

Finance Watch Feedback on the Roadmap for a Money Laundering and Terrorism Financing Action Plan

Brussels, 11 March 2020

Finance Watch is an independent, non-profit public interest association dedicated to making finance work for society. It was created in June 2011 to be a citizen's counterweight to the lobbying of the financial industry and conducts technical and policy advocacy in favour of financial regulations that will make finance serve society.

Its 80+ civil society members from around Europe include consumer groups, trade unions, housing associations, financial experts, foundations, think tanks, environmental and other NGOs. To see a full list of members, please visit www.finance-watch.org.

Finance Watch was founded on the following principles: finance is essential for society and should serve the economy, it should not be conducted to the detriment of society, capital should be brought to productive use, the transfer of credit risk to society is unacceptable, and markets should be fair and transparent.

Finance Watch is independently funded by grants from charitable foundations and the EU, public donations and membership fees. Finance Watch has received funding from the European Union to implement its work programmes. There is no implied endorsement by the EU or the European Commission of Finance Watch's work, which remains the sole responsibility of Finance Watch. Finance Watch does not accept funding from the financial industry or from political parties. All funding is unconditional, vetted for conflicts of interest and disclosed online and in our annual reports. Finance Watch AISBL is registered in the EU Joint Transparency Register under registration no. 37943526882-24.

We agree to the publication of this feedback.

Feedback on the European Commission Roadmap for an Action Plan towards a new comprehensive approach to preventing and combating money laundering and terrorism financing

The European Commission roadmap on the action sets out the aim of ensuring an effective and coherent EU framework against money laundering and terrorist financing. In order to achieve this the interaction with the 5th EU anti-money laundering directive (AMLD) and other EU regulation clearly will need to be assessed. A key example that needs to be addressed by the action plan is the direct overlap between the AMLD and the payment accounts directive (PAD).

Article 13 of the AMLD sets out that the identification of a client is the responsibility of the financial institution. This responsibility, and the potential liability that goes with it, is potentially a strong disincentive for the financial institution to take any risk where there are doubts over the identification process. As a consequence article 15 on “Anti-discrimination” of the PAD is at risk of not being fully implemented. Article 16.2 of the PAD anticipates the risk that credit institutions might be reluctant to open bank accounts under some circumstances and provides a clear legal basis requiring a solution.

This overlap sends a very complex message to credit institutions that they should be very cautious (as they are liable) when it comes to identification processes, together with an obligation to behave in a very inclusive manner when granting access to a payment account with basic features.

An adjustment and clarification needs to be made in the AMLD to limit the risk of back-door discrimination. Article 13 of the AMLD needs to be amended in at least two ways:

- Introduce a new point (e) under Article 13(1) as follows- *“ensuring the proportional application of customer due diligence measure outlined in this article, in line with the level of services being offered under Directive 2014/92/EU.”*
- Introduce a new point (4a) under Article 13 as follows: *“Member States shall ensure that the requirements for obliged entities in this Article do not contravene the application of Articles 15 and 16(2) of Directive 2014/92/EU.”*

A specific group at risk from this overlap of rules is migrants. These people can have very different statuses, ranging from asylum seekers to migrants. The current regulatory framework does not allow proportional treatment for this group of people, whether legal or illegal, when they try to access a payment account. Where there are concerns over the authentication of a document provided by the customer, a proportionate response should be to allow access to an account with limited features and stricter due diligence requirements, contrary to the current reaction to deny access to an account. This means targeting amendments to the current Article 11 of AMLD. The level of identification requirements (and the amount of the transactions that do not require specific scrutiny under the AMLD) should be proportionate to the quality and soundness of the identification process. The “EBA Opinion on the application of customer due diligence measures to customers who are asylum seekers from higher-risk third countries or territories” is a useful

reference point here, which sets out an interesting and pragmatic response to the diverse situations encountered (p.9).

Article 11 of the AMLD needs to be amended to ensure that proportionate due diligence measures can be introduced to ensure compliance with Article 16(2) of the PAD.

- Introduce a new point (e) under Article 11(as follows: *“Member States shall ensure that the application of this Article and due diligence requirements does not contravene the application of Articles 15 and 16(2) of Directive 2014/92/EU.”*

Nowadays, in a large number of EU countries, the use of a payment account is a requirement to access decent accommodation, to access a legal job, to receive benefits, to pay for utilities and much more. Therefore, not having access to an account, even with limited features and linked to stricter due diligence requirements of what can be seen as risky transactions, maintains certain groups of people in a grey zone that increases the risk of delinquency and criminality. Moreover, this approach contains a significant adverse effect: people who cannot use digital means of payment via a payment account are constrained to exclusively using cash. The EBA, in the previously mentioned opinion, acknowledges this potential risk: “The financial inclusion of asylum seekers is an important component of wider integration efforts... At the same time, financial inclusion is central to the fight against [money laundering and terrorist financing]: this is because lack of access to financial services can drive financial transactions underground and away from effective [Anti-Money Laundering and Counter-Terrorist Financing] controls and oversight.”

From this standpoint, overly demanding procedures to prove identity have a significant adverse effect. The distribution of liability between financial institutions and anti-fraud authorities also increases the risk of illegitimate exclusion. This can be better clarified and addressed in the AMLD.

Some solutions are already in place and being explored. An important example is the measures taken by the German authorities, who have introduced a carve-out for refugees from the ‘know your customer’ requirements. It allows them to use a document authorised by the German authorities including a set of necessary identification details. Other national competent authorities could similarly limit the number and type of documents issued for these groups of people to in turn limit the risk of people being denied access solely as a result of excessive administrative complexity. Migrants’ capacity to exercise their rights is currently nothing more than a dream and the danger associated with alternatives to accessing financial services, such as carrying cash, is very high.

The European Commission can play a clear role here in facilitating the assessment of best practice and introducing harmonised rules based on its finding to resolve these issues. For this reason the current roadmap proposal for the evidence base and data collection required would need to be amended. The European Commission should undertake further impact assessment, as it has not yet uncovered all of the areas that need to be addressed under the action plan. A particular focus should also be put on gathering and assessing the impact of the current provisions of the AMLD. This would help to better understand how they might have changed the actions of ‘obliged entities’.

Innovation might offer interesting solutions to guarantee identification via a cross-use of personal details (something a person knows, something a person holds, something a person is – biometric) to guarantee that a single “person” cannot duplicate identities in different countries. This would also require further investigation and assessment.