Dutch Banking Association

POSITION PAPER

Information sharing in the fight against money laundering

KEY MESSAGES

The NVB is fully supportive of the European Commission's overarching objective to enhance the effectiveness of the current EU AML/CTF framework. Information-sharing is paramount to an effective AML/CFT regime, and laws and regulations should not disproportionately hamper such cooperation. In the Netherlands public-private partnerships as well as innovative interbank partnerships, like a transaction monitoring utility, demonstrate to be an effective way of fighting money laundering and terrorist financing. Therefore, it is absolutely key to develop an intelligence-led approach with the aim to effectively mitigate money laundering and financing of terrorism risks.

The NVB proposes the following amendments to the Commission's proposal for an AML Regulation:

- The creation of a robust legal basis for the exchange of information between obliged entities, competent authorities and law enforcement in accordance with constitutional guarantees and fundamental rights, both in the context of public-private partnerships and innovative interbank partnerships (paragraphs 1 and 2);
- The removal of restrictions in relation to outsourcing; as long as obliged entities remains fully liable there is no rationale to add any restrictions (paragraph 3);
- The introduction of specific requirements on intra-group sourcing, alongside the provisions on reliance and outsourcing to third parties (paragraph 4).

This NVB position paper should be read in conjunction with the EBF position paper on the AMLR and the NVB position paper on ultimate beneficial ownership.

1. Creation of an adequate legal basis for the exchange of information between obliged entities, competent authorities and law enforcement for public-private partnerships

Information-sharing is critical in ensuring the effectiveness of the AML/CFT rules in practice. The FATF and other relevant international bodies recognise that effective information-sharing is one of the cornerstones of an effective AML/CFT framework. In response to the Commission consultation on guidance on rules for public-private partnerships in the AML/CFT domain, the EBF highlighted that *"[w]eaknesses in information sharing between obliged entities, financial intelligence units and law enforcement authorities may inadvertently facilitate the activities of criminals who operate nationally or across borders"*.[1] The NVB already highlighted back in 2019 that *"[i]t is important that the public and private sector fulfil their roles as gatekeepers of the financial system together"*.[2]

Examples of (recent) Dutch public-private partnerships in the context of combating money laundering and terrorist financing are the Serious Crime Task Force and Terrorist Financing Task Force under the

[1] EBF, *Response to Public Consultation on Guidance on the Rules Applicable to the Use of Public-Private Partnerships in The Framework of Preventing and Fighting Money Laundering and Terrorist Financing*, 10 January 2022 (link).

[2] NVB, *The case for further reform of the EU's AML framework*, November 2019 (link).

auspices of the Dutch Financial Expertise Centre (FEC). The Dutch FEC is a partnership of supervisors and public authorities involved in supervision, control, detection and prosecution in the financial sector with the aim of strengthening the integrity of the financial sector. The authorities joined in the FEC exchange insights, knowledge and experiences to combat financial-economic crime. The two task forces are joined by private sector parties and have achieved good results at case level, but also in terms of improving knowledge and insights among all participants. For example, the partnership has led to several investigations involving arrests, hundreds of suspicious transactions, seizure of narcotics, money and other valuable goods, but also in improving up procedures within banks, improving their gatekeeper function. In addition, a lot of valuable knowledge is gained within the task force about phenomena, for example about how and where underground banking becomes intertwined with the legal financial sector.
At present, however, it is pioneering and largely dependent on the willingness of all partners to conduct (temporary) pilots and conclude covenants between all partners for a limited period. There is no adequate legal basis for the exchange of information between obliged entities, competent authorities and law enforcement, which impedes the functioning of public-private partnerships (PPPs) in the AML/CFT domain.

In the Netherlands, the six largest retail banks and the FIU have joined forces in the fight against money laundering and terrorist financing in a cooperative effort called **Fintell Alliance**.[3] The objective of this unique partnership is to share knowledge and to strengthen the effectiveness of the Dutch AML/CTF (Anti-Money Laundering & Counter Terrorism Financing) reporting regime. The effectiveness of the partnership, however, is limited as banks and the FIU experience legal restrictions in practice. Especially the absence of a legal basis to share information with other banks, other than related to "the same customer and the same transaction" is felt as a gap.

