CCBE interpretative note on Article 3(3)(a) of AML Regulation

Executive Summary

The note aims at suggesting a meaningful interpretation regarding the scope of lawyers' responsibilities in the context of the new Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT) framework, in particular with regards to the wording of Article 3(3)(a) of the new Anti-Money Laundering Regulation. The purpose of this document is to bring clarity regarding the scope of this provision by suggesting a teleological interpretation that avoids the problems that inevitably arise due to this new wording.

Disclaimer: *The interpretation provided in this note aims at providing guidance regarding the new AML/CFT framework and assisting lawyers, supervisors and institutions. The views presented in this document are those of the CCBE and might not align with the interpretation by regulators or Courts. The CCBE is not aware of any case law providing guidance on the new wording. It is the sole responsibility of the legal users to apply the provisions in specific circumstances of an individual case and to base their actions and decisions on the legal provisions. The CCBE is not responsible for the consequences of any actions taken on the basis of the information provided and the ultimate responsibility belongs to the lawyer.*

1. Introduction

Regulation (EU) 2024/1624 of the European Parliament and the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (**"AML Regulation"**) recognises practising lawyers as obliged entities.

Article 3 of the AML Regulation defines the scope of AML/CFT provisions. The obligations apply to "obliged entities" which are (inter alia):

"(3) the following natural or legal persons acting in the exercise of their professional activities:

(a) auditors, external accountants and tax advisors, **and any other natural or legal person including independent legal professionals such as lawyers, 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;**

(b) notaries, **lawyers and other independent legal professionals, where they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or carrying out of transactions for their client concerning any of the following:**

(i) buying and selling of real property or business entities;

(ii) managing of client money, securities or other assets, including crypto-assets;

(iii) opening or management of bank, savings, securities or crypto-assets accounts;

(iv) organisation of contributions necessary for the creation, operation or management of companies;

(v) creation, setting up, operation or management of trusts, companies, foundations, or similar structures;"

A similar - but slightly differently worded - provision was introduced with Directive (EU) 2018/843[1] ("**Fifth Directive**"), which amended Directive (EU) 2015/849[2] ("**Fourth Directive**"). According to Article 2.1.(3)(a) of the Fourth Directive as amended by the Fifth Directive, obliged entities are (inter alia) "auditors, external accountants and tax advisors, and **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**." In comparison, the Fourth Directive before the amendment only mentioned "auditors, external accountants and tax advisors", without the additional definition in bold. It may further be noted that, contrary to the AML Regulation, the aforementioned Article 2.1.(3)(a) does not expressly refer to lawyers or independent legal professionals. Conversely, independent legal professionals are referred to only under Article 2.1.(3)(b), therefore making them out of scope of the provision of the Fourth/Fifth Directive addressing tax advice as a distinct activity.

In other words, the wording of Article 3(3)(a) of the AML Regulation contains new elements. The purpose of this note is to show the problems that might arise due to this new wording regarding the current scope of the AML Regulation and to suggest a meaningful interpretation regarding the scope of lawyers' responsibilities in the context of the new AML/CFT framework.

2. Observations on the new wording

The new wording of Article 3(3)(a) AML Regulation lacks clarity and therefore requires a very careful interpretation taking into account both the wording itself, and the context and objectives of the provision.

The meaning of **"principal business or professional activity"** is not defined:

- Both "business" and "professional activity" refer to an activity which is market-oriented, i.e. the provision of professional services to customers **in exchange for adequate compensation**. Therefore, any activity which is provided for free or just occasionally must be excluded, as such activities are neither businesses nor professional activities.
- "Principal" obviously defines both "business" and "professional activity". It further limits the application in several senses.
  Firstly, "principal" must be read **as "main" activity**, i.e. the majority (more than half) of the business or professional activity must consist of "material aid, assistance or advice on tax

[1] Directive (EU) 2018/843 of the European Parliament and the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directives 2009/138/EC and 2013/36/EU (Text with EEA relevance).

