

THE SUPERVISION IN THE AREA OF ANTI-MONEY LAUNDERING (AML) IN RELATION TO LEGAL AND ADVISORY PROFESSIONALS

Marie Karfiková,* Michaela Hladká**

Abstract: *The article deals with the situation of legal and advisory professionals as obliged entities according to the legal framework of anti-money laundering (AML) and counter-terrorism financing (CTF) measures, and specifically with the supervision of these obliged entities. In this article, the authors pay special attention to the differences of these independent professionals (especially their obligation of confidentiality), the reasons for their inclusion into the scope of obliged entities, and their level of risk in the AML field. The supervision of these obliged entities is assessed in relation to the legal framework in effect until the end of 2020, the legal framework given by the amendment to the Czech AML Act, and de lege ferenda. Moreover, the article reflects the knowledge gained in practice and the problems detected during the application of AML measures in relation to the legal and advisory professionals, relevant cases, and comparison of legal frameworks in different jurisdictions.*

Keywords: *anti-money laundering, supervision, legal and advisory professionals*

1. INTRODUCTION¹

The law concerning measures against the legitimisation of the proceeds of crime or money laundering² is categorized as a specific area related to financial law within the framework of the science of financial law.³ This categorization is very well justified given the fact that the law against the legitimisation of the proceeds of crime very significantly protects the national financial system and prevents the misuse of the national financial system for the purposes of money laundering and terrorism financing. However, it is necessary to stress that this area of law very significantly overlaps other areas of law, especially the criminal (penal) law and administrative law.

At the national level, the anti-money laundering (hereinafter “AML”) legal framework is currently set mainly by Act No. 253/2008 Coll., on selected measures against legitimisation of the proceeds of crime and financing of terrorism, as amended (hereinafter “AML Act”⁴). At the European level, the relevant legal instrument is the so-called 5th AML Direc-

* Professor JUDr. Marie Karfiková, CSc., Professor and the Head of the Department of Financial Law and Finances at the Faculty of Law, Charles University, Prague, Czech Republic

** JUDr. Michaela Hladká, Ph.D., Ph.D. candidate at the Faculty of Law, Charles University, Prague, Czech Republic, Deputy Head of Analytical Department of the Financial Analytical Office, Czech Republic

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² The English terminology uses the term “money laundering”, the Czech terminology uses quite often the term “legitimation of the proceeds of crime”, as indicated by the title of the Czech AML Act and also for example the title of the crime according to Section 216 of Act No. 40/2009 Coll., Criminal Code, as amended. The Czech translation of terms “money laundering” or “dirty money laundering” are used promiscue.

³ KARFIKOVÁ, M., et al. *Teorie finančního práva a finanční vědy*. Prague: Wolters Kluwer ČR, 2018, 356 p. Concerning the law against money laundering see p. 295 and following.

⁴ The abbreviation “AML” indicates the English term “anti-money laundering”, in other words the measures against legitimisation of the proceeds of crime.

tive.⁵ Within the AML legal framework, obliged (reporting) entities are a very important legal institute. The enumerative list of obliged entities is stipulated in Section 2 of the AML Act. This list includes undertaking entities that create a significant level of risk in relation to their misuse for money laundering or terrorism financing. The list of obliged entities went historically through an essential development. At the very beginning of the AML legal framework in the 1990s, only banks and other financial institutions were involved. Subsequently, it became necessary to include other sectors that participated in disposing of client's property or in obtaining important information on such property or its handling. It is possible to name the real estate sector, gambling sector, trade in virtual assets or works of art as examples.⁶

Legal and advisory professionals are a specific group of obliged entities. In the Czech legal framework, which is based on the framework of the European Union,⁷ these professionals are auditors, tax advisors and chartered accountants,⁸ court bailiffs,⁹ public notaries and lawyers.¹⁰ It is necessary to stress that in most cases these professionals are not obliged entities for all their activities, but only for activities specified in the AML Act, as described in detail below.

Involvement of legal and advisory professionals within the obliged entities under the AML Act¹¹ was a very controversial legislative step, which has been undertaken on the basis of European legislation.¹² This step historically was and still is subject to very intense criticism especially in relation to the professional obligation of confidentiality of these entities.¹³ The argument against this criticism is mainly the practical experience with involvement of these professionals into very serious and sophisticated money laundering schemes, as described in following parts of this article.

