

CCBE preliminary comments on the AML package

8/10/2021

On 20th July, the European Commission published a set of proposals “to strengthen the EU's anti-money laundering and countering terrorism financing (AML/CFT) rules”.¹ The package is composed of four legislative proposals and one impact assessment.²

The CCBE duly noted the publication of the package and wishes to express preliminary first comments, before adopting a more detailed position on the proposals. The CCBE recognises the need to have in place effective AML/CFT rules and welcomes the objective of the proposals to further harmonise standards. Nevertheless, the Commission itself recognises that a full evaluation of the AML regime has not yet taken place,³ which goes against the Commission’s internal rules.⁴ Therefore, the conclusion by the Commission on the inconsistency of supervision across the internal market is based on incomplete, not to say incorrect, assumptions.

The CCBE is particularly worried about the approach taken towards self-regulation of the legal profession, which is the institutional safeguard and cornerstone of independence of lawyers and the rule of law. In its 2021 Rule of Law report, the Commission considered that: “*An effective justice system requires that lawyers be free to pursue their activities of advising and representing their clients, and bar associations play an important role in helping to guarantee lawyers’ independence and professional integrity.*”⁵ The CCBE considers that in order to preserve the Bars’ role, the Commission should be careful when designing its policies in all fields, including in the field of AML/CTF. Furthermore, the CCBE is concerned that the Commission acts based on the assumption that self-regulatory bodies do not provide adequate control.⁶ The CCBE does not agree with this assumption which, in our opinion, is not based on factual data and does not recognise efforts made by the Bars in preventing money laundering.

The proposals seek to establish three layers of AML supervision and oversight of non-financial obliged entities: (1) In principle, self-regulatory bodies act as supervisors of individual legal professionals and

¹ European Commission, “Beating financial crime: Commission overhauls anti-money laundering and countering the financing of terrorism rules”, 20.07.2021, Press release, available [here](#).

² Proposal for a Regulation establishing the European Authority for Countering Money Laundering and Financing of Terrorism (hereinafter “AMLA Regulation”), available [here](#); Proposal for a Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (hereinafter “AML Regulation”), available [here](#); Proposal for a Directive on the mechanism for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU)2015/849 (hereinafter “6th AML Directive”), available [here](#); Proposal for a Regulation on information accompanying transfers of funds and certain crypto-assets (recast), available [here](#); Impact assessment, available [here](#).

³ See Section 3 - Results of ex-post evaluations, 1st bullet point, proposal for 6th AML Directive, AMLA Regulation and AML Regulation.

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

⁵ See 2021 Rule of Law report, page 5, available [here](#).

⁶ See, in particular, Recital 69, Proposal for 6th AML Directive.

law firms.⁷ (2) Member States are required to establish oversight of self-regulatory bodies by a public authority, which includes the power to issue instructions to remedy a failure to perform supervisory functions.⁸ (3) The AMLA may issue a formal opinion to a supervisory authority supervising self-regulatory bodies and finally even an individual decision to self-regulatory bodies to remedy non-compliance.⁹ According to the CCBE, the kind of supervision proposed by the package deeply affects self-regulation and independence of Bars and Law Societies as well as of the legal profession. It empowers public authorities as well as the AMLA not only to exercise a general oversight on the legality and conformity of the AML supervision, but also provides those authorities with the competence to deal with individual cases. The changes proposed by the Commission undermine the delicate balance found in the Member States between the independence of Bars and the necessity to fight money laundering.

The CCBE recalls that independent lawyers are part of independent justice and democracy and play a role in strengthening the rule of law.¹⁰ Therefore, questioning self-regulation poses real risks for these principles and the rights of citizens that they allow to ensure. As the Commission recognises itself¹¹, some Member States question the standards of independent justice. The CCBE considers that introducing oversight of the legal profession as proposed by the package would give such countries an excuse to control and to attack lawyers.

Furthermore, there is no evidence that European supervision would be more satisfactory than national level supervision and supervision by Bars, in terms of efficiency and effectiveness. One of the major assets of self-regulation of the legal profession is that self-regulatory bodies have a much better understanding of the profession than public authorities or even the proposed AMLA, the latter being a super-supervisor of many financial and non-financial professions. Therefore, as experience has shown in England and Wales for example, an authority such as AMLA risks being a cost-intensive but inefficient additional supervisory authority.

The AMLA would also conduct a “peer review” of non-financial supervisors.¹² Whilst peer review has proved to be an effective tool to share best practices, the design of the peer review as provided for by the AMLA Regulation proposal is just an additional assessment by a public authority. The AMLA obviously is no peer to the non-financial professions so that a process designed, managed and controlled by the AMLA does not deserve to be called “peer review”. However, the CCBE is happy to consider and discuss a peer review process which is designed, managed and controlled by the profession itself to enhance AML regulatory and supervisory practice.

The CCBE acknowledges that full harmonisation of standards by a regulation can improve the application of AML provisions throughout Europe. Furthermore, the CCBE particularly approves that the proposed AML Regulation preserves the protection of the well-developed and recognised principle of legal professional privilege/professional secrecy as provided for by the existing AML directive(s) and national law. However, in order to benefit from full harmonisation, the CCBE suggests that some important definitions be added to the proposal. For example, definition, scope and application of “*ascertaining the legal position*” should be clarified by taking into account the case law of the European

⁷ Article 29, Proposal for 6th AML Directive.

⁸ Recital 69 and Article 38, Proposal for 6th AML Directive.

⁹ Article 32, Proposal for AMLA Regulation.

¹⁰ This is recognised by international bodies, such Council of Europe, and the Commission themselves, see for example 2021 Justice Scoreboard, page 51, available [here](#).

¹¹ See, for example, 2021 Rule of Law Country report for Poland, page 12, available [here](#).

¹² Article 28, Proposal for AMLA Regulation.

Court of Human Rights and the Court of Justice of the European Union and by providing for the highest standards in respect of the preservation of the rule of law.