Anti-money-laundering package

Impact assessment (SWD(2021) 190, SWD(2021) 191(summary) accompanying four Commission proposals on money laundering and countering financing of terrorism (AML/CFT), including: a regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (COM(2021) 420), a regulation establishing the authority for AML/CFT (COM(2021) 421), a regulation on information accompanying transfers of funds and certain crypto-assets (COM(2021) 422), and a directive on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (COM(2021) 423)

This briefing provides an initial analysis of the strengths and weaknesses of the European Commission’s impact assessment (IA) accompanying the above-mentioned proposals, submitted on 20 July 2021 and referred to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) and the Economic and Monetary Affairs Committee (ECON). The package is included in the 2021 Commission work programme and in the joint declaration on EU legislative priorities for 2021. For more information on the background and content of the package, see the EPRS EU Legislation in progress briefing and European Parliament studies published in the last couple of years.

For over 30 years, the EU has been developing a regulatory framework to prevent money laundering (ML) and terrorist financing (TF) and to manage the associated risks. The first EU Anti-money-laundering Directive (AMLD1) was adopted in 1991 and has since undergone three major reforms (in 2001, 2005 and 2015) as well as substantial amendments (in 2018). Despite these constant improvements, the existing framework still suffers from some shortcomings that have been highlighted by the Commission in a series of reports analysing the effectiveness and efficiency of the EU AML/CFT regime. In its communication of July 2019 accompanying these reports, following a number of prominent cases of alleged money laundering involving EU credit institutions, the Commission concluded that additional reforms were necessary.

On 7 May 2020, the Commission presented an action plan listing measures to strengthen the EU rules on combating ML and TF as well as their implementation on the basis of six pillars:

1. ensuring effective implementation of the existing EU AML/CFT framework;
2. establishing an EU single ‘rulebook’ (i.e. a consistent, EU-wide set of rules) on AML/CFT;
3. bringing about EU-level AML/CFT supervision;
4. establishing a support and cooperation mechanism for financial intelligence units (FIUs);
5. enforcing EU-level criminal law provisions and information exchange;
6. strengthening the international dimension of the EU AML/CFT framework.

The AML/CFT package contains four legislative proposals to support the implementation of this action plan. More specifically, the proposal COM(2021)421 aims to implement Pillars 3 and 4 of the action plan with the creation of an EU AML authority, while proposals COM(2021)420, COM(2021)422 and COM(2021)423 aim to implement Pillar 2 by means of a clearer set of rules, and to contribute to Pillar 6. The IA therefore focuses on Pillars 2, 3, 4 and in part on Pillar 6 of the action plan (IA, p.3), as Pillars 1 and 5 do not require legislative action.

Both the European Parliament and Council expressed support for the Commission’s 2020 action plan. In its resolution of 10 July 2020, the European Parliament called for stronger EU AML rules and
welcomed plans for a new EU AML/CFT institutional set-up.\textsuperscript{4} On 4 November 2020, the ECOFIN Council adopted conclusions supporting each of the pillars of this action plan.\textsuperscript{5}

**Problem definition**

Following a description of the political and legal context of the initiative, the Commission identifies three shortcomings of the current framework to prevent AML (IA, pp. 8-12).

- 'the application of AML/CFT rules across the EU is both ineffective and insufficient';
- there is an 'insufficient oversight of how entities subject to AML/CFT rules apply them';
- the 'insufficient detection of suspicious transactions and activities by FIUs, particularly in cross-border cases, limits their capacity to suspend transactions and to disseminate relevant information to competent authorities'.

According to the IA, 'these three problems interact with one another to create a situation that continues to provide an economic lifeline for criminals' (IA, p. 14).

The IA clearly describes three underlying causes or problems drivers:

- a lack of clear and consistent rules;
- inconsistent supervision across the internal market — in particular, diverging methods to assess and identify risks and apply the risk-based approach to supervision;
- insufficient coordination and exchange of information among FIUs.

