

Cover letter and Note on Horizontal Issues

of 7 June 2022 regarding the second draft of the assessment report of the concrete implementation and effective application of AMLD4 by the Netherlands

On 21 April 2022 we received the second draft Assessment Report, of the assessment of the concrete implementation and effective application of the 4th AMLD in the Netherlands. We were informed by the CoE that the same draft was shared with you, the European Commission. In our e-mail of 25 April we already informed you that the Netherlands still has strong concerns regarding the report. In this cover letter we will describe our main overarching concerns. Of equal importance are our concerns regarding specific findings and conclusions. You can find our most important concerns in our comment boxes in the draft report attached and in the annexes provided by several supervisors and FIU-NL. Please note that we focused on the most important issues and did not do a thorough check on all statistics used for example.

Importance of the assessment

To begin with, the Netherlands would like to emphasize that it attaches great importance to this assessment. It can contribute to improving European legislation in the field of AML/CFT and at the same time help the Netherlands improve our national AML/CFT system. Many parties, most of all the assessment team from the CoE, have put a lot of energy into this evaluation. This alone would have already been reason enough for the Netherlands to review the draft report and prepare our comments very carefully. In addition, it is current national policy in the Netherlands for this type of assessment to be made public, once it is final. This also contributes to the importance that the content is correct. The Netherlands regret that the efforts made and time spent have led to a report that is, in the view of the Netherlands, only of very limited use, because of the impediments elaborated on below and in the mark-up version of the draft report. Nonetheless we still plan to benefit from the assessment as much as possible to further improve our system. It is also with that in mind that we want to do everything in our power to further enhance the report.

Next steps

Also in light of our intention to publish the final assessment, we kindly request that you send us a final version, our comments at the second draft taken into account. Should you decide to address our comments in another manner, leaving the draft assessment as it is, please keep us informed about how you intend to pursue.

Main points of concern regarding the draft report

The report does not contribute to the purpose of the evaluation

Article 65 AMLD4 charges the European Commission with the obligation to report on the implementation of AMLD4. The article mentions several specific aspects that the Commission should include in its report.¹ It is however, unclear for the Netherlands, how the draft report relates

¹ Article 65 reads:

The report shall include in particular:

- (a) an account of specific measures adopted and mechanisms set up at Union and Member State level to prevent and address emerging problems and new developments presenting a threat to the Union financial system;
- (b) follow-up actions undertaken at Union and Member State level on the basis of concerns brought to their attention, including complaints relating to national laws hampering the supervisory and investigative powers of competent authorities and self-regulatory bodies;
- (c) an account of the availability of relevant information for the competent authorities and FIUs of the Member States, for the prevention of the use of the financial system for the purposes of money laundering and terrorist financing;

to those aspects mentioned and contributes to the assessment overall assessment of the European Commission. A large number of findings and conclusions reflect specific situations or issues within the Netherlands, without further explanation how those issues relate to the content of AMLD4 itself and the improvement of AML/CFT legislation at a EU level. Also given the unclear methodology, the scoping issues mentioned below and a tendency to only focus on deficiencies, without mentioning effective implementation or best practices, the Netherlands believes that the findings of the report in its current form can only make a limited contribution to an assessment of Article 65 AMLD4.

Consequences of the unclarity of purpose and methodology for the evaluation process

The lack of clarity about the purpose of the assessment and the methodology used has limited the Netherlands' ability to provide targeted and adequate information. After all, in order to collect the relevant information and to be able to contextualise sufficiently, it is essential to understand the intended use. For the scope and purpose of the evaluation, Dutch authorities mainly relied on Article 65 AMLD. They also assumed that the focus of the entire process would be on identifying EU-wide areas for improvement. The current content of the report is very different.

Only deficiencies

The Netherlands object to the focus on deficiencies in the current conclusions. The Netherlands attaches great importance to the fact that the report can be read independently and that the context of the conclusions in the report is also clear to a party that was not involved in the assessment process. The report in its current form stands in the way of a holistic and comprehensive overview of the strengths and weaknesses of our system, because of the very critical tone of large parts of the report, without mentioning the achievements of the system properly and the fact that the conclusions in the report only mention deficiencies and do not state to what extent the assessed articles are met. We regret that the report does not mention best practices either, something that the Netherlands had expected on the basis of Article 65 AMLD. We have also shared this concern with the CoE and we welcome that some clarification on this aspect of the methodology was added. However, the Netherlands strongly feel that the quality of the report could be enhanced by adding to the conclusions the elements where no deficiencies were found.

Qualification of deficiencies

The conclusions of the report consist of listed deficiencies. The report distinguishes between 'major' deficiencies and 'limited' deficiencies and uses the same categories for impact. So far the Netherlands have not received any document explaining the methodology used by the CoE in relation to its findings. Based on the report or the guidance we have received, it is not clear how the CoE determines whether a finding qualifies as a deficiency. Also it is not clear how the weight of a particular deficiency is determined or how the weight of the impact of the deficiency is determined.

The unclarity about the qualification of deficiencies is further enhanced by the fact that various changes have been made to the draft report as a result of the input provided by the Netherlands, responding to the first draft. While the text on alleged shortcomings has been amended in some

(d) an account of the international cooperation and information exchange between competent authorities and FIUs;

(e) an account of necessary Commission actions to verify that Member States take action in compliance with this Directive and to assess emerging problems and new developments in the Member States;

(f) an analysis of feasibility of specific measures and mechanisms at Union and Member State level on the possibilities to collect and access the beneficial ownership information of corporate and other legal entities incorporated outside of the Union and of the proportionality of the measures referred to in point (b) of Article 20;

(g) an evaluation of how fundamental rights and principles recognised by the Charter of Fundamental Rights of the European Union have been respected.

parts, this apparently does not always lead to a different assessment or qualification of the shortcomings in general. We specifically refer to the chapter 4, 6 and 8. Without further explanation this is incomprehensible. The Netherlands finds it also noticeable that shortcomings seem to qualify as 'major' rather quickly, given the fact that the majority of the shortcomings is qualified as major. It is not easy to understand why. The Netherlands cannot accept these qualifications without an explanation about the weighting of the shortcomings.

