. For every concerned situation, a selection of information is – where available – included originating from material from various of international organisations and from Member States.

#### *4.1.3.1 – Real estate situations*

For the purpose of the study, real estate situations are defined as situations in which non-financial professionals act on behalf of and for their client in real estate transactions or intermediate [278] in real estate transactions.

##### 4.1.3.1.1. Information from international organisations

In a **report of June 2007[279],** the **FATF** listed typologies and cases relating to money laundering and terrorist financing in the real estate sector.

The typologies report explains that a number of methods, techniques, mechanisms, and instruments are available to misuse the real-estate sector. The report indicates that many of these methods are in and of themselves illegal acts. Certain of them might, however, be perfectly legal if they are not associated with a money laundering or terrorist financing scheme. The FATF has identified in this study a series of the more common or basic methods and grouped them into the following typologies. The typologies are explained in the report and illustrated by different cases studies.

- Use of complex loans or credit finance *(loan-back schemes and back-to-back loans schemes);*
- Use of corporate vehicles;
- Manipulation of the appraisal or valuation of a property;
- Use of monetary instruments;
- Use of mortgage schemes;
- Use of investment schemes and financial institutions;
- Use of properties to conceal money generated by illegal activities.

In the case studies related to these typologies, non-financial professions are in a number of cases listed as mechanisms.

[278] Understood as encompassing the following: advising the client; intermediate between persons, or intervening in the transaction or formalising transactions.

[279] FATF Money laundering and terrorist financing through the real estate sector, 29 June 2007

Next to these money laundering and terrorist financing methods, the **use of non-financial professionals is also described in the report as a typology**. Specifically with regard to assistance with the purchase or sale of real estate, the report explains that non-financial professionals such as notaries, registrars, real-estate agents, etc., are sometimes used by suspected criminals on account of their central role in carrying out real-estate transactions. The FATF indicates that their professional roles often involve them in a range of tasks that place them in an ideal position to detect signs of money laundering or terrorist financing.

The report also mentions that several cases were identified where non-financial professionals detected illegal activity e.g.:

- Notaries and registrars detecting irregularities in the signing of the property transfer documents (for example, using different names or insisting on paying a substantial part of the cost of the transaction in cash);
- Buying land designated as residential through a legal person and then reclassifying it a short time later for commercial development.

The report concludes that professionals working with the real-estate sector are therefore in a position to be key players in the detection of schemes that use the sector to conceal the true source, ownership, location or control of funds generated illegally, as well as the companies involved in such transactions.

In the measures to consider, the FATF concluded that notaries and registrars seemed to be the weakest link in the chain of real estate transactions, while they may be able to play a role in the detection of high risk transactions relating to the real estate sector. Due to their central position in the legal system in relation to these real estate transactions, these professions could potentially also perform a role in centralising and filtering information.

As a possible solution in countries where the legal professions are considered public servants, the report suggested to put a system in operation by notaries and registrars. The system would encompass, in particular, the identification and analysis of patterns of transactions where there is a risk of them concealing money laundering or terrorist financing activities. These models should include mechanisms for notifying financial intelligence units, for example, of those cases in which the level of risk increases or does not decrease after analysis. On this basis, the co-operation of notaries and registrars in the fight against money laundering and terrorist financing would be more clearly supported.

The report reflects on the fact that some FATF members considered the creation an overall database at the level of the professional association, which would include the majority of the details of all transactions authorised by a notary or registrar and thus serve as the central gathering point for information from these public servants. In establishing a system like this, the FATF indicates, that countries would also need to consider cost effectiveness and privacy protection issues.

**In 2010, the FATF GTA report** lists as third feature money launderers and terrorist financiers turn to the abuse of assets/stores of values. Real estate is one of the sub features described in the report[280]. The GTA sets out that the **use of real estate transactions is one of the proven and most frequent methods of money laundering used by organised crime**. The report refers to the results of the 2009 Strategic Surveillance Survey in which it was demonstrated that many jurisdictions consider real estate businesses to be high risk.

[280] GTA, section 4.4.3.

The GTA report presents the following ways of laundering money through real estate transactions:

- Real estate may be bought by a front organisation using illegal money. Profit from the sale of that property can be regarded as a legal income. Even the purchase of unprofitable business can be used to disguise the illegal proceeds as income generated by that business;
- The price of real estate can be manipulated (representation under or over its real value). The GTA explains that in the case of under-pricing, the difference is paid with "dirty" money. The property is then sold at a higher price, which creates an income, which again can be regarded as legal income. The GTA explains further that in some jurisdictions illegal money is laundered through the purchase and sale of land. Again illegal funds can be laundered by price manipulation (over pricing). Land appraisal documentation and purchase and sale agreements are falsified and the transactions are made by front and fictitious companies.

According to the GTA, in deciding where to invest in real estate, the attractiveness of a jurisdiction will often form part of criminal decision making. Good places to invest are those jurisdictions where the climate is favourable or where others from the criminal's peer group hold property.

The FATF indicates as one of the harms caused by the abuse of real estate characters the fact that increased criminal influence in businesses involved in real estate, could lead to distorted decision making and formulation of professional advice, as such causing harm to these business sectors.

The GTA identifies the following main motives for the use of real estate transactions:

- Real estate provides a permanent asset and long term investment offering the perception of financial stability and providing security for future loans;
- Property investment allows large sums to be concealed and integrated which provides the ability to obscure the true source of the funds and hide the identity of the beneficial owner amongst a number of authentic conveyancing transactions;
- The ability to commingle illicit funds with a genuine income which makes profits appear to be legitimate.

In terms of enablers, the GTA addresses the **use of intermediaries, e.g. real estate agents and solicitors** because these professionals provide an extra layer between the criminal and the transactions he undertakes. According to the GTA, the corruption of such intermediaries (which can include local planning officials) enables the criminal to achieve his objective more easily or further distance himself from the activity.

Weak regulatory controls in some countries can also be considered as an enabler e.g. no restrictions or regulation applied by property registers, resulting in a low risk of detection so that money laundering can be easily camouflaged among the large numbers of genuine transactions.

As useful measures, specifically related to real estate transactions, the GTA proposes to consider:

- Bringing leasing agents within the scope of regulation;
- Bringing property transfer and registration procedures under the scope of national AML/CFT regimes.

**The Egmont Group's sanitized cases** contain a few examples related to real estate situations. One example relates specifically to **the use of gatekeepers** in a real estate transaction.

*Case 1 Use of gatekeepers in a real estate transaction*

Upon executing a deed of sale of a property, a notary received a cheque from the buyer's lawyer, Mr. M. The lawyer pointed out to the notary that the money originated from the sale of a property that belonged to Mr. M's family. The cheque was first endorsed in favour of Mr. M's family before being endorsed to the notary. The cheque was issued from the lawyer's personal account rather than his client account.

Analysis of Mr. M's affairs revealed the following:

His bank account was credited by cash deposits, and thereafter, it was mainly debited by mortgage repayments.

Mr. M was known to the police for organised crime and armed robbery, for which he had already been convicted.

Investing the proceeds of crime in real estate is a well-know money laundering transaction in the integration stage.

This analysis showed that the cash deposited into Mr. M's account for the mortgage repayments probably originated, either entirely or in part, from criminal activities. The money laundering was facilitated by the intervention of the lawyer.

Indicators:

Use of "gatekeepers" professional services

Purchase of valuable assets

**Interpol's 2009 EU [281]Organised Crime and Threat Assessment** report reflects on the fact that anti-money laundering regulations have forced criminals to smuggle cash across several jurisdictions in order to place it securely in accessible facilities.

The report demonstrates that real estate and related activities, ranging from construction and restoration to property investment companies, real estate agencies and the purchase of immovables, are an economic domain habitually used for laundering money.

An example of this trend is given in the report: "*Organized crime groups employ controlled construction companies to restore acquired property – often no more than mere ruins – with crime-generated money. As soon as buildings or estates are reconstructed to perfect conditions they sell them, laundering the invested money and making a profit on it".*

[281] http://www.europol.europa.eu/publications/European_Organised_Crime_Threat_Assessment_(OCTA)/ OCTA2009.pdf, p 50 and following.

The report concludes that this reflects an extremely profitable, double-layered money laundering technique. A significant amount of criminal proceeds can be used in the reconstruction phase, purchasing building material also on the black market and hiring irregular workers. This shifts the burden of cash placement on others while splitting considerable amounts of illicit profits into small fragments that are far more difficult to detect. In a second phase, the fully refurbished and often prestigious end product is sold on the real estate market for an allegedly legitimate and well-deserved profit.

#### 4.1.3.1.2. Information from Member States

*The following selection of typologies and cases originates primarily from the desk research performed as described above. The selection was made within the framework of the objectives of this part of the study.*

*The additional information received through the questionnaires was limited. The reasons for this are explained above.*

In 2007 the Belgian FIU published a typological analysis regarding real estate[282] based on all of the reported files since 1993 involving real estate investments. The analysis illustrates the different techniques used involving real estate investments and contains examples of the files reported.

One of the techniques described by the report is the use of non-financial professions. The report states:*"In order to circumvent money laundering countermeasures, launderers have had to develop more complex methods. Criminals wanting to launder criminal proceeds turn to the expertise of professionals. This trend has been noted internationally and is becoming more frequent in money laundering operations in Belgium.*

*Lawyers, notaries, accountants and other professions carry out a number of important tasks that criminals target in order to use their knowledge and set up mechanisms to launder money of illicit origin".*

The typological analysis of the reported files focused on the services most often used by money launderers. These services relate to introduction with financial institutions, performing of financial transactions, establishing corporate structures and setting up legal and financial constructions and intervention in real estate transactions.

**Examples of cases and techniques:**

*Case 2 (2009)*[283] *Real estate*

A Russian couple residing in Belgium managed the company OIL established in Singapore active in the oil and gas industry. A company established in the British Virgin Islands was the company OIL's sole shareholder. The company OIL carried out substantial transfers to the company. The money was then transferred again to their accounts in Singapore. The use of these accounts as transit accounts, the use of tax havens and the involvement of off-shore companies caught the bank's attention.

[282] http://www.ctif-cfi.be/doc/en/typo_ctif_cfi/NL1236c-EN-Final.pdf
[283] Belgium

The couple also significantly invested in real estate in Belgium for a total amount of several million EUR. The notary found these large investments and payment through transfers from Singapore suspicious. Police sources showed that the individuals led a Russian criminal organisation. They did not carry out any commercial activity in Belgium that could justify the transactions on their accounts. The Belgian financial system was clearly only used for money laundering purposes.

Money laundering and real estate Offence

| | |
|---|---|
| Parties involved | Natural persons |
| | Companies |
| Sectors involved | Financial institutions |
| | Non-financial professions |
| Channels used | International transfers |
| | Real estate |
| Jurisdictions involved | Belgium, Singapore and British Virgin Islands |
| Disclosing entities | Banks, notary |
| Warning signals | Tax havens |
| | Off-shore companies |
| | Transit accounts |
| | Large investments in real estate |
| | Real estate paid by transfers from off-shore centres |

*Case 3 (2009)[284] Real estate*

Property was sold by the original owners at a contract price substantially higher than the deemed or "objective value" (a value set by the tax authorities for the purpose of calculating property taxes) - a very uncommon practice in Greece. An intermediary was used as a buyer on behalf of a third party (the "ultimate buyer") that ultimately received title of the property by means of a successive sale.

The intermediary (the first buyer) resold the real estate almost immediately to the ultimate buyer (a legal entity) at a substantially higher price. In this way, the ultimate buyer recorded a substantial outlay (in the accounting records), an amount significantly higher than the actual price paid to the original owner of the property. The difference could then be used for illicit purposes (possibly including bribery).

[284] Greece

Indicators:

- Higher than normal price;

- Successive sales;

- Use of intermediaries.

Industry: Real Estate

*Case 4 (2008)*[285] *Real estate*

Mr. X is a foreign resident and is the director of a company which has its offices in a tax haven. He is also the director of a foreign bank, and is known for associating with organised crime groups.

A series of real estate investments are carried out in different parts of France for amounts totalling several million Euros. Although not seeming to be directly involved in the transactions, Mr. X appears to be the initiator of them, and maintains direct or indirect links with the legal persons involved.

The purchases are financed with funds from bank accounts in Central Europe, and fed by transfers of funds from a foreign bank.

Indicators: Purchase of high value assets e.g. real estate, multiple transactions

Industry: Banking/ Real estate

*Case 5 (2007)* [286] *Real estate*

A Central European businessman makes a high-value real estate purchase. The funds for this come from foreign firms.

The banks that wire these funds are nearly systematically located in a different country than the principals (the firms).The case was referred to the judicial authorities on the grounds of suspected laundering of proceeds from organised crime.

Amount of money involved: 1.000.070 EUR

Indicators: purchase of a high value asset, e.g. property, lack of economic justification for these transfers (unclear connections between the firms and the businessman), use of firms located abroad, Buying or selling property above or below market value

Industry: Banking/real estate

[285] France
[286] France

*Case 6 (2007)*[287] *Real estate*

The company ANDI, managed by Mr. OXO, sold a property to the company BARA, managed by Mr. RYA, for a significant amount for which the deposit was paid in cash. A large part of the price was also paid in cash. When the notary who had executed the act noticed these transactions he sent a disclosure to the Unit based on article 10bis of the Law of 11 January 1993.

Analysis revealed the following elements:

- The notary deed showed that money for the cheque to the notary was put on the account of the company ANDI by a cash deposit two days before the cheque was issued.
- Information from the bank showed that the company ANDI and Mr. OXO's personal account were credited by substantial cash deposits. This money was used for, among other things, reimbursing a mortgage loan, and was withdrawn in cash.
- Police sources revealed that Mr. OXO and Mr. RYA were the subject of a judicial inquiry into money laundering with regard to trafficking in narcotics. They were suspected of having invested their money for purchasing several properties in Belgium through their companies.

All of these elements showed that the cash used for purchasing property probably originated from trafficking in narcotics for which they were on record.

*Examples of money laundering schemes in real estate situations provided by stakeholders*

- A land was repeatedly sold between various commercial companies controlled by the same natural person. The land was transacted at a much over-evaluated price, having as purpose to extract significant amounts of money out of the company to conceal their unjustified use. Finally, the money was transferred to an off-shore company also controlled by the natural person, who was involved in tax evasion activities by the concerned commercial companies.
- Private companies, especially within construction activity area, conclude high value contracts with state authorities for the purpose of developing infrastructure projects – roads, bridges, civil construction, etc. The price of the contracts is overvalued or supplemented/increased during the execution of the contract. Moneys are transferred from the companies accounts trough different channels which appear to be legal (dividends, loan repayment, etc) into shareholders accounts. In respect of typologies identified from STRs coming from notaries: notaries have a "special account" where they receive money from the buyer, then certify the agreement and after the property has been transferred to the buyer, the notary transfers the money to the seller. Bearing in mind this mechanism, usually the assets are purchased on the 3rd layer and the main indicators are:
  - Money launderers use a "front man";
  - After specific questions, notaries refuse to perform the transaction;
  - The price is under or above the market price;
  - Transactions are performed in cash.
- Accomplices in the country, having the role of "whitening" the illicit funds received from abroad, proceeded to hide the true nature of the origin of the money by investing the "dirty" money in lands and buildings; the real estate is purchased (directly or by intermediaries) and, consequently, resold in order to obtain profits and to justify the amounts of money they had.
- A criminal group intended to sell several apartments in a short period of time, for which the price of selling was the same or smaller than the one for buying; by this modality, they tried to hide any trace

[287] Belgium

that would conduct to the funds origin. The real estate was also obtained by shark-loaning activities (from persons who did not succeed to return the loan and the interest rate).
- A company would pay large sums to an off-shore company based on a fictitious invoice (usually for consulting services). This money would then be moved between various off-shore companies as a loan. After a few years the money would be returned to the market in the form of real-estate investment or share acquisitions.
- Artificially inflate the value of land so as to 'draw down' credit that was provided between 2005 and 2008. This indicates that flows of goods/transactions are occurring where they in fact they are non-existent. Tainted monies are thereby 'explained".

### *4.1.3.2 – Business related situations*

For the purpose of the study, business related situations are defined as situations in which non-professionals act on behalf of and for their client in the selling of business entities or intermediate[288] in selling of business entities.

As explained above, in the available information, business related situations are almost always linked to corporate related situations. The selling of business entities is often part of a larger set up of misuse of corporate vehicles.

#### 4.1.3.2.1. Information from international organisations

We have not come across information specifically concerning business related situations as described above. This does not mean that transactions in business related situations do not occur. It could mean that transactions in business related situations are often linked to or categorized together with corporate related situations. We therefore refer to the information included in the section on corporate related information.

#### 4.1.3.2.2. Information from Member States

*The following selection of typologies and cases originates primarily from the desk research performed as described above. The selection was made within the framework of the objectives of this part of the study.*

*The additional information received through the questionnaires was limited. The reasons for this are explained above.*

We have identified only one case that solely relates to business related situations[289].

*Case 2008[290] Business related situation - Takeover of companies by criminal groups and the following embezzlement of the assets of the companies through fictitious transactions*

[288] Understood as encompassing the following: advising the client; intermediate between persons, intervening in the transaction or formalising transactions.

[289] It can even be discussed if this example is an example of money laundering.

Criminal offenders choose a company and make enquiries with the information system of the Commercial Register, where they obtain the relevant information about the company (owners, members of the management board, the annual report, etc). The bank that holds the current account of the company is identified. For this purpose, the criminal offenders typically ask the company for a price offer regarding products or services and in its reply, the company specifies the current account where to pay for the product or the service.

Thereafter a fictitious person is appointed as a new member of the management board of the company by using counterfeit documents. In order to designate a fictitious person as a new member of the management board, at first the documents and minutes of the general meeting of shareholders of the company are fabricated, in accordance with which the old member of the management board is removed and a new member of the management board is elected. Thereafter the fictitious person goes to the notary public or a rural municipality secretary where he/she receives confirmation of the signature of the member of the management board on the petition for an entry to be submitted to the Commercial Register.

Finally, the Commercial Register makes a new entry on the basis of the petition for an entry in the registry card of part B pursuant to which the fictitious person becomes a new member of the management board.

As a result, criminal offenders gain control over the assets of the company and, within a short period, the company is made impecunious by fictitious transactions.

With regard to detection of the aforementioned scheme, the FIU recommends that:

- Companies observe carefully the transactions made on the bank account of the company in order to find out the withdrawal of the assets as soon as possible;
- Companies use additional security measures in order to manage the risk of withdrawal of assets on the basis of the aforementioned scheme, including to disclose data about the bank account of the company only to reliable business partners;
- Notaries public or a rural municipality secretary pay special attention to the requests related to confirmation of a new member of the management board, incl. the authenticity of the documentation used for the petition and, if necessary, ask additional questions in order to make sure that the person applying to become a member of the management board is not a fictitious person.

Indicators: fictious members of management board/ sudden withdrawal of funds

Industry: professional services/banking

[290] Estland

*Examples of money laundering schemes in business related situations provided by stakeholders*

- Repeated changes of the ownership structure of a company.
- Company registration services were provided to foreign individuals and the commercial entities were later used to open account in various other Member States and transfer funds through those accounts. In many cases there were no or very limited activities of the entities in the home Member State.
- A company A, established abroad with a very vague company object en administrators residing abroad, opened an account in Belgium. The company received a significant loan for the purchase of a real estate company in Belgium. The credit was paid back through international transfers coming from the account of Z, a lawyer and one of the administrators of the company A. The money did therefore not originate from the activities of company A in Belgium. The loan was secured by a bank guarantee from a private bank in the USA. The bank guarantee was later transferred to a bank in a tax paradise. Many countries intervened in the financial structure, probably to make possible investigations difficult. The account of company A was credited through an international transfer with an unknown principal. Shortly afterwards the money was redrawn from the account by lawyer Z who had no official address in Belgium. From the information the FIU got from other FIU it seemed that the lawyer Z was suspected of the management of suspicious money. One of the other administrators was known for drug trafficking en money laundering. All these elements demonstrated that company A and its administrators were part of an international structure to launder money deriving from drug trafficking.

### *4.1.3.3 – Financial related situations*

For the purpose of the study, financial related situations are defined as situations in which non-financial professionals act on behalf of and for their client in financial transactions or intermediate[291] between clients and credit or financial institutions regarding management of clients' money, accounts and assets, or opening or management of bank, savings or securities accounts.

In general three main types of possible involvement by non-financial professions in financial related situations can be distinguished:

- Use of the gatekeeper to gain introduction to a financial institution;
- Use of the gatekeeper to perform financial transactions;
- Use of third party accounts.

#### 4.1.3.3.1. Information from international organisations

Throughout different FATF reports, the involvement of gate keepers in financial related situations is described. Very often there is a link with another relevant situation i.e. real estate situations or corporate related situations.

[291] Understood as encompassing the following: advising the client; intermediate between persons, or intervening in the transaction.

In the **FATF report on money laundering typologies 2003-2004**, the following cases were presented:

*Case 1 Accountant and lawyers assist in a money laundering scheme*

Suspicious flows of more than USD 2 million were identified being sent in small amounts by different individuals who ordered wire transfers and bank drafts on behalf of a drug trafficking syndicate who were importing 24 kg of heroin concealed in cargo into Country Z. Bank drafts purchased from different financial institutions in Country Y (the drug source country) were then used to purchase real estate in Country Z.

An accountant was used by the syndicate to open bank accounts and register companies. The accountant also offered investment advice to the principals.

A firm of solicitors was also used by the syndicate to purchase the property using the bank drafts that had been purchased overseas after they had first been processed through the solicitor's trust account. Family trusts and companies were also set up by the solicitors.

*Case 2 Accountant provides specialist financial advice to organised crime*

A law enforcement operation identified an accountant, Mr. J, who was believed to be part of the criminal organisation involved in money laundering and re-investment of illicit proceeds derived from drugs trafficking led by Mr. X. Mr. J's role was mainly that of a "legal and financial consultant". His task was to analyse the technical and legal aspects of the investments planned by the organisation and identify the most appropriate financial techniques to make these investments appear licit from a fiscal stance. He was also to try as much as possible to make these investments profitable. Mr. J was an expert in banking procedures and most sophisticated international financial instruments. He was the actual financial "mind" of the network involved in the re-investment of proceeds available to Mr. X. Mr. J operated by sub-dividing the financial transactions among different geographical areas through triangle transactions among companies and foreign credit institutions, by electronic transfers and stand-by credit letters as a warrant for commercial contracts which were later invested in other commercial activities.

*Case 3 Solicitor uses his client account to assist money laundering*

Over a period of three years Mr. X repatriated funds to Country Y for his use and benefit. He was assisted by lawyers and accountants using false transactions and off-shore corporations. Mr. Y, formerly a lawyer, facilitated Mr. X's repatriation scheme by managing Mr. X's off-shore corporation and bank accounts in several important financial centres. Mr. Y drafted documents that purported to be "loan" agreements between the off-shore shell corporation and a Mr. X nominee in Country Y. These loan agreements served as the basis for the transfer of millions from bank accounts in several different countries to the Mr. X's home country. Upon arrival in the bank accounts opened by Mr. X's nominee, the funds were transferred to Mr. X. Mr. Y's lawyer used the law firm's bank accounts to facilitate the transfers.

*Case 4 Trust fund is used to receive dirty money and purchase real estate*

A lawyer was instructed by his client, a drug trafficker, to deposit cash into the lawyer's trust account and then make routine payments for mortgages on properties beneficially owned by the drug trafficker. The lawyer received commissions from the sale of these properties and brokering the mortgages. While he later admitted to receiving the cash from the trafficker, depositing same into his trust account, and administering payments to the trafficker's mortgages, he denied knowledge of the source of the funds.

In the **2007 FATF report on Money laundering and terrorist financing through the real estate sector** reference is made to a number of cases revealing that criminals and terrorists have used non-financial professionals or gatekeepers to access financial institutions. According to the report, this is especially important during the process of determining eligibility for a mortgage, opening bank accounts, and contracting other financial products, to give the deal greater credibility.

The report also explains that bank accounts are sometimes opened in the name of non-financial professionals in order to carry out various financial transactions on their behalf. Examples included are, depositing cash, issuing and cashing cheques, sending and receiving international fund transfers, etc., directly through traditional saving accounts or indirectly through correspondent accounts.

The following cases were presented in the report.

*Case 5 Misuse of a real estate agent to gain introduction to a financial institution, possible link to terrorist financing*

(Predicate offence: suspected terrorist financing)

A trustee for a trust established in an off-shore centre approached a real estate agent to buy a property in Belgium.

The real-estate agent made inquiries with the bank to ask whether a loan could be granted. The bank refused the application, as the use of a trust and a non-financial professional appeared to be deliberately done to disguise the identity of the beneficial owner. The bank submitted a suspicious transaction report.

Following the analysis of the financial intelligence unit, one of the members of the board of the trust was found to be related to a bank with suspected links to a terrorist organisation.

Indicators and methods identified in the scheme:

- Instrument: real estate, loan.

- Mechanisms: bank, trust, real-estate agent.

*Case 6 Abuse of a notary's client account*

(Predicate offence: suspected trafficking in narcotics)

A company purchased property by using a notary's client account. Apart from a considerable number of cheques that were regularly cashed or issued, which were at first sight linked to the notary's professional activities, there were also various transfers from the company to his account.

By using the company and the notary's client account, money was laundered by investing in real estate in Belgium, and the links between the individual and the company were concealed in order to avoid suspicions.

Police sources revealed that the sole shareholder of this company was a known drug trafficker.

Indicators and methods identified in the scheme:

- Instruments: cheque, cash, wire transfers, real estate.

- Mechanisms: notary, bank.

- Techniques: intermediary account, purchase of real estate, incoming wire transfer.

*Case 7 Use of a solicitor to perform financial transactions*

(Predicate offence: distribution of narcotics)

An investigation of an individual revealed that a solicitor acting on his behalf was heavily involved in money laundering through property and other transactions.

The solicitor organised conveyancing for the purchase of residential property and carried out structured transactions in an attempt to avoid detection. The solicitor established trust accounts for the individual under investigation and ensured that structured payments were used to purchase properties and pay off mortgages.

Some properties were ostensibly purchased for relatives of the individual even though the solicitor had no dealings with them. The solicitor also advised the individual on shares he should buy and received structured payments into his trust account for payment.

Indicators and methods identified in the scheme:

- Instruments: cash deposits, real estate.

- Mechanisms: solicitor, trust accounts.

- Techniques: structured cash transactions, establishment of trust accounts to purchase properties and pay off mortgages, purchase of property in the names of the main target.

- Opportunity taken: the solicitor set up trust accounts on behalf of the target and organised for transactions to purchase the property, pay off mortgages, and shares were purchased to avoid detection. In some cases properties were purchased in the names of relatives of the target.

The **2010 FATF GTA** also refers to the possible involvement of gatekeepers in financial related situations (see above).

The **Egmont Group** also published a specific case related to the use of gatekeepers in financial related situations.

*Case 8 Use of gatekeepers*

Mr A was in control of a corporation's financial affairs and abused this position of trust by defrauding the company.

He authorised and instructed staff to make electronic funds transfers from the company to his bookmakers' accounts. He then instructed the bookmakers to direct excess funds and winnings from the account to his personal account or third party accounts.

He also instructed bank officers to transfer funds from his accounts internationally.

In order to layer and disguise the fraud, Mr A instructed his lawyer to contact the beneficiary of these international transfers to return the payments via wire transfers into the lawyers trust account.

Approximately $340,000 was returned in one international transfer to the lawyers trust account. The lawyer then transferred $270,000 to a church fund in an attempt to further hide the assets and was preparing to transfer the funds to an overseas account. To access these funds the suspect undertook structured withdrawals of $7,400 each within a nine day period.

Indicators:

- Use of "gatekeepers" professional services;
- Use of foreign bank accounts;
- Structuring.

#### 4.1.3.3.2. Information from Member States

*The following selection of typologies and cases originates primarily from the desk research performed as described above. The selection was made within the framework of the objectives of this part of the study.*

*The additional information received through the questionnaires was limited. The reasons for this are explained above*

*Case 9 (2009) Financial related situations*[292]

Collateral offered was falsified future receivables. A criminal gang network that had committed forgery and fraud used third persons' current accounts to buy luxury cars. The criminal network picked as victims businessmen in financial problems and low credit standing and used them to apply for and get loans circumventing the bank's procedures via collaboration with a local bank branch manager. The manager was systematically using clients in trouble, who in exchange for a commission would, along with an accountant, forge the accounts of the client, establish front companies to obtain the loan. Collateral offered was falsified future receivables.

Indicators:

- Use of front companies;
- Purchase of high-value assets;
- Circumvention of internal procedures.

Industry: Banking

*Case 10 (2008) Financial related situations* [293]

The company TRIB established in Belgium holds an account in Belgium on which Mr. VIR holds power of attorney. The latter lives in Belgium and manages the company TRIB. He also holds a personal account with the same bank.

The company CO, established in Belgium, issued a cheque for a considerable amount that was cashed on a lawyer's account. The latter then requested to write out various cheques. Some of the cheques were written out to the company TRIB. Cash withdrawals and transfers took place on this company's account for the accelerated repayment of an investment credit. Mr. RED cashed the remaining cheques at a bank in a tax haven.

The cheque written out by the company CO was intended to release money to buy shares of the company TRIB. After using the lawyer's account a considerable amount of the money released by the company CO was transferred to Mr. VIR's personal account in a tax haven.

This transfer confirmed that Mr. VIR was the main economic beneficiary of this financial transaction for purchasing the company TRIB.

Police sources showed that Mr. VIR was the subject of a file on money laundering and trafficking in human beings. He was suspected of being a slumlord abusing the vulnerable situation of foreigners in a precarious or illegal administrative situation to make a profit by renting out parts of buildings at excessively high prices.

The profit made by TRIB may have, wholly or partly, originated from Mr. VIR's criminal activities related to human trafficking.

[292] Greece
[293] Belgium

By selling shares of the company TRIB to the company CO Mr. VIR was able to recover part of his profits from his criminal activities.

Indicators: Use of a lawyer's account

- Use of a transit account;
- Transfer to a tax haven;
- Accelerated repayment of loans.

Industry: Banking/professional services

*Case 11 (2008) Financial related situation* [294]

A judgment stated that a lawyer fraudulently intervened in several financial transactions for a company he represented established in an off-shore centre. He had opened an account in name of this company on which various international transfers took place. Through these transactions, for a total amount of several million EUR, money was laundered from a stock market offence committed by the lawyer's clients.

*Case 12 (2007) Financial related situation* [295]

A notary disclosed the real estate purchase by the company RICH, established in an off-shore centre. For this purchase the company was represented by a Belgian lawyer. The payment of the property took place in two stages. Prior to drafting the deed a substantial advance was paid in cash. The balance was paid by means of an international transfer on the notary's account. Analysis revealed the following elements:

The balance was paid on the notary's account with an international transfer from an account opened in name of a lawyer's office established in Asia. The principal of this transfer was not the company RICH but a Mr. WALL. Ms. WALL, ex-wife of Mr. WALL resided at the address of the property in question.

Police sources revealed that Mr. WALL was known for fraud abroad.

These elements seemed to indicate that Mr. WALL wanted to remain in the background of the transaction. That is why he used an off-shore company, represented by a lawyer in Belgium and channelled the money through a lawyer's office abroad to launder money from fraud by investing in real estate.

Indicators: use of gatekeepers, cash payment

Industry: Banking/Professional services

[294] Belgium
[295] Belgium

*Case 13 (2007) Financial related situation*[296]

Over a few month's time Mr. CAP, a lawyer residing in Belgium, repeatedly went to a foreign exchange office to receive money through money remittance from different Central European countries for a considerable total amount.

Analysis revealed the following elements:

Mr. CAP was already reported by the Unit for human trafficking. In this file Mr. CAP sold a property in Central Europe.

In addition, one of the principals of the transfers, a Mr. KROP, intervened in another file reported by the Unit with respect to human trafficking. Mr. KROP, who resided in Central Europe, was the beneficiary of a money remittance transaction in this file. Mr. LINO sent him this money from Belgium.

Some countries from which Mr. KROP received money were countries known for human trafficking.

Finally the transactions were all the more suspicious since they were carried out by one of Mr. CAP's customers so these should have taken place through a bank account. The individual involved wanted to avoid this by using money remittance.

The financial flows described above (Mr. LINO in Belgium sends money to Mr. KROP in Central Europe and a few months later Mr. KROP sends money from Central Europe to Mr. CAP in Belgium) were linked with each other and probably originated from human trafficking.

Indicators: Multiple money remittance transactions, use of gatekeepers

Industry: money remittance services/professional services

*Case 14 2007*[297] *Financial related situations*

A bank disclosed a trust established in an off-shore centre to the FIU. This trust had gone to a real estate agency to buy a property of several million EUR. The real estate agent made inquiries with the bank to verify whether a loan could be granted. The bank refused the application.

Analysis revealed the following elements:

- The trust's goals consisted of Islamic banking activities.
- One of the Trust's members of the board was an Islamic bank whose name was mentioned in the circular "Commission de Surveillance du Secteur Financier" 01/35 [Supervising Committee of the Financial Sector] of Luxembourg regarding the embargo against the Taliban.
- Furthermore, this bank was also suspected of being linked to a terrorist organisation.

[296] Belgium
[297] Belgium

Using a trust and appealing to a non-financial profession was clearly meant to disguise the identity of the final economic beneficiary. Given these elements the Unit reported this file in relation to terrorism financing.

### *4.1.3.4 – Corporate related situations*

For the purpose of the study, corporate related situations are defined as situations wherein non-financial professionals act on behalf of and for their client in corporate transactions related to the creation, operation and management of legal entities and trusts as well as the organisation of contributions necessary for the creation, operation or management of companies[298]; intermediation[299] in the creation of legal entities and trusts; intermediation[300] in the operation and management of legal entities and trusts; intermediation[301] in the organisation of contributions necessary for the creation, operation or management of companies.

#### 4.1.3.4.1. Information from international organizations

The **FATF report on money laundering typologies 2003-2004** includes the following cases.

*Case 1 Legal professionals facilitate money laundering*

A director of several industrial companies embezzled several million dollars using the bank accounts of off-shore companies. Part of the embezzled funds were then invested in real estate in Country Y by means of non-trading real estate investment companies managed by associates of the person who committed the principal offence.

The investigations conducted in Country Y, following a report from the FIU established that the creation and implementation of this money laundering channel had been facilitated by accounting and legal professionals - gatekeepers. The gatekeepers had helped to organise a number of loans and helped to set up the different legal arrangements made, in particular by creating the non-trading real estate investment companies used to purchase the real estate. These professionals also took part in managing the structures set up in Country Y.

[298] Including: acting as director or secretary of a company, a partner of a partnership or a similar position in relation to other legal persons; acting as trustee of an express trust or a similar legal arrangement; acting as nomineed shareholder for another person (other than a listed company).

[299] Understood as encompassing the following: advising the client; formalising transactions; forming companies or other legal persons;

[300] Understood as encompassing the following: advising the client; assisting in the execution of transactions; arranging for another person to act as a director or secretary of a company, a partner of a partnership or a similar position in relation to other legal persons; arranging for another person to act as a trustee of an express trust or similar legal arrangement; arranging for another person to act as a nominee shareholder for another person (other than a listed company).

[301] Understood as encompassing the following: advising the client and assisting in the execution of transactions.

*Case 2 Lawyer uses off-shore companies and trust accounts to launder money*

Mr. S headed an organisation importing narcotics into country A from country B. A lawyer was employed by Mr. S to launder the proceeds of this operation.

To launder the proceeds of the narcotics importing operation, the lawyer established a web of off-shore corporate entities. These entities were incorporated in a Country C, where scrutiny of ownership, records, and finances was not strong. A local management company in Country D administered these companies. These entities were used to camouflage movement of illicit funds, acquisition of assets and financing criminal activities. Mr. S was the holder of 100% of the bearer share capital of these off-shore entities.

In Country A, a distinct group of persons and companies without any apparent association to Mr. S transferred large amounts of money to Country D where it was deposited in, or transited through Mr. S's off-shore companies.

This same web network was found to have been used to transfer large amounts of money to a person in Country E who was later found to be responsible for drug shipments destined for Country A.

Several other lawyers and their trust accounts were used to receive cash and transfer funds, ostensibly for the benefit of commercial clients in Country A. When they were approached by law enforcement during the investigation, many of these lawyers cited "privilege" in their refusal to cooperate. Concurrently, the lawyer established a separate similar network (which included other lawyers' trust accounts) to purchase assets and place funds in vehicles and instruments designed to mask the beneficial owner's identity. The lawyer has not been convicted of any crime in Country A. Investigators allege however that his connection to and actions on behalf of Mr. S are irrefutable.

The **FATF Report October 2006**[302] **on the misuse of corporate vehicles, including trust and company service providers** has identified in respect of corporate vehicles areas of vulnerability for money laundering and terrorist financing, along with evidence of their misuse.

The report presents a series of cases as examples of the misuse of corporate vehicles from which certain key elements and patterns for this misuse are identified.

The second typology described in the report relates to the involvement of specialised financial intermediaries or professionals in facilitating the formation of an entity and exploiting the opportunities presented by foreign jurisdictions to employ various arrangements that can be used for legitimate purposes but can also be used to help conceal true beneficial ownership, such as corporate shareholders, corporate directors and bearer shares.

According to the report, the report the degree of complicity of these financial intermediaries and professionals varies widely, with some unknowingly facilitating illicit activities and others having greater knowledge of their clients' illicit purposes.

[302] At the time of the closing of the study the FATF report on money laundering using trust and company service providers was not yet available.

*Case 3 Corporate related situations*

A company initially established in an off-shore centre had moved its registered office to become a limited company under Belgian law. It had consulted a lawyer for this transition. Shortly afterwards the company was dissolved and several other companies were established taking over the first company's activities. The whole operation was executed with the assistance of accounting and tax advisors. The first investment company had opened an account in Belgium that received an important flow of funds from foreign companies. The funds were later transferred to accounts opened with the same bank for new companies. These accounts also directly received funds from the same foreign companies. Part of it was invested on a long term basis and the remainder was transferred to various individuals abroad, including the former shareholders of the investment company. These funds were also transferred to the new companies. The whole structure was set up by tax accountants.

The **FATF 2007 report on Money laundering and terrorist financing through the real estate sector** comments on the role of gatekeepers in relation to the management or administration of companies. The report refers to documented cases of non-financial professionals that were approached by money launderers and terrorists not just to create legal structures, but also to manage or administer these companies. In this context, the FATF concludes that these professionals may have been generally aware that they are taking an active role in a money laundering operation. The access of these gatekeepers to the companies' financial data and their direct role in performing financial transactions on behalf of their clients make it almost impossible to accept that they were not aware of their involvement.

**The FATF GTA 2010** report identifies the transfer of value as second feature used by money launderers. Third party business structures, charities and other legal entities are sub feature in that category. Criminal abuse of third part business structures can take place, amongst others, with the intervention of professional advisers

#### 4.1.3.4.2. Member States

*The following selection of typologies and cases originates primarily from the desk research performed as described above. The selection was made within the framework of the objectives of this part of the study.*

*The additional information received through the questionnaires was limited. The reasons for this are explained above.*

*Case 4 (2008) Corporate related situation*[303]

Mr. RED, residing in Belgium, runs an accountancy firm and manages some ten companies. All of these companies, active in the construction business, were established by Mr. RED in the same period.

*Suspicious transactions*

The bank noticed suspicious transactions on the accounts of two of these companies. The credit transactions consisted of transfers by order of companies in the same sector. Upon receipt the money was consistently withdrawn in cash by Mr. RED, who held power of attorney on the accounts.

[303] Belgium

A large part of these companies had its head office at the same address, which was merely a postal address.

According to Mr. RED's explanations the recently established companies were intended to be sold to third parties.

In another file reported by CTIF-CFI the accountancy firm was involved in fraud. The company also established a number of companies in order to be sold to third parties.

The authorised capital of every company involved was deposited in cash and systematically withdrawn in cash some days later. Subsequently only transactions on the accounts of two companies took place.

Several companies of the same sector and principals of the transfers were known to the police for trafficking in illicit labour.