A problem tree (IA, p. 24) presents in rather simplified terms the problems and their respective underpinning drivers as described above, with their 'first' and 'second level' consequences, affecting public security, investments, the stability of EU financial systems and the functioning of markets. However, the main stakeholder groups (including EU citizens, businesses and administrations...), could have been presented in a more precise way in the problem analysis, indicating how they are affected by the problems.

The problem analysis is substantiated by several reports and targeted consultations. Based on these sources, the IA provides some information on the scale of the problems, but data availability is limited due to the nature of the problems and the IA acknowledges that 'it is by definition impossible to know how much undetected criminal activity' is taking place in the area of ML/TF (IA, p. 56). Moreover, the IA explains how the problems are likely to evolve without EU action. The current tools 'are not sufficient to address problems that due to a fast evolving context have become structural in nature'. 'Unless the EU adopts a new, comprehensive approach to preventing money laundering and terrorism financing that tackles the identified problem drivers, the EU economy and financial system will remain exposed to risks' (IA, pp. 22-23).

It is noteworthy that no evaluation of the existing AML Directive took place prior to the preparation of the IA, which is contrary to the Better Regulation Guidelines (SWD(2017)350) but explained by the urgency of proceeding with a new initiative in the area of AML/CFT (IA, p. 55). Also, the Commission communication of July 2019 and accompanying reports deal with the effectiveness and efficiency of the EU AML/CFT regime as it stood at that time and therefore 'can be considered as constituting a preliminary evaluation of the regime' (IA Annex 4, pp. 73-76).

**Subsidiarity / proportionality**

This initiative is based on Article 114 of the Treaty on the Functioning of the European Union (TFEU), which is the same legal basis as the current EU AML/CFT legal framework. 'Article 114 is appropriate considering the significant threat to the internal market caused by money laundering and terrorist financing, and the economic losses and disruption of functioning of the single market and reputational damage on a cross-border level which this can create at the level of the Union' (COM(2021) 420, p.4).
The IA stresses that the importance of acting at EU level ‘has been recognised in the five previous iterations of the AML Directive, and is still the case as regards this legislative package’ (p. 26). This is due not least to the significant cross-border dimensions and the structural nature of the issues. As regards subsidiarity scrutiny, national parliaments did not submit any reasoned opinion by the respective deadlines of 19 November 2021 for COM(2021) 420, 18 November 2021 for COM(2021) 423, and 30 November 2021 for COM(2021) 421 and COM(2021) 422.

According to the principle of proportionality as set out in Article 5 of the Treaty on European Union (TEU), the proposals do not go beyond what is necessary in order to achieve the objectives set. Also, ‘proportionality has been an integral part of the impact assessment accompanying the proposal and all the proposed options in different regulatory fields have been assessed against the proportionality objective’ (COM(2021) 420 and COM(2021) 423).

Regarding the choice of instruments, the Explanatory Memorandum mentions that a regulation is the ‘required instrument for the creation of a new EU agency’ (COM(2021) 421). The package’s other two regulations (COM(2021) 420 and 422) are also considered appropriate instruments to contribute to the creation of a single rulebook, ‘being directly and immediately applicable, and thus removing the possibility of differences in application in different Member States due to divergences in transposition’. As some provisions of the current AML Directive were not suitable to be directly applicable in the form of a regulation (e.g. those concerning the powers and tasks of competent authorities, the establishment and access to beneficial ownership and bank account registers), they have been reformulated, with amendments, in a directive (COM(2021) 423).

Objectives of the initiative

According to the IA, the general objective of the Commission proposal is ‘to achieve a comprehensive AML/CFT framework that will adequately protect the EU’s economy and financial system from criminal infiltrations, as well as to ensure public security’ (IA, p. 27). This general objective translates into three specific objectives (SO):

1. to strengthen EU anti-money-laundering rules and enhance their clarity while ensuring consistency with international standards and other EU legislation;
2. to improve the effectiveness and consistency of anti-money-laundering supervision;
3. to increase the level of cooperation and exchange of information among FIUs.