That is why the NVB now proposes to introduce a legal basis for the exchange of information in PPPs. We recommend to introduce it as a separate provision in the Regulation, immediately after the provision on processing of personal data (article 55 AMLR).

> ***Article 55(a) New - Exchange of data under Public Private Partnerships***
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> *1. For the purpose of combating money laundering and terrorist financing and related predicate offences, including for the fulfilment of their obligations under Chapter V of this Regulation [(reporting obligations)], obliged entities may, together with competent authorities as defined in Article 2(31) of this Regulation, including Europol, participate in cooperation arrangements established in one or across several Member States.*
> *2. Without prejudice of Regulation 2016/679, for no other purposes than those specifically mentioned in the arrangements pursuant to this Article and to the extent it is necessary to exchange information referred to in Article 54, by way of derogation of Article 54(1) of this Regulation, obliged entities participating in such arrangements may exchange the necessary information with other participating obliged entities and the competent authorities.*
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> *Within the cooperation arrangements referred to in paragraph 1 and where such arrangements involve, inter alia, cooperation and information exchange between obliged entities and the aforementioned authorities, obliged entities shall process personal data in accordance with [new article on processing of personal data for AML purposes].*

2. Creation of a robust legal basis for the exchange of information between obliged entities

Cooperation and information-sharing is not only relevant in the context of public-private partnerships. Information-sharing enhances the effectiveness of banks' role as gatekeeper and therefore plays a crucial role in upholding the integrity of the banking system. For the purpose of combating money laundering and terrorist financing, restrictions to information-sharing mechanisms should be proportionate.

[3] NVB about Fintell Alliance (in Dutch), 11 February 2021 (link)

In order for the AMLR not to stand in the way of effective bilateral cooperation as well as information-sharing within private partnerships, such as interbank initiatives, with the aim to enhance the effectiveness of the AML/CTF regime, it should allow (targeted) information sharing among banks.

A clear legal basis to share information on customers and transactions is needed. This should allow to jointly assess, (prospective) customers, (series of related) transactions or natural persons related to the (prospective) customer or (series of related) transactions. This would enable credit and financial institutions to identify customers (including the ultimate beneficial owners) and transactions that (may) bring about ML/TF risks on a timely basis and for it to mitigate those risks effectively. To ensure proportional information sharing, it should be limited to sharing information amongst credit institutions and financial institutions. As these are the most important gatekeepers to the financial system.

In the Netherlands more exchange of information between obliged entities is expected; the Dutch legislator is currently working on legislation allowing obliged entities of the same category (e.g. between banks) to share information on AML/CFT related rejections or exits of (prospective) high risk customers to prevent 'shopping behaviour'. The NVB is positive about the possibility of exchanging client information. This would for example prevent a prospective client that has been refused on the grounds of serious ML/TF risks by one bank to try his luck at another bank (in practice criminals often learns from previous experiences and try to shield anything that could lead to money laundering suspicions)

Based on the foregoing, the NVB proposes to amend Article 54(4) of the AMLR:

> *"4. By way of derogation from paragraph 1, for obliged entities referred to in Article 3, points (1) and (2), disclosure may take place between two or more relevant obliged entities provided that they are located in the Union, or with entities in a third country which imposes requirements equivalent to those laid down in this Regulation, that are from the same category of obliged entities, and that are subject to professional secrecy and personal data protection requirements, in the following situations:*
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> *(i) the same (prospective) customer and ultimate beneficial owners of the (prospective) customer; or*
> *(ii) the same transaction or series of transactions that are related (transaction pattern); or*
> *(iii) in cases related to the same (alleged) network of natural persons related to (prospective) customers [and ultimate beneficial owner] or transactions.*

3. Outsourcing

Criminals exploit the financial system by performing high-volume transactions between different accounts they hold at different banks. Banks on their own cannot (always) identify ML/TF suspicions if they only have a view on a part of the transactions and this limitation for banks in individually looking at money laundering and terrorist financing patterns has been recognised. Therefore, intensive cooperation between banks is necessary to detect those suspicious multi-bank transactions. Because privacy and data protection are of the highest priority, banks use the latest privacy enhancing techniques to achieve this. This means that banks supply their data separately, pseudonymized and encrypted to TMNL and do not have access to each other's data in any way.

