

May 11, 2020

EUROPEAN COMMISSION LAUNCHES MAJOR AML INITIATIVE

To Our Clients and Friends:

Overview

On May 7, 2020, the European Commission (the “**Commission**”) announced an **action plan** of measures designed to pursue what will likely constitute a fundamental reshaping of how rules relating to anti-money laundering (“**AML**”) and counter-terrorist financing (“**CTF**”) are implemented, overseen and enforced in the EU (the “**Action Plan**”). The Action Plan was published alongside further clarification regarding the identification of high-risk third countries that have strategic deficiencies in their national AML and CTF regimes.

This alert focuses on the rationale and key components of the Action Plan.

Background

In July 2019, the Commission published a “package” of AML communications, in which a number of weaknesses were identified in relation to the EU’s AML and CTF framework (the “**Anti-Money Laundering Package**”). In a report published amongst the suite of documents, the Commission pointed to a number of deficiencies evident from recent money laundering scandals in the banking sector. In particular, a key issue flagged in relation to the cases analysed in the report was that of cross-border payments and transfers, which present a challenge where there is insufficient harmonisation of national supervisory frameworks, standards and capabilities across the EU.

This fragmentation results from several historic factors, including the EU’s use of Directives relating to money laundering rather than directly applicable Regulations (leaving decisions on implementation to Member States) and a measure of divergence inherent in the Member States’ various approaches to the regulation of businesses generally, and sectors of key AML risk in particular, such as the financial and gambling sectors. There has been long-standing criticism of the EU’s lack of co-ordinated action on AML, including from the European Banking Federation (the “**EBF**”), which has called the EU’s framework “*ineffective*” and in need of “*critical review*”.^[1]

Following the Anti-Money Laundering Package, the Commission was invited by the European Parliament and Council to investigate what steps could be taken to achieve “*a more harmonised set of rules, better supervision, including at EU level, as well as improved coordination among Financial Intelligence Units*”. The Action Plan is the Commission’s response to this challenge and is intended to be the first step on the path to creating a comprehensive framework to combat money laundering and terrorist financing across Europe.

The Action Plan

The Action Plan is structured on the basis of six “pillars”. The holistic aim of these is to (i) improve the overall fight against money laundering; and (ii) strengthen the EU’s global role in this sphere. Once implemented, it is hoped that this will result in greater harmonization of rules across the EU, with better supervision and improved co-ordination between the competent authorities of the various Member States. The Action Plan is described as aiming to “*shut down any remaining loopholes and remove any weak links in the EU’s rules*”.^[2]

The Action Plan sets out the Commission’s intended actions over the next 12 months, including the proposal of a new harmonized set of rules in Q1 2021 (there are no changes to EU law at this point). A new EU level supervisory body will be proposed at around the same time.

The six pillars are discussed below.

Effective application of the rules

The Commission has stated that it will, of course, continue to closely monitor the implementation of EU rules by Member States to ensure that the national rules are in line with the highest possible standards. In parallel, the Action Plan encourages the European Banking Authority (the “**EBA**”)^[3] to make full use of its recently heightened role to tackle money laundering and terrorist financing.

The EBA separately announced on May 7, 2020, in response to the publication of the Action Plan, that it stands ready to support the Commission’s considerations through the consultation (on which, please see “[The Action Plan consultation](#)” below), whilst using its powers to lead, coordinate and monitor the EU financial sector’s fight against money laundering and terrorist financing.

Single EU rulebook

As noted above, there is a degree of variation in the ways in which Member States currently apply the EU AML and CTF rules. Key areas of divergence identified include the list of entities subject to national rules, customer due diligence requirements, internal controls and reporting obligations.

The Commission announced that a more harmonized set of rules will be proposed in Q1 2021. A Q&A, published with the Action Plan, does not express a definitive view on whether the Action Plan will lead to a new Regulation – the Commission instead indicates that this will be “*subject to a thorough analysis to ensure that [it] reaches as high a level of harmonization as possible*”.

EU-level supervision

Oversight of AML and CTF regimes is currently conducted at a national level, which leads to significant differences in the way that the rules are supervised. Therefore, in Q1 2021, the Commission will formally propose to establish a supervisor at the EU level.

The Q&A provides that the role and scope of this EU-level supervision – as well as the supervisory body that should be tasked with carrying out this role – will be proposed following a thorough assessment of all options. This will also include consideration of feedback received in the open public consultation launched in connection with the Action Plan.

Whilst criminal enforcement of AML offences introduced in response to EU legislation has historically been undertaken at a Member State level (where competence to do so lies), the Commission has said that it is also critical to build capacity at EU level to investigate and prosecute financial crime. It noted that Europol has stepped up its efforts in order to tackle economic and financial crime with the new European Economic and Financial Crimes Centre, which should become operational in the course of 2020. Amongst other things, this will concentrate all financial intelligence and economic crime capabilities in a single entity within Europol.

Co-ordination and support mechanism for Member States' Financial Intelligence Units

The Commission was keen to point out that Financial Intelligence Units in Member States play a critical role in identifying transactions and activities that could be linked to criminal activities.

However, it noted in the Q&A that several Financial Intelligence Units have not complied with their obligation to exchange information with other Financial Intelligence Units. Additionally, some Financial Intelligence Units have not managed to engage in a meaningful dialogue by giving quality feedback to private entities, as required by AML legislation. The Action Plan lays the groundwork for the creation of an EU support and coordination mechanism for these Units. The Commission will formally propose to establish this mechanism to help further coordinate and support the work of these units in Q1 2021.

