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FATF – KEY GLOBAL AML ARCHITECT. FROM FRINGE INSTITUTION TO KEY BODY OF GOVERNANCE

ABSTRACT: The purpose of the article is to question the added value of the Financial Action Task Force (further – FATF) experimental governance strategy in the development of anti-money laundering (further – AML) policies by providing insight into the regulatory mechanism of AML on European Union level (further – EU) from the angle of the advocates' sector. The article gives insight on the notion of "experimental governance" from the perspective where traditional forms of authority that exist in the national legislation, are being destabilised and new ones are created, providing accountability mechanisms for it. For the purpose of the analysis of the said notion, the author will make a reference to FATF recommendations binding for legal professionals as by attributing advocates the AML "gatekeeper" role, these legal professionals are undirectly considered as facilitators of money laundering by the global institutional regulatory regime. The following main conclusions could be drawn: 1.Good governance is not always the same as democratic governance. This should be attributed to the incentives of the AML legislative package to establish European supervisory body (further – AMLA), granting it powers to issue decisions that are legally binding also to legal professionals – advocates, thus narrowing the boundaries of advocate's immunity concept as it restricts the vital component – independence of advocats – the core element of the legal profession itself, which can not be altered without negative consequences on the rule of law. 2. The legal concerns exist that the chosen regulatory strategy by setting AML framework goals at supranational level puts the rule of law at risk. The content and rationale of the AML legislative package need to be in line with the principles of conferral, proportionality, and subsidiarity with respect to the limits of the powers of EU, as set out in Article 5 of the Treaty on European Union, thus ensuring the sound governance of Union competences within the limits of the competences conferred upon it by the Member states in the Treaties.

KEYWORDS: advocats, anti-money laundering, experimental governance, Financial Action Task Force, independence, rule of law

FATF – KLUCZOWY GLOBALNY ARCHITEKT AML. OD INSTYTUCJI PERYFERYJNEJ DO KLUCZOWEGO ORGANU ZARZĄDZANIA

ABSTRAKT: Celem artykułu jest ocena wartości dodanej strategii eksperymentalnego zarządzania stosowanej przez Grupę Specjalną ds. Przeciwdziałania Praniu Pieniędzy (FATF) w kształtowaniu polityki przeciwdziałania praniu pieniędzy (*anti-money laundering* – AML) poprzez przedstawienie mechanizmu regulacyjnego AML na poziomie Unii Europejskiej (UE) z perspektywy sektora adwokackiego. Artykuł przedstawia pojęcie „eksperymentalnego zarządzania" w kontekście destabilizacji tradycyjnych form władzy istniejących w prawie krajowym i tworzenia nowych mechanizmów odpowiedzialności. W celu analizy tego pojęcia autor odnosi się do rekomendacji FATF, które są wiążące dla przedstawicieli zawodów prawniczych, ponieważ przypisując adwokatom rolę „strażników" systemu AML, globalny system regulacyjny pośrednio uznaje ich za osoby potencjalnie ułatwiające proceder prania pieniędzy. Z analizy można wyciągnąć

następujące główne wnioski: 1. Dobre zarządzanie nie zawsze oznacza zarządzanie demokratyczne. Wynika to z faktu, że pakiet legislacyjny AML przewiduje utworzenie Europejskiego Urzędu ds. Przeciwdziałania Praniu Pieniędzy (AMLA), który będzie miał uprawnienia do wydawania prawnie wiążących decyzji wobec przedstawicieli zawodów prawniczych – adwokatów. Ogranicza to zakres immunitetu adwokackiego, podważając jego kluczowy element – niezależność adwokatów, co może negatywnie wpłynąć na praworządność. 2. Istnieją obawy prawne dotyczące wybranej strategii regulacyjnej. Ustanowienie ram AML na poziomie ponadnarodowym może stwarzać zagrożenie dla praworządności. Treść i uzasadnienie pakietu legislacyjnego AML powinny być zgodne z zasadami przyznania, proporcjonalności i pomocniczości, określonymi w artykule 5. Traktatu o Unii Europejskiej, co zapewni właściwe zarządzanie kompetencjami Unii w granicach uprawnień przyznanych jej przez państwa członkowskie w traktatach.