[2] Directive (EU) 2015/849 of the European Parliament and the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and the Council, and repealing Directive 2005/60/EC of the European Parliament and the Council and Commission Directive 2006/70/EC (Text with EEA relevance).

matters". However, it is not specified how to define such a "majority" (e.g. by the amount of compensation earned in relation to compensation for other activities; the time used for such activities compared to the time used for other activities; etc.).
Secondly, such an activity **must be more than just a side-effect of other activities**, i.e. assistance in tax matters connected with another (principal) activity is not meant (e.g. a lawyer assisting in a real estate transaction often has to make tax declarations and/or provide ancillary tax analysis and advice, as well). For the avoidance of doubt, AML/Know-Your-Client (KYC) obligations would in any case be triggered in such case, as the lawyer's involvement in a real estate transaction would make him/her fall into the scope of the AML/KYC due diligence obligations.
Thirdly, a "principal" activity requires that it is **backed by a certain organisational structure**, e.g. specialised staff, software dedicated to tax matters etc.
Fourthly, "principal" also includes a dimension in time. It must be **sustainable and long-lasting**. A principal activity must either be carried out over a longer period of time (several years) or must at least be started with the intention to be carried out for a longer period of time. This is also confirmed by the use of the term "undertakes".

The terms **"material aid, assistance or advice on tax matters"** also require clarification:

- "Material aid" and "assistance" seem to have the very same meaning. It not only includes "advice", but also other activities, i.e. filing of tax returns. "Advice" means issuing recommendations based on facts in a certain situation.
- "Tax matters" is strictly limited to issues covered by tax law, i.e. provision of national or international law which define the matter at hand as tax matter. Accounting, bookkeeping, controlling, etc., are not tax matters.

While **"directly"** is clear, **"by means of other persons to which that other person is related"** must be defined:

- "Related" implies a stable and manifest connection. Related must be construed in the sense of a corporate connection, i.e. if a law firm is shareholder of a tax advisor or employs a tax advisor or lawyers giving tax advice.
- Two persons are not related merely by referring a client to that other person (e.g. a lawyer referring tax questions to a tax advisor), nor by other connections which are not a stable and shared common interest in providing tax services to the same client.

Moreover, the wording is not clear whether lawyers should be covered under letter (a) with all their activities or still remain subject to the stricter conditions of letter (b) with all other activities not covering tax matters. The inclusion of lawyers among obliged entities whenever they provide tax advice could have **a spillover effect** which is not within the objective of the provision. To avoid that, a strict interpretation should be given to this provision. **It should apply to lawyers only for a specific case in which material aid, assistance or advice in tax matters is provided by a lawyer as principal business or professional activity. It is not meant to cover other activities not related to such tax activities.**

The inclusion of lawyers under letter (a) can create an unintended full AML/CFT obligation on law firms and lawyers, who provide assistance or advice on tax matters – even on matters that do not concern tax matters. For example, it is obvious that, if a lawyer provides tax advice as principal professional activity, but also defends clients in criminal cases, they should not be subject to AML/CFT obligations when defending in criminal cases. The objective of the provision is to cover "material aid, assistance or advice in tax matters", but not to include any other activity in the realm

of the AML/CFT obligations. Therefore, the provision should be read – concerning lawyers – as if "material aid, assistance or advice in tax matters" provided as principal professional activity was mentioned in letter (b), which is the specific provision for legal professionals.

The CCBE therefore considers that lawyers or law firms shall be obliged entities under letter (a) only **insofar as they undertake to provide material aid, assistance or advice in tax matters as principal professional activity.** Therefore, a lawyer or a law firm may be treated like a tax advisor, insofar as they act like a tax advisor. Other professional activities performed by these same lawyers are not subject to the provision of letter (a). Similarly, a law firm that is an obliged entity falls under the provision of letter (a) only insofar as its lawyers undertake to provide material aid, assistance or advice in tax matters as principal professional activity. Other professional activities by the law firm are not subject to letter (a).

