

POSITION PAPER ANTI-MONEY LAUNDERING

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EU ACTION PLAN FOR A POLICY PREVENTING MONEY LAUNDERING AND TERRORIST FINANCING

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INTRODUCTION

Transparency International Nederland (TI-NL) is pleased to have the opportunity to contribute to the discussion on the future of EU policy regarding anti-money laundering (AML) and combatting the financing of terrorism (CFT). This is not a new subject; for decades national governments, European cooperation led by the European Commission, global efforts in the context of the FATF, and civil society organisations like Transparency International aim to fight criminal behaviour linked to AML/CFT.

Transparency International is focused on fighting bribery and corruption. Proceeds of (grand) corruption are often the proceeds of crime that have to be laundered. Therefore, money laundering and corruption are closely related. Despite results achieved, the fight against criminal behaviour will never be over. Criminal behaviour continues; the Covid-19 epidemic has already shown new cases.

TI-NL welcomes the attention the EU Commission is giving to this important subject. Money laundering and the financing of terrorism are major problems for all EU Member States and undermine European economies and political systems. Lack of appropriate action against Money Laundering and Terrorist Financing undermines societies, distorts competition between countries and plays stronger against less strong jurisdictions. Much of AML / CFT criminality is cross border; the weakest link determines the strength of the whole structure. Therefore, close cooperation between national authorities, supported and assisted by supra national bodies such as the EU Commission, is crucial.

The Communication by the Commission (dated 7 May 2020) notes that there are past results and present initiatives (such as the 5AMLD and an increased mandate for the EBA), but also that these are insufficient and that more is needed. First and foremost, the Communication lists as major concerns:

- divergences in rules by Member States;
- the application of rules by Member States; and

- serious weaknesses in enforcement are among the major concerns.¹

TI-NL fully agrees with these observations and **urges the Commission** to take up the task of addressing these major concerns as a priority, including making available appropriate funding for these purposes.

Despite the recent scandals and repeated warnings from the Commission that there should be no further delays in transposing 5AMLD, only [11 Member States](#) have formally completed full transposition of the 5AMLD. With regard to provisions on beneficial ownership transparency, the result is even more alarming, only [5 countries](#) have implemented fully accessible public registers.

It is essential that **the Commission exerts pressure** to:

- speed up the process of transposition;
- ensure proper and harmonised implementation and respect of EU law, both in letter and spirit.

Indeed, a number of Member States, including the Netherlands, have introduced limitations when implementing their beneficial ownership registers such as tipping off provisions requiring to inform beneficial owners if someone is doing a search on them, paywalls or limitations and constraints in searching functions, or a combination of all the aforementioned.

TI-NL suggests the Commission, in creating new rules, instruments for execution and enforcement:

- focusses on its ability to strengthen national structures and initiatives. Rather than enlarge Brussels' capacities; national where legally required and possible, at EU level if and when inevitable;
- Avoids overlap with work at national level and 'power grab' by Brussels' institutions;
- Facilitates coordination of efforts by national authorities.

EFFORTS BY THE NETHERLANDS

Observations by TI-NL on these EU initiatives must be read in the context of domestic initiatives - such as in the Netherlands - on the same issue, where the discussion is ongoing on a "Plan of Action Money Laundering". Several ideas are under consideration, among others:

- closer cooperation between AML gatekeepers in the financial sector;
- cooperation between private and public parties involved in AML/CFT;
- better enforcement, including more human / financial resources;
- international cooperation.

TI-NL is very keen to see these ambitious objectives implemented in the nearest future. In doing so, appropriate account has to be taken of possible obstacles like privacy legislation and anti-competitions laws. Furthermore, the independence of enforcing institutions should under no circumstance be compromised by the close relations with the institutions they are mandated to supervise.

Commission initiatives should be in line with, amplify and not obstruct the best practises in individual EU Member States to the greatest extent possible.

¹ https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_821

SIX KEY POINTS TO CONSIDER

1. Mandate

It is well known that EU Member States and the EU Commission have a permanent dynamic relation on policy topics that are and that are not in the domain of the mandates given by Member States to the Commission ('Brussels' power grab"). TI-NL has no opinion on the desirability of more power for Brussels; that is for Member States to decide. However, TI-NL is concerned, given the length of negotiation processes in national political fora and the EU-capital on any issues of mandate, which is likely to result in real action in combatting money laundering and terrorist financing getting out of sight for several years. But we don't have several years. Recent and ongoing scandals have shown that we should treat AML/CFT as a matter of urgency.

TI-NL therefore makes a plea for effective measures at EU-level that can be taken within the powers that are in place today. Measures that will enhance the effectiveness of rules and tasks already at the disposal of national capitals.

TI-NL supports all contributions the Commission can make to assist Member States in implementing the already existing anti-money laundering rules, as well as improve performances in complying with those rules. To be judged upon when FATF will undertake its next country examination.

2. EU-supervision

Given that money laundering crimes are very often cross-border and are very costly to people and countries, all initiatives taken by the Commission that will improve performance of national institutions and their international cooperation, will be supported by TI-NL.

The Commission proposes to supervise national AML/CFT efforts at central level. One of the instruments would be an enlarged EBA. How realistic is this ambition? Antitrust work by the Commission has proven to be highly effective.

However, **TI-NL requests clarification** on the following before passing a judgement on the desirability of the Commission's proposals:

- today, national authorities are in charge of supervision of their (financial) institutions. It is indistinct from the Commission plans whether EU supervision would replace national efforts or would strip supervisory bodies of their powers. In the negative case, it is also unclear whether national bodies would perform their tasks as seriously if Brussels will play a supranational role.
- today's EBA is understaffed for the tasks it is mandated to perform. Additional mandate, enlarged organisation and structural funding would be prerequisites for successful AML/CFT supervision at EU-level. It is unclear what a completely new institution suggested by the Commission would do, assuming Member States would agree to its creation.