Indicators:

Several companies that were recently and simultaneously established;

Establishing companies to be sold to third parties;

Involvement of an accountancy firm;

Involvement of dormant companies;

Sensitive sector;

Depositing the company capital in cash consistently followed by cash withdrawals;

Immediate cash withdrawals upon receipt of the money;

Financial flows without clear economic justification;

Unclear destination of the money.

Industry: Banking/professional services

*Case 5 2007 Corporate related situations*[304]

A foreigner residing in Belgium was introduced to a bank by a firm of lawyers to open an account. This account was credited with large sums by foreign transfers ordered by an unknown counterpart. The money was used to purchase real estate. Analysis revealed the following elements:

- These purchases were paid by bank cheques issued by order of a notary to invest the money in real estate projects in Belgium;
- The individual involved was assisted by other foreign investors for setting up a particularly complex scheme;

[304] Belgium

- From questioning the Belgian civil-law notary the Unit learnt that he had been engaged by four foreign companies to help set up two holding companies;
- These two holding companies had in their turn set up two other Belgian real estate companies.
- The real estate investments took place through these two companies;
- The people representing these companies – a lawyer and a diamond merchant – acted as front men for the individual involved;
- It turned out that the lawyer who had introduced this person to the bank was also involved in other schemes of a similar nature;
- The address of the registered office of the Belgian companies was also the address of his lawyer's office.

This information showed the important role played by the lawyer in setting up a financial and corporate structure to enable funds from unknown foreign principals to be invested in real estate projects in Belgium. On the basis of these elements the Unit decided to report the file for laundering the proceeds of organised crime.

*Case 6 2007 Corporate related situations*[305]

The use of front companies is a frequently used money laundering technique concealing the origin of the funds and increasing the anonymity of partners or beneficiaries of transactions. When front companies are used this should lead to suspicions of financial institutions and non-financial professions.

A file reported by the Unit involved a company purchasing company shares and real estate by using a notary's third party account. Apart from large cheques that were regularly cashed or issued-which at first seemed to be related to the notary's professional activities there were multiple transfers from this company.

Analysis revealed the following elements:

- Police sources showed that the company's sole shareholder was known as a drug trafficker;
- The financial analysis revealed that this foreigner had invested money of illicit origin in various companies and buildings in Belgium;
- These investments were indirectly carried out by this individual. It became clear that by means of a foreign company, of which he was shareholder, he managed the company in Belgium that had purchased the buildings and shares of other Belgian companies;
- He tried to conceal the links with the companies to avoid attracting the attention of the judicial authorities.

By using the notary's bank account the money of illicit origin was laundered by carrying out investments in Belgium and by concealing the individual's link with the companies to avoid raising suspicions.

Besides the constructions using off-shore companies financial and legal professionals are sometimes used, making the scheme more complex and less transparent. By using obscure legal structures such as trusts the identity of the true economic beneficiaries can be concealed.

[305] Belgium

*Case 7 (2007) Corporate related situation* [306]

The company PRO, a management holding established in Belgium, held an account with a bank in Belgium. This company was represented by an accountant in Belgium. Even though the account remained dormant the representative suddenly announced an unusual transaction. This transaction was to be carried out for Mr. KING, a foreigner residing in the Caribbean who wanted to buy a property in South Africa for a substantial total amount. The company PRO and Mr. KING were not linked to each other in any way. The bank refused to carry out the transaction.

Analysis revealed the following elements:

A construction was set up to purchase the property. Mr. KING stated he had established a company under foreign law, the company INVEST, which was supposed to purchase the property through two companies established in Belgium.

The associates of these two Belgian companies were foundations established abroad. These two companies had opened two accounts with the same bank in Belgium. Shortly after these accounts were opened each of them was credited by a substantial transfer by order of a company established in the Caribbean. The money was then transferred to the account of the company PRO with another bank.

Apart from these transactions the accounts of the two Belgian companies remained inactive.

Police sources revealed that the accountant representing the company PRO was known for money laundering transactions abroad related to organised crime. In addition, Mr. KING was on record for organised crime.

The use of transit accounts opened in name of two Belgian companies, the involvement of natural and legal persons established in different countries, the involvement of an accountant and foreign foundations as well as setting up a complex financial structure all pointed to an untransparent construction that was most likely intended to launder money from organised crime for which the individuals were known.

Indicators: opening of transit accounts/involvement of different persons established in different countries, complex financial structure

Industry: Banking/professional services

*Case 8 (2007) Corporate related situation* [307]

An auditor made a disclosure to the Unit concerning a company CO. He noticed that Mr. JIL, manager of the company CO, carried out a capital increase of several million EUR. The auditor found it suspicious that the origin of the funds was unknown.

Moreover company CO appeared to be a dormant company.

Apart from a disclosure by the auditor the notary executing the deed and the bank holding the company CO's account also disclosed these facts to the Unit.

[306] Belgium
[307] Belgium

*Intervention by the Unit*

Through the capital increase by means of a contribution in kind Mr. JIL obtained a majority interest in the company CO.

Mr. JIL was a candidate refugee from the Middle East.

The company CO was a night shop, which is considered to be a sensitive sector in respect of terrorism financing.

Multiple cash deposits were carried out on company CO's account.

Mr. JIL was known to the police for his ties with a terrorist organisation. He was suspected of employing illegal aliens and using the profits of the night shop in order to finance terrorist activities. Part of the night shop's profits was sent to the Middle East to support a terrorist network.

Furthermore, certain elements revealed a link between the invested funds and blood diamonds of terrorist groups. This reinforced the serious indications of terrorism financing.

*Case 9 (2007) Corporate related situation*[308]

In a conviction for money laundering related to illegal trade in goods and merchandise the judge mentioned the fact that the defendant used a front company of which the head office only consisted of a post office box, established at the address of a lawyer's office to cover up his tracks and complicate future investigation

In another judgement the company involved (A) appeared to be an off-shore company acting as a front man. The defendant (Y), former lawyer of the co-defendant (X), chose this company. The judge emphasized that the whole file showed many links between defendant (X) and (Y). The address of two successive offices of (Y) was used for the correspondence of company (A). So (Y) had to be aware that defendant (X) wanted to conceal his role as the party entitled in this company and that he was the liquidator of the company (Z), which upon liquidation was clearly managed by a front man.

*Case*[309] *10 Corporate related situation*

A foreigner, Mr. A opens an account in Bulgaria with the help of a law firm. On this account large sums of money are deposited through international transfers from unknown origin. The money is withdrawn from the bank in the form of cheques by a notary and are invested in real estate projects.

[308] Belgium
[309] Bulgarian FIU List of indicators for Notaries

In one of these projects, the person in question (Mr. A) is backed by other foreign investors. After asking for additional information from the notary, it was clarified that the notary was asked by 4 foreign companies to establish two holdings. In these two holding two local companies from the real estate sector were also engaged. People representing those companies - a lawyer and diamond trader- acted as agents for Mr A.

It was found that the lawyer who presented Mr. A. and the bank also was involved in the schemes of a similar nature. The address of the local real estate companies matched the address of the lawyer.

This information shows the important role lawyers played in the development of financial and corporate structure designed to attract funds from unknown foreign sources to invest in local real estate.

With these data, financial intelligence unit decided to refer the case to the judicial authorities for suspected laundering of proceeds of criminal activity. Prosecutors began their investigation.

Indicators:

Money transfers of unknown origin;
Large sums of money involved;
Investment in high-value assets (real estate);
Use of intermediaries;
Use of complex corporate structure.

Industry: Banking/real estate/professional services

**Examples of corporate related situations provided by stakeholders**[310]

- A foreign citizen received into his account an amount of money from a foreign company having the same country of origin as him. The headquarters of the company had a PO Box as official address, which was assumed to belong to a law office or to a banking branch connected to the said company. In a very short period of time, the money was withdrawn by a resident, having a proxy on the foreign citizen account. The resident was proven to be involved in the intermediation of international adoptions by foreign citizens.
- A common scheme was the establishment of paper-companies for the purpose of VAT evasion. The perpetrators would acquire a company from a person who establishes a company en gross, and a random person is appointed as director (usually homeless people would be appointed). A fictitious invoice is used to transfer the money to the company and the "director" would then make withdrawals and take provision for it. These schemes were mostly conducted by larger organised groups, aimed at laundering money from other illegal activities (tax evasion, drug trafficking, etc.).
- In case of bankruptcy - the real owner sells the business to a new person/manager and in complicity with him/her, he/she withdraws the cash. Lawyers acting as trustee of bankruptcy reported the first owner who stole the money.
- Establishing networks of businesses for the purpose of transferring financial resources. The typical schemes consist of:
    - Establishment of shell companies whose sole purpose of existence is to register an enterprise and open a bank account in one or several banks;

[310] Not all of these examples describe the intervention of gatekeepers.

- Developing high level of turnover immediately after the establishment, while registering low level of income;
- Short life-span of the these enterprises;
- Recruitment of enterprise owners among persons of very low income or unemployed;
- Withdrawal of financial resources immediately after they are paid into the proper bank account.

– VAT carousel schemes or other tax avoidance: Usually money launderers' use a classic ML scheme – a number of buffer companies, where directors of such enterprises (usually limited companies) are nominees (very often homeless people). During such ML layering process, false agreements are used very commonly.

– Result of liquidated companies is transferred to a pooled account of a lawyer in order to transfer the fund subsequently to so called beneficial owners.

## Additional information Extent of the problem: Selection of cases from third countries[311]

*Case 1 (2009)* [312]

Authorities began investigating a suspect allegedly involved in illegally raising investment funds and operating an unregistered managed investment scheme.

AUSTRAC began monitoring the financial activities of the suspect and his associates, and analysis of the information gathered indicated that the suspect was sending funds from Australia to two accounting firms in New Zealand. The funds were then transferred back to Australia, where they were used to purchase luxury vehicles and real estate, and for gambling.

A suspect transaction report (SUSTR) detailing the main suspect's activities was also submitted to AUSTRAC.

AUSTRAC information showed that the amount of funds returning to Australia was greater than the amount originally sent to New Zealand. Authorities concluded that the suspects were raising money from the public in Australia and New Zealand to fund the managed investment scheme, and that the funds were being transferred to New Zealand and then back to Australia to disguise their origins.

Further investigations followed, and both suspects were charged with operating an unregistered managed investment scheme and sentenced to two years imprisonment.

Indicators: Purchase of high-value assets (vehicles, real estate)

Outgoing transfer with corresponding incoming funds transfer – appears to be a 'u-turn' transaction

Industry: Gambling/real estate/banking

*Case 2 (2009)* [313]

Analysis of AUSTRAC information revealed that a husband and wife were regularly undertaking structured international funds transfers to Asia. Over a number of years the couple, who were joint directors of a company registered in their names, had regularly sent international funds transfers to Asia via various bank branches in Victoria using cash generated from their company. They had sent more than AUD3 million overseas in this manner.

Further investigations revealed that approximately AUD4.8 million in taxable income for the couple was unaccounted for. It was alleged that the transfers represented undeclared income generated from the couple's business. It was suspected that the remitted funds were transferred to a second overseas account and then sent back to Australia via large international funds transfers.

[311] I.e. the third countries included in the scope of part 4.3. of the study (Australia, South-Africa and Switzerland).
[312] Austrac, Typologies and case studies report 2009/2008/2007: selection of most relevant cases
[313] Australia

It was believed that after the couple received the funds back in Australia, the funds were invested in real estate in Melbourne. Thus, the funds from the tax evasion were successfully laundered and integrated back into the Australian economy. A proceeds of crime investigation into the couple's assets was successful in restraining AUD16 million of real estate.

Indicators: Multiple funds transfers to common beneficiaries

Outgoing transfer with corresponding incoming funds transfer – appears to be a 'u-turn' transaction

Purchase of high-value assets (real estate)

Industry: Banking/real estate

*Case 3 (2009)* [314]

An importer of toys and other items from Asia was suspected of attempting to avoid his tax obligations after failing to lodge tax returns, and an audit was conducted into his activities.

Investigations established that the importer had transferred more than AUD 1.5 million into an account he held in Asia in four separate transfers. In addition, investigators noted incoming international funds transfers into the importer's Australian account; he was also found to have purchased an expensive residential property in Australia.

The importer was unable to substantiate the source of the funds he had originally transferred to his overseas bank account.

Authorities took action against the importer and approximately AUD 1 million in tax and penalties was raised.

Indicators: Large international funds transfers

Purchase of high-value assets (real estate)

Industry: Banking/real estate

*Case 4 (2009)* [315]

A director of a company under liquidation dishonestly used company funds to purchase real estate.

A suspect transaction report (SUSTR) lodged by the company's liquidator established that company funds had been withdrawn from the organisation's account during the liquidation period. The SUSTR sparked an investigation which revealed that the director had purchased real estate with company funds, using cheques in the amount of AUD 9,500 to avoid the AUD 10,000 transaction reporting threshold.

[314] Australia
[315] Australia

The director was charged and subsequently pleaded guilty to two counts of dishonestly using his position as a director to gain a personal advantage in breach of the *Corporations Act 2001*, and one charge of structuring transactions to avoid reporting under the *Financial Transaction Reports Act 1988*. The director received a three-year suspended prison sentence for the offences.

Indicators: Company account used for personal use

Purchase of high-value assets (real estate)

Structured transactions

Industry: Banking/real estate

*Case 5 (2009)* [316]

The main suspect in this case wanted to establish a profitable welding company but did not want to be legally associated with the company due to a professional conflict of interest. An associate of the main suspect, a certified accountant with no criminal history, became the legal and apparent senior staff member of the welding company, while the main suspect actually directed and managed the company, albeit without any legal standing to do so.

The accountant administered both real and false invoices to create the illusion that funds moving through the welding company were from legitimate commercial activity. He also drew up cash cheques and cashed these on a weekly or fortnightly basis. Frequently, these cash withdrawals from company accounts were for amounts greater than the AUD10,000 transaction reporting threshold. Bank staff did not become suspicious of these regular withdrawals due to the apparently legitimate nature of the transactions.

The accountant then gave this cash to the main suspect, allowing the main suspect to receive profits while remaining at arm's length from the official business of the company.

The main suspect attempted to launder the cash proceeds through direct deposits into a mortgage account, deposits into his mother's credit union account, and the private cash purchase of a four-wheel drive vehicle. He also attempted to launder cash through accounts and through a mortgage for real estate which was in his father-in-law's name, but which was in fact operated by him.

The property subject to the mortgage was established in a trust, although legal advice indicates that this was not a legitimate trust. The main suspect paid for improvements to this property with cash.

Both the main suspect and his wife also gambled significant sums of money.

The welding company later became the focus of a corruption investigation which uncovered the illicit activities of the main suspect. The investigation further revealed that the company accountant was also a registered tax agent, a financial planner and a finance broker. In addition to the false invoicing and cash withdrawals he undertook for the welding company, he also supplied false documentation to clients wishing to misrepresent their financial status.

[316] Australia

These false documents included documents understating the income of clients who were attempting to avoid paying child support and documents overstating the incomes of clients applying for loans.

Indicators: Purchase of high-value assets (real estate, vehicles)

Low-value property purchased with improvements paid for in cash before re-selling

Use of false documentation

Use of false invoices

Use of family member accounts

Use of gatekeepers (accountant)

Industry: Banking (ADIs), Professional services, Financial advisors/planners, Real estate, Gambling

*Case 6 (2009)* [317]

A vendor and purchaser colluded to transfer a property at an agreed price but then recorded the formal transaction price as significantly lower than the agreed price. The purchaser paid the difference between the two prices to the vendor in cash, which was not recorded on any of the formal conveyancing documents.

The vendor deposited the cash into his bank account on a date close to the date on which the contracts for the sale of the property were exchanged, indicating to law enforcement officers that the cash actually formed part of the total sale price.

Understating the official sale price of the property was an act of fraud allowing the offenders to avoid paying the required amount of stamp duty on the property. It is also suspected that the cash involved in the transaction was the proceeds of other criminal activities, and that the transaction was an attempt to launder the illicit cash through the real estate sector.

Law enforcement action was taken against the offenders and the property in question was seized under the *Proceeds of Crime Act 2002*.

Indicators:

Client purchases or sells real estate above or below the market value while apparently unconcerned about the economic disadvantages of the transaction

Large cash deposit

Industry: Real estate / Banking

[317] Australia

*Case 7 (2009)*[318]**:**

The South African FIU received several STRs about an attorney who appeared to be abusing his attorney trust facility. The suspicious transactions in the reports pointed out the following:

- Multiple large sums of money were being deposited into the trust account by different people and companies over a period exceeding two years;
- These funds were used to make payments to other depositors in South Africa and abroad;
- Funds from this account were being remitted to foreign jurisdictions deemed to be tax havens;
- Money was transferred to the attorney's personal credit card; his practice expenses were also paid directly from the trust account.

Indicators:

- A sudden and unexplained spike in turnover of the trust account;
- Servicing of practice expenses via the trust account – for example, fees or commission paid to the attorney from the account;
- Servicing of personal expenses from the trust account. Transfers to a personal credit card were used to buy luxury items;
- Funds from the trust account were routed to accounts of the attorney's own entities;
- No business trust account serviced the practice.

Industries: Professional services

*Case 8 (2009)* [319]

A Sydney accountant has been charged with 34 offences after she allegedly incorporated businesses in Vanuatu to help clients evade tax by laundering funds through an AUD10 million off-shore tax evasion scheme.

Authorities allege that the accountant promoted and implemented the scheme on behalf of her Australian-based clients, and have investigated businesses in Vanuatu as part of their ongoing probe.

The accountant, her husband and ten of her clients have been charged with a total of 153 offences, including defrauding the Commonwealth, obtaining financial advantage by deception and using money as an instrument of crime.

The scheme allegedly involved the use of companies in Vanuatu, which were owned by the directors of Australian-based companies, to issue false invoices to the companies for services that were never actually provided. The companies then claimed tax deductions for the false expenses, while the funds held off-shore were laundered back to the individuals in Australia to avoid being disclosed as income in tax returns.

To date, the investigation has traced 5.2 million AUD allegedly laundered through the tax evasion scheme; however, authorities suspect that the matter could involve as much as 10 million AUD in laundered funds.

[318] South Africa
[319] Austrac, Typologies and case studies report 2009/2008/2007: selection of most relevant cases

Indicators: Funds transfers involving a tax haven

Use of false invoicing

Industry: Professional services

*Case 9 (2008)* [320]

An Australian accountant became the subject of an audit after it was identified that a number of entities situated in a tax haven country had been transferring money to an account linked to the accountant. Auditors discovered that the accountant had enlisted high net worth clients to participate in an off-shore scheme.

The scheme involved the creation of false invoices for overseas expenses which were purportedly incurred in setting up an off-shore business. These invoices were then used to support claims for tax deductions and losses claimed in tax returns. The accountant received a fee for the scheme and the money sent overseas was returned to the clients as fictitious loans.

As a result approximately 895,000 AUD in tax and penalties were raised.

Indicators: False invoicing

Wire transfers involving an off-shore tax haven

Industry: Banking (ADIs)

Professional services

*Case 10 (2008)* [321]

Approximately 60 bank deposits of amounts less than AUD10,000 were deposited into an individual's account within a four-month period, totalling AUD550,000. Money was also deposited at a credit union.

Following this series of structured deposits into the accounts, the individual in question purchased three real estate properties with bank cheques, and a high-value motor vehicle with AUD 66,900 cash. It is not known how the significant amount of cash required to pay for the car was delivered to the motor vehicle dealer, but it was withdrawn from a bank account and paid to the dealer in two instalments.

A law enforcement investigation commenced and the suspect was eventually charged with supplying prohibited drugs and money laundering offences, and approximately AUD1.5 million worth of assets have been restrained.

[320] Austrac, Typologies and case studies report 2009/2008/2007: selection of most relevant cases
[321] Australia

Indicators:

Cash purchases of high-value assets (motor vehicle, real estate)

Structured deposits clustered over a period of time

Use of bank cheques

Industry: Banking (ADIs), Motor vehicles, Real estate

*Case 11 (2008)* [322]

A law enforcement agency investigated a matter involving a drug offender growing a large crop of cannabis on a property. When the individual was arrested for this offence, it was established that the person had purchased the block of land under a false name.

Under the provisions of chapter 3 of the *Criminal Proceeds Confiscation Act 2002*, if the offender had effective control of the land and used that land to produce dangerous drugs, the property was liable for forfeiture. Initial inquiries revealed the property was registered as being owned by a different person. Further inquiries made with another government department revealed the registered owner of the land had the same first names as the offender, but a different surname. The registered land owner's recorded date of birth was also very similar to that of the offender, with the year and month identical, but the day slightly different.

It was alleged the offender had purchased the property under a false name, as no identification was required by the real estate agent to sign the contract. It is further suspected the offender took the contract to a solicitor for conveyancing and had the solicitor sign the transfer documents on the offender's behalf. The sale was executed in 2002, but the final payment not made until 2004. The final payment was made via a solicitor. This payment method was written into the contract.

Indicators: Unusual payment arrangement included in the terms of contract

Use of false name

Use of gatekeepers (solicitor)

Industries: Professional services, Real estate

[322] Australia

*Case 12 (2008)*[323]**:**

Following the payment of a sum of money to the account of a notary's office, a bank sent a STR to the FIU.

The STR referred to the payment of several tens of millions credited to the account of the notary. As the transaction appeared unusual, in particular because of the amount, the financial intermediary requested its client to clarify matters. The notary explained that the payment was a gift from a high-ranking government official or president of a country on the African continent to his children residing in Switzerland. The funds were destined for the purchase, via the intermediary of a public limited company yet to be established, of an apartment in the town in question.

As the funds originated from a politically exposed person (PEP), the degree of corruption in the African country in question was assessed as high and the Swiss Federal Banking Commission (SFBC) had issued warnings regarding this country, the financial intermediary reported the case.

Following investigations carried out by the FIU, it became apparent that the extremely high price of the property in question was in no proportion to the normal price for this type of object. Furthermore, open sources revealed that a third country was already carrying out investigations into corruption and money laundering by the government official in question and members of his family.

Indicators:

Unusual large money transfer based on account history;
Involvement of PEPs from third countries with high corruption;
Higher than normal purchase price of real estate.

Industry: Banking/real estate/professional services

*Case 13 (2008)* [324]

Law enforcement launched an investigation into allegations that a Colombian-based syndicate was involved in the regular importation of commercial quantities of cocaine into Australia. The proceeds of the sale of the drugs were allegedly repatriated back to the United States (US) and laundered through the black market peso exchange.

Inquiries conducted within the US and Australia indicated that the offenders had purchased a debt owed to the Colombian-based syndicate in exchange for cash received in Australia. It is suspected that the offenders made payments to a member of the syndicate in Colombia, before travelling to Australia to receive the cash.

Investigations established that the syndicate enlisted the services of an accountant/financial advisor to assist with the laundering process. Money was laundered via a foreign exchange company which remitted funds to various bank accounts overseas.

[323] Switzerland
[324] Australia

Once the foreign exchange company and the syndicate had agreed on the rate to exchange Australian dollars into United States dollars, a member of the syndicate deposited cash into accounts held by the foreign exchange company at various inner-city banks. The syndicate had arranged for the foreign exchange company to remit these funds to overseas bank accounts as soon as they were deposited. The syndicate had also opened a safe deposit box at a bank, where they stored approximately AUD800,000 in cash.

As a result of the law enforcement operation, three members of the syndicate were arrested in Australia in possession of approximately AUD2.6 million in cash. The three were charged with money laundering under section 400.3 of the *Criminal Code Act 1995*. One of the members has now been convicted of this offence.

Indicators:

Multiple deposits made in the same geographical location

Use of gatekeepers (accountant)

Use of safety deposit boxes

Multiple wire transfers involving a high risk drug country

Industry: Banking (ADIs), Money transfer (remittance), Professional services

*Case 14 (2007)* [325]

AUSTRAC information assisted in identifying real estate which had been purchased with illegally obtained company funds. A large number of bank cheques in the amount of AUD9,500 were used by the defendants to purchase the property. These bank cheques were purchased over a period of days by the defendant from numerous banks in the suburbs of Perth.

Indicators:

Multiple transactions of a similar nature at numerous branches within a short space of time

Structuring the purchase of bills of exchange, e.g. bank cheques

Structuring the purchase of a high value asset, e.g. property

Industry: Professional services, authorised deposit-taking institutions

[325] Australia

*Case 15 (2007)* [326]

An Australian-based solicitor structured funds to an off-shore account in Hong Kong. At times it is believed that he actually carried cash to Hong Kong. His colleague, a Hong Kong-based solicitor, arranged for the creation of off-shore companies in the British Virgin Islands and bank accounts in Hong Kong to receive structured funds from Australia. These funds were then transferred to other countries by the Hong Kong-based solicitor to hide from authorities or returned to Australia in order to appear legitimate.

Indicators:

Physical carriage of cash / BNIs out of Australia

Structuring of wire transfers

Use of gatekeepers (solicitors) to conduct wire transfers

U-turn transactions occurring with funds being transferred out of Australia and then portions of those funds being returned

Wire transfers to tax haven countries

Industry: Professional services, authorised deposit-taking institutions

*Case 16 (2007)* [327]

This case involved the production of large quantities of amphetamines in several states of Australia.

The suspects laundered most of the proceeds of the manufacture of the amphetamine with the assistance of Australian entities.

The Australian-based entities deposited cash supplied to them by the wife of the main suspect (usually in structured amounts under the 10.000 AUD reporting threshold) into their own accounts. The funds were drawn from the accounts using cheques payable to the suspect's wife or a company or business over which she and her husband had control. The Australian-based entities were also instructed to send some of the money to overseas accounts by international wire transfer. Money was often moved through different accounts, before being wire transferred off-shore. The case involved approximately AUD5 million.

Over 1 million AUD was also laundered by the group through an accountancy firm. The firm was initially approached on the basis that one of the suspects had substantial funds overseas, which he wished to repatriate to Australia. At the time, the person was a bankrupt and money could not be held in his own name. Advice was sought from the accountants to devise a structure to enable the repatriation of the funds and acquisition of real estate. The accountants were given 20.000 AUD to be used as a deposit on a real estate purchase. The accountants were aware of reporting thresholds and deposited the money into bank accounts in amounts less than the 10.000 AUD reporting threshold.

[326] Australia
[327] Australia

The accountants recommended a number of money laundering schemes to the principals of the drug ring.

Their standard approach was to launder the money into a number of bank accounts in amounts less than the reporting threshold of 10.000 AUD and to then draw cheques on those accounts.

The accountants used 15 different bank accounts to receive the cash. These included personal accounts, the bank accounts of others, unwitting family members, the accountants' business accounts (including trust accounts), and the bank accounts of corporate entities established for the purpose. Two other methods used to launder the funds were use of bookmakers and gamblers. In the case of the bookmakers, the method was to attend race days with substantial amounts of cash.

The person would seek out a bookmaker he knew, express his discomfort at carrying such a large amount in cash and ask them to hold his cash for him until he either used it for bets or collected it at the end of the day. He would then leave it with the bookmaker and deliberately not collect it at the end of the day. Early the following week he would contact the bookmaker and ask him to post him a cheque for the money.

The accountants had a business association with a wealthy businessman who was a frequent gambler at Australian casinos. The accountants approached the businessman and offered to provide cash at short notice to him or his associates for gambling at casinos. The accountants offered to accept 95 per cent of the value of the cash they provided on the basis that the gambler later repaid the money by depositing money into a foreign bank account which had been set up for the purpose.

Indicators:

Cash deposits given to gatekeepers (accountants) to place in the gatekeepers or associates accounts

Cheques made out regularly to companies and individuals not linked to the account

Deposit of gambling proceeds into a foreign bank account

Leaving large amounts of cash with a bookmaker and requesting a cheque in return

Purchase of high value assets, e.g. real estate

Use of gatekeepers, e.g. accountant and lawyers to undertake transactions

Use of a third party to gamble proceeds through casinos

Use of third parties to deposit cash and conduct wire transfers

Industry: Professional services, authorised deposit-taking institutions, gambling services

*Case 17 (2007)* [328]

A bankrupt used the name of a family member to pay cash into an account and to draw a cheque to the value of the cash. He provided the cheque to a lawyer.

The lawyer provided a cheque to the family member for part of the sum and then deposited the remainder of the funds into the person's premium life policy which was immediately surrendered. The surrender value was paid into the family member's account.

Indicators: Cheques issued to a family member

Purchase of an insurance policy followed by immediate surrender

Use of gatekeepers, e.g. accountant and lawyer to undertake transactions

Industry: Insurance intermediaries

*Case 18 (2007)* [329]

A person in control of a corporation's financial affairs abused this position of trust by defrauding the company. The person authorised and instructed staff to make electronic funds transfers from the company to his bookmakers' accounts. He then instructed the bookmakers to direct excess funds and winnings from their accounts to his account or third party accounts, and instructed bank officers to transfer funds from his accounts internationally.

In order to layer and disguise the fraud, he instructed his lawyer to contact the beneficiary of the original international transfers to return the payments via wire transfers into the lawyer's trust account. Approximately AUD 450,000 was returned in one international transfer to the lawyer's trust account.

The lawyer then transferred AUD 350,000 to a church fund in an attempt to further hide the assets and was preparing to transfer the funds to an overseas account. To access these funds the person made structured withdrawals of AUD 9,000 each within a nine-day period.

Indicators:

Elaborate movement of funds through different accounts

Funds transferred to a charity fund

Structuring of cash withdrawals

Transfers from company accounts to private betting accounts

Transferring funds into third party accounts

Using third parties to undertake wire transfers

[328] Australia
[329] Australia

U-turn transactions occurring with funds being transferred out of Australia and then portions of those funds being returned

Use of gatekeepers, e.g. accountant and lawyers to undertake transactions

Industry: Gambling services, professional services, authorized deposit-taking institutions

*Case 19 (2007)* [330]

A person was involved in a multimillion dollar tax fraud undertaken through lodging fraudulent Goods and Services Tax (GST) claims. To achieve the fraud, he used a number of stolen and false identities and forged documentation to open and operate bank accounts, obtain credit cards, register companies and open serviced and virtual offices.

The companies' bank accounts received the proceeds of the fraud and subsequently transferred the funds into other company accounts and various stolen identity accounts. These funds were moved constantly to have the appearance of being legitimate. The person also falsified trade documents to launder money between the companies controlled by him. The funds would be moved from one company to the other under the guise of legitimate business. He also employed international accounting firms using stolen identities and provided forged documentation to help undertake the fraud. The person used these gatekeepers to help distance himself from the underlying fraud. Once the proceeds had been layered, he then withdrew funds using ATMs, business cheques, credit cards, cash cheques, electronic debit system, direct transfers to other parties and cash withdrawals. The cash withdrawals were varied in amounts and were both structured and non-structured.

Indicators:

Elaborate movement of funds through different accounts

Structuring of cash withdrawals

Use of companies to move funds under the guise of legitimate transactions

Use of false and stolen identities to open and operate bank accounts

Use of gatekeepers (accountant) to give appearance of legitimacy

Industry: Professional services, authorised deposit-taking institutions

[330] Australia

## Additional information Extent of the problem: anecdotal information based on answers FIUs, competent authorities and professional associations

| Situation | Total per situation | Count FIU | FIU answered | Competent Authority | | Comp. Auth. Answered | Professional Associations | | Prof. Ass. answered |
|---|---|---|---|---|---|---|---|---|---|
| | | | | Financial [331] | Non-Financial | | Finan-cial | Non-Finan-cial | |
| Corporate: change of registered office for no apparent reason | **18** | 10 | 13 | - | 2 | 10 | 3 | 3 | 26 |
| Corporate: contributions necessary for the creation or operation of companies | **11** | 9 | 13 | - | - | 10 | 1 | 1 | 25 |
| Corporate: creation of complex multi-jurisdictional structures of corporate vehicles | **23** | 11 | 13 | - | 2 | 10 | 4 | 6 | 26 |
| Corporate: dissolution of a company and setting up other companies taking over the first company's activities | **16** | 8 | 13 | - | 3 | 11 | 3 | 2 | 26 |
| Corporate: establishment of different companies within a short time frame | **15** | 8 | 12 | - | - | - | 3 | 4 | 26 |
| Corporate: formation and/or use of off-shore companies | **30** | 12 | 12 | - | 5 | 11 | 6 | 7 | 27 |
| Corporate: formation and/or use of shell companies | **21** | 11 | 13 | - | 1 | 10 | 4 | 5 | 26 |
| Corporate: formation or purchasing of a company with a dubious or unrelated to the previous activity corporate object | **15** | 8 | 12 | - | 2 | 10 | 3 | 2 | 25 |
| Corporate: forming of multiple companies by one person or a group of persons, of which several go bankrupt | **16** | 10 | 12 | - | 1 | 10 | 2 | 3 | 25 |
| Corporate: organising of insolvency | **14** | 7 | 12 | - | 1 | 10 | 3 | 3 | 26 |
| Corporate: use of companies with several statutory changes prior to the execution of transactions | **19** | 11 | 13 | - | 2 | 10 | 2 | 4 | 25 |
| Corporate: use of nominees | **18** | 9 | 12 | - | 1 | 10 | 3 | 5 | 25 |
| | | **114** | | **-** | **20** | | **37** | **45** | |
| Financial: large number of active accounts in the name of different companies lacking apparent economic substance | **31** | 13 | 13 | 8 | 1 | 23 | 5 | 4 | 26 |
| Financial: overpricing and under pricing of securities | **21** | 8 | 13 | 4 | - | 21 | 4 | 5 | 26 |
| Financial: substitution of beneficiary of a life insurance contract with a person without any link to the policy holder | **15** | 8 | 13 | 3 | 1 | 21 | 2 | 1 | 24 |

[331] Financial Sector Competent Authorities were only asked to respond to questions relation financial related situations.

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Financial: use of illiquid securities or shares in fictitious companies | **5** | 1 | 13 | - | - | - | 3 | 1 | 25 |
| Financial: use of life insurance contracts with high premiums | **21** | 9 | 13 | 7 | 1 | 23 | 2 | 2 | 26 |
| Financial: use of nominee accounts(escrow) accounts | **20** | 10 | 13 | 5 | - | 22 | 2 | 3 | 27 |
| Financial: use of transit accounts/payable through accounts | **22** | 11 | 13 | 5 | - | 22 | 1 | 5 | 26 |
| Financial: use of trust (escrow) accounts | **14** | 9 | 13 | 2 | - | 21 | 2 | 1 | 27 |
| | | **69** | | **34** | **3** | | **21** | **22** | |
| Real Estate: investment in hotels, restaurants, similar developments | **18** | 9 | 13 | - | 1 | 10 | 4 | 4 | 26 |
| Real estate: | **28** | 9 | 13 | - | 4 | 11 | 6 | 9 | 30 |
| Real estate: misuse of property investment funds | **10** | 5 | 13 | - | - | 10 | 3 | 2 | 25 |
| Real estate: over-valuation of real estate to obtain the largest possible mortgage | **24** | 6 | 11 | - | 4 | 12 | 6 | 8 | 29 |
| Real estate: under-valuation of real estate by unrecorded cash payments | **24** | 6 | 13 | - | 3 | 12 | 7 | 8 | 28 |
| Real estate: use of cash | **26** | 11 | 14 | - | 3 | 11 | 7 | 5 | 28 |
| Real estate: use of complex loans and credit finance (loan back schemes, back to back loan schemes ...) | **16** | 7 | 14 | - | 1 | 11 | 4 | 4 | 31 |
| Real estate: use of corporate vehicles | **25** | 12 | 14 | - | 2 | 12 | 5 | 6 | 28 |
| Real estate: use of illegal funds in mortgage loans and interest payments | **18** | 8 | 14 | - | 1 | 11 | 4 | 5 | 28 |
| Real estate: use of payable-through accounts or transit accounts | **20** | 10 | 14 | - | 1 | 10 | 3 | 6 | 26 |
| Real estate: use of trust accounts or escrow accounts | **14** | 6 | 13 | - | 1 | 12 | 3 | 4 | 30 |
| | | **101** | | **-** | **25** | | **57** | **66** | |
| Non financial professions: intermediation in business transactions | 20 | 12 | 14 | - | - | 11 | 6 | 2 | 35 |
| Non financial professions: management or administration of companies by non-financial professions | 19 | 11 | 14 | - | 1 | 11 | 4 | 3 | 36 |
| Non financial professions: assistance by non financial professions in the purchase or sale of property | **23** | 11 | 14 | - | 2 | 11 | 5 | 5 | 29 |
| Non financial professions: use of non-financial professions to obtain access to financial institutions | 19 | 10 | 14 | - | 1 | 12 | 4 | 4 | 38 |

## 4.2 – Impact of the AML Directive solution

### 4.2.1 – Issue 1: Scope

In relation to this issue, the following questions were examined:

*Which are the non-financial professions covered at national level (e.g. the definition of independent legal professional is open-ended)? Following the coverage of "trust and company service providers" by the AML Directive, are there gaps regarding the coverage of professional intermediaries in the situations described above (i.e. possibility of money laundering displacement)? How do Member States deal with practitioners that are not registered within a professional body but actually providing similar services, is such practice prohibited? How are experts (liquidators) in bankruptcy/insolvency cases considered by national legislation? Are there comparative advantages for some non-financial professions compared to others as a result of the AML regime? Are obligations clear for notaries and independent legal professionals in relation to the scope of the AML measures? Is there an overlap between lawyers and trust and company service providers? Has there been a role of professional associations/self-regulatory bodies in providing guidance on the AML rules to their associates? Where has been guidance provided (e.g. mapping of the guidance)? Has there been a role of professional associations/self-regulatory bodies in providing other services to their associates (e.g. such as the Spanish notaries)?*

For the purpose of this study **non-financial professions** should be understood as referring to auditors, external accountants, tax advisors, notaries, other independent legal professionals, trust and company service providers and real estate agents (see Article 2.1. (3) (a) to (d)) of Directive.

*Covered non-financial professions in general*

All national implementing legislation of all Member States includes **at least the following non-financial professions**[332]:

- Auditors, external accountants and tax advisors;
- Notaries (when existing in the concerned country) and independent legal professionals;
- Real estate agents.

Several Member states have **extended the scope** of the national implementing legislation to other professional categories[333].

[332] **Non-financial professions** should be understood as referring to auditors, external accountants, tax advisors, notaries, other independent legal professionals, trust and company service providers and real estate agents (see Article 2.1. (3) (a) to (d)) of Directive.

[333] For an overview we refer to the section with regard to stricter measures.

