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# THE FIGHT AGAINST MONEY LAUNDERING

## AN INTERNATIONAL COMBAT, A EUROPEAN CHALLENGE

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# THE FIGHT AGAINST MONEY LAUNDERING

## AN INTERNATIONAL COMBAT, A EUROPEAN CHALLENGE

Money laundering is a multifaceted phenomenon. First of all, it is neither static nor temporary: it is constantly evolving, finding new resources in an ever-increasing financial globalisation and the evolution of technology. It is also a phenomenon that is inherently transnational, not only disregarding borders, but using them to blur the trail of successive financial transactions across the globe and obstructing the course of justice. Finally, it is a phenomenon that is on the increase. According to an estimate by the Financial Action Task Force (FATF), the annual volume of money laundering operations is estimated at between 2 and 5% of global GDP.

The fight against money laundering is therefore a real challenge for the authorities, requiring them – as well as sensitive sectors – to be ever more vigilant. Organised crime has so much money at its disposal that it is in a position to infiltrate financial institutions, acquire or control entire sectors of the economy and corrupt public officials and even governments.

International and European cooperation is more necessary than ever. However, this essential cooperation is not without its difficulties, given the differences in legal systems, which are sometimes so great. In recent years, international bodies such as the Financial Action Task Force, the European institutions and the Council of Europe have been helping to harmonise national structures in order to improve mutual legal assistance.

In this context, notaries are one of the actors in the fight against money laundering and cooperate effectively with government authorities. In Europe, by virtue of their status as public office-holders, they are at the centre of the legal arrangements for real estate transactions and corporate acts, which are among the most important channels for money laundering operations. For this reason, they must implement the FATF Recommendations and the resulting European legislation. They also have an obligation to inform the public authorities of any suspicions they may have about a financial operation or transaction.

This publication, produced as part of the CNUE's "Europe for Notaries - Notaries for Europe" training programme, is intended to give European notaries, and more broadly practitioners, an overview of the work of international bodies and the legislation in force in the fight against money laundering. Finally, it will be a useful source of food for thought for professionals who, in their daily practice, must be able to serve the best interests of their clients, the State and society in general.

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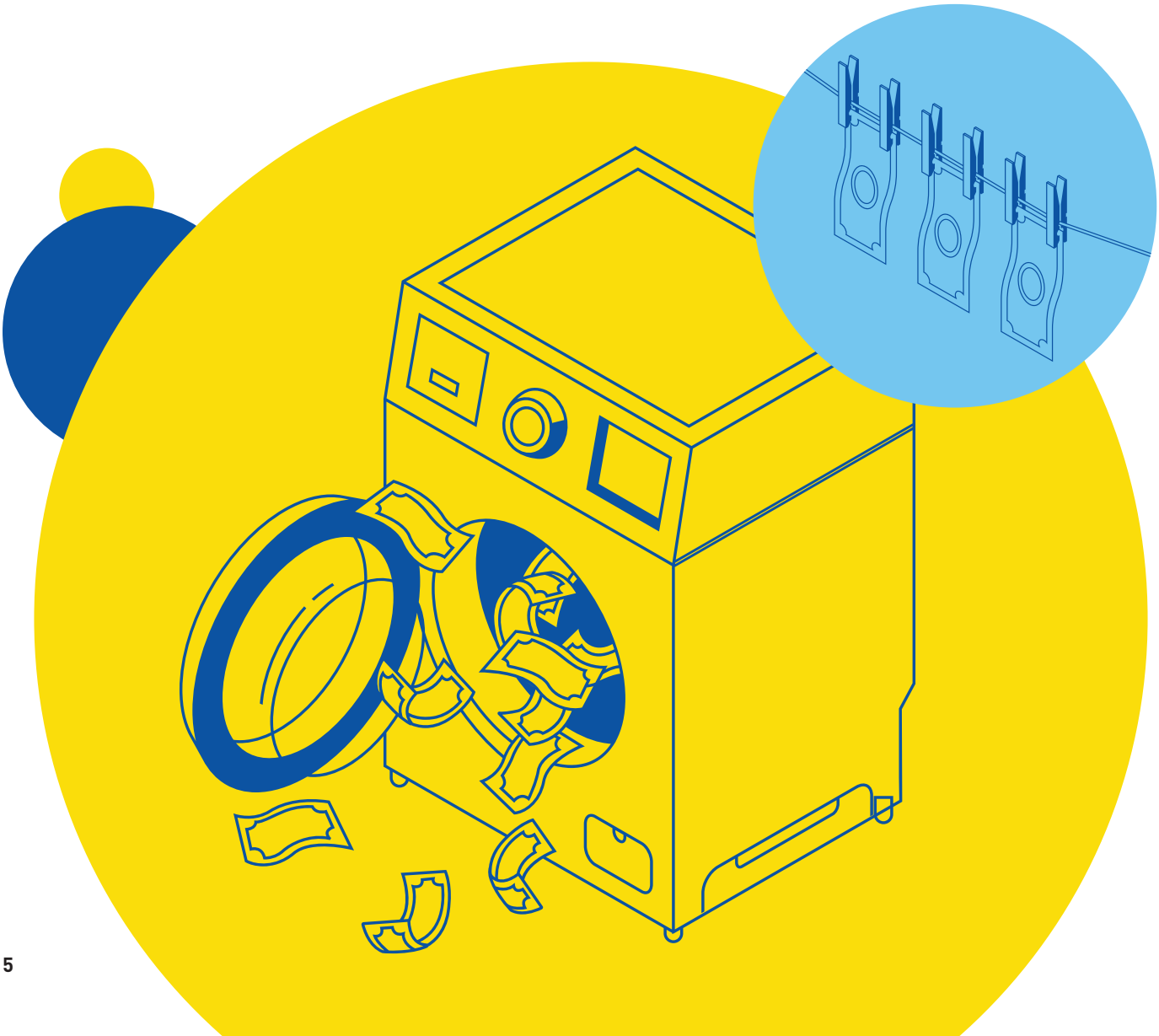
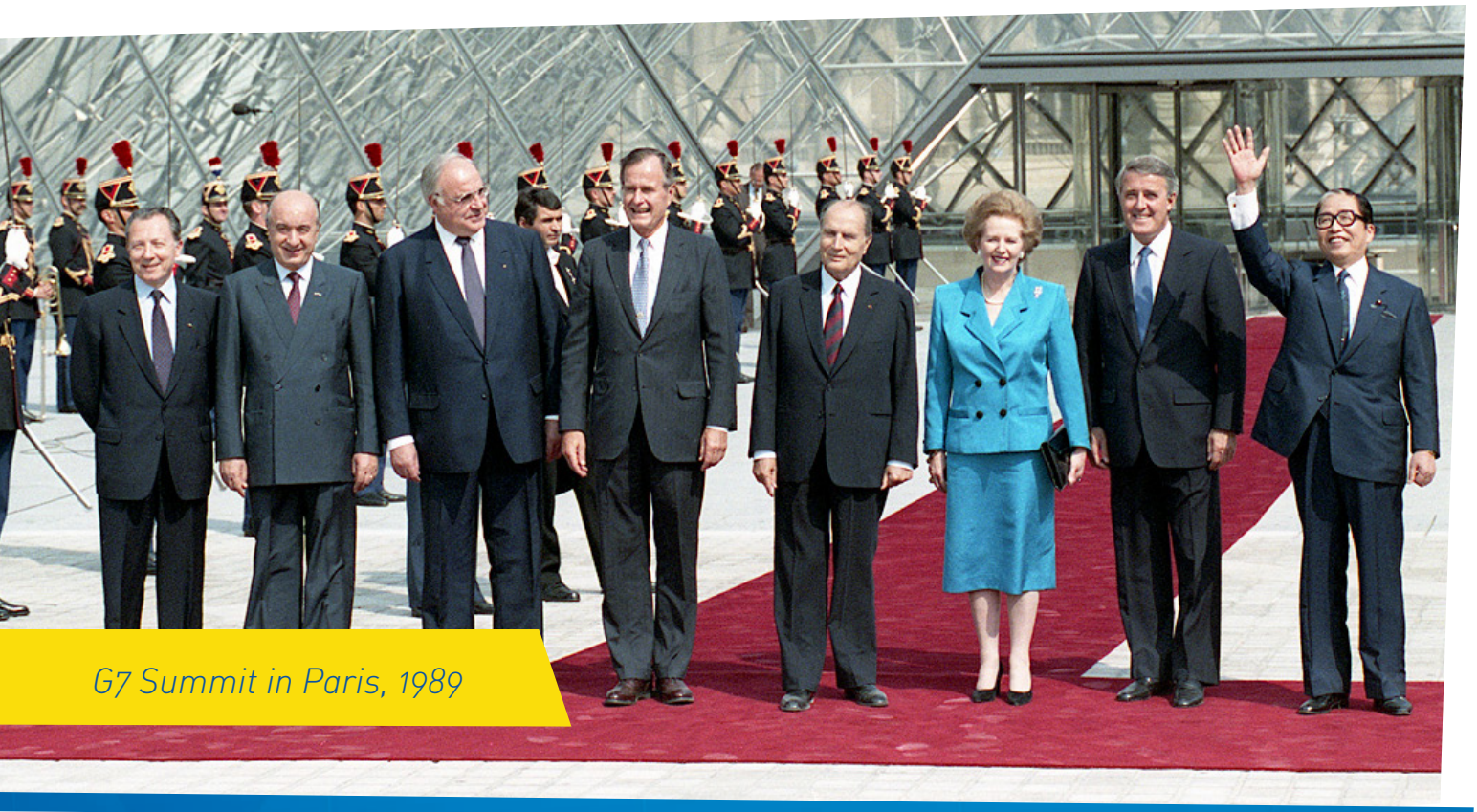


# A CONSTANTLY CHANGING LEGISLATIVE FRAMEWORK

# The Financial Action Task Force: a key player in necessary international harmonisation

**The Financial Action Task Force (FATF)** is an inter-governmental body created in 1989 at the G7 Summit in Paris to respond to growing concerns about money laundering. The FATF has been tasked with examining money laundering techniques and trends, considering existing actions at national and international level and outlining measures that still need to be taken to combat money laundering.