While these objectives are directly linked to the problem drivers, the IA does not define any operational objectives linked to the preferred policy option, as required by the Better Regulation Guidelines (BRG). The objectives would have benefitted from being more ‘S.M.A.R.T.’, i.e. specific, measurable, achievable, relevant and time-bound (BRG, p. 20), to facilitate monitoring of their achievement and evaluation later on.

Range of options considered

The IA proposes a range of options to achieve each of the three specific objectives. Under each specific objective (SO), the IA explains clearly what would happen under the baseline scenario (‘changing nothing’).

In addition to these three baseline scenarios, the Commission examines eight policy options in total (see IA, pp. 29-55). Table 1 below shows for each of the three specific objectives, the respective baseline and policy options considered in the IA, as well as its preferred option (three in total and highlighted in blue in the table).

The options are presented in a balanced way but they could have been further refined to be more specific on certain aspects. In particular under specific objective 2 (on supervision), the exact criteria to select ‘risky entities’ in option 3 (mostly focusing on large and cross-border entities, see IA pp. 43-44) could have been more clearly defined and justified (e.g. by comparing with alternatives), as it would affect the number of entities falling under direct EU supervision. Under
specific objective 3 (concerning FIUs), specific tasks to be conferred to the AML authority (AMLA) could also have been discussed in more detail in option 3.

Table 1 – Overview of the policy options considered

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<tr>
<td>1</td>
<td>BASELINE: no changes to rules of existing EU AML framework</td>
<td>BASELINE: AML supervision at national level with limited coordination by the EBA</td>
<td>BASELINE: informal coordination among national FIUs through EU FIUs’ platform</td>
</tr>
<tr>
<td>2</td>
<td>Directly applicable and more harmonised rules only for supervised entities</td>
<td>Establish EU-level indirect oversight over all obliged entities</td>
<td>Commission delegated / implementing regulatory power</td>
</tr>
<tr>
<td>3</td>
<td>Directly applicable and more harmonised rules for supervised entities and also supervisors / FIUs</td>
<td>Create EU-level direct oversight over selected risky entities and indirect oversight over all other entities</td>
<td>Create EU-level support and coordination mechanism for FIUs as part of EU AML authority</td>
</tr>
<tr>
<td>4</td>
<td>Create EU-level direct oversight over all obliged entities</td>
<td>Create a single EU FIU, replacing national FIUs</td>
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Source: compiled by the author on the basis of the IA, pp. 29-55.

It is noteworthy that further discussions concerning the preferred options also feature in annexes.

As regards the creation of an EU rulebook (under specific objective 1):

- different areas for greater harmonisation of rules are discussed in Annex 6 (pp. 82-92);
- three options for future EU policy towards third countries are listed in Annex 8 (pp. 106-110): 1) the status quo (baseline); 2) an option to abandon any kind of formal EU listing system (leaving it entirely to ‘obliged entities’ (i.e. entities subject to AML/CFT obligations) to determine the specific measures to adopt regarding high risk third countries), 3) an intermediate option providing a greater degree of harmonisation of countermeasures/enhanced due diligence (EDD) and allowing for input and guidance from the new AML authority, which is described in more detail;
- three options are discussed in Annex 9 (pp. 111-119) for the introduction of cash limits: 1) keeping the status quo by relying on traders in goods while allowing Member States to define stricter rules, 2) introducing an upper EU-wide limit for large cash payments while allowing Member States to adopt stricter limits at national level (which is favoured for the moment) or 3) introducing an EU-wide harmonised limit on large cash payments;
- three options are examined for the interconnection of bank account registers for AML and law enforcement authorities in Annex 7: the baseline, the interconnection of bank account registers with access to them by FIUs only (option 1) or with access by FIUs and other competent authorities (option 2). The impacts of the preferred option (2) on effectiveness, proportionality and costs are analysed (pp. 93-105). It should be noted that this analysis has also been used to support the proposal for a directive COM(2021) 429 linked to this package and regarding access of competent authorities to centralised bank account registries through the single access point.

