

CCBE Comments on the Report from the Commission on the assessment of the risk of money laundering and terrorist financing affecting the internal market and relating to cross-border activities (SWD (2019) 650 final accompanying {COM(2019) 370 final})

20/11/2019

The following are comments from the Council of Bars and Law Societies of Europe (CCBE) in response to the “Legal services from notaries and other independent legal professionals” section in the Report from the Commission on the assessment of the risk of money laundering and terrorist financing affecting the internal market and relating to cross-border activities (SWD (2019) 650 final accompanying {COM(2019) 370 final}).

“Legal services from notaries and other independent legal professionals”

Product

Legal service from legal professionals

Sector

Independent legal professionals, lawyers, notaries

Description of the risk scenario

Perpetrators may employ or require the services of a legal professional (such as a lawyer, notary or other independent legal professional) – as regards:

- misuse of client accounts;
- purchase of real state;
- creation of trusts and companies/ management of trusts and companies; or
- undertaking certain litigation.

They may be involved in money laundering schemes by helping create 'opaque structures' defined as business structures where the real identity of the owner(s) of entities and arrangements in that structure is concealed through the use of, for example, nominee directors. The creation of such structures, often set up in multiple jurisdictions including offshore centres, is complicated and requires both regulatory and tax services of professionals.

Threat

Terrorist financing

The assessment of the terrorist financing threat related to legal services provided by legal professionals has been considered together with money laundering schemes related services provided by these professionals to hide the illegal origin of the funds. The terrorist financing threat therefore does not

need a separate assessment.

Conclusion: The assessment of the terrorist financing threat related to services provided by legal professionals is therefore considered as very significant (level 4).

CCBE comment: The CCBE cannot understand how, or see any justification for, assessing the terrorist financing threat related to services by legal professionals as being “*very significant (level 4)*”.

The assessment of “*very significant (level 4)*” also appears to be in contradiction to what is reported at a national level through national risk assessments, and is also in contradiction to the views of law enforcement.

The CCBE requests that this rating be elaborated on and explained in more detail, as the CCBE can find no explanation for justifying the reasoning behind a level 4 level of threat. The CCBE believes that conclusions of this nature seriously impact and undermine the credibility of the SNRA Report for this sector. In addition, this assessment also results in an unnecessary negative impact on the legal sector’s reputation.

Money laundering

The assessment of the money laundering threat related to legal services provided by legal professionals has some features in common with legal services provided by accountants, auditors and tax advisors. As for all other legal activities, risk of infiltration or ownership by organised criminal groups is a money laundering threat for accountants, auditors and tax advisors. These professionals may be unwittingly involved in the money laundering but may also be complicit or negligent in conducting their customer due diligence obligations.

CCBE comment: Regarding the use of the word “*complicit*” the CCBE has emphasised on a number of occasions that its member Bars and Law Societies do not, and never will, condone the actions of any lawyer who knowingly participates in any criminal activity of a client, whether relating to money laundering, tax evasion or any other criminal activity.¹ Furthermore, it is not accurate to use “*complicit*” and “*negligence*” in the same sentence as they are two very different actions.

In addition, the CCBE understands that the SNRA addresses risks and not situations where professionals are knowingly involved. The CCBE would appreciate clarification in this respect.

Law enforcement agencies report that organised crime groups frequently use legal services provided by legal professionals and involve this sector in their money laundering schemes. Legal professionals’ services are considered useful for setting up money laundering schemes as they are needed for certain types of activities and/or because access to specialised legal and notarial skills and services may help with the laundering of the proceeds of crime. Lawyers are particularly prone to being misused by criminals because engaging a lawyer adds respectability and an appearance of legitimacy to an activity even when the service provided can help criminals launder money.

CCBE Comment: The sentence “*Lawyers are particularly prone to being misused by criminals because engaging a lawyer adds respectability and an appearance of legitimacy to an activity even when the service provided can help criminals launder money*” requires much reflection, as it appears to disregard that lawyers have been subject to strict anti-money laundering (AML) requirements and obligations since the second AML Directive in 2001, in addition to AML training and awareness activities. The level

¹ The CCBE’s use of the *reference* to “money laundering” includes terrorist financing.

of AML awareness within which the legal profession conducts their activities cannot support an assertion that *“Lawyers are particularly prone to being misused by criminals...”*.