*G7 Summit in Paris, 1989*

In April 1990, less than a year after its creation, the FATF published a report containing a set of 40 Recommendations setting out a comprehensive plan of action to combat money laundering. These Recommendations were revised in 1996, 2001, 2003 and most recently in 2012 to ensure that they remain current and relevant.

Starting with its own members (39 to date), the FATF monitors the progress made by countries in implementing its Recommendations. In February 2012, the FATF completed a thorough review of its standards and published the revised FATF Recommendations. The revision is intended to strengthen international safeguards and enhance protection of the integrity of the financial system by providing governments with more robust tools to take action against financial crime.

## The main changes were as follows:

- Combating the financing of the proliferation of weapons of mass destruction through the systematic application of targeted **financial sanctions** when required by the United Nations Security Council.

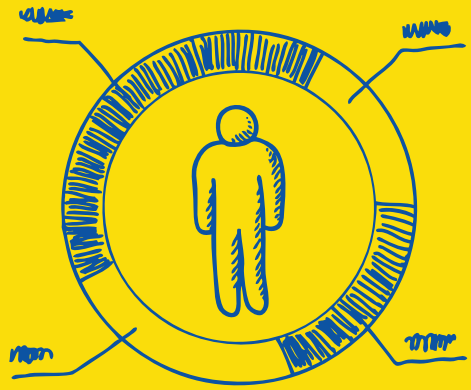
- **Improved transparency** to prevent criminals and terrorists from hiding their identity and assets behind legal entities and arrangements.

- More demanding obligations for **politically exposed persons**. Broadening the scope of money laundering predicate offences to include tax offences.

- **A strengthened risk-based approach** allowing countries and the private sector to allocate their resources more effectively by targeting areas of higher risk.

- More effective **international cooperation**, in particular for the exchange of information between the authorities concerned, the conducting of joint investigations and the tracing, freezing and confiscation of illicit assets.

- **Better operational tools** and a wider range of techniques and powers for both financial intelligence units and prosecuting authorities in the investigation and prosecution of money laundering and terrorist financing.



# EU action against money laundering

**The issue** of the fight against money laundering became a major concern for the European legislator and the legal professions with the creation of the Financial Action Task Force (FATF) in 1989. The European Union is involved in discussions within the FATF and is responsible for translating the recommendations adopted (in 1990) and revised (in 1996, 2001, 2003 and 2012) into various legislative instruments. Thus, the First European directive on the subject (91/308/EC OJEC of 28 June 1991) was adopted in 1991. It imposes a certain number of rules on all professions in the financial sector.

The Second European directive came into force on 4 December 2001 (2001/97/EC of the European Parliament and of the Council) amending Directive 91/308/EEC.
It extends the scope of vigilance and reporting obligations for money laundering operations to non-financial activities and professions considered likely to be misused by money launderers, including "notaries and other independent legal professionals". The Directive also introduces requirements for customer identification, record keeping and reporting of suspicious transactions.

The Third Anti-Money Laundering Directive (2005/60/EC of 26 October 2005 of the European Parliament and of the Council) dates from 2005. It repeals the first two directives and recasts the provisions. It incorporates many of the 40 FATF Recommendations adopted in June 2003. The Directive provides a definition of beneficial owner. Finally, it removes Member States' discretionary power to authorise the communication of information, i.e. the possibility of informing the customer of the existence of a report on suspicion of money laundering.

In February 2012, the FATF completed a thorough review of its standards and published the revised Recommendations. A fourth EU Directive was adopted on 20 May 2015, with the aim of bringing EU law into line with the revised FATF Recommendations.

## The following are among the provisions adopted:

- An expanded definition of "**politically exposed person**".

- A more precise definition of "**beneficial owner**".

- The importance of a **risk-based approach** for Member States, businesses and practitioners.

- The extension of this approach to all the elements that make up the **duty of due diligence**, including the obligation to identify the customer, his/her representative and the beneficial owners.

- Information on **beneficial owners**: new obligation for companies and other legal entities to obtain and retain accurate information on their beneficial owners.

- Establishment, in each Member State, of a **central register of beneficial owners** in which this information is recorded.

- Access to this register granted to "**taxable entities**" (including notaries).

- **Erasing of personal data** at the end of the legal retention period (5 years imposed by the Directive, possibility of an extension to 10 years).

The European Commission published the proposal to amend the Fourth Directive on 5 July 2016, against the backdrop of terrorist attacks in the heart of Europe and scandals linked to the organised use of tax havens and other tax evasion techniques. The Fifth Anti-Money Laundering Directive (EU Directive 2018/843) seeks to strengthen the existing European preventive system along two main lines:

- combating terrorist financing by preventing the use of the financial system to finance criminal activities;

- strengthening transparency rules to prevent large-scale concealment of funds and to prevent tax evasion and money laundering.

Member States are obliged to transpose this directive into national law by 10 January 2020 at the latest. They must also set up the registers on beneficial owners referred to in Article 30 by 10 January 2020, the registers on trusts referred to in Article 31 by 10 March 2020 and the centralised automated mechanisms referred to in Article 32a by 10 September 2020. For its part, the Commission shall ensure the interconnection of the registers on beneficial owners referred to in Articles 30 and 31 by 10 March 2021 at the latest.

# Notaries and the risk-based approach (RBA)

What is meant by RBA is that the extent and intensity of the measures to be adopted by the notary will depend on a case-by-case assessment which is to consider, at any rate, the purpose of the business, the amount of the assets involved, the scope of the transactions and the regularity or duration of the business relationship. Moreover, the notary must also include his own risk assessment for his office and the (demonstrative) factors suggestive of potentially higher or lower risk.

The measures the notary adopts on the basis of a risk-oriented assessment of the individual case must be transparent and verifiable.

The implementation of the RBA therefore requires the risk identification and assessment, the risk management and mitigation, the ongoing monitoring of changes to risks and the documentation of risk assessments and measures to monitor, manage and mitigate risks.

The RBA is considered as being an effective way to combat money laundering and terrorist financing. In the implementation of an RBA, financial institutions and designated non-financial businesses and professions (DNFBPs) should have processes in place to identify, assess, monitor, manage and mitigate money laundering and terrorist financing risks.

The general principle of an RBA is that, where there are higher risks, countries should require financial institutions and DNFBPs to take enhanced measures to manage and mitigate those risks; and that, correspondingly, where the risks are lower, simplified measures may be permitted. Simplified measures should not be permitted whenever there is a suspicion of money laundering or terrorist financing.

The RBA to AML/CFT means that countries, competent authorities and DNFBPs, including notaries and other legal professionals, should identify, assess and understand the ML/TF risks to which they are exposed and take the required AML/CFT measures effectively and efficiently to mitigate and manage the risks.

**Stephan Matyk-d'Anjony,**
**Österreichische Notariatskammer (Austria)**

# WHISTLEBLOWING

The EU-AML directives require that procedures be put in place to report breaches of the EU AML-rules based on the 4th and 5th AML directives, both at the level of the notarial office and at the level of the competent authority for the surveillance of the notary which could be, e.g. a notarial chamber.

To reach that goal, appropriate procedures have to be implemented – among others – also in notarial offices for the notaries' employees, or persons in a comparable position, to report such breaches of AML laws internally through a specific, independent and anonymous channel, proportionate to the nature and size of the notarial office concerned. As a consequence, notarial offices have to be equipped with appropriate communication channels to enable employees to report such breaches.

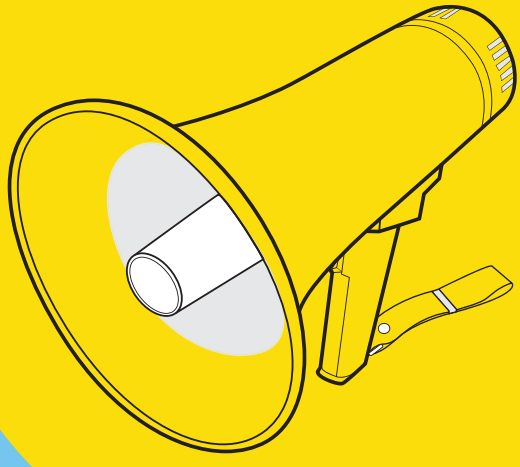
As to the competent authorities, as well as, where applicable, self-regulatory bodies (e.g. a notarial chamber), these entities have to establish effective and reliable mechanisms to encourage the reporting to competent authorities, as well as, where applicable self-regulatory bodies, of potential or actual breaches of the national provisions transposing the EU-AML Directive.

For that purpose, these entities shall provide one or more secure communication channels for persons for the reporting. Such channels shall ensure that the identity of the persons providing the information is known only to the competent authorities, as well as, where applicable, self-regulatory bodies.

Furthermore, national legislators have to ensure that individuals, including employees and representatives of the obligated entity (e.g. the notary) who report suspicions of money laundering or terrorist financing internally or to the Financial Intelligence Unit (FIU), are legally protected from being exposed to threats, retaliatory or hostile action, and in particular from adverse or discriminatory employment actions.

Finally, Member States have to ensure that individuals who are exposed to threats, hostile actions, or adverse or discriminatory employment actions for reporting suspicions of money laundering or terrorist financing internally or to the FIU are entitled to present a complaint in a safe manner to the respective competent authorities.