SŁOWA KLUCZOWE: adwokaci, przeciwdziałanie praniu pieniędzy, eksperymentalne zarządzanie, Grupa Specjalna ds. Przeciwdziałania Praniu Pieniędzy, niezależność, praworządność

INTRODUCTION

When contemplating about the idea if this article, the author was inspired by the famous Indian economist and philosopher Amartya Kumar Sen's view on democracy, saying that "country does not have to be deemed fit *for* democracy; rather, it has to become fit *through* democracy" .

There are two fundamental aspects at the basis of democratic society – the rule of law and justice. The rule of law cannot exist without defence and without an advocat there can be no rule of law. Defense is not imaginable without the client's right to freely communicate information with his advocate, and legitimately expects that all information provided to his person of trust will remain confidential. This principle of legal certainty and trust bears an absolute character, it cannot be diminished, conditioned, or withdrawn in certain situations apart from advocates professional duty.

The dominant and constantly augmenting need for maximum transparency and subjectiveness to the requirements of stringent surveillance activities of those persons who are considered to be the subjects of anti-money laundering (further – AML) legislation perspective, is being implemented by issuing new legislative acts (new standards or rulebooks) via certain form of supra-national governance and "by all means", ignoring the division of state powers in democratic society and an advocate's role in it.

The origins of advocate as a "gatekeeper" can be traced back to the introduction of this connotation by FATF, indicating the link between the legal services and the money laundering trends, due to the complicated legal and financial character of money laundering operations. By atributing the advocate a gatekeeper's role and thus subjecting the legal professional to strict AML regulation (duty to disclose information entrusted to the advocate by his client to competent authorities in case suspicions about money laundering arouse, criminalization of the advocate's intervention in money laundering activities, creation of the European supervisory body (further – AMLA) as supervisor for the non-financial professions), advocat has to conflict his professional confidentiality duty towards his client and so does the concept of self-regulation of the profession, established long time ago in legal profession's tradition and practice and supported at the national level by substantive

laws and codes, and principles. In this way, a new paradigm is created in that the advocate must transform from the client's defender to its accuser.

This article is devoted to a brief overview of how AML is regulated at EU level and what consequences does the supranational interference in the form of one centralized body of surveillance and policy maker may cause to legal professionals – advocats. The author will focus on the notion of independence of the legal profession and how the new rulebook of AML changes the shape and scope of this independence, thus affecting the fundamental democratic right to legal defense.

The aim of the article is to question the added value of the FATF's experimental governance strategy in AML policy development by providing an insight into the regulatory mechanism of AML at the EU level from the angle of advocates' sector.

Several tasks have been defined within the framework of this article. To provide information on the transformation of FATF from fringe institution and soft-law mechanism into a leading example of experimental governance in setting AML standards and policies. The creation of AMLA, a surveillance body for non-financial AML subjects, including advocates, and how this form of governance affects and collides with the cornerstone of the advocate's profession, independence.

Initially, FATF was established as a soft-law mechanism (participation of its members on a voluntary basis, and FATF as an institution or governing body does not operate in accordance with binding treaty obligations), and has found a way to become an influential AML standard setter globally and its standards being implemented in a coercive way. In order to better illustrate the major shift in the FATF mandate of action, the author will make a reference to the initial Economic Declaration of FATF of July 16, 1989[1], then to FATF Mandate of April 12, 2019[2] and finally to FATF Ministerial Mandate of April 21, 2022[3].

In accordance with the Ministerial Economic Declaration of the G7 Summit in Paris July 16, 1989 the world's economic situation presented three main challenges: (1) the choice and the implementation of measures needed to maintain balanced and sustained growth, counter inflation, create jobs and promote social justice; (2) the development and further integration of developing countries into the world economy and (3) the urgent need to protect the environment for future generations.

The Ministerial Mandate of April 12, 2019, revised the previous one, broadening the scope of activity and competence of FATF in money laundering, terrorist financing and identified the following tasks: (1) identification analysis of money laundering, terrorist financing and other threats to the integrity of financial system; (2) development of international standards; (3) assessment and monitoring the members of FATF through peer-reviews, follow up processes;

[1] Economic Declaration, Paris, July 16, 1989, http://www.g8.utoronto.ca/summit/1989paris/communique/index.html.
[2] FATF Mandate of April 12, 2019, https://www.fatf-gafi.org/en/the-fatf/mandate-of-the-fatf.html (2.12.2024).
[3] FATF Ministerial Mandate of April 21, 2022, https://www.fatf-gafi.org/content/dam/fatf-gafi/FATF/FATF-Ministerial-Declaration-April-2022.pdf.coredownload.pdf.

