

Our position

Anti-money laundering legislative package



AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3 trillion in 2020, directly supports more than 4.8 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

Executive Summary

High profile anti-money laundering (AML) cases affecting the Single Market in recent years have highlighted the need for legislators to address the weaknesses identified in the EU's regulatory and supervisory framework. It is fundamental for laws, regulations, procedures and processes intended to prevent criminals from disguising illegally obtained funds as legitimate income to be comprehensive across the EU and to be adapted to digitalisation and the new laundering stratagems. AmCham EU welcomes the recent European Commission proposals and has outlined recommendations that should be kept in mind when enhancing the EU's future AML framework.

Introduction

The American Chamber of Commerce to the EU (AmCham EU) is a longstanding supporter of a robust anti-money laundering and countering the financing of terrorism (AML/CFT) framework within the European Union (EU). AML scandals in Europe in recent years have highlighted the need for further policy reforms to address weaknesses in regulatory requirements and policy harmonisation. A recent Europol report highlights that less than 1% of criminal proceeds in the EU are confiscated by authorities and that COVID-19 is providing criminals with new ways to launder proceeds deriving from criminal activities¹, e.g., through increased scams targeted at increased digital and teleworking activities.

Therefore, the European Commission's package of legislative proposals to strengthen the EU's AML and CFT rules released on 20 July 2021 is highly appropriate. It contains:

- A proposed new Regulation on AML/CFT (AMLR) bringing requirements for obliged entities under more harmonised EU rules;
- A proposed new EU AML Authority (AMLA) with direct and indirect supervisory powers on obliged entities and a mandate to further develop a single EU rulebook on AML/CFT;
- A proposed 6th Directive on AML/CFT with provisions to ensure better coordination between Member States, including on home-host responsibilities of supervisors and better cooperation between national Financial Intelligence Units (FIUs);
- A proposed revision of the Regulation on Transfer of Funds to extend the scope to include the transfer of crypto-assets.

Key issues and recommendations

There are ten areas of particular significance for policymakers to focus on in order to ensure a more effective and a more robust AML/CFT framework for the EU and globally, as AML operations are global by nature.

1. **Harmonisation** – The harmonisation of AML rules for obliged entities through the AMLR proposal and standards to be developed by the AMLA is crucial to achieve greater alignment of both public and private sector resources with law enforcement priorities. In particular:
 - a. The harmonisation of **customer due diligence (CDD)** measures and the updated, feasible and detailed rules and standards on simplified and enhanced know your customer (**KYC**) processes.

¹ Europol, Beyond the pandemic, how Covid-19 will shape the serious and organized crime landscape in the EU, 30 April 2020, https://www.europol.europa.eu/sites/default/files/documents/report_beyond_the_pandemic.pdf

A single set of rules across Member States will help obliged entities further focus on detecting cases rather than on ensuring local compliance.

- b. Rules on how suspicious transactions are to be identified and reported to FIUs through a common template for **suspicious activity reports (SARs)** should be harmonised across the EU. Devising the future template calls for a collaborative approach with all industry participants.

However, there are still references for Member States to go beyond the EU framework by retaining the option of adding additional requirements. Base-line AML/CFT requirements should be consistent, so that the risk-based approach can then be applied proportionately and effectively by obliged entities across the Union, whereas additional requirements above and beyond the Regulation should be adopted on an exceptional basis. If applied differently by Member States across various provisions, it may lead to inconsistencies and fragmentation, potentially undermining the objective of a homogenous EU framework.

Also, it will be essential that, even in the case of a directly applicable AML Regulation, guidance and interpretation at the national level are also applied consistently across the EU.

2. **Identification of beneficial owners** – The harmonisation of **beneficial ownership** requirements, notably in relation to nominees and foreign entities, is also crucial.
 - a. However, the information required on beneficial owners goes significantly further than the current legislation. A more proportionate, risk-based approach would allow lighter requirements for entities deemed as low-risk.
 - b. Furthermore, the requirement to drill down to 25% ownership on every level of the corporate structure when applying customer due diligence provisions, would, at best, be far too onerous and, at worst, unworkable in multi-layered, cross-border and complex structures. This could ultimately result in failing to identify the ultimate beneficial owner. EU legislation should therefore contextualise beneficial ownership as the effective beneficial ownership of the customer, as opposed to intermediate and independent beneficial ownership of all parent companies. Policymakers could use wording similar to that of the recently revised EBA guidelines on ML/TF risk factors².
 - c. Beyond this, there should be a risk-based approach for obliged entities to take reasonable measures to understand the customer's ownership and control structure. If the intent of the Commission is to make sure there is not aggregated ownership, this should be clearly stated and obliged entities should be free to apply their own risk-based approach to reach this end.
 - d. Finally, the final definition should be the same definition used by national beneficial ownership registers in Member States. It should also note that, beyond asking the customer, firms will not be able to ascertain criteria such as *'links with family members of managers or directors/those owning or controlling the corporate entity'*. Ultimately, beneficial ownership registers can only be fully and properly used across borders if they are based on common data standards and are fully interoperable.