**Stephan Matyk-d'Anjony,**
**Österreichische Notariatskammer (Austria)**

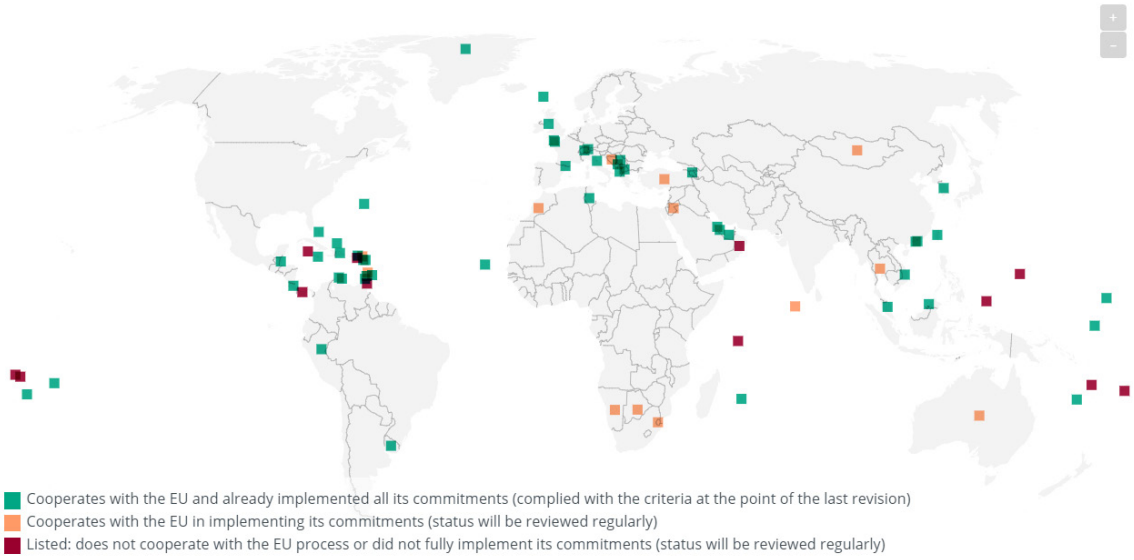


# A tool for risk analysis: EU blacklists

**As part of their daily work,** legal professionals have specific tools at their disposal to assess the risks of money laundering in a case under their responsibility. Two European Union blacklists are part of these tools: the list of tax havens and the list of third countries with insufficient measures to combat money laundering and terrorist financing.

In December 2017, the European Union adopted for the first time a common list of 17 tax havens, or "non-cooperative tax jurisdictions". On 18 February 2020, EU Finance Ministers adopted the second major update of this European blacklist. Four new territories were added: the Cayman Islands, Palau, Panama and the Seychelles. None of the eight countries currently on the blacklist (American Samoa, Fiji, Guam, Oman, Trinidad and Tobago, US Virgin Islands and Vanuatu) has been removed, bringing the total number of jurisdictions to twelve. EU Finance Ministers also removed 16 jurisdictions (Antigua and Barbuda, Armenia, Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cape Verde, Cook Islands, Curaçao, Marshall Islands, Montenegro, Nauru, Niue, Saint Kitts and Nevis, Vietnam) from the 'grey' list of countries that have made commitments.

The blacklisted countries have, according to the European Commission, refused to enter into dialogue with the European Union or to address their shortcomings in the area of good tax governance. For countries on the 'grey' list, or watch list: their commitments are deemed sufficient by the European Union, but their implementation is closely monitored. These lists are regularly updated and require a unanimous vote in the Council. No EU Member State or European countries closely associated with the EU are on the black or grey lists.



The black list is accompanied by sanctions: credits from certain European financial instruments (the European Fund for Sustainable Development, the European Strategic Investment Fund and the External Lending Mandate) may not be channelled through entities established in the listed countries.

## Three criteria have been used to identify non-cooperative jurisdictions:

- **Lack of transparency:** the territory does not comply with certain standards (international, OECD or bilateral agreements with Member States) regarding the exchange of information, either automatically or on request. For example, it refuses to transmit banking information deemed relevant to the administration of another country.

- **Unfair tax competition:** the territory has harmful tax regimes, contrary to the principles of the EU Code of Conduct or the OECD Forum on Harmful Tax Practices. These may include tax facilities reserved for non-residents or tax incentives for activities that do not relate to the local economy.

- **Implementation of BEPS measures:** the country has not committed to the OECD minimum standards to address tax base erosion and profit shifting (BEPS). For example, the corporate tax rate is so low that it leads multinationals to artificially transfer their profits to the country without these companies carrying out sufficient economic activities.

« On 13 February 2019, the European Commission unveiled its new list of 23 third countries with strategic deficiencies in their frameworks for combating money laundering and terrorist financing. »

In contrast to the list of tax havens, the list of third countries with insufficient arrangements for combating money laundering and terrorist financing does not yet have the same legitimacy.

On 13 February 2019, the European Commission unveiled its new list of 23 third countries with strategic deficiencies in their frameworks for combating money laundering and terrorist financing. This is a standard exercise, as the Commission had already established and updated such a list in 2016 and again in 2018.

Following the listing, banks and other entities falling within the scope of EU anti-money laundering rules are required to apply enhanced vigilance for financial transactions involving customers and financial institutions from these high-risk third countries, in order to better detect suspicious capital flows.

The Commission has developed its own methodology for identifying high-risk third countries, based on information provided by the Financial Action Task Force, supplemented by its own expertise and other sources such as Europol. The countries assessed meet at least one of the following criteria:

- they have a systemic impact on the integrity of the EU financial system;
- they are considered by the International Monetary Fund as international offshore financial centres;
- they have economic relevance for the EU and strong economic links with the EU.

> The Commission is expected to propose a new draft shortly in consultation with Member States in an effort to reach a consensus.

The 2019 list included the following 23 countries and territories: Afghanistan, American Samoa, Bahamas, Botswana, Democratic People's Republic of Korea, Ethiopia, Ghana, Guam, Iran, Iraq, Libya, Nigeria, Pakistan, Panama, Puerto Rico, Samoa, Saudi Arabia, Sri Lanka, Syria, Trinidad and Tobago, Tunisia, United States Virgin Islands, Yemen.

However, the Member States did not agree and on 6 March 2019 rejected the Commission's proposal, which had, moreover, been criticised by the United States. The Member States argued that the procedure for updating the list was unclear and that it risked being challenged in court. This position was regretted by the European Parliament in a resolution adopted on 14 March. The Commission had to propose a new draft in consultation with Member States in an effort to reach a consensus. The draft was finally released on 7 May 2020.

# What are the prospects of the European Union in combating money laundering?

**With the successive adoption** of the Fourth and Fifth Directives, the European Union appears to have taken a major step towards a coherent and effective framework in the fight against money laundering. But recent financial scandals have highlighted the need for further efforts. The European Commission made this observation through a communication and four reports published on 24 July 2019. The Commission insists on the need for full implementation of the Fourth and Fifth Directives, while stressing that a number of structural shortcomings still need to be addressed.

## The reports address the following points:

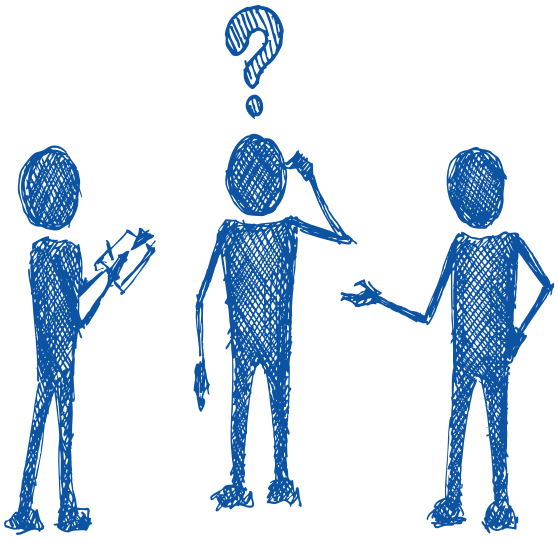
- **An analysis of** recent high-profile money laundering **cases** in EU banks, in order to provide an analysis of some current shortcomings and to present possible avenues for improvement.

- **Possible avenues** for enhanced cooperation between Financial Intelligence Units (FIUs).

- **Elements to be considered** for a possible interconnection of bank account registers and data retrieval systems.

- **The Commission suggests** that such a system could possibly be a decentralised system with a common platform at EU level.

- **Supranational risk assessment**, with an updated inventory of sectoral risks associated with money laundering and terrorist financing.



These reports will serve as a basis for future strategic choices on how to strengthen the European framework for the fight against money laundering. In this respect, a European Commission action plan was expected on 25 March 2020. For its part, on 5 December 2019 the Council of the EU adopted conclusions in line with the guidelines drawn up by the Commission. However, the Council invites the Commission to explore further possible actions, in particular by examining:

- **ways** to ensure more effective cooperation between the authorities and bodies concerned, including by tackling obstacles to the exchange of information between them;

- **whether** certain aspects could be better dealt with by means of a Regulation;

- **the possibilities,** advantages and disadvantages of conferring certain supervisory responsibilities and capacities on an EU body.

> The Commission insists on the need for full implementation of the Fourth and Fifth Directives, while stressing that a number of structural shortcomings still need to be addressed.

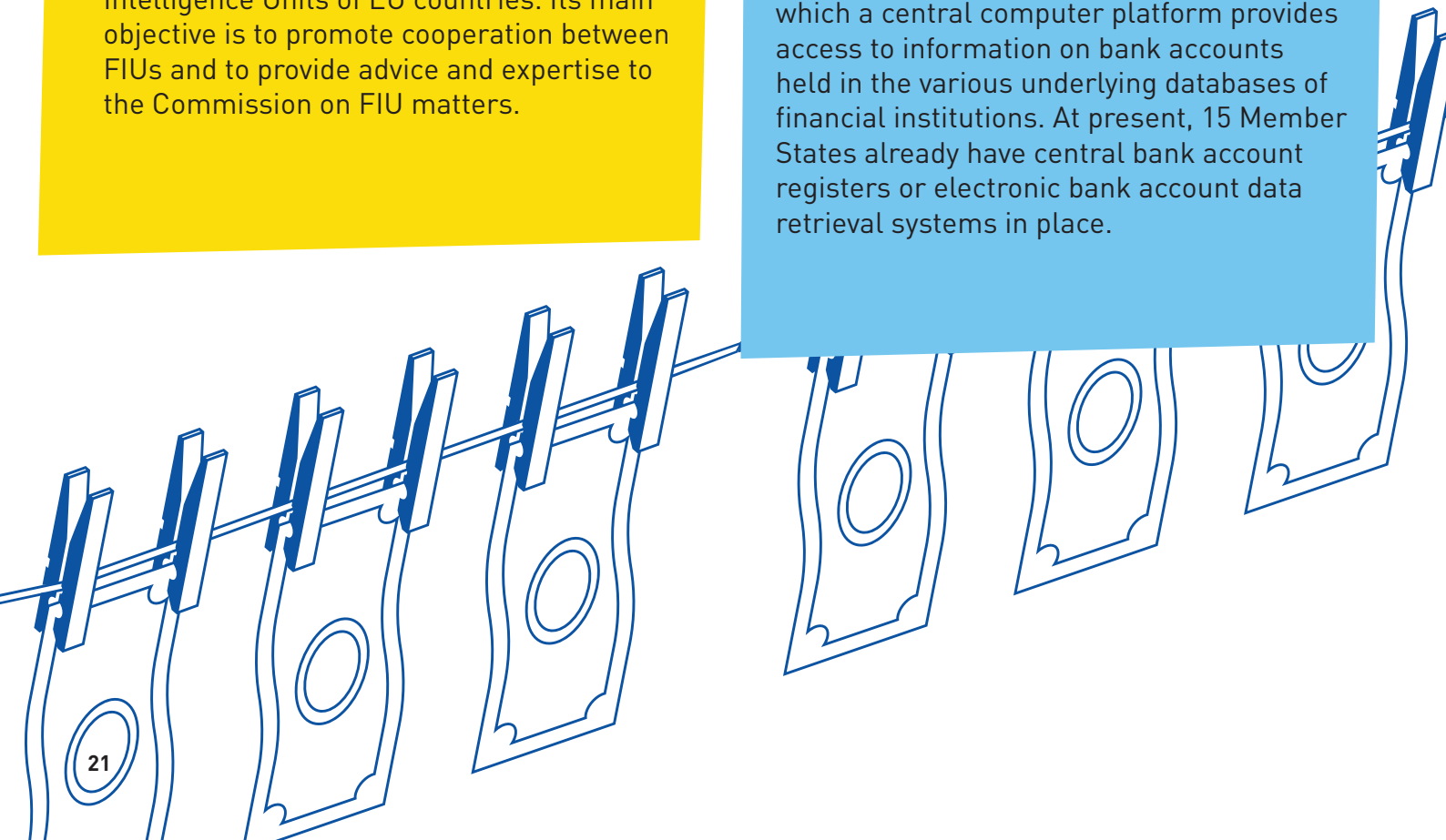
## What is a Financial Intelligence Unit (FIU)?