(4) promotion of full and effective implementation of FATF Recommendations by all countries. In 2001, the FATF expanded its mandate to also combat terrorist financing.

In accordance with the Ministerial Mandate of April 21, 2022, FATF reaffirmed that it is at the centre of the international effort to take decisive, co-ordinated and effective action against these threats of crime, terrorism, corruption, and the destruction of environment and called upon all jurisdictions to remain vigilant of the threats to the integrity, safety and security of the international financial system arising from the actions of the Russian Federation, commitment to effectively implement the United Nations Convention Against corruption by designing FATF Recommendations, and pursue work on the misuse of citizenship by investment schemes and complicit financial and non-financial professional services providers by the corrupt to implement FATF standards, recovery of criminal proceeds remains unsufficient. Meaningful and effective asset recovery helps eliminate incentives for criminal activity, including corruption and tax crimes.

FATF has gained its influence and power through a decision-making process that is characterized as an experimental governance example by setting standards for the AML regime globally (40^{+} Recommendations[4]), evaluating, and revising them. From the revisions, FATF learns of the challenges and solutions that will be further implemented in these standards.

The FATF decision-making methodology can be characterized by what is referred to as 'experimentalist architecture' according to the characteristics identified by Sabel and Zeitlin[5] .

1. Relevant actors (often states and international institutions) set framework goals and metrics to gauge progress. FATF sets the framework goals (40+ Recommendations) and metrics to evaluate how these goals are being reached. After establishing goals, the mutual evaluation phase follows. It is conducted by FATF teams of experts (comprising FATF members and/or international organizations) and usually is conducted on-site.
2. Lower-level units are obliged to implement policies aimed at meeting those standards, but are given autonomy to implement the policies they deem most appropriate;
3. In return for that autonomy, they must report regularly on their performance and participate in a peer review that compares their performance to others. A detailed 'common methodology' is being developed. The members discuss the results in a peer review in the plenary. Unsatisfactory results must be monitored once again and discussed at the next Plenary session. This leads to the result that States are required to write their own legislation to ensure compliance with it.
4. The collective wisdom gained from implementation and evaluation is taken into account as the goals, metrics, and procedures are periodically reviewed and revised by

[4] FATF International standards on combatting money laundering and the financing of terrorism and proliferation, The FATF Recommendations.

[5] Ch.F. Sabel, J. Zeitlin, Learning from difference: The new architecture of experimentalist governance in the EU. "European Law Journal" 2008 14(3): 271-327, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2527&context=faculty_scholarship (2.12.2024).

participants. FATF, together with interpretative notes and guidelines, creates the foundation of cascading AML legislation in the EU. The requirements of the updates are reflected in the AML directives, which set implementation deadlines for member states. The European Commission is in charge and is a body for transposing the surveillance of the AML directive into the national legislation of member states. It has authority to use measures of coercion for member states for non-compliance.

Furthermore, the requirements of AML directives are reflected in the national legislation in the applicable laws on anti-money laundering and proliferation of terrorist financing. In case of non-compliance, vor partical compliance, FATF uses its strongest measure of incentive, blacklisting of non-compliant countries by creating gray and black lists

To reach a general compliance with the FATF AML Rulebook or 40^{+}Recommendations, measures of coercion are needed. As was mentioned earlier, FATF initially was established as a soft-law mechanism, and it still preserves this characteristic; it cannot apply sanctions or other material sanctions towards its members, but instead it uses a very strong mechanism of coercion.

It is interesting to note that FATF does not penalize or sanction these countries directly, but the result is achieved through third parties – institutions and banks who refrain from cooperation with the listed countries by taking the decision themselves. Thus, the listed or non-compliant country faces the risk of being excluded from the market, risk of reputation, risk of destabilysing economy, etc.

For the purposes of this article, the author will look at recent European Comission's package of legislation called AML package, presented on July 20, 2021[6]. The main changes brought with the new AML package are directed towards the greater transparency requirements in AML questions, primarily aimed at improving processes for detecting suspicious transactions and activities and closing loopholes that criminals exploit to launder illicit proceeds or finance terrorist activities through the financial system. The author will focus attention on two legislative documents it comprises, the VI Directive on AML/CFT that will replace the existing IV Directive 2015/849/EU (further – 6th AMLD[7]) and the European Commission's proposal for a regulation establishing the Authority for Anti-Money Laundering and Countering Terrorism Financing of Terrorism (further – AMLA)[8].

