

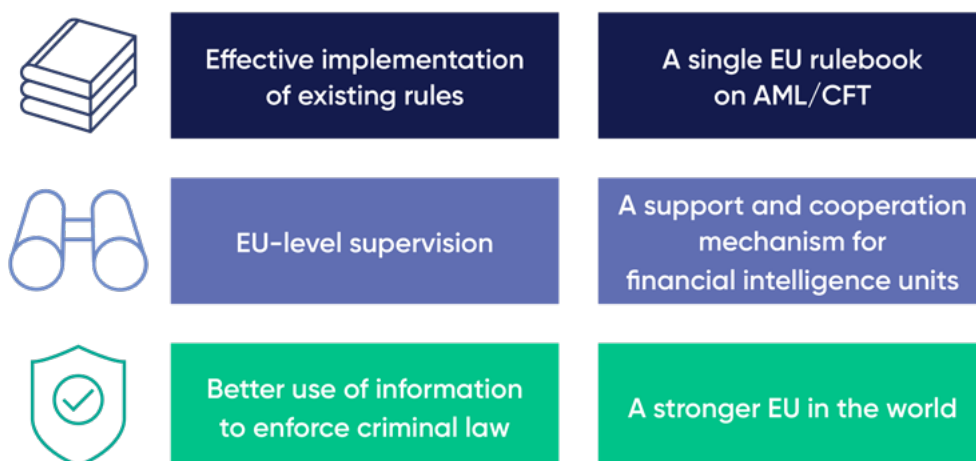
The EU AML Package: Shaping the new pillars of the future EU AML/CFT framework

September 2021

1. Introduction

In recent years, several major money-laundering scandals have shaken up the financial services industry in the European Union and indicated the EU lawmakers that the existing regulatory framework on the prevention of money laundering and terrorist financing might need some further adjustments. The divergences in national transpositions of AML Directives, together with the lack of a standardised approach to the supervision of obliged entities, have been identified as the main weak spots of the existing framework. The rapid adoption of new technological solutions in finance and the ever increasing use and popularity of crypto-assets have also drawn the EU lawmakers' attention to some emerging money laundering risks that still need to be addressed.

Driven by these recent experiences, the Commission has come up in May 2020 with the brand new **Action Plan** for a comprehensive Union policy on preventing money laundering and terrorist financing that has set out the main pillars for the future regulatory framework on AML/CFT:



By building on these six pillars, the Commission has published on 20 July 2021 the legislative package (**the AML Package**) designed to create the stronger EU regulatory and supervisory framework on AML/CFT that shall successfully tackle the risks related to money laundering and terrorist financing and bridge the identified weaknesses in national frameworks. The Commission's package is comprised of the following four legislative proposals:

- proposal for a Regulation creating an EU AML Authority ("**AMLA Regulation**");
- proposal for a Regulation on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing ("**AML/CFT Regulation**");
- proposal for a Directive establishing the mechanisms that Member States should put in place to prevent the use of the financial system for money laundering and terrorist financing purposes ("**AMLD6**"), and
- proposal for the revision of Regulation (EU) No 2015/847 expanding traceability requirements to crypto-assets ("**Revised Transfers of Funds Regulation**").

2. AMLA Regulation

In the wake of several money laundering scandals and the rising awareness of the shortcomings in effective supervision and enforcement of AML/CFT rules in the EU, the creation of a single EU AML authority has been a subject of many discussions in recent years. Instead of providing the European Banking Authority (EBA) with additional powers, the Commission is now proposing the creation of a new dedicated EU authority that would be acting as the first dedicated EU AML authority.