An FIU is a national central unit established in each Member State which is responsible for receiving and analysing information from private entities on financial transactions considered to be related to money laundering and terrorist financing. FIUs share the results of their analyses with the competent authorities where there is reason to suspect money laundering, related predicate offences or terrorist financing. The EU – and international – framework for the fight against money laundering and terrorist financing is based on these analyses.

The EU FIU Platform is an informal expert group set up in 2006 by the Commission which brings together the Financial Intelligence Units of EU countries. Its main objective is to promote cooperation between FIUs and to provide advice and expertise to the Commission on FIU matters.

## What are the national central bank account registers?

Article 32a of the Fourth Anti-Money Laundering Directive requires Member States to establish, by 10 September 2020, centralised automated electronic mechanisms at national level which make it possible to identify any natural or legal person holding or controlling payment accounts, bank accounts and safe-deposit boxes in their respective territories. These mechanisms may be set up either as a central register, by means of which all relevant information is stored in one system, or as a data retrieval system, by means of which a central computer platform provides access to information on bank accounts held in the various underlying databases of financial institutions. At present, 15 Member States already have central bank account registers or electronic bank account data retrieval systems in place.



# Focus on Council of Europe action

The Council of Europe was the first international organisation to stress the need to take measures to counter money laundering. In 1977, the European Committee on Crime Problems (CDPC) of the Council of Europe set up a committee of experts, whose work led to the adoption in 1980 by the Committee of Ministers of the Council of Europe of a Recommendation on measures against the transfer and safekeeping of funds of criminal origin. This Recommendation was accompanied by a package of measures for the establishment of a comprehensive programme to combat money laundering.

In 1990, the Council of Europe adopted the 'Strasbourg Convention' on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. The Convention was designed to facilitate international cooperation and mutual assistance in the investigation of offences and the tracing, seizure and confiscation of the proceeds of such offences. It has been ratified by all Member States of the Council of Europe, making it a particularly useful tool for international cooperation because of its various provisions on mutual assistance. Moreover, it is also open for signature by countries which are not members of the Organisation.

In 2003, the Council of Europe decided to update and extend the Strasbourg Convention to take into account the fact that terrorism-related activities could be financed not only by laundering of criminal proceeds but also by lawful activities. This process was completed on 3 May 2005 with the adoption of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.

# The Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL)

Established in 1997, MONEYVAL is a permanent monitoring body of the Council of Europe responsible for assessing compliance with the main international standards in the fight against money laundering and terrorist financing and for evaluating the effectiveness of the application of these standards, as well as for making recommendations to national authorities on necessary improvements to their systems. Through a process of mutual evaluation, peer review and regular follow-up of its reports, MONEYVAL aims to improve the capacity of national authorities to combat money laundering and terrorist financing more effectively. By assessing its members on the basis of the international implementing standards developed by the FATF, as well as by producing recommendations tailored to different jurisdictions, MONEYVAL contributes to the effective implementation of these standards at national level by each of its members.

# What role does the CNUE play in combating money laundering?

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**The notaries of Europe** are a central link in the Member States' action to combat money laundering. As the representative body of the notarial profession in Europe, the CNUE participates in the work of the FATF and the European institutions, for which it makes its expertise and that of its members available.

**For a sound knowledge** and application of the European Directives Nos 2018/843, 2009/138/EC and 2013/36/EU, the CNUE is committed to the training of notaries. Thus, through its "Europe for Notaries - Notaries for Europe" programme, supported by the European Union, the CNUE organised seminars in nine countries between 2018 and 2020 on the theme of the fight against money laundering. Training is and will remain a priority for the CNUE in the years to come.

> « For a sound knowledge and application of the European Directives Nos 2018/843, 2009/138/EC and 2013/36/EU, the CNUE is committed to the training of notaries. »

**In addition, the CNUE** is working to simplify the cooperation of notaries in the fight against money laundering by promoting specific tools adapted to the profession at European level. In many Member States, several initiatives have been taken to establish a national risk analysis framework for notaries, making it easier for them to decide whether they need to make a declaration to the competent authority for the processing of financial information. Some notariats are very advanced and even propose systems for consulting European and international databases to identify, in particular, politically exposed persons.

**A coordinated approach** at CNUE level aims to facilitate the sharing of national expertise, but also to ensure a high level of risk analysis in a greater number of European notariats. Among the objectives pursued are:

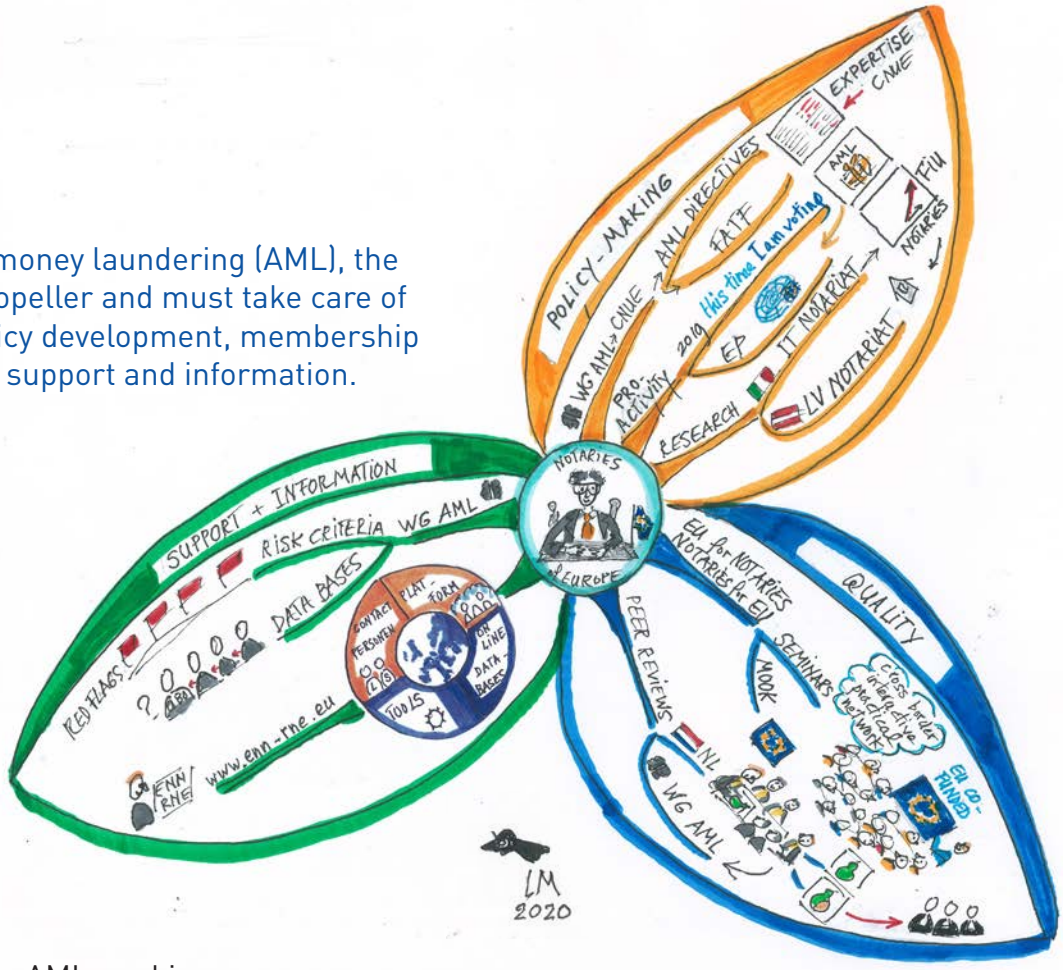
**1) The creation** of a European framework for risk analysis at the level of the European notariat.

**2) The drafting** of specifications to develop a single access to a structured solution enabling interested notariats to facilitate the identification of high-risk clients, with detailed and updated profiles.

**3) The evaluation** of the usefulness of a European tool for the notariat that includes access to the above-mentioned points, possibly within the framework of a project co-funded by the European Commission.

> A coordinated approach at CNUE level aims to facilitate the sharing of national expertise.

**In the fight** against money laundering (AML), the CNUE is a sort of propeller and must take care of its three blades: policy development, membership quality and member support and information.




**1. With the help** of its AML working group, the CNUE makes its expertise available to global and European institutions with a view to the adoption of legislation in this field. The CNUE promotes its proposals when the political agenda allows, for example on the occasion of the last European elections. The CNUE is also a platform for exchange between European notariats, which makes it possible to highlight national 'best practices' or to provide concrete support. For example, thanks to research by the Italian notariat, Latvian notaries were able to prove to their ministry the important role of notaries in real estate transactions and the prevention of money laundering.

