

Opinion of the European Economic and Social Committee on the ‘Proposal for a regulation of the European Parliament and of the Council on information accompanying transfers of funds’

COM(2013) 44 final — 2013/0024 (COD)

and on the ‘Proposal for a directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing’

COM(2013) 45 final — 2013/0025 (COD)

(2013/C 271/05)

Rapporteur: **Christophe ZEEB**

On 28 and 27 February and on 12 March 2013 respectively, the Council of the European Union and the Parliament decided to consult the European Economic and Social Committee, under Articles 114 and 304 of the Treaty on the Functioning of the European Union, on the

Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

COM(2013) 45 final – 2013/0025(COD)

and the

Proposal for a Regulation of the European Parliament and of the Council on information accompanying transfers of funds

COM(2013) 44 final – 2013/0024 (COD).

The Section for Economic and Monetary Union and Economic and Social Cohesion, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 24 April 2013.

At its 490th plenary session, held on 22 and 23 May 2013 (meeting of 23 May), the European Economic and Social Committee adopted the following opinion by 145 votes in favour with 4 abstentions.

1. Conclusions and recommendations

1.1 The European Economic and Social Committee (EESC) welcomes the Commission’s proposals on adapting the European regulatory framework to reflect changes made to international standards on preventing and combating money laundering and the financing of terrorism. The criminals abusing the financial system and the facilities provided by the internal market threaten the very foundations of our society. In the EESC’s view, it is essential to equip the European Union and the Member States with effective means of bolstering the integrity and transparency of financial transactions. The Commission’s proposals are certainly a step in the right direction in this respect.

1.2 The EESC welcomes the clarifications that have been made with regard to the customer due diligence requirements of professionals regarding beneficial owners; these will boost transparency when it comes to individuals using legal entities as screens and also in relation to people who are politically

exposed and may be at greater risk of corruption owing to their functions. The EESC also approves of the inclusion of gambling service providers on the list of professionals subject to requirements, as this sector can be exploited for money laundering purposes.

1.3 The EESC welcomes the Commission’s ambition for the European Union to lead the way in the global fight against money laundering and terrorism. The EESC considers that one of the ways of ensuring that the new European regulatory framework is effective and thus enables the EU to lead the way in fighting against money laundering is for all stakeholders to join forces. The EESC welcomes the clarifications added throughout the proposal to ensure proportionality with regards to SMEs. The EESC deems it appropriate to provide small entities with more technical and professional assistance via intermediate bodies such as professional chambers, associations and federations, enabling them to meet the obligations set out in the proposal.

1.4 The EESC applauds the Commission for attempting the delicate balancing act of reconciling the apparently conflicting interests of personal data protection and the fight against money laundering. The purpose of having a wide range of professionals collect and analyse information, including data of a personal nature, is solely to detect criminal activities. Professionals must therefore take care to protect the private lives of their customers as far as possible, while making it a priority to assist national authorities in the fight against crime.

1.5 The EESC welcomes the proposal to harmonise the sanctions applicable in the financial sector at European level. Crime prevention must be as effective as possible and professionals be subject to sanctions that are dissuasive and commensurate with the sums of money being laundered. The EESC therefore calls on the Commission and the Member States to ensure the consistent and correct application of the administrative sanctions and penalties.

2. Background

2.1 Money laundering, the financing of terrorist activities and the proliferation of weapons of mass destruction are all threats to global security and the integrity of the financial system. The Financial Action Task Force (FATF) is the body mandated at international level to design measures, known as recommendations, to prevent and combat money laundering, the financing of terrorism and, as of recently, the financing of proliferation of weapons of mass destruction.

2.2 The FATF recommendations were revised over a period of close to three years with a view to strengthening preventive measures and securing the financial system greater protection, by equipping governments with sturdier tools with which to penalise serious offences. The FATF adopted its new recommendations in February 2012 ⁽¹⁾.

2.3 The key changes introduced by the FATF's new recommendations are the following:

2.3.1 The recommendations provide additional detail on the risk-based approach that countries and entities subject to obligations (hereafter referred to as 'professionals') must take in order to mitigate their money-laundering and terrorist financing (hereafter referred to as 'ML/TF') risks and adapt their supervisory systems so as to deploy their resources in an appropriate manner, in accordance with the nature of the risks identified.

2.3.2 The recommendations provide the necessary clarification as to the nature of the obligations to which professionals are subject. They define the scope of obligations with regard to i) transparency regarding beneficial ownership of companies and beneficiaries of wire transfers, and ii) the identification of politically exposed persons who may present a greater risk of corruption relating to their functions.

2.3.3 The recommendations provide for more effective investigative means for criminal investigation authorities and financial intelligence units, and bolster the exchange of information on investigations, monitoring and the prosecution of serious offences.

