

CCBE comments on the 3rd Supranational Risk Assessment

16/02/2023

SUMMARY

In this paper, the CCBE comments on the assessment of the risk of money laundering and terrorist financing affecting the internal market and relating to cross-border activities, published by the European Commission in October 2022. The CCBE recalls that lawyers act as gatekeepers and most of them respect their AML compliance duties. Moreover, the CCBE welcomes that the Commission recognises the importance of the training for lawyers in the AML field. Nevertheless, the CCBE regrets that many serious findings are not supported by any references and data. Finally, throughout the document, the CCBE suggests a number of improvements and solutions, such as establishing a permanent and regular dialogue with the Commission regarding AML requirements and awareness-raising measures for lawyers.

Preliminary remarks

This document aims at providing comments to the third Supranational Risk Assessment (SNRA), published by the European Commission on 27th October 2022.¹

In essence, in this report, the Commission considers that:

- The assessment of the terrorist financing (TF) threat related to services provided by legal professionals is considered as very significant.
- The level of money laundering (ML) threat related to legal professionals (lawyers, notaries and other independent legal professionals) is considered as very significant (level 4).
- The assessment of the TF vulnerability related to services provided by legal professionals is considered as significant (level 3).
- The level of ML vulnerability related to services provided by legal professionals is considered as significant for lawyers (level 3) and moderately significant/significant for notaries.
- Risk level: High for lawyers.

The CCBE shares the view that lawyers, when carrying out anti-money laundering (AML) obligations, act as gatekeepers and play their role in the prevention of ML and TF.

¹ The SNRA being composed of a report (COM(2022) 554 final) and a staff working document (SWD(2022) 344 final).

The CCBE also sees that lawyers doing transactions face risks of being misused without their knowledge. However, in general, lawyers do respect, carry out and make every effort to comply with the AML/CFT obligations which are imposed on them by the current AML framework in force.

The CCBE welcomes that the training project of the CCBE and the European Commission is mentioned in the report (SWD page 199). The CCBE thinks that training professionals continuously is crucial to improve understanding by lawyers of AML/CFT requirements and ML/TF risks and is an essential component of the prevention of ML/TF. **The CCBE wishes to stress that it is willing to continue this type of cooperation with the institutions.** The CCBE would also like to recall that Bars already provide comprehensive AML training for lawyers at national level.²

Comments

- **Regarding mitigating measures**

Regarding mitigating measures for the competent authorities/self-regulatory bodies (SRBs), the CCBE has already taken into consideration the measures proposed by the Commission. It has drawn attention of its member Bars to the conclusions of this SNRA. The CCBE member Bars have communicated these measures to further knowledge about them at their respective national levels.

Moreover, the CCBE wishes to express the following additional remarks regarding some of the mentioned mitigating measures:

For the Commission: *“To monitor the take-up of training activities by the legal profession on the basis of the training package completed.”*³

The CCBE thinks that the Commission, as part of this monitoring, should regularly exchange with Bars and the CCBE and explore further ways of cooperation regarding a follow-up to this training package.

For the Commission: *“In anticipation of the entry into force of the AML reform package, to continue dialogue on the implementation of the money laundering and terrorist financing requirement and to raise awareness of and exchange best practices on different aspects of legal professionals’ anti-money laundering compliance.”*⁴

The CCBE would like to suggest establishing a permanent and regular dialogue with the Commission regarding AML requirements and awareness-raising measures for lawyers. It could take the form of an annual meeting between the CCBE and the Commission. This dialogue could be broadened to other institutions such as the European Parliament and the Council.

The CCBE would also be happy to put in place additional awareness-raising measures such as webinars, conferences, training materials, etc.

² See for example, Law Society of Ireland [here](#); Paris Bar [here](#).

³ SWD(2022) 344 final, page 199.

⁴ SWD(2022) 344 final, page 199.

For Member States: *“In line with the FATF standards, Member States should ensure that when supervision is performed by self-regulatory bodies, they are overseen, for AML/CFT purposes, by a public authority.”*⁵

The CCBE would like to recall that such an oversight poses risks to the independence of Bars and it should be accompanied with proper safeguards.⁶

- **Regarding the risk of infiltration of the legal profession and the allegation that the respectability of the profession is used to legitimise criminal activities**

*“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.”*⁷

*“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.”*⁸

*“Given the very few suspicions reported by lawyers to financial intelligence units, extrapolating useful case studies to exemplify ML/TF threats is difficult. In fact, most cases reported in typologies regarding lawyers or appearing in revelations by investigative journalists refer to situations where the lawyers themselves were found to be actively facilitating money laundering. These typologies confirm nonetheless that risks exist and are very significant.”*⁹

With regards to the above conclusions of the SNRA, the CCBE would like to point out that it is unclear which data are these allegations based on. The CCBE has repeatedly requested the Commission to provide empirical background and reliable data sources.