The **drafting technique** used by the Member States for the non-financial professions differs in the following areas:

- The *description of the professional category* i.e. open-ended or closed ended definitions[334]. This is particularly the case for the independent legal professionals. A large number of Member States identify the different independent legal professions; others make use of the general concept "independent legal professionals (e.g. Greece, Malta). Not all legislation explicitly mentions the notion "independent" (e.g. Bulgaria). An overview of the description of independent legal professionals in the different Member States is presented below.

| Country | Type of definition | Notion Independent Legal Professional |
|---|---|---|
| Austria | Closed ended | Lawyers and notaries |
| Belgium | Closed ended | Lawyers, notaries and bailiffs |
| Bulgaria | Combination: description of category and open ended | Notaries, persons providing legal advice |
| Cyprus | Closed ended | Independent lawyers |
| Czech Republic | Closed ended | Notaries, lawyers and executors (court bailiffs) |
| Denmark | Combination: description of category and open ended | Lawyers and undertakings and persons that otherwise commercially supply the same services |
| Estonia | Combination: description of category and open ended | Notaries, attorneys, bailiffs, trustees in bankruptcy, interim trustees in bankruptcy and providers of other legal services |
| Finland | Combination: description of category and open ended | Advocates and their assistants referred to in the Advocates Act and other businesses or professions providing legal services |
| France | Closed ended | Notaries, bailiffs, receivers and court-appointed administrators, as well as advocates of the Conseil d'Etat and of the Court of Cassation, and counsel of the Courts of Appeal. |
| Germany | Closed ended | Lawyers, legal advisers, patent lawyers and notaries |
| Greece | Combination: description of category and open ended | Notaries and other independent legal professionals |
| Hungary | Open ended | Persons who are engaged in the territory of the Republic of Hungary in the provision of legal counsel or notary services |

[334] See also Commission Staff Working Document: The application to the legal profession of Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering, 2006

| | | |
|---|---|---|
| Ireland | Closed ended | Relevant independent legal professional meaning a barrister, solicitor or notary. |
| Italy | Closed ended | Notaries and lawyers; labour consultants |
| Latvia | Combination: description of category and open ended | Sworn notaries, sworn advocates, other independent legal professionals |
| Lithuania | Combination: description of category and open ended | Notaries and other persons entitled to perform notarial actions, as well as advocates and advocate's assistants |
| Luxembourg | Combination: description of category and open ended | Notaries, within the meaning of the law of 9 December 1976 on the organisation of the profession of notaries, as amended; Lawyers, within the meaning of the law of 10 August 1991 on the legal profession, as amended in specific circumstances; Persons other than those listed above who exercise in Luxembourg on a professional basis an activity of tax or economic advice or one of the activities that are in scope for lawyers |
| Malta | Combination: description of category and open ended | Notaries and other independent legal professionals |
| Poland | Combination: description of category and open ended | Notaries, attorneys performing their profession, legal advisers (non-employed), foreign lawyers (non employed) |
| Portugal | Combination: description of category and open ended | Notaries, registrars, lawyers, solicitadores and other independent legal professionals, acting either individually or incorporated as a company |
| Romania | Combination: description of category and open ended | Notaries, lawyers and other persons exercising an independent legal profession |
| Slovakia | Combination: description of category and open ended | A court distrainer, an administrator who manages activity within bankruptcy, restructuring proceedings or debt removal proceedings under a special regulation, an advocate or notary |
| Slovenia | Closed ended | Lawyers, law firms and notaries |
| Spain | Combination: description of category and open ended | Notaries and registrars of property, trade and personal property, lawyers, barristers and other independent professionals |
| Sweden | Combination: description of category and open ended | Advocates or associates at advocate law offices, independent legal professionals other than those referred to above. |

| | | |
|---|---|---|
| The Netherlands | Combination: description of category and open ended | Natural person, legal person or company providing advice or assistance as a lawyer, civil-law notary or junior civil-law notary or in the course of a similar legal profession or business in an independent professional or business capacity |
| UK | Open ended | Independent legal professional meaning a firm or sole practitioner who by way of business provides legal or notarial services to other persons |

The overview demonstrates that in some Member States, in addition to lawyers and notaries, other categories of legal professionals are also covered. These regulated professions are often country specific and are not necessarily found in other Member States. This is e.g. the case for liquidators/experts in bankruptcy/insolvency. In some countries they belong to a separate regulated profession and are mentioned as a category of legal professionals under anti money laundering legislation. In other countries their activities can be performed by e.g. lawyers.

- The *exact identification of the professional category*: When defining professional categories reference is often made to the legislation regulating the concerned profession when available. In relation to real estate agents in some cases the exact scope of the real estate activity is further defined e.g.:

  - Belgium: Real estate agents referred to in Article 2 of the Royal Decree of 6 September 1993 protecting the professional title and exercise of the profession of real estate agent and who exercise the activities referred to in Article 3 of the same Decree (= intermediary activities, including management activities);
  - France: persons who execute, supervise or recommend transactions relating to the acquisition, sale, transfer or letting of real property;
  - Portugal: Real estate agents as well as agents buying and reselling real estate and construction entities selling directly real property.

*Trust and company service providers*

**All but three Member States** include the category of trust or company service providers.

Most Member States include the category to the extent that the concerned persons are not covered by the provisions that apply to other non-financial professions in order to avoid overlaps between e.g. lawyers and trust and company service providers.

In all but one[335] of the Member States where the professional category of trust or company service providers has been included, the **definition** of the category is identical (or nearly identical) to the definition in the Directive.

[335] Bulgaria: according to the English version of the Bulgarian AML law, trust or company service providers are defined as persons, whose occupation is to provide:
a) Management address, correspondence address, or office for the purpose of legal person registration;
b) Legal person, off-shore company, fiduciary management company or similar entity registration services;
c) Fiduciary management services for property or person under letter b).
In Bulgaria the concept of trust does not exist.

In France[336] a limited form of service company providers is included in the scope of the AML legislation: a "société de domiciliation" or an "incorporation company". These types of company service providers allow other companies to install their headquarters in its premises (business address, mailbox, office rental, etc). Such "société de domiciliation" can also provide additional services to companies such as phone standard, forward all incoming mail and phone calls, administrative assistance, etc.

**Belgium, Hungary and Poland**[337] do not include the category of trust or company service providers.

According to the FATF mutual evaluation report of Belgium[338], the profession of trust and company service providers does not exist as such in Belgium. The activities performed by this profession are practiced by lawyers and accountants (eventually by lawyers). To our knowledge no provision exists that legally restricts the provision of trust and company services to independent legal professionals.

The FIU explains that the services related to trust and company service providers however are regulated activities which in Belgium are practiced by notaries, lawyers or accountants/auditors. Incorporation of companies can only be facilitated by notaries, domiciliation services are always accompanied by accounting and other services provided by accountants. There is currently no evidence that on trust and company service providers as such are active on the Belgian market.

The Ministry for National Economy of Hungary explains that the profession of trust or company service provider does not exist in Hungary. Some of the services usually associated with this profession may be provided on a professional basis by lawyers and public notaries, which are covered by AML/CFT rules.

*Possible gaps regarding the coverage of professional intermediaries in the situations described above?*

The 2006 Commission Staff Working Document on the legal profession[339] commented that at the time, competitors to independent legal professionals in the provision of legal or quasi-legal services remained outside the scope of the Directive. Interventions in real estate or financial transactions could be practiced by other regulated or unregulated professionals, financial institutions or by any duly empowered person in the normal exercise of his civil rights, without the need to be qualified as a lawyer or notary.

Even the planning or execution of transactions concerning the creation, operation or management of trusts, companies or similar structures is not a reserved activity for lawyers or notaries.

The Directive has therefore included trust and company service providers in the scope of the directive. Consideration 15 of the Directive explains that as the tightening of controls in the financial sector has prompted money launderers and terrorist financers to seek alternative methods for concealing the origin of the proceeds of crime and as such channels can be used for terrorist financing, the anti-money laundering and antiterrorist financing obligations should cover life insurance intermediaries and trust and company service providers.

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[336] In France the concept of trust does not exist.
[337] At the time of the closing of the study we had not received additional information on Poland.
[338] Troisième Rapport d'évaluation mutuelle Belgique, juin 2005, p.131.
[339] See also Commission Staff Working Document: The application to the legal profession of Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering, 2006

In order to allow a view on possible gaps regarding the coverage of professional intermediaries following the coverage of "trust and company service providers" by the AML Directive, questions were included in the questionnaire related to other professions that offer similar services but are not covered by the Directive.

Not all stakeholders have given their opinion on this subject. From the responses received, **no gaps have been identified relating to existing professions that offer similar services but are not covered by the Directive.**

The recent FATF GTA report reflects on useful measures for jurisdictions keen to attack criminally held real estate. One of the suggested measures that countries might consider is bringing leasing agents within the scope of regulation. The report also sets out that in some countries land record departments[340] or government land offices are asked to submit reports of large-value cash transactions and suspicious transactions to their FIUs.

Two stakeholders comment on a possible gap. This possible **gap is however related to national transposition of the directive rather than to the Directive**. One stakeholder is concerned about legal advisors (outside the lawyers profession) that offer similar services but are not covered by the national AML legislation as this legislation includes a closed ended definition of independent legal professional[341]. The other stakeholder remarks that bailiffs are not explicitly covered by the national AML legislation.

Further in relation to possible gaps we have questioned stakeholders on possible gaps with regard to practitioners that offer similar services but are **not registered with a professional body** and because of the lack of registration are not in scope of national legislation. Not all stakeholders have expressed views on this matter. On the basis of the information gathered and on the basis of legislative examples, Member States deal with this situation in the following ways:

- Prohibit the offering of the concerned services without registration with a professional body;
- Legislative techniques: Member States sometimes use an open ended scope or clarify by way of definitions of the AML legislation.

*Box 16: Example of definition clarification*

Ireland:

"External accountant" means a person who by way of business provides accountancy services (other than when providing such services to the employer of the person) whether or not the person holds accountancy qualifications or is a member of a designated accountancy body.

We have **not come across any issues** being raised with regard to this kind of possible gaps.

[340] This is already the case in e.g. Spain.

[341] We have no information on evidence that could exist supporting the possible gap (i.e. number of independent legal advisors that offer similar services and are not registered as another profession).

*Competitive advantages*

The 2006 Commission Staff Working Document on the legal profession[342] examined the possible competitive advantages legal professions benefited from compared to other regulated professions. The report reflects on the fact that it had been claimed that the Directive creates competitive advantages for lawyers compared to other professionals (in particular tax advisors) resulting from the limited scope of application of its rules for lawyers. Regulated professions other than lawyers or notaries are indeed also subject to high deontological standards, including strict rules on confidentiality and professional secrecy.

At the time of the 2006 Commission Staff Working Document, this view was supported by very few stakeholders. The legal profession in particular considered that its specific professional duties and ethical obligations place it in a different situation to other professionals. Furthermore, according to stakeholders, in practice, there were no such competitive advantages.

The response on the survey question "Are there comparative advantages for some non-financial professions compared to others as a result of the AML regime?" shows the same results as in 2006.

A very large majority of stakeholders is of the opinion that there are **no competitive advantages** for lawyers compared to other non-professional professions as a result of the AML regime.

The legal profession commented that the exceptions provided for by the Directives in relation to lawyers are justified by interests of constitutional relevance. Lawyers are only in scope in certain circumstances, other non-financial professions in all circumstances, lawyers as such have less obligations, but the specificities of the profession justify this.

**A small number** of participating stakeholders indicate that there is a competitive advantage for independent legal professions compared to other non-financial professions.
Stakeholders comment that lawyers are only in scope in certain circumstances, other non-financial professions in all circumstances.

Consideration 21 of the Directive states that directly comparable services need to be treated in the same manner when provided by any of the professionals covered by the directive. In order to ensure the respect of the rights laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Treaty on European Union, the directive therefore offers possibilities to Member States to apply the same limitations that exist for lawyers to certain obligations in the case of auditors, external accountants and tax advisors, who, in some Member States, may defend or represent a client in the context of judicial proceedings or ascertain a client's legal position.

Despite this possibility, some stakeholders comment that lawyers are covered by the legal professional privilege in more circumstances than other professionals, even when providing the same services. This provides a marketing advantage with many clients who desire absolute confidentiality.

[342] See also Commission Staff Working Document: The application to the legal profession of Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering, 2006

*Scope of the AML measures for notaries and independent legal professionals*

**Notaries and independent legal professionals** do not fall within the scope of the Directive in all circumstances, but only when (in the exercise of their professional activities) they carry out certain financial, real estate and corporate related activities. For any other activity, lawyers do not fall within the scope of the directive

The directive[343] describes the **activity based scope** of notaries and other independent legal professionals as follows:

> "When they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or execution of transactions for their client concerning the:
> (i) Buying and selling of real property or business entities;
> (ii) Managing of client money, securities or other assets;
> (iii) Opening or management of bank, savings or securities accounts;
> (iv) Organisation of contributions necessary for the creation, operation or management of companies;
> (v) Creation, operation or management of trusts, companies or similar structures."

In most Member States, the **activity based scope** as determined in the Directive has been **transposed in national legislation with no or minor differences.**

In the following Member States **differences** can be identified either in **wording or in scope**:

| Country | Difference | Activity Based Scope |
|---|---|---|
| Belgium | Scope | All activities for notaries and bailiffs. |
| Bulgaria | Scope | The activity scope includes fiduciary property management. |
| Czech republic | Scope/wording | • Buying or selling real estate, a business entity, or its part,<br>• Managing of customer assets, such as money, securities, business shares, or any other assets, including representation of the customer or acting on his account in relation to opening bank accounts in banks or other financial institutions or establishing and managing securities accounts, or<br>• Establishing, managing, or controlling a company, business group, or any other similar entrepreneurial entity regardless of its status of a natural/legal person as well as receiving and gathering of money or other valuables for the purpose of establishing, managing, or controlling such entity, or<br>• Providing services of encashment, payments, transfers, deposits, or withdrawals in wire or cash transactions, or any other conduct aimed at or directly triggering movement of money. |
| Denmark | Scope | The scope includes "providing other business advice". |

[343] Art. 2, 1, (3)(b) Directive

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| Hungary | Scope | • The obligations of customer due diligence and reporting prescribed in this Act shall apply to attorneys - with the exception set out in Subsection (3) - if they hold any money or valuables in custody or if they provide legal services in connection with the preparation and execution of the following transactions in accordance with Subsection (1) of Section 5 of the Attorneys Act:<br>– Buying or selling any participation (share) in a business association or other economic operator<br>– Buying or selling real estate properties<br>– Founding, operating or dissolving a business association or other economic operator<br>• The customer due diligence and reporting requirements prescribed in this Act shall apply to notaries public - with the exception set out in Subsection (4) - if he provides safe custody services or if he provides notarial services in connection with the preparation and execution of the following transactions in accordance with the NPA:<br>– Buying or selling any participation (share) in a business association or other economic operator<br>– Buying or selling real estate properties<br>– Founding, operating or dissolving a business association or other economic operator |
| Luxemburg | Scope | The activity scope includes "providing a service of a trust and company service provider". |
| Poland | Scope | Limited activity scope applies to attorneys, legal advisers and foreign lawyers.<br>Scope for notaries refers to "trading in assets value". |
| Portugal | Scope | The scope includes "transferring and buying rights with regard to professional sportsmen and women". |
| Spain | Scope | All activities for notaries and registrars of property, trade and personal property |
| The Netherlands | Scope | Activities in the field of taxation included. |

*Scope exceptions*

Several Member States[344] have opted for the possibility provided for in article 9 (5) of the directive, not to apply the provisions that prohibits covered entities to enter into or maintain a business relationship or carry out transactions when due diligence obligations cannot be complied with. This option is related to situations wherein lawyers are in the course of **ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings**.

We were informed of **two special exemptions**, i.e. an exemption for small practices in Germany and extended exemptions in Poland.

Small firms **in Germany** with no more than ten members of the respective professions ("Berufsträger": lawyers, tax advisors, auditors) are exempt from the obligations of section 9 (1) and (2) no.s 2 and 3 MLA. This exemption is based on instructions issued by the Chamber of Lawyers, the Chamber of Notaries and the Chamber of Auditors. The exemption is not included in the AML Law itself.

Lawyers who do **not** conduct the transactions listed in section 2 (1) no. 7 MLA **on a regular basis** are exempt from the obligations of section 9 MLA according to section 9 (1) second sentence of the MLA. This exemption is only applicable to lawyers, not to other professions.

The exemptions do not refer to all obligations stated in the German AML Act but only to the following points:

- Internal Safeguards ["covered persons must take appropriate internal measures to ensure that they cannot be misused for the purpose of money laundering and terrorist financing" – section 9 (1)]
- Internal guidelines ("developing and updating internal principles, appropriate business and customer-related safeguards and controls to prevent money laundering and terrorist financing" – section 9 (2) no. 2)
- Employee awareness ("ensuring that employees responsible for carrying out transactions and for initiating and establishing business relationships are aware of methods of money laundering and terrorist financing and of the requirements pursuant to this Act" – section 9 (2) no. 3).

The **Polish AML** Law exempts legal professionals from some duties (art. 10d). Polish legal professionals are exempt from following obligations: - conducting ongoing monitoring of the undertaken transactions; - identifying the beneficial owner and taking risk-based and adequate measures to verify his identity; - obtaining the information on the purpose and intended nature of the business relationship; - conducting ongoing monitoring of the business relationship including scrutiny of transaction undertaken throughout the course of that relationship - measures concerns enhanced customer due diligence (e.g. ensuring that customer's identity is established by additional documents, data or information); - applying adequate financial security measures based on products or transactions allowing for anonymity; - establishing adequate and appropriate policies and procedures of customer due diligence; - appointing the person responsible for fulfilment of anti-money laundering obligations required by Polish law.

[344] According to our information this is the case for Belgium, Cyprus, Denmark, Estonia, Greece, Latvia, Lithuania, Luxembourg and Spain.

*Guidance for non-professional associations and other services provided by self-regulatory bodies/professional associations*

**Guidelines** can be of help with the interpretation and implementation of the law. Private stakeholders express the need for guidance tailored to their profession, practical guidance and specific guidance for small practices.

FIU's, competent authorities and self regulatory bodies/professional associations were asked to identify the existing guidance for non-financial professions. In different Member States guidance in relation to the Directive is still being drafted following national implementation of the directive. The following list only contains examples of guidance and should therefore not be considered as an exhaustive overview where possible references have been included[345].

| Country | Guidance |
|---|---|
| Austria | • Non non-binding guidance for Austrian notaries to prevent ML and FT - updated most recently in July 2010.<br>• The MoE and the WKO are in the process of drafting guidelines for professions under the Trade Act (GewO).<br>• In 2008, the Chamber of Chartered Public Accountants and Tax Consultants published a special version of its member magazine, particularly dealing with the application of AML/CFT framework. On 31 August 2009 the Chamber of Chartered Public Accountants and Tax Consultants issued a circular on the practical application of the AML/CFT framework. Both documents are addressed to Chartered Public Accountants, Tax Consultants as well as other Accountancy Professions. |
| Belgium | • Guidelines of the FIU<br>• In March 2010 the Belgian FIU has issued revised general information notes to all above listed non-financial professions. These general information notes reflect the basic AML duties as set out by the law of 11 January 1993, recently changed by the law of 18 January 2010. In 2006 and 2007, the FIU has also issued a number of typology documents e.g. typologies related to real estate, notaries and anti-money laundering, etc.<br>• In relation to lawyers, no guidance has yet been issued for the lawyer's profession in relation to the recent new law implementing the third directive in Belgium. Prior to the new law, amongst others, the following guidance has been published: Recommendation from the National Bar Association of 1 February 1996; Recommendation from the OBFG of 12 March 2007, including an overview of the client identification requirements for various types of clients; Various deontological recommendations from the OVB of 28 January 1999, August 1999, 23 February 2002 and 9 December 2002; Circular Letter from the Antwerp Bar Association of 12 November 2007.<br>• With regard to notaries, a working group has recently been installed in order to develop specific guidance for notaries in relation to the Belgian recently modified AML legislation. The guidance is expected to be issued by the end of 2010. |

[345] Guidance is often not publicly accessible.

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| | • Updated guidance for auditors, external accountants and tax advisors has not yet been made available. The Institute of Auditors issued guidance on the basis of the previous law. Articles on the application of the AML law by the Institute of tax consultants are also available. |
| Bulgaria | • General guidance on specific topics in relation to all covered professions has been developed by the FIU.<br>• Further guidance is being developed related to the areas of risk and the risk categories of reporting entities.<br>• The Chamber of Notaries in conjunction with representatives of the Financial Investigation Directorate of the State Agency for National Security has given a seminar. At that seminar representatives of the Directorate provided specific guidelines on the application of the law. The internal regulations of notaries for the application of the law have been updated over the past two years at the suggestion of the Directorate. Currently there are no other more detailed and updated guidelines for this professional group. |
| Cyprus | • Cyprus Bar Association: Prevention of money laundering and terrorist financing, directive to the members of CBA – February 2009<br>• Institute of certified public accountants: Prevention of money laundering and terrorist financing, directive to the members of ICPAC – September 2008<br>• MOKAS (Cyprus FIU): Guidelines to the members of the Cyprus Estate Agents Registration Council |
| Czech Republic | The FIU provides legal opinions which are provided on request of obliged entities and are published on the websites of the FIU<br>http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/reg_stanoviska_fau.html |
| Denmark | Guidance has been issued by the FIU (general indicators of possible money laundering or financing of terrorism containing indicators in relation to real estate situations), the Professional Association of Real Estate Agents, and the Danish Commerce and Company Agency.<br><br>The Danish Bar and Law Society has issued guidelines to all members of the Danish Bar and Law Society on their obligations under the MLA and the Third Directive |
| Estonia | The FIU has issued guidelines for:<br>• Auditors and providers of accounting services;<br>• Notaries public (in cooperation with Chamber of Notaries).<br><br>The Chamber of Notaries and Estonian Bar Association have issues guidance that has been coordinated with FIU. |
| Finland | The FIU has published general best practices by preventing ML: Keskusrikospoliisi Rahanpesun selvittelykeskus Parhaat käytänteet Päivitetty 19.3.2009.<br>A real estate association (KVKL), the nationwide advocacy and umbrella organization, has conducted a good brokerage practice directive for its members (SKVL, Realia Group, Kiinteistömaailma and OP-Keskus) www.kvkl.fi / Hyvä välitystapa. The good brokerage practice directive is being updated at the moment. |

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| | The Finnish Bar Association had also issued anti-money laundering guidance prior to the adoption of the new Act on Preventing and Clearing Money Laundering and Funding of Terrorism and this guidance is currently being updated to reflect the new legislation. |
| France | Tracfin published a general guide on bribery in June 2008 the "Guide d'aide à la détection des opérations financières susceptibles d'être liées à la corruption".<br>According to the annual report of Tracfin 2009, the « Conseil supérieur du notariat et la chambre interdépartementale des notaires de Paris, Seine-Saint-Denis et Val-de-Marne» has published guidelines.<br><br>Tracfin has also been involved in the development of specific guidelines by several supervisors or associations:<br>– The « Haut Conseil du Commissariat aux Comptes » : norme d'exercice professionnel relative aux obligations du commissaire aux comptes (published 20/04/2010)<br>– The Order of Certified Accountants: norme d'exercice professionnel relative aux obligations des professionnels de l'expertise comptable (published 07/09/2010)<br>– Guidelines for real estate agents were elaborated jointly with the DGCCRF(supervisor for this reporting entity)(published 12/10/2010)<br>– A guide established by the "Conseil des Ventes Volontaires" was published in October 2010.<br>– A note on AML/TF for the directors of casinos was elaborated jointly with the DCPJ (supervisor for this reporting entity)<br><br>The Order of Certified Accountants has made a general presentation on the AML rules dated October 2009 available on its website http://www.experts-comptables.fr/csoec/content/download/353941/9590500<br>The French bar association (Conseil National des Barreaux) has adopted professional guideline on the obligations of lawyers under the anti-money laundering regime imposed by the Second European Directive, as transposed into French law by the law of 11 February 2004 and the decree of 26 June 2006. These guidelines were published in September 2007. |
| Germany | The following instructions/guidance for non-financial professions is available:<br>  <br>Instructions Lawyers<br>• German Federal Bar<br>  <br>Guidance Notaries<br>• Federal Chamber of notaries<br>   <br>Instructions Auditors Guidelines Auditors<br>• Chamber of public accountants |

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| | • Federal Chamber of Tax advisors  Instruction Tax Advisers  Guidance Tax Advisors |
| Greece | According to the FATF interim follow up report, February 2010, the Ministry of Justice has issued a circular containing instructions for lawyers and notaries regarding implementation details of their obligations laid down by the provisions of the AML Law (2008) and the other supervisory authorities (the General Directorate for Tax Audits, the Accounting and Auditing Supervisory Commission and the Gambling Control Commission) are in the process of developing similar tailored guidance. |
| Hungary | According to stakeholders, guidance has been issued through internal rules by the service providers; model rules by the supervisory authorities (under Section 33 of the new AML/CFT Act) e.g. the Budapest Bar Associations' Practice Note,<br>Regulation of the Hungarian Bar Association on the Prevention and Preclusion of Money Laundering for Lawyers and Law Firms. |
| Ireland | In July 2010 the Law Society of Ireland has issued Guidance Notes for Solicitors on Anti-Money Laundering Obligations.<br>Most guidance notes for the nonfinancial professions are still in draft. Various accountancy bodies have drafted a set but have not yet published them. The same is the case for the Institute of Taxation. A set of guidance notes for the Property Service Industry has also been drafted which are not yet published but have been submitted to their regulator for approval. |
| Italy | General guidance exists (not specifically tailored to non-financial professions) e.g. Rules are provided in the Resolution No. 895 of 23 December 2009 of the Bank of Italy concerning the AML registrations in the Electronic Data Base (AUI), Guidelines for reporting institutions known as "Decalogo", Bank of Italy - 12 January 2001).<br>Guidance on CDD procedures is currently under review by the Bank of Italy and will be issued shortly.<br><br>On 23 of December 2009 the Bank of Italy issued a resolution concerning the AML registrations rules, applicable to banks, financial intermediaries and audit companies. The Ministry of Justice in April 16, 2010 issued a Ministerial Decree concerning indicators of suspicious transactions, applicable to professionals.<br><br>The instrument directed to lawyers is the "Istruzioni applicative" (Instructions). The Instructions were issued by the Ufficio Italiano Cambi (the Italian FIU, now the Unità di Informazione Finanziaria) on 24 February 2006 in the framework of the implementation of the 2nd Anti-Money Laundering Directive. The Instructions are not yet updated in the light of the 3rd Anti-Money Laundering Directive. |
| Latvia | Reference is made by the FIU to the website, www.fntt.lt for existing guidance.<br>The Chamber of auditors has issued guidelines. The guidelines are not mandatory.<br>The Chamber of Notaries and Bar Association have also issued guidelines. These are mandatory based on the Notaries Law and the lawyers' law. |
| Lithuania | • On 27 of January 2009 the FCIS approved guidelines, intended for prevention of money laundering and/or terrorist financing for amongst others accounting undertakings or |

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| | undertakings providing tax advice services.<br>• On 28 of February 2009 the State Gaming Supervisory Commission approved guidelines, intended for prevention of money laundering and/or terrorist financing, for gaming companies.<br>• On 10 of June 2009 the Chamber of Bailiffs approved guidelines, intended for prevention of money laundering and/or terrorist financing, for bailiffs or persons authorised to perform bailiff's activities;<br>• On 23 of June 2009 the Chamber of Notaries approved guidelines, intended for prevention of money laundering and/or terrorist financing, for notaries;<br>• On 2 of July 2009 the Lithuanian Bar Association approved guidelines, intended for prevention of money laundering and/or terrorist financing, for advocates and their assistants;<br>• On 26 of October 2009 the Chamber of Auditors approved guidelines, intended for prevention of money laundering and/or terrorist financing for auditors. |
| Luxemburg | The following guidance for non-financial professions has been identified :<br><br>L'Ordre des Avocats à Luxembourg: Circulaire no 7 – 2008/2009 and Circulaire no 8 – 2008/2009;<br>L'Institut des réviseurs d'Entreprises: Norme professionnelle relative à la lutte contre le blanchiment et contre le financement du terrorisme.<br>http://www.ire.lu/fileadmin/media/Env_normatif_Normes_LU/20100629_Norme_AML.pdf |
| Malta | The FIU has issued draft procedures and guidance which were subject to consultation.<br>The FIAU is currently reviewing the comments received with a view to finalising the document.<br>"Procedures and Guidance Implementing the Provisions of the Prevention of Money Laundering and Funding of Terrorism Regulations - Part I" |
| Poland | No specific regulation designed for independent legal professions has been prepared. Access is provided to relevant FATF guidance as well as to guidance on counteracting money laundering and terrorism financing, prepared and disseminated by the FIU. |
| Portugal | In Portugal several competent authorities of non financial professions have issued guidelines directed to the entities they oversee:<br>• Internal Notes for casino operators: Decision no. 2/2008, of 5th of June, directed to casino operators clarifying the application to the gambling industry of the legal regime of Law no. 25/2008 and the Decision no. 35/2008, of 20th of June<br>• The Authority for Food and Economic Safety (ASAE), that maintains competence to oversee dealers in high value goods as well as company and legal arrangements service providers, tax advisers and external auditors, where they are not subject to monitoring by another competent authority, published on its website, in 2008, guidance elaborating on the legal duties of the entities subject related to the prevention of money laundering and terrorism financing.<br>• The National Institute for Construction and Real Estate (INCI), which received through Article 4 c) of Law no. 25/2008 the competence to oversee and regulate real estate agents and construction entities selling property directly into the market, has published in its website information referring to the subject entities and to their legal duties, to raise awareness on the compliance with the AML/CFT Law.<br>• The INCI has also issued Regulation no. 79/2010, of 13th of January 2010, published in the Official Gazette of 5th of February 2010, to instruct in detail subject entities |

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| | acting in the real estate mediation sector, the purchase, sale and resale of real property on how to comply with the legal duties prescribed in Article 34 of the AML/CFT Law, namely how to forward the declaration of the outset of its activity and the main elements of each transaction they carry on that should be reported to the INCI.<br>• The Institute for Registrars and Notaries issued Decision no. 104/2009 related to raise awareness to the Law no. 25/2008 to be applicable respectively to notaries and registrars (Article 4 f)).<br>• The Bar Association and the Chamber of Solicitadores have also published on their websites information on the legal preventive regime of money laundering and terrorism financing as well as the EC Directives on this subject.<br>• The Order of Chartered Accountants published also Law no. 25/2008 in its website, as well as in SITOC, a CD–ROM distributed every month to these professionals with the aim of clarifying and promoting awareness of these professionals to the preventive AML/CFT legal regime.<br>• The Order of Statutory Auditors has published in its website information on the legal AML/CFT regime disseminating information on Law no.25/2008 on money laundering and terrorism financing. |
| Romania | In Romania, the FIU issued several training manuals meant to be tools for all reporting entities, in order to detect suspicious transactions:<br>• Romanian Suspicious Transactions Guidelines, 2004;<br>• Training Manual on Anti-Money Laundering and Countering the Financing of Terrorism, 2005;<br>• Manual on Fighting Money Laundering and the Financing of Terrorism, for Competent Authorities, 2005;<br>• Manual on risk based approach and suspicious transactions indicators, Sept. 2010 - this latest document has been more specifically issued for non-financial reporting entities. |
| Slovakia | No information available at the time of the closing of the study. |
| Slovenia | The following general guidance exists:<br>• RULES on Performing Internal Control, Authorised Person, Safekeeping and Protection of Data and Keeping of Records of Organizations, Lawyers, Law firms and Notaries;<br>• RULES on the Method of Communicating the Information on Lawyers, Law Firms or Notaries to the Office for Money Laundering Prevention of the Republic of Slovenia.<br><br>Other general applicable guidance (not tailored for non-financial professions):<br>• RULES laying down conditions under which a person may be considered as a customer representing a low risk of money laundering or terrorist financing;<br>• RULES laying down conditions to be met by a person to act in the role of a third party;<br>• RULES laying down conditions to determine and verify customer's identity by using customer's qualified digital certificate;<br>• RULES laying down conditions under which there is no obligation to report cash transaction data for certain customers;<br>• RULES laying down the list of equivalent third countries;<br>• RULES on the Method of Forwarding Information to the Office for Money Laundering Prevention of the Republic of Slovenia;<br>• RULES on the Method of Forwarding Information to the Office for Money Laundering Prevention of the Republic of Slovenia. |

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| Spain | Self regulatory bodies are starting to advise their members about the implications of the new law. Before the enactment of AML 10/2010, different associations (Spanish Association of Jewellers, Silversmiths and Clock and Watchmakers, the Consejo General de Colegios de Economistas de España, Consejo Superior de Colegios Oficiales de Titulares Mercantiles de España and Instituto de Censores Jurados de Cuentas, the Accounting and Auditing Institute, the Spanish Casino Association and the General Council of Law and the General Council of Notaries) helped their members in the compliance of the AML requirements by producing guidelines, organizing training courses, submitting law clarifications notes, answering doubts in the application of the legislation e.g.<br>• Guidelines approved by the Ilustre Colegio de Abogados de Málaga, and therefore applicable only to the members of this bar;<br>• The Guidance on the Risk-Based Approach to combating money laundering and terrorist financing recommended by FATF (translated into Spanish by the Consejo General de la Abogacía Española, the Spanish Bar Association). |
| Sweden | The authorities responsible for the supervision may issue AML/CFT secondary regulations (Chapter 8, Section 1 of the New Act), and such regulations have been issued by all authorities.<br>The Swedish Bar Association has issued guidelines to all members of the Swedish Bar on their obligations under the AMLA and the Third Directive. Other professional bodies have issued guidelines as well, and lawyers may also find these helpful when coming to terms with their obligations.<br>Guidelines from the Swedish Bar. |
| The Netherlands | The DNB organised several workshops, seminars and presentations for trust offices (2009 – 2010).<br>The professional bodies of tax advisors, chartered accountants, attorneys at law and (junior) civil-law notaries all have composed manuals (guidelines) on the interpretation of AML/CFT for their professionals. The BFT reviewed these manuals and provided comments. In cooperation with the Ministry of Finance the BFT published a manual for lawyers, notaries, tax advisers and accountants. This brochure was spread via the professional organizations.<br>Furthermore the professional bodies of tax advisors and chartered accountants composed an e-learning course/exam. The BFT reviewed and approved this E-learning course. The BFT also has a website (www.bureauft.nl) with 30 frequently asked questions, a power point presentation on AML and various publications of articles on AML. In cooperation with FIU-NL BFT organizes private sector outreach meeting (*relatiedag*). The BFT issues three times in a year its own newsletter in which actual developments are described. This newsletter is distributed to the various professionals and also available on the website.<br>The BHM has issued guidance (in close co-operation with the FIU) for real estate agents (Manual for Real estate agents August 2009) and has participated to several information |

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| | sessions.<br><br>Guidance can be found via:<br>• www.advocatenorde.nl/wetenregelgeving/dossier-wwft.asp (lawyers)<br>• http://www.notaris.nl/page.asp?id=1006 (notaries)<br>• http://www.novaa.nl/uploads/tx_publication/Richtsnoeren_Wwft_01.pdf (accountants)<br>• http://www.nivra.nl/NivraSite/Thema's/Assurance/Leidraden.aspx#15 (accountants) |
| UK | Guidance for non-financial professions is available:<br>• Law Society practice note http://www.lawsociety.org.uk/productsandservices/practicenotes/aml.page<br>• CCAB Anti-Money Laundering Guidance for the Accountancy Profession - www.icaew.com/moneylaundering<br>• The Office of Fair Trading (OFT) has issued general guidance and sector-specific guidance. It is downloadable from www.oft.gov.uk/mlr.<br><br>The industry guidance for the financial sector from the Joint Money Laundering Steering Group is also of use to non-financial professions.<br>http://www.jmlsg.org.uk/bba/jsp/polopoly.jsp?d=749 |

Other than guidance, self-regulatory bodies/professional associations offer the following main types of **additional services**:

- Windows on available information via dedicated anti money laundering web pages;
- Different types of training e.g. an online e-learning course regarding AML which all lawyers can undertake See for an example www.advocatenorde.nl/wetenregelgeving/dossier-wwft.asp.;
- Advice before filing reports;
- Ad hoc telephone guidance on MLR related queries;
- Awareness raising through e-alerts, articles in industry journals, networking groups and e-forums;
- Support in development of procedures.

*Box 17: Example of support in development of procedures*
In Slovakia, each tax advisor is required to prepare his/her own program on activities in the area of AML/CFT[346]. The Chamber of Tax Advisors supports the development of this program by providing organizational assistance and training for tax advisors. The Chamber also took care of the preparation of the general AML program for tax advisors.

Depending on the reporting framework, self- regulatory bodies/professional associations perform a role in the reporting process.

[346] § 20 par. 1 Law No. 297/2008 Z. z. on AML and CFT

*Example of role in reporting process: the role of the Centralized Prevention Body (OCP- Organo Centralizado de Prevencion) of the General Council of Notaries in Spain*[347].

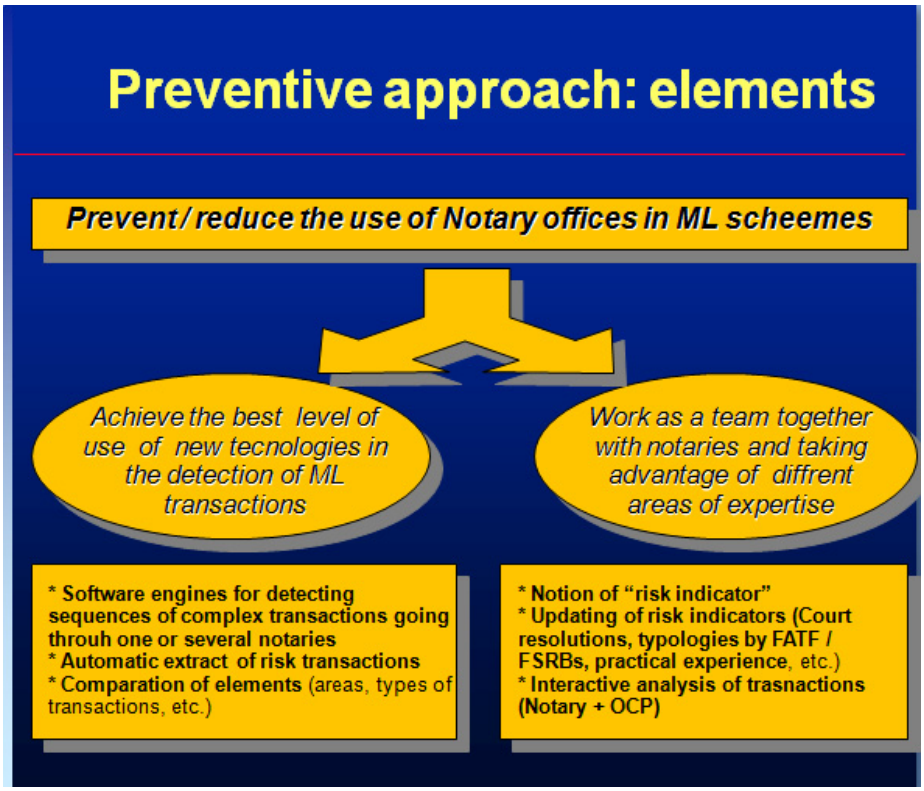
In Spain there are about 3000 notaries, all members of General Council of Notaries (16 regions – professional colleges under Council of Notaries).

The AML/CFT obligations for notaries are extended to the entire notarial activity, while Directive provisions restrict these obligations accordingly to art. 2 para.1 (3) letter b.

The OCP was set up as a **centralised unit aimed at preventing and combating ML-FT** within the General Council of Notaries in 2005 according to the Ministerial Order no.2963/2005.

The main features of the OCP are:

- Full use of the potentialities of the so called "unfiled index", fruitfully experienced in other areas of co-operation with Authorities (tax information, etc.);
- Integrated, compiled information on transactions performed before all notaries;
- Automated treatment of information (red flags, patterns, etc.).




**The role of OCP is:**

- To receive and examine reports sent by notaries based on list of risk indicators issued by the OCP;
- Report the suspicious transaction reports (STRs) to the FIU;

[347] Information received from the OCP

- Reply to requests for information of other competent authorities (FIU, Law enforcement bodies, judges);
- Issue guidelines in respect of implementation of AML/CFT rules and regulations;
- Provide AML/CFT training to notaries and update typologies.

Interesting is the development of a Unified Index (centralized database) system which allows enhancing the involvement of the notaries in the AML-CFT regime starting with information from 2004.

The Unified Index (centralized database) contains all the transactions performed by notaries (there are 230 types of operations codified). The information from notaries feed the database every 2 weeks through a secured and confidential network using a certified signature process.

The database represents a public instrument for other competent authorities which may access it using a special card with CIP and using a password.