Intended to be the “centrepiece of the EU AML/CFT supervisory system”, the European Anti-Money Laundering Authority (“AMLA”) will basically have two main areas of responsibility:

2.1 Direct supervision

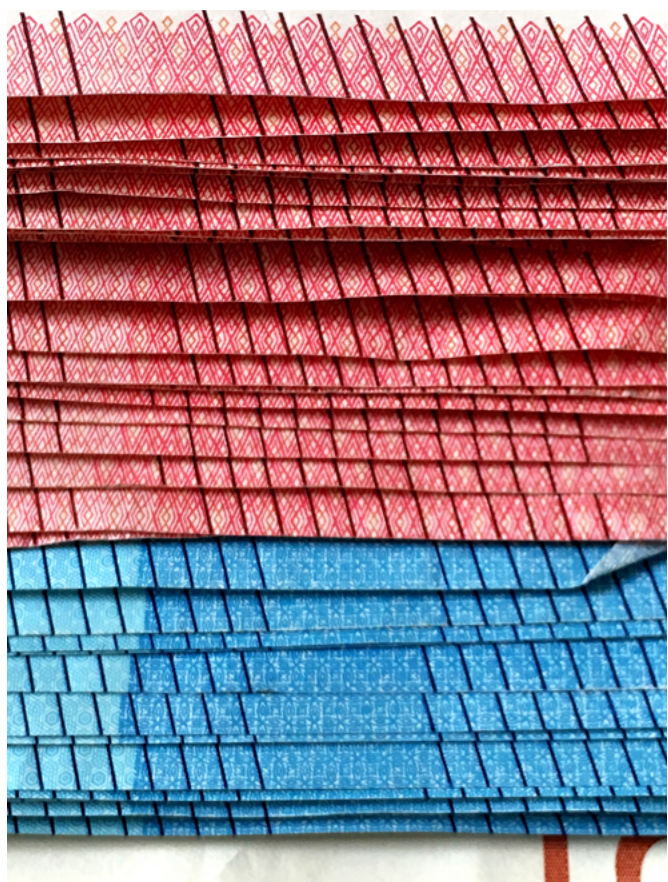
The AMLA will be directly supervising a limited number of the selected obliged entities in the EU that will include high-risk cross border credit and financial institutions (or groups of such institutions) operating in a significant number of EU Member States. Based on a combination of a pre-defined criteria (related to their cross-border activities and ML/FT risks), the AMLA will be assessing every three years which entities will be subject to its direct supervision.

Further, in exceptional cases other entities whose material breaches of applicable AML/CFT requirements are not sufficiently or in a timely manner addressed by national supervisors can also fall under the definition of the selected obliged entities. In this case, the AMLA will be empowered to request a Decision from the Commission that would place the entity under its direct supervision.

The direct supervisory powers of the AMLA will be exercised through joint supervisory teams composed of the AMLA staff and the staff of the national supervisory authorities from the EU Member States where the entity is operating. In its capacity, the AMLA will be empowered to request information, examine books, records and documentation, conduct the interviews with the staff, outsourcing companies as well as other related entities to the obliged entity under its supervision. Further, the AMLA will also be able to conduct on-site inspections subject to prior approval of the national supervisory authority in the respective EU Member State. The AMLA will also be able to levy fines in the amount of up to EUR 10 million or 10% of the annual turnover of the selected obliged entity for non-compliance with the applicable AML/CFT requirements and/or its instruction.

2.2 Coordination of work of national supervisory authorities

In addition to its direct supervisory function, the AMLA will also exercise the indirect supervision of non-selected obliged entities in the EU through the coordination and oversight of national supervisory



authorities, including self-regulatory bodies at national level. It will have the power to adopt binding templates and models for reporting of suspicious transactions and activities that obliged entities will be required to use when making mandatory reporting to financial intelligence units (FIUs).

Further, the AMLA will have the power to adopt Regulatory and Implementing Technical Standards (RTS and ITS), Guidelines and Recommendations that will also complement the Level 1 requirements stipulated by the AML/CFT Regulation and the AMLD6.

