



L'ASSOCIATION POUR LE DÉVELOPPEMENT DES ACTIFS NUMÉRIQUES

ADAN's contribution

Consultation on EC's action plan for a comprehensive Union policy on preventing money laundering and terrorist financing

Paris, 29 July 2020

Introduction

Adan is a 1901 non-profit organisation whose mission is to bring together and animate the digital assets industry in France and in Europe. With 40+ corporate members, including Ark Ecosystem, Blockchain Partner, Coinhouse, Coinhouse Custody Services, ConsenSys France, iExec, Kaiko, Ledger, LGO Markets, Nomadic Labs and Woorton, Adan is the most important French organization in the digital assets field.

Adan is thankful to the European Commission for allowing the expression of industry players in this open consultation. The Association's objectives are to help create the more favourable environment in the EU for the development of a crypto-asset industry competitive with other regions of the world.

The Association is available for any additional commentary or work related to digitalisation and crypto-assets.

Ensuring effective implementation of the existing rules

Question 2.2 Additional comments

In order to ensure the correct transposition and application of the coming revised EU AML/CFT framework, Adan is in favour of shifting to an EU regulation to be transposed into national laws directly. As a directive is only giving objectives to State members that then develop their own national provisions to achieve them, experience has proven that national regulatory frameworks could diverge a lot among State members creating conditions for unfair competition and regulatory arbitrage. A regulation would be a preferred option as it is transposed into national laws directly.

Delivering a reinforced rulebook

Question 3. The Commission has identified a number of provisions that could be further harmonised through a Regulation. Do you agree with the selection?

	Yes	No	Don't know
List of obliged entities			
Structure and tasks of supervision			
Tasks of financial intelligence unit			
Customer due diligence			
Electronic identification and verification			
Record keeping			
Internal controls			
Reporting obligations			
Beneficial ownership registers			
Central bank account registers			
Ceiling for large cash payments			
Freezing powers for financial intelligence units			
Sanctions			

Question 4. What other provisions should be harmonised through a Regulation?

Generally speaking, both to ensure legal certainty for actors that provide their activities in several EU Member States and to avoid regulatory arbitrage, **efforts towards harmonisation and convergence of interpretations and practices within jurisdictions must be enhanced, through a Regulation and other tools that appear relevant.** To this end, creating a **dedicated EU AML-CFT body** that coordinates the supervision of obliged entities is another crucial foundation in this trend. Please refer to our answer to question 14 for more details.

One example of regulatory divergence within EU Member states is that French crypto-asset service providers' AML/CFT provisions must be checked *a priori* by the French banking supervisor so they cannot provide their custody and crypto-fiat exchange services before being registered with them. This is a French peculiarity that creates a breach in the EU level playing field for French crypto actors, especially at a time when other countries have not designed any regulatory framework for their own crypto-asset service providers (so-called "VASPs" according to the FATF's terminology).

Adan recommends to clearly enforce a *posteriori* controls for VASPs in order to harmonize it within all EU jurisdictions for the following reasons:

- When checked *a priori*, the AML/CFT system has not been empirically tested and it is difficult to assess its effectiveness, that an *a posteriori* control can verify.
- The *a priori* registration is very burdensome and results in significant delays which are very detrimental for actors that cannot start doing business, especially at a time when the economy needs to regain greater dynamism.
- To avoid congestion in regulators' operational channels and inertia, *a priori* controls of AML/CFT systems require significant dedicated resources to process registration applications. As explained by the EC in their Plan, as "the budgetary impact of any option would be a key consideration" in the current economic context, *a priori* controls would enhance supervision costs.
- *A posteriori* controls are not lighter than *a priori* controls: they are just as strict while having the advantage to speed up the entry into the market of new entrants.

Question 7. Should new economic operators (e.g. crowdfunding platforms) be added to the list of obliged entities?

Regarding the FATF's recommendation, Adan undertands that the European Commission is considering the application of AML/CFT rules to virtual assets service providers (VASPs).

In this perspective, Adan would like to emphasize that VAPSS would be very different "obliged entities" from others, that is why **traditional AML/CFT risk analysis and prevention mechanisms designed for such obliged entities should be adapted to VASPs.** Please find further details referring to our answer to question 8, points c and d, and our position paper.

Question 8. In your opinion, are there any FinTech activities that currently pose money laundering / terrorism financing risks and are not captured by the existing EU framework? Please explain.