² EBA, Guidelines on customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions, 1 March 2021, https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Guidelines/2021/963637/Final%20Report%20on%20Guidelines%20on%20revised%20ML%20TF%20Risk%20Factors.pdf

3. **Politically Exposed Persons (PEPs)** – Efficient screening of Politically Exposed Persons (PEPs) will depend on access to accurate, complete and up-to-date information on individual PEPs in countries where the relevant financial institution has business operations. It is important to avoid a ‘one size fits all approach’ which risks denying individuals access to financial services. The current PEP definition is too prescriptive and not consistent with international FATF standards to specify a baseline list of functions. This ‘capped approach’ can lead to serious operational and legal problems for both OEs and their service providers. Finally, further global harmonisation and alignment on the definition of PEPs is highly welcome.
4. **Outsourcing** - Detailed attention should be paid to the new provisions on outsourcing outlined in Article 40 of the draft AML Regulation. More concretely, there should be further clarifications about the difference between obliged entities that purchase standardised AML/CFT solutions (eg, screening tools and watchlist data) and those that outsource the actual performance of the AML/CFT requirements. Without these clarifications the provisions could prevent obliged entities from making use of essential decision-making tools that enable them to fulfil their compliance requirements. This would undermine the primary political objective of the AML package of preventing and addressing organised financial crime.
5. **AML authority** – The creation of a new EU AML authority (AMLA) can become a game-changer from the current AML/CFT framework in three principal ways:
 - a. Greater harmonisation and supervisory cooperation should result in more consistent application of rules, reducing risk of national interests impacting supervision effectiveness and increasing efficiency of regulatory interaction and enforcement.
 - b. The set-up of dedicated EU capacity within the AMLA to develop a better understanding of the threats posed by financial crime is necessary. This should be a collaborative effort, not just between EU authorities, but also between the public and private sector. It should be accompanied by the development of key performance indicators to measure progress against objectives. This would help instil a sense of collective ownership of responsibility for the success of Europe’s ambitious package.
 - c. AMLA is also an opportunity to improve collective capabilities by mapping the capabilities of law enforcement and major financial institutions to combat financial crime. This mapping exercise will inform future work on taking an EU-wide action against major financial crime threats. This work could establish how various capabilities interrelate to each other including the SAR regime and help non-financial sectors (such as legal, accountancy, property and gaming) to identify how best their skills, experience and capabilities can be harnessed to combat financial crime.
6. **Digital** – The Commission’s response to the emerging challenges linked to technological innovation is highly valued, in particular the crypto asset sector and the use of digital identity.
 - a. The extended scope of obliged entities to Crypto Asset service providers (CASPS) and the extension of the travel rule to crypto transactions between CASPS and financial services providers – in line with Financial Action Task Force (FATF) standards – are key to prevent and detect of the use of crypto-assets for money laundering or terrorism financing purposes.
 - b. We believe that the introduction of a European Identity Wallet – as set out in the Commission’s eIDAS review proposal – and the further inclusion of digital identity as a means

for remote customer onboarding in the AML Regulation is another positive step towards fighting crime in the financial services sector and beyond.

7. **Data protection** – The AMLR proposal provides further clarification on processing certain categories of personal data in relation to the General Data Protection Regulation (GDPR). However, while the risk-based approach underpinning the proposed legislative package is crucial, further clarifications are needed to provide certainty to market operators on how to handle criminals’ personal data from a privacy perspective. It should also be ensured that obliged entities operating in multiple jurisdictions are able to share information across their group to adequately map financial crime and produce more complete reports to authorities.
8. **Public private partnerships** – The Commission’s ongoing work on developing guidance for the development of public private partnerships (PPPs) across the EU should be finalised before the end of 2021. This is crucial in the fight against financial crime. The EU should establish a working group and include cross-sectoral private sector representatives to extend work on the future collective ambition and improve information-sharing and use. Europol’s Financial Intelligence Public-Private Partnership, and other PPPs that already in exist in several Member States and that promote strategic information-sharing between banks, FIUs, law enforcement agencies and national regulators, highlight the positive results of these arrangements.
9. **Asset recovery** – The Commission’s ongoing work to present a legislative proposal on strengthening the mandate of national Asset Recovery Offices is expected in the first half of 2022. It is in the community’s best interest to ensure that we are making the best use of the legal powers at the EU’s disposal to increase the assets taken out of criminal hands.
10. **International** - Money Laundering and Terrorism Financing is a global phenomenon which merits a global response. The COVID-19 crisis and the rapid pace of digitalisation accompanying it have compounded the need for leading jurisdictions to move together. This requires proactive coordination and collaboration between jurisdictions and between the public and private sectors beyond the work being done by the Financial Action Task Force (FATF), notably in the area of threat assessments. The proposed third-country regime has the potential to be used as political leverage by the EU, in particular regarding the granting of equivalence decisions to third countries. These concerns are compounded by the avowed objective of the European Commission to go beyond international FATF standards. As such, the EU listing process of non-compliant third countries should be as transparent as possible, especially when it is based on standards going beyond FATF ones.

Conclusion

As described in the outset, the Commission’s AML package is a step in the right direction and we welcome its ambition to lead by example in the global fight against financial crime. We also hope that co-legislators can find a swift agreement on an updated framework that is robust and efficient in achieving this goal.