## I. Reporting by notaries to the OCP based on a list of risk indicators and examination by OCP analysts.

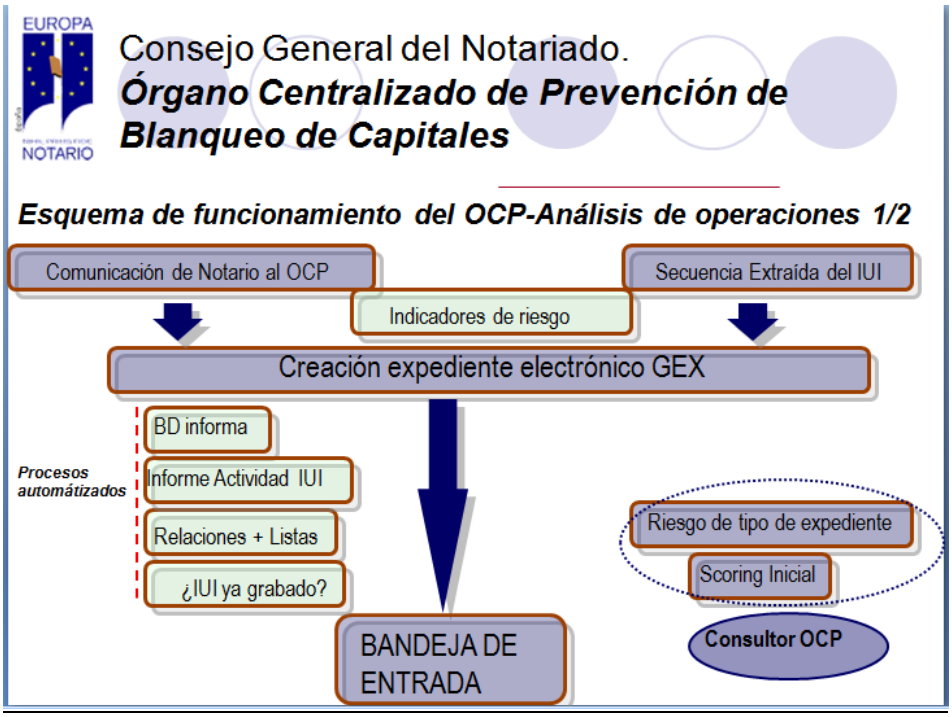
- **The list of risk indicators**
  - It is issued by the OCP, updated each time it is necessary and delivered to notaries through intranet.
  - It contains 2 types of indicators:
    - Objective (i.e. age of the person in relation to operation performed, funds coming from risky territories, using cash);
    - With a high subjective component in assessing the AML risk (i.e. transaction inconsistent with the degree of activity of the client).
  - Each risk indicator is linked to a score, so the system automatically provides a scoring number for each report sent by notaries.

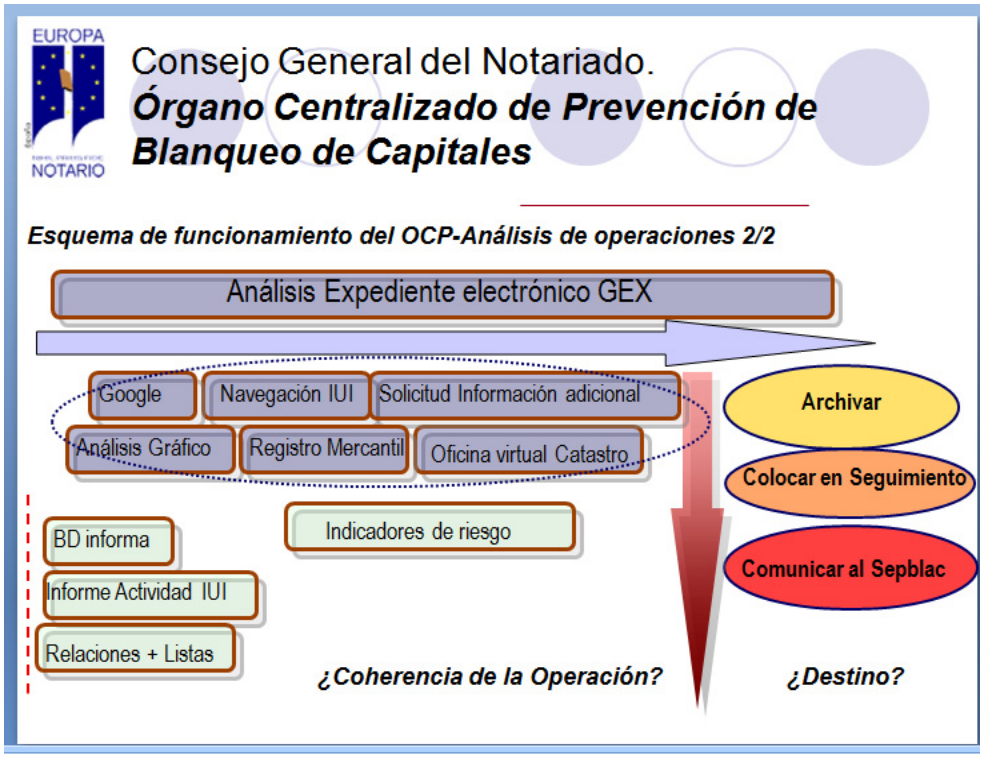
- **Reports**

  According to OCP guidelines on reporting, if a notary notices a risk indicator linked to the operation performed, he has to check if there are any other risk indicators (i.e. a *foreign citizen coming from a fiscal paradise territory*, *using cash* for buying a real estate). If the result is:

  - One indicator – no report (except the case of a very valuable risk indicator as using cash)
  - More than one indicator - immediately report to the OCP (meaning 1-3 days)
  - There is a template of report developed by the OCP, each field being mandatory
  - The reports are sent electronically

- **Examination**



The target of the examination through the Unified Index (centralized database) is to assess the level of ML/FT risks and to identify the ML and FT suspicions. There are 3 levels of examinations:

a) Analysis of reports sent by notaries;

b) Analysis of sequences of several transactions (trigger situations – operations performed by a specific legal person/natural person in a relevant period of time);

c) Analysis on other competent authorities' request.

The analysis is performed in 2 steps:

1. An automatic electronic analysis by the system to establish the risk;

2. Adding information:

- Internal information (using the Unified Index (centralized database), OCP analysts can identify all other transactions performed by a person in front of other notaries),
- External information from public databases as Companies Register, financial statements or Internet. It is worth to mention that OCP has access to FACTIVA in order to facilitate the identification of PEPs and more information on beneficial owner, if the case.

**II. Report the suspicious transaction reports (STRs) to FIU**

- If the outcome of all activities performed during the analysis generates a logic explanation, the report will be archived, with the possibility to reactivate if necessary.
- If the outcome of all activities performed during the analysis does not generate a logic explanation, the operation should be reported as STR to FIU (SEPBLAC).

***Conclusion:***

The STRs are submitted by OCP and not by an individual notary based on:

- The analysis made upon the initial reports received accordingly to list of risk indicators;
- The analysis made upon their initiative via the Unified Index (centralized database).

**III. Answer to other competent authorities request (FIU, Law enforcement bodies, judges)**

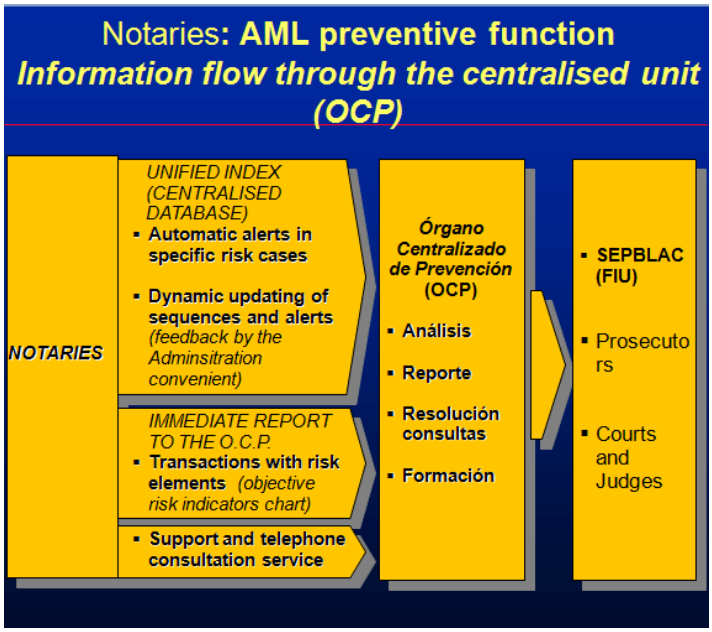
The OCP is the body which responds to other competent authorities to requests for additional information.

A technical particularity of the developed IT system (Unified Index (centralized database) is that it reflects in:

- Red flags represent "asked information from other competent authority";
- Blue flags represent "already reported information to FIU".

Such type of warnings may help in developing further analysis as alerts for follow-up situations.

The law enforcement bodies, FIU and judges have at their disposal a very useful database which allows the performing of connections between companies, natural persons, documents, transactions which imply a notarial activity. Additionally, this database may help the judicial authorities to identify the moving of different real estate properties and if there is an interest to block a transaction.



### 4.2.2 – Issue 2: CDD

In regard to this issue the following questions were examined:

*How are professionals dealing with CDD issues? Which are their specific problems, as opposed to general problems also applying to credit and financial institutions? For instance, professionals tend to have a different business (professional) relationship with clients than banks, usually based on irregular one-off transactions; also lawyers may have an established professional relation with a client outside the scope of application of the AML Directive but a particular transaction may be caught by the AML Directive at a later stage, how are those cases dealt with in practice? How small/single practitioners handle the CDD process? Is there a disproportionate effort between compliance with the CDD requirements and the time spent on providing the requested service for instance one-off legal advice on a simple issue involving less than 1 hour work); Is reliance on third parties for CDD purposes more needed than in the case of financial institutions? How is it conducted in practice? When practiced, is reliance practiced within professions (e.g. lawyer to lawyer) or also across professions (e.g. lawyer to auditor)?*

#### *4.2.2.1 – Non-financial profession and CDD*

The stakeholders indicated that from an operational point of view, risk assessment is often done manually by non-financial professions as IT solutions are too costly given the often smaller sizes of practices, and not tailored to the specific needs of the non-financial professions.

A small majority of stakeholders reported that non-financial professions, given their close relationship with their client, have an advantage over banks with regard to:

- The identification and verification of client;
- The assessment of corporate and control structures; and
- The collection of information on the purpose and intended nature of the business relationship given their close relationship with their client.

Stakeholders indicate that a specific problem for non-financial professions lies within the fact that the business relationships of non-financial professions often are characterised by irregular one-off transactions. In the case of independent legal professionals, the relationship is also more susceptible to evolution where a particular transaction in an otherwise out of scope relationship is caught by the AML Directive. These relationships are as such difficult to monitor effectively. It was indicated by stakeholders that one is obliged to perform CDD each time a new engagement or assignment is initiated by the non-financial professional.

Stakeholders also reported specific problems related to the detection of the beneficial owner and/or the origin of funds in transactions in an international context. As mentioned, non-financial professions are often organised in smaller practices and therefore do not have the required resources (both human and financial) to obtain and verify the required (foreign) documentation. It is considered by stakeholders almost impossible to determine the beneficial owner in complex cases that require a lot of research.

Some stakeholders believe that small/single practitioners are in practice more lax in the application of CDD. In this regard stakeholders often refer to the so called ‘dead loss excuse’.

This concept refers to the fear of practitioners to lose clients due to compliance with AML requirements that can create mistrust between the client and the professional which is contrary to the most substantial value of his relationship with the client.

On the subject of the disproportionality of CDD requirements, the opinions of the stakeholders were divided:

- Some public sector layer stakeholders do not agree with the statement that CDD could be disproportionate. Disproportionality is not element that is taken into account by the Directive. In their opinion CDD must be performed at all times when required by law.
- Some private stakeholders believe that there is a disproportionate effort between compliance with the CDD requirements and the time spent on providing the requested service e.g. one-off legal advice on a simple issue involving less than 1 hour work. Consequently according to these stakeholders the risk should be better targeted by policymakers and the legislative reply should be proportionate to the identified risks.

The monitoring of the business relationships and the scrutiny of transactions for non-financial professions is often considered to be a (too) severe burden for non-financial professions (especially for single practitioners). In this regard a law society stated that the AML legislation is too much drafted for financial institutions where automatic monitoring tools exist. In general monitoring of the relationship by non-professional professions is done manually. Stakeholders reported that automatic systems are not available, too costly or inappropriate. Financial and credit institutions report less problems as the monitoring systems are automatic tools.

#### *4.2.2.2 – Third party reliance*

Non-financial professions will rarely be the sole interveners in a transaction. In most cases there is also a financial institution involved. It is clear that in situation like this, it would be inefficient to force the non-financial professions involved to conduct a CDD themselves. As financial institutions are often much better equipped to carry out the customer due diligence obligations than non-financial professions such a duplication would lead to unnecessary delays and costs. As such there is a definite need for financial professions to be able to rely on third parties for their CDD. This need is said to be less present in the case of banks who can take advantage of their advanced IT systems and economics of scale.

When implementing their third party reliance regime, the legislation demonstrates that the Member States have taken into account this need. This is evidenced by the fact that 23 Member States[348] allow auditors, external accountants and tax advisors to use third party reliance. In addition 22 Member States[349] allow the mechanism for independent legal professionals.

Furthermore in 26 Member States third party reliance is allowed across professions[350]. Nevertheless stakeholders in most Member States have reported that non-financial professions do not often make use of the regime. The reason for this can be found in the fact the covered entities which make use of the reliance regime remain responsible for the correct fulfilment of the CDD requirements.

[348] AT, BE, CY, CZ, DE, DK, EE, ES, FI, HU, IE, IT, LT, LU, LV, MT, NL, PL, RO, SE, SI, SK and UK.
[349] BE, CY, CZ, DE, DK, EE, ES, FI, HU, IE, IT, LT, LU, LV, MT, NL, PL, RO, SE, SI, SK and UK.
[350] AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK and UK. However not in every member reliance is possible on all covered entities (see third party reliance for a detailed overview).

As covered entities often prefer to conduct CDD themselves than to rely on someone whose information can be incorrect.

Many non-financial professionals such as lawyers and notaries have indicated that they see the need for the creation of a specific framework to avoid duplication in case financial institutions are involved. According to them, financial institutions are much better equipped to carry out the customer due diligence obligations and intervene in most situations. According to these stakeholders, it should be sufficient to have CDD performed by financial institutions.

### 4.2.3 – Issue 3: Reporting issues

In relation to reporting issues, the following questions were examined:

*Which are the reasons for the relatively low number of reports from non-financial professions compared to credit and financial institutions? Would this reflect the fact that they come across low numbers of suspicious transactions? Does this mean that they focus on the quality of reports? Which are the reasons for the different pattern in some countries (e.g. in the UK regarding lawyers)? Would higher numbers reflect defensive reporting by fear of sanctions? Which is the role of the self-regulatory bodies after the change in Directive 2005/60/EC which does not grant them a filtering role: do they provide advice to professionals before filing reports? Do they have a useful role in the reporting process? Is the obligation on reporting clear for lawyers following the ECJ decision in case C-305/05 – in which practical situations do they believe they should report? How do they perceive the extent of professional secrecy in the AML field compared to other sectors, such as tax area, antitrust/competition area? Which would be the impact of Article 8 of the European Convention on human rights following the decision of the European Court of Human Rights of 24.7.2008 on the André case? When providing legal advice in suspicious cases, where is the dividing line for lawyers regarding the provision of legal advice and being accomplice of money laundering?*

#### *4.2.3.1 – Relatively low number of reports from non-financial professions*

##### 4.2.3.1.1. Number of reports

In the 2006 Commission's Staff Working Document relating to the legal profession[351] it was set out that the number of reports made by independent legal professionals on suspicious transactions was particularly low in the vast majority of EU countries, notably compared to the reports made by financial institutions.

During the period 2003-2005, in the case of notaries, only in Belgium, Estonia, France, Hungary, the Netherlands and Poland did the total number of reports amount to at least 10 per year; and only in the case of Belgium, France and Poland the number of reports had been above 100 per year in at least one of the three years considered. In the case of lawyers, figures were even lower (with the exception of the United Kingdom): only in Germany, Hungary and the Netherlands, the authorities received more than 10 reports from lawyers in at least one of the three years examined.

[351] COMMISSION STAFF WORKING DOCUMENT 2006. The application to the legal profession of Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering

The selection of recent statistics in annex [352] shows that, although an increase in absolute numbers can certainly be detected, the number of reports made by the non-financial professions remains low, especially in comparison to the number of reports submitted by financial institutions.

In contrast with the other Member States, the reporting rates of financial and non-financial professions are more balanced in the UK (because of the high reporting rate of solicitors and accountants), Lithuania (high reporting rate of notaries and company service providers), Romania (high reporting rate of legal professionals) and Spain (high reporting rate of notaries).

In the UK, Belgium, Italy and Malta all non-financial professions have submitted reports. This is however not the case for the other Member States where one or more non-financial professions have not submitted any reports according to the latest statistics.

The non-financial professions which appear the most with zero reports are the trust and company service providers, the real estate agents and the tax advisors.

With regard to the types of covered non-financial professions, the statistics show that in several countries notaries made the most reports. In Austria, Cyprus, Denmark, Germany Poland, Slovenia en the UK however lawyers made the most reports. In some countries e.g. Belgium and France the reporting rate of lawyers and bailiffs (and for France company service providers) remains very low in comparison with the other non-financial professions. The situation of the other non financial professions such as accountants, auditors and real estate agents differs from country to country.

It is beyond this study to draw comparative conclusions on the differences in reporting figures in the Member States. This would require a thorough analysis taking into account amongst others the number of professionals, their activities, the total reports submitted by all non-financial professions etc. in every Member State.

#### 4.2.3.1.2. Reasons for low reporting

Several concurring reasons could explain the relatively low number of reports of the non-financial professions. The reasons most cited by **public stakeholders** were (ranked in order of number of answers):

- Lack of awareness and need for training;
- Difficulties in implementing the necessary CDD structures and procedures;
- Low number of suspicious transactions.

Lack of awareness and training was often mentioned as a reason for law reporting. Stakeholders referred to the fact that financial institutions have been covered longer by the anti-money laundering legislation than the non-financial professions. Additional training might therefore be necessary in order to further build up experience and create awareness. In order to raise the awareness, trainings should be tailored to the specific profession and should treat concrete and practical situations/typologies. In relation to this, a stakeholder also considered a possible need to enhance supervision on the non-financial professions.

[352] Not all selected statistics are completely comparable, the figures indicated in the report should therefore be considered as of an illustrative nature. Not all of the publicly available statistics give separate figures for each type of non-financial profession. Eurostat statistics were not available at the time of the study.

Non-financial professions experience specific difficulties in complying with the anti–money laundering legislation, e.g. applying CDD, the nature of the relationship with the clients (see issue: CDD) and specific reporting difficulties (see below).

A number of public stakeholders suggested also a possible lower number of suspicious transactions in combination with the other factors. Non-financial professions handle fewer transactions than e.g. banks. No evidence, in one sense or the other, has been identified with regard to the possibility that non-financial professions are relatively less confronted with suspicious transactions.

*Box 18: Example: views of financial regulators on the difficulties for the non-financial professions in implementing the necessary structures and procedures*

A financial regulator comments that specific difficulties relate to the type and size of practices of non-financial professions. Non-financial professions tend to be organized in smaller practices which makes it more difficult to implement structures and procedures in an effective way.

Another financial regulator indicates that non-financial gatekeepers process by far less transactions a day than financial service providers, i.e. it is possible that reporting is not low relative to the number of underlying transactions.

**Private stakeholders** (non-financial sector) explained the relatively low number of reports from the non-financial professions referring to the following factors (ranked in order of number of answers):

- Low number of suspicious transactions;
- Difficulties in implementing the necessary CDD structures and procedures;
- Lack of awareness and need for training.

In relation to the legal profession specific difficulties were mentioned with regard to the impact of the reporting duty on the legal privilege (see below).

We have no indication that the quality of reports, i.e. the avoidance of purely defensive reports, could offer an additional explanation as to the relatively low number of reports.

#### 4.2.3.1.3. Reasons for the different pattern in some countries (e.g. in the UK regarding lawyers)

In the 2006 Commission's Staff Working Document relating to the legal profession[353] it was demonstrated that in the United Kingdom there are specific reasons, on which stakeholders agree, for the different (high) figures with regard to reporting by lawyers. The reasons included were the high penalties foreseen by the legislation in case of non reporting; a committed enforcement policy from the authorities; the very broad definition of criminal activity as predicate offence ('all-crimes' approach), which also includes self-laundering and no *de minimis* rule and finally certain ambiguity in the interpretation of national law with respect to the need to report in the context of litigation, the result being a high prevalence of precautionary reporting.

Several Member States (see section on penalties) have foreseen criminal sanctions in their legislation for failing to comply with anti-money laundering requirements. High penalties (up to 8 years) have also been set in Slovakia. The existence of high criminal sanctions can, as indicated in the Commission's Staff Working Document, be considered as one factor out of the range of reasons that could have an impact. Given the reporting statistics in Member States that have also determined high criminal sanctions, it cannot however be the determinative factor.

To our information only a very limited number of Member States (see the section on stricter measures) apply a broad definition of criminal activity. The broad definition of criminal offence and absence of *de minimis* rule in the UK in combination with the sanction regime could therefore account as part of the explanation of the high reporting rates in that Member State.

Covered entities in the UK believe that the current criminal penalties are disproportionate. They also indicate that these penalties have an effect on the risk-based approach and that the regime encourages businesses and money laundering reporting officers to adopt a zero tolerance policy[354]. These opinions could well enhance the effect the above mentioned factor has on the reporting conduct of non-financial professions in the UK.

On the basis of the illustrative statistics, it can be established that notaries in several countries often submit the highest number of reports. Specifically with regard to the high reporting rate of solicitors in some Member States such as the UK, the fact that they provide services which in other countries are provided by notaries, should also be taken into account.

### *4.2.3.2 – Role of self - regulatory bodies in the reporting process*

Article 23(1) determines that by way of derogation from Article 22(1), Member States may, in the case of the persons referred to in Article 2(1)(3)(a) and (b), designate an appropriate self-regulatory body of the profession concerned as the authority to be informed in the first instance in place of the FIU. Without prejudice to paragraph 2, the designated self-regulatory body shall in such cases forward the information to the FIU promptly and unfiltered.

Where Member States have made use of the possibility provided in Art. 23§1 of the Directive , self-regulatory bodies act as channel for the reporting of suspicious transactions by specific categories of covered entities/persons.

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[353] COMMISSION STAFF WORKING DOCUMENT 2006. The application to the legal profession of Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering

[354] Review of the Money Laundering Regulations: summary of the call for evidence March 2010 – HM Treasury p. 12

Several Member States have opted for the possibility determined in art. 23§1 of the Directive. As such a number of self-regulatory bodies have a channelling role in the reporting process. This is, to our knowledge the case for Belgium (lawyers), Czech Republic (lawyers and notaries, auditors, executors and tax advisors), Denmark (lawyers), France (lawyers), Germany (auditors, chartered accountants, lawyers, patents agents, legal advisors, notaries and tax advisors), Greece (lawyers via special Committee of Lawyers), Hungary (lawyers and notaries), Lithuania (lawyers), Luxembourg (lawyers), Poland, Portugal (Lawyers and *solicitadores)*, Romania (notaries – for lawyers different practices exist) and Spain (notaries).

The concerned self - regulatory bodies will verify if legal conditions to report are respected e.g. in scope of reporting duties. If conditions are met, the self-regulatory body will refer the report to the FIU. No judgement is made on the suspicious nature of the transaction.

*Box 19: Example of channelling role of self-regulatory bodies Czech Republic*

A suspicious transaction report shall be made by a lawyer to the Bar Association. The Bar Association, shall examine the suspicious transaction report made by a lawyer or a public notary as to whether it is not in conflict with Article 1 or 2, Section 2(1g) or Section 18(1), and see that it has all the particulars required by this Act. If the suspicious transaction report does not have all the particulars required by this Act, the Chamber shall notify the disclosing lawyer or notary. If the suspicious transaction report made by the lawyer or the notary meets all the conditions set out in the first sentence, the Chamber shall refer the disclosure to the Ministry without undue delay, but no later than in 7 days from the detection of the suspicious transaction.

Advice before reporting is sometimes given although from the feedback that we have received this service does not seem to be rendered systematically. There are examples of a systematic more general offering of advice e.g. as already indicated in the 2006 Commission's Staff Working Document relating to the legal profession[355] sometimes help lines and other support are available.

The role of the *Centralized Prevention Body (OCP- Organo Centralizado de Prevencion) of the General Council of Notaries* in Spain is to our knowledge quite unique[356].

[355] COMMISSION STAFF WORKING DOCUMENT 2006. The application to the legal profession of Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering

[356] For a description of the role of the OCP, see section scope above.

### *4.2.3.3 – Lawyers and reporting*

#### 4.2.3.3.1. Introduction

The reporting duty touches upon basic principles of the relationship between a lawyer and his client. In order to guarantee everyone's right to legal advice and assistance from a lawyer, the lawyer's professional secrecy/legal privilege is considered highly important. A client must have the possibility to present all facts of his case to his lawyer. The confidential relationship between a lawyer and his client is a necessary condition for the exercise of a lawyer's profession.[357] To protect this relationship, a lawyer has the right not to disclose information or materials covered by secrecy. Anti-money laundering legislation puts lawyers under an obligation to disclose information about their clients in case of suspicions of money laundering and can oblige lawyers to furnish information at the FIU's request. (art. 22, §1 Third Directive).

In the opinion of lawyers, these reporting obligations could interfere with the protection of the professional secrecy[358] and consequently with the right to legal advice and assistance, as it might discourage people from consulting a lawyer.[359] A number of court cases have decided on certain aspects of the reporting duty.

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[357] Code of conduct of the CCBE: confidentiality is a primary and fundamental right and duty of the lawyer. (available at http://www.ccbe.org/fileadmin/user_upload/NTCdocument/2006_code_enpdf1_1228293527.pdf)

[358] It should be noted that there is a difference between the common law concepts of legal professional privilege and the continental concepts of professional secrecy. In continental jurisdictions, the obligation of professional secrecy is a duty imposed by the law. It is a duty owned by the lawyer, which is protected by the relevant Bar and is enforced by criminal sanctions. In Ireland and in the UK (England, Wales, Scotland and Northern Ireland) on the other hand, legal professional privilege is a concept defined by the Courts as a privilege to be asserted as of right by clients in the course of the administration of justice. It is a privilege owned by the client, who can choose to waive that privilege in certain circumstances. Its breach may be sanctioned with disciplinary action and will mean that evidence which should have been protected by the privilege will not be admissible in court. Two different types of the common law privilege exist. First, litigation privilege protects advice and documents created for the purpose of litigation. This covers not just client-lawyer communication but also documents or advice given by third parties. Secondly, legal advice privilege protects communication between lawyers and their clients where it is sought and given independently of any actual or potential legal proceedings. The use of the expression 'legal professional privilege', which derives from the common law jurisdictions, can lead to confusion when applies also to cover the continental concept of professional secrecy. Yet the Court of Justice itself uses the expression 'professional privilege'. The common law legal privilege is different from the European professional secrecy in several ways. First, it also applies to legal advice given by in-house lawyers, while European professional secrecy only arises if the lawyer is independent of his client. Secondly, the UK legal privilege is broader to the extent that the European professional secrecy only applies to information linked to legal proceedings. Thirdly, the European professional secrecy is perceived as a duty of the lawyers, whereas in the UK, legal privilege is a privilege owned by the client. (See J. KOMAREK, "Legal professional privilege and the EU's fight against money laundering", *Civil Justice Quarterly* 2008, vol. 27, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1031721 and CCBE, *Regulated legal professions and professional privilege within the European Union, the European Economic Area and Switzerland, and certain other jurisdictions*, [A report by John Fish, Former President of the CCBE and solicitor, Dublin], February 2004, available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/fish_report_enpdf1_1184145269.pdf)

[359] M. LUCHTMAN and R. VAN DER HOEVEN, "Case C-305/05, *Ordre des barreaux francophones et germanophone et al.* v. *Conseil des Ministres*, judgment of the Court of Justice of 26 June 2007, Grand Chamber; [2007] ECR I-5305", *CMLR* 2009, vol. 46, 301 – 318.

#### 4.2.3.3.2. Relevant provision of the "Third Directive"

The Directive requires lawyers to fully cooperate and inform the national FIU of suspicious transactions. Article 22 provides an obligation to inform the competent FIU on their own initiative, when a lawyer *"knows, suspects or has reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted."*[360] Until they have complied with this requirement, lawyers have to refrain from carrying out transactions which they know or suspect to be related to money laundering or terrorist financing.[361] Furthermore, lawyers shall furnish the FIU with all necessary information at its request.[362] However, an exemption to those reporting obligations is created by article 23 of the Directive. According to its second paragraph, Member States are not obliged to apply those reporting obligations to lawyers *"with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings."*[363]

Another derogation applicable to lawyers can be found in the first paragraph of article 23.[364] *"Member States may (...) designate an appropriate self regulatory body of the profession concerned as the authority to be informed in the first instance in place of the FIU."* In such a case, the self-regulatory body shall forward the information to FIU "*promptly and unfiltered*".[365]

#### 4.2.3.3.3. Court cases

##### A. ECJ Case 305/05[366]

The question whether the reporting obligations of lawyers in the AML field violate the right to a fair trial has been brought before the European Court of Justice ("ECJ"). On 26 June 2007, the Grand Chamber of the ECJ rendered an important judgment by stating that reporting obligations did not violate article 6 of the ECHR. In this case, the Belgian constitutional court referred a preliminary question to the ECJ. It asked the ECJ whether the reporting obligations are contrary to the guarantees of independence of lawyers and professional secrecy, which are the basis of an effective right of defense. According to certain Belgian bar associations, the reporting obligations are unlawful because they violate the lawyers' obligation of professional secrecy and the fundamental right to a fair trial and a fair defense. The Court answered briefly by stating that the nature of the activities covered by the Directive *"is such that they take place in a context with no link to judicial proceedings and, consequently, those activities fall outside the scope of the right to a fair trial."*

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360 Article 22, §1, a Third Directive.
361 Article 24, §1 Third Directive.
362 Article 22, §1, b Third Directive.
363 This exemption also applies to notaries, auditors, external accountants, tax advisors and other independent legal professionals.
364 It also applies to auditors, external accountants, tax advisors and other independent legal professionals.
365 This regime constitutes an evolution compared to Article 6(3) of the First Directive (as amended by the Second Directive).
366 ECJ C-305/05, *Ordre des barreaux francophones et germanophone et al. v. Conseil des Ministres,* 2007.

Moreover, activities that are linked to judicial proceedings are exempted from the reporting obligations pursuant to article 23 § 2 of the "Third Directive". Consequently, the "Third Directive" meets the requirements of article 6 ECHR. The Court did not agree with the arguments of the bar associations that the reporting obligations would cause serious damage to the relationship of trust between a lawyer and his client and compels lawyers to comply with the cooperation and reporting obligations under the AML rules.

The judgment was rendered on the grounds of the former AML directives, but it is fully applicable under the "Third Directive".

The ECJ judgment as such led to the following conclusions. Firstly, the reporting and cooperation duties imposed to lawyers by the AML rules are lawful and not disproportionate. The ECJ accepts the choice made by the European legislator that a limitation of the professional secrecy is justified by the objective of fighting money laundering.

Secondly, Member States are obliged to introduce in their national legislation an exemption to the reporting and cooperation duties for all activities linked to judicial proceedings in order to guarantee the right to a fair trial under article 6 ECHR. Although the exact wordings of the "Third Directive" leave them the choice to include such an exemption[367], the Court makes it compulsory.[368] As a consequence the Court enhances the distinction between lawyers' activities that fall under the cooperation and reporting obligations and activities that do not fall under the obligations.

Thirdly, the Court determined the circumstances in which a lawyer is no longer subject to the reporting obligations. A lawyer, executing an activity that is covered by the Directive, is exempted from the obligations as soon as he is called upon for assistance in defending the client or in representing him before the courts, or for advice as to the manner of instituting or avoiding judicial proceedings.[369]

### B. Belgian Council of State, 2 July 2010: the Superior Administrative Court of Belgium agrees with the European Court of Justice[370]

In a very recent judgment of 2 July 2010, the Belgian Council of State decided in the same way as the European Court of Justice. In this case, the Flemish Bar Council and the Dutch speaking Brussels Bar Association lodged an action for annulment of a Royal Decree which implements a specific article of the national anti-money laundering law.[371] The attacked Royal Decree implements article 14quinquies of the national anti money laundering law. This article obliges persons and institutions covered by the law, including lawyers, to report to the 'Cel voor financiële informatieverwerking' (the Belgian FIU) in case of

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367 Article 23 Third Directive ["Member States shall not be obliged (…)]".

368 Contrary to article 23 of the Directive, its recital 20 provides obligatory exemptions from reporting obligations for legal advice. The ECJ admitted that this may lead to several interpretations of the exemption. In such a case, Member States are obliged to interpret the wording of secondary legislation consistently not only with Community law, but also with the fundamental rights protected by Community legal order or with the other general principles of Community law. To guarantee the right to a fair trial, protected as a fundamental right within the European Community, priority should be given to the interpretation given by the Court.

369 M. STOUTEN, commentary on ECJ C-305/05, *AB* 2007 (NL), 1961 – 1970.

370 Council of State (BE) 2 July 2010, n° 206.397.

371 KB 3 juni 2007 tot uitvoering van artikel 14quinquies van de Wet van 11 januari 1993 tot voorkoming van het gebruik van het financiële stelsel voor het witwassen van geld en de financiering van terrorisme. The attacked Royal Decree implements article 14quinquies of the national anti money laundering law. This article obliges persons and institutions covered by the law, including lawyers, to report to the 'Cel voor financiële informatieverwerking' (the Belgian FIU) in case of a suspicious fact or action that can be related to laundering money coming from serious or organized fiscal fraud. They should also report from the moment they trace one of the indicators, established by the King. Article 2 of the attacked Royal Decree fixes a list of indicators.

a suspicious fact or action that can be related to laundering money coming from serious or organized fiscal fraud. The Decree sets out a list of indicators that should be taken into account with regard to serious or organized fiscal fraud.

The appellants argued, amongst others, that the reporting obligations of lawyers in the AML field, provided by the contested provision, are an unreasonable and thus an unlawful infringement of the rights of defense, the respect of privacy and the professional secrecy of lawyers. According to the requesting lawyers' associations, the professional secrecy of lawyers is of a major concern in the exercise of their profession and is an essential aspect of two fundamental rights, i.e. the rights of defense (article 6 ECHR) and the right to respect for private life (article 8 ECHR). In their opinion, the restrictions on the professional secrecy are not strictly justified and consequently unlawful. No balance has been made between the interest of the professional secrecy and the interest served by the reporting obligations, the public order nature of the professional secrecy has been disregarded, the necessity of a restriction of the professional secrecy has not been proved and the broad terms of the reporting obligations lead to a de facto abolition of the professional secrecy.

The appellants alleged that the far-reaching obligations under the AML rules lead to a breach in the confidential relationship of a lawyer and his client, which prevents the normal exercise of the lawyer's profession. They also indicate the fact that information obtained by lawyers about the opposite party or a person with whom the client has negotiated, is not covered by an exemption from the reporting obligations. Moreover, the dichotomy between activities that fall under the reporting obligation and those that don't were questioned. In the opinion of the appellants, the activities of a lawyer cannot be divided into services that are linked to judicial proceedings and services that are not.

The Council of State did not accept this argumentation. According to the Council, the restriction of the professional secrecy in case of an indication of money laundering is justified and consistent with the ECHR and the Belgian constitution. The restriction is a consequence of the reporting obligations to the FIU, imposed on lawyers by the Belgian legislator to fight money laundering. To support its decision, the Council refers to two judgments of the Constitutional Court and endorses its interpretation of the scope of the reporting obligations.[372] In both cases before the Constitutional Court, the restriction of the professional secrecy was criticized. The Constitutional Court considered the professional secrecy of a lawyer as a general principle that is connected to the respect of fundamental rights.

Therefore, rules that deviate from this confidentiality should be interpreted strictly, according to the principle of legality. The Court refused to annul the provisions of the Belgian AML law providing the reporting obligations, but made a reservation regarding its interpretation. Firstly, information obtained by a lawyer in the course of the essential activities of his profession, is covered by his professional secrecy and can never be reported to the authorities. Those "essential activities" refer to the defense or representation of a client before the courts and the provision of legal advice, even alongside any judicial proceedings. Secondly, a lawyer can be submitted to the reporting obligations only if he performs an activity that goes beyond his specific assignment of defending or representing before the courts and giving legal advice.

The Council of State considers itself bound by this interpretation of the Constitutional Court and interprets the scope of the contested provision in the same way. In the Councils view, the appellants fail to show that the reporting obligations are manifestly disproportionate to its objective of fighting money laundering. Consequently, there is no breach of the rights of defense, the right to respect of private life or the professional secrecy.

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[372] Constitutional Court (BE), 23 January 2008, n° 10/2008 (in this case, the Belgian Constitutional Court referred the preliminary question to the ECJ in the case 305/05) and Constitutional Court (BE), 10 July 2008, n° 102/2008.

It should be mentioned that the French Council of State has expressed the same view as the Belgian judges. It rendered a very similar judgment on 10 April 2008. According to the French Council of State, lawyers' obligations in the AML field do not violate article 6 ECHR with regard to their activities of defense and representation before the courts, to the extent that the possibility of confidentiality, as provided by the "Second Directive", is interpreted as an obligation. Neither do the obligations violate article 8 ECHR, to the extent that the exercise of a lawyer's professional activity as a legal adviser is covered by the professional secrecy, unless the lawyer participates in a money laundering action, gives legal advice with a view to money laundering or knows that his client asks for legal advice with the intention of money laundering.

C. The obligations of lawyers under the "Third Directive" and article 8 ECHR

Lawyers' duties under the "Third Directive" have also been discussed in relation to the right to respect of privacy, guaranteed by article 8 of the European Convention on Human Rights.

An important judgment was rendered by the European Court of Human Rights in the *André* case.[373] This French case concerns a search of a lawyer's professional premises by tax officials, for the purpose of finding evidence against one of their clients. The applicants, a lawyer and a law firm, argued that there was an infringement of their defense rights and of professional secrecy and challenged the lack of effective judicial review. They relied on article 6 and article 8 of the ECHR. The Court decided that both provisions were violated.

Regarding article 8 ECHR, the Court first observed that a lawyer's office is covered by the word *"home"* within the meaning of the first paragraph of article 8 ECHR. Consequently, a search and seizure of evidence in a lawyer's office are considered as being an interference with the exercise of the right of respect of private life and have to meet certain requirements to comply with the European Convention on Human Rights. Pursuant to article 8, § 2 ECHR, measures should be in accordance with the law, should aim for a legitimate purpose and should be necessary in a democratic society. In this case, the interference was provided for by the French national law and pursued a legitimate purpose, namely the respect of public order and the prevention of crime.

However, the search and seizure measures were disproportionate to this objective and thus not *"necessary in a democratic society"*. Accordingly, the Court decided that there had been a violation of article 8 ECHR.

In its considerations, the Court underlined the importance of the professional secrecy of lawyers. The respect of professional secrecy is the basis of the confidential relationship between a lawyer and his client and is inextricably linked with the client's right against self-incrimination, which prevents the authorities from obtaining evidence trough coercion or pressure, against the will of the 'accused'. In the Court's view, searches and seizures in a lawyer's office definitely involve a restriction of the professional secrecy. The Court accepts such measures but verifies whether they are accompanied by special guarantees. Neither does the ECHR prohibit imposing some obligations on lawyer's that concern their relationship with their clients, for example in case of indications of participation in criminal offences or to fight certain practices such as money laundering. Considering the central role of lawyers in the administration of justice and their capacity of intermediaries between citizens and justice, measures restricting professional secrecy should be defined clearly.

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[373] ECHR *André et autres v. France*, 2008.

In this case, certain special procedural guarantees were provided. The search was executed in the presence of the president of the Bar association of which applicants were members and the report on the search contained special provisions relating professional secrecy. However, those guarantees were not adequate to prevent the effective disclosure of all the documents at the practice or their seizure. In addition, the tax inspectors and the senior police officer had been given extensive powers by virtue of the broad terms of the search warrant.

Lastly, the Court noted that in the context of a tax inspection into the affairs of the applicants' client company the tax inspectorate had targeted the applicants for the sole reason that it was finding it difficult to carry out the necessary checks and to find documents capable of confirming the suspicion that the company was guilty of tax evasion, although at no time had the applicants been accused or suspected of committing an offence or participating in a fraud committed by their client.

Accordingly, the executed measures were disproportionate and did not meet the requirements of article 8 § 2 ECHR**.**

## D. Conclusions: Practical implications for lawyers

European and national case law indicate that the reporting obligations of lawyers under the AML rules respect the right to a fair trial, guaranteed by article 6 ECHR. Nonetheless some important comments and reservations were made, which entail some practical implications for a lawyer in the course of his profession. Furthermore, the *André* case shows that article 8 ECHR enhances the respect of professional secrecy and limits the authorities' powers to interfere.[374].