Adan would like to seize this opportunity to challenge some long-standing received ideas about "oversized" ML/FT risks raised by crypto-assets. It is not about denying that ML/FT risks exist in the crypto universe but assessing the true level of such risks.

a) First, **crypto-assets do not raise substantial ML/FT risks.** In their "National Analysis of Money Laundering and Terrorist Financing Risks in France" published in September 2019, the French Treasury outlines that **the illicit use of crypto-assets for ML/FT purposes is not a preferred option by criminals.** Indeed, some factors - such as the specific knowledge and technical expertise required to use them, as well as their volatility - deter them from using these assets. Moreover, in many scenarios, the information stored on and off chain allow for the identification of customers and the monitoring of transactions. For this reason, very few cases where crypto-assets were used for illicit purposes have been reported. This analysis is corroborated by the 2020 State of Crime Report which reveals that illicit transactions is "a small share of all cryptocurrency activity at just 1.1%" and that the overwhelming majority of such transactions consists in scams, not ML/FT.

b) Second, **all crypto-asset activities do not bear the same level of ML/FT risks.**

First of all, it is of utmost importance to distinguish crypto market players (exchanges, brokers, custodians, etc.) from other companies dealing with crypto-assets (e.g. as a product, means of payment or investment) when defining the scope of AML/CFT requirements. For example, as already set very clearly by the European Parliament¹ and FATF², non-custodial wallets are pure technical providers who should be excluded from the lists of VASPs: as they do not function as intermediaries, it does not make much sense to target them for AML/CFT purposes. Similar reasoning should be led regarding other actors that develop blockchain products and services and are not market players.

Within market-related activities, "crypto-crypto" exchanges are deemed to raise lower ML/FT risks. In their analysis, the French Treasury attributes a "moderate level of risk" (on a scale of "low" to "high") to crypto-assets and precise that "crypto-crypto" activities are less exposed to BC-FT threats than "crypto-fiat" activities, as they do not imply the re-injection of funds into traditional economic channels. The conclusions of a public consultation led by Adan on the crypto-crypto activities carried out from France corroborate this analysis (please refer to this report: <https://adan.eu/rapports>). Several tangible reasons can be outlined in our position paper.

c) Third, **AML/CFT risk analysis and prevention mechanisms should be adapted to crypto-assets.**

As the use of crypto-assets can, at the first glance, be likened to financial activities (money, investment vehicles, trading, etc.), the first reaction of regulators is to apply the same analyses as for the financial sector. Notably, transfers of crypto-assets are often equated to transfers of money. However, features inherent to crypto-assets make transactions very different from financial ones.

Therefore, while crypto-assets do require an appropriate level of ML/FT regulation, applying existing regulations to them is the best way to (please with details in our position paper):

- **Ill-estimate the risks of crypto-assets in general.**
- **Leave the areas where risks could have been identified - as they were not captured by the traditional financial analysis schemes - out of the scope of the supervision.**
- **Fail to prevent illegal activities.**
- At the very end, **prevent innovation** by placing the burden of the costs associated with an inefficient framework on companies with nascent activity.

¹ [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648779/IPOL_STU\(2020\)648779_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648779/IPOL_STU(2020)648779_EN.pdf)

² FATF guidelines, point 48.

d) That is why, in line with the EC’s intention “to implement a comprehensive AML/CFT policy, adapted to the specific threats, risks and vulnerabilities currently facing the EU and designed in a manner that can evolve efficiently while taking into account innovation”, when considering the crypto industry within the revised AML-CFT framework, **Adan recommends that the legislative proposal includes or plans necessary measures to take previous observations into account.**

To this end, **the EC could first conduct a deep analysis of how illegal activities are technically leveraging crypto-assets to perform transfer of funds.** Numerous companies and tools are now available that have been successfully used by different policies (FBI, CIA, OCRGDF from the French Ministry of Interior, etc.) in the world relying on the transparent nature of the blockchain, that allows for detailed analysis of transactions history and a more efficient and refined BC/FT risk analysis. This can be done through a task force that will gather and be on the vanguard in terms of technical knowledge. Based on this analysis, the Commission could **iterate on the best ways to counter illegal activities by detecting the use of crypto-assets.** Finally, once best practices are consensually agreed as efficient, **they could be transposed into the future AML-CFT regime.**

Question 9. The Commission has identified that the consistency of a number of other EU rules with anti-money laundering / countering the financing of terrorism rules might need to be further enhanced or clarified through guidance or legislative changes. Do you agree?