Enforcing EU-level criminal law provisions and information exchange

The Commission notes that judicial and police co-operation, on the basis of EU instruments and institutional arrangements, is essential to ensure the proper exchange of information. It also points to the role that the private sector can play in combating money laundering and terrorist financing, indicating that it will issue guidance on the role of public-private partnerships to clarify and enhance information sharing.

The EU's global role

The EU plays an important role on the world stage in shaping international standards in the fight against money laundering and terrorist financing and is actively involved in the Financial Action Task Force (“**FATF**”). The Commission is determined to step up its efforts so that the EU acts as a “*single global actor in this area*”. In particular, the Commission has stated that the EU will adjust its approach to third countries with strategic deficiencies in their AML and CTF regimes that pose significant threats to the “single market”. It specifically points to the new methodology issued alongside the Action Plan as giving the EU the right tools to do so.

New methodology to identify high-risk third countries

At the same time as it published the Action Plan, the Commission published a new methodology to identify high-risk third countries that have strategic deficiencies in their national AML and CTF regimes, which pose significant threats to the EU's financial system.

The goal is to provide more clarity and transparency in the process of identifying these third countries. The key new elements concern: (i) the interaction between the EU and FATF listing process; (ii) enhanced engagement with third countries; and (iii) reinforced consultation of Member States experts.

Updated list of high risk countries

The Commission has a legal obligation to identify high-risk third countries with strategic deficiencies in their AML and CTF regimes. The Commission revised its list on May 7, 2020. It states that the new list is now “*better aligned*” with the lists published by the FATF.

Countries added to the list are: the Bahamas, Barbados, Botswana, Cambodia, Ghana, Jamaica, Mauritius, Mongolia, Myanmar, Nicaragua, Panama and Zimbabwe.

Countries which have been de-listed are: Bosnia-Herzegovina, Ethiopia, Guyana, Lao People's Democratic Republic, Sri Lanka and Tunisia.

The Commission amended the list by means of a Delegated Regulation, which will now be submitted to the European Parliament and Council for approval within one month (with a possible one-month extension). The Regulation listing third countries – and therefore applying new protective measures – applies as of October 1, 2020. This is to ensure that all stakeholders have time to prepare appropriately. The de-listing of countries, however, will enter into effect 20 days after publication of the Delegated Regulation in the Official Journal.

The UK position

The transition period for the UK's departure from the EU is currently set to end on December 31, 2020. There is a great deal of uncertainty surrounding what, if any, agreement will be made between the remaining EU Member States and the UK.

A key question is whether the UK will choose to separately implement any changes brought about under the Action Plan, given that these will occur after the end of the Brexit transition period. Any arrangements reached with the remaining EU Member States will likely require the UK to maintain a degree of “equivalence” (broadly, retaining legal and regulatory frameworks substantially similar to those of the EU); in relation to AML and CTF, this is likely to align with the interests of British industry, and in particular its financial sector.

The Action Plan consultation

The consultation on the Action Plan is open for comment until July 29, 2020. This is run via the Commission's [online portal](#). A number of key topics that may be of interest include (i) what regulatory provisions need to be harmonised (for example, whether record keeping should be covered); (ii) which

body should exercise the EU supervisory powers (for example, the EBA or a new EU centralised agency); and (iii) what powers this EU supervisor should have. It is expected that the financial sector, and other sectors that stand to be significantly impacted, will participate actively in this consultation.

Looking ahead

The Action Plan is clearly ambitious and speaks to an obvious need. The initial industry-level response has been very positive – the EBF, for example, indicated that it is “*greatly encouraged*”.[4] As discussed above, there has been considerable discussion for some time about the significant issues posed by the varying implementation, supervision and enforcement of AML and CTF frameworks across the Member States of the EU. Key to the effectiveness of any new harmonized regime overseen at EU level will be the extent to which the EU supervisory body will be endowed with enforcement and investigative powers, including the power to commence or instruct competent authorities at national level to commence investigations, and the degree to which it will be able to foster information sharing and policy alignment across Member States, and with third countries.

To date, Member States have maintained control over the creation of offences and criminal enforcement in relation to EU AML legislation. As a result, the law in this area has historically been something of a “patchwork quilt” across the EU, with each Member State adopting its own approach to implementation, through the filter of the peculiarities of its own criminal law, using the domestic criminal and regulatory authorities already in place. This presents a significant hurdle to efforts to secure EU-level harmonization of the law, supervision and enforcement in the field of AML/CTF. As such, if the Action Plan is to fulfil its ambitions, it will require innovation, creativity and flexibility from both the Commission and Member States. However, the prize for such efforts would be significantly enhanced coherence and efficiency in AML regulation across Europe, to the advantage of both European society and European business.

[1] “Lifting the spell of dirty money – EBF blueprint for an effective EU framework to fight money laundering”, EBF, March 2020

[2] European Commission press release, “Commission steps up fight against money laundering and terrorist financing”, May 7, 2020

[3] From January 1, 2020, the EBA has had a clear legal duty to contribute to preventing the use of the financial system for the purposes of money laundering and terrorist financing and to lead, coordinate and monitor the AML/CFT efforts of all EU financial services providers and competent authorities.

[4] Press release: “EBF supports new EU plans to fight money laundering”, European Banking Federation, May 7, 2020



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Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding these developments. If you would like to discuss this alert in greater detail, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's White Collar Defence and Investigations or Financial Institutions practice groups, or the following authors:

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