

# NON-FINANCIAL SECTOR AS A MONEY LAUNDERING BARRIER

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**Abstract:** *The variety of professions in a scope of non-financial sector offers the possibility to operate as professional money launderers. As intermediaries, they can support money launderers in concealing the true nature or source of illegally obtained proceeds. Their role in concealing the beneficial ownership while hiding, collecting and moving illegally acquired property is becoming increasingly attractive. The attractiveness of active or passive engagement depends on the ability to act within the specificity of the profession, as well as their competencies in conducting transactions.*

**Keywords:** *Money laundering, Beneficial owner, Independent professions, Risk, Advice.*

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## 1. INTRODUCTION

The first attempts of money laundering mostly involved the financial sector. As the money laundering process evolved its preventive measures developed as well, especially those related to the non-financial sector (lawyers, notaries, accountants, auditors and tax advisers). Considering the obligation to implement the mandatory measures, the specificity of non-financial sector refers to their core business of reaching the ultimate goal of protecting public morality and professional ethics in the scope of anti-money laundering and terrorist financing system.

## 2. BASIC TOOLS OF FINANCIAL ACTION TASK FORCE

At the beginning of the anti-money laundering system the independent professions were merely a secondary barrier relating to the inflow of dirty money into the financial system. In this respect, the Directive 91/308/EEC [1] (hereinafter: the First Directive) required an amendment in order to extend its provisions in whole or in part to professions and to categories of undertakings other than the credit and financial institutions, while the Directive 2001/97/EC [2] (hereinafter the Second Directive) listed them by the type of profession. The Directive 2005/60/EC [3] (hereinafter the Third Directive) did not change the scope of their obligations, although there was a fundamental change in terms of anti-money laundering and terrorist financing prevention, the so-called risk-based approach.

The first Financial Action Task Force (hereinafter FATF) report for the period 1990-1991 [4] highlighted a growing trend of using non-traditional financial institutions and professions that might be involved in money laundering process. They were classified in four categories, whereas one of the categories included lawyers, accountants, notaries and other independent professions. For the first time they are emphasized as an example of high risk area that could possibly be used in the placement stage.

Furthermore, in the report for the period 1993-1994 [5] the same reporting entities were mentioned in the context of due diligence procedure. A lack of beneficial ownership identification was pointed out as an important issue. Furthermore, there was a question as to what extent ex-

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ternal auditors and public authorities should be enabled to report any reasonable suspicions of money laundering activities they encountered during their work, to law enforcement authorities.

The process whereby the European Union member states made changes in national laws by strengthening preventive measures in the banking sector, shifted the money launderers' focus to the non-financial sector. A significant step forward was made in the report for the period 1995-1996 [6] by distinguishing lawyers as particularly sensitive. The report for the period 1996-1997 [7] emphasized significant issues in countries whose money laundering system is being evaluated. The most important question posed by independent professions is the obligation of professional secrecy, closely related to the identification of clients and beneficial owners, and consequently to transactions with shell companies.

The trend of increasing cases of criminals seeking advice and assistance from lawyers, notaries, accountants and other financial practitioners is clearly visible from the report for the period 1997-1998 [8] as well as for the period 1998-1999 [9]. Therefore, the involvement of independent professions in even more complex money laundering processes was often related to transactions via offshore zones. The final analyzed report for the period 1999-2000 concluded the genesis of independent professions' affirmation as the „Gatekeepers”, thus adding to the seriousness of the situation in which money laundering prevention required the incorporation of new elements.

### **3. DEVELOPING ATTITUDES TOWARDS THE OBLIGATIONS OF THE INDEPENDENT PROFESSIONS**

While on the one hand there was a lack of legislation and supervision, on the other hand their active role in legal entities' business was increasingly emphasized leading to the issue of the legal professional privilege as well as other types of professional secrecy. Therefore, the new money laundering modalities, realized through misuse of the independent professions' skills and services, ensured lawyers and other „Gatekeepers“ an adequate influence over all three stages of money laundering [10].

Under the mentioned circumstances, with the alarming cognition of the importance and the role of the independent professions conducting money laundering, the Second Directive came into force in 2001 and for the first time regulated their obligations and the limited scope of preventive measures. Despite their evident involvement in the money laundering process considering the various opportunities created by the obligation of professional secrecy, the Second Directive provided for exemptions from the practice of those professions, respecting the basis of the legal profession.

The Third Directive, notably the novelties presented through the risk assessment in all segments of its application, did not change the basic idea imposed by the Second Directive. It follows that the Third Directive paid particular attention to the obligation of professional secrecy and kept it in force. Thus, legal advice remained subject to the obligation of professional secrecy “unless the legal counsellor is taking part in money laundering or terrorist financing, the legal advice is provided for money laundering or terrorist financing purposes or the lawyer knows that the client is seeking legal advice for money laundering or terrorist financing purposes”.

Directive 2015/849 [11] and Directive 2018/843 (hereinafter the Fifth Directive) [12] emphasized the obligation of treating legal professionals equally in applying preventive measures when engaging in financial or business transactions. Thereby, the Fifth Directive extends the scope of

obliged entities to “any other person that undertakes to provide, directly or by means of other persons to which that other person is related, material aid, assistance or advice on tax matters as principal business or professional activity”.