Legal professionals can support money laundering either by using the tools already at their disposal (e.g. client accounts) or by helping their clients create and manage accounts, trusts and companies to conceal and/or legitimise the source of their funds.

CCBE comment: The use of the word *“support”* in the sentence *“Legal professionals can support ...”* mistakenly provides the impression that lawyers are in favour of, or “support”, money laundering. A better use would be *“Legal professionals risk being involved in money laundering ...”*

The CCBE also disagrees with the reference *“... helping their clients create and manage accounts, trusts and companies to conceal and/or legitimise the source of their funds.”* This again implies that the legal professional is somehow complicit in trying to *“legitimise the source of ...funds”*.

There are many ways in which client accounts can be used to launder money, the most common of which are:

- performing financial transactions on behalf of a client, including offshore banking;
- accepting large cash deposits in the client's account followed by cash withdrawals or the issuance of cheques;
- purchasing real estate, companies or land on behalf of a client; and
- in some cases, using the personal account of the legal professionals themselves to receive and transfer funds.

CCBE Comment: The CCBE disagrees with this assessment of client accounts. A legal professional is an obliged entity required to have AML systems in place. A legal professional is required by law to have a separate client account to hold client monies, to keep full accounts of those monies and to have those accounts independently audited. Accordingly, there are already controls in place. If there is any “misuse” of a client account i.e. use of the account for any non-permitted purpose, this will be detected by an independent auditor.

A legal professional may not operate a banking facility or otherwise allow funds to pass through the client account without it being involved in an underlying legal transaction relating to those funds. It is the transaction on which the legal professional is advising which will determine whether or not there is a risk of money laundering in respect of the funds being paid into the pooled account. If there is a risk on money laundering regarding the underlying transaction the legal professional is under an obligation to report any suspicions in relation to the transaction on which he/she is advising.

Lawyers can help create and manage shell and legitimate companies by providing contracts and creating corporate accounts. Offshore companies and trusts are particularly attractive to organised crime groups due to their strict banking and legal and administrative secrecy regulations and practices and the anonymity that they provide. In addition to the legal advice and paperwork that they provide, legal professionals can also take an active role in managing a company and its assets. They can for instance represent their client in the purchase and sale of a company and are responsible for disposing of the financial assets by ordering money transfers, buying other companies or investing in real estate. Similarly, lawyers can hold a position within the company (e.g. owner, director, and administrator), further distancing their client from the criminal assets.

CCBE comment: Regarding “*Similarly, lawyers can hold a position within the company (e.g. owner, director, and administrator), further distancing their client from the criminal assets*”, it should be noted that in some member states these activities are prohibited i.e. a person is not acting as a lawyer when they do anything other than provide legal services and would not be recognised as a lawyer when acting as an owner of a company. This means they would not receive the benefit of client accounts and principles regarding confidentiality/privilege do not apply.

In most EU countries, lawyers provide the complete documentation for the foundation and registration of companies, transfer of ownership titles, opening of accounts in banks, invoices and international trading documents. The nature of this documentation is challenging for investigations due to the technicality and secrecy that it entails.

Criminal organisations do not consider access to legal professionals to be particularly complex. For them, relying on legal professionals’ skills means that they do not need to develop these competences themselves. To launder money, some organised crime groups have infiltrated law firms, posed as phony solicitors or stolen the identity of lawyers.

CCBE comment: Regarding the sentence “*Criminal organisations do not consider access to legal professionals to be particularly complex*”, this sentence implies that criminals can access with ease, in an unchallenged and non-questioning manner, a legal professional who has significant training and education in identifying money laundering threats and risks. This statement does not take into account the fact that the legal sector has been regulated for AML compliance for many years and significant hurdles and CDD compliance requirements makes access very complex. This statement is not a proper reflection of the extensive training and high standards which regulate the profession. The CCBE is also keen to learn whether any research or studies exist to support this statement, as any research or studies which support this statement would be of assistance with respect to training purposes.