According to the AML legal framework, the obliged entities shall fulfil a wide range of duties, such as customer due diligence,¹⁴ suspicious transactions reporting,¹⁵ or suspension of customer's transaction.¹⁶ The legal and advisory professionals are obliged to fulfil

⁵ Directive (EU) 2015/849 of the European Parliament and of 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 of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, amended by Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018.

⁶ TVRDÝ, J., VAVRUŠKOVÁ, A. *Zákon o některých opatřeních proti legalizaci výnosů z trestné činnosti a financování terorismu*. 2nd ed. Prague: C. H. Beck, 2018, 581 p. Regarding the topic of obliged entities in general see p. 6 and following.

⁷ See Article 2(3)(a), (b) of the 5th AML Directive.

⁸ Section 2(1)(e) of the AML Act.

⁹ Section 2(1)(f) of the AML Act.

¹⁰ Section 2(1)(g) of the AML Act.

¹¹ In the Czech Republic, the legal and advisory professionals became obliged entities in the AML legal framework on the basis of Act No. 284/2004 Coll., that amended the former AML Act No. 61/1996 Coll.

¹² For more details concerning the relevant European legislation and its requirements (including international comparison) see XANTHAKI, H. *Lawyers Duties under the Draft Money Laundering Directive: Is Confidentiality a Thing of the Past? Journal of money laundering control*. 2001, Vol. 5, No. 2, pp. 103–114.

¹³ BAKEŠ, M. *Legalizace výnosů z trestné činnosti a advokátní mlčenlivost*. *Bulletin advokacie*. 1998, No. 3, pp. 18–22.

¹⁴ Section 7 and Section 9 of the AML Act, Article 10 and following of the 5th AML Directive.

¹⁵ Section 18 of the AML Act, Article 32 and following of the 5th AML Directive.

¹⁶ Section 20 of the AML Act, Article 32(7) of the 5th AML Directive.

these duties as well, however with a quite high number of correctives and modifications arising from their specific status as described below.

The legal framework could not be assessed as complex and effective without the existence of effective possibility to enforce the fulfillment of the duties imposed by law and the possibility of punishing the non-fulfillment of these duties. The Czech AML legal framework, reflecting the European law, contains special provisions concerning the supervisory processes, administrative offences and administrative sanctions as well.¹⁷

It would be useful to stop here and focus on the terminology concerning the supervisory processes in financial law. Despite the fact that the science of financial law elaborates this terminology into detail,¹⁸ the current legislation and practice related to financial law use this terminology promiscue and in some cases inaccurately. Even the AML Act names the Chapter II of the Part three, „Administrative supervision” although the AML supervision is specific and connected rather with the area of financial law. Also in the organizational chart of the Financial analytical office¹⁹ (in Czech “Finanční analytický úřad”, hereinafter “FAU”) there is a division called “Control division” dealing with the supervision of obliged entities.

On the other hand, in terms of the legal and advisory professions the AML legal framework effective until 31st December 2020 contained different legal regulation. The core of supervision and sanctioning of legal and advisory professionals was in the hands of professional chambers. The current amendment to the AML Act²⁰ (Act No. 257/2020 Coll.) intends to bring significant changes and tries to at least partly move the supervision of legal and advisory professionals into the hands of general AML supervisory authorities, which means into the hands of the FAU. The reasons for this proposal were mainly the transposition of respective provisions of the 5th AML Directive,²¹ experience gained from practice, results of the evaluation of compliance and effectiveness of AML measures in the Czech Republic conducted by the Moneyval of Council of Europe,²² and the assessment of disproportionality between the results of supervision and sanctioning of legal and advisory professionals and other obliged entities.²³

¹⁷ In the AML Act see the provisions concerning the supervision (Section 35 and following) and administrative offences (Section 43 and following). In the 5th AML Directive see the Article 45 and following.

¹⁸ KARFÍKOVÁ, M. et al. *Teorie finančního práva a finanční vědy*. Prague: Wolters Kluwer ČR, 2018, 356 p. Supervisory processes in financial law are described on the p. 91 and following.

¹⁹ Organizační struktura. In: *Finanční analytický úřad* [online]. [2021-03-24]. Available at: <<https://www.financnianalytickyyurad.cz/uredni-deska/organizacni-struktura.html>>.