**2. The CNUE** monitors the quality of its members. With the financial support of the European Union, the CNUE held nine training seminars on this topic between 2018 and 2020. These actions complement the initiatives taken at national level. For example, in the Netherlands, peer reviewers assist their colleagues in the fight against money laundering. Every three years, a notary's office is subject to a quality audit, during which the peer reviewer studies, among other things, the anti-money laundering policy and actual files and discusses them with the office. These audits are educational, but if necessary, a sanction is possible. The CNUE's AML working group is the ideal platform to discuss and share such national self-regulatory systems.

**3. The CNUE** assists its members. The AML working group aims to develop a common set of risk indicators at European level and is working on access to databases. The platform of the European Notarial Network (www.enn-rne.eu) also offers support with national interlocutors who answer questions from notaries and a secure platform on which notaries can discuss their practical cases.

**Lineke Minkjan,**
**Koninklijke Notariële Beroepsorganisatie (Netherlands)**

# The ENN supports notaries dealing with cross-border cases


**The ENN provides notaries with many tools and resources that can be consulted online, such as in the fight against money laundering.**
**A quick overview of what you can find by registering at www.enn-rne.eu.**

• **A network of interlocutors** at your service. Joining the ENN means being able to rely on the help of a network of national interlocutors. They are on hand to give you practical information on your cross-border cases. Exchanges take place entirely electronically via the ENN's secure online platform.

• **An integrated videoconferencing system**. Thanks to this system, users have the possibility to communicate and exchange online.

• **Practical tools**. The ENN provides bilingual tools to facilitate information exchange between notaries.

• **Legal databases** that can be consulted free of charge.

**Registration with the European Notarial Network is very simple:**

All you have to do is go to the home page of the website: www.enn-rne.eu

Choose "New Account" from the menu and fill in the registration form.

Enter your contact details, as indicated in the European Directory of Notaries (www.notaries-directory.eu).

You will receive a confirmation email with your username and password.

Each time you connect to the platform, a security PIN will be generated and sent to your email address.

Please note that only notaries practising in one of the 22 member countries of the Council of the Notariats of the European Union can access the platform.

# THE NOTARY IN THE FIGHT AGAINST MONEY LAUNDERING

# Prevention of money laundering and notarial function[1]

by **IGNACIO GOMÁ LANZÓN**
Notary in Madrid
Chair of the CNUE´s Anti-Money Laundering working group.
(Illustrations by Blanca Marías)

Talking about money laundering and the notarial function at international level is not an easy task because, although in Europe we all have a common framework for combating money laundering manifested through directives, not all notaries have the same functions and procedures and not all apply the money laundering regulations in the notarial function in the same way.

Therefore, despite being Chair of the CNUE Anti-Money Laundering working group, what I can deal with properly is how the Spanish notary's office works in general and in particular in this field, although I am fully aware that my professional experience cannot be transferred to all countries. Nevertheless, I am going to try to transmit ideas that are common to all.

Money laundering is a postmodern, liquid, malleable, polymorphic crime. There are several reasons for this:

- It is a crime that is difficult to apprehend, difficult to detect, because it adapts to the diversity of markets, being able to occur in the financial world, but also in real estate, jewellery, gambling, etc., with different operations depending on the type of activity.

[1] This paper is the text of the author's presentation at the Seminar "O PAPEL DO NOTARIADO EUROPEU NA LUTA CONTRA O BRANQUEAMENTO DE CAPITAIS E O FINANCIAMENTO DO TERRORISMO", held on 14 October 2019 in Lisbon, which was promoted by the Ordem dos Notarios de Portugal, in collaboration with the Spanish and French notariats, within the framework of Training 2018-2019, co-financed by the European Union's

• It is a crime in appearance of second-order because it does not pursue the antecedent fact producing the money - e.g. drug trafficking - or the act of terrorism, but another type of conduct that seeks to favour or take advantage of the results of the antecedent crime - in the specific case of laundering - reintroducing the illegally obtained profits in the legal and official market: they want to make eye-catching and ostentatious cash usable by means of its conversion into legitimate account entries. One might think that it is not as serious as the predicate offence, but the fact is that money laundering distorts the market and establishes competitive advantages for those who break the law and, on the contrary, prejudices and disadvantages for those who comply with them. That is why the legal good protected in its pursuit is the proper formation of assets.

These characteristics have shaped the way we fight it. The FATF 40 recommendations are a reflection of this. Two are of particular interest:

Recommendation 1 on a risk-based approach. Logically, the first thing was to control the channels through which the market flows, and particularly the financial flows, run. Initially, an attempt was made to combat money laundering by means of a system of systematic reporting of all transactions; but soon, already in Reagan's time, it was found to be ineffective due to the impossibility of processing millions of data physically sent on paper. It therefore evolved into a different system, consisting of imposing diligence on customer knowledge (knowing your client), already used in the fight against terrorism, and requiring individualised and occasional communications when risk was appreciated, but waiving the obligation in the case of known customers. The success of the system meant that financial laundering was largely dismantled, banking secrecy was greatly reduced and tax havens were left as financial outlaws, the mere mention of which ignites all the alarms.

Of course, once the financial system began to be better controlled, the sinuous and adaptable ("liquid and polymorphic" we said earlier) world of laundering has sought other channels for its function and has considered that the legal world, of real estate and commercial transactions, could serve as a means of laundering, for the respectability and discretion provided by prestigious professions adorned with the principle of confidentiality and professional secrecy. This is, of course, the case with notaries, who are therefore also subject to a risk-based approach.

Recommendation 3, on the criminalisation of money laundering. The problem is that the very postmodern nature of the offence being prosecuted also imposes repression of some sort of "liquid" or amorphous, which marries badly with the classic criminal types:

• There is an enormous heterogeneity of the subjects of the crime, ranging from jewellers to notaries, casinos and banks; moreover, an extensive concept of the perpetrator is usually included - as is the case in Article 301 of the Spanish Criminal Code - which, by the will of the legislator, means that any form of participation in laundering is an authorship, with the corresponding increase in responsibility if only "help" has been given.

• The punishable activities are included in very open types, sometimes referring to "any other act to hide or conceal its illicit origin" (art. 301 of the Spanish Penal Code), which imposes a dangerous indetermination that may affect the principle of legality and that our Supreme Court has already specified must imply a direct operation with these goods.

• As regards proof of the offence, it should be noted that the conviction of the predicate offence is not required and that the presumption of innocence applies, but that this does not preclude judicial conviction by means of an indictment (Sentence of Spanish Supreme Court, 5-10-2006). Some authors have even come to understand that a crime such as this, multi offensive, requires a repression closer to practice than to legal dogma, to the point of accepting a reversal of the burden of proof, replacing the presumption of innocence with a new presumption: in dubio pro víctima (Beristaín); victim on the other hand that does not exist concretely.

• The commission of the crime can also occur through serious negligence, and by any person, which has special significance with respect to the obligated subjects, who have specific requirements of diligence with an important subjective component of "risk assessment", and who may find themselves immersed in criminal proceedings because of their carelessness.

All these elements, due to their expansive and indeterminate nature, logically ignite the alarms in the legal world, which damage the principle of legal security, their own and that of their client, and they find themselves in a tremendous dilemma, between sword and wall, between having to defend or advise the client who pays them and also attend to another client, the State, who can put you in prison. "No servant can serve two masters, for either he will hate the one and love the other, or he will be attached to the one and despise the other. They cannot serve God and riches," says Matthew 6-24-43. This is the question posed by my exposition: how can we achieve what the Gospels consider impossible: to serve two masters and not die in the attempt?


## The notary's relationship to this norm

Regulation in Spain has, in effect, a risk-based approach and in order to make preventive work more efficient, transfers the responsibility for taking decisions in many areas to the regulated entities. The relationship with the notary has gone through three phases: the notary as a collaborating subject (1993-2003), the notary as a subject limited only to certain transactions (purchase and sale of real estate, companies) from 2003 to 2010, and from 2010 he is a complete subject bound in respect of all his transactions, but in any case also with this subjective approach of risk-limited communication.

How does this new regulation fit into the daily work of notaries?

Perhaps a few clarifications will be needed beforehand. From the point of view of the economic analysis of law - as Cándido Paz-Ares made us see in his day - it is often said that the notary has a function of reducing transaction costs.

On the one hand, private costs, because the notary acts as an "engineer of transaction costs", by technically facilitating the insertion of transactions into the legal and economic system: the notary reduces uncertainty and adds value to transactions through:

- his function of executor or enforcer (evidentiary and executive effectiveness),
- his arbitration function (solving problems in negotiation),
- his mediating role (in the sense of making the space for negotiation visible),
- his auditing function (the control of legality),
- his contractual design work by completing the contract, adapting it to the law and innovating by creating formulas.

However, on the other hand, the notary reduces the social costs that can be produced by transactions that are not adjusted or contrary to the law, through his hindering function, which is configured in this sense as a "gatekeeper", because it "lowers the barrier" before those cases that are not adjusted to the law. This is the control that in legal terms is called "legality".

As you can see, both in the aspect of private and public costs, this aspect of compliance with the law is essential. But the crime of money laundering is a crime that deviates from the classic legality control of notaries. The notary easily avoids contract vices such as lack of capacity or consent, error, malice, violence and intimidation, which are appreciable by the senses. It will also prevent civil or administrative irregularities by preventing acts from being consummated if certain requirements are not met. The notary, in short, has so far been a classic gatekeeper, which detects the obvious and expresses irregularities. His intervention is clear, and his constructions are solid legal buildings by virtue of the control of legality attributed to him by law and tradition

However, the concept of legality control has evolved. In the first place, due to a dynamic of efficiency, it has been in crescendo in the aspect of competence in Spain, because in contrast to the old trend that considered the notary to be a professional in private law, and only in private law, the natural evolution has led to the estimation that the notary has to apply the whole of the legal system, and particularly the Administrative and Fiscal, and in addition many functions have been attributed to him in formerly judicial fields.

