Fighting money laundering effectively: Maintaining proportionality and professional secrecy

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Position paper of the European Tax Adviser Federation (ETAF) on the European Commission's anti-money laundering package 2021

The European Tax Adviser Federation (ETAF) is a European umbrella organisation for 280,000 tax professionals from France, Germany, Italy, Belgium, Romania, Hungary and Austria. The main role and mission of ETAF is to represent the regulated tax profession at European level in liaising closely with European policy makers in order to promote good legislation in tax and professional matters.

On 20 July 2021, the European Commission published a comprehensive legislative package to combat money laundering and terrorist financing (hereinafter: AML/CFT) with a total of four legislative proposals: a regulation establishing a new European anti-money laundering authority; a regulation establishing a single *corpus* of rules; a recast of Regulation 2015/847 on information accompanying transfers of funds; and a 6th anti-money laundering Directive.

Under the current European legislation in the area of AML/CFT, tax advisers belong, among others, to the group of *"obliged entities"* and are reacting, in this capacity, to the new package.

I. General considerations

Money laundering and financing of terrorism (hereinafter: ML/FT) jeopardise the security of our societies and the financial stability of the economy. In particular, the organised crime acting across borders exploits existing loopholes which are available due to the different implementation of the current European legislation in the area of AML/CFT by the Member States.

ETAF supports the European Commission in its effort to replace the existing patchwork of different regulations in Europe by common rules. However, this must take place under consideration of the different national structures, legal cultures and the existing diversity of professional law in Europe.

Effective responses in the area of AML/CFT for the fight against organised cross-border criminality require close coordination and a constant exchange of experiences between the competent public authorities including the national supervisory authorities and the Financial Intelligence Units (hereinafter: FIUs).

ETAF supports the European Commission's plan to promote close cooperation and exchange between the control bodies and the FIUs. Such a cooperation can be achieved through the creation of a European AML/CFT authority (hereinafter: AMLA). However, the national structures and competencies of the Member States must be considered. In addition, the AMLA should concentrate on cross-border cases.

ML and FT are present worldwide and must therefore be combated at global level. The establishment, expansion and maintenance of international cooperation and networks will contribute significantly to the success of AML/CFT in Europe and worldwide. In that regard, ETAF believes that the tasks of the AMLA should focus more on the international cooperation with third countries. In this spirit, we also welcome the intention of the Commission to establish a 'grey' list of third countries at risk of money laundering alongside the existing 'black' list, which will ensure greater proportionality in the consequences that accompany the inclusion of a country on the EU list and a more tailor-made follow-up.

Cryptocurrencies are increasingly used as a means of ML/FT[1]. ETAF therefore explicitly welcomes the European Commission's proposal to expand AML/CFT measures to the crypto sector. We consider the proposal as an effective instrument for curbing ML/FT as well as tax evasion within the European Union.

Another key measure of the package is the proposal to introduce an EU-wide maximum limit of €10,000 for large cash transactions. Cash remains indeed the preferred method of payment for criminals because it is difficult to trace. ETAF strongly supports the introduction of an EU wide maximum cash limit.

II. Establishment of a European AML/CFT Authority (AMLA)

The differentiation of the tasks and competencies of the AMLA in its function as a supervisory authority between the financial sector on the one hand and the non-financial sector on the other hand is fundamentally appropriate and as such to be welcomed. The non-financial sector has multi-layered economic sectors and thus different obliged entities, so that a comprehensive supervision through the AMLA would be disproportionate in this area. Due to its more heterogeneous nature and the lack of harmonisation in terms of requirements, the supervision in the non-financial sector must remain decentralized at the level of Member States, since they can act much faster, more effectively and more appropriately.

Nevertheless, according to the Commission's proposal, the AMLA shall be given far-reaching powers over the supervisory authorities in the non-financial sector.

[1] R. HOUBEN and A. SNYERS, "Cryptocurrencies and blockchain: legal context and implications for financial crime, money laundering and tax evasion", European Parliament study, July 2018, https://www.europarl.europa.eu/cmsdata/150761/TAX3%20Study%20on%20cryptocurrencies%20and%20blockchain.pdf

According to Art. 5 paragraph 4 b) in conjunction with Art. 31 of the proposal for the establishment of an EU authority to combat ML/FT (hereinafter: AMLA draft regulation), the AMLA shall monitor these supervisory authorities through peer reviews by examining and evaluating the adequacy of the competencies, the human resources, the independence and the effectiveness of the supervisory practice as well as the application of EU law. As a result of this review, the AMLA shall issue guidelines and recommendations to the relevant authority in accordance with Art. 43 of the AMLA draft regulation.

In addition, Art. 32 of the AMLA draft regulation suggests that the AMLA can investigate whether the specific supervisory activity of the supervisory authority in the non-financial sector has been carried out in accordance with EU law or national law or whether it has deficiencies. If the AMLA claims deficiencies, a multi-stage procedure is planned in which the AMLA or the European Commission shall be able to issue binding guidelines directly to the national authorities and shall even be given the possibility of issuing a binding decision vis-à-vis the national supervisory authority.