	Yes	No	Don't know
Obligation for prudential supervisors to share information with anti-money laundering supervisors			
Bank Recovery and Resolution Directive (Directive 2014/59/EU) or normal insolvency proceedings: whether and under what circumstances anti-money laundering grounds can provide valid grounds to trigger the resolution or winding up of a credit institution			
Deposit Guarantee Schemes Directive (Directive 2014/49/EU): customer assessment prior to pay-out			
Payment Accounts Directive (Directive 2014/92/EU): need to ensure the general right to basic account without weakening anti-money laundering rules in suspicious cases			
Categories of payment service providers subject to anti-money laundering rules			
Integration of strict anti-money laundering requirements in fit&proper tests			

Question 9.2. Additional comments

The most significant obstacle to the development of the “crypto/blockchain” sector is the difficult relations between the actors and banking institutions. **At the customer level, this threatens their general right to basic account.**

Users of crypto/blockchain products and services are partially or entirely prevented from using them. As an example, when a client wants to transfer funds to a crypto-asset exchange platform, it very regularly happens that his bank simply blocks the payment or asks the customer to sign a release whose content intends to discourage the operation by providing partial information, exaggerating the risks encountered. When he receives funds from a platform, the consequences are even more dire as the account to which they are credited is often closed by the bank, as of the first transaction and without giving the client the opportunity to transmit any information relating to the origin of these funds.

That is why the revised AML/CFT framework should restore the general right to basic account for everyone including users of crypto/blockchain products and services. Solutions should be to adapt the AML/CFT risk analysis framework and prevention mechanisms for crypto-asset activities to better assess their real ML/FT risks and prompt credit institutions not to reject them systematically.

Bringing about EU-level supervision

Question 10. What entities/sectors should fall within the scope of EU supervision for compliance with anti-money laundering / countering the financing of terrorism rules?

- All obliged entities/sectors
- All obliged entities/sectors, but through a gradual process
- Financial institutions
- Credit institutions

Question 11. What powers should the EU supervisor have? (at most 1 choice)

- Indirect powers over all obliged entities, with the possibility to directly intervene in justified cases
- Indirect powers over some obliged entities, with the possibility to directly intervene in justified cases
- Direct powers over all obliged entities
- Direct powers only over some obliged entities
- A mix of direct and indirect powers, depending on the sector/entities

Question 13. Which body should exercise these supervisory powers? (at most 1 choice)

- The European Banking Authority
- A new EU centralised agency
- A body with a hybrid structure (central decision-making and decentralised implementation)
- Other

Question 13.1. if other: please explain

Adan strongly promotes the European Commission's idea to create "a new, dedicated EU AML supervisory body [...] that would be competent for supervising obliged entities in both the financial and the non-financial sector" and agree with the Commission's analysis that "this would allow maximum flexibility to design a tailored system in terms of organisation and governance, with simplified and swift decision-making processes to respond to risks quickly, as well as synergies with the coordination and support mechanism for FIUs".

However, regarding the two main drawbacks identified by the EC (the long process to establish this new ESA and possible overlaps with existing regulators like EBA), adding to this efficiency and resources considerations, Adan suggests that this new EU-level body first ensures the indirect supervision of obliged entities starting with new ones that do not fall within the current EU AML-CFT regime (like VAPSS). Please also refer to our answer to question 14.

Question 14. Additional comments

From a practical perspective, Adan recommends:

- **in any field (including AML/CFT), the supervision of actors in crypto-assets at a national level**, with coordination at the EU level in order to ensure a certain level of harmonization between practices. Indeed direct supervision by the European Authorities would not be efficient nor cost-effective.
- for such coordination at the EU level, **the creation of a new European Supervision Authority (ESA along with EBA, ESMA and EIOPA) dedicated to crypto-assets**, possibly in relation with a self-regulatory body that could help keep processes and create a first level regulation delegated by member States. This new ESA is the best option to ensure that devoted expertise and resources are allocated.
- **in addition to or alternately, the creation of a new EU-level AML/CFT supervisory system**. In line with the aforementioned consideration, this new body should include devoted expertise and resources in the crypto-asset field to ensure an effective indirect supervision of the crypto-asset industry.

In the perspective of building this framework, **Adan recommends close dialogue with the national regulators, industry players and associations**. From there, good practices can be inferred and adapted tools chosen or developed at the EU or national level. As a professional association, Adan is dedicated to ensure good practices from the industry players.

Additional information

Please read Adan's position paper "Towards a suitable AML/CFT regime for markets in crypto-assets".

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