3. Justification

If a broader interpretation would be given to Article 3(3)(a) AML Regulation, it could undermine fundamental rights of clients. A broader interpretation of Article 3(3)(a) AML Regulation would not be consistent with the fundamental principles of the EU AML legislation[3] which are now reflected in Art. 3(3)(b) AML Regulation: lawyers are considered gatekeepers against money laundering only insofar as they perform the activities defined herein.

If the advice of a lawyer advising on some limited tax issues would result in covering all activities of the law firm under AML/CFT rules, the restrictions introduced by Art. 3(3)(b) AML Regulation would be rendered meaningless and this would harm fundamental principles of the rule of law in a democratic society. This would be particularly risky if a law firm had a criminal law department, which would then be covered by AML/CFT obligation, i.e. if the obligations would "spill over" to other areas and activities.

Criminal law advice is not included in the list of Art. 3(3)(a) AML Regulation, i.e. it was consciously exempted from AML/CFT rules. If a law firm has a criminal law department which advises on matters that are not within the scope of Art 3(3)(b) AML Regulation, these matters will not become subject to AML/CFT obligations merely because of a spillover effect from advice rendered by a tax department in the same firm whose activities fall under Art. 3(3)(a) AML Regulation.

It is important to recall the recent case law of the Court of Justice of the EU which, ruling with regards to tax lawyers, confirmed again that lawyer-client confidentiality enjoys special protection under the EU Charter of Fundamental Rights.[4]

Whatever the area of law to which it relates, legal advice given by a lawyer enjoys the strengthened protection guaranteed by Article 7 of the Charter to communications between lawyers and their clients.[5]

[3] See Directive 2001/97/EC, Recital 16

[4] See CJEU 8 December 2022, C-694/20; CJEU 29 July 2024, C-623/22.

[5] CJEU 26 September 2024, C-432/23, par.51.

3.1. Professional secrecy: a fundamental principle

First and foremost, it should be noted that the AML Regulation recognises lawyers' professional secrecy as a fundamental principle that limits the obligation to (i) report suspicious transactions (STR)[6] and (ii) refrain from carrying out a transaction or establishing a business relationship, and to terminate the business relationship and consider reporting a suspicious transaction to the FIU in relation to the customer where they are unable to apply customer due diligence (CDD) procedures, to the extent that they ascertain the legal position of their client, or perform the task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings. Recital 12 of the AML Regulation states that the reporting obligations concerning suspicious transactions must not infringe upon the right to a fair trial or the principle of professional secrecy. Lawyers are bound to maintain the confidentiality of information obtained from their clients, and this obligation is regarded as essential for the protection of the rule of law.

Professional secrecy safeguards the communication between a lawyer and their client, ensuring the freedom to disclose legal details without fear of these being shared with external authorities. This is particularly relevant in the context of tax advisory services, which may involve sensitive financial data concerning the client.

Recital 143 of the AML Regulation explicitly emphasises that practising lawyers should not be required to provide information to Financial Intelligence Units (FIUs) or professional self-regulatory bodies regarding information received from or concerning one of their clients during the process of determining the client's legal situation or when performing their duties in defence or representation of that client in legal proceedings, or in connection with such proceedings. This includes providing advice on initiating or avoiding such proceedings, regardless of whether the information was received before, during, or after the conclusion of those proceedings (provided the lawyer is not involved in money laundering or terrorist financing activities themselves).

Similarly, Article 21(2) of the AML Regulation stipulates that practising lawyers are exempt from the obligation to refrain from carrying out a transaction or establishing a business relationship, and to terminate the business relationship and consider reporting a suspicious transaction to the FIU in relation to the customer where they are unable to comply with KYC and CDD requirements, when they ascertain the legal position of their clients or performing duties related to the defence or representation of that client in legal proceedings, including providing advice on initiating or avoiding such proceedings.