In addition, access to legal professionals is one thing, however, this does not translate into assistance from legal professionals, as clients have to undergo customer due diligence requirements. Legal professionals are also highly alert to risks that their services may be misused, and a legal professional is also capable of discerning when a transaction is legitimate or not.

This “*access*” to legal professionals does not translate into assistance, and therefore, the “*very significant (level 4)*” rating (mentioned below) should be revised.

CCBE comment: Regarding the sentence “*To launder money, some organised crime groups have infiltrated law firms, posed as phony solicitors or stolen the identity of lawyers*”, the CCBE cannot agree with what appears to be far-fetched and extravagant remarks. If this has happened, it can only be assumed that such incidents are extremely rare. A sentence of this nature is not justified in a Report of this importance and it seriously impacts on the credibility of the SNRA Report for this sector and the sector itself.

Conclusions: According to information provided by law enforcement agencies, legal professionals are frequently used in money laundering schemes. Using the services of legal professionals helps organised criminal organisations to avoid developing their own knowledge and expertise, and provides a ‘stamp approval’ for their activities. The level of money laundering threat related to legal professionals (lawyers, notaries and other independent legal professionals) is therefore considered as **very significant** (level 4).

CCBE comment: Regarding the conclusions, we cannot understand how, or see any justification for, assessing the level of money laundering threat related to legal professionals as being at the highest level - very significant (level 4). We would ask that this be elaborated on and explained so that such a rating can be justified.

In addition, the CCBE believes that, with regard to the sentence “*According to information provided by law enforcement agencies...*” the Commission should consider obtaining information from other sources of information for the legal sector. This is necessary as the State is prohibited from regulating the legal profession due to rule of law principles and, therefore, the knowledge of law enforcement about the legal sector is not evidence-based. Consideration should instead be given to research/findings published by, for example, the FATF.

Vulnerability

Terrorist financing

The assessment of the terrorist financing vulnerability related to legal service provided by legal professionals has been considered together with money laundering schemes related to services from these professionals to hide the illegal origin of the funds. The terrorist financing threat therefore does not need a separate assessment.

Conclusion: The assessment of the terrorist financing threat related to services provided by legal professionals is therefore considered as significant (level 3).

CCBE comment: Regarding the conclusions, and as referred to within our comments regarding the terrorist financing “*Threat*”, the CCBE cannot understand how, or see any justification for assessing the terrorist financing threat related to services by legal professionals as being “significant (level 3)”.

The assessment of “significant (level 3)” is both in contradiction to what is reported at a national level through national risk assessments and is also in contradiction to the views of law enforcement. The CCBE requests that this rating be elaborated on and explained in more detail as the CCBE can find no explanation for justifying the reasoning behind a level 3 level of threat.

This is another example of where the CCBE believes that conclusions of this nature seriously impacts upon the credibility of the SNRA Report for this sector and the sector itself. We would therefore ask that this be corrected - or at the very least be elaborated on - and explained with credible evidence in such a manner whereby the conclusion can be justified. The provision of a factual basis will assist the CCBE Member Bars in their education and training efforts.

Money laundering

The assessment of the money laundering vulnerability related to legal advice provided by legal professionals shows that:

a) risk exposure

The risk exposure results from the nature of some services/activities provided by legal professionals (which require anti-money laundering compliance).

The risk exposure of this sector is affected by the fact that it could be quite often be involved in the management of complex legal situations. In particular, the fact that legal services do not necessarily

involve the handling of proper financial transactions means that legal professionals have to trigger other kinds of red flags that are more difficult to define (e.g. a customer's behaviour).

CCBE comment: Due to the extent to which lawyers are closer to the legal service than a bank could ever be in a transaction (i.e. lawyers have a better understanding and typically meet with and engage with a client on a face-to-face basis), lawyers are, in fact, perfectly placed to understand customer behaviour and relate that to relevant red flags for the legal sector.

