

LIGHT
**LEGAL COMPETENCY TO PREVENT AML/CFT: ILLUMINATING DARK
CORNERS**

**POLICY STATEMENT ON THE ROLE OF LEGAL PROFESSIONS TO PREVENT MONEY
LAUNDERING AND TERRORIST FINANCING**
ADOPTED BY THE CONSORTIUM OF THE LIGHT PROJECT

LIGHT is a European project that aims to increase the competence of lawyers and notaries in Anti-Money Laundering (AML) and Countering the Financing of Terrorism (CTF) matters. The purpose is to strengthen their role in the implementation of AML/CFT laws and to ensure the effectiveness of the AML / CFT policies. This policy statement responds to a document from the European Commission¹ which highlighted the high vulnerability of legal professions to money laundering. After obtaining a grant under the Justice Program 2014-2020, the project started in December 2020 and will last 2 years, until November 2022. By the end of the project, selected lawyers and notaries will have improved their functional AML skills.

In this document, we shall certify the commitment of lawyers and notaries regarding AML/CTF, following the assessment of the implementation of EU law in AML/CFT in the different national contexts, as described in the report produced by the project consortium led by Confprofessioni, the Italian Confederation of Liberal professions, thanks to the contribution of the International Union of Notaries (UINL). The following organizations have also contributed to that report: Women Lawyers' Association (Bulgaria); European Council of the Liberal Professions (CEPLIS, Belgium); Federnotai, Italian Federation of Notaries' Associations; Spanish General Council of Notaries; General Council of Spanish Lawyers.

Please note that the project consortium acknowledges the SWD (2021)190 accompanying the Anti-money laundering package published on 20 July 2021 by the European Commission (including among

¹ Commission Staff Working Document SWD (2019) 650.
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others the proposal for a Regulation establishing the European Authority for Countering Money Laundering and Financing of Terrorism).

The constant changes in criminal reality, as well as the detection and knowledge of new types of money laundering, have led to a series of changes in international standards and to the incorporation of new measures for the prevention and repression of this crime and, therefore, to a series of changes in European legislation.

In this context, a succession of directives has been adopted at European level, reflecting these changes. The latter is Directive 2015/849, hereinafter referred to as "the Directive".

Notaries and lawyers play a major role in the implementation of EU law on AML/CFT in the different national contexts of Member States. The FATF Recommendation and the EU Directive stipulate that notaries and lawyers, to the extent that they fall under the scope of the above-mentioned regulation², should be subject to the main obligations of (a) carrying out a risk assessment, (b) conducting due diligence, (c) keeping records, (d) identifying politically exposed persons, (e) implementing internal control measures and (f) reporting suspicious transactions.

All these obligations reveal how the implementation of the Directive's provisions is not the same in all Member States and how lawyers and notaries currently work, as well as their willingness to work more closely with the competent authorities. We feel that the information provided in this policy statement renders very clear the sincere commitment of the legal professionals towards the effective implementation of AML/CFT laws.

Lawyers and notaries are in fact strong supporters of law enforcement and absolute transparency in all issues regarding money laundering and terrorism financing. These professions, and their regulatory and representative bodies, request very clear guidelines from the competent national and European authorities as per the methodology of the implementation of the legislation on AML/CTF, in the context of their specific strict deontological rules, for them to continue to best serve the interests of their clients, whilst protecting at the same time the community from corruption and terrorism. In this

² It is important to note that according to FATF Recommendation 22 and Article 2(3)(b) of the Directive, notaries and lawyers are obliged entities under the Directive, « *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»;*

regard, the need for legal certainty is a key element for the adequate compliance with AML/CFT legislation and is one of the main demands from the legal profession.

It is for this reason that lawyers and notaries wish to receive proper training in order to correctly and efficiently apply European legislation regarding the fight against money laundering and terrorism financing.

Lawyers and notaries are also calling for a clarification of national laws and for a better implementation of European legislation by Member States in order to allow them to work jointly with their competent authorities towards the suppression of phenomena of money laundering and terrorist financing.