The independence and professional secrecy of a lawyer are part of the fundamental rights and general principles of Community law.[375] Lawyers have to accomplish the reporting and cooperation duties imposed by the AML directives, but only to the extent that the professional secrecy is respected.[376].

As mentioned above, a distinction should be made between lawyers' essential activities and activities which do not fall in the scope of lawyers' specific legal defense, representation in legal proceedings and legal advice. Only essential activities are covered by the professional secrecy. Information obtained in the exercise of such activities cannot be reported. The professional secrecy has a large scope. It does not only cover information received *during* legal proceedings, but also information obtained before or after proceedings.

It also extends to legal advice. No clear definition of 'legal advice' is provided, which could lead to difficulties for lawyers to know the exact scope of their confidentiality duty.[377] A statutory clarification seems to be recommendable.[378]

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[374] A. JACOBS and P. HENRY, "Non, les cabinets d'avocats ne sont pas des banques de données!" (Commentary on CEDH 24 Juin 2008), JLMB 2009 (BE), vol. 19, 870 – 873.

[375] See also ECJ *AM&S Europe Ltd. v Commission*, 1983; ECJ *Wouters* **v.** Algemene Raad van *de Nederlandse Orde* van *Advocaten*, 2002; ECJ *Akzo Nobel NV v. Commission*, 2009.

[376] In its interpretative note under recommendation 16, FATF had stressed that the regulations could not violate lawyers' professional secrecy. (available at http://www.fatf-gafi.org/document/16/0,3343,en_32250379_32236920_43690576_1_1_1_1,00.html)

[377] The ECJ does not answer the question what is meant by "legal advice", but seems to subscribe a narrow interpretation. The Belgian Constitutional Court, on the other hand, gives a large definition: "*to inform the client on the current state of law that*

In practice, article 23 § 1 of the Directive can be of importance. Pursuant to this provision, *"Member States may designate an appropriate self-regulatory body to be informed in the first instance in place of the FIU"*. According to the Belgian Constitutional Court, the bar president is an essential safeguard for lawyers as well as for clients. By checking whether legal application standards are met, he has a central, unique and constitutional role. His intervention should, among other things, avoid any violation of fundamental rights.

The bar president has to solve arsing problems concerning the scope of the reporting obligations. For instance, he shall be faced with questions about the content of 'essential activities', about what to do with mixed activities, about the duration of professional secrecy in case of continuous contact and exchange of information between a lawyer and his client or about the international cooperation between lawyers subject to different national legislations.

The French Council of State fully endorses the central role of the profession' self-regulatory body. The Council is of the opinion that its intervention is essential to safeguard the validity of a legislation which would otherwise prove null.

The Directive gives Member States the possibility to appoint an appropriate self-regulatory body to be informed in the first instance. Certain doctrine reflects on whether this possibility does not turn into an obligation if a Member State wants to respect the proportionality principle, as required by the European Convention on Human Rights.[379].

The practical implications for lawyers may be different in each Member State, depending on the way the national legislator has implemented the AML directives and the way national judges decide.

In the UK for instance, the Court of Appeal decided on the scope of the reporting duty of lawyers in the *Bowman v. Fels* case.[380] In this case, a party's legal adviser reported the opponent to the National Criminal Intelligence Service ('NCIS') shortly before the hearing in a property dispute. In the view of the legal adviser, the British anti-money laundering legislation obliged him to report. In particular, section 328 of the Proceeds of Crime Act 2002 states that *"a person commits an offence if he enters into, or becomes concerned in an arrangement which he knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person"*.

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*applies to his personal situation or to the operation he undertakes to launch or to advise him on the way to proceed to such operation legally"*.

[378] By way of comparison: At first sight, the terms of the South African regulation seems to be clearer as it gives a more precise description of the scope of the confidentiality duty. Section 37 of the Financial Intelligence Centre Act 38 of 2001 states: *"Reporting duty and obligations to provide information not affected by confidentiality rules (...) does not apply to the common law right to legal professional privilege as between an attorney and the attorney's client in respect of communications made in confidence between (a) the attorney and the attorney's client for the purposes of legal advice or litigation which is pending or contemplated or which has commenced; or (b) a third party and an attorney for the purposes of litigation which is pending or contemplated or has commenced."* Still, no definition of 'legal advice' is given. As a consequence, there is uncertainty about the interpretation of the legal professional privilege in the context of meeting the reporting obligations under the South African legislation. In practice, South African attorneys seem to be interpreting the obligation to report very widely and, when in doubt, are generally erring on the side of caution and reporting the transaction. However, a broad interpretation might interfere with the client's right to legal advice and the respect of his private life. Further clarity would be welcome. (See FATF Eastern and Southern Africa Anti-Money Laundering Group, *Mutual Evaluation Report. Anti Money Laundering and Combating the Financing of Terrorism. South Africa,* February 2009, available at http://www.fatf-gafi.org/dataoecd/60/15/42432085.pdf)

[379] G.-A. DAL, and J. STEVENS, "Anti-money laundering, the Court of Justice of the European Communities and national jurisdictions", available at http://www.advocaat.be/UserFiles/file/2008-11-13%20trad%20EN%20La%20prevention%20du%20blanchiment%20de%20capitaux.pdf.

[380] Bowman v. Fels [2005] EWCA Civ 226, available at http://www.bailii.org/ew/cases/EWCA/Civ/2005/226.html.

The central issue to be determined by the Court in this case was whether this provision means that, as soon as a solicitor acting for a client in legal proceedings discovers or suspects anything in the proceedings that may facilitate the acquisition, retention, use or control of "criminal property", he must immediately notify NCIS of his belief if he is to avoid being guilty of the criminal offence of being concerned in an arrangement which he knows or suspects facilitates such activity.

The Court held that Section 328 does not cover or affect the ordinary conduct of litigation by legal professionals, including any step taken in litigation from the issue of proceedings and the securing of injunctive relief or a freezing order up to its final disposal by judgment. In reaching its decision, the Court reviewed at length the AML directives. If found that the protection provided by article 6 of the "Second Directive" (article 23 Third Directive) to legal professionals in their activities related to judicial proceedings and legal advice, would be undermined if section 328 covered those activities. As this could not have been the intention of the European legislator, the Court considered that is was not appropriate to put legal professionals, performing this kind of activities, under an obligation to report suspicions of money laundering. For similar reasons, it was improbable that the English legislator would have wanted to bring the ordinary conduct of litigation under Section 328. A judgment or an order could not be seen as an "arrangement". Furthermore, the Court stressed that access to justice on a private and confidential basis is a fundamental principle of European Union law, European Human Rights law and UK domestic law which could not be lightly interfered with.

#### 4.2.3.3.4. Practical experiences

All Member States have opted to include the exemption of article 23, 2 of the Directive in their national legislation in relation to lawyers.

*Is the obligation on reporting clear for lawyers following the ECJ decision in case C-305/05 – in which practical situations do they believe they should report?*

Most lawyers and professional organizations of lawyers responded to this question by explaining the activity based scope as it is currently defined in their national legislation.

Stakeholders commented on certain ambiguities that exist and on the interference of the AML duties with the protection of the professional secrecy and consequently with the right to legal advice and assistance.

As such some law associations indicated that the case law from EU, France and Belgium and not least the wording of the directive "ascertaining the legal position" leads to uncertainty.

Questions were also raised in relation to the term advice. According to a bar association, the lawyers exemption should be narrowed down to all legal advice and not only if a lawyers is called upon for assistance in defending the client or in representing him before the courts, or for advice as to the manner of instituting or avoiding judicial proceedings.

In general it was stated that the exemptions of the directive have been literally implemented in national legislation but without precise description of when reporting outweighs client confidentiality.

On the **basic conflict** that, despite the modifications to the reporting duty, remains between the reporting obligations and the trust relationship with the client the following reflections were made:

- The reporting obligation, based upon mere suspicions, is a fundamental breach of the well-recognised human rights of clients.
- The AML legislation has created anxiety and legal uncertainty as national law is in contradiction with another law of higher rank which also provides the strict respect of professional secrecy in the relations between clients and their lawyers always and the Criminal Code considers a criminal offence to reveal the secrets of the client.
- The AML reporting obligations are in conflict with the right to consult a lawyer in complete confidentiality as guaranteed by the right to a fair trial and the right to respect private life according to Art 6 and Art 8 ECHR as well as Art 2 and 6 TEU and the European Charter of Fundamental Rights.

Several stakeholders request to reconsider the reporting role.

*On the question whether there would be an impact of Article 8 of the European Convention on human rights following the decision of the European Court of Human Rights of 24.7.2008 on the André case, very few replies and of them mostly negative replies were given by stakeholders.*

A stakeholder commented that that the court case decision shows that the in order to safeguard the fundamental rights and freedoms the reporting obligations for lawyers must be removed entirely.

Another stakeholder concluded that lawyers are not be obliged to disclose under this act any information obtained by them during or in relation to any court or preliminary proceedings, which are pending, about to be open, or are closed, as well as any information related to establishing a client's legal status

*On the question how do they perceive the extent of professional secrecy in the AML field compared to other sectors, such as tax area, antitrust/competition area, no replies have been received from stakeholders.*

As mentioned before no clear definition of 'legal advice' is provided, which could lead to difficulties for lawyers to know the exact scope of their confidentiality duty.[381] A statutory clarification seems to be recommendable.

*When providing legal advice in suspicious cases, where is the dividing line for lawyers regarding the provision of legal advice and being accomplice of money laundering?*

Stakeholders commented that as professionals, there is clearly no role for solicitors in assisting criminals to launder the proceeds of their crime. If they engaged in such activity they would be caught by the principal money laundering offences.

There are clear ethical obligations upon the profession to ensure their clients are fully advised on the law and the requirements with which they should comply to conduct their affairs in accordance with the law; and solicitors must refuse to provide legal services where to do so would facilitate the commission of a crime.

[381] The ECJ does not answer the question what is meant by "legal advice", but seems to subscribe a narrow interpretation. The Belgian Constitutional Court, on the other hand, gives a large definition: "*to inform the client on the current state of law that applies to his personal situation or to the operation he undertakes to launch or to advise him on the way to proceed to such operation legally"*.

A lawyer having the suspicion that a transaction is abused for money laundering will refrain to continue his services. Otherwise he also might have to face criminal and disciplinary sanctions himself.

Solicitors would not, as officers of the Court, proceed with illegal transactions (including money laundering and CTF), and as such can encourage clients to regularise their affairs.

#### 4.2.3.3.5. Nature of the reporting duty

Individual stakeholders are in general not in favour of automatic reporting although some mentioned that automatic reporting at least would have the advantage that such a system could easily be explained to clients and would resolve probably some customer issues. On the other hand stakeholders feel that FIUs should not be covered with useless reports.

A number of individual stakeholders are in favour of "intelligent" reporting of suspicious transactions. This on the other hand places more responsibility with the covered entities/persons.

**Recent reporting statistics non-financial professions**

***Note: To provide a complete overview, the non-financial professions that were not listed in the statistics provided by the Member States have been added to the tables, when they are a covered entity according to the national legislation, as having submitted no STR's (i.e. value 0) unless there was residual category ("others" or "other covered entities") included in the statistics. The information provided in the tables below is based on the most recent publicly available data[382].***

## 1. Austria – Statistics of 2008

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Notaries | 3 |
| Lawyers | 6 |
| Accountants and Tax Advisors | 1 |
| Real Estate Agents | 3 |
| Auditor | 0 |
| Trust and Company Service Providers | 0 |
| **Total number of suspicious transaction reports non-financial professions: 13** | |
| **Total number of suspicious transaction reports (for all covered entities): 1.059** | |

## 2. Belgium – Statistics of 2009

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Notaries | 251 |
| Company auditors | 76 |
| External accountants, external tax advisors, approved accountants, approved tax specialists-accountants | 44 |
| Lawyers | 3 |
| Bailiffs | 2 |
| Real Estate Agents | 9 |
| **Total number of suspicious transaction reports non-financial professions: 385** | |
| **Total number of suspicious transaction reports (for all covered entities): 17.170** | |

## 3. Bulgaria – Statistics of 2008

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Notaries | 1 |
| Lawyers | 0 |
| Accountants and Auditors | 0 |
| Tax Consultants | 1 |
| Real Estate Agents | 0 |
| Trust and Company Service Providers | 0 |
| **Total number of suspicious transaction reports non-financial professions: 2** | |
| **Total number of suspicious transaction reports (for all covered entities): 591** | |

[382] For the purpose of this section "publicly available data" is defined as "data contained in the Moneyval/FATF Mutual Evaluation reports and/or the annuals reports published by the FUI within the last three years". Only the statistical data that differentiates between the different categories of non-financial professions and encompasses a full year has been used.

## 4. Cyprus – Statistics of 2009[383]

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Lawyers | 6 |
| Accountants and Auditors | 2 |
| Company Service Providers | 0 |
| Real Estate Agents | 0 |
| Tax Advisers | 0 |
| **Total number of suspicious transaction reports non-financial professions: 8** | |
| **Total number of suspicious transaction reports (for all covered entities): 428** | |

## 5. Czech Republic – Statistics of 2007

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Notaries | 0 |
| Independent Legal Professionals | 2 |
| Real Estate Entities | 0 |
| Other obliged entities | 21 |
| **Total number of suspicious transaction reports non-financial professions: 23** | |
| **Total number of suspicious transaction reports (for all covered entities): 2048** | |

## 6. Denmark – Statistics of 2009

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Lawyers | 11 |
| Auditors and tax advisors | 4 |
| Real estate agents | 0 |
| Others | 4 |
| **Total number of suspicious transaction reports non-financial professions: 19** | |
| **Total number of suspicious transaction reports (for all covered entities): 2.095** | |

## 7. Estonia – Statistics of 2009

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Auditors | 0 |
| Bailiffs | 0 |
| Other legal advisers | 2 |
| Notaries public | 46 |
| Trustees in bankruptcy | 3 |
| Lawyers | 3 |
| Accountants | 3 |
| Real Estate Developers | 1 |
| Company Service Providers | 0 |
| **Total number of suspicious transaction reports non-financial professions: 58** | |
| **Total number of suspicious transaction reports (for all covered entities): 4.534** | |

[383] No notaries exist in Cyprus

## 8. France - Statistics of 2009

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Notaries | 370 |
| Receivers and trustees in bankruptcy | 57 |
| Chartered accountants | 55 |
| Real estate agents | 33 |
| Auditors | 22 |
| Bailiffs | 2 |
| Lawyers | 2 |
| Company Service Providers | 0 |
| **Total number of suspicious transaction reports non-financial professions: 539** | |
| **Total number of suspicious transaction reports (for all covered entities): 17.310** | |

## 9. Finland - Statistics of 2009

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Realtors | 9 |
| Accountants | 7 |
| Lawyers | 8 |
| Audit Firms | 16 |
| Tax Advisors | 0 |
| Company Service Providers | 0 |
| **Total number of suspicious transaction reports non-financial professions: 40** | |
| **Total number of suspicious transaction reports (for all covered entities): 27.781** | |

## 10. Germany – Statistics of 2009

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Bar Association | 4 |
| Chamber of Public Accountants | 2 |
| Lawyers | 16 |
| Legal aid providers | 0 |
| Patent attorneys | 0 |
| Notaries | 5 |
| Qualified auditors | 1 |
| Certified accountants | 0 |
| Tax consultants | 1 |
| Agents in tax matters | 0 |
| Real-estate brokers | 1 |
| Trust and Company Service Companies | 0 |
| **Total number of suspicious transaction reports non-financial professions: 30** | |
| **Total number of suspicious transaction reports (for all covered entities): 9.046** | |

## 11. Greece – Statistics of 2009[384]

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Other reporting persons and entities | 26 |
| **Total number of suspicious transaction reports non-financial professions: 26** | |
| **Total number of suspicious transaction reports (for all covered entities): 2.304** | |

## 12. Hungary – Statistics of 2008

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Real Estate Agents | 0 |
| Auditors | 3 |
| Accountants | 7 |
| Tax Experts | 1 |
| Lawyers | 3 |
| Public Notaries | 4 |
| **Total number of suspicious transaction reports non-financial professions: 18** | |
| **Total number of suspicious transaction reports (for all covered entities): 9.680** | |

## 13. Ireland – Statistics of 2009

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Accountants | 10 |
| Real Estate Agents | 3 |
| Auditors | 16 |
| Dealers - High Value Goods | 7 |
| Solicitor | 15 |
| Tax Advisor | 0 |
| Other * | 6 |
| **Total number of suspicious transaction reports non-financial professions:** | 57 |
| ***Other includes: Mortgage Brokers, Spread Betting***<br><br>**Total number of suspicious transaction reports (for all covered entities):** | 14.00 |

[384] No statistics detailing the number of STR's per category of non-financial profession were provided

## 14. Italy– Statistics of 2009

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Notaries | 69 |
| Bookkeepers | 10 |
| Accountants | 28 |
| Real estate agents | 3 |
| Lawyers | 3 |
| Auditors | 7 |
| Company Auditors | 2 |
| Others | 8 |
| **Total number of suspicious transaction reports non-financial professions: 124** | |
| **Total number of suspicious transaction reports (for all covered entities) : 20.660** | |

## 15. Latvia– Statistics of 2008

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Notaries | 5 |
| Accountants/Auditors | 0 |
| Real estate agents | 0 |
| Tax Advisors | 0 |
| Lawyers | 3 |
| Company Service Providers | 0 |
| **Total number of suspicious transaction reports non-financial professions: 8** | |
| **Total number of suspicious transaction reports (for all covered entities) : 26.437** | |

## 16. Lithuania – Statistics of 2009

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Notaries | 31 |
| Lawyers | 0 |
| Accountants/Auditors | 0 |
| Company Service Providers | 24 |
| Others subjects under the AML Law | 17 |
| **Total number of suspicious transaction reports non-financial professions: 72** | |
| **Total number of suspicious transaction reports : 213** | |

## 17. Luxemburg – Statistics of 2009

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Notaries | 2 |
| Company Auditors | 12 |
| Accountants | 29 |
| Real Estate Agents | 0 |
| Lawyers | 6 |
| Tax advisors/Economic Advisors | 1 |
| Trust and Company Services Providers | 0 |
| **Total number of suspicious transaction reports non-financial professions: 40** | |
| **Total number of suspicious transaction reports: 1332** | |

## 18. Malta – Statistics of 2009

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Independent Legal Professionals | 3 |
| Trustees and Fiduciaries | 2 |
| Real Estate Agents | 2 |
| Accounting Professionals | 4 |
| Company Service Providers | 3 |
| **Total number of suspicious transaction reports non-financial professions: 14** | |
| **Total number of suspicious transaction reports (for all covered entities): 63** | |

## 19. Poland – Statistics of 2009

| Selected covered entities | Number of suspicious activity reports related to money laundering[385] |
|---|---|
| Notaries | 2 |
| Law offices | 3 |
| Company Service Providers | 0 |
| Accountants/Auditors/Tax Advisors | 0 |
| Real Estate Agents | 0 |
| **Total number of suspicious transaction reports non-financial professions: 5** | |
| **Total number of suspicious transaction reports (for all covered entities): 1.362** | |

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Notaries | 17 |
| Law offices | 0 |
| Company Service Providers | 0 |
| Accountants/Auditors/Tax Advisors | 0 |
| Real Estate Agents | 0 |
| **Total number of suspicious transaction reports non-financial professions: 17** | |
| **Total number of suspicious transaction reports (for all covered entities): 10.904** | |

## 20. Portugal – Statistics of 2007

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Notaries | 0 |
| Chartered Accountants | 1 |
| Others | 8 |
| **Total number of suspicious transaction reports non-financial professions: 9** | |
| **Total number of suspicious transaction reports (for all covered entities): 724** | |

[385] Suspicious Activity Reports (SAR) submitted by cooperating units and other sources has not been included. In total 1862 SAR's were submitted. SAR are descriptive reports which include contain description of several, dozen or even several hundred transactions (usually they are related to each other via parties to transactions, circumstances of transactions, similar period of their completion and/or involvement of the same assets) and their circumstances which in the view of the reporting institution/unit may be related to money laundering or terrorism financing.

## 21. Romania – Statistics of 2008

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Auditors, natural and legal persons providing taxes and accounting consultancy | 2 |
| Public notaries, lawyers and other persons exercising independent legal profession | 227 |
| Company Service Companies | 0 |
| Real estate agents | 2 |
| **Total number of suspicious transaction reports non-financial professions: 231** | |
| **Total number of suspicious transaction reports (for all covered entities): 2.332** | |

## 22. Slovakia – Statistics of 2009

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Auditors and Accountants | 3 |
| Real estate agents | 2 |
| Notaries | 2 |
| Court distrainers | 1 |
| Lawyers | 0 |
| **Total number of suspicious transaction reports non-financial professions: 9** | |
| **Total number of suspicious transaction reports (for all covered entities): 2686** | |

## 23. Slovenia - Statistics of 2009

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Lawyers | 3 |
| Notaries | 0 |
| Auditors and Accountants | 0 |
| Tax Advisors | 0 |
| Trust and Company Service Companies | 0 |
| **Total number of suspicious transaction reports non-financial professions: 3** | |
| **Total number of suspicious transaction reports (for all covered entities): 199** | |

## 24. Spain – Statistics of 2008

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Notaries | 248 |
| Lawyers | 32 |
| Auditor, accountants and tax advisors | 6 |
| Real estate agents | 30 |
| Trust and Company Service Providers | 0 |
| **Total number of suspicious transaction reports non-financial professions: 316** | |
| **Total number of suspicious transaction reports (for all covered entities): 2904** | |

## 25. Sweden – Statistics of 2009

| Selected covered entities | Number of suspicious transaction reports related to money laundering |
|---|---|
| Lawyers | 3 |
| Real Estate Agents | 8 |
| Auditors | 8 |
| Tax Advisors | 0 |
| Accountants | 0 |
| Trust and Company Services Companies | 0 |
| **Total number of suspicious transaction reports non-financial professions: 19** | |
| **Total number of suspicious transaction reports (for all covered entities): 9137** | |

## 26. The Netherlands - Statistics of 2009

| Selected covered entities | Number of unusual transaction reports related to money laundering |
|---|---|
| Accountants | 617 |
| Lawyers | 22 |
| Tax advisors | 92 |
| Corporate advisors | 50 |
| Realty brokers | 0 |
| Real Estate Agents | 3 |
| Notaries | 389 |
| Independent legal advisors | 0 |
| Trust companies | 5 |
| **Total number of unusual transaction reports non-financial professions: 1.178** | |
| **Total number of unusual transaction reports (for all covered entities): 163.933** | |

## 27. United Kingdom - Statistics of 2009

| Selected covered entities | Number of suspicious activity reports related to money laundering[386] |
|---|---|
| Accountant | 6.381 |
| Barrister | 6 |
| Company Formation Agent | 73 |
| Estate Agent | 134 |
| Legal ( Other) | 90 |
| Solicitor | 4.761 |
| Tax Advisors | 96 |
| Other | 1.308 |
| **Total number of suspicious activity reports non-financial professions: 12.849** | |
| **Total number of suspicious activity reports (for all covered entities): 228.131** | |

[386] The suspicious activity reports relating to terrorist financing (703 in total) have been deducted from the total amount of suspicious activity reports (228.834).

### 4.2.4 – Issue 4 Supervision and Monitoring (Part II)

The following questions have been examined:

| |
|---|
| *Which is the role of professional associations and/or self regulatory bodies in supervision? Which is their added value compared to other kind of supervisors such as specialized agencies devoted to the supervision of a particular profession (e.g. NL regarding lawyers) or to general supervisors (FIUs in some countries)? If appointed as supervisors, how do self-regulatory bodies comply with paragraph 2 of Article 37 of the AML Directive (as referred to in paragraph 5 of Article 37)? How is Article 37(4) applied regarding the risk-based approach to supervision? What type of supervisory activity is conducted? Which are the decisions taken? Any sanctions?* |

#### *4.2.4.1 – Self-regulatory bodies vs. other kind of supervisors such as specialised agencies devoted to the supervision of a particular profession (e.g. NL regarding lawyers) or to general supervisors (FIUs in some countries)*

The following advantages of self-regulatory bodies in comparison to specialized (larger) agencies were indicated by stakeholders:

- As self-regulatory bodies are in most cases staffed and led by professionals from the same profession, the particularities of the profession can be taken into account more easily;
- The possibility of reporting to self-regulatory bodies offers support to the covered entities, especially with regard to the application of legal standards such as legal privilege protection. The "channelling" role of the self-regulatory body consists of forwarding the STR to the authorities after the assessment of the information received from the professional in order to ascertain whether such information falls under the legal privilege protection.

The following difficulties of self-regulatory bodies were detected by stakeholders:

- In some cases self-regulatory bodies have a lack of resources to act as a monitoring entity. Stakeholders report that self-regulatory bodies often act on an incident basis, rather than a systematic monitoring. According to stakeholders, on-site inspections often (only) happen in case of an incident (e.g. complaint);
- In some cases self-regulatory bodies cannot rely on any (own) implementation legislation allowing them to supervise and penalize in an effective manner, according to a stakeholder.

#### *4.2.4.2 – Compliance of self-regulatory bodies with article 37 (2) AML Directive and supervisory (monitoring) activities conducted by self-regulatory bodies*

Article 37 (2) provides that Member States have to ensure that the competent authorities have adequate powers, including the power to compel the production of any information that is relevant to monitoring compliance and perform checks, and have adequate resources to perform their functions.

Article 37 (5) of the AML Directive provides that self-regulatory bodies can only be granted supervisory powers in case the requirements of article 37 (2) are fulfilled.

In general stakeholders have reported that the self-regulated bodies are adequately empowered in Member States where self-regulatory bodies have supervisory powers[387].

The following specific measures and activities were reported frequently by stakeholders throughout Member States:

- Orders to comply within a certain period;
- The possibility to impose disciplinary and administrative sanctions.

Stakeholders in almost all Member States, where self-regulatory bodies have supervisory powers, have listed the following monitoring activities by self-regulatory bodies:

- Requesting of information (off-site inspections);
- On-site inspections.

In Poland and Portugal an additional periodical reporting obligation towards the self-regulatory body was indicated.

#### *4.2.4.3 – Transposition and implementation of article 37 (4) AML Directive*

This subject is dealt with in the section relating to issue 16.

[387] Austria, Belgium, Cyprus, Denmark, Estonia, Finland, France, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Poland, Portugal, Romania, Slovenia, Spain, Sweden and the United Kingdom.

#### *4.2.4.4 – Role of professional associations in supervision*

We have not come across professional associations having a direct role in supervision. The role of professional associations lies in the indirect implementation and interpretation role of regulation issued by supervisors. For example, professional associations are in most cases very well placed to draft guidance documents. In a lot of Member States professional associations are also often consulted by supervisors e.g. in the process of developing new regulation

### 4.2.5 – Issue 6 The role of lawyers

In relation to this issue the following questions where examined:

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| *What is the perception of lawyers about their role in the AML/CFT system? What is the perception from other professions and from credit and financial institutions about the role of lawyers? Which is the impact of the rules on the client's access to law/legal advice?* |

#### *4.2.5.1 – Introduction*

The objective of this section is specifically to gauge **opinions** from stakeholders on the role of lawyers. The opinions were mainly expressed via the questionnaires.

Only two **private stakeholders** outside the legal profession have expressed a view on the overall role of lawyers in the AML/CFT system. A few private stakeholders have given their opinion on more detailed questions relating to specific aspects of the lawyer's AML/CFT framework (and/or the role of non-financial professions in general) in the system (e.g. questions on scope difference, the question if the reporting duty should be revised for lawyers). These opinions are treated under the relevant sections of the report.

Some **public stakeholders** (mostly FIUs) have expressed their opinion on the role of lawyers in the system.

Public stakeholders and lawyers associations/individual lawyers (hereafter referred to as "lawyers") have **clearly different views** on the role of lawyers in the AML/CFT system.

The role of independent legal professionals in general in the fight against money laundering has been the object of an earlier inquiry i.e. as part of the Commission Staff Working Document "The application to the legal profession of Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering[388].

In this paper the following questions were submitted to stakeholders:

*Is the application of the Directive to the legal profession having a real impact in the fight against money laundering?*

*Which should be the role of the independent legal professionals in the fight against money laundering?*

The paper demonstrates that the views of the stakeholders were divided on both issues.

With regard to the impact of the AML directive in the fight against money laundering, some Member States and some professional organisations representing notaries assessed the impact of the AML directive as positive in terms of prevention.

[388] Section 5.5. of the paper. The paper can be found at http://ec.europa.eu/internal_market/company/docs/financial-crime/lawyers_en.pdf

Other Member States and professional associations representing lawyers expressed the view that the application of the directive to the legal professions did not have and would not have any impact in the fight against money laundering because of the particularities of the lawyers' work and/or the type of obligations foreseen in the directive, which are contrary to the principles of the profession.

Some other stakeholders were slightly more optimistic as to the usefulness of the legal profession's involvement for law enforcement purposes. However, they predicted a lower impact than expected by the legislator because the obligations of the directive are not tailored to legal professions.

The paper indicates that the views of the stakeholders were also divided regarding regards the question which the most effective role for the legal profession in the fight against money laundering could be.

Public stakeholders were in general of the opinion that the most effective role for the legal profession should be to apply the existing rules, although there was agreement that legal professionals needed better information on what they can and cannot do.

Some of the professional associations representing notaries were in favour of strengthening the role of notaries, as real introducers.

The professional associations representing lawyers however expressed their views on a totally different role for their profession in the fight against money laundering. The paper sets out that lawyers claim they should be exempted from the reporting obligation. Lawyers were also of the opinion that professional rules of conduct are already a good tool for the prevention of money laundering. The associations however agreed that awareness creating (e.g. through training and dissimination of information) and putting in place preventive measures on the basis of an adapted risk based approach were acceptable.

### *4.2.5.2 – The perception of the lawyers*

The replies to the question what the **perception is of lawyers about their role** in the AML/CFT system, mainly relate to the following aspects:

- The **usefulness** of the lawyers role;
- The **proportionality** of the obligations;
- The **contradiction** between the reporting obligation and the essence of the profession. These aspects are included in the section of the study on reporting issues.

Many lawyers question the **usefulness of their role**. Arguments for this position are:

– *The low number of suspicious transactions/reports*: Some lawyers state that there is no supporting evidence of lawyers being used as a vehicle for money laundering and that as such no evidence exists on the real benefit from their inclusion in the scope of the AML/CFT framework. Some lawyers are of the opinion that very few transactions actually may give rise to a report to the FIU which results in a low number of reports. This limits the usefulness of their role in the AML/CFT system.

- *Earlier detection by other parties involved*: Some lawyers express the opinion that in many situations, financial institutions intervene next to lawyers. If suspicious transactions would occur and a lawyer was misused as gatekeeper, the intervening bank would in practice already have reported long before any lawyer would come across the suspicious transactions.
- *The lack of added value:* The two previous arguments lead many lawyers to question the added value of their role.

Other lawyers **acknowledge the general role** the profession has in the AML/CFT system but **question the proportionality of (some of) the obligations**.

In the conclusions of the Conseil des Barreaux Européenne/Council of Bars and Law Societies of Europe (CCBE) Comments on the above mentioned Commission Staff Working Document389, the CCBE states that it believes that the introduction of reporting requirements on lawyers is a disproportionate and unnecessary initiative. The CCBE believes that more appropriate and useful measures could be put in place, for example, different procedures and practices.

Some lawyers express the opinion that AML obligations result in a huge administrative burden and impact professional secrecy. Rules are deemed unproportionally burdensome and/or unclear. Unproportional rules can lead to a loss of effectiveness.

*Box 20: Example: In its response to the call for evidence in the review of the money laundering regulations launched by HM Treasury, the Law Society of England and Wales expressed its views on the role of lawyers in relation to certain aspects of the AML framework*[390].

"Solicitors are gatekeepers of our legal system and help facilitate many of the more significant commercial transactions which occur within the UK and the global economy.

Equally, solicitors are required to protect the fundamental human rights of their clients, including rights to privacy and a private life, and rights to confidential legal advice and representation.

As professionals, who are required under our code of conduct to uphold the rule of law, there is clearly no role for solicitors in assisting criminals to launder the proceeds of their crime. And in any event, if they engaged in such activity they would be caught by the principal money laundering offences.

Further, there are clear ethical obligations upon the profession to ensure their clients are fully advised on the law and the requirements with which they should comply to conduct their affairs in accordance with the law; and solicitors must refuse to provide legal services where to do so would facilitate the commission of a crime.

TLS agrees that, against the background of being guardians to the legal system and being both legally and ethically required to not engage in money laundering, solicitors have a role to play in achieving the aims of the UK's anti-money laundering regime.

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389 CCBE comments on the Commission Staff Working Document "The application to the legal profession of Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering"

390 Response by the Law Society of England and Wales to the call for evidence in the Review of the Money Laundering Regulations 2007 December 2009

However, we, and our members, remain to be convinced that the role that solicitors are currently assigned within the UK AML regime is actually resulting in the most effective or appropriate use of our members' skills, existing work methods and the very nature of the solicitor-client relationship, to achieve those aims. The Law Society remains committed to advocating for AML laws which are clear in law and proportionate to the identified risks".

The response explains that the Law Society is not convinced that the current AML laws are clear or that they are proportionate to the identified risks. The Society believes that the following measures are required:

- An evidential assessment of the actual risk of money laundering within the EU and by sector;
- A clear understanding of the outcomes in terms of impact on money laundering activity in the EU being sought and an appreciation of the degree to which those results can realistically be achieved;
- A commitment to drafting legislation and regulations which seek to proportionately mitigate actual risks in a way which will bring about the results being sought;
- A true appreciation of the costs incurred by the regulated sector in complying with the requirements;
- A true understanding of the effect that the current anti-money laundering regime has on European PLC because of the competition challenges faced by the regulated sector from other jurisdictions which do not have such complex anti-money laundering legislation;
- The creation of a robust feedback mechanism, between government, FIUs, law enforcement and the regulated sector, which clearly measures the outcomes being achieved as a result of the anti-money laundering framework and continually updates the risk assessments.

### *4.2.5.3 – Perception of others*

The 2 private stakeholders who did comment, generally stated that the role of lawyers in the AML/CFT system is useful.

**Most public stakeholders** (FIUs) indicated that the role of lawyers is important. The arguments on which this view is based are the following:

- *Their role as gatekeeper in the prevention of ML/FT*[391] ;
- *The significant operations that they witness and facilitate*: Lawyers often intervene in important transactions which makes their preventive role as gatekeeper so useful.
- *The quality of the data they have access to in relation to their work:* The quality of the data that lawyers have access to enables them to provide useful information in case of suspicious transactions.

**Two FIU's** stated that the role of lawyers is **not important** given the limited number of STR's that they file.

[391] More information on the role of the gatekeeper can be found in section on the extent of the problem.

### *4.2.5.4 – Impact of the rules on client's access to legal advice*

The opinion of lawyers on the impact of the rules on client's access to legal advice differs. Lawyers who believe that the rules have an impact illustrated this impact as follows:

- *Adverse effect on the relationship client/lawyer/ reluctancy to seek advice*: The reporting obligation has an adverse effect on the confidential relationship between client and lawyer. Some clients may be afraid that the lawyer would have to report their transaction to the FIU, and as such may be reluctant to seek advice on problematic issues (even in situations where he is unwittingly used for money laundering). It is also not clear for clients that they can still obtain litigation advice on a confidential basis, even if the advice concerns money laundering issues. AML obligations (especially reporting obligations) therefore have a significant impact on the client-lawyer relation and infringe the exercise of citizens' right to freely consult a lawyer. Citizens (including undertakings) may be discouraged from seeking and obtaining legal advice, knowing the existence of reporting obligations. From a general perspective access to law and access to justice are impaired.
- *Possible lack of disclosure of all relevant information*: The reporting obligation stands contrary to attorney-client privilege and therefore the client will not easily disclose all information.
- Members of the public do not understand that they can still obtain litigation advice on a confidential basis, even if the advice concerns money laundering issues.
- *Impact on small mandates*: For **small mandates** (i.e. mandates with a small fee volume) the administrative burden added by the AML obligations simply results in refusals to accept such mandates from the outset to avoid such burden and costs. In **transactional mandates** with many parties and jurisdictions involved, the proper conduct of independent KYC risks timely process and closing of transactions.

Other lawyers do not believe that the rules have an impact on the access to legal advice. The following opinions on the matter were given:

- No impact as regards the access to the advice, but an impact on timing. Before the CDD checks are completed, the advice cannot be provided;
- Clients should always be aware that there are certain obligations that have to be complied with to prevent money laundering;
- Professional secrecy has for generations been a cornerstone in ensuring clients a fair trial and qualified legal advice. The obligation to report suspicious transactions run counter to the fundamental values connected with lawyers. This does not in itself hamper clients' access to legal advice but is weakening the public trust in lawyers' confidentiality.

## 4.3 – The existence and practicability of alternative solutions

### 4.3.1 – Solutions in third countries

This section gives an overview on how non-financial professionals are treated under the Anti-Money laundering legislation of Australia, South-Africa and Switzerland[392].