There is no doubt that ascertaining the client's legal position, even in matters that may initially appear unrelated to tax issues, can inadvertently touch upon tax-related aspects. Therefore, it is essential to emphasise that in such situations, a lawyer does not automatically become obligated to comply with KYC/customer due diligence (CDD) requirements simply because a tax-related issue arises. The situation must first be assessed in the context of the exception concerning the determination of the client's legal position. When it comes to STRs, Articles 21 par.2 and Article 70 par.2 of the AML Regulation explicitly enumerate tax advisors as those entitled to invoke

[6] For the purpose of this note, reference to STRs shall be understood as covering suspicious activity reporting (SAR) since, depending on the case and indicators identified, the declaration of suspicion to the Bar / FIU could relate to (a) given transaction(s) or to a broader activity – therefore triggering the filing of an STR or SAR).

the exemption from reporting when ascertaining the legal position/giving pre-litigation advice. Consequently, lawyers acting under Article 3(3)(a) would inherently enjoy the exemption.

3.2. Contractual limitations

Often, the scope of legal advice or representation is regulated in the contract or other arrangements between the lawyer and the client.

If legal professionals were to be considered tax advisors under Article 3(3)(a) AML Regulation when they undertake, directly or indirectly, to provide tax advice as principal activity, tax-related information obtained during the provision of legal advice would automatically trigger the application of AML/CFT procedures. **However, if tax advisory services have not been expressly defined as the purpose of cooperation between the lawyer and the client, there is no contractual basis for the lawyer to request the required information from (all) his/her clients. This cooperation would therefore not fall under the scope of Art. 3(3)(a) AML Regulation.**

It is beyond doubt that a lawyer may clearly define the scope of legal services in an agreement with the client, including the explicit exclusion of services subject to AML/CFT provisions. Such an agreement makes it clear that the lawyer is not an obliged entity for the purpose of the activity, provided that tax advice (or other activities covered by Article 3(3)(b)) is not rendered *per facta concludentia* — that is, through implicit actions despite the lack of explicit contractual regulation.

3.3. Proportionality of AML/CFT obligations for lawyers

In this context, it is essential to consider the principle of proportionality. This principle stipulates that AML/CFT obligations should be tailored to the nature and scale of the obliged entity's activities (including lawyers) and the actual risk of money laundering. Recital 28 AML Regulation emphasises that the measures undertaken by obliged entities should be appropriate to the identified risks.

In the context of tax advisory services, AML/CFT obligations should therefore apply to lawyers only when tax advice is a clearly defined element of the legal service provided. **If tax-related advice arises marginally or as a by-product of other legal services (e.g., providing information on tax obligations in inheritance cases), there is no basis for applying AML/CFT procedures to that client.**

Imposing excessive AML/CFT obligations on lawyers who do not provide tax advisory services as a contracted service could result in disproportionate administrative burdens and costs for them, as well as undermine the trust inherent in the lawyer-client relationship.
The AML/CFT requirements should not compel lawyers to apply KYC/CDD procedures "just in case." Such an approach would lead to a situation where lawyers bear a significantly higher burden as obliged entities than intended by the EU legislator, and it would contradict the purpose of the AML Regulation, which is not to enforce superficial measures by obliged entities.

The imposition of AML/CFT obligations on lawyers should be proportionate to the actual risk of money laundering and aligned with the *ratio legis* of the AML Regulation. Overburdening lawyers with disproportionate obligations could hinder their ability to perform their professional duties while respecting confidentiality and could lead to unnecessary administrative processes without improving the overall effectiveness of anti-money laundering measures.

3.4. Data Protection (GDPR)

The CCBE considers it necessary to draw attention to issues related to the protection of personal data. This matter is particularly relevant in the context of the aforementioned principle of proportionality, which is also applicable under Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (“**GDPR”**). The application of KYC/CDD measures, such as client identification and transaction monitoring, "just in case," by lawyers in situations where the circumstances do not indicate that they are providing services that would make them obliged entities under the AML Regulation, may violate GDPR provisions. The principle of data minimisation, established in Article 5(1)(c) of the GDPR, requires that the scope of collected data be limited to what is necessary for the purpose of the processing.