Concerning the EU level agency (under specific objective 2), the question of whether it should be an entirely new body or whether some or all of the new tasks (supervision function and FIU support coordination mechanism) should be given to existing bodies (such as the European Banking Authority – EBA), is considered in Annex 5 (IA, pp. 77-81).
Assessment of impacts

The IA (pp. 36-55) illustrates how the three preferred options have been selected after carrying out a comparison of all options in achieving the specific objectives and based on three main criteria outlined in the Better Regulation Guidelines (BRG, p. 28): effectiveness, efficiency and coherence. This analysis has been summarised in tables (p. 42, p. 45, p. 47, pp. 54-55), scoring the magnitude of impacts for each option against the baseline (indicated as 0) from 'strongly positive' (+++) to 'strongly negative' (−−), with intermediate scores: 'positive' (+), 'marginal/neutral' (≈) and 'negative' (−).

The analysis of options is fed with the feedback received from consultations (see below). According to the IA, the three preferred options are those receiving the broadest support from stakeholders. Also, 'it is estimated that the three preferred options when applied together will interact with each other positively in such a way as to magnify the benefits of each option individually' (IA, p. 49).

According to the Better Regulation Guidelines, an IA should consider all potential impacts, including economic, social and environmental impacts. The guidelines also require that 'all relevant impacts should be assessed qualitatively and quantitatively whenever possible' (see BRG p. 26) for all preferred options. Nevertheless, the analysis of potential impacts of the options in the IA is mainly qualitative, complemented by some quantitative elements, and focuses on economic impacts.

The IA analyses the expected costs and benefits of the preferred options for the main stakeholders affected by this initiative: businesses in the financial and non-financial sector (obliged entities), public administrations at the national and European level (competent authorities), and consumers/citizens. An overview table is provided in Annex 3 (IA, pp. 70-72).

The main benefits of the preferred options are listed in the IA, but are not quantified. They include better detection of suspicious transactions and the reduction of compliance costs for obliged entities, both benefits being more significant in cross-border cases. Further benefits of the preferred options listed are linked to the removal of barriers to the internal market and a higher legal certainty.

The main recurrent costs generated by the preferred options are linked to the creation and functioning of a new EU AML Authority (AMLA). Supposing a staff level of 250 full-time staff, the annual cost has been preliminary estimated around €40 million when fully operational, of which over half is expected to be financed from fees from obliged entities. However, this tentative quantification of costs in the IA (p. 44 and Annex 5) relies on some uncertainties and assumptions. In particular, AMLA’s ‘staffing levels would depend on the number of entities supervised directly’ (IA, Annex 5) which will depend on how these entities are selected. Also since ‘the Authority will be established at the beginning of 2023 and the activity of direct supervision will commence at the beginning of 2026’ (COM(2021) 421, p. 9), the IA could have provided more explanations on the transition phase in terms of costs and from an operational point of view. For example, more details could be provided regarding the transfer to AMLA of two existing infrastructures that is planned in the proposal establishing the AMLA (COM(2021) 421, p. 9): the AML/CFT database (currently managed by EBA), and the FIU.net system (hosted by Europol since 2016, but temporarily transferred to the Commission pending the creation of the authority). Further one-off costs are also expected to be borne by administrations and businesses (especially entities newly covered and crypto-asset service providers) to adjust to the new framework.

SMEs / Competitiveness

SMEs are mentioned only twice in the main text of the IA. It states that a harmonised and consistent EU AML/CFT framework would decrease legal uncertainty and administrative burden (by reducing compliance costs) for obliged entities. Among them, SMEs active cross-border would benefit in particular, as they are less able to bear high compliance costs (IA, pp. 40, 68). However, the potential impact of the introduction of cash limits on SMEs (at least in some Member States), is not analysed.