#### *4.3.1.1 – Scope*

**Note: In regard to the Australian AML/CFT legislation it needs be noted that lawyers are currently excluded from the scope of AML regime unless they are involved in financial transactions. There are however plans to extend the AML/CTF Act to a range of services ordinarily provided by lawyers and other professionals by means of a so-called second tranche of reforms. Draft legislative provisions to implement this second tranche were publicly released in August 2007 after which a public consultation was launched. Since then no further progress has been reported. We have not received any indications that this will change in the near future.**

| | **Scope** |
|---|---|
| Australia[393] | The scope of the Australian AML/CTF Act[394] is determined by the term "reporting entities". A reporting entity is defined as a financial institution, or other person, who provides designated services. Designated services are listed in section 6 of the Act. Among them are financial services, bullion and gambling services.<br><br>Lawyers are currently excluded from the scope of AML regime unless they are involved in financial transactions. However the so-called Second Tranche of Reforms foresees in extending the scope of the AML/CTF Act to a range of services ordinarily provided by lawyers and other professionals.<br><br>The first draft of the Second Tranche[395] adds the following services to definitions of designated services in section 6 of the AML/CTF Act:<br>• Real Estate services;<br>• Professional services (making arrangements on behalf of a person or giving / directing tailored advice);<br>• Business services (acting as a special person for a person or a company, e.g. acting as a trustee).<br><br>The insertion of the services mentioned will subject the following non-financial professions to the AML/CTF Act:<br>• Real estate agents in relation to buying and selling of real estate;<br>• Lawyers, notaries, other independent legal professionals and accountants when preparing for or carrying out certain transactions;<br>• Trust and company service providers when they prepare for or carry out for a client the transactions listed in the Glossary to the FATF recommendations. |

[392] See Annexes 6, 7 and 8 for more a detailed overview of the applicable legislation.
[393] All statements regarding the Second Tranche of Reforms are subject to change.
[394] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act)
[395] See http://www.austrac.gov.au/files/second_tranche_designated_services_tables.pdf.

| | |
|---|---|
| | The submissions (from various firms and associations like the Law Council of Australia or Tax Institute of Australia) received on the draft designated services tables indicated that the definitions are thought to be too broad and in some cases incompatible with the existing rules, for example the definition of client confidentiality. In their view costs and benefits will not be proportionate, because the risk of ML/TF in these non-financial professions is not as big as in financial transactions.<br><br>Furthermore, due to the size of some of these service providers (for example, Real Estate Agents or a small accounting practices in rural regions), extending the existing AML/CTF obligations to the proposed Tranche 2 designated services would create onerous compliance burdens.<br><br>A number of submissions suggest that separate and specific obligations are required for Tranche 2 service providers. |
| South Africa | The scope of the South African AML Act[396] is determined by the term "accountable institutions". There are two types of accountable institutions, financial businesses and non-financial businesses.<br><br>Non-Financial businesses include:<br>• Attorneys (as defined in the Attorneys Act, 1979);<br>• Board of executors and trust companies;<br>• Estate agents;<br>• Insurance and investment providers;<br>• Investment advisers, public accountants;<br>• Gambling institutions.<br><br>The Attorney Act, 1979 defines an "attorney" as any person duly admitted to practice as an attorney in any part of the Republic, "notary" means any person duly admitted to practice as a notary in any part of the Republic.<br><br>Pursuant to the AML Act, only "an attorney as defined in the Attorneys Act, 1979 (Act 53 of 1979)" has certain obligations (i.e. duty to identify clients, duty to keep records, reporting duties, and measures to promote compliance). By definition, notaries are excluded from these duties. However section 29 of the FIC Act stipulates that … "any person has a duty to report a suspicious or unusual transaction, as long as they are party to that transaction". As such, notaries are subject to a reporting duty. The other obligations do not yet apply to them (see below).<br><br>The Financial Intelligence Centre (South African FIU)[397] issued a Consultation document[398] on 16 August 2010, proposing that Schedule 1 to the Act be amended to include "A practitioner who holds a fidelity certificate as defined in section 1 of the Attorneys Act, 1979". This section in the Attorneys Act currently defines a Practitioner as: "any attorney, notary or conveyance"<br><br>The President of the Republic of South Africa signed and assented to the Amendment Act on 27 August 2008. The FIC proposes that the date the Amendment Act comes into force on 1 December 2010. |

[396] Financial Intelligence Centre Act (FICA)
[397] See https://www.fic.gov.za.
[398] See https://www.fic.gov.za/DownloadContent/NEWS/PRESSRELEASE/CONSULTATIONDOCUMENT.pdf.

| | |
|---|---|
| | This means that 'notaries' will be subject to all the same duties as imposed on other accountable institutions in the near future. |
| Switzerland | Lawyers and notaries in Switzerland will only be subject to the AML legislation when they can be qualified as financial intermediaries[399].<br><br>Whether lawyers or notaries act as a financial intermediary depends on the services they provide. If lawyers and notaries act within the scope of their occupation and perform typical activities they will not be qualified as financial intermediary. Only in cases where lawyers or notaries provide services outside their typical or distinguishing professional activities within the scope of an engagement they will be qualified as a financial intermediary. The distinction whether a lawyer or notary will be classified as a financial intermediary or not is sometimes difficult and depends on the individual case.<br><br>**Examples of lawyers and notaries qualifying as financial intermediaries:**<br>(1) If a lawyer or notary takes the role of executioner of a will, for example in the sense of Art. 517ff Swiss Civil Code, he will not be qualified as a financial intermediary even if he facilitates asset transaction in this role. But if he for example holds on deposit assets belonging to the heirs or keeps on managing a bank account now belonging to them after the division of an estate he will be qualified as financial intermediary as this activity will no longer be linked to his professional activity as lawyer or notary.<br>(2) Similarly a lawyer or notary acting as trustee will be classified as financial intermediary in the sense of the AMLA.<br>(3) If a lawyer or notary holds securities on deposit which according to Art. 2 (3) lit. g AMLA generally qualifies as financial intermediation it again is necessary to evaluate if this is done as part of his typical professional activities. This would certainly be the case if a lawyer or notary holds on deposit the shares of a company he has set up and continues to advice. However when a lawyer or notary holds deposit securities which are not linked to his legal practice (e.g. part of his typical professional activities), he is considered a financial intermediary. This would for example be the case if he holds on deposit shares of a company because their owner trusts him more than his bank.<br>(4) A lawyer or notary will also be qualified as financial intermediary in the sense of the AMLA if he becomes a member of the board of directors of a Swiss or foreign domiciliary company. Domiciliary companies are understood to be organized associations of persons and all organized units of assets in the sense of Art. 150 of the Swiss Federal Code on Private International Law (CIPIL).<br><br>Lawyers and notaries who act as financial intermediaries must affiliate to a self-regulatory organisation.<br><br>In addition to the direct supervision by FINMA[400] in its fight against money laundering and terrorist financing, the Anti-Money Laundering Act also provides for the indirect supervision of certain financial intermediaries by self-regulatory |

[399] Chapter 1, article 2 of the Federal Act on Combating Money Laundering in the Financial Sector (AMLA)

[400] See http://www.fedpol.admin.ch

| | |
|---|---|
| | organisations (SROs).<br><br>The task of the SROs is to draw up the regulations governing the implementation of the obligations under the Anti-Money Laundering Act and to ensure that the institutions affiliated to them comply with their obligations. The SROs themselves are subject to supervision by FINMA, which is therefore responsible for recognising SROs (or to withdraw the recognition from SROs), for approving regulations and for ensuring that the SROs actually enforce their implementation. FINMA can conduct on-site checks at an SRO or instruct an audit firm to carry out the checks on its behalf.<br>Audit companies performing such reviews must be accredited by the Anti-Money Laundering Control Authority (AMLCA). |

#### *4.3.1.2 – The application of CDD*

| | **Application of CDD** |
|---|---|
| Australia[401] | The provisions of the Australian AML/CTF Act[402] with regard to CDD are similar to those of the Directive.<br><br>Reporting entities are required to have appropriate risk-based systems and controls in place to assist in meeting these obligations. Such systems and controls must be based on the nature, size and complexity of the reporting entity's business and the ML/TF risks faced. In addition there are provision regarding enhanced and simplified customer due diligence.<br><br>Section 248 of the AML/CTF Act provides that specified persons can be exempted from the Act via exemption provided by the Austrac CEO[403].<br><br>The screening for politically exposed persons (PEPs) is an important part of CDD. It must be conducted before providing a designated service and as an ongoing measure.<br><br>Reporting entities also have obligations to verify the identity of pre-commencement customers in certain situations. |
| South Africa | In principle the CDD provisions of the South African AML Act[404] apply to both financial and non-financial professions subject to the law. However some exemptions have been foreseen regarding the following professions:<br>• Insurance & Investment Providers;<br>• Estate Agents;<br>• Administrator of Property;<br>• Gambling Institutions;<br>• Banks;<br>• Members of a stock exchange. |

401 All statements regarding the Second Tranche of Reforms are subject to change.
402 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act)
403 A list of the granted exemptions is available here http://www.austrac.gov.au/exemptions_granted.html.
404 Financial Intelligence Centre Act (FICA)

| | |
|---|---|
| | Attorneys are exempted from CDD requirements with respect to every business relationship or single transaction except when he assists a client in the planning or execution of real estate transactions, business undertaking transactions, the opening or management of a bank, investment or securities account as well as in connection with the creation, operation or management of a company or close company or trust outside the Republic. Furthermore an attorney is not exempted from the compliance with the provisions if he assists his client in deposing of, transferring, receiving, retaining, and maintaining control of or in any way managing any property or assists in the management of any investment. In addition an attorney is not exempted in the case that he represents his client in any financial or real estate transaction or if his client deposits - over a period of twelve months - an amount of R 100,000 or more with the institution in respect of the attorney's fee. |
| Switzerland | All non-financial professionals subject to the AML legislation[405] are obliged to perform the CDD measures.<br><br>Banks may waive the identification of beneficial owners of accounts or securities accounts held by lawyers or notaries licensed in Switzerland or by firms of lawyers or notaries organised as a company on behalf of their clients provided they confirm to the bank in writing that<br>1. They are not themselves the beneficial owners of the assets deposited and<br>2. They are subject to the corresponding cantonal and federal legislation in their capacity as lawyers or notaries and<br>3. They are bound by professional confidentiality (Art. 321 of the Swiss Penal Code) in respect of the assets deposited and<br>4. The account/securities account is used solely for the purposes of their activity as lawyers or notaries. |

#### *4.3.1.3 – Duplication issue*

| | **Duplication issue** |
|---|---|
| Australia[406] | In Australia a second reporting entity can rely on the customer identification procedure of the first reporting entity under special circumstances.<br><br>While it is known that the regulator does not encourage duplicate reporting by reporting entities for the same transaction, the issue of duplicate reporting between entities has been largely undealt with in the Australian legislation.<br><br>Non-financial professions are all subject to the same regulations, there are no general exemptions for special professions.<br><br>Whilst it is unclear when Tranche 2 will be rolled out and which obligations it will impose, a number of submissions made by industry bodies have suggested that separate and specific obligations must be implemented for Tranche 2 service providers, as they feel an extension of existing obligations to Tranche 2 service providers would result in an unworkable solution. |

[405] Chapter 1, article 2 of the Federal Act on Combating Money Laundering in the Financial Sector (AMLA)

| | |
|---|---|
| South Africa | No rules exist that allow third party reliance. Every accountable institution is responsible for their own compliance with regulations. An exemption only exists for intermediaries. |
| Switzerland | Generally, all non-financial professionals are obliged to perform the CDD requirements. The issue of duplication is not separately considered in the Swiss legislation. The duplication issue is apparently not a problem in practice. |

#### *4.3.1.4 – The reporting issue*

| | **Duplication issue** |
|---|---|
| Australia[407] | A report to AUSTRAC (the Australian FIU)[408] must be submitted in the following situations:<br>• In case of suspicious matters (SMR's);<br>• If a reporting entity provides a designated service that involves a threshold transaction (TTR's);<br>• If person sends or receives an international funds transfer instruction.<br><br>A reporting entity may be required to give AML/CTF compliance reports to the AUSTRAC CEO.<br><br>Timeframes for reporting are set:<br>• TTRs - within 10 business days from the transaction;<br>• SMRs - within 24 hours from when the suspicion is formed if the offences relate to terrorism financing, or within 3 business days from when the suspicion is formed for all other offences.<br><br>It is highly unlikely that Tranche 2 services will have to report International Fund Transfer Instructions (IFTIs) due to the nature of their services and the reporting obligation falling on the bank making the payment. It should be acknowledged that the potential filing of SMRs is one of the legal professions greatest concerns as indicated in submissions/media commentary to date.<br><br>Different forms may be designed for different types of reporting entities (e.g. currently there are different TTR forms for financial services than for gambling).<br><br>According to the current draft, non-financial professions are subject to the same provisions as the financial professions.<br><br>In accordance with the Australian regulatory requirements, reporting entities are required to make reports on suspicious matters (thus the term Suspicious Matter reports). This is a change from the old legislation which required the reporting of suspicious transactions. As such, the reporting obligations are quite extensive. A person who acts suspiciously, but does not actually conduct a transaction may nevertheless be reported through an SMR. |
| South Africa | South Africa has adopted a phased approach regarding threshold reporting. Currently there is an obligation on casinos, attorneys and motor vehicle dealers |

[406] All statements regarding the Second Tranche of Reforms are subject to change.
[407] All statements regarding the Second Tranche of Reforms are subject to change.
[408] See http://www.austrac.gov.au.

| | |
|---|---|
| | to report all transactions in excess of ZAR 25 000. This is over and above the obligation to report suspicious and unusual transactions in terms of the Financial Intelligence Centre Act.<br>Further, this threshold reporting obligation does not abate the obligation to identify and verify the identities of customers (with the exception of motor vehicle dealers, who in terms of the FIC Act, are reporting institutions), and based on the institution's risk based approach, which will determine the level of the CDD: low risk clients: the minimum requirements of the FIC Act; high risk clients: enhanced due diligence.<br><br>In relation to the reporting duty and confidentiality, the following exception for attorneys (only) is included in the legislation.<br><br>"Reporting duty and obligations to provide information not affected by confidentiality rules:<br>(1) Subject to subsection (2), no duty of secrecy or confidentiality or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance by an accountable institution, supervisory body, reporting institution, the South African Revenue Service or any other person with a provision of this Part.<br>(2) Subsection (1) does not apply to the common law right to legal professional privilege as between an attorney and the attorney's client in respect of communications made in confidence between-<br>(a) The attorney and the attorney's client for the purposes of legal advice or litigation which is pending or contemplated or which has commenced; or<br>(b) A third party and an attorney for the purposes of litigation which is pending or contemplated or has commenced." |
| Switzerland | The obligation for lawyers and notaries to report on suspicious transactions depends on their classification. If a lawyer or notary provide services outside his typical professional activities he will be qualified as a financial intermediary in the sense of AMLA (see comments above) and is obliged to report on suspicious transactions according to art. 9 of the AMLA. If lawyers or notaries act within the scope of their occupation and perform typical activities they will not be qualified as financial intermediary; in these cases they are bound by professional secrecy in terms of Art. 321 Swiss Civil Code and not obliged to report on suspicious transactions. |

***4.3.1.5 –*** *The possible application of enhanced CDD by credit and financial institutions to non-financial professions*

| | **The possible application of enhanced CDD by credit and financial institutions to non-financial professions** |
|---|---|
| Australia[409] | In accordance to the AML/CFT rules Section 15(9)[410], the reporting entity must apply the enhanced customer due diligence program when:<br>• The risk-based systems and controls indicate that the ML/TF risk is high; or<br>• A suspicion has arisen for the purposes of section 41 of the AML/CTF Act. |

[409] All statements regarding the Second Tranche of Reforms are subject to change.
[410] Anti-Money Laundering and Counter-Terrorism Financing rules (AML/CTF Rules).

| | |
|---|---|
| | ECDD is therefore founded on risk based approach but accountants and lawyers (gatekeepers) are sometimes viewed as higher risk categories particularly dealing with overseas entities. |
| South Africa | South African legislation[411] does not distinguish between 'credit and financial institutions' and non-financial professionals. All accountable institutions (inclusive of 'credit and financial institutions' and 'non-financial professions') "may not establish a business relationship or conclude a single transaction with a client unless the accountable institution has taken the prescribed steps to establish and verify the identity of the client" (FIC Act, section 21), irrespective of whether the client is a non-financial professional or not.<br><br>The general principles of risk based approach apply. |
| Switzerland | The Swiss legislation does do not perceive a higher or lower risk of money laundering when non-financial professionals are involved in financial transactions. They always have to apply the same provisions irrespective of the nature of the client. |

[411] Financial Intelligence Centre Act (FICA)

### 4.3.2 – Alternative solutions

#### *4.3.2.1 – The application of CDD*

The cost to fulfil CDD requirements was reported by stakeholders as a specific problem for non-financial professions.

Costs and time spent are experienced as not in relation to the risk of involvement, especially by single practitioners.

Alternative measures could include tailored CDD requirements for small practices. Reference is made to the example of Germany where a specific regime applies under certain conditions for small practices.

With regard to timing issues, suggestions were made to allow CDD requirements to be fulfilled within a reasonable time frame and not always at the start of the cooperation.

CDD problems relating to beneficial owners and PEPs are horizontal of nature. Practical measures can be suggested in those areas rather than alternative solutions:

- A uniform beneficial owners declaration form;
- More publicly available information (e.g. improved registers);
- Further limitation of the ability of entities to incorporate within their jurisdiction with unregistered beneficial ownership, subject to consideration of privacy requirements;
- Enhanced transparency requirements for companies and legal structures (e.g. the example in Belgium).

#### *4.3.2.2 – The duplication issue*

With regard to the duplication issue alternative measures could include further third party reliance possibilities. Suggestions were made to have wider possibilities to allow a second entity involved in a transaction to rely on the customer identification procedure of the first reporting entity under specific circumstances. Such a measure could be helpful for both the duplication issue as well as the CDD administrative burden for non-financial professions.

Such a framework would need to set out clearly roles and responsibilities of the different parties involved.

#### *4.3.2.3 – The reporting issue*

In relation to the reporting issue, it is clear that notwithstanding the flexibility offered currently by the directive to exempt lawyers in certain situations, the obligation remains an important issue for lawyers.

There are different arguments pro and contra the retention of the reporting duty. It can be argued that reporting occurs less frequent by non-financial professions than by financial institutions. Non-financial professionals often have an advisory role and are not always involved in financial transactions for clients.

The (however limited) information that we received from stakeholders relating to the extent of the problem demonstrates that the concerned situations (real estate, corporate, financial and business) are vulnerable for money laundering. This would be an argument in favour of keeping a reporting duty in place for all possible involved non-financial professionals.

A further clarification of the reporting duty might be envisaged whereby the situations in which lawyers do not need to report are explained (ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings).

A powerful role of the self regulatory bodies in the reporting process (e.g. advice before reporting) might also be considered (e.g. the example of the notary profession in Spain).

#### *4.3.2.4 – The possible application of enhanced CDD by credit and financial institutions to non-financial professions*

With regard to the possible application of enhanced CDD by credit and financial institutions to non-financial professions, we have no indication that there is a need for additional or alternative measures in that area. In principle the risk based approach could be used for these purposes. Application of ECDD could maybe have adverse effects in terms of e.g. costs and timing.

However it might be recommendable for Member States to set up public private cooperation structures to enable professionals to verify the authenticity of identification documents such as identity cards or acts of incorporation.

#### *4.3.2.5 – Strengthening the role of the FIU*

Alternative measures to strengthen the role of the FIU's could include:

- Request all FIU's to report quantitative and qualitative information on money laundering methodologies and typologies on a yearly basis;
- Mandate all FIU's to request information about quantitative and qualitative information on money laundering methodologies and typologies to the competent authorities and professional organizations;
- Request all FIU's to organize yearly national trainings for competent authorities and professional organizations regarding new ML trends and AML best practices (risk based approaches, use of transaction monitoring software and best practices to avoid mass reporting of false positives, public sources for identification of beneficial owners, available databases for PEP testing,…);
- Provide recommendations to FIU's on best practices regarding internal procedures, organization structure and systems used;
- Request from FIU's to question professions involved in transactions for which other professions have filled a SAR in order to explain the reasons for not reporting.

#### *4.3.2.6 – Strengthening the role of the professional organisations*

Alternative measures to strengthen the role of the professional organizations could include:

- Request professional organizations to provide yearly AML trainings to their members;
- Request professional organizations to verify if their members provide regular AML trainings to their personnel;
- Request professional organizations to explain the filter function of the FIU's, the confidentiality around SAR's, the boundaries of professional secrecy, the absence of litigation or sanction risks in case of regular reporting, on the contrary that regular reporting can protect them from future litigation, the process from SAR to criminal investigation,etc.

#### *4.3.2.7 – Intelligent reporting*

- Implement an obligation to investigate doubtful transactions to enable AML stakeholders to assess if a transaction can be qualified as ML suspicious and requires reporting to FIU;
- Implement an obligation to request clients to provide copies of invoices/contracts in cases where internal data does not suffice to perform assessments of the suspicious nature of transactions e.g. in case of serious and organized fiscal fraud such as VAT carrousel;
- Request from judicial authorities to respect the confidentiality and not to disclose the reporting party to the reported party when performing investigations;
- Request Member States to include concrete examples of potential money laundering indicators in their regulations.

# 5. Analytical conclusions

## 5.1 – General conclusions

In general it can be concluded that in terms of transposition, we have not detected important issues. Member States have generally transposed the minimum required provisions of the Directive and the implementing directive related to the issues that are the subject of this report.

A number of stricter measures have however been adopted by Member States.

With regard to implementation practices, the following horizontal issues were identified by stakeholders:

- Interpretation issues with regard to certain definitions;
- Difficulties with practical implementation due to, amongst others, a lack of public available information (e.g. PEPs and beneficial owners);
- Implementation problems for small practices;
- Cost of compliance.

A clear need for additional guidance was formulated, specifically by the non-financial professions.

Differences in implementation of the obligations by non-financial professions in comparison to financial professions often relate to the specific activities of these professions (e.g. the reporting issue) and to the size of the practices. For some issues identical problems were experienced by non-financial and financial professions (e.g. beneficial owners, risk based approach).

Based on the general comment that financial professions are more advanced in detecting suspicious transactions and on the fact that the latest statistics show that the frequency of AML reporting for most non-financial professions in most Member States is still very low, the inherent risk increases of launderers being tempted to use techniques which involve non-financial professions.

## 5.2 – Issue specific conclusions

### Examination of the operation of the AML Directive

#### 5.2.1 – Issue 1: Scope – the question of the financial activity on an occasional and/or limited basis (application of Article 2(2) of the AML Directive and of Article 4 of its implementing measures)

Thirteen Member States have implemented the principle to exempt financial activity on an occasional and/or limited basis into their national legislation. From this group of thirteen Member States, seven Member States have drafted the necessary implementation legislation in order to allow entities subject to the AML legislation to be exempted. All seven Member States meet the requirements as set out in article 4, 1 of the Implementing Directive. It cannot be demonstrated that all of the conditions set by in article 4, 3 and 4 have been complied with. This can partly be explained by the recent transposition

of the Directive (Ireland) and the lack of actual exemptions granted. For some aspects of the requirements there was an information gap. Monitoring systems (or other adequate measures) vary a lot ranging from high level supervision to detailed compliance verification measures.

Exemption systems that do not require specific consent, will be more difficult to monitor.

### 5.2.2 – Issue 2: Scope – stricter national measures

Most Member States have implemented in one way or another one or more stricter measures. Stricter measures relate to a variety of topics covered by the Directive. Stricter measures are sometimes significant extensions of obligations. Limited differences have also been identified. At times it can be relatively unclear whether or not differences are stricter measures rather than options or specific measures chosen by Member States to clarify general principles. This leads to discussions and interpretation difficulties. Al these factors complicate the listing of existing stricter measures.

Article 4 of the Directive determines that where Member States decide to extend the provisions of the Directive to professions and to categories of undertakings other than defined in the Directive they shall inform the Commission thereof. We have no knowledge of this obligation being fulfilled in practice. This measure could however, when extended to all kinds of stricter measures, create opportunities in terms of transparency.

Stricter measures as such have an impact on cross-border activities. They can complicate cross border compliance. Having a clear view on the existence of stricter measures is essential to enable compliance. A central database of all stricter measures applied in the Member States could therefore be useful tool.

In general it is recommendable to avoid too great a diversity in the implementation of stricter measures between Member States in order to avoid complications of cross-border compliance.

### 5.2.3 – Issue 3: CDD – the application of the risk-based approach by the covered entities

Although the risk based approach is present in all Member States, and the advantages can clearly be demonstrated, the practical implementation is not without difficulties. In general, although guidance exists the need for practical tailored guidance is still present, specifically for the non-financial professions.

IT systems exist that can support the implementation of the approach. They come however at significant cost. Small practices often deal with risk based approach manually which leads to, according to stakeholders, an increased administrative burden and costs.

Some concern exists that a there is a danger that the risk based approach chosen by the entities, is questioned afterwards by competent authorities in case a suspicious transaction was missed. For this reason covered entities are sometimes also reluctant to make use of simplified customer due diligence regime but apply normal CDD to all of their customers.

### 5.2.4 – Issue 4: CDD – the question of the beneficial owners

The information received from stakeholders in relation to the beneficial owners issue was extensive. This clearly demonstrates, as expected, that the topic raises a lot of discussion.

Member States have in general transposed the definition of beneficial owner in an identical way. Few exceptions were identified. In all Member States the process of identifying a beneficial owner and verifying its identity is, taking into account the risk based approach, not a purely declarative process.

Public stakeholders in most Member States are in general satisfied with:

- The steps taken by the covered entities/persons to identify and verify the identity of beneficial owners;
- The deterrent effect of the requirements;
- The value of the requirements for their investigations.

A lot of input was received on the definition of beneficial owner. The responses from stakeholders demonstrate that there are many questions about the interpretation of certain aspects of the definitions and suggestions were made for possible modifications. The concept "control" was identified by many stakeholders as unclear.

It is clear that there is a significant demand for clarification. Next to clarification by way of including additional definitions in the Directive where necessary, additional guidance and Frequently Asked Questions would be helpful.

With regard to the practical problems encountered by covered entities during the process of identification and verification of the identity of beneficial owners, numerous issues were mentioned. A large number of stakeholders plead for initiatives in the area of availability of information on structures and in connection with these additional transparency requirements.

There is a general consensus between stakeholders that there is no need to lower the threshold from 25% to 20%.

### 5.2.5 – Issue CDD Threshold

All Member States require that covered entities apply customer due diligence measure when carrying out occasional transactions amounting to 15.000 EUR or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked. 9 Member States however impose a threshold that is lower than the required 15.000 EUR for all or some occasional transactions. In the majority of the Member States the term "several operations which appear to be linked" is not defined.

While not required by the Directive 11 Member States require that cash transactions above a certain threshold are reported to the FIU. The reporting threshold differs from Member State to Member State and from profession to profession. 6 Member States even prohibit cash transactions. The majority of the stakeholders are against the introduction of such prohibition on EU level.

### 5.2.6 – Issue CDD – The question of the anonymous accounts

Member States prohibit the keeping of anonymous accounts in their national legislation. The majority of Member States have done so via an explicit prohibition in their national legislation. The other Member States have implemented the requirement by not allowing banks to open account without identifying the customers involved first. A small number of Member States allow the opening of numbered accounts. In all cases CDD is performed when the account is opened.

In the Member States where anonymous accounts still exist, the funds on these accounts will only be released to the account holder after customer due diligence has been performed and the account is (re)registered in the customer name.

### 5.2.7 – Issue CDD – The question of the casinos

All Member States require casinos to register, identify and verify customers immediately on or before entry, regardless of the amount of chips purchased. 11 Member States require that casinos perform an identification of their customers if they purchase or exchange gambling chips with a value of 2.000 EUR or more 5 Member States have set the threshold even lower at 1.000 EUR. One Member State, Bulgaria, maintains a threshold which exceeds the threshold of the Directive.

In practice it is not always clear if the identification when purchasing chips is still required when the customer has already been identified when he entered the casino. The reason for this is the fact that the identification requirement at entry is sometimes, as already indicated above, prescribed by the gambling legislation which does not take in account the anti-money laundering legislation and vice versa.

### 5.2.8 – Issue 5: Simplified CDD

On the matter of simplified CDD there appears to be a large convergence between the Member States, i.e. the majority of the Members States have opted not to expand upon the framework foreseen by the Directive.

It is sometimes unclear to what extent Member States have decided to define the products that fulfil the criteria of article 3(3) themselves and whether the Member States have made risk assessments pursuant to article 3(4).

Individual stakeholders have, in general, made the regime an integral part of their internal CDD procedures.

Some stakeholders did comment that simplified customer due diligence adds a level of complexity to their operations as they have to ascertain if a person falls within the simplified CDD regime.

### 5.2.9 – Issue 6: Enhanced CDD: politically exposed persons (PEPs)

With a few exceptions, the PEP definitions have been transposed quite literally. Domestic PEPs are not included in the scope of the ECDD rules.

Existing practical difficulties have been confirmed. The main difficulties revolve around the lack of appropriate public information on PEPs. Commercial databases are most often used but the quality of these databases is questioned by stakeholders. Also the costs involved are considered to be high and as such the possibilities for small practices to consult them are, according to stakeholders, limited. A strong request is made by stakeholders for international, official, correct and costless PEP lists.

Questions with regard to "persons known to be close associates" are regularly identified. Stakeholders believe the definition is too wide.

The findings on compliance with existing PEPs obligations, should be considered as illustrative in relation to experienced difficulties rather than as conclusive evidence:

- A smaller number of stakeholders (mostly from the non-financial professions) indicated that **approval of senior management** is not required for establishing business relationships with PEPs. On the basis of the information received, it is not clear what the reasons for non-compliance are. The size of the practices i.e. the absence of different management levels could have an impact on the practical fulfilment of the requirement, the lack of detection of PEPs etc.

- Approval of senior management for maintaining the business relationship when someone becomes a PEP situations is not a requirement of the Directive[412] but is included in the FATF recommendations. Despite this, approximately half of the stakeholders confirmed that approval of senior management for maintaining the business relationship with existing customers that become PEPs is requested in practice.
- 52% of the stakeholders (most of them belonging to the financial sector) replied that they apply measures to establish the source of wealth and the source of funds involved. It is not possible to clearly identify the origin of the 'no' answers. Some stakeholders indicate 'no' to the general question but then confirm that they ask confirmations/declarations from their clients with regard to the source of wealth and funds. A number of stakeholders also indicate that due to the activities practised they do not encounter PEPs in their business.
- As to the methods used to establish the source of wealth and funds, confirmations/declarations from clients are most often used. On the basis of the information received confirmations from third parties are seldom obtained. Other evidence i.e. copies of documents evidencing the source of wealth and funds is sometimes used. In general, it is clear that this is an area where it is very difficult to obtain information.

### 5.2.10 – Issue 7: Enhanced CDD: international trade-related transactions

None of the Member States have explicitly identified (international) trade-related transactions as a high risk in their primary anti-money laundering legislation. However the majority of them have indicated that these kinds of transactions can be considered as high risk-transactions via the provisions transposing article 13(1) of the Directive if certain red-flag indicators are present.

A large number of covered entities, especially in the financial sector, and professional associations have implemented measures such as targeted training programs and internal procedures to deal with trade-based money laundering. With regard to the detection of money laundering, covered entities, in practice, mostly focus on the circumstances surrounding the transaction to determine if a transaction is suspicious as the nature of the goods involved can rarely be adequately verified due to insufficient knowledge regarding the nature of the underlying goods or lack of expertise. To combat terrorist financing, circumvention of sanctions or proliferation (financing) covered entities mostly rely on and screen against lists containing names of terrorists and countries and/or persons subject to sanctions.

### 5.2.11 – Issue : ECDD Anonymity

The majority of Member States explicitly state in their relevant national legislation that covered entities must have special attention for products and transactions require that might favour anonymity. The other Member States have implemented this requirement via the general rule that covered entities must have enhanced monitoring in place of transactions that might pose a higher risk of money laundering or terrorist financing.

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[412] We have not come across stricter national measures in that area.

The Member States stated that their national legislation requires that specific attention is paid to all products or transactions that might favour anonymity, regardless if old or new technology is used.

### 5.2.12 – Issue : Reliance on third parties

While the principle of third party reliance has been widely accepted by the Member States, limitations of the framework are in place in different countries. A number of non-financial professionals are in favour of a specific framework allowing them to rely to a further extent on the measures taken by other covered entities (i.e. specifically financial institutions). Allowing reasonable reliance could specifically help single practitioners.

### 5.2.13 – Issue 8: Reporting obligations: postponement of transactions

The legal framework of the postponement possibility can differ slightly. The two main systems are postponement or consent.

FIUs seem to have limited to no experience with cross border postponement or freezing orders.

Postponement/consent time differs significantly. Long postponement/consent times can cause difficulties for covered entities in their relationship with clients i.e. client complaints because of delays in services. This could possibly have an impact on the so called dead loss excuse (the fear of losing business by complying with AML rules. It is recommendable for all parties involved to keep postponement/consent times as short as possible.

The difference between postponement and freezing orders is largely experienced to be a legal difference rather than a practical one with the exception of disclosure and timing aspects.

### 5.2.14 – Issue 9: Protection of employees after reporting

It is clear that there is a large convergence between Member States with regard to the measures taken to protect employees after they make a suspicious transaction report. Although the measures are not in all legislations clearly indicated.

Not many incidents in relation to protection were reported. Many large entities have taken up the responsibility to ensure that their employees are sufficiently protected on the employer level. With regard to single practitioners measures are more difficult to develop. Given the close relationship of the single practitioner with the client, it is very difficult for them to implement additional safeguards to protect themselves.

There have been complaints with regard to breaches of confidentiality obligations at the level of authorities. Confidentiality is a concern for all covered entities but not in the least for casinos. This has led to awareness creating initiatives in some countries.

### 5.2.15 – Issue 10: Internal organisation: replies to FIUs and other authorities by credit and financial institutions

All the responding Member States have either explicitly or implicitly implemented the duty for financial and credit institutions to have systems in place to respond rapidly and fully to enquiries in

their national legislation. They have also ensured that the competent authorities have access to all the information they need to carry out their duties. These broad powers can however conflict with data protection obligations causing privacy issues for the covered entities involved.

A request for better coordination between EU AML and data protection directives has been expressed.

### 5.2.16 – Issue 11 + 5[413]: Penalties

In accordance with the provisions of the Directive all Member States have implemented a national penalty regime that can be applied in case of non-compliance with AML rules. All Member States have implemented administrative penalties and administrative measures. Additionally, twenty Member States have incorporated criminal sanctions in their national legislation.

The variety in national penalty regimes is so large that is not possible to compare penalties throughout all Member States.

Next to this national penalty regime of administrate and criminal sanctions and measures, most of the self-regulatory bodies with supervisory powers have indicated that disciplinary sanctions will be imposed in case of non-compliance with AML regulations.

Some stakeholders, mostly from the public sector, are of the opinion that the range of sanctions provided by the legal framework is sufficient and proportionate to the severity of the respective breaches. Other stakeholders, mostly from the private sector in Member States with criminal sanctions, have reported that the sanctions are disproportionate.

Several indications exist that the national penalty regime is applied in practice in most Member States. Nevertheless, exact (public available) numbers on the imposed sanctions are scarce upon today. The public availability of the number of imposed sanctions would be advisable. This would have the additional benefit of raising awareness amongst all stakeholders.

### 5.2.17 – Issue 12: Member States review of the effectiveness of their AML systems

All Member States perform a basic review of the effectiveness of their AML systems within the context of their AML annual reports and based on the collection of statistics. Some Member States keep additional statistics. These are used by the FATF in its Methodology for Assessing Compliance with the FATF Recommendations. As such they can be considered relevant for measuring the effectiveness of AML systems and their collection as best practice.

Other than statistics, it is however unclear if all Member States systematically conduct full, complete and comprehensive reviews of their AML systems that exceed the basic analysis of statistics.

Initiatives in that area are in being developed. The examples included in the report demonstrate that different Member States are working on approaches that will enable them to get a more in depth view on the effectiveness of measures taken.

This is recommendable as effectiveness cannot be measured through statistics alone.

[413] Of part 4 of the study.

### 5.2.18 – Issue 13: Supervision and monitoring

Each Member State has set up its own supervisory architecture for the financial institutions, the non-financial profession and the casinos. In some Member States supervision of all obliged entities is performed by one single supervisor. In other Member States a variety of supervisors is put in place. Within most Member States the self-regulatory bodies of non-financial professions act as supervisors.

With regard to financial institutions and casinos, the obligation in the Directive that supervisors must have enhanced supervisory powers, notably the possibility to conduct on-site inspections is put in place in all Member States. Regarding the supervision on non-financial professions, most Member States have opted for a monitoring on a risk-sensitive basis. Stakeholders have listed some of the risk criteria.

In view of increasing transparency with regard to the penalties and raise general awareness of AML regulation amongst obliged entities, regular meetings between the supervisors, the covered entities and the FIUs are recommendable.

## Specific examination of the impact of the AML Directive

### 5.2.19 – The extent of the problem

In order to draw detailed and in depth conclusions on the extent of the problem, access to detailed information is essential. One of the important findings of the examination is the lack of quantitative information and the limited qualitative information. This information gap has different reasons:

- The type of quantitative information (i.e. based on the four situations) does not exist;
- Qualitative information based on the four situations is limited;
- With regard to the content of qualitative information the following needs to be taken into account:
  - In order to perform the examination, the selection of available qualitative information needed to be categorised under the four situations while some of the cases contained techniques that could qualify for more than 1 situation.
  - Business related situations almost always appear in available information linked to corporate related situations.
  - The exact role of the gatekeepers is often not specified in the case studies.
- Few respondents gave detailed information with regard to the extent of the problem. Respondents were often not able to respond more in detail because they did not have information/relevant experience on/with regard to the subject (mostly the case with individual stakeholders), they were not to be able to give information because information is not kept on the basis of the relevant situations or they were not to be able to give information because of confidentiality reasons.

The FATG GTA report also comments on the difficulties of information gathering. It has experienced that the collection and assessment of reliable and quantitative data on current money laundering/terrorist financing threats is difficult. The FATF would welcome efforts to improve the amount and quality of data in order to gain a better understanding of the threats.

**Misuse of gatekeepers in general**: The desk research demonstrates in general that the misuse of gatekeepers happens. The gatekeepers' role is not new. It has been described since the late 1990's and appears consistently in reports. It should however be noted that there are different types of involvement of professionals (of which not all can be considered as misuse) i.e.:

- They can be involved in the criminal activity itself;
- They can become suspicious and terminate their services (with or without reporting to the FIU);
- They can unknowingly be involved and have no suspicion that criminal activity is occurring.

The recent FATF GTA report confirms the role of the gatekeeper and lists it as a general typology next to cash and bearer negotiable instruments, transfer of value, assets and stores of value and jurisdictional/environmental aspects.

Given the lack of quantitative information it is not possible to draw conclusions on the frequency with which gatekeepers are misused.

**With regard to the relevant situations:** Based on the desk research available (selection of case examples and confirmations in reports), one could deduce that money laundering methods related to real estate situations and corporate related situations are most common which would seem to indicate that they are the most attractive for money launderers. The anecdotal information obtained from stakeholders seems to point in the same direction. Arguments that could support this deduction are e.g. the large amounts involved in real estate transactions, the fact that in financial related transactions, financial institutions are always involved which increases the likelihood of detection. There is however no quantitative information available to substantiate this conclusion.

**With regard to the type of non-financial professions involved**: On the basis of the available information, it is not possible to conclude on the type of non-financial professionals that are misused in the four situations. In both real estate situations as corporate related situations different non-financial professionals can intervene (e.g. legal professions and real estate agents in real estate transactions, legal professions, accountants and tax advisors in corporate related situations). The above cases where gatekeepers are explicitly mentioned refer to the interventions of notaries, accountants, real estate agents and lawyers.

**Recommendations:**

- If the issue is to be further examined in the future access to additional information is necessary: It could be recommended to require additional statistics and typology information from the Member States (adapt art 33 of the directive);
- A clear view on the type of non-financial professionals involved, the frequency of their involvement and the type of their involvement requires additional research as to which professions intervene in the different transactions in the different Member States.

## 5.2.20 – Scope

All national implementing legislation of all Member States includes **at least the following non-financial professions**:

- Auditors, external accountants and tax advisors;
- Notaries (when existing in the concerned country) and independent legal professionals;
- Real estate agents.

Several Member States have extended the scope of the national implementing legislation to other professional categories. Also the drafting technique differs. In relation to non-financial professions, open ended and closed ended definitions are used.

We have not come across gaps in relation to the scope of the Directive with regard to non-financial professions. In relation to transposition in national law, it was concluded that Belgium, Hungary and Poland have not included the category of trust or company service providers.

A very large majority of stakeholders is of the opinion that there are no competitive advantages for lawyers compared to other non-financial professions as a result of the AML regime.

Not all Member States have opted to extend the "privileged information" exception to other professions than lawyers. Some stakeholders comment that lawyers are covered by the legal professional privilege in more circumstances than other professionals, even when providing the same services. This provides a marketing advantage with many clients who desire absolute confidentiality.

Some stricter measures have been set by Member States with regard to the activity based scope for notaries and independent professions.

Trying to get an overview of the existing AML guidance for non-financial professions has proven to be quite difficult. Guidance from a large number of stakeholders was still being drafted following recent transposition of the Directive. Existing guidance is often also not easily accessible. Updated guidance was often not available.

Next to the channelling role in some countries, the role of self-regulatory bodies consist in e.g. awareness creating, offering assistance with the drafting of procedures, advising members of their profession. An interesting example is the role of the Spanish OCP.

### 5.2.21 – Issue : CDD

The cost for IT solutions remains a problem for small practices and the solutions are often not adapted to the needs of the profession. This results in the fact that small practices often deal with CDD manually which can be a time consuming administrative practice.

Problems with CDD requirements were reported in situations where stakeholders are confronted with an international dimension.

Non-financial professions will rarely be the sole interveners in a transaction. When implementing their third party reliance regime, the Member States have clearly taken into account this need. This is evidenced by the fact that 22 Member States allow auditors, external accountants and tax advisors to use third party reliance. In addition 21 Member States allow the mechanism for independent legal professionals.

Furthermore in 26 Member States third party reliance is allowed across professions. Nevertheless stakeholders in most Member States have reported that non-financial professions do not often make use of the regime.

### 5.2.22 – Issue : Reporting issues

The number of reports made by the non-financial professions remains low, especially in comparison to the number of reports submitted by financial institutions.

Contrary to other Member States the reporting rates of financial and non-financial professions are somewhat balanced in the UK (because of the high reporting rate of solicitors and accountants), Lithuania (high reporting rate of notaries and company service providers), Romania (high reporting rate of legal professionals) and Spain (high reporting rate of notaries).

The reasons most cited for the lower reporting rate are difficulties in implementing the necessary CDD structures and procedures, lower number of suspicious transactions and lack of awareness and need for training. Trend differences exist e.g. higher reporting rate in UK.