2.4 The FATF will begin a new round of mutual evaluation of its members from 2014, with a particular focus on how effectively its new recommendations are applied.

3. The Commission proposal

3.1 The proposals for (i) a fourth directive to combat ML/TF and (ii) a second regulation on the information accompanying the transfer of funds tie in with the updating of the European regulatory framework and reflect changes made to the FATF recommendations.

3.2 The main changes made by the proposals to the European regulatory framework are as follows:

3.2.1 The list of professionals has been expanded to include: i) traders in goods conducting cash transactions of EUR 7 500 and above ⁽²⁾, ii) providers of gambling services, and iii) letting agents.

3.2.2 Specific reference is made to tax crime as a predicate offence to money laundering.

3.2.3 The proposed directive specifies that the risk-based approach, to be applied at supranational and national level as well as by each professional, must involve degrees of customer due diligence, based on a minimum list of factors to be taken into consideration and guidelines drawn up by the European supervisory authorities.

3.2.4 The European supervisory authorities (EBA, EIOPA and ESMA) are called upon to take part in analysing ML/TF risk in the European Union and to issue regulatory technical standards for the Member States and financial institutions.

⁽¹⁾ www.fatf-gafi.org

⁽²⁾ The threshold is currently EUR 15 000.

3.2.5 The professionals must obtain information on beneficial owners and treat politically exposed persons, domestically or within international organisations, as belonging to a high risk category.

3.2.6 A list of administrative sanctions is given to be applied in cases where professionals systematically breach the basic requirements of the directive.

3.3 The proposed changes are based in particular on the study ⁽³⁾ on the application of the third anti-money laundering directive conducted by an independent consultancy firm and also on the views collected by the Commission during its public consultation.

3.4 The proposed directive and regulation will replace the existing directive and regulation, which will be repealed.

4. General comments

4.1 The EESC agrees on the need to adapt the existing European regulatory framework with regard to combating ML/TF to reflect the changes at international level. The EESC is aware that the ML/TF phenomenon affects all sectors of the economy and that constant care must be taken to ensure that the regulatory framework is effective in preventing the use of the financial system for criminal ends.

4.2 The EESC welcomes the Commission's ambition for the European Union to lead the way in the fight against money laundering and terrorism. It recalls its position already set out in a previous opinion, welcoming 'the further development of the rules to prevent money laundering and terrorist financing as a symbol of a European Union that is ensuring high standards of probity and conduct in public and private behaviour. The directive is both a practical step in the management of financial affairs and also a means of strengthening the European Union' ⁽⁴⁾.

4.3 The EESC believes that reducing the threshold above which traders in goods must abide by the requirements of the directive from EUR 15 000 to EUR 7 500 represents a further step in the right direction to promote payments other than in cash. The EESC has already pointed out in a previous opinion ⁽⁵⁾

⁽³⁾ http://ec.europa.eu/internal_market/company/docs/financial-crime/20110124_study_amld_en.pdf

⁽⁴⁾ OJ C 267, 27.10.2005, pp. 30–35.

⁽⁵⁾ OJ C 351, 15.11.2012, p. 52.

that cash is viewed as a factor that facilitates the underground economy and that payments other than in cash are more transparent in fiscal and financial terms and less costly for society as a whole, as well as being practical, safe and innovative.

4.4 Supporting small entities

4.4.1 The EESC welcomes the fact that letting agents and gambling service providers are to be subject to anti-ML/TF restrictions despite not being covered by the FATF recommendations.

4.4.2 The EESC welcomes the clarifications added throughout the proposal to ensure proportionality with regard to SMEs. To ensure that small entities are able to meet the obligations contained in the proposed directive, the EESC suggests involving intermediate bodies, such as professional chambers, associations or federations that represent small entities at national level, on a formal basis and task them with the provision of guidance, support and mediation services. Small entities must be given support so as to prevent them from becoming a prime target for money launderers.

4.5 Reconciling identification requirements with the digital age

4.5.1 The requirement regarding the identification of persons must involve their being physically present. If not, professionals must apply enhanced due diligence measures owing to the risk associated with transactions conducted at a distance. The EESC doubts whether this level of requirement is commensurate with society's shift towards a totally digital age.

4.5.2 The EESC calls on the Commission to devise measures that can reconcile customer identification requirements with the increasingly common use of electronic payments and communications.

4.6 The balance between personal data protection and the fight against money laundering

4.6.1 The EESC highlights the importance of reconciling the interests of personal data protection with the need to safeguard the integrity of the financial system by combating ML/TF.