The meaning of "*proper financial transactions*" should also be elaborated on, as lawyers do not provide financial services.

b) risk awareness

The sector is not homogeneously organised (scope of legal professionals varies from one Member State to another — this shouldn't be a risk in itself) even though some EU organisations play an important role in providing information on how to apply anti-money laundering/combating the financing of terrorism (AML/CFT) requirements, in providing guidance and facilitating the exchange of information. In particular, they help define a list of red flags that people working in the sector can use, e.g. client's behaviour or identity, concealment techniques (use of intermediaries, avoidance of personal contact), size of funds (disproportionate amount of private funding), etc. The profession already seems to be aware of some risks such as a customer giving instructions about transactions from a distance or with no legitimate reason or when there are numerous changes in legal advisor in a short time frame or the use of multiple legal advisors with no good reason.

CCBE comment: Regarding the sentence "*The profession already seems to be aware of some risks such as a customer giving instructions about transactions from a distance or with no legitimate reason or when there are numerous changes in legal advisor in a short time frame or the use of multiple legal advisors with no good reason*", the CCBE is confident that its members are aware of extensive risks rather than "*some risks*".

In addition, regarding "*scope of legal professionals varies from one Member State to another*", it is not the scope of legal professionals which is relevant, but rather the scope of services provided and activities/transactions they are involved in which are relevant.

In general, the level of suspicious transaction reporting is very low when dealing with legal professionals (although suspicious transaction reports from legal professionals cannot be compared to legal reports from financial institutions, for example).

CCBE comment: Regarding the level of STR reporting, the CCBE wishes to emphasise that STRs from legal professionals have a very different (and higher) quality. While STRs from the banking sector are usually triggered by automatic systems, and can often be of a limited intelligence value, STRs from legal professionals are triggered by the sound experience and qualitative analysis by legal professionals. As a consequence, in most cases the high number of STRs from the financial sector lead to a very low number of concrete results and a low number of convictions (in many countries, there is about one conviction for each one thousand STRs) and this may be attributed to their limited intelligence value. In addition, the high number of low-quality STRs jam the capacity of FIUs to analyse and follow up cases. Unless such qualitative factors are taken into account, the level of STRs does not provide any useful information.

It should be noted that the 4th AML directive explicitly provides the possibility for lawyers to dissuade a client from engaging in illegal activity. When the lawyer tries to dissuade a client from engaging in

illegal activity, it does not constitute disclosure (article 39§6 of directive 2015/849/EU). In such circumstances, it is illogical to question the number of STRs by lawyers.

It may be beneficial to mention that the FATF stated in its 2013 Report that *“the level of reporting by the legal sector is unlikely to be at the same level as that of the financial institutions. There is a significant difference in the volume of transactions undertaken by legal professionals in comparison to financial institutions. In addition, the level of involvement in each transaction, which affects the basis on which a suspicion may arise and be assessed is significantly different*

However, in some countries, self-regulatory bodies are regulated by the State and are independent, acting efficiently as intermediaries between the financial authorities and the professionals involved. They organise, examine and evaluate the facts, making it easier for the financial authorities to distinguish between money laundering and normal cases.

c) legal framework and controls

Notaries, lawyers and other independent legal professionals have been subject to EU anti- money laundering requirements since 2001. They must apply customer due diligence where 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 carrying out of transactions for their client concerning the: (i) buying and selling of real estate 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, foundations, or similar structures.

Legal professionals are organised and regulated in different ways depending on the Member States concerned. Legal services are also often carried out face-to-face, which is a specific challenge for employee protection. There are also differences between the various professions involved, since notaries, being professionals, also participate in the public duty, and have, in some Member States, the status of public office holders.

CCBE comment: The Commission is invited to provide information about the source of the statement *“...which is a specific challenge for employee protection.”* The legal profession representative bodies are not aware of a lawyer being at risk because they provide AML-regulated legal services on a face-to-face basis. The fact that there is not a risk to lawyers when they meet clients face-to-face is an indicator of the extent to which the sector is not at the ascribed threat/risk and vulnerability levels suggested by the Commission in this report. If it is the case that lawyers are at risk, and law enforcement have knowledge of specific individuals at risk, there would be an obligation on the part of law enforcement to inform individual lawyers.