An example of such excessive conduct would be a situation where a lawyer does not intend to provide tax advisory services but still conducts a full KYC procedure out of concern that the client may, at some point, undertake tax-related activities, which could potentially expose the lawyer to accusations of not having performed KYC/CDD. Such an approach violates the purpose limitation principle under Article 5(1)(b) of the GDPR, as the data is not processed for a clearly defined and justified purpose.

Furthermore, performing KYC/CDD without a specific legal basis may breach the principle of data minimisation, as the data collected would exceed what is necessary for the provision of a particular legal service. At the same time, the lawyer cannot rely directly on the AML Regulation to justify such data processing, as they would be overinterpreting their obligations in that particular situation. Therefore, it is crucial to emphasise that lawyers should assess on a case-by-case basis whether KYC/CDD procedures are genuinely necessary in the context of the specific service provided, in order to avoid unnecessary processing of personal data.

In this context, it should be clear that if a lawyer does not intend to engage in tax advisory services, they should not have to consider themselves as obliged entities in this regard.

4. Conclusion

The proper application of the AML Regulation by lawyers requires maintaining a balance between the protection of professional secrecy and compliance with AML/CFT obligations. Clearly defining the scope of cooperation with clients and applying the principle of proportionality when implementing KYC and CDD procedures are essential elements of this balance. Lawyers must avoid excessive collection of personal data, which may lead to a GDPR violation.

Therefore, Article 3(3)(a) must be construed in accordance with fundamental rights and the objective of the AML regulation. Lawyers may be subject to AML/CFT obligations only **insofar as they undertake to provide material aid, assistance or advice in tax matters as principal professional activity.** Other professional activities shall not be subject to AML/CFT obligations merely by a spillover effect from tax activities.

Annex: Practical tips for lawyers

1. Definition of the scope of legal services

It is beyond doubt that a lawyer may clearly define the scope of legal services in an agreement with the client, including the explicit exclusion of services subject to AML/CFT provisions.

In such cases, the lawyer should explicitly state in the contractual clauses that their services do not include tax planning or tax optimisation advice. This limitation should be clearly and precisely described in the agreement and should reflect the actual state of affairs. Limiting the scope of tax-related advice can also help avoid the necessity of conducting KYC and applying CDD measures. A lawyer who clearly defines the scope of their services and informs the client of the limitations concerning tax advisory services operates within their professional obligations and mitigates the risk of excessive application of AML procedures.

Clearly defining the scope of legal services in the agreement should prevent the lawyer from being subject to obligations under the AML Regulation if tax advisory services are not part of the engagement. Lawyers must clearly communicate to clients the scope of their services and potential risks associated with tax advisory services, while ensuring that such limitations are not used to circumvent obligations under the AML Regulation. It is evident that potential audits and oversight by local AML/CFT competent authorities / self-regulatory bodies may cover not only the contractual terms, but also the actual execution of the assignment. Therefore, any attempt to formally exclude tax advisory services in a contract, while actually providing such advice, should always be considered a breach of the AML obligations.

2. Review of clauses of the client-lawyer contract during the relationship

It is crucial to emphasise that lawyers should assess on a case-by-case basis whether KYC/CDD procedures are genuinely necessary in the context of the specific service provided, in order to avoid unnecessary processing of personal data.

The CCBE does not exclude the possibility that, in the event of a change in the nature of the cooperation between a lawyer and their client — particularly if tax advisory services become the main part of the provided service — the lawyer may amend the cooperation agreement to include appropriate provisions related to this area of advice.

Introducing such an amendment would allow for the precise definition of new obligations arising from AML regulations, including the necessity to conduct KYC and CDD procedures. This practice would also help avoid the unnecessary collection of personal data and minimise the risk of violating GDPR provisions. By acting cautiously and in accordance with the principle of proportionality, a lawyer should assess whether the change in the scope of services provided indeed justifies the application of AML procedures.

This cautious approach ensures that lawyers remain compliant with AML requirements while avoiding excessive administrative burdens or unnecessary data processing. Adjusting agreements in response to changes in the services provided allows lawyers to tailor their obligations to actual risks, maintaining both professional confidentiality and compliance with legal requirements.