Advocat is a person who implements the third state power – by securing the rights to defense for his or her clients, the fundamental rights to fair justice have been implemented. It is an essential component of the legal system and, as such, its operation and supervision must have regard to each's

[6] Pricewaterhouse Coopers International (PwC), European Comission's package of leg-islation called AML package, presented on July 20, 2021, https://www.pwc.pl/en/articles/eu-aml-package.html (2.12.2024).

[7] Proposal for a Regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0420 (2.12.2024).

[8] Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0421 (2.12.2024).

State's unique legal system of each state and the rule of law mechanism of each state. Article 6 of the European Convention on Human Rights[9] and Article 47 of the Charter of Fundamental Rights of the European Union[10] states that advocates for independence are integral components of the right to a fair trial. And this should be respected by others.

When analyzing the notion of independence of the legal profession, a reference should be made to the Charter of core principles of the European legal profession adopted on November 24, 2006. The Charter entails the core principles regarding the advocate profession, and it serves as a support for advocacies that stand for their independence as well as about the role of an advocate in the society. According to the Charter "a lawyer needs to be free – politically, economically and intellectually – in pursuing his or her activities of advising and representing the client. This means that the lawyer must be independent of the state and other powerful interests (...). The lawyer's membership in a liberal profession and the authority derived from that membership helps to maintain independence, and bar associations must play an important role in helping to ensure the independence of the lawyer. Self regulation of the profession is seen as vital in butressing the independence of the individual lawyer"[11].

Each state has its own regulatory body that governs and monitors the activities of advocates (further, the SRB). The main task is to care about the prestige of advocate profession, to ensure the professional development of legal professionals, by providing and obtaining the knowledge and practice in order to implement the tasks laid down in the national legislation binding for advocates in line with principles of democracy. These institutions are specifically designed for these tasks, as they are professional SRBs and they monitor the activities within the legal profession according to fundamental rights and freedoms and rules and principles of democracy. It is important to note the autonomy of SRBs in decision making towards advocates. They must be independent in their activities.

Nonetheless, with the establishment of new AMLA reglamentation, a situation can be faced that reflects the dual nature of law. Although the importance of independent lawyers and an independent bar has recently been recognized by the European Commission in its 2021 Rule

[9] European Convention of Human Rights, https://www.echr.coe.int/documents/d/echr/convention_ENG (2.12.2024).

[10] Official Journal of the European Communities. 2000. Charter of Fundamental Rights of the European Union (2000/C 364/01), https://www.europarl.europa.eu/charter/pdf/text_en.pdf.

[11] The European Court of Human Rights. 2003. Applications nos. 23145/93 and 25091/94 Case of Elci and Others V. Turkey. In https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-61442%22]}, § 669. See also § 3 of the Reply to the recommendation 2121 (2018) of the parliamentary assembly of the Council of Europe (DoC.14825, 5 February 2019: "The Committee of Ministers agrees with the Assembly that lawyers play a vital role in the administration of justice and that the free exercise of the profession of lawyer is indispensable to the full implementation of the fundamental right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights. In this respect, the Committee of Ministers is concerned by the threats, in certain national contexts, to the safety and independence of lawyers as well as to their ability to perform their professional duties effectively. This is particularly the case for defence lawyers in criminal proceedings.", The European Court of Human Rights. 2019. Applications nos. 4133/16 and 31542/16. Ahmet Tunç and Zeynep Tunç against Turkey and Ahmet Tunç and Güler Yerbasan against Turkey, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-191117%22]} (2.12.2024).

of Law Report, "legal professions play a fundamental role in ensuring the protection of fundamental rights and strengthening the rule of law. An effective justice system requires that lawyers be free to pursue their activities of advising and representing their clients, and bar associations play an important role in helping to guarantee lawyers' independence and professional integrity" [12].

12 and in Recital 80 of the proposed AML Regulation[13] "in accordance with the case – law of the European Court of Human Rights, a system of first instance reporting to a self-regulatory body constitutes an important safeguard for upholding the protection of fundamental rights as concerns the reporting obligations applicable to lawyers. Member states should provide the means and manner by which to achieve the protection of professional secrecy, confidentiality, and privacy.