On the other hand, and this is the one we are most interested in, the standard of legality has increased, and this has had a lot to do with laundering regulations: control is no longer only formal, but also of the fund. The consideration of notaries as obligatory subjects in the field of legislation against money laundering has introduced in our notarial legislation the concept of "material regularity", applicable not only to the crime of money laundering, through the modification of article 24 of the Organic Law of Notaries through the reform operated by Law 36/2006.

Now, what does it mean to control the "material regularity", the substance of the case?

It is a question of ensuring not only that the act is apparently legal, but that it is also legal in its aims, in its true cause, in its intentions, and avoiding that fiduciary contracts are being formalised, fraudulent or simply for illegal purposes.

I have had the opportunity to reflect on this concept at a number of conferences on different subjects because the concept of material regularity can distort the notarial function by turning the notary into something that he is not: he will be a judge if he has to consider an abusive bank term not expressly prohibited; a policeman if he has to report an act that could be criminal, or a tax inspector if he has to detect a fraudulent act. And the notary, although he collaborates with all of them, is not one of those professions, very worthy, but something else, and if he does not focus on his objectives, he may not do well either for himself or the others.

The key is to know what level of control of material regularity can be exercised by the notary, who does not have all the elements of judgment or sufficient means of evidence to go beyond the level of what has been declared, and to determine to what extent he can meddle in the substance of a matter that can very well be stolen by the parties and over which, on the other hand, he has no legal powers to demand disclosure. For practical purposes, this means asking whether he has the possibility of refusing to authorise a certain document because of suspicions of the existence of a crime, although without the absolute certainty of its existence. Moreover, on some occasions, for example in the case of abusive clauses, it could be concluded that the notary is "judging" without contradictory procedure, against the principle of effective judicial protection of the Constitution.

The notarial function consists of being a vehicle for contractual autonomy and channelling its flow between the channels of legality; not paralysing it in the face of any subjective suspicion. The legal system seeks a balance between a "precautionary jurisprudence", that of notaries, which will discard the most serious structural and obvious defects of the business quickly and economically, and the jurisprudence itself, that of judges, which will mend the defects, structural or not, that have escaped notarial control, with all the elements of judgment that it deems pertinent. Total security simply cannot be achieved, or it is too costly and too slow. Therefore, the political decision consists of determining what degree of insecurity we are capable of tolerating, knowing that behind the notarial authorisation, there will always be a judicial control.

How, then, do we get the notary to serve the two evangelical lords? The first thing that has to be said is that the notary is an expert in adapting because his own nature is hybrid between the public and the private: we attend as civil servants, but the private pay us.

From my point of view, the main thing to understand is that the attitude of the notary before the legal act has changed. To launder money is to be able to answer questions, and to fight against laundering is to ask them. The notary, at least in my personal experience, is not going to accept formally correct but incoherent, strange or inexplicable statements. This has always been the case, but the difference is that now you have to ask. The law helps us with some specific obligations that can generate those questions: What have been the means of payment; who is the real owner, what is the object of society? In other words, it is necessary to demand more information in case of doubt in order to clear up logical inconsistencies or incomprehensible situations.

« The notary, at least in my personal experience, is not going to accept formally correct but incoherent, strange or inexplicable statements. »

The problem is the subjectivity of these situations, often dependent on the appearance of the persons coming forward or on the concurrent circumstances, which are not always clear but may nevertheless conceal a serious underlying crime.

As I explained at the beginning, the substitution of the systematic reporting system for that of risk assessment, generated in the first few years — at least in Spain — such anxiety that the notary had to communicate anything, thus returning to the inefficient total operations reporting system. Fortunately, the law and the notarial internal regulation provided the means to objectify as far as possible our obligations, imposed the regular remission of parameterised information so that it can be managed and crossed, created indicators that facilitated the function of suspicion, and interposed a notary-friendly organism that helped us to fulfil our obligations, as it effectively does.

I believe that this is the way forward. The right conjunction between our specific functions and the prevention of money laundering will come from technology. Rejected systematic reporting is no longer useless from the moment that the Administration receives all the notarial information through a Single Computerised Index that allows it to process the information. Now it does not matter so much that the notarial suspicions (although they still have importance) such as the possibility of the Administration or the internal notarial organ to cross information, to perform searches by matters, suspicious persons, real estate and companies. Subjectivity and the risk of liability decrease.
I'm not saying that it hasn't cost us a lot of trouble, a lot of work and a lot of money, but I think that in the end collaboration and transparency is the best way to defend the essence of our profession which, moreover, let's not forget, is part of the State and cannot have the State against it. The Latin notary has the facet of a public official, so he is not something alien and foreign to the authority, but is part of it: when I have had the opportunity, I have stressed that we are part of the solution, we are aligned with the money laundering authorities, perhaps unlike other professions with less public obligations, and that is precisely our specific added value: impartiality and public service coupled with private advice. I put this on record as a contribution to the redrafting of the FATF guide to the legal professions for 2019.

But I would not like to end without highlighting another issue that I have had the opportunity to note during visits to other countries. As a notary, you cannot prevent money laundering if you are not a complete, strong and self-sufficient notary with functions in all matters of property and personal law.

When a notary's office lacks the monopoly of access to the public register of real estate transfers, when it does not have competence in the constitution of companies, when inheritances are made by private document, when its functions are limited to little more than the recognition of signatures without a real control of legality, the problem we have is not only money laundering, but also legal security and public order. And, I would add, in addition to money laundering.

Not only the launderer, but any person, will choose the legal system that requires the least guarantees and controls, so if the legislation gives a choice between a system with controls and guarantees, and another without, those controls and guarantees will probably not be provided. A legal system is as valuable as its weakest link, and the same goes for a money-laundering prevention system.

I have recently been in countries concerned about money laundering to which I was called to talk about the Spanish system for preventing money laundering, but listening to the previous interventions, I realised that the problem they had was not only money laundering: the list of crimes that were committed was much broader: they were predicate crimes such as misappropriation or fraud carried out by allowing transactions to be recorded in a private document and without any control.

It is curious to observe that people in some of these countries, on the one hand, promote the prevention of money laundering but at the same time defend an Anglo-Saxon notarial system because it is supposed to be faster and more efficient. It is certainly faster, and very convenient for those who handle money and do not want to give many explanations, but of course, it is not more efficient or safer for the normal law-abiding citizen or for the general interests of the State than a system of Gatekeepers who, in addition, perform important private functions at a very moderate cost. The uncritical praise of the Anglo-Saxon - so widespread - is a sign of mental laziness, of simple-mindedness. Of course, it is in terms of the security of transactions, in my opinion. The scandal of money laundering in Estonia through a branch of the largest bank in Denmark, facilitated by the creation of companies without any control in the United Kingdom, clearly highlights a situation where the legislation allows this type of opaque companies to be created and although since 2016 it requires the person with a significant shareholding to be declared, nobody checks the veracity of anything!

The notary has an obvious and renewed role in the fight against money laundering, but it is necessary that the notary is not just another competitor in the legal services market, but a strong figure with added value: a real legal advisor and at the same time an effective gatekeeper in all the operations under his jurisdiction. This requires efforts and limitations, but they are worth it for everyone.

# Economic analysis of anti-money laundering:

## European countries with a notarial system have better FATF compliance


*Notaries are crucial gatekeepers as concerns the cooperation with their National Institutions: they can share important information with the anti-money laundering (AML) Authorities about financial transactions and represent a key source of information in implementing identity check, applying customer due diligence procedures, identifying the Beneficial Owner (BO) of a company and reporting suspicious transactions to the Financial Information Units (FIUs). During the training seminars, Antonio Cappiello (economic expert at CNN), showed that data analysis is a key element in the AML approach and that the macroeconomic assessment is an effective tool also to underline the notarial positive socio-economic contribution in the dialogue with policymakers. In this interview, he gives us some insight into the economic approach and its relevance.*

**Interview with Antonio Cappiello**
Consiglio Nazionale del Notariato (CNN)
Speaker at "Europe for Notaries, Notaries for Europe" seminars

## How can we measure the anti-money laundering compliance of a country? What parameters can we use?

The Financial Action Taskforce (FATF) recommendations are the internationally endorsed global AML standards enabling countries to successfully take action against illicit use of their financial system. We could use the mutual evaluation reports (MER) of the FATF in order to make further analyses and better compare the compliance among countries. A first basic idea of my analysis was to extrapolate the MER scores on some specific FATF immediate outcomes (especially, among others, the ones related to Designated AML professionals) in order to assess better the sectors where notaries and professionals give a specific contribution. The FATF country evaluation and the professionals' compliance with AML are strictly interconnected: if a country globally better complies with AML, it is also an advantage for its notaries and legal professionals as a high level of compliance implies a positive evaluation of the related sectors indicated by the FATF immediate outcomes (I-O) and recommendations (R).

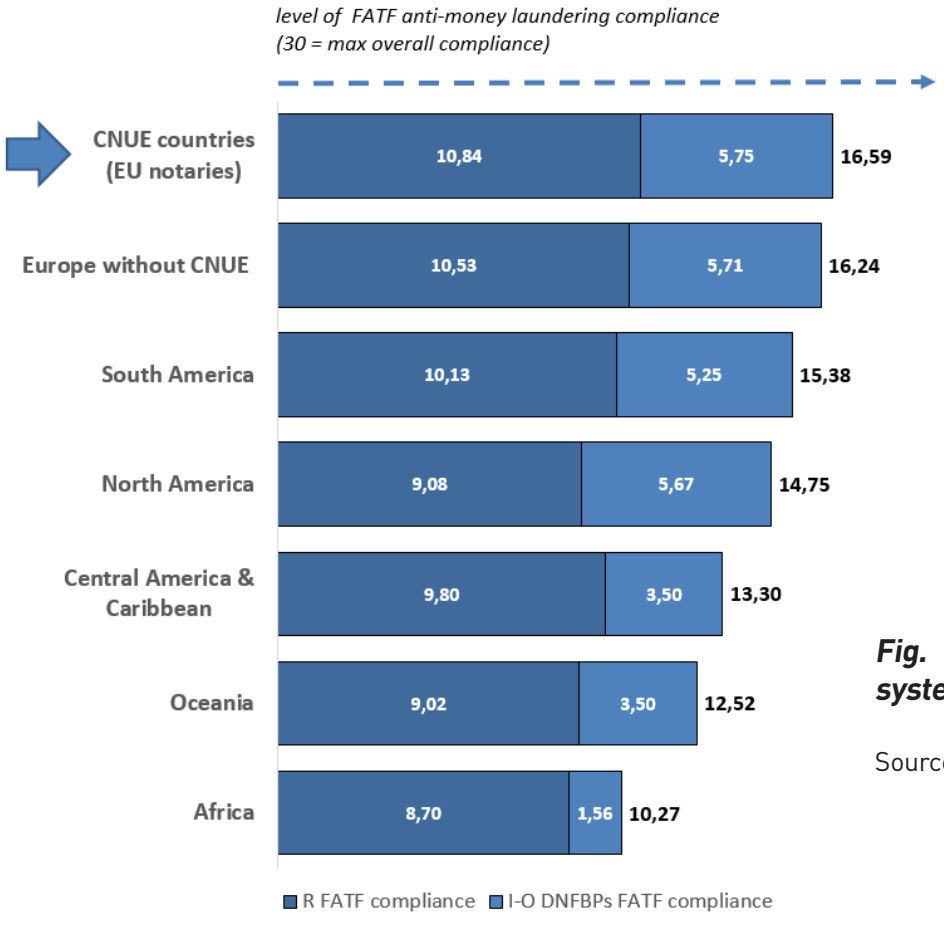



***Fig. 1: EU countries with a notarial system have better AML compliance***

Source: elaboration on FATF data (2019-2018)