SMEs covered by the AML framework currently ‘play a limited role in ML/TF detection’ (IA, executive summary). They are essentially non-financial actors including notaries, real estate agents, and
accountants. Their awareness of ML/TF is expected to increase, as well as supervision to ensure that they apply AML/CFT measures. ‘As a result of this initiative, the number of suspicious transactions that they report should increase’.

The IA indicates that the single rulebook is not likely to have any negative impact on international competitiveness of EU entities. ‘On the contrary, the evidence from past alleged money laundering cases indicates that the reputational risks have a significant impact on the competitiveness of involved banks, which can be reduced by a stronger preventive framework’ (IA p. 41).

Simplification and other regulatory implications

According to IA (IA pp. 55-56) and the explanatory memoranda of the proposals, the AML package should contribute to simplification in a number of ways, including:

- the replacement of certain rules in a directive with more harmonised and directly applicable rules in a regulation will remove the need for transposition work in the Member States and facilitate business for cross-border entities in the EU;
- more harmonised AML rules in a number of areas will facilitate the implementation of group-wide internal policies, controls and procedures across the internal market;
- high-risk cross-border financial entities which will be directly supervised by the AMLA, will no longer have to deal with multiple supervisors in different Member States. Also, cooperation between FIUs will be simplified by the creation of an FIU coordination mechanism;
- the removal of traders in goods from the scope of the EU AML framework on the introduction of cash limits will release such traders from the administrative burden of submitting to their FIU reports on cash operations exceeding €10 000.

Impacts on national budgets and administrations

According to the IA, national supervisors currently supervising entities that will be transferred to an EU supervisor may experience some savings that are not quantified in the IA. However, ’it is not anticipated that they reduce staff’ (IA, p.44).

Relations with third countries

The IA analyses the proposed policy towards third countries in Annex 8 (pp. 106-110). ‘A more effective approach to third countries should reduce the burden on operators as rules to be applied become smarter and enhanced checks are reserved for risky situations only’ (IA executive summary).

Monitoring and evaluation

In the section on monitoring and evaluation, the IA describes the set of proposed indicators to be used to measure the achievement of impacts (IA, p. 58). However, this list looks incomplete and most indicators are not specific enough. The indicator table would have benefitted from clearly setting out all indicators mentioned in section 9, as well as performance indicators for the future AML authority (related to the supervision of obliged entities and the supervision of FIUs) that are listed in the corresponding proposal (COM(2021) 421, pp. 95-96). The Better Regulation Guidelines (BRG, p. 48) recommend defining for each indicator a clear measurement unit and a data source (i.e. a specific report with frequency of reporting), but here the only source of information indicated is ‘FIU’. Relevant data collection and reporting aspects (e.g. responsibilities, frequency of reporting and related eventual costs) could also be further detailed in the monitoring arrangements.

In addition, the Commission plans to carry out an evaluation of the present package five years after its entry into force (IA, p. 56). ‘The AML authority will be reviewed at the same time, if it has been in operation at least two years by that time’ (IA, executive summary).
Stakeholder consultation

The Commission consulted a wide range of stakeholders on this initiative and the feedback collected was used throughout the IA. The consultation strategy (IA Annex 2, pp. 61-67) was built on several components: 1) targeted consultation of Member States and competent AML/CFT authorities; 2) a request for advice from the EBA; 3) an opinion of the European Data Protection Supervisor, 4) a high-level conference gathering representatives from Member States, competent authorities, academics, civil society and the private sector; 5) a consultation on the roadmap announcing the Commission’s action plan; 6) an open public consultation (OPC) on the actions put forward in the action plan.