The conclusions are serious as they suggest that it is easy for criminals to use lawyers to legitimise their interests. The report completely ignores that lawyers carry out comprehensive due diligence exercises in order to check their clients, to identify red flags and to ensure compliance with legal provisions.

Moreover, it seems the report is implying that lawyers are participating in ML on a significant scale. The respectability and reputation of lawyers, most of which comply with their AML duties, is therefore negatively affected by such conclusions.

The CCBE would like to question if the benefit of infiltration of the profession for ML purposes is not overstated: transactions always have to go through numerous steps, lawyers do not “decide” on anything (other than notaries), but only assist. There is no “stamp approval” as the Commission likes to refer to.¹⁰ Also, the CCBE makes clear the problem of infiltration has not come up in practice yet. The CCBE therefore requests that evidence is provided in order to back those allegations.

The CCBE is of the view that this is an example where law enforcement authorities would need to step up their intelligence gathering and share with the Bars (in a confidential way). Infiltration means a lot

⁵ SWD(2022) 344 final, page 200.

⁶ In this regard, see also the CCBE position paper on the AML package, available [here](#).

⁷ SWD(2022) 344 final, page 196.

⁸ SWD(2022) 344 final, page 197.

⁹ SWD(2022) 344 final, page 197.

¹⁰ SWD(2022) 344 final, page 198.

of criminal energy, a lot of invested resources, AML rules can only make it more difficult, but it seems rather a question of classic law enforcement work.

- **Regarding legal professional privilege**

There seems to be a misunderstanding regarding the application of legal professional privilege (LPP) in the field of AML/CFT.

Lawyers are subject to AML/CFT requirements, such as customer due diligence (CDD), when they carry out transactions.¹¹ For example, CDD must be carried out in the circumstances indicated in Article 11 of the AML Directive in force (e.g. when establishing a business relationship, when there is a suspicion of ML or TF, regardless of any derogation, exemption or threshold). Further details are set in the Articles that follow. Article 13 lists CDD measures¹². **LPP does not limit those obligations in any way. Even if the activity is subject to LPP according to the applicable national law, the legal professional has to fulfil its obligation according to the AML/CFT requirements.**

Legal professional privilege is relevant only when applying **Article 14 par.4** and **Article 33, 34**. **However, even if LPP applies, the framework does not allow the lawyer to execute ML/TF transactions.**

Article 14 par.4 reads: *“Member States shall require that, where an obliged entity is unable to comply with the customer due diligence requirements laid down in point (a), (b) or (c) of the first subparagraph of Article 13(1), it shall not carry out a transaction through a bank account, establish a business relationship or carry out the transaction, and shall terminate the business relationship and consider making a suspicious transaction report to the FIU in relation to the customer in accordance with Article 33.”*

Member States shall not apply the first subparagraph to notaries, other independent legal professionals, auditors, external accountants and tax advisors only to the strict extent that those persons ascertain the legal position of their client, or perform the task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings.”

If a lawyer cannot comply with CDD requirements (e.g. cannot identify a beneficial owner – one of the cases of Article 13 par.1 a)), in situations covered by LPP (i.e. if a lawyer ascertains the legal position of the client or defends or represents that client in/or concerning judicial proceedings, including providing advice on instituting or avoiding such proceedings), lawyers are still covered by their professional duties and might therefore need to terminate the business relationship. Lawyers are still required to carry out CDD. In other words, LPP does not exempt lawyers from carrying out CDD.

¹¹ Article 2 AMLD par 1 (3) (b): “notaries and other independent legal professionals, 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 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, foundations, or similar structures;”

¹² CCD measures are the following: identification and verification of customer’s identity (par.1a)), identification of beneficial owner (par.1b)), assessing and obtaining information on the purpose and nature of the relationship (par.1c)).

Legal professional privilege is also relevant for Article 33 (reporting obligations for obliged entities) and 34 (reporting to SRB and derogation from reporting for issues covered by LPP).

Article 33 foresees an obligation of obliged entities to report *“on their own initiative, where the obliged entity knows, suspects or has reasonable grounds to suspect that funds, regardless of the amount involved, are the proceeds of criminal activity or are related to terrorist financing, and by promptly responding to requests by the FIU for additional information in such cases (...)”*

“All suspicious transactions, including attempted transactions, shall be reported.”

Article 34 further states: *“1. By way of derogation from Article 33(1), Member States may, in the case of obliged entities referred to in point (3)(a), (b) and (d) of Article 2(1), designate an appropriate self-regulatory body of the profession concerned as the authority to receive the information referred to in Article 33(1).*

Without prejudice to paragraph 2, the designated self-regulatory body shall, in cases referred to in the first subparagraph of this paragraph, forward the information to the FIU promptly and unfiltered.