## Can you give us an example? What does the aggregate analysis tell us about CNUE countries?

Considering a sample of about 90 countries (based on the latest available data on FATF Mutual Evaluation Reports 2019-18), we can obtain an average level of compliance by country clusters (countries grouped by area). Higher scores represent a better level of compliance of the considered cluster of countries. As concerns "FATF immediate outcomes" (I-O), I selected the ones in which notaries and legal professionals are more directly concerned as AML designated entities (e.g. I-O concerning DNFBPs and suspicious transactions reports). In CNUE countries, the majority of suspicious transaction reports (STRs) of the DNFBPs are typically provided by notaries. Therefore, some FATF indicators concerning DNFBPs could be used as a proxy of notarial compliance (e.g. in Italy, according to the last FIU reports, about 86% of STRs are provided by notaries). As concerns the 40 FATF recommendations, I took into consideration the overall score since it represents the quality of AML infrastructure backing the high standard professional activity of the notaries. I did a similar analysis (presented during the training seminars of Romania, Latvia, Lithuania and Malta) based on 2016-17 FATF data that confirmed the best compliance on AML by CNUE countries.

## Can "EU notarial anti-money laundering training and cooperation" have, using an economic term, "positive externalities"?

The benefit of the notarial functions, if transformed in synthetic comprehensible indicators, could definitely help the country's government in the implementation of policies. The 'Europe for Notaries' seminars also provided the occasion to exchange best practices in order to support other notariats in further developing their institutional role to guarantee citizens and business operators. Just as an example, on the occasion of this cycle of seminars and other European Notarial Network seminars on AML, we realised that FIU data on STRs of Latvian notaries were a signal that a full compulsory notarial control on real estate contracts could allow a better AML monitoring by the supervisory authorities.

The Latvian FIU data just needed to be elaborated: the figures on notarial STRs represented an indication of the high AML potential of the Latvian notaries with whom we subsequently elaborated a study that was successfully used in order to support their professional development plan with the national authorities.

## Why is it important to highlight the tangible effects of notaries on the economic system?

Media campaigns without the support of epistemological evidence are not effective and do not impress governments and policymakers. Policy choices, including EU legislation, are to a greater extent based on specific impact assessments using cost-benefit analysis. Since we are convinced that the legal certainty provided by the Notaries of Europe is an important value, we must be able to unveil this inner asset and provide pieces of evidence through the typical instruments of economic analysis. The findings emerging by reliable studies are the right reasonable factors to be considered in order to communicate in policymaking systems effectively.

# Essential characteristics of the Spanish anti-money laundering system

**by PEDRO GALINDO**
**Manager, Centralised Organisation for the Prevention of Money Laundering**

OCP NOTARIADO
CENTRALIZED ORGANIZATION
FOR THE PREVENTION OF MONEY LAUNDERING

The anti-money laundering system of the Spanish Notariat has brought about a significant improvement on behalf of Public Authorities, who now have access to:

- **A new** source of valuable information: the IUI ('Índice Único Informatizado', or 'Single Computerised Index'), databases containing information on the operations performed daily at all notary offices in Spain.

- **A body** made up of professional specialists in anti-money laundering who draw on the database to analyse and notify risk-related operations.

It also offers advantages for notaries, who delegate the handling of a part of their obligations to a team of experts working in their name.

Regulations in force: Act 10/2010, on the prevention of money laundering and of terrorist financing, and Royal Decree 304/2014, approving the Regulation of Act 10/10.
The characteristics of this system are described in Order EHA/2963/2005, governing the OCP ('Órgano Centralizado de Prevención', or 'Centralised Organisation for the Prevention of Money Laundering') in the field of money laundering within the General Council of Notaries, and Order EHA/114/2008, governing compliance with certain obligations of notaries in the field of anti-money laundering.

## 01. Anti-money laundering actions by notaries: evolution

Over recent years there has been an increase in the regulatory obligations that notaries must comply with in their professional practice.
As a consequence of the transposition of the Recommendations of the Financial Action Task Force (FATF) and EU Directives, the status of notaries has shifted from being collaborating parties to designated parties.

Since 2003 the structure of the system has been based on centralised compliance with certain obligations.

**The table below specifies the obligations undertaken by notaries and by the OCP:**

| Group | Obligation | Compliance |
|---|---|---|
| **Due diligence** | Formal identification | **Directly by the notary** |
| | Identification of the beneficial owner | |
| | Obtain the purpose and nature of the business relationship | |
| | Archiving of documents | |
| **Information** | Non-performance of suspicious operations | |
| | Special examination of risk-related operations and retrieval of risk-related procedures from the notarial database | **Through the OCP** |
| | Notification of evidence of money laundering, where applicable | |
| | Systematic notification of operations in breach of the obligation to present form S-1 | |
| | Cooperation with the authorities | |
| **Other** | Preparation of the Manual of Anti-Money Laundering Procedures | |
| | Training courses for notaries and their employees | |
| | External expert examination | |

# 02. OCP of the General Council of Notaries: functions

**a) Coordinate the actions** of notaries in the field of anti-money laundering: the coordinated actions of a group (over 2,900 notaries), centralised management of information or shared criteria for the interpretation of regulations provide unquestionable advantages in the public interest.

**b) Establish** internal notarial procedures with regard to anti-money laundering: the OCP has produced its "Manual of Anti-Money Laundering Procedures", uniformly applicable at all notary offices to clarify the regulatory obligations imposed while standardising the specific means of compliance.

**c) Analyse the operations** detected in the IUI and operations notified by notaries on a centralised basis and with uniform criteria.

**d) Notify the SEPBLAC** ('Servicio Ejecutivo de la Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias', or 'Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences') of operations revealing evidence of laundering: if the evidence of risk in the operation is confirmed after a special examination, the OCP will notify the SEPBLAC, for and on behalf of the notaries. Notification of an operation to the SEPBLAC constitutes an exception to the principle of notarial archive secrecy, justified by the corroborated existence of risk factors and an analysis in which those factors are not confirmed.

**e) Handle the requests** made by a court or administrative authorities.

**f) Training for notaries** and their employees: the OCP undertakes training initiatives (online and in-person courses) contributing to the efficacy of the system.

# 03. Operations subject to notarial anti-money laundering obligations

Following the publication of Act 10/2010, all operations conducted before a Notary are subject to anti-money laundering obligations. The obligation to identify the beneficial owners of legal entities also came into force simultaneously. In order to fulfil this obligation, the Act deems a declaration by the representative of the legal entity to be sufficient. Notaries have access to two additional elements allowing them to corroborate these statements: the BDPJE ('Base de Datos de Personas Jurídicas Excepcionadas', or 'Database of Exempted Legal Entities') and the BDTR ('Base de Datos de Titulares Reales', or 'Database of Beneficial Owners').

The BDPJE is a register listing legal entities regarding which the notary is under no obligation to ask the client as to their beneficial owner.

The BDTR contains information as to the beneficial ownership of a great many legal entities. This information is derived from the following sources:

**- From the BDPJE.**

**- Accredited beneficial ownership: monitoring of successive transfers of company shares or stock from the incorporation of the company onwards, using the data recorded in the IUI; from deeds of declaration of single-member status, or change of single-member (natural person).**

**- Declared beneficial ownership.**

**- From deeds of appointment of officers of legal entities, who may be beneficial owners through administrative powers if there are no beneficial owners through ownership or control.**

**Using the information from the IUI, the OCP has also created its BDPRP ('Base de Datos de Personas con Responsabilidad Pública', or 'Database of Politically Exposed Persons'), recording the identification details of those who hold or have held major public functions in Spain (Article 14, Act 10/2010). The court authorities, State law enforcement agencies, etc. have been provided with access.**

# 04. Information processing for anti-money laundering

**The three main activities of the OCP are detection, analysis and, where applicable, notification of operations to the SEPBLAC. These are performed in sequence, with the outcomes of the previous step determining those which may be reached in the following phase.**

**The OCP has established several elements allowing it to estimate the risk associated with operations and to detect those revealing a higher risk profile, in order to embark on a realistic analysis focused on these operations.**

## The risk-related operations detection phase

**- Detection of risk-related operations** by the OCP, by establishing alerts or patterns applied to the IUI, so that when the event triggering the alert occurs, the system captures the operation for analysis. The IUI contains the essential information (parties involved, place of residence, the amount involved in the operation, etc.) for all legal business and acts authorised by all notaries since 2004, in electronic format. Each notary office periodically uploads the operations it performs to the IUI. The transfer of information from the notary offices to be centralised at the IUI is conducted via a remote electronic network offering the utmost guarantees of confidentiality and security. The triggering sequences are based on the existence of various operations with shared elements. The OCP determines that a set of operations constitutes an alert-triggering sequence in accordance with its proximity to money laundering structures.