The Dutch legislator is currently working on a legislation allowing banks to outsource their transaction monitoring to a specialized utility (**Transaction Monitoring Netherlands – TMNL**). This one-of-a-kind initiative brings together transaction data from different banks and makes meaningful connections between them. These links provide new insights into possible money laundering and terrorist financing. TMNL ensures that banks are even better able to detect potentially unusual transactions and that new patterns can be uncovered that would otherwise go unnoticed. This allows investigative services to tackle money laundering more effectively, public resources are used more efficiently and criminals are given less room to operate".[4] Given the fact that money laundering has a highly cross-border nature the

[4] Transaction Monitoring Nederland (TMNL), (link).

NVB, and supported by the Dutch legislator, supervisor, FIU and law enforcement, welcomes the possibility for the outsourcing of transaction monitoring in Article 40(1) AMLR.

At the same time, NVB notes that restrictions to outsourcing a number of tasks is unnecessarily and disproportionately restrictive. Since obliged entities remain fully liable and responsible for the compliance with laws and regulations for all activities outsourced to agents or external service providers, the NVB does not consider there to be any rationale for the proposed restrictions under "a" to "f" in Article 40(2) of the AMLR.

The NVB proposes to delete the restrictions "a" to "f" included in the proposed Article 40(2) of the AMLR.

4. Processing or centralising tasks within the same group: intra-group sourcing

Besides outsourcing towards agents and external service provide, obliged entities – when part of a group – also source/centralise tasks within the group to more effectively and efficiently act in compliance with applicable AML/CTF laws and obligations.

Both the AMLD5 and the current AMLR proposal are not entirely clear on the status of this type of 'intra-group sourcing' or 'processing', i.e. whether it should be regarded reliance or outsourcing. Moreover, it should be made clear that the exchange of, and access to client information for the purposes of the AMLR and fulfilling the group policies to this end is necessary among group members. While the AMLD5 suggests this is to be considered outsourcing, the AMLR leans towards this situation regarding this as a form reliance. If that is the (change in) direction, the proposed restriction to not allow reliance concerning the customer due diligence requirement of ongoing monitoring does not make sense from a business and practical point of view. Processing or centralising CDD requirements should not depend on the type of the CDD requirement. Moreover, processing or centralising should not be limited to CDD requirements only.

It would provide clarity for obliged entities operating in groups, if a separate provision on intra-group sourcing were to be added. This should stress the necessity to share client information for the purposes of abiding by the AMLR, alongside the existing provisions on reliance and outsourcing. With the applicability of the internal policies and procedures established at group level, and with internal controls in place, there should be no restrictions to the type of requirements that can be sourced/processed/centralised within the group. We propose to apply the same logic behind outsourcing given that the obliged entity remains fully liable for actions of the entity to which activities are outsourced.

The NVB proposes the introduction of a new provision in the AMLR following the requirements related to reliance and outsourcing:

Article 41a New – Intragroup sourcing

1. *Obliged entities that are part of a group as referred to in Article 2(29) of this Regulation, are allowed to source or centralise the requirements stemming from this Regulation, provided that the group-wide policies, controls and procedures referred to in Article 7(1) and 7(2) of the Regulation apply and are in compliance with this Regulation, or with equivalent rules in third countries.*
2. *The obliged entity shall remain ultimately responsible for the performance of the requirements sourced to other parts within the group in accordance with the first paragraph of this Article.*

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Dutch Banking Association

The Dutch Banking Association represents the common interests of the banking sector. Banks are important to everyone. We are the connecting links between the banking sector, politics and stakeholders. Together with these parties, we proactively work towards a service-oriented, stable and competitive banking sector.