



Position Paper

on the European Commission's AML/CFT Legislative Package

The Council of the Notariats of the European Union (CNUE) is the European umbrella organisation representing 22 national chambers of notaries with more than 45,000 notaries and 200,000 collaborators.

CNUE supports the objective of the European Commission, the European Parliament and the Council to combat money laundering and terrorist financing more effectively throughout the European Union. Notaries contribute on a daily basis in preventing money laundering in their function as public officers in important areas of legal transactions (e.g. real estate, company law).

However, CNUE is concerned about certain proposals in the AML/CFT legislative package published by the European Commission on 20 July.

The Anti-Money Laundering Authority (AMLA) and supervision over notaries (see I. and II.)

- In line with the Commission's proposal, CNUE is of the opinion that AMLA should only exercise supervision over certain obliged entities in the financial sector and limit its activities to a coordinating function with respect to obliged entities in the non-financial sector. Indeed, a clear-cut differentiation needs to be done between the financial and the non-financial sector. Unlike the financial sector, the non-financial sector is heterogeneous (or *sui generis*) and has specificities (or singular aspects) that are important to respect and maintain as they contribute to the efficiency of the system at national level.
- Furthermore, as far as notaries are concerned, a strict and effective monitoring regime is already in place at national level by ministries of Justice, courts and/or professional self-regulatory bodies, as well as national FIUs, in particular with regard to the fight against money laundering and terrorist financing. This supervision also takes into account the specificities of the function of the notary as a public officer appointed by the State exercising public functions, and thus, to a certain extent, considered an extension of the State, but also, in some Member States, entrusted with judicial functions and thus forming part of the judiciary, whose independence is a characteristic of the rule of law and is guaranteed by the Constitution.

However, Article 32 of the Regulation provides that where national supervisory authorities of the non-financial sector fail, the AMLA may take their place. Taking into account the strict supervision regimes already in place in the States and their specific place in the judicial system of the States, notaries should be explicitly excluded from the powers of AMLA under Art. 32 of the AMLA-Regulation at the risk of calling into question the separation of powers in States and the organisation of the judiciary.



- Furthermore, CNUE suggests that, for the purpose of a sound exchange of information, which is necessary for an effective fight against money laundering and terrorism financing, AMLA not only involves in its work representatives of the supervisory authorities, but also of the obliged entities (see I.).

Self-regulatory bodies (see II.)

- CNUE welcomes the fact that the proposed anti-money laundering regulation continues to provide for supervisory powers to be exercised by self-regulatory bodies. However, it provides for these bodies to be subject in turn to the supervision of another public authority. In the case of notaries, the intervention of such an authority would lead to a significant interference with the institutional autonomy of the states since these bodies are under the supervision of the Ministry of Justice and the courts, hence it would raise important constitutional difficulties and would disrupt a well-established, operational and efficient system. CNUE considers the proposal as an “unjustified” vote of no confidence against self-regulatory bodies (see II.).
- In view of the efficiency of the supervisory regimes that already exist for notaries (see point I.), they should be explicitly excluded from Article 32.6 of the AMLA Regulation and Article 38 of the VI AML Directive.

Due diligence issues (see III.)

- CNUE understands and welcomes the need to create a uniform EU regulatory framework for combating money laundering and terrorist financing. However, CNUE questions and is concerned about the extent of certain general due diligence requirements. Notaries are already strongly involved in the fight against money laundering and are often the first professionals in terms of the number of suspicious transaction reports to the financial units. While they wish to continue to combat money laundering and are not opposed to being given new responsibilities, they point out that notaries' offices are often micro and small businesses with limited resources. They therefore ask that a balance be found and that the new obligations they would be responsible for represent real added value.
- Furthermore, the harmonisation provided for in the Commission proposal should not prevent Member States to provide for more far-reaching regulations in some areas, in order to avoid a race to the bottom and to ensure a high standard achieved in AML, as some Member States have gone beyond the standards provided for in the previous Directive (see III).

Notaries are partners of the State by reporting suspicious transactions (see IV.)

