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From:	Presidency
To:	Financial Services Attachés Working Party on Financial Services and the Banking Union (AML)
Subject:	AML: Attachés working party 09.06.2023 - Written input from EP technical team to technical trilogues, as requested by Presidency [1/06/23]

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New Obliged entities proposed by the European Parliament - rationale

As a general line, it should be noted that the inclusion of additional obliged entities serves the purpose of ensuring that those gatekeepers apply CDD measures. In addition, it is also aimed at ensuring that those gatekeepers are able to send suspicious transactions report to the FIU – and that the FIUs have the authority to request information to those obliged entities under article 50. If those gatekeepers are not included in the scope of AMLR, the FIUs would not be in a position to receive and analyse suspicious transactions reports – and likewise the FIUs would not be competent to make a request to those gatekeepers to receive necessary information. Even if at national level some FIUs may be granted extended rights to request information, this does not give any assurance that those gatekeepers have actually collected any CDD information and this information will not be available in all Member States thus hindering FIU-to-FIU cooperation.

- Certified Debt Collectors

Parliament intention is to capture under the scope the AMLR financial sector professionals which provide services in relation to credit servicing activities and which would not be captured under the current definition of financial institution. We may suggest for clarity to refer to the definition of credit purchasers and credit service providers of Directive (EU) 2021/2167.

- Property developers

It makes sense to oblige all parties involved in a real estate business to avoid loopholes. Lawyers, notaries and real estate agents are already. The property developers have so far been covered by the goods dealers in parts, but this does not show full effect, because in Germany they usually make use of the privilege (no acceptance of cash from EUR 10,000).

Real estate agents are obliged and act only as intermediaries, why should this be interpreted differently for developers? These can also detect suspicious activities. Here, there could be relief for purely intermediary activities.

It is also consistent with the FATF standards and the FATF Guidance on real estate, which clarifies that the obligations on real estate agents applies to any real estate professionals including real estate "developers".

See: https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-rba-real-estate-sector.html

- NFTS service providers

Due to their anonymity, the lack of KYC checks and high price volatility, non-fungible tokens (NFTs) are exposed to similar risks as the crypto-asset sector in general. The rapid expansion of the NFTs from a niche market to a market which was valued above 40 billions euros in 2021 has become an important area of concern for law enforcement agencies and other AML competent authorities.

Due to the general carve-out provided under MiCA for crypto-assets that are "unique and non-fungible"[1], NFT intermediaries providing services in relation to NFTs trading would remain completely out of the horizontal AML regulatory framework. This would create a loophole which can be easily exploited by criminals to launder illicit proceeds or finance terrorist activities through the crypto sector, unless those intermediaries are brought under the horizontal AML obligations and supervision.

While the Parliament has supported the view that NFT intermediaries should be fully regulated under MiCA, the Parliament respects the agreement reached in the context of the MiCA negotiations and understands Council reservations regarding the inclusion of the NFT sector under the same prudential and consumer protection rules established for the crypto sector in general.

However, the rationale behind the carve-out under MiCA solely relates to the application of MiCA specific regime, and should therefore not prevent the regulation of the sector for AML purposes. In particular, the exclusion from MiCA is clearly justified by the limited extent to which non-fungible crypto-assets can have a financial use, which in turn limits "risks to holders and the financial system" (for ref. see MiCA, recital 10), meaning consumer protection and prudential concerns.

In light of the ML/TF risks posed by NFTs and considering the scenario where the whole NFT sector would be left out of EU wide AML legislation as an increased threat, the Parliament considers that the inclusion of NFTs intermediaries as obliged entities under AMLR would be appropriate and necessary, as a second-best solution in the lack of a broader EU regulatory regime which is yet to be defined (and which may take several years to be agreed).

For the Parliament, the existence of sectoral legislation at EU-wide level is not a condition to apply AML/CFT rules. A step-by-step approach is possible (similarly to the approach taken with respect to crypto exchanges and wallet providers under AMLD5 before MiCA was in place) and the only pragmatic option to effectively tackle money laundering and terrorist financing risks posed by NFTs.

Moreover, the Parliament notes that the Commission report foreseen under MiCA Art 142, in 18 months after entry into force, is not intended to deal with AML risks, rather to assess the necessity and feasibility of regulating offerors of NFTs as well as providers of NFTs services mainly for the purpose of regulating areas such as market abuse, consumer protection and intellectual property.

The Parliament position is in line with the view taken by the Commission in the context of the MiCA negotiations:

"If left unregulated for AML/CFT purposes, NFTs would also become even more prone for AML/CFT risks. By ensuring that service providers providing services to these are included in MiCA, the connection between MiCA and the overhauled AML framework is ensured and will not create a gap. Should NFTs remain outside of MiCA, this gap could still be closed by including NFT service providers in the horizontal AML framework as obliged entities." [COM non-paper, May 2022]

The risks posed by NFTs are also underlined in the Supranational Risk Assessment published by the Commission in 2022.