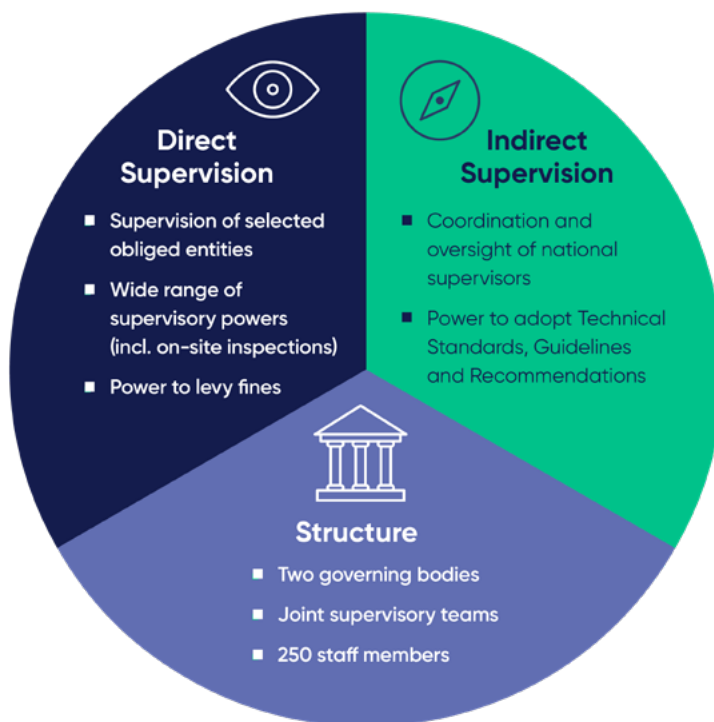
2.3 Governing structure

The new EU AML-watchdog will be composed of two collegial governing bodies:

The Executive Board – composed of five independent members and the Chair of the Authority that will be acting as the governing body of the authority. The Executive Board will take all decisions towards obliged entities under the AMLA supervision and towards national supervisory authorities.

The General Board – composed of representatives of Member States, including heads of national supervisory authorities and the heads of FIUs, that will be responsible for adopting all regulatory instruments (RTS, ITS, Guidelines and Recommendations).

The AMLA shall be established at the beginning of 2023, however it is not intended to start exercising its direct supervisory powers until 2026. Once it becomes fully operational, the AMLA shall be composed of approximately 250 staff members.



3. AML/CFT Regulation

Despite the great contribution that the AML-Directives have made to the harmonisation of national frameworks, they have not always been implemented into national law of all EU Member States in a consistent way. This led to the creation of certain divergences in national rules that have started to

represent significant obstacles for obliged entities operating in more than one EU Member State. Further, the inconsistent approach to the implementation of requirements on customer due diligence has left the loopholes in national systems that have been misused for the purposes of laundering of illicit assets in certain parts of the EU Single Market.

Dedicated to create the single harmonised EU regulatory framework, the Commission has decided to come up this time with the proposal for AML/CFT Regulation, whose provisions will be directly applicable in all EU Member States without the need for national transposition. Nevertheless, the AML/CFT Regulation aims to harmonise the rules in certain important areas only including the provisions on the scope of application on AML/CFT rules, the requirements on customer due diligence and requirements on reporting of suspicious activities and transactions.

3.1 Expanded scope of obliged entities

The proposed Regulation expands the scope of obliged entities by bringing some new types of financial and non-financial companies under the scope of AML/CFT rules. By following the recommendations of the Financial Action Task Force (FATF) and by a way of preparing the ground for the forthcoming EU regime on crypto-assets, the proposed Regulation adds crypto-assets service providers (CASPs) within the meaning of their proposed definition under the Regulation on markets in crypto-assets (MiCAR) to the list of obliged entities. Further, the proposed Regulation also adds the following entities to the list of obliged entities that will in the future need to comply with EU requirements on AML/CFT:

- Crowdfunding service providers which fall outside the scope the new EU Crowdfunding Regulation (**Regulation (EU) 2020/1503**);
- Creditors for mortgage and consumer credits together with mortgage and consumer credit intermediaries (that are not regulated financial institutions);
- Operators involved on behalf of third country nationals in the context of investor residence schemes.

3.2 Customer due diligence & the EU Digital Identity

Despite being defined quite straight forward in the AML-Directives, the requirements on customer due diligence (CDD) were one of the main areas of the EU AML/CFT framework that was frequently transposed inconsistently in national law of EU Member States. Decided to bridge these divergences, the Commission has now proposed some clarifications on the information that are to be obtained in the course of CDD and on the process of verification of the customer's identity.

In the light of recent proposal for amendment of e-IDAS Regulation, the proposed Regulation introduces the possibility for obliged entities to use (still to be developed) the European Digital Identity for the purposes of customer's identification, and verification of customer's identity.