- As state-appointed public officers European notaries are essential and effective partners of the Member States and the EU in the fight against money laundering. Through their various



national reporting regimes notaries already issue a large number of reports on suspicious transactions – in many Member States far more than any other obligated entity in the non-financial sector. This means that in the Member States well-functioning reporting regimes are already in place that often go beyond what is required by AML legislation. The Regulation should permit the Member States to define rules as to when a notary shall report a transaction. Then, the Member States can strike the right balance between the need for effective AML/CFT measures and respecting both the privacy of the citizens and the legal duties of the notaries including confidentiality.

I. Competences of the AMLA

A central component of the legislative package is the creation of a new EU authority for combating money laundering and terrorist financing (AMLA). European notaries expressly recognise the benefits of a European supervisory system in this field.

CNUE understands that AMLA is to exercise a coordinating function with regard to the supervision of obliged entities in the non-financial sector. This will ensure a uniformly high level of supervision in all Member States. However, it must be ensured that AMLA not only takes sufficient account of differences that exist between the individual groups of obliged entities in the Member States, but also within the same group of entities. This needs to be recognised under the AMLA architecture and competences in the proposed AMLA Regulation and 6th AML Directive.

Notarial activity in each Member State is of a different nature (e.g.: Latin notaries compared to other types of notaries). This makes the existence of a single regulator of all activities lose the ability to adapt to local specifications.

Furthermore, CNUE suggests that AMLA must involve in its work not only representatives of the supervisory authorities, but also of the obliged entities.

Effective anti-money laundering requires a sound exchange of information between all relevant stakeholders. On this point, CNUE supports all proposed measures to increase the information exchange between all relevant actors in the fight against money laundering and terrorist financing such as improvement of interconnection and reliable data of ultimate beneficial owner registers. Also, putting in place reliable registers on politically exposed persons would be an important improvement in the fight against money laundering.

Furthermore, the committees for carrying out the peer reviews (Art. 31) should only consist of representatives of AMLA and the supervisory authorities, but not of representatives of the obliged entities. Yet the latter often have special expertise. Even self-regulatory bodies, which are responsible for anti-money laundering supervision, are to be invited to these peer reviews only at the discretion of AMLA “[o]n a case by case basis” (Art. 31(9)). However, an effective fight against money laundering can only succeed in cooperation with the obliged entities. Therefore, AMLA must involve representatives of obliged entities in its work. To this end, especially Recital 9 and Article 31 of the proposal for an AMLA Regulation need to be adapted accordingly.



II. Supervision of the Notaries of Europe

Notaries are subject to very strict state supervision in their function as public officers. In general, supervision over notaries is exercised by judicial authorities, the Ministries of Justice and/or by the chamber of notaries and/or other supervisory authorities, such as FIUs.

According to the proposal for the 6th AMLD, such national supervision will in principle still be possible in future. However, the proposal provides that self-regulatory bodies must in turn be subject to supervision by a public authority. Article 32(3) provides AMLA with the power to issue a “recommendation” to the supervisory authority, which is de facto binding, as the supervisory authority has to inform AMLA within ten working days about the steps taken to comply with the recommendation. The wording “recommendation” therefore is misleading. If the supervisory authority does not comply with the recommendation, AMLA can request that the Commission issues a “formal opinion” directed to the supervisory authority (Article 32(4)), which should be issued within three months after the recommendation. The supervisory authority has to comply within ten working days (Article 32(5)). If the supervisory authority does not comply, it is again AMLA who takes action, this time by issuing an “individual decision” directed to a self-regulatory body (SRB) (Article 32(6)). The competences of this authority are specified in detail (Art. 38 et seq.).

As a consequence, AMLA would have direct powers to issue individual decisions towards SRBs. CNUE is very critical about this, as there would be a significant interference with the institutional autonomy of Member States as well as a disruption of a proven system. Moreover, this would raise important constitutional issues, since the principle of self-regulation is in some Member States enshrined in the constitution with legal guarantees. The proposed regulation therefore represents an – unjustified – vote of no confidence against self-regulatory bodies. However, self-regulatory bodies are corporations under public-law that are subject to supervision by ministries to ensure that they perform their statutory duties properly. CNUE does not consider it appropriate for self-regulatory bodies to be subject to further supervision that is specific to the fight against money laundering.