Lawyers and notaries naturally underline their strong commitment to their codes of ethics and conduct which are designed to serve both their clients and the general public. In this regard, it is important to note that the Directive sets out the rule of respect to professional secrecy in the terms established in article 34.2³. The importance of the professional secrecy for the fundamental right of defence and the rule of law needs to be taken into consideration when dealing with AML/CFT regulations and cannot be seen as an obstacle in the fight against these phenomena. Professional secrecy is aimed at the protection of other key elements of the fundamental rights and the rule of law that need to be balanced when implementing these regulations.

Framework of the Policy Statement

In 1989, at the initiative of the G-7, an intergovernmental body known as the Financial Action Task Force (FATF) was created to coordinate efforts to prevent money laundering. At that point, the objective was to develop and promote policies aiming at combating **money laundering** in both the international financial system and the national financial systems of the member entities. In October 2001, in addition to anti-money laundering standards, the FATF was given the task of developing and promoting international standards on combating terrorist financing. The FATF oversees international standards for regulations against these two issues. This body approved what is known as the “40 Recommendations”, which constitute the international standard in this area and a basis/starting point for the various international legislations that were approved in relation to the prevention of money

³ « 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 ».

laundering and terrorist financing, including the first Directive adopted by the European Union in this area⁴.

These Recommendations contain, in general terms, measures to be integrated within Member States' legal systems. They also contain measures to be taken by financial and non-financial institutions to prevent money laundering and terrorist financing, institutional measures for national systems related to the fight against money laundering and terrorist financing, as well as measures on international co-operation.

The FATF sought the support of 'gatekeepers' to combat money laundering and terrorist financing. They included, among others, certain designated non-financial businesses and professions (DNFBPs), such as lawyers and notaries, who assist with transactions involving the movement of money in national and international financial systems. Legal professionals are also subject to obligations regarding cooperation in the prevention of money laundering and terrorist financing.

(a) Lawyers and notaries must perform a general risk assessment

Regarding Recommendation 1 of the Financial Action Task Force and its corresponding interpretative note, notaries and lawyers must take the appropriate measures to identify and assess their money laundering and terrorist financing risks, considering the risk factors related to their customers, countries or geographic areas, products, services, transactions or delivery channels.

In the four Member States in which national focus groups were questioned, it appears that some of these professions have self-regulatory bodies that provide assistance to its members against money laundering and terrorist financing. In some of the four countries, self-regulation is taken care of by competent authorities such as the national notarial chambers or the different "orders" of lawyers and some of them have already set up sectoral risk assessments of money laundering and terrorist financing, taking into account national laws, which derive from European Directives. Nevertheless, in some cases, such as in Spain, lawyers have not been granted by Spanish authorities a specific AML/CFT self-regulatory body (a Centralized Prevention Body or OCP), which would be, in view of the General Council of Spanish Lawyers, necessary for the adequate application of AML/CFT regulations.

In several Member States, competent authorities and self-regulatory bodies carry out their task correctly. A number of lawyers and notaries are, however, still not aware of the measures that apply. This is, for example, the case in Belgium where one can observe a lack of guidelines on which legal professionals can rely on.

⁴ Council Directive 91/308/EEC of 10 June 1991.
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Nevertheless, a large number of notaries and lawyers do follow and/or sometimes adopt themselves objective procedures compatible with the legal criteria and methodologies, for the analysis and assessment of the risks of money laundering and terrorist financing.

(b) Customer Due Diligence

“Customer due diligence” (CDD) consists of identifying and knowing all natural or legal persons intending to establish business relationships or carry out any transaction. It is not possible to maintain business relations or carry out transactions with natural or legal persons who have not been correctly identified. In the Member States that have been studied, the individual assessment takes into account the overall risk assessment and it is provided for by national laws. The process should be submitted to the competent control authorities. Various documents are made available to legal professionals to assist them in this process, and numerous registers are available.

There are guidelines set by self-regulatory bodies (the obligation to follow them varies from country to country). This makes identification easier.

Nevertheless, several difficulties arise, in particular in two cases. First, mainly in the case of lawyers, the notion of professional discretion which hinders the procedure of this identification, such as in the case of Belgium for example (despite the fact that professional discretion, as explained above, is to be respected as part of the fundamental right of defence and the rule of law). Second, the difficulties in identifying BO in general, and particularly in the case of foreign legal establishments for which it is necessary to have appropriate information. In the case of foreign legal establishments, the difficulties are mainly linked to the fact that the necessary information is in foreign registries, as well as to the characteristics of the foreign entities themselves.