In the opinion of lawyers, reporting obligations could interfere with the protection of the professional secrecy and consequently with the right to legal advice and assistance, as it might discourage people from consulting a lawyer. Certain aspects of the reporting duty have been decided upon in different court cases.

As mentioned above, a distinction should be made between lawyers' essential activities and activities which do not fall in the scope of lawyers' specific legal defense, representation in legal proceedings and legal advice. Only essential activities are covered by the professional secrecy. Information obtained in the exercise of such activities cannot be reported. The professional secrecy has a large scope. It does not only cover information received *during* legal proceedings, but also information obtained *before* or *after* proceedings. Professional secrecy also extends to legal advice. No clear definition of 'legal advice' is provided, which could lead to difficulties for lawyers to know the exact scope of their confidentiality duty. A clarification seems to be recommendable.

### 5.2.23 – The role of lawyers

This section of the study sets out the opinions of lawyers on their role in the AML/CFT system and the opinions of others on the lawyers' role. It is clear that opinions differ.

# 6. Annexes

## 6.1 – Annex 1: Glossary – List of abbreviations

| | |
|---|---|
| AML | Anti Money Laundering |
| AML Law - AML/CFT Law | Primary AML legislation of a Member State transposing the Directive (list of primary legislation included in annex 2) |
| CDD | Customer Due Diligence |
| Directive | 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 |
| EC | European Commission |
| FATF | Financial Action Task Force |
| FIU | Financial Intelligence Unit |
| Implementing Directive | Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of 'politically exposed person' and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis |
| MS | Member States |
| STR | Suspicious Transactions Report / Report on financial transactions |

## 6.2 – Annex 2: Overview of primary legislation[414]

### 1. EU Member States

| Country | Applicable primary legislation | Year of enactment | Last amended |
|---|---|---|---|
| Austria[415] | Banking Act<br><br>Insurance Supervision Act<br><br>Securities Supervision Act<br><br>Act on Payment Services<br><br>Trade Act<br><br>Gambling Law<br><br>Lawyer's Act<br><br>Notarial Code | | 2010<br><br>2010<br><br>2010<br><br>2010<br><br>2010<br><br>2010<br><br>2010<br><br>2010 |
| Belgium | Law on the preventing use of the Financial system for purpose of laundering money and financing of terrorism | 1993 | 2010 |
| Bulgaria | Law on the Measures against Money Laundering | 1998 | 2009 |
| Cyprus | Prevention and Suppression of Money Laundering and Terrorist Financing Law of 2007 | 2007 | 2010 |
| Czech Republic | Act No. 253/2008 Coll. on selected measures against legitimisation of proceeds of crime and financing of terrorism | 2008 | 2009 |
| Germany | Act on the Detection of Proceeds from Serious Crimes (Money Laundering Act) | 2008 | 2009 |
| Denmark | Act on Measures to Prevent Money Laundering and Financing of Terrorism<br>Gambling Casino Act | 2007<br><br>1990 | 2009<br><br>1993 |
| Estonia | Money Laundering and Terrorist Financing Prevention Act | 2007 | 2010 |
| Greece | Law 3691/2008 on prevention and suppression of money laundering and terrorist financing and other provisions | 2008 | N/A |
| Finland | Act on Preventing and Clearing Money Laundering and Terrorist Financing | 2008 | 2010 |
| France | Monetary and Financial Code | | 2010[416] |
| Hungary | Act CXXXVI of 2007 on the Prevention and Combating of Money Laundering and Terrorist Financing | 2007 | 2008 |
| Ireland | Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 | 2010 | N/A |
| Italy | Legislative Decree 231/2007 | 2007 | 2010 |

414 This overview represents the status of legislation on 11 November 2010.
415 In Austria AML/CFT provisions are contained in sector-specific legislation. The "Last amended" column refers to the provision of this legislation related to money-laundering.
416 Sections of the Monetary and Financial Code concerning AML/CFT

| | | | |
|---|---|---|---|
| Lithuania | Law No. VIII-275 on the Prevention of Money Laundering | 1997 | 2009 |
| Luxembourg | Law on the fight against money laundering and terrorist financing transposing Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering | 2004 | 2010 |
| Latvia | Law on the Prevention of Laundering the Proceeds from Criminal Activity (Money Laundering) and of Terrorist Financing | 2008 | 2009 |
| Malta | Prevention of Money Laundering Act | 1994 | 2008 |
| Netherlands | Anti-Money Laundering and Anti-Terrorist Financing Act | 2008 | 2009 |
| Poland | Act on counteracting money laundering and terrorism financing | 2000 | 2009 |
| Portugal | Law 25/2008 establishing the preventive and repressive measures for the combat against the laundering of benefits of illicit origin and terrorism financing,transposing into the domestic legal system Directive 2005/60/EC of the European Parliament and Council, of 26 October 2005, and Directive 2006/70/EC, of the Commission, of 01 August 2006, relating to the prevention of the use of the financial system and of the specially designated activities and professions for purposes of money laundering and terrorism financing, | 2008 | 2009 |
| Romania | Law No. 656 on prevention and sanctioning money laundering, as well as for setting up some measures for prevention and combating terrorism financing<br><br>Law No. 535 of 25 November 2004 on preventing and fighting terrorism | 2002<br><br>2004 | 2010<br><br>2004 |
| Slovakia | Act on the Prevention of Legalization of Proceeds of Criminal Activity and Terrorist Financing and on Amendments and Supplements to Certain Acts | 2008 | 2009 |
| Slovenia | Prevention of Money Laundering and Terrorist Financing Act | 2007 | 2010 |
| Spain | Prevention of Money Laundering and Terrorist Financing Act | 2010 | N/A |
| Sweden | Act on Measures against Money Laundering and Terrorist Financing | 2009 | 2010 |
| United Kingdom | The Money Laundering Regulations 2007 | 2007 | 2007 |

## 2. Selected Third Countries

| Country | Applicable primary legislation | Year of enactment | Last amended |
|---|---|---|---|
| Australia | Anti-Money Laundering and Counter-Terrorism Financing Act 2006 | 2006 | 2010 |
| South Africa | Financial Intelligence Centre Act | 2001 | 2008 |
| Switzerland | Federal Act on Combating Money Laundering in the Financial Sector | 1997 | 2009 |

## 6.3 – Annex 3: Selected issues related to the examination of the operation of the AML Directive

The **selected issues** are, in accordance with the Service Contract ETD/2009/IM/F2/90 the following:

- Scope: the question of the financial activity on an occasional and/or limited basis (application of Article 2(2) of the AML Directive and of Article 4 of its implementing measures). Have Member States made use of the possibilities of Article (2)(2) of the AML Directive (as specified in Article 4 of the implementing measures)? If so, in which circumstances is this exemption applied? Which are the conditions applying nationally (cf. Article 4(1) of the implementing measures)? How have Member States assessed the money laundering or terrorist financing risk (cf. Article 4(2) of the implementing measures)? How have Member States implemented Article 4(3) of the implementing measures? How are Member States monitoring the use of the exemption (cf. Article 4(4) of the implementing measures)?

- Scope: stricter national measures (application of Article 5 of the AML Directive). The examination should particularly include a mapping of the provisions adopted (or retained in force) by Member States and which are stricter than those foreseen by the Directive. The examination should assess which are the implications of the stricter measures for stakeholders, in particular for those operating in more than one Member State. When the AML Directive allows for options, the choice of a stricter option should not be considered as a stricter national measure pursuant to Article 5.

- CDD: the application of the risk-based approach by the covered entities (application of Article 8(2) of the AML Directive). How does national legislation deal with the risk-based approach concerning CDD? Has this resulted in a diminution of CDD requirements in national law and a corresponding increase of covered entities' responsibility? Do covered entities benefit from specific guidance in this regard? If so, has the FATF guidance been considered? Who has provided the guidance (e.g. governments, supervisory self-regulatory bodies, professional associations, etc.)? How do supervisors (cf. article 37) monitor the application of the risk-based approach by covered entities in the light of the last sentence of Article 8(2). Which is the impact of the risk-based approach from the FIUs perspective: has this resulted in better quality of reports? How is the risk-based approach perceived by the covered entities (as regards the non-financial professions see also below)? Is there a difference between the credit and financial institutions on the one side and the non-financial professions on the other side?

- CDD: the question of the beneficial owners (application of Articles 8(1) and 3(6)). How is the question of beneficial ownership dealt with in the national legislation? How does national legislation deal with legal entities and/or legal arrangements which are unknown in their national law (e.g. in countries where legislation does not allow for the creation of trusts, how are trusts treated if they become customer of a bank in that country?

  How are covered entities (as regards the non-financial professions, see also below) implementing the obligation to identify beneficial owners: do they exclusively rely on information provided by the customer itself? Which are the risk-based and adequate measures generally taken by covered entities to verify the identity of beneficial owners? Which are the adequate measures generally taken to understand the ownership and control structure of the customer? How do covered entities deal with legal entities and legal arrangements which are unknown in their national law? Are there particular difficulties for covered entities to be underlined? Which are the views of the public authorities, in particular supervisors and FIUs on how beneficial owners are identified (and verified) by covered entities? Which are the views of public authorities as regards the deterrent effect of these identification/verification requirements? Which are the views of the FIUs as regards the usefulness of these identification/verification requirements for FIUs investigations? Is there evidence supporting these views?

- Is the definition of beneficial owner in the AML Directive sufficiently clear? Is the scope of the definition of beneficial owner too wide, making therefore difficult to comply with the obligation? Should the obligation be tightened by establishing a lower threshold in Article 3(6): i.e. from 25% to 20% (cf. Article 43?)? What would be the consequences of such diminution?

- Simplified CDD (application of Article 11 of the AML Directive and Article 3 of the implementing measures). How does national legislation deal with simplified CDD? In which circumstances is simplified CDD authorised? How has Article 3 of the implementing measures been used by MS? Which customers, products and transactions have been considered to be of low risk? How Article 3(4) has been applied? How is the question of equivalence of third country rules treated in this context by Member States? Have white lists of equivalent third countries been established? For all cases of Article 11? What is the difference, in practice, for covered entities between simplified CDD pursuant to Article 11 of the AML Directive and Article 3 of the implementing measures on the one hand, and a low level of CDD resulting from the application of the risk-based approach to normal CDD (pursuant to Article 8(2)), on the other hand?

- Enhanced CDD: politically exposed persons – PEPs (application of Articles 13(4) and 3(8) of the AML Directive and Article 2 of the implementing measures). How does national legislation deal with domestic and non-domestic PEPs? How has the definition of PEP been implemented? Do national authorities provide any assistance to covered entities regarding identification of domestic and non-domestic PEPs? How the PEP issue is treated (regarding identification of PEPs, approval of initiation of business relationship with PEPs and monitoring of PEPs activities) by covered entities in practice? Is the purchase of list of PEPs from data vendors the only solution to PEP identification? How covered entities deal with existing customers that become PEPs later on? What do covered entities generally do when person are no longer entrusted with public functions? Are there different approaches between credit and financial institutions on the one hand and non-financial professions or casinos on the other hand? Do professional associations of covered entities or self-regulatory bodies provide any kind of assistance in this regard?
- Enhanced CDD: international trade-related transactions (application of Article 13(1) of the AML Directive). The FATF has identified trade-based money laundering (TBML) as a growing concern. Have Member States dealt with TBML in their national legislation transposing the AML Directive? In particular, are trade transactions considered to be of higher risk pursuant to Article 13(1) of the AML Directive? How are covered entities (in particular credit institutions) dealing with the question of trade transactions from the perspective of the monitoring of the business relation (Article 8(1) of the AML Directive)? Have credit institutions developed particular enhanced CDD measures or any expertise in this regard that allows them to identify trade transactions and monitor them with a view to discover TBML? Are these solutions of interest to discover trade transactions that could result in financing of terrorism? Also, are these solutions of interest to discover trade transactions that could result in illegal trading activity (such as proliferation of weapons of mass destruction)?
- Reporting obligations: postponement of transactions (application of Article 24 of the AML Directive). How has Article 24 of the AML Directive been transposed into national law? Are instructions given not to carry out transactions? By which authority? Which is the role of FIUs in this regard? Is this kind of measure effective from the perspective of FIUs or other authorities? Is there any objective evidence of this? Which is the border line between postponement orders and freezing orders in practice? How MS are dealing with request for postponement orders from other EU/EEA countries? Is this part of the FIU cooperation? How do covered entities deal with this situation? Are there differences between credit and financial institutions on the one side and non-financial professions on the other side? What is the perception of covered entities about the requirement in Article 24(1): useful or unnecessarily burdensome? Is the possibility provided for in Article 24(2) widely or rarely used?

- Protection of employees after reporting (application of Article 27 of the AML Directive). How has Article 27 been transposed into national legislation? Have specific measures related to AML reporting been taken (in addition to normal rules on protection of witnesses in criminal proceedings)? How is protection organised in practice by reporting entities? What do covered entities do in this regard? Are there differences between credit and financial institutions and casinos on the one hand, and non-financial professions on the other hand? Are there differences between large entities and single practitioners? How are single practitioners protected? Are there best practices in relation to protection of employees? What is the perception of stakeholders (such as trade unions)? Which is the experience of national authorities with the application of Article 27?

- Internal organisation: replies to FIUs and other authorities by credit and financial institutions (application of Article 32 of the AML Directive). How has Article 32 been transposed into national legislation? Which authorities have the right to ask for information? How are credit and financial institutions organised in practice to copy with the requirements of Article 32? Is the system used? How rapidly are replies provided? Are credit and financial institutions in a position to provide information not just on the account holder but also on the (where applicable) beneficial owner? Are there other tools at the disposal of public authorities, such as a centralised bank account registry?

  Penalties (application of Article 39 of the AML Directive). How has Article 39(1) of the AML Directive been transposed into national legislation? Which types of penalties are applied for failing to comply with the AML obligations in the national law transposing the AML Directive? Administrative sanctions, administrative measures, criminal sanctions? How has Article 39(2) of the AML Directive (in relation to credit and financial institutions) been transposed into national legislation? How has Article 39(3) and (4) of the AML Directive in relation to legal persons been transposed into national legislation? Are penalties foreseen in national legislation pursuant to Article 39 comparable across Member States? Are penalties applied in practice? In which cases have penalties been applied? Are the foreseen and applied penalties sufficiently dissuasive?

- Member States review of the effectiveness of their AML systems (application of article 33 of the AML Directive). Have Member States reviewed the effectiveness of their AML systems pursuant to the AML Directive? How MS define effectiveness? What are the methodologies used by MS to assess the effectiveness of their AML regime? Are they relevant? In doing so, what type of indicators MS use to assess the effectiveness of their AML regime? Are they relevant? Are there best practices that could be identified?

- Supervision and monitoring (application of Article 37 of the AML Directive). How has Article 37 of the AML Directive been transposed into national legislation? How is the supervision architecture in the Member States? Are the same authorities responsible for the supervision and monitoring of all covered entities? Are credit and financial institutions supervised differently than the non-financial professions or the casinos? How is Article 37(4) been transposed into national law and implemented in practice? Are self-regulatory bodies allowed to perform supervisory tasks? What are the differences in practice regarding normal monitoring pursuant Article 37(1) and enhanced supervision of credit and financial institutions and casinos pursuant to Article 37(3)? How are casinos supervised?

  Which are differences between supervision of land based casinos and on-line casinos? Which are the differences between the supervision of privately-owned casinos and publicly-owned casinos? Is supervision useful and effective? What do covered entities think?

In addition to the above required minimum selection of issues, the following supplementary issues were added in accordance with our proposal to the invitation to tender n° MARKT/2009/06/F:

- CDD: the question of anonymous accounts (art. 6 of the Directive) – member states shall prohibit their credit and financial institutions from keeping anonymous accounts or anonymous passbooks. The numbered accounts and accounts or passbook on fictitious names are allowed by Directive. Are these subjects of full CDD measures?
- CDD: the question of threshold (art.7 b) of the directive) – the institutions and persons covered by the Directive shall apply CDD measures when carrying out occasional transactions amounting to 15.000 EUR or more. Are transactions of 15.000 EUR covered?
- CDD: the question of casinos (Art.10 of the Directive) – member states shall require that all casino customers be identified and their identity verified if they purchase or exchange gambling chips with a value of 2.000 EUR or more. This is not required if they are identified at entry. The FATF R 16 stipulates that the identity of customer has to be established and verified when they engage in financial transactions equal to or above 3.000 EUR. The Directive transaction threshold is lower. In which situations customers of casinos have to be identified?
- Covered entities: the question of high value deals (art.2 (1) (3) (e) of the Directive) – the Directive applies to natural and legal persons trading in goods where payments are made in cash in an amount of 15.000 EUR or more. The scope of Directive it is broader than the application of FATF R 12. Is the national legislation covering the full scope of Directive or only natural and legal persons dealing in precious metals and precious stones?

- CDD: the question of third party reliance (Art. 15 of the Directive) - The Directive allows to rely for CDD performance on third parties from EU Member States or third countries under certain conditions and categorized by profession and qualified. What are the rules for procedures for reliance on third parties? Are their special conditions, categories etc.?
- CDD: the question of specific provisions concerning equivalent third countries (Art. 11, 16(1)(b), 28(4),(5) of the Directive) – the Directive provides specific provisions concerning countries which impose requirements equivalent to those laid down in the Directive (e.g. SCDD). How does the country address the issue of equivalent third countries?
- ECDD: anonymity (Art. 13 (6) of the Directive): The Directive requires ECDD in case of ML or TF threats that may arise from products or transactions that might favour anonymity, while FATF R8 scope is referring only to new or developing technologies that might favour anonymity. Is the national legislation focused on products or transactions regardless of the use of technology?

## 6.4 – Annex 4: Selected issues related to the specific examination of the impact of the AML Directive on identified non-financial professions

- The extent of the problem. The examination should describe the money laundering (and terrorist financing) typologies where non-financial professionals, in the exercise of their professional activities, are directly and indirectly involved, by examining the following situations:

  (a) Real estate situations: acting on behalf and for their client in real estate transactions; intermediation[417] in real estate transactions;

  (b) Business related situations: acting on behalf and for their client in the selling of business entities; intermediation[418] in selling of business entities;

  (c) Financial related situations: acting on behalf and for their client in financial transactions; intermediation[419] between clients and credit or financial institutions regarding management of clients' money, accounts and assets, or opening or management of bank, savings or securities accounts;

  (d) Corporate related situations: acting on behalf and for their client in corporate transactions related to the creation, operation and management of legal entities and trusts as well as the organisation of contributions necessary for the creation, operation or management of companies[420]; intermediation[421] in the creation of legal entities and trusts; intermediation[422] in the operation and management of legal entities and trusts; intermediation[423] in the organisation of contributions necessary for the creation, operation or management of companies.

  The examination should assess the attractiveness of these situations for money laundering (and terrorist financing), from the perspective of: ease to move money, to conceal property etc. For instance, the use of bearer shares, sleeping partners etc. could be considered. The focus should be on the infiltration of proceeds of crime in the financial system by using schemes involving the above situation.

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[417] Understood as encompassing the following: advising the client; intermediate between persons, or intervening in the transaction or formalising transactions.

[418] Understood as encompassing the following: advising the client; intermediate between persons, intervening in the transaction or formalising transactions.

[419] Understood as encompassing the following: advising the client; intermediate between persons, or intervening in the transaction.

[420] Including: acting as director or secretary of a company, a partner of a partnership or a similar position in relation to other legal persons; acting as trustee of an express trust or a similar legal arrangement; acting as nomineed shareholder for another person (other than a listed company).

[421] Understood as encompassing the following: advising the client; formalising transactions; forming companies or other legal persons;

[422] Understood as encompassing the following: advising the client; assisting in the execution of transactions; arranging for another person to act as a director or secretary of a company, a partner of a partnership or a similar position in relation to other legal persons; arranging for another person to act as a trustee of an express trust or similar legal arrangement; arranging for another person to act as a nominee shareholder for another person (other than a listed company).

[423] Understood as encompassing the following: advising the client and assisting in the execution of transactions.

The examination should include the identification and systematic presentation of cases before the national judiciary authorities and/or FIUs involving the type of situations described above[424].

The examination should consider the possibility that more than one type of non-financial profession could be involved in the same transaction concerning the situations described above (e.g. a lawyer and a notary).

- The impact of the AML Directive solution. The AML Directive extends the AML obligations that were developed for credit and financial institutions (e.g. know-your-customer and reporting to the FIUs about suspicious transactions) to the non-financial professions. The examination should assess: **(i)** how the AML Directive obligations for non-financial professions are transposed into national legislation and **(ii)** how the obligations are put into practice by the non-financial professions. The following **selected issues** are addressed:

  (a) Scope: Which are the non-financial professions covered at national level (e.g. the definition of independent legal professional is open-ended)? Following the coverage of "trust and company service providers" by the AML Directive, are there gaps regarding the coverage of professional intermediaries in the situations described above (i.e. possibility of money laundering displacement)?

  How do Member States deal with practitioners that are not registered within a professional body but actually providing similar services, is such practice prohibited? How are experts (liquidators) in bankruptcy/insolvency cases considered by national legislation? Are there comparative advantages for some non-financial professions compared to others as a result of the AML regime? Are obligations clear for notaries and independent legal professionals in relation to the scope of the AML measures? Is there an overlap between lawyers and trust and company service providers? Has there been a role of professional associations/self-regulatory bodies in providing guidance on the AML rules to their associates? Where has been guidance provided (e.g. mapping of the guidance)? Has there been a role of professional associations/self-regulatory bodies in providing other services to their associates (e.g. such as the Spanish notaries)?

[424] N.B. the question to be examined is not on whether "professionals" are guilty of money laundering offences (or, *mutatis mutandis*, terrorist financing) because they were involved in money laundering schemes but rather whether in money laundering cases real estate laundering schemes or corporate vehicles are systematically used – irrespective of whether professionals were prosecuted for money laundering.

(b) CDD: How are professionals dealing with CDD issues? Which are their specific problems, as opposed to general problems also applying to credit and financial institutions? For instance, professionals tend to have a different business (professional) relationship with clients than banks, usually based on irregular one-off transactions; also lawyers may have an established professional relation with a client outside the scope of application of the AML Directive but a particular transaction may be caught by the AML Directive at a later stage, how are those cases dealt with in practice? How small/single practitioners handle the CDD process? Is there a disproportionate effort between compliance with the CDD requirements and the time spent on providing the requested service (for instance one-off legal advise on a simple issue involving less than 1 hour work); Is reliance on third parties for CDD purposes more needed than in the case of financial institutions? How is it conducted in practice? When practiced, is reliance practiced within professions (e.g. lawyer to lawyer) or also across professions (e.g. lawyer to auditor)?

(c) Reporting issues: which are the reasons for the relatively low number of reports from non-financial professions compared to credit and financial institutions? Would this reflect the fact that they come across low numbers of suspicious transactions? Does this mean that they focus on the quality of reports? Which are the reasons for the different pattern in some countries (e.g. in the UK regarding lawyers)? Would higher numbers reflect defensive reporting by fear of sanctions? Which is the role of the self-regulatory bodies after the change in Directive 2005/60/EC which does not grant them a filtering role: do they provide advice to professionals before filing reports? Do they have a useful role in the reporting process? Is the obligation on reporting clear for lawyers following the ECJ decision in case C-305/05 – in which practical situations do they believe they should report? How do they perceive the extent of professional secrecy in the AML field compared to other sectors, such as tax area, antitrust/competition area? Which would be the impact of Article 8 of the European Convention on human rights following the decision of the European Court of Human Rights of 24.7.2008 on the André case? When providing legal advice in suspicious cases, where is the dividing line for lawyers regarding the provision of legal advice and being accomplice of money laundering?

(d) Supervision. Which is the role of professional associations and/or self regulatory bodies in supervision? Which is their added value compared to other kind of supervisors such as specialised agencies devoted to the supervision of a particular profession (e.g. NL regarding lawyers) or to general supervisors (FIUs in some countries)? If appointed as supervisors, how do self-regulatory bodies comply with paragraph 2 of Article 37 of the AML Directive (as referred to in paragraph 5 of Article 37)? How is Article 37(4) applied regarding the risk-based approach to supervision? What type of supervisory activity is conducted? Which are the decisions taken? Any sanctions?

(e) Penalties for non-compliance with the AML Directive. See above on part I for general issues. Specifically on non-financial professions, are there disciplinary sanctions applied by self-regulatory bodies for non-compliance with AML rules? Are they dissuasive? Useful? How are disciplinary sanctions for non-respect of the professional secrecy articulated with AML obligations? Which is the impact of the penalties foreseen by national legislation for non-compliance on the reporting levels by non-financial professions?

(f) Role of lawyers in the AML system. Specifically regarding lawyers, which is the impact of the rules on the client's access to law/legal advice? What is the perception of lawyers about their role in the AML/CFT system? What is the perception from other professions and from credit and financial institutions about the role of lawyers?

## 6.5 – Annex 5: List of respondents - Participants to the AML Study

### Online respondents[425]

| | |
|---|---|
| **FIU** | **22** |
| **Competent Authority** | **66** |
| Auditor | 5 |
| Casino | 3 |
| External Accountant | 1 |
| Financial Sector | 35 |
| Lawyer | 15 |
| Notary | 1 |
| Other independent legal professional | 1 |
| Real Estate | 3 |
| Tax Advisor | 1 |
| Trust & other company service provider | 1 |
| **Professional Association** | **82** |
| Auditor | 6 |
| Casino | 3 |
| External Accountant | 2 |
| Financial Sector | 36 |
| Lawyer | 15 |
| Notary | 6 |
| Other independent legal professional | 3 |
| Real Estate | 9 |
| Tax Advisor | 1 |
| **Individual Practitioner** | **173** |
| Auditor | 13 |
| Casino | 5 |
| Credit Institution | 34 |
| External Accountant | 2 |
| Insurance company | 5 |
| Investment Firm | 2 |
| Lawyer | 84 |
| Notary | 11 |
| Other financial institution | 4 |
| Other independent legal professional | 2 |
| Real Estate | 3 |
| Tax Advisor | 8 |
| Trust & other company service provider | 1 |
| **Grand Total** | **344** |

[425] Some of the online respondents have also cooperated further to the study by way of providing additional information through e-mail follow up questions and/or interviews.

## Other respondents[426]

| | |
|---|---|
| **FIU en policy makers** | **15** |
| **Competent Authority** | **11** |
| Financial Sector | 2 |
| Insurance Company | 1 |
| **Professional Association** | **10** |
| Auditor | 2 |
| Financial Sector | 2 |
| Lawyer | 3 |
| Notary | 2 |
| Tax Advisor | 1 |
| **Individual Stakeholder** | **31** |
| Auditor | 2 |
| Credit Institution | 13 |
| Insurance Company | 2 |
| Lawyer | 12 |
| Notary | 1 |
| Other financial institution | 1 |
| **Grand Total** | **66** |

[426] Respondents that have contributed in another way to the study e.g. by providing information, through interviews etc.

## 6.6 – Annex 6: Analysis Australia

| ISSUE N° | ISSUE | EC LEGISLATION | COUNTRY LEGISLATION | |
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| | | THIRD DIRECTIVE | PRIMARY (AML/CTF Act) | SECONDARY |
| 1 | **Scope**: | *Chapter 1, Art. 2*<br>1. This Directive shall apply to:<br>(1) Credit institutions;<br>(2) Financial institutions;<br>(3) The following legal or natural persons acting in the exercise of their professional activities:<br>(a) Auditors, external accountants and tax advisors;<br>(b) **Notaries and other independent legal professionals**, when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assessing in the planning or execution of transactions for their client [...]<br>(c) Trust or company service providers not already covered under points (a) or (b);<br>(d) Real estate agents;<br>(e) Other natural or legal persons trading in goods, only to the extent that payments are made in cash in an amount of EUR 15 000 or more, whether the transaction is executed in a single operation or in several operations which appear to be linked;<br>(f) Casinos. | The AML/CTF Act shall apply to reporting entities. A reporting entity is a financial institution, or other person, who provides designated services.<br><br>Designated services are listed in section 6.of the Act, among them financial services, bullion and gambling services. **At the moment lawyers are not generally obliged under these rules**, only in connection with financial transactions.<br><br>There are efforts to extend the AML/CTF Act (Second Tranche) to a range of services ordinarily provided by lawyers and other professionals.<br><br>**The first draft of the Second Tranche provides, that these professions should be added to the existing definitions of designated services** in section 6 of the AML/CTF Act:<br>• Replacement of Table 2 - Bullion, precious stones and precious jewellery<br>• Insert of Table 4 - Real Estate Services<br>• Insert of Table 5 - Professional services (making arrangements on behalf of a person or giving / directing tailored advice)<br>• Insert of Table 6 - Business services (acting as a special person for a person or a company, e.g. acting as a trustee) | |

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| **2** | **The application of CDD** | | | |
| | How are CDD regulations applied on non-financial professions? To what extent are your existing rules on CDD adapted to the nature and specificities of the non-financial professions?<br>What is the main difference between your local legislation and the Third AML Directive? | *Chapter 2, Art. 7*<br>The institutions and persons covered by this Directive shall apply customer due diligence measures in the following cases:<br>(a) When establishing a business relationship;<br>(b) When carrying out occasional transactions amounting to EUR 15 000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked;<br>(c) When there is a suspicion of money laundering or terrorist financing, regardless of any derogation, exemption or threshold;<br>(d) When there are doubts about the veracity or adequacy of previously obtained customer identification data. | *Part 2 Identification procedures (Simplified Outline):*<br>A reporting entity must carry out a procedure to **verify a customer's identity** before providing a designated service to the customer. However, in special cases, the procedure may be carried out after the provision of the designated service. (Division 2-5)<br><br>A reporting entity must carry out **ongoing customer due diligence** (Division 6).<br><br>A key feature of the Australian legislation is the focus on provision of designated services, as opposed to transactions or relationships. | *AML/CTF Rules, Chapter 15 Ongoing customer due diligence:*<br>contains requirements regarding ongoing CDD:<br>• KYC information<br>• Transaction monitoring program<br>• Enhanced customer due diligence program<br><br>*AML/CTF Rules, Chapter 15 Ongoing customer due diligence, Part 15.9*<br>The reporting entity must apply the enhanced customer due diligence program when:<br>(1) It determines under its risk based systems and controls that the ML/TF risk is high; or<br>(2) A suspicion has arisen for the purposes of section 41 of the AML/CTF Act.<br><br>*AML/CTF Rules, Chapter 4 , Part 4.1.3*<br>For the purposes of these Rules, in identifying its ML/TF risk a reporting entity must consider the risk posed by the following factors:<br>(1) Its customer types, including any *politically exposed persons;*<br>(2) The types of designated services it provides;<br>(3) The methods by which it delivers designated services; and<br>(4) The foreign jurisdictions with which it deals.<br><br>*AML/CTF Rules, Chapter 6, Part 6.3 Verification of the identity of pre commencement customers*<br>6.3.2 The reporting entity must, within 14 days commencing after the day on which the suspicious matter reporting obligation arose, take one or more of the actions specified below:<br>(1) Carry out the applicable customer identification procedure unless the reporting entity has previously carried out or been deemed to have carried out that procedure or a comparable procedure;<br>(2) Collect any KYC information in respect of the customer; or |

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| | | | | (3) Verify, from a reliable and independent source, certain KYC information that has been obtained in respect of the customer;<br>for the purpose of enabling the reporting entity to be reasonably satisfied that the customer is the person that he or she claims to be. |
| | | *Chapter 2, Art. 8*<br>1. Customer due diligence measures shall comprise:<br>(a) Identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source;<br>(b) Identifying, where applicable, the beneficial owner and taking risk-based and adequate measures to verify his identity so that the institution or person covered by this Direction is satisfied that it knows who the beneficial owner is, including, as regards legal persons, trusts and similar legal arrangements, taking risk-based and adequate measures to understand the ownership and control structure of the customer;<br>(c) Obtaining information on the purpose and intended nature of the business relationship;<br>(d) Conducting ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's or person's knowledge of the customer, the business and risk profile, including, where necessary, the source of funds and ensuring that the documents, data or information held are kept up-to-date. | *Part 7 Anti-money laundering and counter-terrorism financing programs (Simplified Outline):*<br>• A reporting entity must have and comply with an a**nti-money laundering and counter-terrorism financing program**.<br>• An anti-money laundering and counter-terrorism financing program is divided into Part A (general) and Part B (customer identification).<br>• Part A of an anti-money laundering and counter-terrorism financing program is designed to identify, mitigate and manage the risk a reporting entity may reasonably face that the provision by the reporting entity of designated services at or through a permanent establishment of the entity in Australia might (whether inadvertently or otherwise) involve or facilitate:<br>(a) money laundering; or<br>(b) financing of terrorism.<br>• Part B of an anti-money laundering and counter-terrorism financing program sets out the applicable customer identification procedures for customers of the reporting entity. | *AML/CTF Rules, Chapter 4 Applicable customer identification procedure and Verification:*<br>contains the requirements with which Part B of the AML/CTF program must comply, including which KYC information at minimum are to be obtained and how they are to verified in respect of the kinds of customer:<br>(1) Individuals – Part 4.2 of these Rules;<br>(2) Companies – Part 4.3 of these Rules;<br>(3) Customers who act in the capacity of a trustee of a trust – Part 4.4 of these Rules;<br>(4) Customers who act in the capacity of a member of a partnership – Part 4.5 of these Rules;<br>(5) Incorporated or unincorporated associations – Part 4.6 of these Rules;<br>(6) Registered co-operatives – Part 4.7 of these Rules;<br>(7) Government bodies – Part 4.8 of these Rules. |

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| | | *Chapter 2, Art. 8, Para 2 states that the institutions and persons may determine the extent of customer due diligence measures set out in para 1 on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction* | *Part 10 - Record-keeping requirements (Simplified Outline):*<br>• The AML/CTF Rules may provide that a reporting entity must make a **record of a designated service**. The reporting entity must retain the record for 7 years.<br>• If a customer of a reporting entity gives the reporting entity **a document relating to the provision of a designated service,** the reporting entity must retain the document for 7 years.<br>• A reporting entity must retain a **record of an applicable customer identification procedure** for 7 years after the end of the reporting entity's relationship with the relevant customer.<br>• A reporting entity must retain a c**opy of its anti-money laundering and counter-terrorism financing program**. | *AML/CTF Rules, Chapter 8 and 9, Part A of a standard /joint anti-money laundering and counter-terrorism financing (AML/CTF) program:*<br>contain requirements regarding Part A of the standard / joint AML/CTF program |
| | | *Chapter 2, Art. 9, Para 1*<br>Member States shall require that the verification of the identity of the customer and the beneficial owner takes place before the establishment of a business relationship or the carrying-out of the transaction.<br><br>*Art. 9, Para 2-4 describe variations which are possible.* | See above (Part 2 of AML/CTF Act) | |
| | | *Chapter 2, Art. 11 lists cases for simplified customer due diligence (for instance if the customer is a credit or financial institution)* | | |
| | | *Chapter 2, Art. 13 lists cases for enhanced customer due diligence (in situations which by their nature can present a higher risk of money laundering or terrorist financing)* | | |

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| **3** | **The duplication issue** | | | |
| | Who is obliged to perform the CDD according to the AML Act in case that non-financial professionals from different categories are involved in the same transaction (e.g. a lawyer or real estate agent **and** a notary in the case of real estate transactions)? | *Chapter 2, Section 4 "Performance by third parties"*<br>*Art. 14*<br>*Member States may permit the institutions and persons covered by this Directive to rely on third parties to meet the same requirements. However, the ultimate responsibility for meeting those requirements shall remain with the institution or person covered by this Directive which relies on the third party.*<br><br>*Art. 15*<br>*Where a Member State permits*<br>• *Credit and financial institutions referred to in Article 2(1)(1) or (2)*<br>• *Currency exchange offices and money transmission or remittance offices referred to in Article 3(2)(a)*<br>• *Persons referred to in Article 2(1)(3)(a) to (c)*<br>*situated in its territory to be relied on as a third party domestically, that Member State shall in any case permit to recognise and accept the outcome of the customer due diligence requirements carried out in accordance with this Directive by a certain institution or person (covered by this Directive) in another Member State and meeting the requirements laid down in Articles 16 and 18, even if the documents or data on which these requirements have been based are different to those required in the Member State to which the customer is being referred.*<br><br>*Art. 16*<br>*For the purposes of this Section, 'third parties' shall mean institutions and persons who are listed in Article 2, or equivalent institutions and persons situated in a third country, if they meet certain requirements (mandatory professional registration;* | *Part 2 Division 7 Section 38 Applicable customer identification procedures deemed to be carried out by a reporting entity:*<br>"If ...the customer is or becomes a customer to whom another reporting entity provides, or proposes to provide, a designated service… has effect as if the applicable customer identification procedure had also been carried out in respect of the customer by the other reporting entity." | *AML/CTF Rules, Chapter 7, Part 7.2 Licensed financial advisers:*<br>"… the first reporting entity making arrangements for the customer to receive a designated service from the second reporting entity… the second reporting entity has obtained a copy of the record… the second reporting entity has determined that it is appropriate for it to rely upon the applicable customer identification procedure carried out by the first reporting entity having regard to the ML/TF risk faced by the second reporting entity relevant to the provision of the designated service to the customer." |

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| | | *compliance with CDD and record keeping requirements of this Directive or equivalent requirements).*<br><br>*<u>Art. 17</u>*<br>*Where the Commission adopts a decision pursuant to Article 40(4), Member States shall prohibit the institutions and persons covered by this Directive from relying on third parties from the third country concerned to meet the CDD requirements.*<br><br>*<u>Art. 18</u>*<br>*Third parties shall make information requested in accordance with the requirements immediately available (relevant copies of identification and verification data and other relevant documentation on the identity of the customer or the beneficial owner).*<br><br>*<u>Art. 19</u>*<br>*This Section shall not apply to outsourcing or agency relationships where the outsourcing service provider or agent is to be regarded as part of the institution or person covered by this Directive.* | | |
| | | | | *<u>AML/CTF Rules, Chapter 7, Part 7.3 Designated business groups</u>*<br>Both reporting entities must be a member of the same designated business groups (a group of 2 or more persons, each member has elected, in writing, to be a member of this group and is no member of another designated business group).<br>"The second reporting entity has obtained a copy of the record from the first reporting entity and has determined that it is appropriate for it to rely upon the applicable customer identification procedure carried out by the first reporting entity having regard to the ML/TF risk faced by the second reporting entity relevant to the provision of the designated service to the customer." |

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| | **To what extent are non-financial professions (intervening in the same transaction) subject to the same AML obligations?** | | | |
| | If they are not subject to the same AML obligations (e.g. notaries and credit institutions have a reporting obligation and lawyers only have a duty to reply to the FIU if asked), what kind of solutions are installed or common? | | | |
| | Is there a special rule/regulation on reliance on third parties for CDD purposes in your country? If yes, does an assessment exist how dissuasive this regulation is for potential money launderers? | | *Part 2 Division 7 Section 37 Applicable customer identification procedures may be carried out by an agent of a reporting entity:* The applicable customer identification procedure may be carried out by an agent of a reporting entity (authorized by the reporting entity). | |
| | | | *Part 2 Division 7 Section 38 Applicable customer identification procedures deemed to be carried out by a reporting entity:* The applicable customer identification procedure may be carried out by another reporting entity (which has already verified the customers' identity). | See above: *AML/CTF Rules, Chapter 7, Part 7.2 Licensed financial advisers* |
| | | | | See above: *AML/CTF Rules, Chapter 7 Part 7.3 Designated business groups* |

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| **4** | **The reporting issue** | | | |
| | Is there an obligation for non-financial professionals to report on suspicious transactions? | *Chapter III, Art. 22, Para 1*<br>Member States shall require the institutions and persons covered by this Directive, […], to cooperate fully:<br>(a) by promptly informing the FIU, on their own initiative, where the institution or person covered by this Directive knows, suspect or has reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted;<br>(b) By promptly furnishing the FIU, at its request, with all necessary information, in accordance with the procedures established by the applicable legislation.<br><br>*Chapter III, Art. 23, Para 1*<br>By way of derogation from Article 22(1), Member States may, in the case of the persons referred to in Article 2(1)(3)(a) and (b), designate an appropriate self-regulatory body of the profession concerned as the authority to be informed in the first instance in place of the FIU. [...] | *Part 3 Reporting obligations (Simplified Outline):*<br>A reporting entity must give the AUSTRAC CEO **reports about suspicious matters** (Division 2).<br>If a reporting entity provides a designated service that involves a **threshold transaction**, the reporting entity must give the AUSTRAC CEO a report about the transaction (Division 3).<br>If a person sends or receives an i**nternational funds transfer instruction**, the person must give the AUSTRAC CEO a report about the instruction (Division 4).<br>A reporting entity may be required to give AML/CTF **compliance reports** to the AUSTRAC CEO (Division 5).<br><br>Also note there are timeframes for reporting:<br>TTRs - within 10 business days from the transaction,<br>SMRs - within 24 hours from when the suspicion is formed if the offences relates to terrorism financing, or within 3 business days from when the suspicion is formed for all other offences. | *AML/CTF Rules, Chapter 18 Reportable details for suspicious matters:*<br>contains reportable details for suspicious matters |
| | How extensive is the obligation for non-financial professionals to report on suspicious transactions (e.g. is the obligation of non-financial professionals lower compared to the obligation of credit and financial institutions)? | *Chapter III, Art. 23, Para 2*<br>Member States shall not be obliged to apply the obligations laid down in Article 22(1) to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings. | | |

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| | Are non-financial professionals obliged to report on suspicious transactions in case they are not involved in the financial transactions for their clients but act as an advisor for these clients? | *Chapter III, Art. 23, Para 2*<br>see above | *Part 3 Division 2 Section 41 Reports of suspicious matters:*<br>Contains suspicious matter reporting obligation, the wording used is "…suspects of reasonable grounds .. that the provision … of the service… may be relevant…" | |
| | Are all non-financial professionals obliged to report on suspicious transactions or do only some of them have the obligation to report (e.g. legal professionals)? | *Chapter III, Art. 23, Para 2*<br>see above | | |
| | In case that non-financial professionals are not obliged to report on suspicious transactions, what is the role of those professionals in the AML field? What is the contribution of those professionals to the prevention of money laundering and terrorist financing? | | | |
| | In case there are CDD and record keeping obligations for non-financial professions together with the obligation to reply to FIU queries (without the obligation to report on suspicious transactions) is this regulation of sufficient deterrent value? | | | |

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| **5** | **The possible application of enhanced CDD by credit and financial institutions to non-financial professions.** | | | |
| | Which is the perception of risk by credit and financial institutions when non-financial professionals are involved in financial transactions (e.g. checks were previously applied by non-financial professionals too)? Do credit and financial institutions consider those situations as representing a low risk of money laundering and terrorist financing? | | | |
| | Are credit and financial institutions required to apply enhanced CDD to customers represented by or manifestly advised by non-financial professionals? | | | *AML/CTF Rules, Chapter 15 Ongoing customer due diligence:*<br>Section 15(9) The reporting entity must apply the enhanced customer due diligence program when:<br>(1) it determines under its risk-based systems and controls that the ML/TF risk is high; or<br>(2) A suspicion has arisen for the purposes of section 41 of the AML/CTF Act. |
| | Do credit and financial institutions perceive financial transactions involving non-financial professionals or customers advised by those professionals as high risk because of the more sophisticated nature of these activities? Are in these cases enhanced CDD procedures required by financial institutions (maybe to mitigate risk in case non-financial professions have no reporting obligation)? | | | |

## Summary:

In summary, it is unclear when Tranche 2 will be rolled out and what obligations it will impose. A number of submissions have been received from industry, including the legal, accounting professions, super funds and real estate. A number of submissions feel that a one-size fits all approach to compliance is unworkable. And extending existing obligations to Tranche 2 services would be too onerous a compliance burden. Instead, specific provisions and obligations should be implemented for these services which are manageable and will be of value for the regulator.