According to the SNRA:

[1] MiCA does not dispute the fact that NFTs are also crypto-assets in substance. It just excludes from the application of MiCA rules those NFTs that are unique and non-fungible. In the moment an NFT becomes fungible, it would be brought under the scope of MiCA for the purpose of regulating its financial use.

- Exposure to ML risks arise due to the limited application of customer due diligence checks on many of the major NFT sales platforms and the fact that many services seem now created for the express purpose of obfuscating the origin and destination of funds through NFTs;
- It is possible for criminals to set up an account, list a number of NFTs and then purchase said NFTs from themselves for an inflated price;
- The proceeds from malicious sales can be hidden with relative ease;
- The current popularity experienced by NFTs, and subsequent high prices, further complicate the process of identifying which transactions are wash trading and which are legitimate purchases.

In the SNRA, the Commission also recommends that: "Competent authorities should ensure that NFT sales platforms are covered under the categories of obliged entities submitted to their customer due diligence and other AML/CFT obligations".

- Online platforms

Money laundering does not only take place in on-site transactions.

Art brokers are currently also obliged to comply with regulations for online shops and digital payment methods under the German AML-law "GwG", as they are obliged to identify customers regardless of the type of payment from EUR 10,000.

Online businesses in particular are suitable for concealing identity, UBO, etc. due to anonymity.

Prone to money laundering through simple cancellation, rebooking of goods. In this way, processes and postings can be generated artificially.

Money laundering is possible here in the form of layering and integration (see 3-phase model of money laundering).

- Persons trading luxury goods

The luxury sector has been for long time vulnerable to money laundering and sanctions evasion. There is no secret that luxury items offer money launderers the opportunity to spend in few steps large amounts from their proceeds of crime and convert them into legitimate funds. Moreover, the lack of compliance obligations in this sector resulted in limited awareness of money laundering concerns and further exacerbated their appeal as a destination for illicit finance. Europol has highlighted the low number of suspicious transaction reports submitted by high-value goods dealers as a sector. Recent revelations such as the Panama papers about the large-scale misuse of the luxury sector for money laundering purposes call for robust regulatory action in this field.

The Parliament considers that the same anti-money laundering obligations applying to traders of precious stones and metals should also apply to traders of luxury goods (such as traders in luxury vehicles, high-end fashion items, jewellery and collectibles). This additional category of traders has a responsibility – and is often better placed than other type of intermediaries - to prevent the misuse of the luxury sector for money laundering purposes and sanctions evasion. There is no good reason for treating these professionals in a different way, having regard to the assessment of the ML risks and vulnerabilities as well as the difficulty to address those risks via other channels.

According to the SNRA 2022 the assessment of the money laundering vulnerability related to the purchase of high value goods other than gold, diamonds, artefacts and antiques shows that this risk scenario shares the same vulnerabilities as that for the purchase of gold/diamonds [SNRA assigns to both categories a residual of 3,40].

Some of the features that increase the attractiveness of the luxury sector for money laundering and sanctions evasion include the following:

- Luxury goods provide an easy and accessible vehicle to launder dirty money through expensive goods, like luxury vehicles;
- Portable goods like watches and other designer accessories are easily transportable and traded across borders;
- Subjective values and emphasis on secrecy and confidentiality in the luxury sector, which also contributes to money laundering risks;
- Luxury goods transactions are often associated with anonymous shell companies or intermediaries that purchase and manage these assets;
- The global nature of luxury markets, which makes high value goods an attractive commodity for sanctions evaders and launderers looking to move illicit finance into or out of a country.

In a 2023 Report on Money Laundering and Terrorist Financing in the Art and Antiquities Market, the FATF found low levels of effective supervision and enforcement in the luxury sectors in all seven countries scrutinised. The FATF reports that jurisdictions take different approaches – some cover dealers of all luxury goods over a certain price threshold, while others focus more narrowly on specific types of items.

Why cash limits would not be sufficient to tackle the ML risks in luxury markets

An approach based only on cash limits and the reliance on the financial sector would not be sufficient and effective to tackle the ML risks posed by the luxury sector.

As pointed out by the SNRA "anti-money laundering requirements are limited to payments in cash and do not consider the risks of transactions using other means of payment". In fact, despite the common perception of luxury sector ML as being cash-based, large cash payments are rarely accepted or have been increasingly replaced with alternative payment methods: wire transfers, cryptocurrencies, offshore accounts, shell companies. Therefore, criminals can easily exploit these alternative avenues to conduct illicit transactions and avoid detection, even if cash limits are in place. Moreover, sophisticated criminals may easily circumvent cash thresholds via multiple transactions below the thresholds.

A FATF report of 2020 highlights that "trade-based money laundering is one the methods most preferred by money launders, and is often combined with the use of front companies, front men, and other ML techniques". As an example, FATF reports the results of a PPP investigation conducted the Netherlands on the illicit cash integration in the automotive sector, which showed that "the sector isn't as cash based as thought" and that "there are only several companies accepting large amounts of cash, with payments in cash being only sporadic rather than regular".