(c) Legal professionals do keep records

In accordance with FATF Recommendation 11 and Article 40 of the Directive, notaries and lawyers must keep for at least five years: all documents obtained for compliance with the due diligence obligation (*e.g. copies of official identification documents such as passports, identity cards, licenses or similar documents*), including the results of any preliminary analysis undertaken (*for example, investigations to establish the background and purpose of complex, unusually large transactions*) after the transaction date.

This means that they must also keep all the necessary records on transactions carried out with the customer, both locally and internationally, in order to make them available to the authorities.

Due diligence information and transaction records should be made available to the competent national authorities upon appropriate authorization. This minimum obligation is respected by the States we interviewed and for some, the duration is even 10 years.

(d) Obligation to identify politically exposed persons

This obligation means that notaries and lawyers, in addition to ensuring that they identify whether the client or beneficial owner is a Politically Exposed Person (PEP), must apply enhanced due diligence measures.

This implies, first, that appropriate risk management systems must be put in place to determine whether the client or the ultimate beneficiary (the beneficial owner) is a politically exposed person. Likewise, in the event that the client or the ultimate beneficiary fulfils this condition, notaries and lawyers must be familiar with this circumstance at the time of the execution of the transaction with the client and must adopt reasonable measures to establish the source of the wealth and the source of the funds that the client intends to use in the transaction. The requirements for all types of PEP should also apply to their family members or close associates.

In Belgium, there are measures ensuring that attention is paid to family members of politically exposed persons or persons known to be closely associated with exposed persons. The same goes for Bulgaria. In Italy, as in most other Member States, authorization must be obtained from persons invested with administrative or managerial powers or their delegates, or, in any case, persons exercising an equivalent function, before entering in or continuing an ongoing relationship, professional service, or occasional transaction, with such clients. In Spain, there is even a database of Spanish politically exposed persons available, in which one can find information on people who exercise or have exercised important public functions through an election, a nomination or investiture in the Kingdom.

(e) Implementation of internal control measures by lawyers and notaries

Another of the obligations established by the FATF and the EU for lawyers and notaries is the implementation of internal control measures. The implementation of the European legislation regarding this point is however not completely fulfilled.

Internal control measures imply that notaries and lawyers must:

- Establish AML / CFT policies and procedures that will be applicable in their office, including adequate selection procedures to ensure high standards when hiring employees.
- Develop and maintain a continuous training program for internal and external employees; and
- Establish an internal audit procedure to self-assess the operativeness of the system.

In Belgium and Bulgaria, although the legislation does provide for this type of measures, the reality is different. Lawyers and notaries do not apply (completely or partially) common legal provisions. The training on combating money laundering and terrorist financing is not mandatory or is deemed unnecessary. The new generation of legal professionals is, however, more interested in these issues. It is obvious that self-regulatory bodies should become more pro-active with regards to this matter.

In Spain, lawyers are left without common guidelines on internal policies and procedures, unlike Spanish notaries who benefit from a Money Laundering Centralized Prevention Body (OCP). Common internal control policies and procedures were indeed developed by OCP and documented in the AML/CFT Procedures Manual, for the application of notaries. This Manual must be applied by all notaries for the proper fulfilment of their obligations. Mandatory training courses were designed by the OCP for notaries and their employees. During the national focus group, Spanish lawyers pointed out that they hold meetings and courses on the subject every year, but the lack of an OCP-like body makes action and planning difficult. Spanish Lawyers have for a long time demanded Spanish authorities to establish an OCP-like body for lawyers. The notarial sector underlined that its OCP is a very valuable instrument for the development of annual and continuous training plans, as well as for their follow-up. Lawyers and notaries point out the lack of training organized by the authorities.

In Italy, the National Chamber of Notaries (CNN) and the Consiglio Nazionale Forense (CNF) created their own technical rules after hearing the Financial Security Committee. The technical rules, applicable for notaries and lawyers, contain the procedures and methodology for the analysis and the evaluation of the risk of ML and TF describing the internal controls, the CCD and the conservation of the documentation.

With reference to the promotion of compliance with obligations, the compulsory continuing training programs prepared by the National Bar Council and the National Chamber of Notaries must continue to include the AML discipline among the subjects.

