

# **Yves Mersch: Anti-money laundering and combating the financing of terrorism – recent initiatives and the role of the European Central Bank**

Speech by Mr Yves Mersch, Member of the Executive Board of the European Central Bank and Vice-Chair of the Supervisory Board of the European Central Bank, at the Colloque de l'AEDBF Europe, Paris, 15 November 2019.

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## **Introduction**

A number of high-profile cases of the alleged systematic use of banks for money laundering have been reported over the last two years, along with reports of investigations and other follow-up measures being taken by national authorities. This has put anti-money laundering (AML) and combating the financing of terrorism (CFT) high on the agenda of policymakers at both the European and global levels. The European Commission, EU legislators and other authorities all rightly agree that misuse of the financial system cannot be tolerated. They have started to strengthen the EU's AML/CFT framework, and further changes are in the pipeline.

So let us take a closer look at three things. First, what are the objectives of combating money laundering and terrorist financing? Second, what is it that the ECB can – and cannot – do in this area? And third, how might the European AML/CFT framework develop in the future?

## **Objectives of combating money laundering and terrorist financing**

The EU's current AML/CFT framework largely follows the international standards established by the Financial Action Task Force. The framework has two main objectives. The first is to protect society from crime. And the second is to protect the stability and integrity of the European financial system. EU legislators recognise that money laundering, terrorist financing and organised crime are significant problems that are damaging the integrity, stability and reputation of the financial sector and threatening the Internal Market and the internal security of the Union. They also acknowledge that acts of terrorism are one of the most serious violations of the universal values of human dignity, freedom, equality and solidarity, and of the enjoyment of human rights and fundamental freedoms on which the Union is founded.

Efforts to combat money laundering and terrorist financing concern two areas of EU law: the establishment and functioning of the Internal Market and judicial cooperation in criminal matters. These two areas differ in the level of harmonisation which can be pursued under the current Treaties. Even though the AML/CFT framework has been harmonised to a significant extent at the EU level, it remains strongly connected to the national legal frameworks, particularly to the criminal law of individual Member States and the crimes defined therein, which differ considerably.

More precisely, both the AML Directive and the Directive on combating money laundering by criminal law contain minimum lists of the predicate offences to money laundering; that is, the types of underlying criminal activity which generate the property that need to be laundered. These lists highlight the link to the national laws of Member States. First, they rely on national criminal law by referring to offences that can be punished with deprivation of liberty for a maximum of more than one year. And second, they do not define the actual content of the individual predicate offences; this again is regulated by national law.

Effectively combating money laundering and terrorist financing requires a coordinated approach from legislators, AML/CFT supervisors, law enforcement authorities, judicial authorities, financial intelligence agencies, banks and other financial institutions, and many others.

Information sharing between all these bodies has often been insufficient, particularly across borders. That being said, we must always be mindful of the rule of law and protect people's fundamental rights. Public allegations of a bank being involved in money laundering or terrorist financing could lead to serious financial difficulties, or even cause the bank to fail, even if the allegations are later found to be exaggerated or completely unjustified.

### **What the ECB can (and cannot) do to fight money laundering**

Now what is the role of the ECB? It is important to clarify that our mandate is purely prudential. In 2013, supervisory tasks were conferred on the ECB on the basis of Article 127(6) of the Treaty on the Functioning of the European Union (TFEU). This Article limits the tasks that can be conferred on the ECB to those that concern policies that relate to the prudential supervision of credit institutions and other financial institutions – with the exception of insurance undertakings. This provision, in turn, was duly reflected in the SSM Regulation which further limited the scope to banks only. There, the legislator explicitly confirmed, in recital 28, that the task of AML/CFT supervision remained with the national authorities.

That said, there is still a role for prudential supervisors to contribute to combating money laundering and terrorist financing. This is reflected in recital 29 of the SSM Regulation, which states that “the ECB should cooperate, as appropriate, fully with the national authorities which are competent to ensure a high level of consumer protection and the fight against money laundering.”

Indeed, prudential supervisors might come across information that could help to uncover money laundering or terrorist financing. For instance, they may obtain insights into the quality of a banks' general internal governance, with potential implications for the functioning of the bank's AML/CFT measures. Our supervisors might detect information of this sort during an on-site inspection, and they can share it with the competent authorities.

At the same time, the prudential supervisor can use the insights gained by AML/CFT supervisors and reflect the AML/CFT-related concerns in its prudential tasks. It does so, for instance, when it grants authorisations to credit institutions; when it assess whether bank managers are fit and proper for their job; when it assesses acquisitions of qualifying holdings; and when it engages in ongoing supervision and the Supervisory Review and Evaluation Process (the so-called SREP).

The job of AML/CFT supervisors, on the other hand, is to monitor and enforce the compliance of credit institutions and other obliged entities with the AML/CFT requirements that are set out in the applicable laws. We must therefore acknowledge that the two sets of supervisors play very different roles, and synergies are limited.

In order to improve cooperation between both sets of supervisors, the latest amendment to the AML Directive required the ECB to sign an agreement setting out the practical modalities for exchanging information with the AML/CFT supervisors of credit and financial institutions within the European Economic Area. This agreement was signed in January this year. And ever since, the ECB has been exchanging information under this framework. Our initial experience has shown that it is particularly important to put in place robust formal procedures and exchange information in secure ways only when there is strong justification for doing so and based on well-defined relevance criteria. All this is necessary to ensure the rights of the supervised banks are protected. There is a narrow line between enabling the appropriate flow of information and ensuring the confidentiality of this information.