By way of background, the Commission has proposed on 3 June 2021 **a Regulation** that will amend the e-IDAS Regulation and establish a framework for European Digital Identity, the single digital wallet containing key identity information about the person that can be easily stored on mobile phones (in the form of an app). The European Digital Identity is intended to enable EU citizens and residents to store their key identity information in a digital wallet based on which they can easily (among other) open a bank account, file in tax returns, rent a car, or prove their age.

The use of the European Digital Identity has a huge potential to speed up sometime cumbersome CDD processes that are currently performed by financial institutions repeatedly based on provided information by the client in each single case. Based on the European Digital Identity, the clients would be able to

use their digital wallet for the identification purposes, whereas the obliged entities would be able to rely on one single set of information securely stored in such digital wallet. In coming weeks, we will prepare a separate publication on the European Digital Identity and its use in the financial services sector.

The AMLA will be empowered to produce regulatory technical standards with more detailed requirements on CDD, which shall also include the specific requirements for simplified CDD in the case of lower risk situations.

3.3 Focus on beneficial ownership

Aiming to prevent the use of certain structures for money laundering purposes, the proposed Regulation stipulates more detailed and harmonised rules as regards the information that need to be obtained for the purposes of identification of beneficial owners especially in relation to corporate legal entities as well as express trusts and similar legal arrangements (like foundations). Trustees of any express trust administered in the EU are responsible to obtain adequate information on beneficial ownership of the trust estate and to provide the relevant information about them to obliged entities that conduct the customer due diligence.

Further, the proposed Regulation introduces some new disclosure requirements for nominee shareholders and nominee directors who will be required to maintain adequate, accurate and current information about the identity of their nominators (and their beneficial owners) and disclose them when dealing with other legal entities. Last but not least, new obligations are introduced for legal entities incorporated (as well as express trusts or similar legal arrangements administered) outside the EU that will be required to register their beneficial ownership when entering into a business relationship with EU obliged entities or when acquiring real estate in the EU.



3.4 Shedding more light on the use of bearer instruments

The proposed Regulation introduces an EU-wide limit on cash transactions by explicitly preventing the traders in goods or services from accepting cash payments in amounts exceeding EUR 10 000 for a single purchase. Whereas traders in goods have been treated as obliged entities when accepting cash payments exceeding EUR 10 000 so far, they will now be completely prohibited from accepting cash payments that exceed this amount. Given that no cash transactions above the aforementioned limit will be acceptable, traders in goods (with the exception of traders in works of art, precious metals and stones) are removed from the list of obliged entities. Further, the proposed Regulation prohibits

the issuance of bearer shares of non-listed companies by requiring mandatory registration of all issued shares of such companies.

In the field of crypto-assets, the proposed Regulation aims to prevent the use of anonymous wallets due to the fact that traceability of crypto-asset transactions in such case cannot be ensured. Therefore, financial institutions and CASPs, will no longer be allowed to provide anonymous crypto-wallets to their clients (however, this ban falls short of prohibiting the purchasing of anonymous crypto-assets held in self-custody).

3.5 The new third country policy

In accordance with the proposed Regulation, the Commission will identify the countries with compliance weaknesses in AML/CFT frameworks in two different categories in relation to which different rules will apply. Third countries that are subject to a "call for action" by the FATF will be identified by the Commission as high-risk third countries and in relation to entities and persons located in such jurisdictions the rules on enhanced due diligence will be mandatory (the "black list"). On the other side, countries that are subject to increased monitoring by the FATF will be placed on a separate list (the "grey list") and in the case of a customer due diligence conducted on entities and persons coming from these jurisdictions, specific enhanced due diligence requirements (less onerous ones) will be applicable. Besides following the FATF practice, the Commission will be empowered to identify third countries not listed by the FATF that pose a specific threat to the EU financial system and to place them on either of the aforementioned lists.

4. The sixth AML Directive

Whereas the proposed AML/CFT-Regulation aims to bring the main AML/CFT requirements on the higher legislative footing, the proposed 6th version of the EU AML-Directive (the AMLD6) brings a number of amendments to existing rules primarily in the area of supervisory practices of and regulatory cooperation between the national competent authorities (NCAs) and the financial intelligence units (FIU) in the EU.