(f) Obligation to report suspicious transactions

FATF Recommendation 20 and Article 34 of the Directive, require lawyers and notaries to cooperate fully by promptly informing the Financial Intelligence Unit (FIU), including filing a report, on their own initiative. They must do so when they know, suspect or have reasonable grounds to suspect that any

funds, regardless of the amount involved, are the proceeds of criminal activity or are related to terrorist financing. They have to promptly respond to requests for further information from the FIU in such cases and provide the FIU, directly or indirectly, at its request, with all the necessary information, in accordance with the procedures established by the applicable law.

In the case of notaries and lawyers, the FATF and the EU allow Member States to designate an appropriate self-regulatory body of the relevant profession as the authority to receive the information described above. The obligation to report suspicious transactions also includes the prohibition to inform the client or third parties that such report or related information is provided to the FIU or self-regulatory body.

Moreover, Article 34.2 of the Directive establishes the cases in which legal professions are not obliged to report suspicious activity, in respect of elements linked to professional discretion or professional secrecy, particularly when representing a client with regards to judicial proceedings or ascertaining the legal position of the client.

In Belgium, this obligation is provided for legally. Lawyers however benefit from a double exemption regime intending to protect their relationship with their clients. On top of this there is within the profession a “traditional” reticence to “denounce” the client. This leads to a very limited number of STRs. Specific risk indicators to facilitate the detection of suspicious transactions for the notarial sector are issued, but the participants in the national focus group do not consider them useful as they stand.

In the examined countries, many supervisory and self-regulatory bodies do not provide feedback on the quality of STRs submitted by notaries and lawyers and some of them consider that the relationship between lawyers and the relevant authorities is not optimal. Despite the existence of criteria or indicators of suspicion of money laundering and terrorist financing to identify suspicious transactions, in most of the countries there is no assistance to notaries and lawyers in order to comply with AML/CFT obligations.

Lawyers are not required to report suspicious transactions based on the information they receive or obtain on one of their clients, as part of the verification of the legal situation of their client. A special regulation exists for notaries. In some countries, both lawyers and notaries consider that the FIU should stimulate an increase in the quality of reports.

National focus group participants underlined that no feedback is provided for by the FIU to legal professionals. In most of the countries, communication with self-regulatory bodies, reported in the focus group, does not seem sufficient to increase the effectiveness of the AML/CFT system.

In addition, participants considered that the role of associations of legal professions such as notaries and lawyers, as “intermediary bodies”, is not exploited in most of the countries in order to provide assistance to the professionals involved and data security to the FIU.

Assigning a team of experts specializing in AML/CFT within lawyers’ and notaries’ associations is a solution proposed by the participants in the focus groups in order to increase the efficiency of the AML/CFT system. The system of centralization applied by the notaries in Spain, which inspired the project, was generally acknowledged as a good practice to be followed.

In the case of Spain, lawyers stressed that it would be desirable to further clarify the exemptions due to the notion of professional discretion which lawyers are subject to under Spanish law. In practice, lawyers encounter serious difficulties in distinguishing between information that is covered by professional discretion and information to be disclosed in suspicious transaction reports.

Lacking a specific mechanism to report suspicious transactions to the FIU, Spanish lawyers expressed during the National Focus Group that it would be very useful for them to have their own OCP with the authorities in this regard. This was repeatedly requested by the Consejo General de la Abogacía Española. Spanish notaries pointed out that they receive the evaluation of their reports every year, which is a unique fact in the whole sector as reports are made centrally by the OCP.

DECLARATION

We, Notaries and Lawyers,
concerned about money laundering and financing of terrorism,

recalling

The 2000 United Nations Convention against transnational organised crime,

The United Nations Political Declaration and Action Plan against money laundering,

The 1999 International Convention for the Suppression of the Financing of Terrorism,

The 2020 European Commission action plan for a comprehensive Union policy on preventing money laundering and terrorist financing,

The 2019 European Commission Communication entitled "Towards better implementation of the EU's anti-money laundering and countering the financing of terrorism framework",

The FATF 40 Recommendations

EU legal framework on anti-money laundering and countering the financing of terrorism,

we approve

This statement on the role of Notaries and Lawyers in advocating the European strategy on Anti-money laundering and countering the financing of terrorism

We reiterate that good public and corporate governance, rule of law and strong institutions are essential foundations for a sound economy to reduce poverty and inequality, to increase social integration and opportunities for all, to attract investment and to protect the environment,

We reaffirm that transparency in public affairs is an essential condition for the accountability of States and for the active participation of civil society and the private sector in economic and development processes,

We agree that problems of money-laundering impede sustainable economic, social and environmental development and undermine social cohesion, stability and security. Weak governance is among the factors conducive to the spread of terrorism.