## 6.7 – Annex 7: Analysis South-Africa

| ISSUE N° | ISSUE | EU LEGISLATION | COUNTRY LEGISLATION | |
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| | | THIRD DIRECTIVE | PRIMARY (FIC Act) | SECONDARY |
| **1** | **Scope** | *Chapter 1, Art. 2*<br>1. This Directive shall apply to:<br>(1) credit institutions;<br>(2) financial institutions;<br>(3) the following legal or natural persons acting in the exercise of their professional activities:<br>(a) auditors, external accountants and tax advisors;<br>(b) **notaries and other independent legal professionals**, when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assessing in the planning or execution of transactions for their client [...]<br>(c) trust or company service providers not already covered under points (a) or (b);<br>(d) real estate agents;<br>(e) other natural or legal persons trading in goods, only to the extent that payments are made in cash in an amount of EUR 15 000 or more, whether the transaction is executed in a single operation or in several operations which appear to be linked;<br>(f) casinos. | *Schedule 1 List of accountable Institutions (summary)*<br>*Non-Financial businesses:*<br>• **Attorneys (as defined in the Attorneys Act, 1979)**<br>• Board of executors and trust companies<br>• Estate agents<br>• Insurance and investment providers<br>• Investment advisers, public accountants<br>• Gambling institutions<br><br>*Financial businesses*<br>• Financial instrument traders<br>• Management companies (registered in terms of the Unit Trusts Control Act)<br>• Banks, mutual banks, credit institutions, Postbank<br>• Foreign-exchange brokers,<br>• Persons who issue, sell or redeem travellers' cheques, money orders or similar instruments<br>• Members of a stock exchange<br>• Ithala Development Finance Corporation Limited<br>• Money remitters<br>• Persons approved by Registrar of Stock Exchanges or the Registrar of Financial Markets | |

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| **2** | **The application of CDD** | | | |
| | How are CDD regulations applied on non-financial professions? To what extent are your existing rules on CDD adapted to the nature and specificities of the non-financial professions?<br>What is the main difference between your local legislation and the Third AML Directive? | *Chapter 2, Art. 7*<br>The institutions and persons covered by this Directive shall apply customer due diligence measures in the following cases:<br>(a) When establishing a business relationship;<br>(b) When carrying out occasional transactions amounting to EUR 15 000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked;<br>(c) When there is a suspicion of money laundering or terrorist financing, regardless of any derogation, exemption or threshold;<br>(d) When there are doubts about the veracity or adequacy of previously obtained customer identification data. | *Chapter 3, Part 1, Sec. 21: Identification of clients and other persons*<br>(1) An accountable institution may not establish a business relationship or conclude a single transaction with a client unless the institution has taken the prescribed steps:<br>(a) To establish and verify the identity of the client;<br>(b) If the client is acting on behalf of another person, to establish and verify:<br>• The identity of that person; and<br>• The clients authority to establish the business relationship or to conclude the single transaction on behalf of that other person<br>(c) If another person is acting on behalf of the client, to establish and verify:<br>• The identity of that person; and<br>• That other person's authority to act on behalf of the client.<br>are established and verified.<br><br>(2) ... | *MLTFC: Chapter1 (**Regulations 2-19**) Establishment and verification of Identity:*<br>*Regulations contain requirements, which information are to be obtained and how they are to be verified regarding*<br>• *Natural Persons (Part 2)*<br>• *Legal Persons (Part 3)*<br>• *Partnerships (Part 4)*<br>• *Trusts (Part 5)*<br><br>*MLTFC Chapter 3, **Regulation 21**: Information to identify proceeds of unlawful and money laundering activities* (with regard to Art. 7 (d) of the Third Directive):<br>(1) An accountable institution must, in the circumstances referred to in sub regulation (2), obtain the information referred to in sub regulation (3) from or in respect of:<br>(a) a client who has established a business relationship or concludes a single transaction; or<br>(b) a prospective client seeking to establish a business relationship or conclude a single transaction.<br>(2) An accountable institution must obtain the information referred to in sub regulation (3) whenever it is reasonably necessary, taking into account any guidance notes concerning the verification of identities or the reporting of suspicious and unusual transactions which may apply to that institution, with a view to obtain additional information:<br>(a) concerning a business relationship or single transaction which poses a particularly high risk of facilitating money laundering activities; or<br>(b) to enable the accountable institution to identify the proceeds of unlawful activity or money laundering activities. |

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| | | | | (3) The information which an accountable institution must obtain in the circumstances referred to in sub regulation (2) must be adequate to reasonably enable the institution to determine whether transactions involving a client referred in sub regulation (1) are consistent with the institution's knowledge of that client and that client's business activities and must include particulars concerning:<br>(a) the source of that client's income; and<br>(b) the source of the funds which that client expects to use in concluding the single transaction or transactions in the course of the business relationship.<br><br>*MLTFC* ***Regulation 19****:*<br>contains requirements regarding ongoing CDD |
| | | *Chapter 2, Art. 8*<br>1. Customer due diligence measures shall comprise:<br>(a) Identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source;<br>(b) Identifying, where applicable, the beneficial owner and taking risk-based and adequate measures to verify his identity so that the institution or person covered by this Direction is satisfied that it knows who the beneficial owner is, including, as regards legal persons, trusts and similar legal arrangements, taking risk-based and adequate measures to understand the ownership and control structure of the customer;<br>(c) Obtaining information on the purpose and intended nature of the business relationship; | *Chapter 3, Part 4 (Measures to promote compliance by accountable institutions), Section 43: Training and Monitoring of Compliance* (with regard to Art. 8 (d) of the Third Directive):<br>An accountable institution must:<br>(a) …<br>(b) appoint a person with the responsibility to ensure compliance by:<br>(i) the employees of the accountable institution with the provisions of this Act and the internal rules applicable to them; and<br>(ii) The accountable institution with its obligation under this Act. | EXEMPTIONS according to Part 4, **Sec. 10**:<br>Exemptions from Parts 1 and 2 of Chapter 3 of Act 38 of 2001<br>(1) Attorneys (in respect of those functions) are exempted "from compliance with the provisions of Parts 1 and 2 of Chapter 3 of the Act in respect of every business relationship or single transaction except for a business relationship or single transaction in terms of which<br>(a) a client is assisted in the planning or execution of<br>(i) The buying or selling of immovable property;<br>(ii) The buying or selling of any business undertaking;<br>(iii) The opening or management of a bank, investment or securities account;<br>(iv) The organisation of contributions necessary for the creation, operation or management of a company or close corporation or of a similar structure outside the Republic;<br>(v) The creation, operation or management of a company or close corporation or of a similar structure outside the Republic; |

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| | | (d) Conducting ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's or person's knowledge of the customer, the business and risk profile, including, where necessary, the source of funds and ensuring that the documents, data or information held are kept up-to-date. | | (vi) The creation, operation or management of a trust or of a similar structure outside the Republic, except for a trust established by virtue of a testamentary writing or court order<br>(b) A client is assisted in disposing of, transferring, receiving, retaining, maintaining control of or in any way managing any property<br>(c) A client is assisted in the management of any investment;<br>(d) A client is represented in any financial or real estate transaction<br>(e) A client deposits, over a period of twelve months, an amount of R100 000 or more with the institution in respect of attorney's fees which may be incurred in the course of litigation."<br><br>*MLTFC **Regulation 18**: Verification in absence of contact person*<br>If an accountable institution obtains information in term of these regulations about a natural or legal person, partnership or trust without contact in person with that natural person, or with a representative of that legal person or trust, the institution must take reasonable steps to establish the existence or to establish or verify the identity of that natural or count legal person, partnership or trust, taking into account any guidance notes concerning the verification of identities which may apply to that institution.<br><br>With regard to Chapter 2, Art. 8 (c) of the Third Directive:<br>(A) Please refer to our comments under Regulation 21 above.<br>(B) *MLTFC **Regulation 17**:* Additional requirements when person act on authority of another |

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| | | | | (1) when a natural person seeking to establish a business relationship or to conclude a single transaction with and accountable institution on behalf of another natural person, a legal person or a trust, the institution must, in addition to the other steps as may be applicable in terms of regulations 3 to 16, obtain from that person information which provides proof of that person's authority to act on behalf of that other natural person, legal person or trust, taking into account any guidance notes concerning the verification of identities which may apply to that institution.<br><br>With regard to Chapter 2, Art. 8 (d) of the Third Directive:<br>*MLTFC **Regulation 19**: Accountable institution maintain correctness of particulars:*<br>An accountable institution must take reasonable steps, taking account any guidance notes concerning the verification of identities which may apply to that institution, in respect of an existing business relationship, to maintain the correctness of particulars which are susceptible to change and are provided to it under this Chapter.<br><br>Exemption 18: "Exemptions do not apply in case of suspicious and unusual transactions" |
| | | *Chapter 2, Art. 8, Para 2 states that the institutions and persons may determine the extent of customer due diligence measures set out in para 1 on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction* | | EXEMPTIONS, Part 1, **Sec. 3** (Exemption from Parts 1, 2 and 4 of Chapter 3 of Act 38 of 2001):<br>Every natural person who performs the functions of an accountable institution ... in a partnership with another natural person, or in a company or close corporation is exempted from the provisions or Parts 1, 2 an 4 of Chapter 3 of the Act subject to the condition that those provisions are complied with by another person employed by the partnership, company or close corporation in which he or she practises. |

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| | | *Chapter 2, Art. 9, Para 1*<br>Member States shall require that the verification of the identity of the customer and the beneficial owner takes place before the establishment of a business relationship or the carrying-out of the transaction.<br><br>*Art. 9, Para 2-4 describe variations which are possible.* | | EXEMPTIONS, according to Part 1, Sec. 5 (Exemption from verification obligations under section 21 of the Act):<br>If the client is situated in a country where the AML regulations and supervision of compliance is equivalent to that of the accountable institution and a person or institution of this country confirms in written that the identity of the client is verified and that all documents obtained will be forwarded, the accountable institution is exempted from the duty to identify Clients. |
| | | *Chapter 2, Art. 11 lists cases for simplified customer due diligence (for instance if the customer is a credit or financial institution)* | | EXEMPTIONS, according to Part 1, Sec. 6 (Exemption from regulations made under Act 38 of 2001):<br>(1) Every accountable institution is exempted from some obligations (information, verification or record duties), in respect of a business relationship established or single transaction concluded with a public company the securities of which are listed on a stock exchange recognized for this purpose (listed in Schedule to these exemptions).<br>(2) Every accountable institution is exempted from some (partly further) obligations concerning the particulars referred to in those regulations. |
| | | *Chapter 2, Art. 13 lists cases for enhanced customer due diligence (in situations which by their nature can present a higher risk of money laundering or terrorist financing)* | | |

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| **3** | **The duplication issue** | | | |
| | Who is obliged to perform the CDD according to the AML Act in case that non-financial professionals from different categories are involved in the same transaction (e.g. a lawyer or real estate agent **and** a notary in the case of real estate transactions)? | *Chapter 2, Section 4 "Performance by third parties"*<br>*Art. 14*<br>*Member States may permit the institutions and persons covered by this Directive to rely on third parties to meet the same requirements. However, the ultimate responsibility for meeting those requirements shall remain with the institution or person covered by this Directive which relies on the third party.*<br><br>*Art. 15*<br>*Where a Member State permits*<br>• *Credit and financial institutions referred to in Article 2(1)(1) or (2)*<br>• *Currency exchange offices and money transmission or remittance offices referred to in Article 3(2)(a)*<br>• *Persons referred to in Article 2(1)(3)(a) to (c)*<br>*situated in its territory to be relied on as a third party domestically, that Member State shall in any case permit to recognise and accept the outcome of the customer due diligence requirements carried out in accordance with this Directive by a certain institution or person (covered by this Directive) in another Member State and meeting the requirements laid down in Articles 16 and 18, even if the documents or data on which these requirements have been based are different to those required in the Member State to which the customer is being referred.* | | EXEMPTIONS, according to Part 1, Sec. 4 (Exemption from section 21 and 22 of the Act 38 of 2001):<br>The second accountable institution is exempted from the CDD regulations if **the primary accountable institution** confirms in writing<br>• That either it has established and verified the identity of the client or<br>• That on the basis on their internal rules and procedures the identity of every client is established and verified. |

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| | | *Art. 16*<br>*For the purposes of this Section, 'third parties' shall mean institutions and persons who are listed in Article 2, or equivalent institutions and persons situated in a third country, if they meet certain requirements (mandatory professional registration; compliance with CDD and record keeping requirements of this Directive or equivalent requirements).*<br><br>*Art. 17*<br>*Where the Commission adopts a decision pursuant to Article 40(4), Member States shall prohibit the institutions and persons covered by this Directive from relying on third parties from the third country concerned to meet the CDD requirements.*<br><br>*Art. 18*<br>*Third parties shall make information requested in accordance with the requirements immediately available (relevant copies of identification and verification data and other relevant documentation on the identity of the customer or the beneficial owner).*<br><br>*Art. 19*<br>*This Section shall not apply to outsourcing or agency relationships where the outsourcing service provider or agent is to be regarded as part of the institution or person covered by this Directive.* | | |
| | **To what extent are non-financial professions (intervening in the same transaction) subject to the same AML obligations?** | | | |

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| | If they are not subject to the same AML obligations (e.g. notaries and credit institutions have a reporting obligation and lawyers only have a duty to reply to the FIU if asked), what kind of solutions are installed or common? | | | |
| | Is there a special rule/regulation on reliance on third parties for CDD purposes in your country? If yes, does an assessment exist how dissuasive this regulation is for potential money launderers? | | | See above, EXEMPTIONS, according to Part 1, Sec. 4 |
| **4** | **The reporting issue** | | | |
| | Is there an obligation for non-financial professionals to report on suspicious transactions? | *Chapter III, Art. 22, Para 1*<br>Member States shall require the institutions and persons covered by this Directive, […], to cooperate fully:<br>(a) by promptly informing the FIU, on their own initiative, where the institution or person covered by this Directive knows, suspect or has reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted;<br>(b) By promptly furnishing the FIU, at its request, with all necessary information, in accordance with the procedures established by the applicable legislation.<br><br>*Chapter III, Art. 23, Para 1*<br>By way of derogation from Article 22(1), Member States may, in the case of the persons referred to in Article 2(1)(3)(a) and (b), designate an appropriate self-regulatory body of the profession concerned as the authority to be informed in the first instance in place of the FIU. [...] | *Chapter 3, Part 3, Sec. 27: Accountable institutions to advise Centre of clients*<br>If an authorised representative of the Centre requests an accountable institution to advise whether-<br>(a) A specified person is or has been a client of the accountable institution;<br>(b) A specified person is acting or has acted on behalf of any client of the accountable institution; or<br>(c) A client of the accountable institution is acting or has acted for a specified person,<br>the accountable institution must inform the Centre accordingly. | *MLTFC Chapter 4: Reporting Of Suspicious and Unusual Transaction:*<br>contains requirements about<br>• Manner of reporting (Regulation 22)<br>• Information to be reported (Regulation 22 and 23)<br>• Period for reporting (Regulation 24) |

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| | | | *According to Chapter 3, Part 3, Sec. 28: Cash transactions above prescribed limit, 28A: Property associated with terrorist and related activities*<br>An accountable institution must report to the Centre,<br>• If an amount of cash in excess of the **prescribed amount** is paid to or is received from the customer,<br>• If it has in its possession or under its control **property** owned or controlled by or on behalf of, or at the direction of any entity which has committed, or attempted to commit, or facilitated the commission **of a specified offence** or which is identified in a notice issued by the President | |
| | | | *According to Chapter 3, Part 3, Sec. 29: Suspicious and unusual transactions*<br>A person who **manages a business or is employed by the business** and knows or have to know that the business is involved or enquired in suspicious and unusual transaction(defined in this section 29) must report it to the Centre (grounds for the knowledge and the prescribed particulars concerning the transaction). | |
| | | | *Chapter 3, Part 3, Sec. 30: Conveyance of cash to or from Republic*<br>"A person intending **to convey an amount of cash in excess of the prescribed amount** to or from the Republic … must report … to a person authorised by the Minister for this purpose." | |

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| | | | *According to Chapter 3, Part 3, Sec. 31: Electronic transfers of money to or from Republic*<br>An accountable institution must report to the Centre if it through electronic transfer sends out or receives **money in excess of a prescribed amount** from outside the Republic. | |
| | How extensive is the obligation for non-financial professionals to report on suspicious transactions (e.g. is the obligation of non-financial professionals lower compared to the obligation of credit and financial institutions)? | *Chapter III, Art. 23, Para 2*<br>Member States shall not be obliged to apply the obligations laid down in Article 22(1) to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings. | **FIC Act, Section 37** (Reporting duty and obligations to provide information not affected by confidentiality rules):<br>(1) …<br>(2) ...does not apply to the common law right to legal professional privilege as between an attorney and the attorney's client in respect of communications made in confidence between:<br>(a) the attorney and the attorney's client for the purposes of legal advice or litigation which is pending or contemplated or which has commenced; or<br>(b) A third party and attorney for the purposes of litigation which is pending or contemplated or has commenced. | |
| | Are non-financial professionals obliged to report on suspicious transactions in case they are not involved in the financial transactions for their clients but act as an advisor for these clients? | *Chapter III, Art. 23, Para 2*<br>see above | **FIC Act, Section 29:** [This section applies to any employed person, not only accountable institutions as listed in Schedule 1 to the FIC Act.] (1) (b) ...to which the business is a party... | *According to PRECCA Chapter 7, Sec. 34 Duty to report corrupt transactions:*<br>duty to report to any police official on any person in position of authority who knows or ought reasonably to have known or suspected that any other person has committed certain offences |
| | | | | *According to POCDATARA sec. 12:*<br>obligation to report certain offences linked to terrorist activity including terrorist financing |

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| | Are all non-financial professionals obliged to report on suspicious transactions or do only some of them have the obligation to report (e.g. legal professionals)? | *Chapter III, Art. 23, Para 2*<br>see above | **FIC Act, Section 29:** [This section applies to any employed person, not only accountable institutions as listed in Schedule 1 to the FIC Act.] (1) (b) ...to which the business is a party... | |
| | In case that non-financial professionals are not obliged to report on suspicious transactions, what is the role of those professionals in the AML field? What is the contribution of those professionals to the prevention of money laundering and terrorist financing? | | | |
| | In case there are CDD and record keeping obligations for non-financial professions together with the obligation to reply to FIU queries (without the obligation to report on suspicious transactions) is this regulation of sufficient deterrent value? | | | |
| **5** | **The possible application of enhanced CDD by credit and financial institutions to non-financial professions.** | | | |
| | Which is the perception of risk by credit and financial institutions when non-financial professionals are involved in financial transactions (e.g. checks were previously applied by non-financial professionals too)? | | | |

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| | Do credit and financial institutions consider those situations as representing a low risk of money laundering and terrorist financing? | | | |
| | Are credit and financial institutions required to apply enhanced CDD to customers represented by or manifestly advised by non-financial professionals? | | | |
| | Do credit and financial institutions perceive financial transactions involving non-financial professionals or customers advised by those professionals as high risk because of the more sophisticated nature of these activities? Are in these cases enhanced CDD procedures required by financial institutions (maybe to mitigate risk in case non-financial professions have no reporting obligation)? | | | |
| **Sum-mary** | **How the non-financial professions (with a special focus on the legal professions) are treated in the AML legislation?** | | | |

## Summary:

Legal Professionals (Attorneys) are regarded as “accountable institutions” under the FIC Act. As such they are subject to the CDD and record keeping requirements of the FIC Act, the MLTFC Regulations, and Exemptions. In addition to these general obligations of the Act, attorneys must also report all cash transactions in excess of ZAR 25 000.

## 6.8 – Annex 8: Analysis Switzerland

| ISSUE N° | ISSUE | EU LEGISLATION | COUNTRY LEGISLATION | |
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| | | THIRD DIRECTIVE | PRIMARY (AMLA) | SECONDARY |
| 1 | **Scope** | *Chapter 1, Art. 2*<br>1. This Directive shall apply to:<br>• Credit institutions;<br>• Financial institutions;<br>• The following legal or natural persons acting in the exercise of their professional activities:<br>a) Auditors, external accountants and tax advisors;<br>b) **Notaries and other independent legal professionals**, when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assessing in the planning or execution of transactions for their client [...]<br>c) Trust or company service providers not already covered under points (a) or (b);<br>d) Real estate agents;<br>e) Other natural or legal persons trading in goods, only to the extent that payments are made in cash in an amount of EUR 15 000 or more, whether the transaction is executed in a single operation or in several operations which appear to be linked;<br>f) Casinos. | *Chapter 1, Art. 2: Scope of Application*<br>1) This Act applies to financial intermediaries.<br>2) Financial intermediaries are:<br>a. Banks […]<br>b. Fund managers […]<br>c. Insurance institutions […]<br>d. Securities dealers […]<br>e. Casinos […]<br>3) Financial intermediaries are also persons who on a professional basis accept or hold on deposit assets belonging to others or who assist in the investment or transfer of such assets; they include in particular persons who:<br>a. Carry out credit transactions [...]<br>b. Provide services related to payment transactions, [...]<br>c. Trade for their own account or for the account of others in banknotes and [...]<br>d. ...<br>e. Manage assets<br>f. Make investments [...]<br>g. Hold securities on deposit or manage securities<br>4) This act does not apply to:<br>a. The Swiss National Bank;<br>b. Tax-exempt occupational pension institutions;<br>c. Persons who provide their services solely to tax-exempt occupational pensions institutions; | |

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| | | | d. Financial intermediaries within the meaning of paragraph 3 who provide their services solely to financial intermediaries within the meaning of paragraph 2 or to foreign financial intermediaries who are subject to equivalent supervision. | |
| | | | *Chapter 3, Section 1, Art. 14(3)*<br>**Lawyers and notaries who act as financial intermediaries must affiliate to a self-regulatory organisation.** | |
| | | | According to the *Ordinance of the Anti-Money Laundering Control Authority concerning the Financial Intermediation in the Non-banking Sector as a Commercial Undertaking (OCU-AMLA)* an activity is considered as a commercial undertaking if certain criteria are fulfilled. (The OCU-AMLA is not available in English.) | |
| | | | *Chapter 3, Section 3a, Art. 18: Duties of FINMA*<br>(1) FINMA shall have the following duties in terms of its supervision of the financial intermediaries under Article 2 paragraph 3:<br>[…]<br>e. it specifies in detail the duties of due diligence in terms of Chapter 2 for the financial intermediaries directly subordinated to it and stipulates how these duties must be fulfilled; [...] | |

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| **2** | **The application of CDD** | | | |
| | How are CDD regulations applied on non-financial professions? To what extent are your existing rules on CDD adapted to the nature and specificities of the non-financial professions?<br>What is the main difference between your local legislation and the Third AML Directive? | *Chapter 2, Art. 7*<br>The institutions and persons covered by this Directive shall apply customer due diligence measures in the following cases:<br>a) When establishing a business relationship;<br>b) When carrying out occasional transactions amounting to EUR 15 000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked;<br>c) When there is a suspicion of money laundering or terrorist financing, regardless of any derogation, exemption or threshold;<br>d) When there are doubts about the veracity or adequacy of previously obtained customer identification data. | *Chapter 2, Section 1, Art. 3: Verification of the identity of the customer*<br>(1) When establishing a business relationship, the financial intermediary must verify the identity of the customer on the basis of a document of evidentiary value. Where the customer is a legal entity, the financial intermediary must acknowledge the provisions regulating the power to bind the legal entity, and verify the identity of the persons who enter into the business relationship on behalf of the legal entity.<br>(2) In the case of cash transactions with a customer whose identity has not yet been identified, the duty to verify identity applies only if one transaction, or two or more transactions that appear to be connected, involve a considerable financial value.<br>(3) Insurance institutions must verify [...]<br>(4) If in cases under paragraphs 2 or 3 there is any suspicion of money laundering or terrorist financing, the identity of the customer must be verified even if the relevant amounts have not been reached.<br>(5) The Swiss Financial Market Supervisory (FINMA), the Federal Gaming Board and the self-regulatory organisations shall determine what constitutes a considerable financial value within the meaning of paragraphs 2 and 3 in their respective fields and adjust such values as required. | *Chapter IV, Section 1, Art. 22 SRO SAV/SNV: General Identification Duty*<br>When establishing a business relationship, the contracting party must be identified.<br><br>*Chapter IV, Section 1, Art. 23 SRO SAV/SNV: Cash Transactions*<br>The financial intermediary has to identify the contracting party of cash transactions if one or multiple transactions, which seem to be connected, exceed the amount of CHF 15,000 or the equivalent amount in foreign currency; in case of currency exchange business, the contracting party has to be indentified if the amount exceeds CHF 5,000 or the equivalent amount in foreign currency. |
| | | *Chapter 2, Art. 8*<br>1. Customer due diligence measures shall comprise:<br>a) Identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source; | *Chapter 2, Section 1, Art. 6: Duty of clarify*<br>(1) The financial intermediary is required to identify the nature and purpose of the business relationship wanted by the customer. The extent of the information that must be obtained is determined by the risk represented by the customer. | |

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| | | b) Identifying, where applicable, the beneficial owner and taking risk-based and adequate measures to verify his identity so that the institution or person covered by this Direction is satisfied that it knows who the beneficial owner is, including, as regards legal persons, trusts and similar legal arrangements, taking risk-based and adequate measures to understand the ownership and control structure of the customer;<br>c) Obtaining information on the purpose and intended nature of the business relationship;<br>d) Conducting ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's or person's knowledge of the customer, the business and risk profile, including, where necessary, the source of funds and ensuring that the documents, data or information held are kept up-to-date. | (2) The financial intermediary must clarify the economic background and the purpose of a transaction or of a business relationship if:<br>a. it appears unusual, unless its legality is clear;<br>b. there are indications that assets are the proceeds of a felony or are subject to the power of disposal of a criminal organisation (Art. 260$^{ter}$ No. 1 SCC) or serve the financing of terrorism (Art. 260$^{quinquies}$ para. 1 SCC). | |
| | | *Chapter 2, Art. 8, Para 2 states that the institutions and persons may determine the extent of customer due diligence measures set out in para 1 on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction* | *Chapter 2, Section 1, Art. 4: Establishing the identity of the beneficial owner*<br>(1) The financial intermediary must obtain a written declaration from the customer indicating who the beneficial owner is if:<br>a. The customer is not the beneficial owner or if there is any doubt about the matter;<br>b. The customer is a domiciliary company;<br>c. A cash transaction of considerable financial value in terms of Art. 3 paragraph 2 is being carried out.<br>(2) In the case the collective accounts or collective deposits, the financial intermediary must require the customer to provide a complete list of the beneficial owners and to give notice of any change to the list without delay. | *Chapter IV, Section 2, Art. 31 SRO SAV/SNV: Duty of Establishing the identity of the beneficial owner*<br>The financial intermediary has to obtain a written declaration from the customer indicating who the beneficial owner is if the customer is not the beneficial owner or if there is any doubt about the identity of the beneficial owner. [...] |

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| | | *Chapter 2, Art. 9, Para 1*<br>Member States shall require that the verification of the identity of the customer and the beneficial owner takes place before the establishment of a business relationship or the carrying-out of the transaction.<br><br>*Art. 9, Para 2-4 describe variations which are possible.* | | |
| | | *Chapter 2, Art. 11 lists cases for simplified customer due diligence (for instance if the customer is a credit or financial institution)* | | |
| | | *Chapter 2, Art. 13 lists cases for enhanced customer due diligence (in situations which by their nature can present a higher risk of money laundering or terrorist financing)* | | |
| **3** | **The duplication issue** | | | |
| | Who is obliged to perform the CDD according to the AML Act in case that non-financial professionals from different categories are involved in the same transaction (e.g. a lawyer or real estate agent **and** a notary in the case of real estate transactions)? | *Chapter 2, Section 4 "Performance by third parties"*<br>*Art. 14*<br>*Member States may permit the institutions and persons covered by this Directive to rely on third parties to meet the same requirements. However, the ultimate responsibility for meeting those requirements shall remain with the institution or person covered by this Directive which relies on the third party.*<br><br>*Art. 15*<br>*Where a Member State permits*<br>• *Credit and financial institutions referred to in Article 2(1)(1) or (2)*<br>• *Currency exchange offices and money transmission or remittance offices referred to in Article 3(2)(a)*<br>• *Persons referred to in Article 2(1)(3)(a) to (c)* | | |

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| | | *situated in its territory to be relied on as a third party domestically, that Member State shall in any case permit to recognise and accept the outcome of the customer due diligence requirements carried out in accordance with this Directive by a certain institution or person (covered by this Directive) in another Member State and meeting the requirements laid down in Articles 16 and 18, even if the documents or data on which these requirements have been based are different to those required in the Member State to which the customer is being referred.*<br><br>*<u>Art. 16</u>*<br>*For the purposes of this Section, 'third parties' shall mean institutions and persons who are listed in Article 2, or equivalent institutions and persons situated in a third country, if they meet certain requirements (mandatory professional registration; compliance with CDD and record keeping requirements of this Directive or equivalent requirements).*<br><br>*<u>Art. 17</u>*<br>*Where the Commission adopts a decision pursuant to Article 40(4), Member States shall prohibit the institutions and persons covered by this Directive from relying on third parties from the third country concerned to meet the CDD requirements.*<br><br>*<u>Art. 18</u>*<br>*Third parties shall make information requested in accordance with the requirements immediately available (relevant copies of identification and verification data and other relevant documentation on the identity of the customer or the beneficial owner).* | | |

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| | | *Art. 19*<br>*This Section shall not apply to outsourcing or agency relationships where the outsourcing service provider or agent is to be regarded as part of the institution or person covered by this Directive.* | | |
| | **To what extent are non-financial professions (intervening in the same transaction) subject to the same AML obligations?** | | | |
| | If they are not subject to the same AML obligations (e.g. notaries and credit institutions have a reporting obligation and lawyers only have a duty to reply to the FIU if asked), what kind of solutions are installed or common? | | | |
| | Is there a special rule/regulation on reliance on third parties for CDD purposes in your country? If yes, does an assessment exist how dissuasive this regulation is for potential money launderers? | | | |
| **4** | **The reporting issue** | | | |
| | Is there an obligation for non-financial professionals to report on suspicious transactions? | *Chapter III, Art. 22, Para 1*<br>Member States shall require the institutions and persons covered by this Directive, […], to cooperate fully:<br>(a) by promptly informing the FIU, on their own initiative, where the institution or person covered by this Directive knows, suspect or has reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted; | *Chapter 2, Section 2, Art. 9: Duty to report*<br>(1) A financial intermediary must immediately file a report with the Money Laundering Reporting Office Switzerland ("the Reporting Office") as defined in Article 23 if it:<br>a. knows or has reasonable grounds to suspect that assets involved in the business relationship:<br>1. are connected to an offence in terms of Article 260$^{ter}$ Number 1 or 305bis SCC, | *Chapter V, Section 1, Art. 61 SRO SAV/SNV: Duty to report*<br>The financial intermediary has the duty to report according to Art. 9 AMLA.<br><br>In case the financial intermediary does file a report in accordance with Art. 9 AMLA he is not permitted to cancel the respective business relationship.<br>A report has to be filed even if the according facts are already known by the prosecution |

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| | | (b) By promptly furnishing the FIU, at its request, with all necessary information, in accordance with the procedures established by the applicable legislation.<br><br>*Chapter III, Art. 23, Para 1*<br>By way of derogation from Article 22(1), Member States may, in the case of the persons referred to in Article 2(1)(3)(a) and (b), designate an appropriate self-regulatory body of the profession concerned as the authority to be informed in the first instance in place of the FIU. [...] | 2. are proceeds o a felony<br>3. are subject to the power of disposal of a criminal organisation, or<br>4. serve the financing of terrorism (Art. 260$^{quinquies}$ para. 1 SCC)<br>b. terminates negotiations aimed at establishing a business relationship because of a reasonable suspicion as defined in letter a.<br>[...] | authorities.<br>There is no duty to report if there is no business relationship which is to be treated by the AMLA. |
| | How extensive is the obligation for non-financial professionals to report on suspicious transactions (e.g. is the obligation of non-financial professionals lower compared to the obligation of credit and financial institutions)? | *Chapter III, Art. 23, Para 2*<br>Member States shall not be obliged to apply the obligations laid down in Article 22(1) to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings. | *Chapter 2, Section 2, Art. 9: Duty to report*<br>[...]<br>(2) Lawyers and notaries are not subject to the duty to report insofar as they are bound in their activities by professional secrecy in terms of Article 321 SCC. | According to *Art. 321 SCC (Violation of professional secrecy)* clerics, lawyers, defence lawyers, notaries, […] and their auxiliary persons, who disclose a secret entrusted to them because of their profession will be penalized with fines or prison terms of up to 3 years. The violation of professional secrecy is also liable to prosecution after termination of employment. The perpetrator is not liable to prosecution if the secret was disclosed due to consent of the beneficiary or written consent of the authorities. Federal and cantonal regulations regarding the duty to give evidence and the duty of disclosure towards a public authority remain reserved. |
| | Are non-financial professionals obliged to report on suspicious transactions in case they are not involved in the financial transactions for their clients but act as an advisor for these clients? | *Chapter III, Art. 23, Para 2*<br>see above | | |
| | Are all non-financial professionals obliged to report on suspicious transactions or do only some of them have the obligation to report (e.g. legal professionals)? | *Chapter III, Art. 23, Para 2*<br>see above | | |

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| | In case that non-financial professionals are not obliged to report on suspicious transactions, what is the role of those professionals in the AML field? What is the contribution of those professionals to the prevention of money laundering and terrorist financing? | | | *Art. 5 CDB 08: Individuals and entities that are bound by professional confidentiality*<br>Banks may waive the identification of beneficial owners of accounts or securities accounts held by lawyers or notaries licensed in Switzerland or firms of lawyers or notaries organised as a company on behalf of their clients provided they confirm to the bank in writing that<br>a) They are not themselves the beneficial owners of the assets deposited and<br>b) They are subject to the corresponding cantonal and federal legislation in their capacity as lawyers or notaries and<br>c) They are bound by professional confidentiality (Art. 321 of the Swiss Penal Code) in respect of the assets deposited and<br>d) The account/securities account is used solely for the purposes of their activity as lawyers or notaries.<br>Form R is provided for the declaration under Art. 5. |
| | | | | *Commentary on the CDB 08 (Art. 5):*<br>Due to the protection of professional confidentiality (Art. 321 Swiss Penal Code) the bank is unable to verify if the declarations made in Art. 5 are accurate. The bank is therefore not bound by any monitoring obligation. This is the responsibility of the relevant authorities. |
| | In case there are CDD and record keeping obligations for non-financial professions together with the obligation to reply to FIU queries (without the obligation to report on suspicious transactions) is this regulation of sufficient deterrent value? | | | |

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| **5** | **<u>The possible application of enhanced CDD by credit and financial institutions to non-financial professions.</u>** | | | |
| | Which is the perception of risk by credit and financial institutions when non-financial professionals are involved in financial transactions (e.g. checks were previously applied by non-financial professionals too)?<br>Do credit and financial institutions consider those situations as representing a low risk of money laundering and terrorist financing? | | | |
| | Are credit and financial institutions required to apply enhanced CDD to customers represented by or manifestly advised by non-financial professionals? | | | |
| | Do credit and financial institutions perceive financial transactions involving non-financial professionals or customers advised by those professionals as high risk because of the more sophisticated nature of these activities? Are in these cases enhanced CDD procedures required by financial institutions (maybe to mitigate risk in case non-financial professions have no reporting obligation)? | | | |

## Summary:

Lawyers and notaries may qualify as financial intermediaries in certain circumstances. Only in this case they have the obligations according to the AMLA. Lawyers and notaries who act as financial intermediaries must affiliate to a self-regulatory organisation (SRO). Lawyers and notaries are not subject to the duty to report insofar as they are bound in their activities by professional secrecy in terms of Article 321 SCC.

The obligation according to article 9 of the AMLA (Duty to report) is only applicable if a lawyer or notary is qualified as a financial intermediary. In general this is not the case if lawyers and notaries act within the scope of their occupation and perform typical activities. Only in cases where lawyers or notaries provide services outside their typical or distinguishing professional activities within the scope of their engagement art. 321 of the Swiss Criminal Code is not applicable; only in this cases the lawyer or notary will be qualified as a financial intermediary and has the same obligations as the other covered persons and institutions according to the AMLA.