With respect to the role of the financial sector in this area, the FATF highlights that financial institutions in particular consider trade-based money laundering "as the hardest type of ML activity to detect". According to the FATF, one reason is that trade-based money laundering schemes "can consist of a large number of front companies, with funds transmitted between several banks, meaning each of the involved FIs can see only a small part of the network". This fragmentation "makes it inevitably difficult for FIs to identify potential TBML schemes based on the analysis of the whole chain, and in many cases limits their ability to detect discrepancies in supplementary documentation and customer profiles". Moreover, financial institutions face an additional challenge in relation to trade-based ML schemes using the over-/and under-pricing technique, as they "often have only a vague

description of the traded good, and establishing a "fair price" can require significant resources and may be based solely on open source information."

For all these reasons, the Parliament believes that a comprehensive approach is needed in order to effectively address money-laundering risks in the high-end luxury markets.

Relevant FATF publications: "Trade-Based Money laundering, Trends and Developments, 2020; "Money Laundering and Terrorist Financing in the Art and Antiquities Market", 2023".

See also Transparency International Report: Tainted Treasures: money-laundering risks in luxury markets, 2017.

Anecdotal evidence[2]

- Certain football clubs, leagues and intermediaries

Many cases have shown that the football industry has featured illegal practices, including money laundering, corruption, and drugs.

According to a report from the FATF of July 2009 entitled 'Money Laundering through the Football Sector', "the professional football market has undergone an accentuated growth due to a process of commercialisation. Money invested in football surged mainly as a result from increases in television rights and corporate sponsorship. Simultaneously, the labour market for professional football players has experienced unprecedented globalisation – with more and more football players contracted by teams outside their country and transfer payments of astounding dimensions. The cross border flows that are involved may largely fall outside the control of national and supranational football organisations, giving opportunities to move and launder money. At the same time money from private investors is pouring into football clubs to keep them operating and can give the investor long term returns in terms of media rights, ticket sales, proceeds of sales of players and merchandising."

In its report of 24 July 2019 to the European Parliament and the Council on the assessment of the risk of money laundering and terrorist financing affecting the internal market and relating to cross-border activities, the Commission assessed professional football and stated "whilst it remains a popular sport it is also a global industry with significant economic impact. Professional football's complex organisation and lack of transparency have created fertile ground for the use of illegal resources. Questionable sums of money with no apparent or explicable financial return or gain are being invested in the sport."

The Commission's Supranational Risk Assessment of 2022 states that the situations has further deteriorated, since "the COVID-19 pandemic has had a devastating effect on club finances, resulting in several growing trends, which could put the sector at greater risk. Due to insufficient resources and training, this sector is still vulnerable to money laundering and, to a far lesser extent, terrorist financing. The sector's own legal framework has increased the checks applied; however, that framework alone is inadequate. Transparency at all levels, from player transfers to club ownership, is essential for reducing this sector's risk level."

[2] https://www.europol.europa.eu/media-press/newsroom/news/belgian-luxury-car-purveyor-arrested-in-spain-for-money-laundering

The SNRA Working Document highlights that “In football, image contracts, advertising contracts, and sponsorship contracts can be tools for criminal practice, notably tax evasion, since the money stipulated in these contracts is commonly transferred to accounts belonging to companies in third countries. This results in a serious risk of fraud, since it is easy to avoid declaring the money received, even if this requires the use of third parties in various financial transactions. The most common form of cash payments involves jurisdictions located abroad that allow the final destination of payments to be disguised. Image rights are also used to conceal the amounts actually paid to players.”

Furthermore, “Lack of transparency regarding the transfer of players and the true owners or managers of football clubs, can lead to the industry being dominated by a handful of people and cause serious concern about prevention and suppression of money laundering. In addition, the use of nonfinancial professionals, such as family members, lawyers, consultants, and accountants as a means of creating structures to move illicit funds has also been observed by the Financial Action Task Force (FATF). The money stipulated in such image contracts (for exploitation of a player’s personal appearance as part of an extensive advertising campaign) is often transferred to accounts of companies in third countries with serious risks of fraud. Advertising and sponsorship contracts can also be used for money laundering. Organized crime could sponsor sport and constitute a bridge to legitimate business. The most common form of payments involves jurisdictions located abroad, always as a way to hide the last destination.”

The Commission therefore invites Member States to consider which actors should be covered by the obligation to report suspicious transactions and what requirements should apply to the control and registration of the origin of the account holders and the beneficiaries of funds.

Professional football is therefore a sector posing high risks and high-level professional football clubs, along with sports agents in the football sector and football associations in Member States, which are members of the Union of European Football Associations, should be considered obliged entities for the purposes of this Regulation. Parliament has struck a balance, and ensured proportionality, by determining that only professional football club are included, and, among those, only clubs where least one team plays in the championship or championships of the two highest level of competition in that Member State and has an annual turnover of at least EUR 7 000 000;

One Member State (BE) has already included these entities as obliged entities in their national AML framework.