ETAF considers that this proposal represents a disproportionate and unnecessary interference with the competencies of the Member States.

The competencies of the AMLA in the *non-financial sector* should be limited to a coordinating and advisory function.

III. Safeguarding the professional secrecy

Professional secrecy is one of the core values of the exercise of the tax adviser profession. ETAF therefore welcomes that the proposal for an EU money laundering regulation (hereinafter: draft AML/CFT-RE) – in accordance with the 4th EU anti-money laundering Directive (Art. 34 paragraph. 2 and Art. 51 paragraph. 2) – foresees an exception for tax advisers to the obligation to submit a report for suspicion of ML as long as they are holders of professional secrecy.

However, the wording proposed in the draft 6th AML/CFT Directive (hereinafter: draft AML/CFTD) shows a regulatory gap and therefore does not meet the requirements for an adequate protection of the professional secrecy. According to the draft AML/CFTD, persons who are subject to professional secrecy are exempt from filing a report for suspicion of ML while this is not the case for the competent supervisory authority (Art. 32 (1) of the draft AML/CFTD). However, the obligation of the supervisory authority to submit a report for suspicion of ML inevitably limits the protection of those who are subject to professional secrecy.

Furthermore, the draft AML/CFTD does not foresee an exception for persons who are subject to professional secrecy regarding the report for discrepancy found in the transparency register (so-called *"discrepancy reports"*), as opposed to the report for suspicion. This contradicts, on the one hand, the case law of the European Court of Justice[2] and the European Court of Human Rights[3] on the protection of professional secrecy in the field of legal advice and, on the other hand, the statement in recital No. 9 of the proposal for an AML/CFT regulation:

[2] ECJ, Case 26 June 2007 – C-305/05.
[3] ECHR, Case 6 December 2012 – 12323/11.

"There should, however, be exemptions from any obligation to report information obtained before, during or after judicial proceedings, or in the course of ascertaining the legal position of a client, which should be covered by the legal privilege. Therefore, legal advice should remain subject to the obligation of professional secrecy except where the legal professional is taking part in money laundering or terrorist financing, the legal advice is provided for the purposes of money laundering or terrorist financing, or where the legal professional knows that the client is seeking legal advice for the purposes of money laundering or terrorist financing".

In order to avoid undermining the professional secrecy, it should be clarified in the draft AML/CFTD that the supervisory authority is exempt from the obligation to report a suspicious transaction if the tax adviser is not obliged to report a suspicious transaction himself. For reasons of coherence of the present money laundering package and to protect the professional secrecy, the draft AML/CFTD should also provide holders of a professional secrecy with an exception to the reporting obligation for discrepancy reports.

IV. Additional requirements for obliged entities

As *"obliged entities"*, tax advisers have the duty to check their client's identity by virtue of Art. 18 of the draft AML/CFT-RE. The new text further expands the information to be collected to the extent that the tax identification number and, in the case of natural persons, the employment or the occupation shall also be recorded. In the meantime, the previously most important sources of information such as official documents, ID cards or excerpts from the commercial register, will no longer be sufficient for the collection and the verification of this data. For the obliged entity, this means a disproportionate and additional effort in identifying and verifying the identity, whereby it is not clear if this additional burden brings added value.

The above-mentioned statement applies even more to the collection and verification of information regarding the beneficial owner. The draft AML/CFT-RE lists considerable extensions of the information to be collected. In contrast to the existing regulation, the proposal no longer differentiates whether the beneficial owner actually represents an increased risk with regard to ML/FT. Some of the information requested in the text about the beneficial owner, such as the national identification number or the tax identification number, e.g. in the case of the residence or company headquarters abroad, cannot be collected at all and often cannot be checked with the necessary care.

Instead of expanding the data collection at the expense of the obliged entities, it would be necessary to carry out and publish a comprehensive assessment of the added value of the previous data collection for combating AML/CFT since the 5th AML/CFT Directive came into force. Then, a reasonable consideration could be made as to which data shall be collected from contractual partners or beneficial owners.

In that regard, it is worth noting that the existing EU AML/CFT rules are not applied correctly by Member States. According to the Commission, all Member States have been subject to infringement procedures for incomplete or incorrect transposition of the 4th AML/CFT Directive. Today, there are still three ongoing non-conformity cases. The Commission also sent letters of formal notice to 16 Member States on the grounds of partial or non-transposition of the 5th AML/CFT[4]. Ensuring the correct implementation of the existing rules must be the first response before creating new ones.

ETAF recommends, for the time being, not to further expand the scope of collecting and verifying information and identity, but instead rather carry out an assessment of the benefits of the previous data collections and then, on this basis, adopt an effective, proportionate and workable obligation.

[4] Opening statement of EU Commissioner Mairead McGuinness before the European Parliament, "Increased efforts to fight money laundering", 20 October 2021, https://ec.europa.eu/commission/commissioners/2019-2024/mcguinness/announcements/opening-statement-european-parliament-increased-efforts-fight-money-laundering_en