In any case, the protection of the anonymity of the legal professional reporting the suspicion should be totally guaranteed. In some Member States there is a risk that the name of the notary at the origin of the declaration could appear on the suspicious transaction report, in particular if it is followed by court proceedings. To avoid this, rules should be developed to prevent any disclosure of the origin of the suspicious transaction report.

The legal professional privilege (professional secrecy) is a recognised principle at EU level which reflects a delicate balance in light of the European Court of Justice ECJ case law on the right to a fair trial (C-305/05), itself reflecting the principles of the European Court of Human Rights as well as of the Charter (such as article 47).

There are cases where these professionals sometimes conduct activities that are covered by the legal

privilege (i.e. ascertaining the legal position of their client or defending or representing their client in judicial proceedings) and at the same time activities that are not covered by the legal privilege, such as providing legal advice in the context of the creation, operation or management of companies. The remit of confidentiality, legal professional privilege and professional secrecy varies from one country to another, and the practical basis on which this protection can be overridden should be clarified.

CCBE comment: The legal profession is very much aware of how lawyer-client confidentiality, legal professional privilege and professional secrecy operate, and the legal profession is very much aware of the limits of such principles.

Furthermore, it is important for the Commission to understand that in cases where law enforcement suspect money laundering, they can apply to a court to issue a warrant to inspect law firms and retain files. Where claims of legal professional privilege/professional secrecy are raised, mechanisms are available to the courts to validate the claims and secure/release evidence to law enforcement.

Conclusions: The sector's awareness of the risks still appears to be limited. Despite the legal framework in place, supervision of the sector does not always ensure a proper monitoring of the possible money laundering abuses. The level of money laundering vulnerability related to legal advice provided by legal professionals is therefore considered as significant (level 3).

CCBE comment: Regarding the conclusion *“The sector's awareness of the risks still appears to be limited. Despite the legal framework in place, supervision of the sector does not always ensure a proper monitoring of the possible money laundering abuses. The level of money laundering vulnerability related to legal advice provided by legal professionals is therefore considered as significant (level 3).”* the CCBE believes the level of awareness is very high and in no manner could the CCBE regard the level of awareness as being limited. The same is true for supervision of the sector which the CCBE would regard as being at a high level.

CCBE member Bars and Law Societies are very active in taking measures to detect, prevent and raise awareness of ML risks. As an illustration of these activities, a table is attached which provides information on activities undertaken across a wide-number of Member States.

The following points illustrate a number of activities undertaken by EU Bars and Law Societies:

- Onsite inspections of client accounts held by lawyers - There are regular on-site inspections of files and client accounts held by lawyers (in the jurisdictions that have client accounts).
- Indicators - Bars and Law Societies have developed lists of indicators which illustrate risk situations which a lawyer should be aware of.
- Specific websites - specific websites have been created which are devoted to Anti-Money Laundering (AML) issues.
- Trainee lawyers - AML information and training is provided to trainee lawyers in order to ensure that those entering the profession are aware of the risks and their obligations.
- Guidelines for lawyers - Guidelines have been developed to assist lawyers in relation to complying with their AML obligations. In addition, these Guidelines are regularly updated and are actively promoted.
- Toolkits - AML Toolkits have been developed which provide lawyers/law firms with practical ‘need to know’ information and contain a mixture of draft policies and procedural checklists which practitioners can use to prepare for and administer their duties under the AML legislative framework.
- Training - Training is undertaken on AML issues including updated and continuous training.
- Assistance - Advice and tips have been developed for new money laundering reporting officers.

- E-updates – Many jurisdictions have e-updates.
- email alerts – in addition to E-updates, many jurisdictions have email alerts about emerging money laundering typologies/red flags and also international guidance and assessments of sector-specific risks.
- “Hotlines”- Many jurisdictions have a dedicated support phone line for their members.
- An AML Directory - Some members have an AML Directory whereby lawyers who practice in this area are willing to be contacted by other lawyers seeking legal advice on AML.
- Conferences – Many jurisdictions regularly organise conferences and seminars to inform lawyers of their AML obligations. Many jurisdictions organise also conferences which bring together policy makers, law enforcement officials, regulators, academics and industry experts to look at the changes ahead, current policy development approaches and other hot topics such as scams targeting law firms and the sanctions regime.
- Sanctions – Members are always reminded of sanctions/penalties for failure to adhere to AML obligations
- Disciplinary procedures – lawyers are subject to disciplinary procedures (including being struck-off) for failure to adhere to AML procedures
- Engagement with the relevant national ministry – Bars and Law Societies maintain close cooperation with the relevant Ministry of Justice
- Promotion of relevant guides – Bars and Law Societies engage in promoting relevant publications, for example, the “*Lawyers Guide to Detecting and Preventing Money Laundering*” which provides practical advice to legal professionals.
- Continuous review – Bars and Law Societies frequently review what further effective measures can be undertaken to enhance AML procedures.