**- Detection of risk-related operations** by notaries and referral to the OCP. This channel is based on a series of risk-related elements established uniformly for all notaries and which could potentially arise in operations (risk indicators). Activity applicable to notaries: if they detect that the procedure involves two or more risk indicators, or just one of particular intensity, they must immediately notify the OCP.

## Analysis phase

The risk-related operations that are detected must be analysed (Article 17, Act 10/2010), to assess whether the level of risk associated with the indicators remains or is increased when additional information is entered. In the case of notaries, the analysis is performed by the OCP.

The additional information is drawn from other related operations in the IUI, or external public information. The analysis aims to search for a (lawful) explanation that would serve to justify and make economic sense of the procedure analysed, by setting it against additional information.

The OCP has established several automated risk element scoring systems to help prioritise operations in the analysis. For example quantification of elements in the procedure (means of payment, nationality, etc.); involvement of a person included on lists drawn up by the OCP (politically exposed persons, individuals mentioned in the media in connection with economic offences, etc.); repeat involvement in procedures by individuals previously analysed by the OCP and notified to the SEPBLAC, etc. Those procedures with the highest scores are prioritised for analysis.

## Conclusions of the analysis

The analytical process will end in one of the following ways:

- **Procedure shelved:** if there is a reasonable explanation for the procedure analysed and the existence of the risk indicator or indicators is justified.

- **Notification of the SEPBLAC:** if it is not possible to make economic sense of the procedure, and the risk remains or increases in the light of the additional information employed.

- **Monitoring:** if the explanation or justification does not lead to a clear conclusion serving to eliminate or reduce the risk suggested by the indicators, the operation is left pending for a reasonable period in case a new procedure should enter the database and potentially increase or eliminate the triggering indicator that was initially noted.

**All actions are undertaken within the strictest duty of confidentiality for the OCP and the Notary with regard to the party executing the instrument and third parties (Article 24, Act 10/2010).**

## 05. Handling of demands for information issued by administrative or court authorities

The centralisation of information and the automation of processes allows for an almost immediate response to any request for information received by the OCP. A Web Service has been in operation since 2008, allowing information to be requested via a secure remote electronic network, identifying the requesting party and reducing the response time.

## Overall appraisal, external opinions and future prospects

**The cornerstones** of the system are optimal exploitation of new technologies, centralised use of information, and specialised analytical function.

**The study into the application** of anti-money laundering and terrorist financing regulations outside the financial sector commissioned by the European Commission from Deloitte highlights Spain's experience with the OCP as a very good solution for Designated Non-Financial Businesses and Professions (DNFBPs).

**The FATF recognised** the prevention system of the Spanish Notariat in 2014 within the context of its assessment of Spain, giving it a highly positive appraisal: "Of the DNFBPs, the strengthening of the preventive measures is most notable within the notaries sector.

The notaries sector has made significant progress as a result of the establishment of the OCP (a centralised prevention unit), which has raised awareness and capacity throughout the sector. Also, the development of elaborate risk indicators and additional STR reporting through the OCP has promoted a good understanding of its ML/TF risks and level of compliance".

**Spanish law makes provision** for the possibility of extending this model to other professional groups.

**In June 2019** the FATF published its "Guidance for Legal Professionals", suggesting the system used by the Spanish Notariat as a model to follow: "the AML system used by Spain's notaries represents a considerable advance for Public Authorities, which thanks to its implementation now have access to a new source of valuable information: notarial indexes (a single database with information on all the public instruments and documents authorised by notaries in the country). This information is processed in an integrated and automated manner to detect potential ML/TF operations".

And regarding the BDTR: "all parties subject to AML requirements may consult the BDTR to facilitate compliance with Due Diligence obligations. This thus allows the FIU and Law Enforcement Agencies to obtain information on owners with a percentage of less than 25% (full corporate regime) at Spanish private limited liability companies, on any given date".

# Training of European notaries on practical cases

## Seminar in Ljubljana on 7 March 2019

**by MILAN DOLGAN, Notary in Ljubljana**
**Moderator of the training seminar**

**The seminar took place on 7 March 2019** in Ljubljana in the framework of the CNUE 'Europe for Notaries – Notaries for Europe' programme, which provided for the organisation of 9 seminars on the subject of the fight against money laundering. Participants were welcomed by the President of the Slovenian Chamber of Notaries, Mrs Sonja Kralj, and there were presentations held by Aleksander Šanca - Secretary of the Slovenian Chamber of Notaries, Darko Muženič – the then Director of the Office of the Republic of Slovenia for Money Laundering Prevention, Branka Glojnari – the current Director of that Office, Dr Bojan Geršak – a specialist in this field, Mr Nejc Korošec – Deloitte, Senior Associate/ Forensic, Milan Dolgan – notary in Ljubljana, Mag. Alexander Winkler – notary in Vienna, Željka Beli – notary substitute in Zagreb and

Dr Michael Herwig and Dominik Hüren – both representatives of the German Chamber of Notaries.
Nejc Korošec gave a presentation on the role of notaries in legal transactions, on the effect that money laundering has upon notaries' work, on notaries' obligations according to the Prevention of Money Laundering Act, what the is risk for money laundering at notary's, why and how a notary is misused for money laundering, how to perceive an attempt of money laundering and actual cases of money laundering at notary's

**A workshop showed an example** of how to launder 1,000.000.00 EUR. Participants were divided into four groups and each group named the person who reported about their solution in the plenary session.

**Branka Glojnari presented** the development of bases for prevention of money laundering, the role of the Office of the Republic of Slovenia for prevention of money laundering, persons liable to implement law, tasks and obligations of persons liable to report, a survey of clients and implementation of client's survey.

**The Director of the Office**, Darko Muženič, presented additional cases, the register of actual owners, reporting standards and sanctions for non-performance.

**The situation** in the field of money laundering in their countries was described by notaries Mag. Alexander Winkler, Dr Michael Herwig, Dominik Hüren and deputy notary Željka Beli.

**Dr Bojan Geršak** displayed motives for money laundering, the characteristics of money laundering, phases of money laundering, incrimination of money laundering in the Penal Code, execution methods and techniques of money laundering and financing of terrorism, and international elements to prevent money laundering. His presentation included a quiz with questions about whether the criminal offence of money laundering is possible without a previous criminal offence and if not only money but also property can be the subject of laundering. He also presented the 'Komerati' case, which is not very demanding in relation to its content. However, it is extensive. A large number of notifications pointed to suspicious transactions; there were more than 64 bank accounts dealt with, which belonged to 29 companies. Many companies from abroad (USA) suffered damage. The damage resulting from frauds exceeded 3,000,000.00 EUR. The highest amount which the law enforcement authorities managed to stop was over 400,000.00 EUR. First, a telephone call came where the caller introduced himself as the owner of a parent company in Germany demanding urgent payment for a false service to prevent a 50% penalty. Since the payment was claimed to be urgent, the caller demanded cash remittance to a bank account in Slovenia. This was followed by e-mail communication and remittance of 116,000.00 EUR.

The Office of the Republic of Slovenia for Prevention of Money Laundering issued an order to stop the transaction to the bank account. The reason for his was that the damaged US company sent a request through its US bank, where it had its bank account open, to return that money claiming they were the victim of a criminal offence. NLB d.d. asked the legal representative of the suspected company to submit evidence/explanations in relation to that money inflow to the bank account. He failed to follow the instructions, and an investigation started immediately.


At that moment, no complaint had come from the damaged entity in the USA yet, just the request to cancel the transaction. So there was no information about how the criminal offence was done, if the suspected person really existed or if it was the person with forged documents again.

The order issued by the Office of the Republic of Slovenia for Prevention of Money Laundering was effective for 5 days. When collecting information and examining documentation, it was found that the associate of that company really existed, but it was a letterbox company, and the suspected person became company's associate and used e-banking 'Klik pro'. The execution of a transaction in e-form was not possible due to a blockage made by the Office. He wanted to know when the blockage would be dropped, stating that the money was not his and that it should be returned to the sender. He even signed the consent to the bank to return that money to the sender. Accordingly, charges were filed in this case for the criminal offence of fraud and not of money laundering.

Since the response time was proper, authorities could be very efficient in the recovery of criminal assets. The Office of the Republic of Slovenia for Prevention of Money Laundering can react immediately (issue an order) when they receive a piece of information from banks. Suspects rely on the time difference between Europe and the USA, making transactions right before banks close on Fridays afternoon. They started to establish companies and bank accounts with false documents. Sometimes commercial banks, when they suspect that they are dealing with money laundering, cancel the contracts on the management of business accounts to such companies at their own initiative.

Professional money launderers apply the principle of a hierarchic organisation (similar to a mafia structure). Their main motive is money, and they include a large number of people and a large number of countries, acting underground (use of 'money mules').

Money laundering is not a classic criminal offence but the result of social and economic developments in the last decade. It accompanies technological progress and growth of an illegal economy, includes large sums of money originating from illegal activities. It is carried out through a legal payment system, and it functions as legitimately gained money or property. Illegal assets are transferred into the economy or are re-invested into criminal activities.

« Professional money launderers apply the principle of a hierarchic organisation. »

The presentation also included a court judgement referring to a case when the information system of an NLB bank's client was attacked. The client was using electronic banking which was broken into with the help of software (virus). The perpetrator was never found. It was just established that somebody raised money from the client's account against his will preventing him from disposing of his money on that account freely. The court then took the view that the perpetrator of a committed criminal offence does not need to be known and that a definition of the objective facts of its commitment is sufficient.

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The next case refers to the example where the suspect forged documents of cars (invoices, registration certificates) which were stolen in Italy. The suspect wanted to register these cars in Slovenia and sell them to a third person and/or a bona fide buyer. His acts were focused on covering the property acquired through a criminal offence. He tried to conceal the true origin of property and to avoid the legal consequences of his acts. These are the signs of money laundering (concealing the origin, presenting money as legally obtained). Had he wanted to keep the vehicles for himself, we would have a case of a criminal offence of covering and not of money laundering.

## Money laundering techniques:

- transfer of assets among bank accounts (79% cases)
- transfer of assets among countries (74% cases)
- cash withdrawals from accounts (68% cases)
- cash deposits (16% cases)
- transfer of assets over national borders (11% cases)
- use of an authorised person to execute transactions (9% cases)
- cash withdrawals from automatic teller machines abroad (8% cases).

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