Article 38 of the proposed 6th AML Directive provides that member states must ensure that the activities of SRBs that supervise AML compliance are subject to oversight by a public authority. The suggested rules on national supervision will disrupt the current rule of law balance necessary to deliver lawyer regulation that is independent of Member State interference.

It seems that the Commission has not taken into consideration the existing regulations applying to the legal profession and the measures put in place by the Bars. Self-regulation, especially independence of Bars, implies freedom from state intervention. Hence, the powers conferred to a national public authority by Article 38 of the proposed 6th AML Directive are incompatible with the independence of bars.

According to the proposal for an AMLA regulation,[14] the AMLA shall have full discretion to establish a breach of Union law. In accordance with Article 32 (1) AMLA shall have powers over supervisory authorities "where a supervisory authority in the non-financial sector has not aplied the Union acts or the national legislation referred to in Article 1 (2), or has applied them in a way which apperas to be breach of Union law, in particular by failing to ensure that the entity under its supervision or oversight satisfies the requirements laid down in those acts or in that legislation."AMLA may therefore act as soon as there "appears" to be a breach of Union law. Moreover, AMLA will have access to the information without any limitations. As soon as there appears to be such a breach in the view of AMLA (Article 32 (2)) "the supervisory authority shall, without delay, provide the Authority with all information which the Authority considers necessary for its investigation including information on how the Union acts or in that legislation referred to in Article 1 (2) are applied in accordance with Union law. Whenever requesting information from the supervisory authority concerned has proven, or is deemed to

[12] Communication from the Commission to the European Parliament, the Council, the Europe-an Economic and Social Committee and Committee of the Regions: 2021 Rule of Law Report, the rule of law situation in the European Union COM (2021) 700 final. In https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0700 (2.12.2024).
[13] Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0421 (2.12.2024).
[14] Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010. In https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0421 (2.12.2024).

be, insufficient to obtain the information that is deemed necessary for the purposes of investigating an alleged breach or non-application of Union law, the Authority may, after having informed the supervisory authority, address a duly justified and reasoned request for information directly to other supervisory authorities".

The addressee of such a request shall provide the Authority with clear, accurate and complete information without any undue delay". (Article 32.2. of Proposal for an AMLA regulation).

Nonobstant of the independence and autonomy of SRBs, AMLA according to the regulation will be entitled to issue legally binding decisions, thus overtaking the administrative and judicial role of the SRB itself.

One of the fundamental values of democratic states is the principle of separation of state powers with an aim to overturn the centralization of power within the hands of one institution or official. State powers have to co-exist alongside each other; they cannot be ranged vertically. All three powers (executive, legislative, and judicial) are equally important, interconnected, and coacting closely within the united system thus securing the sound operation of the state mechanism on the whole. These three powers supplement each other and, if needed, slow down. This regulatory mechanism can be compared to the balance mechanism whose rationale is to ensure justice and the right to fair trial in society. By influencing one of those powers, the balance has been distorted at the rest of the two, and the fundamental rights and values are being put under risk, and thus democracy itself. The consequences of the proposed regulation manifest themselves in centralized powers granted to one institution, which contradicts in substance to the principle of separation of state powers.

SHORT CONCLUSIONS

The independence of advocats is the core element of the legal profession itself, it can not be altered without negative consequences on the rule of law.

The legal concerns that the chosen regulatory strategy gives rise to setting framework goals at supranational level, the AML package puts the rule of law at risk. The content and rationale of the AML package must be in line with the principles of conferral, proportionality, and subsidiarity with respect to the limits of the powers of EU, as set out in Article 5 of the Treaty on the European Union, thus ensuring the sound governance of Union competences within the limits of the competences conferred upon it by the Member states in the Treaties.

By atributing the advocate to the role of a gatekeeper and thus subjecting the legal professional to strict AML regulation, the advocate must conflict his requirements of professional duty requirements with the duty of secrecy toward his client, established a long time ago in legal profession's tradition and practice and supported on the national level by substantive laws, codes, and principles.

Good governance is not always the same as democratic governance. This should be attributed to the incentives of the AML package to establish European supervisory body (further – AMLA),

granting it powers to issue decisions that are legally binding also to legal professionals - advocates, thus narrowing the boundaries of advocate's immunity concept as it restricts the vital component – advocates' independence in exercising their profession as stemming from the traditions of the profession and as stipulated by the normative legislation binding for advocates.

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