The above (non-exhaustive) list of activities illustrates the extensive efforts which Bars and Law Societies take towards informing their membership and raising awareness of money laundering risks pertinent to the legal profession. In addition, legal profession regulators also monitor compliance with their AML obligations, respond appropriately and report suspicions of money laundering occurring within the sector to relevant FIUs.

Mitigating measures

1) for the Commission:

In the context of Directive (EU) 2015/849 as amended by Directive (EU) 2018/843:

- Transposition checks on the implementation of transparency requirements for beneficial ownership information (registration): Member States should notify technical elements of their national AML/CFT regime ensuring transparency requirements for beneficial ownership information.
- Transposition checks on the implementation of identification requirements for beneficial ownership information (definition of the beneficial owner): Member States should notify technical elements of their AML/CFT regime related to beneficial owner definition.
- To better disseminate the EU anti-money laundering legal framework and to help ensure the effective and consistent application of EU law, the Commission should support training activities for the legal profession (lawyers and notaries).
- To organise stakeholder consultations/discussions to help inform the Commission of the transposition of money laundering and terrorist financing directives across the EU and to

raise awareness of and exchange best practices on different aspects of legal professionals' anti-money laundering compliance.

CCBE comment: CCBE members are happy to assist with regard to exchanging best practices on different aspects of legal professionals' AML compliance.

Directive 2018/822/EU comes into effect as from 2020 where intermediaries are required to submit information on reportable cross-border tax arrangements² to their national authorities.

2) for competent authorities:

Member States should ensure that competent authorities/self-regulatory bodies supervising independent legal professionals, lawyers and notaries produce an annual report on supervisory measures put in place to ensure that the sector accurately applies its AML/CFT obligations. When receiving suspicious transaction reports, self-regulatory bodies should report annually on the number of reports filed to the financial intelligence units.

On-site inspections commensurate to the population of independent legal professionals, lawyers, notaries representatives in the Member State's territory.

CCBE comment: The CCBE wishes to mention that on-site and population-commensurate inspections already take place in a number of member states. In addition, regard should be had to the fact that self-regulatory bodies have reporting obligations in the event that they observe money laundering by lawyers or their clients and regulators are compliant with those obligations.

3) for Member States:

Member States should provide guidance on risk factors arising from transactions involving independent legal professionals, lawyers, notaries.

Self-regulatory bodies should make an effort to increase the number of thematic inspections and reporting. They should also organise training courses to develop a better understanding of the risks and AML/CFT compliance obligations.

CCBE comment: Regarding "*Member States should provide guidance on risk factors arising from transactions involving independent legal professionals, lawyers, notaries*", the CCBE believes that legal profession regulators are best-positioned to provide this guidance, as they regulate the sector.

In relation to the statement "*self-regulatory bodies should make an effort to increase the number of thematic inspections*" it would be helpful to know whether this is based on an analysis by the Commission of thematic inspections already undertaken by legal profession regulators in some member states. In addition, sectoral risk analysis and observed compliance weaknesses are the best driver for focused thematic inspections. An over-emphasis on increasing thematic inspections to be seen to be regulating may not increase compliance and reduce risk.

It should also be noted that, as demonstrated from the above, there is already extensive training undertaken by CCBE members regarding awareness raising.

² https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation_en

Self-regulatory bodies should make an effort to increase the number of thematic inspections and reporting. They should also organise training courses to develop a better understanding of the risks and AML/CFT compliance obligations.