²⁰ Chamber press No. 909/0, Senat press No. 327/0 – Vládní návrh zákona, kterým se mění zákon č. 253/2008 Sb., o některých opatřeních proti legalizaci výnosů z trestné činnosti a financování terorismu, ve znění pozdějších předpisů, a další související zákona, zákony související s přijetím zákona o evidenci skutečných majitelů a zákon č. 186/2016 Sb., o hazardních hrách, ve znění pozdějších předpisů. In: *Poslanecká sněmovna Parlamentu České republiky* [online]. [2021-03-24]. Available at: <<https://www.psp.cz/sqw/text/tiskt.sqw?O=8&CT=909&CT1=0#prilohy>>; (Act No. 257/2020 Coll.).

²¹ Especially Article 58(1) of the 5th AML Directive.

²² Czech Republic – Fifth Round Mutual Evaluation Report. In: *Council of Europe* [online]. [2021-03-24]. Available at: <https://www.coe.int/en/web/moneyval/jurisdictions/czech_republic>.

²³ For more details see p. 58 and following of the document Závěrečná zpráva z hodnocení dopadů regulace (RIA) k vládnímu návrhu zákona, kterým se mění zákon č. 253/2008 Sb., o některých opatřeních proti legalizaci výnosů z trestné činnosti a financování terorismu, ve znění pozdějších předpisů, a další související zákona, zákony související s přijetím zákona o evidenci skutečných majitelů a zákon č. 186/2016 Sb., o hazardních hrách, ve znění pozdějších předpisů. In: *ODok aplikace* [online]. [2021-03-24]. Available at: <<https://apps.odok.cz/veklep-detail?pid=KORNBDJKEVE2>>.

The aim of this article is to describe and assess the supervisory processes recently applied to legal and advisory professionals in the area of AML. Moreover, it is necessary to take into account the current amendment (Act No. 257/2020 Coll.) to the AML Act and evaluate its benefits. The article also reflects the relevant AML publications,²⁴ current AML practice, AML cases, statistical data gathered by the FAU, and comparison of legal frameworks in different jurisdictions. Unfortunately, it is not possible to rely on any relevant judicial cases issued by the courts in the Czech Republic concerning the described topic. Within the conclusions the authors offer *de lege ferenda* ideas and recommendations for a more effective legislation and practice.

2. DESCRIPTION AND SPECIFICATION OF LEGAL AND ADVISORY PROFESSIONALS INCLUDING THEIR AML RELEVANCE

As already stated, the category of legal and advisory professions includes lawyers, public notaries, tax advisors, auditors, chartered accountants, and court bailiffs. The regulation is different for each profession as regards the scope of imposed obligations, specific processes and exemptions from these obligations. It is possible to say that the regulation reflects the specific features of each of the above mentioned professions. Among all these features, the obligation of confidentiality is a significant feature both for the AML legal framework and for the sectoral legal frameworks concerning particular legal and advisory professionals.²⁵

The vulnerability of legal and advisory professionals is expressed and confirmed in expert opinions as well. The reasons of exposure to misuse by criminals involved in money laundering activities are three: respectability and an appearance of legitimacy; large scope of offered services; and possibility to operate in many jurisdictions.²⁶

The involvement of legal and advisory professionals into the AML framework should be considered a legitimate step regarding their vulnerability in relation to the misuse for the purposes of money laundering. This vulnerability or risk, which are significantly different for each profession, are described on the basis of practical examples and statistical data provided below.

2.1 Lawyers

Regarding the main features of lawyers' profession, it cannot be reasonably expected that the lawyers would be the obliged entities for all of their activities. Section 2(1)(g) of the AML Act puts a lawyer into the position of an obliged entity when providing safekeep-

²⁴ The publications concerning AML measures and especially the topic of obliged entities are very rare. One of the most significant is for example: GILMORE, W. C. *Dirty Money: The Evolution of Money Laundering Countermeasures*. 2nd edition. Strasbourg: Council of Europe Publishing, 1999, p. 341.

²⁵ For more details concerning AML and sectoral confidentiality see POUPĚ, O. Povinnost mlčenlivosti v AML oblasti. *Finanční, účetní a daňový bulletin*. 2020, Vol. 28, No. 3, pp. 8–11.