4.6.2 Inasmuch as the fight against ML/TF relies on a wide range of professionals collecting and analysing information, including personal data, the EESC believes that the proposals largely meet the requirements of both Member States and professionals so as to achieve a better balance between what are at the outset conflicting interests.

4.6.3 As regards the obligation set out in Article 39 of the proposed directive to destroy documents and information collected after a period of five or ten years after the end of the business relationship, the EESC urges Member States to ensure that their legislation provides for situations (such as criminal proceedings, bankruptcies or successions) in which this obligation should not apply, so as to prevent it from running counter to the general interest.

4.6.4 The EESC proposes that the directive make express provision for the obligation to keep the identity of people declaring suspicious transactions strictly confidential, unless these people have agreed that their identities may be divulged or it is essential that they be divulged in order to secure fair court proceedings in a criminal case.

4.7 *Anchoring the European supervisory authorities' right to intervene*

4.7.1 The EESC notes that the European supervisory authorities will be involved at European level in ML/TF risk analysis and may issue guidelines and regulatory standards for the Member States and financial establishments. While the EESC would stress the importance of consultation and working together with the European supervisory authorities in the Europe-wide fight against ML/TF, it would nevertheless point out that their mandate in terms of representation and regulation is limited when it comes to the financial sector. However, a high proportion of the professionals subject to the obligations do not belong to the financial sector and are not therefore represented at European level. The EESC would therefore propose that the Commission take responsibility at European level for analysing the risks and providing guidance for non-financial professionals who find themselves subject to anti-ML/TF obligations.

4.7.2 The EESC is convinced of the need for EU-level harmonised interpretative recommendations and standards so as to secure more uniform application of anti-ML/TF rules in the Member States.

4.8 *Administrative sanctions*

4.8.1 The proposals set out a list of administrative sanctions following on from the Commission Communication of

8 December 2010, Reinforcing sanctioning regimes in the financial sector, on which the EESC issued an opinion ⁽⁶⁾ and that can also be found in other recent Commission proposals ⁽⁷⁾.

4.8.2 The EESC is in favour of EU-level harmonisation of the penalties applicable in the financial sector. It cannot be denied that crime is a fact of life regardless of efforts to do away with it. It is therefore essential that crime prevention be as effective as possible and that professionals who do not comply with anti-ML/TF requirements be subject to sanctions that are dissuasive and commensurate with the sums of money being laundered.

4.8.3 The EESC nevertheless has doubts regarding the purely administrative nature of the sanctions proposed and fears that their severity might be brought into question with respect to the hierarchy of legal norms and the proportionality of criminal sanctions. Although the administrative sanctions foreseen are of a dissuasive nature and are designed with European harmonisation in mind, it remains the case that criminal penalties for money-laundering vary from one country to another. The EESC calls on the Commission and the Member States to ensure the consistent and correct application of the administrative sanctions imposed on professionals having failed to meet their obligations in the fight against ML/TF and the penalties applicable in cases of money laundering offences.

4.8.4 The EESC fears that compliance of the administrative sanction regime with Articles 6(1) and 7 of the European Convention on Human Rights might be brought into question, with certain administrative sanctions qualifying as criminal penalties that may only be issued by an independent court following a fair trial – conditions that the competent administrative authorities do not meet. The EESC calls on the Commission to seek appropriate legal solutions so as to ensure that the penalty system is beyond reproach.

4.8.5 The EESC believes that – in the proposal – the introduction of minimum principle-based rules for the application of administrative measures and penalties represents an approach that enhances the response of the EU as a whole.

5. **Specific comments**

5.1 The EESC recommends expanding the definition of terrorist financing given in Article 1(4) of the proposal for a directive to include 'all other acts' other than the offences targeted, in accordance with the wording of the fifth FATF recommendation.

⁽⁶⁾ OJ C 248, 25.8.2011, p. 108.

⁽⁷⁾ COM(2011) 651 final, COM(2011) 656 final, COM(2011) 683 final.

5.2 The EESC points out that the annexes to the proposal for a directive provide a checklist of risk factors and types of evidence to be considered by professionals in connection with anti- ML/TF requirements. The EESC believes that the lists provided in the annexes are not exhaustive and that professionals should also consider, in accordance with the risk-based approach, other factors that are closely linked to the Member States and the differing circumstances of the transactions they complete.

5.3 The EESC believes that the key to solving the piracy problem lies in tracing and clamping down the involved financial flows. A blacklist of financial institutions involved in piracy money laundering should be established in the EU. The World Bank, Interpol and Europol can assist in the fight to chase ransoms, which should be traced and confiscated so that piracy is no longer an attractive business ⁽⁸⁾.

Brussels, 23 May 2013.

The President
of the European Economic and Social Committee
Henri MALOSSE

⁽⁸⁾ OJ C 76, 14.3.2013, p. 15.