Misconceptions and factual inaccuracies

In the review process, the Netherlands encountered many misconceptions in the draft report. Some of those have been corrected following our reaction to the first draft, but many remain in the draft report. Some examples are that the report currently concludes at various places (Chapters 5, 6, 10) to the existence of a 'dual reporting system' for UTRs or STRs. The same applies to the conclusion in Chapter 5, which states that it is contrary to the Directive, that OEs do not have access to identifiers such as the date of birth, the place of birth, the country of birth and the address of residence and the conclusion that national coordinating bodies are not perceived effective and responsive and that supervisors should not be able to take action on the basis of information stemming from cooperation (Chapter 9). In the accompanying commentary on the draft report, we have indicated which findings, in our view, are based on misconceptions about the Dutch AML/CFT system. We also refer to the annexes from several supervisors and FIU-NL that point out some examples of misconceptions and factual inaccuracies of specific importance. The Netherlands finds it important to emphasize also in this note that it cannot accept the conclusions of the report if it is not amended on these points.

Status or transposition

In each chapter, under the heading 'status of transposition', the report makes an assessment of the technical implementation of AMLD4 by the Netherlands. The displayed status does not correspond to the current state of affairs in many areas. Previous shortcomings had all been resolved at the time of the interviews in September. The Netherlands would therefore like to see this section amended or deleted in all chapters.

Scope

Several findings and conclusions of the report fall outside of the scope of the assessment. This concerns the scope. For example, the report contains several conclusions about the NRA process and national risk assessment (eg para 270-271), related to Article 7 AMLD4, that is not part of the scope of the assessment. Also, in para 139 notes that statistics provided by the BTWwft show that sanctions applied to the OEs under their purview may not be proportionate or dissuasive: e.g. for real estate agents, an average of 7500 EUR and 15.000 EUR for 2018 and 2019. For these infringements the AMLD4 enforcement regime was not yet in place, because only infringements that took place or started after July 2018 fall under the AMLD4 enforcement regime. This means that most of the data about enforcement concerns the regime prior to the implementation of AMLD4. A last example is that we noted that for the assessment of Article 31 AMLD4 (paras 103-105) about beneficial ownership of legal arrangements, changes made to the directive with AMLD5 and were not a requirement under AMLD4, were already taken into account.

Time restrictions for comments and consequences

After we received the first draft report of the CoE in December, we only had 1 week to respond. As you have seen we have tried our utmost to provide as much input and additional information as possible within that week. We do want to stress that such a short reply period hampers the possibilities of countries to review such an extensive and detailed report thoroughly. This is especially challenging with many parties involved as is the case for this evaluation.

Overarching remarks concerning content of the assessment

Effectiveness objective UTR reporting system

In main finding 10 the report concludes 'there are issues of effectiveness of the objective UTR reporting system, as well as issues of quality of reported UTRs combined with underreporting by certain types of non-financial professions'. This is a very far reaching conclusion that is not substantiated sufficiently in the report as it is not further defined what exact issues lead to this conclusion. Also, the entire system and potential issues related to it, are not sufficiently considered in light of the Dutch context of objective/subjective reporting and the measures taken (such as automation and innovation of FIU-NL processes) to address the large number of objective UTRs received. The quality of reported UTRs is not further substantiated either.

In line with the Dutch legal system, the Dutch legislator has developed a sophisticated reporting system of unusual transactions (UTRs) for obliged entities and the declaration of suspicious transactions (STRs, or disseminations) by the Head of FIU-NL. In this system there is a low threshold for obliged entities to report conducted or proposed/intended UTRs, on the basis of a subjective or objective indicators. The authorities consider this system as advantageous for the Dutch context as it unburdens the obliged entities, while at the same time it enhances the data of the FIU-NL. In addition, it is a helpful fact that FIU-NL can declare the UTRs suspicious by using additional, relevant data, namely data obtained via the VROS and CJIB-match (both systems with information on criminal investigations and convictions), data obtained on the basis of an article 17 Wwft request from obliged entities and data provided by foreign FIUs spontaneously or upon request. As such, FIU-NL staff analyses every UTR. After analyzing, an UTR can be declared suspicious and shared with LEA's. FIU-NL is technically equipped and has the resources to provide for this, while obliged entities do not have these competences nor possibilities. FIU-NL exposes transactions, criminal networks and money flows that could be related to ML, the predicate offences or TF. Because of the knowledge, experience and access to relevant additional data sources the FIU-The Netherlands is able to provide high valuable cases to LEAs.

Reasoning sanctioning

The Netherlands doesn't understand nor assents to the line of thought included in the report where a consistent (perceived) high amount of violations equals ineffective supervision, a systemic problem and/or disproportionate (i.e. too limited) sanctions. Risk based supervision is aimed mainly at OEs (in sectors) that have increased risk and will subsequently result in a higher number of violations (within that specific sector). In our view, this shows effective use of inherently limited supervisory capacity.

Supervisory methodology

The report notes in main finding 14 that supervisors lack methodology to assess effectiveness of the approach taken. We object to this conclusion, as this has not been part of the interviews and supervisors did not have the opportunity to share with the CoE how they assess effectiveness.