Aside from the ad hoc exchange of information, the ECB's approach requires receiving assessments from AML/CFT supervisory authorities at least once a year to support its annual SREP, which is its main off-site supervision tool. In exchange, the ECB shares relevant excerpts of SREP decision letters with AML/CFT supervisors on an annual basis.

Going into more detail, the ECB has also developed an approach to identify and reflect AML/CFT concerns in prudential supervision.

First, as a primary information source, we factor the assessments from AML/CFT supervisory authorities into our prudential SREP assessment. We are also looking into possible prudential warning signals that would complement the assessments received from the AML/CFT supervisors by using our available supervisory data to highlight patterns that might indicate wrongdoing.

And second, we take the necessary action when required. This could range from sharing our concerns with the AML/CFT authorities to imposing supervisory measures to address prudential concerns. We could, for instance, require a bank to strengthen its general governance arrangements or reassess its board members and key function holders. We could even withdraw a bank's licence as a last resort.

Through performing these supervisory tasks, we can, to a certain degree, indirectly contribute to the goals of the Single Market.

And there's more. Following on from the most recent enhancements to EU law, such as CRD V and the AML Action Plan, we are working together with the European Commission and the European Banking Authority, which is tasked with developing technical standards and guidelines to enhance and complement the amended regulatory framework. At the same time, we have actively contributed to the revision of the guidelines on the sound management of AML/CFT-related risks within the AML Expert Group of the Basel Committee on Banking Supervision.

### **How to strengthen the EU's institutional setup**

While much has already been done, weaknesses in the European AML/CFT framework still represent a risk to the integrity and resilience of the European banking sector. The current supervisory fragmentation and differences in supervisory practices in the area of AML/CFT can severely undermine the integrity and stability of EU banks and thereby the ECB's supervisory effectiveness, particularly in a cross-border context.

The steps taken so far might not be enough to effectively prevent money laundering and terrorist financing in the banking sector. Thus, further steps might be considered by the political authorities to make the AML/CFT framework more effective, particularly for cross-border activities.

We therefore welcome the ongoing discussion on what steps to take, and we stand ready to provide support in our areas of competence. However, as I said earlier, the ECB cannot take over the role of an AML/CFT supervisor; this is ruled out by the Treaty. Furthermore, there are also only limited synergies between prudential supervision and AML/CFT supervision.

From our perspective, a strategy to strengthen the EU AML/CFT framework could comprise at least two elements.

First, a further harmonisation of the AML/CFT rulebook could address possible divergences and shortcomings in the way the rulebook was transposed in different Member States. It could also strengthen enforcement of AML/CFT compliance through AML/CFT supervisors by providing clear regulatory guidance and harmonised, stronger supervisory powers. This could be achieved by transforming the AML Directive into an EU regulation, which would have the potential of defining a harmonised anti-money laundering framework that is directly applicable throughout the European Union. To be effective, the scope of a future regulation should be as broad and encompassing as the legal base would allow, also with a view to moving towards a more rule-based approach, while fully respecting the legal constraints and the remaining variety of national institutional setups,<sup>1</sup> particularly in the area of criminal law and justice systems.<sup>2</sup>

Second, supervisory fragmentation should also be addressed, especially in relation to coordination and cooperation procedures. This could be achieved by charging an EU body or a new authority with AML/CFT tasks. This EU body or authority should be independent to allow it to act decisively in addressing ML/TF risks. It could detail a single AML/CFT rulebook via technical standards and/or guidelines, coordinate its implementation and ensure strict and harmonised AML/CFT supervisory practices in the EU and across Member States, leveraging on the experience and expertise of national supervisors. The EU AML/CFT body should make sure that accurate and timely assessments on possible irregularities and ML/TF risks are proactively provided to prudential supervisors, including the ECB in its supervisory role,<sup>3</sup> so these risks can be factored into their prudential assessments.

Finally, if supported by co-legislators and primary law, the EU AML/CFT authority could be equipped with direct AML/CFT supervisory powers.

## Conclusion

Ladies and gentlemen,

Anti-money laundering and combating the financing of terrorism are challenging endeavours. First, they involve several areas of law at both the EU level and national levels. Changes that lead to an efficient distribution of competences might imply the transfer of sovereignty from national to EU level within the existing Treaty framework. Second, several types of authority play a role, including AML/CFT authorities and prudential supervisors. There is a broad heterogeneity of institutional setups among Member States, involving judicial authorities limited to cooperation and implementation, as well as surveillance authorities attached either to the executive or judicial branch, and their interaction with prudential supervisors. In other words, we need to reflect on the most effective way to manage the institutional and functional fragmentation in this area given its inherent cross-border nature.

All of this makes combating money laundering and terrorist financing complicated from both a legal and a practical point of view. The battle can only be won through cooperation. All authorities involved need to cooperate – both within and across national borders. So I welcome the ongoing debates about a review of the regulatory framework and the possibility of establishing an EU AML/CFT body. Within the limits of its mandate, the ECB will continue to contribute to this debate.

Important as this debate is, let's not forget the responsibilities that supervised entities already have: to put in place and maintain internal systems and controls to ensure that they properly manage the risks to which they are exposed.

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<sup>1</sup> For example, national setups of financial intelligence units.

<sup>2</sup> Such as in the case of predicate offences for money laundering where, in line with Article 83(1) TFEU, the European Parliament and the Council only may, by means of directives, establish minimum rules concerning the definition of criminal offences and sanctions.

<sup>3</sup> Information should be provided by the EU AML/CFT body to the coordination function in the SSM for SSM-related AML/CFT tasks, acting as central point of contact.