

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

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## 1. Introduction

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

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

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

## 2. Application of the proportionality principle

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

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

### 3. Specific areas of conflict

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#### 3.1 Fundamental rights

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

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

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

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

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

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

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

### **3.2 Procedural safeguards**

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

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

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

### **3.3 Data Protection**

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

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

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

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

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

### 3.4 Professional privilege/secretcy

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

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

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

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

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

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

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

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

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

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

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

Without this relationship of trust, the fundamental right of EU citizens to legal representation is seriously undermined. Where citizens are reluctant to consult lawyers for fear that the personal information that they disclose may be shared, this has serious consequences for the Rule of Law. Article 19 para 1 TFEU provides that: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." Legal protection ceases to be "effective" when citizens cannot share anymore relevant information with their lawyers. In this regard it has to be considered that nowadays legal environment is highly complex. A client who holds back even tiny pieces of information cannot be correctly advised, represented or defended according to Article 47 Charter of Fundamental Rights.

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

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

### **3.5 Impact on rule of law and proportionality**

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

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

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<sup>4</sup> See C-155/79.

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

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

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

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

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

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

#### 4. Recommendations

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

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

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

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

#### **4.1**    *Expert group*

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

#### **4.2**    *Fundamental rights agency*

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

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