The latter was launched on 7 May 2020 in parallel to the adoption of the action plan and was conducted over 16 weeks until 26 August. It received 202 replies from 24 out of 27 EU Member States and 6 non EU countries, mostly from private-sector representatives (58 %), from EU citizens, non-governmental organisations and academics (22 %), and only 7 % from public authorities. Almost all respondents (99 %) considered that further action was needed to combat ML/TF and deemed action at EU level to be the most effective option. On Pillar 2 of the action plan, respondents supported more harmonised rules, a more harmonised set of obliged entities, more harmonised supervision and cash payments ceilings. For Pillar 3, most respondents (55 %) considered that the EU-level supervisor should cover all obliged entities, with a preference for putting this in place gradually. For the FIU mechanism (Pillar 4), most stakeholders supported broad competences, from assessing trends, developing templates and guidance to supporting joint analyses.

Supporting data and analytical methods used

The IA refers to a number of data sources used in its preparation (Annex 1, p. 60), including:

- technical advice and reports from the EBA and other European supervisory authorities;
- evidence collected in the context of the public consultation described in Annex 2;
- data from Member States in response to a Commission questionnaire, in particular on FIUs;
- publications of the EU FIU platform;

The data sources are essentially from the EU and Member States' public authorities. According to the IA (Annex 1, p. 60), 'the quality of this data is therefore high, with the proviso that it covers essentially the activity of public bodies in the area of supervision enforcement and investigation in the AML/CFT field'. However, given the nature of the activities concerned, the IA is open about the limitations encountered in measuring the amount of undetected money laundering and terrorism financing, as well as alleged criminal ML/TF activity. The IA also states that 'outside of proven cases following full investigation, some indicative evidence comes from investigative journalism, some of it based on unlawfully obtained information. Such sources are by their nature partial and uncertain'.

Follow-up to the opinion of the Commission Regulatory Scrutiny Board (RSB)

The draft IA was submitted to the Regulatory Scrutiny Board (RSB) on 6 November 2020 and approved on 4 December 2020. The RSB gave a positive opinion, noting that 'the report should further improve with respect to the following aspects: 1) The main body of the report does not present the available political choices pertaining to certain implementing options; 2) The report does not sufficiently assess compliance costs and the simplification aspects of the initiative; 3) The report is not clear enough about how 'future proof' the preferred option is' (SEC(2021) 391).

Some of the RSB's comments still appear to hold true, yet the final IA does not explain how they were addressed, despite this being required by the BRG (p. 40). In particular, the tables on the costs and benefits of the initiative on which the Board gave its opinion do not differ substantially from those in the final version of the IA as published by the Commission, meaning that the draft report was not revised in line with the Board's recommendations. The Commission simply mentions in the explanatory memorandum that 'the RSB proposed various presentational improvements to the impact assessment in its positive opinion; these have been made'.
Coherence between the Commission’s legislative proposal and the IA

The proposals appear to reflect the analysis carried out in the IA and to follow the preferred options.

The IA covers four Commission proposals on money laundering and countering financing of terrorism. This legislative package includes major changes designed to strengthen and tackle shortcomings in the current regulatory framework, such as the creation of a new AML authority.

The Commission consulted a wide range of stakeholders to support the initiative. The IA clearly defines the problem and the objectives that are directly linked to the problem drivers. However, the IA does not identify any operational objectives that would have facilitated the monitoring of the preferred options. Moreover, some options could have been refined to be more specific, such as for example on the exact criteria for selecting ‘risky entities’ subject to direct supervision at EU level.

Finally, improvements requested by the RSB appear to be only partially addressed in the final IA.

ENDNOTES


3 Communication from the Commission on an Action plan for a comprehensive Union policy on preventing money laundering and terrorist financing (C/2020/2800), OJ C 164, 13.5.2020, pp. 21-33.


5 Council conclusions on anti-money laundering and countering the financing of terrorism, 12608/20.

This briefing, prepared for the European Parliament’s Committees on Civil Liberties, Justice and Home Affairs (LIBE) and on Economic and Monetary Affairs (ECON), analyses whether the principal criteria laid down in the Commission’s own Better Regulation Guidelines, as well as additional factors identified by Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal.

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