The AMLD6 brings the new rules and minimum standards that aim to enhance the coordination, cooperation and efficiency in AML/CFT supervisory framework by proposing (among other) the following:

- **Contact points for e-money, payment and crypto-asset service providers** – NCAs will be empowered to require issuers of e-money, payment service providers and CASPs that operate on a cross border basis based on the freedom of services, to appoint a contact point in the host Member State that will be required to ensure compliance with the AML/CFT rules;
- **Licensing or registration obligation for currency exchanges, cheque cashing offices and trust or company service providers** – Member States will need to ensure that these entities, whose business can be associated with a higher money laundering risk, are subject to mandatory licensing or registration whereas the gambling service providers will have to be regulated;
- **Frequent risk assessments at the EU level** – the Commission will conduct the assessment of the money laundering and terrorist financing risks in the EU every four years and report its findings to the European Parliament and Council. The assessment itself will be conducted based on the input provided by the AMLA on the current money laundering and terrorist financing risks.
- **Further integration of registers and mechanisms of beneficial ownership, bank accounts and real estate** – further requirements on Member States aimed to enable the quick access to information on beneficial ownership, bank accounts and safe deposit boxes as well as the requirements aimed to provide FIUs and NCAs with the access to contents of national real estate registers are proposed.

5. The Revised Transfers of Funds Regulation

With the idea to complement the **Digital Finance Package**, the Commission has decided to revise the **Regulation (EU) 2015/847** (Transfers of Funds Regulation) with the focus on its application to crypto-asset transactions. In accordance with the legislative proposals published under the Digital Finance Package, the activities of crypto-asset service providers are going to be regulated by the proposed **MiCAR framework** and they will be treated as obliged entities subject to standard AML/CFT requirements. The Revised Transfers of Funds Regulation aims to ensure the proper traceability of crypto-asset transactions through the expansion of its scope of application to all types of CASPs as defined by the FATF. The main idea behind this is to bring crypto-asset transactions under the scope of application of the well-known FATF Travel Rule.

In accordance with the proposed requirements, the CASP of the originator of the transfer will need to ensure in relation to each transfer of crypto-assets that the following information are obtained:

- The name of the originator;
- The originator's account number (where such an account exists and is used to process the transaction);
- The originator's address, personal document number, customer identification number or date and place of birth.

When it comes to beneficiary of the transfer, the CASP of the originator will need to ensure that the transfer is accompanied by the name of the beneficiary and the beneficiary's account number. On the beneficiary's CASPs end, it will need to be ensured that the above-mentioned information are received in relation to each transfer.

The proposed rules apply CASPs in relation to any transaction in fiat currency or a crypto asset that involves either a traditional wire transfer or a crypto-asset transfer between a CASP and another obliged entity (e.g. CASP). Due to the money laundering risks related to crypto-transactions, all crypto-asset transfers (regardless whether domestic or cross-border ones) are to be treated as cross-border wire transfers in accordance with the FATF Recommendation 16.

6. Conclusion

The proposed legislative pieces under the EU AML-Package promise to create the fully harmonised EU framework on AML/CFT which can be of a great benefit to the financial institutions operating in more than one EU Member State. Furthermore, a consistent approach to the definition of regulatory requirements for obliged entities at the EU level could efficiently bridge the gaps in national frameworks that have been largely created due to the arbitrary approach taken during the implementation of AML-Directives.

Nevertheless, the proposed provisions of the future EU AML/CFT framework will most likely experience some further changes while finding their way through the long and complex co-decision making procedure in the European Parliament and the Council. Following their publication in the EU Official Journal, transitional period will also apply during which obliged entities will have time to prepare for the changes to come. The start of application of the AML/CFT Regulation and the deadline for the national transposition of the AMLD6 will most probably not come before 2025, when the AMLA is expected to start with the direct supervision of selected obliged entities.

Your experts



Dr. Verena Ritter-Döring

Partner, Lawyer

+49 69 97130-0

v.ritter-doering@taylorwessing.com



Charlotte Dreisigacker

Associate, Lawyer

+49 69 97130-0

c.dreisigacker@taylorwessing.com



Miroslav Djuric, LL.M.

Professional Support Lawyer, Advocate

+49 69 97130-0

m.djuric@taylorwessing.com