2. Member States shall not apply the obligations laid down in Article 33(1) to notaries, other independent legal professionals, auditors, external accountants and tax advisors only to the strict extent that such exemption relates to information that they receive from, or obtain on, one of their clients, in the course of ascertaining the legal position of their client, or performing their task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings.”

In other words, in principle lawyers falling under the AML Directive need to report to the FIU or SRBs, where applicable, suspicious transactions. They should report when they know, suspect or have reasonable grounds to suspect that funds are the proceeds of criminal activity or terrorist financing. However, they are exempted from reporting as set in Article 33(1) under certain conditions, i.e. when they receive information in the course of ascertaining the legal position of their client, or performing their task of defending or representing that client in, or concerning, judicial proceedings. However, even if the lawyer does not report such a suspicion due the exemption, he will not carry out the transaction, so that the envisaged result of the provision is achieved.

- **Regarding the effectiveness of supervision by self-regulatory bodies**

“In particular, when supervision is performed by self-regulatory bodies data show that inspections are mainly focused on compliance with professional standards rather than with AML/CFT obligations, the risk-based approach is still nascent due to a lack of information on the level of risk of the supervised population and few to no supervisory measures are taken for breaches of AML/CFT obligations, if any breach is detected at all.”¹³

With regards to the above conclusions of the SNRA, the CCBE would like to inquire which data these conclusions are based upon. Unfortunately, these conclusions are not supported by any references, and it is therefore difficult to know where these findings come from.

The CCBE also thinks that the conclusions above underestimate the efforts undertaken by SRBs. The CCBE knows from discussions of best practices examples, that a **risk-based approach when supervising**

¹³ SWD(2022) 344 final, page 199.

the profession is applied. This is the case, for example, in Austria, Denmark, Ireland, Luxembourg and the Netherlands. Furthermore, the CCBE knows from its member Bars that the **supervision focuses on AML/CFT obligations, which are part of the professional standards. This is the case for instance in Sweden, Austria, Belgium, Estonia, Luxembourg and Finland.**

The CCBE does not agree with the statement that “*few to no supervisory measures are taken for breaches*”.¹⁴ The CCBE is aware about a number of supervisory measures implemented by the Bars.¹⁵ In addition, when no breaches are detected, this does not necessarily mean that the supervision is weak but can also mean that the existing rules imposed on lawyers and supervision in place have a discouraging effect and ensure that lawyers do not breach AML/CFT obligations.

- **Regarding the low number of reports**

“In general, the level of suspicious transaction reporting is very low when dealing with lawyers (although suspicious transaction reports from legal professionals cannot be compared to legal reports from financial institutions, for example).”¹⁶

“The sector’s awareness of the risks is not homogeneous, with a higher risk awareness on the side of notaries as opposed to lower measures applied by lawyers, as exemplified by the limited number of suspicions reported across all EU Member States despite the moderately to significantly high risk.”¹⁷

With regards to the above conclusions of the SNRA, the CCBE thinks that, as the report acknowledges itself, it is not appropriate to compare the number of reports from legal professionals to those from the financial sector. However, the CCBE also thinks that **it is not appropriate to compare the number of reports from lawyers to the one from notaries.**

Notaries file more reports because of the type of activities that are carried out by them – they carry out more activities which fall under AML obligations, more transactions. Lawyers carry out many more activities that are not under AML obligations; it is therefore normal that they have a lower number of reports. There is a difference in the focus of work of lawyers. For instance, in Germany, a new law requires reporting on real estate transactions which are carried out more often by notaries than by lawyers. This results in more reports being done by notaries.

The CCBE would also be interested in knowing what number of reports is expected from lawyers. What level would be considered as high enough?

The CCBE is also of the opinion that there is not necessarily a causal link between the low number of reports and the conclusion that the awareness of the sector is low. Low statistics are not necessarily a proof of a lack of awareness.

The CCBE also notes that it receives contradictory signals regarding reporting. There is a risk of authorities being flooded with bad quality STRs and this overreporting may potentially reduce the effectiveness of their work. According to the feedback CCBE members receive from their national authorities, reports from lawyers are of high quality and allow a follow-up. Therefore, **taking into**

¹⁴ SWD(2022) 344 final, page 199.

¹⁵ In some countries, they have led to disbarments, e.g. since 2020, 14 Bar members have been disbarred in Luxembourg for AML/CFT breaches.

¹⁶ SWD(2022) 344 final, page 198.

¹⁷ SWD(2022) 344 final, page 199.

consideration only the quantitative aspect of reporting, as the Commission does, does not reflect the complexity of the issue.

Lawyers do have an exemption from filing STRs. Most of lawyers' work is defending clients so the exemption applies. In fact, a lawyer who defends someone accused of a crime cannot report about the information that was given to him/her by the client for their defence in court. This explains the lower number of reports.