We therefore reaffirm our full commitment to countering money-laundering and terrorist financing by making them policy priorities backed up by appropriate legal instruments, adequate financial, human and institutional resources.

We recognize the progress achieved to date by the European Union in addressing money-laundering and terrorist financing and related challenges to stability and security of Europe.

We reaffirm our agreement to work on a national basis to strengthen anti-money laundering and countering terrorist financing and to develop methods of co-operation among legal associations to assist each other in achieving this goal.

1. Integrity

We view a public and private sector based on integrity, transparency, accountability and rule of law as being the foundation of sustainable development. Thus, we underline the importance of providing training on ethical behaviour for lawyers and notaries, enforcing codes of conduct and conflict-of-interest legislation. In this regard, legal institutions such as the professional secrecy are key elements for the adequate protection of fundamental rights as the right of defence before courts and tribunals although it does not protect a legal professional from knowingly facilitating a client's illegal conduct and, in the case of notaries, in their role as public office holders and in light of their overarching obligation to ensure the common good and the general interests of society. In practice, professional secrecy is not an absolute duty and is often subordinated to the public interest.

We recognize that good governance requires a European legal framework and institutions in which businesses and investments can grow. Therefore, we reaffirm our determination to contribute in implementing the European legal framework at national level.

We recognize the importance of adopting and enforcing laws and other measures against money laundering and terrorist financing and the development of public-private partnerships to implement anti-money laundering and counter financing of terrorism.

We call upon our professional communities to actively promote a society free of laundering by emphasizing the value of integrity and transparency.

2. Combating Money Laundering and Terrorism Financing

We encourage Notaries and Lawyers Associations to mainstream the 40 FATF Recommendations and the Directive on anti-money laundering and terrorist financing, as well as the national legislation on the same matter, and to fully implement it.

We recognize the need to enhance the implementation of the EU legal framework on Anti-money laundering and Countering Terrorist Financing by involving our professional community in the process of information exchange towards the effectiveness of related measures.

We recognize that combating money laundering and terrorist financing requires long-term and comprehensive strategic approaches and strong institutions. We are convinced that those in charge of the prevention, identification, investigation, prosecution and adjudication of criminal offences should be free from improper influence. In particular, we underline the central role that law enforcement bodies and judicial institutions play in fighting against money laundering and financing of terrorism and in guaranteeing the rule of law.

We recognize that acts of international terrorism depend on the financing that terrorists may obtain. We consider that the financing of terrorism is a matter of grave concern to the international community as a whole. We are convinced of the urgent need to enhance international co-operation among legal professions in adopting effective measures for the prevention of the financing of terrorism.

We fully support the international standards contained in the revised Recommendations of the Financial Action Task Force (FATF) and we express our support to the work of FATF-style regional bodies and their observers and, as appropriate, to ratifying or acceding to and fully implementing relevant European and international instruments to counter money-laundering and the financing of terrorism.

We reaffirm our unwavering determination and commitment to overcoming the money laundering and terrorist financing through national and transnational strategies to implement the European policy on the matter.

We recognize that action against money laundering and terrorist financing is a common and shared responsibility requiring an integrated and balanced approach in full conformity with the purposes and principles of European law.

We affirm our determination to provide the necessary competencies to enable public institutions to restore integrity and transparency and to fight against all aspects of the money laundering and financing of terrorism.

We call upon the European competent authorities to include preventive actions against money laundering and terrorism financing in their programmes, taking into account the priorities of national governments.

We call for the strengthening of national mechanism, with the assistance of the legal associations, to share experiences and conclusions resulting from the implementation of national strategies and to report on their activities to European authorities.

We recognize that European approach is indispensable in the global approach to countering the money laundering and terrorist financing and commit ourselves in 2021 to revamp in the European law on the matter, 30 years after the approval of the first Directive on prevention of the use of the financial system for the purpose of money laundering.

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