Furthermore, the existence of a European common regulator most surely implies the establishment of a common standard for all obliged subjects under its scope of action. However, the reporting entities in the financial and non-financial sector, but also within the non-financial sector, are very diverse. In addition, the fact that a European regulator supervises different occupations implies a possible loss of focus on the specificities of the particular professions, which vary significantly. Also, a single European supervisor for all the obliged entities poses a risk to the regulatory framework already achieved by notaries in each Member State.

As a result, notaries should be excluded explicitly from the scope of Art. 32 of the AMLA-Regulation and Art 38 6th AMLD.



III. Appropriate content of the future Anti-Money Laundering Regulation

CNUE welcomes the proposal for the adoption of a Regulation on the fight against money laundering and terrorist financing (AMLR) with directly applicable provisions in order to tackle the lack of coherence caused by means of the Directives' diverging transposition in Member States. However, CNUE is critical of certain aspects:

1. Tightening general due diligence requirements

The proposal for the AMLR stipulates to significantly tighten in some points the general due diligence obligations compared to the 4th AMLD.

Thus, with regard to the obligations to identify and verify the identity of the customer, to verify the identity of the beneficial owner, to identify and verify the origin and destination of the funds, more information will have to be systematically collected by the obliged authorities and more documents will have to be provided by the citizens/companies.

While the notariat is not opposed in principle to increasing the obligations that obliged entities should fulfil, it would like to see a fair balance struck and more account taken of the risk-based approach in each case. Indeed, too much of an increase would mean considerably more bureaucracy for the obliged entities, which in the non-financial sector, are mainly micro and small enterprises with limited human resources.

2. Strength through diversity

From the perspective of the notariat, a future AML Regulation must allow Member States to go even beyond the Regulation's minimum standards with regard to implementation in order to develop tailored and efficient solutions, among others taking into account the different notarial systems. The Union legislator should therefore ensure not to deprive Member States of the possibility to adequately respond to national particularities by introducing a fully harmonised legal framework.

Furthermore, it should be borne in mind that several Member States have already transposed the 4th AMLD and 5th AMLD into national law by introducing provisions that are stricter than required by European legislation.

Harmonisation, by means of a regulation, reduces the current level of due diligence requirements if the lowest common denominator were to be adopted. The regulation should therefore allow Member States to lay down stricter rules to combat this in order to avoid a race to the bottom.

IV. Notaries are partners of the State by reporting suspicious transactions with specific territorial understanding

As state-appointed public officers European notaries are essential and effective partners of the Member States and the EU in the fight against money laundering and terrorist financing. Through their



various national reporting regimes notaries already issue a large number of reports on suspicious transactions – in many Member States far more than any other obligated entity in the non-financial sector. This means that in the Member States well-functioning reporting regimes are already in place that often go beyond what is required by AML legislation. The Regulation should acknowledge these different and well-functioning reporting regimes and expressly permit the Member States to define rules as to when a notary shall report a transaction. In some Member States, e.g., there are no limitations as to when a notary shall report a transaction and, accordingly, the notary has wide discretion to decide on when a suspicion sufficiently justifies a report. In other Member States, notaries file reports in line with objective indicators defined by that State. Of course, under all reporting systems the answer to the question on when to file a report is continuously refined in close cooperation with the FIUs and other authorities. Harmonisation however, should be kept at a level that would not stifle the flexibility and adaptability of the individual notariats who are most familiar with their respective territorial specificity. It should not come at the detriment of the effectiveness that such expert understanding brings, otherwise whittling the strong position held by notaries as effective gatekeepers in the fight against money laundering and terrorist financing. If these different national reporting systems linked to the territorial specificity are respected, the Member States can also strike the right balance between the need for effective AML/CFT measures and respecting both the privacy of the citizens and the legal duties of the notaries including confidentiality – a cardinal rule of professional notarial law in many Member States.

V. Adequate Protection of subject persons/obliged entities

Protection of any subject person, including notaries, is essential in the fight against money laundering and financing of terrorism. If the subject person feels confident enough to submit a suspicious transaction report to the authorities, (which is beyond the protection of confidentiality), then it is up to the authorities to protect that same subject person. The safeguarding of this important principle ensures a stronger position in terms of identification of offences and more importantly, avoidance of third party suits against subject persons for divulgence of information and possibly for not completing any transaction.

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