TI-NL underlines the need for:

- **Assistance by the Commission to Member States** – especially in less affluent countries – to raise awareness for the damage of money laundering and to further improve AML/CFT rules. Gatekeepers and businesses have to understand what is at stake; to accept and internalise that a culture of integrity is a vital part of good governance and sound business practise.

- **Action by the Commission to improve enforcement** at national level and enhanced focus on working together between countries in order to combat money laundering.

3. Divergences in (application of) AML/CFT rules

FATF over the past 30 years has developed state of the art Regulations describing in detail what the optimal government response against money laundering and terrorist financing should look like. It also has a highly sophisticated methodology to examine the content and effectiveness of AML/CFT laws and regulations in its 180 plus participating jurisdictions.

These efforts have proven to be excellent incentives; many countries felt obliged to adapt to the rules and requirements of FATF. Negative FATF-reports result in, decrease in reputation, possibly higher costs of the economy and decreased interest by foreign investors.

The FATF standards, best practises and policy programmes-by- country have no equivalent in the world.

Against this background, the Commission proposals lack detail and specificity. The proposals as they stand could result in more activity in Brussels, including the integration of a future EU Rule Book into Regulation(s) and a subsequent overlap with existing and planned national work.

It should be noted here that the member countries of FATF are being examined individually.

The EU initiatives and actions will only add value if:

- New EU rules represent the best practises available (based on FATF experience), not the best political compromise, and which can make a distinctive difference throughout the EU's territory. In short: "Rules that bite".
- Implementation of these rules can be executed efficiently and effectively at the level of the individual Member States;
- Working together between EU member states (and third countries) is facilitated as money laundering most of the times include multiple jurisdictions.
- Monitoring by the Commission is effective.

The Commission services would make **invaluable contributions** if assistance is given to Member States in promoting them to get closer to the FATF-standards, including reviewing and implementing their national rules.

4. More EU in FATF

The Commission claims that a bigger role for the EU in FATF is necessary to ensure that the EU efforts – the EU Rule Book – will be in line with the letter and spirit of FATF's Recommendations. The likely consequence of such a claim is more EU and less individual Member States at the FATF negotiation table, resulting in another potential battle for competence between the Commission and Member States that will not necessarily bring AML solutions closer in the near future. TI-NL does not believe that is the way forward.

What would be **highly useful, effective and strongly supported** by TI-NL is:

- cooperation between the analytical capacity in the Commission and the FATF in evaluating risky regimes within the EU and around the world;

- dovetailing the Commission's efforts with FATF to improve the quality of the 'high risk jurisdictions list';
- assistance by the Commission to EU-capitals to implement FATF instructions for strengthening national AML/CFT regimes.

5. EU and national FIU's

Financial Intelligence Units (FIU's) play a key role in identifying money laundering risks at national level. Gatekeepers, such as banks, accountants and law firms, supply FIU's with suspicious/unusual transactions. There are several issues with the present system:

- All countries have a risk-based approach to AML reporting. However, not all countries use the same method to implementing such an approach.
- Not all countries use the same definitions of transactions that need to be reported to FIU's; some countries require a transaction to be 'suspicious', others already require reports if a transaction is 'unusual'.
- FIU's have a difficult task; if there are few suspicious activity reports by gatekeepers (like this has been the case in earlier years), it is impossible to make a positive difference in combatting money laundering. Prolonged low reporting by gatekeepers incentivises central governments to economise on the scope and quality of its FIU. If gatekeepers report many cases, including many 'grey area' cases, the FIU can be overwhelmed due to lack of capacity in dealing with these reports and will have serious difficulty in performing its duties. A lack of follow-up on the reports may demoralize the gatekeepers.

The Commission can have a role in:

- Harmonising definitions;
- Monitoring activities in EU Member Countries and assist where weaknesses are identified;
- Facilitating focussed cooperation between gatekeepers and the FIU at national level.

Next to gatekeepers the Commission needs to support other parties than gatekeepers to report signals of money laundering for example:

- research journalists, who have proven to be key in helping to detect large money laundering schemes and even more important informing the public, both individuals and companies;
- whistleblowers, who deserve protection and at least be compensated for the damage caused by the whistleblowing activities.

Today the EU Member States are divided between members of FATF and members of ('FATF's sub organisation') Moneyval. This provides an opportunity for the Commission to bridge any differences this membership structure may cause.

TI-NL considers that assistance by the **Commission should ensure** that:

- throughout the EU, FIU's exist and have sufficient powers, resources and expertise (potentially as co-production with FATF);
- New EU-wide cooperation between FIU's including equal access to information and information-sharing will have value added to raise awareness, standardisation and quality within the EU;

- The EU adopts new technologies in the area of data analysis and artificial intelligence, in a responsible way, to discover suspicious cross-border payment patterns more easily;
- Transaction reporting to FIU's should focus on (fewer but) well documented transactions instead of maximising the volume of reports. Here there is a role for the gatekeepers.

6. EU and Asset Recovery

Asset recovery is important as:

- It deprives criminals of the proceeds of their crimes
- It should provide the means to compensate the victims of those crimes

According to Europol estimates, a small 2.2% of the proceeds of crime are frozen and an even tinier 1.1% is actually confiscated, meaning very little is ever returned to victim populations.

It is essential that the **Commission**:

- **better connects** both AML and asset recovery policy areas; and
- **further enhances** its asset recovery efforts.

TI-NL calls on the Commission to reform its asset recovery framework to facilitate confiscation including in situations where securing a prior conviction is not possible and introduce principles for the responsible return of stolen assets to victim populations of third countries.