Similarly, recent threats to global security was conceptualized by the most recent revision of the FATF Recommendations (2012), especially in relation to the issue of beneficial ownership transparency. According to the mentioned, the Fifth Directive has introduced a new legal framework in terms of improving transparency on the real owners of companies or trusts, establishing the interconnection of the beneficial ownership registers at EU level, and improving cooperation and information sharing between anti-money laundering supervisors and between them and prudential supervisors and the European Central Bank [13].

#### **4. BENEFICIAL OWNERSHIP TRANSPARENCY**

Given the importance of the independent professions in anti-money laundering and terrorist financing system, their key role in concealing beneficial ownership has to be highlighted, in order to manage, collect or move illegally acquired funds. Accordingly, their role varies depending on each legal system incorporated in a particular country: systems in which legal persons can be established without the involvement of professional intermediaries; systems in which professional intermediaries (other than notaries) are required; notarial systems; and systems in which the company registrar tests the accuracy of filings or takes on the customer due diligence obligations of the professional intermediary [14].

Notwithstanding the foregoing, the FATF standards require independent professions to perform due diligence measures and to keep records of such analyses and transactions conducted, and to report to the national financial-intelligence units on suspicious transactions.

Independent professions play a similar role in concealing beneficial ownership in the financial system, namely opening and transferring money to and from bank accounts held in the names of individuals or offshore entities, other than the true beneficial owners of the accounts. Furthermore, they are making false statements on bank documents required by the bank to identify customers and disclose the true beneficial owners of the accounts, along to using “consulting services” agreements and other similar types of contracts to create an appearance of legitimacy for illicit wire transfers [15].

In order to ensure proportional and balanced access to information on the beneficial owner, as well as to guarantee the right to respect privacy and protection of personal data in accordance with the Directive 2016/680 [16] and the Regulation 2016/679 [17], certain exemptions are provided by the Fourth Directive. The exemptions actually offer possibilities to disclose (via registers) real property information, and access the information if that information would expose the real owner to a disproportionate risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation. For the same purpose to prevent abuse of the information in the registers and to balance the beneficial owner’s rights, it has been proposed to establish the system that would allow the information relating the requesting person and the legal basis of its request available to the beneficial owner.

Central registers at the national level play an even more significant role if they are linked internationally. The interconnection of central systems that store real property information through the European Central Platform established by the Directive 2017/1132 [18] requires coordination of national systems, and consequently the adoption of technical measures and specifications for harmonization.

The FATF Recommendations regulate the subject matter in the same manner, in particular the Recommendations 24 and 25. One of the main FATF objectives is to shape the framework of measures to prevent the misuse of legal persons in the money laundering and terrorist financing process. To achieve this goal, the FATF encourages the collection of adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained and accessed in a timely fashion by the competent authorities. In this section, the revised FATF Recommendations have been extended to companies that are able to issue bearer shares or bearer shares warrants, or those which allow nominee shareholders or nominee directors [19].

In this regard, access to information on beneficial ownership should be easier for the financial sector and the independent professions, in accordance with the FATF Recommendations 10 and 22. The same measures are applied to determining the beneficial ownership of other legal entities, including the provision of information on intermediaries, trustees and settlors of such legal forms.

## **5. PROFESSIONAL MONEY LAUNDERING**

It follows that the scope of independent professions' activities makes them suitable to be in a position of active subjects in the money laundering process due to specificity of their position as objective intermediaries. They can easily enable the basic intent of money launderers - to conceal the true nature or source of illegal money, each profession from its own scope of business.

A basic feature that makes professional money launderers unique is the ability to launder money in exchange for a commission, a fee or some other type of profit. Although the specialization of providing money laundering services is their key feature, professional money launderers often run legitimate businesses as well. They do not have to act solely for the purpose of laundering illegal assets. Their knowledge and expertise are used to find loopholes in the law, and thus to conduct tax avoidance, thereby helping to dispose of and legalize criminal origin. Mostly, they are not directly linked to predicate offense and the source of illegally obtained funds that makes them suitable subjects for money laundering.

Independent businesses are often consulted to register and manage companies or other legal entities as well as serving as nominees for companies and accounts. They can use their expertise to comingling legal and illegal proceeds; providing false documentation; placing and moving illicit cash, purchasing assets; obtaining financing; identifying investment opportunities; indirectly purchasing and holding assets; orchestrating lawsuits; recruiting and managing money mules etc. [20]. Depending on the type of independent profession, an individual may perform several roles simultaneously.

Bottom line, a lack of awareness or lack of education about money laundering and terrorist financing vulnerabilities and red flag indicators reduce the likelihood that legal professionals would be in a position to prevent the misuse of their services and avoid a breach of their professional obligations [21]. Consequently, the abuse of professionals can jeopardize the reputations of businesses, individuals and sectors. Professionals playing the role of gatekeepers for criminal funds can cause the integration and acceptance of criminal behavior into local societies [22].

## 6. CONCLUSION

The complexity of money laundering and terrorist financing issues, along with specifics of a legal profession, require appropriate approach and treatment respecting their unique codes of business and ethic. Raising awareness of all potential problems that arise in this process strengthens the prevention system of the non-financial sector in a whole, thus demotivates legalization of illegal funds provided by weaknesses and vulnerabilities of the anti-money laundering system.

The consequences of increased demand for the legal professions' services are manifested through the negative impact on business decision making process, reputational risk and the possibility to influence market and price disruption. Thereby creating the preconditions for the market imbalance by disrupting the service-price ratio disables law abiding citizens access to their services. Therefore, profitability would be built on the provision of services not available to others, making complicity in that kind of practice and the profession itself more profitable.

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