²⁶ A Lawyer's Guide to Detecting and Preventing Money Laundering. In: *Anti Money Laundering Forum* anti-moneylaundering.org [online]. [2021-03-24]. Available at: <<https://www.anti-moneylaundering.org>>. For more details concerning vulnerability of legal and advisory professionals, see pp. 24 and following.

ing of money, securities, or other client's assets, or when required by the client to represent them or to act on their behalf while providing services specified by law. These services mainly include the property and assets management.²⁷ In these respective cases, the lawyer is an obliged entity and shall fulfil the obligations imposed on obliged entities by the AML Act, especially the obligation of customer due diligence, suspicious transactions reporting, suspension of transactions, etc.

Although the activity of lawyers, the practice of advocacy, is regulated mainly by Act No. 85/1996 Coll., on advocacy, as amended, which stipulates a very strict obligation of confidentiality in Section 21, the above described conditions weaken this obligation of confidentiality for the purposes of general interest in detection of money laundering.²⁸

The provisions of Section 27 of the AML Act (Special provisions on lawyers and notaries) are very important and significant for practical application. This section says that provisions concerning customer due diligence (Section 9 of the AML Act), suspicious transactions reporting (Section 18 of the AML Act) and obligation to provide information (Section 24 of the AML Act) shall not apply to a lawyer in terms of information about a customer obtained from the customer or in any other way in the course of or in relation to providing legal consultations, verification of legal position of the customer, defence of the customer in criminal proceedings, representation of the customer in court proceedings, providing legal consultancy, etc.²⁹

Especially this provision causes extended problems when applied in practice. It cannot be expected that the disposing with the customer's property could be the content of a legal consultancy,³⁰ or of the defence of the customer in criminal proceedings.³¹ Despite this fact, this provision is quite often used by lawyers as the reason for non-provision of information related to the disposing of client's assets that occurred when acting on behalf of the client (see practical examples below).

Based on practical experience (see practical examples below), international experience and researches,³² it is obvious that lawyers are the most risky group within the scope of legal and advisory professionals. This group is quite often used or misused for legitimisation of proceeds of crime. The reason for this is the fact that lawyers are legal professionals with the widest scope of knowledge of national and foreign law, with deep knowledge and practical experience, with the widest possibilities of representing the clients before the courts and of course with the very strict obligation of confidentiality.

The role of the Czech Bar Association is indispensable in this aspect as the supportive but also supervisory mechanism for lawyers. According to Section 27(3) of the AML Act,

²⁷ These specified services include for example buying or selling real estate or business entity; establishing, managing or operating a company; providing services of collection, payments, transfers, deposits or withdrawals in wire or cash transactions; etc.

²⁸ See Section 21(6) of Act No. 85/1996 Coll., on advocacy, as amended.

²⁹ For more details see Section 27(1) of the AML Act.

³⁰ See Section 1(2) of Act No. 85/1996 Coll., on advocacy, as amended.

³¹ See Section 35 and following of Act No. 141/1961 Coll., Criminal Procedure Code, as amended.

³² For example, the report of Financial Action Task Force (FATF): Professional Money Laundering. In: *Financial Action Task Force* [online]. [2021-03-24]. Available at: <[https://www.fatf-gafi.org/publications/?hf=10&b=0&q=professional+money+lauding&s=desc\(fatf_releasedate\)](https://www.fatf-gafi.org/publications/?hf=10&b=0&q=professional+money+lauding&s=desc(fatf_releasedate))>.

a lawyer files suspicious transaction report to the Czech Bar Association that analyses this report in a formal way, assesses all the formal requirements, and refers it to the FAU no later than 7 calendar days from the detection of the suspicious transaction. In a similar way through the Czech Bar Association, the lawyer fulfils his obligation to provide information upon the request sent by the FAU. This FAU request shall be addressed also to the Czech Bar Association.³³

2.2 Notaries

The determination of activities of notaries, in relation to which they are considered obliged entities, is very similar to that of lawyers.

The activity of notaries is described mainly in Act No. 358/1992 Coll., on notaries and their activity (Notarial Procedure Code), as amended. This act imposes on notaries a very strict obligation of confidentiality that is weakened by the specific provisions of the AML Act.³⁴

The corrective limiting the fulfillment of AML duties stipulated in Section 27(1) of the AML Act is applied in a very similar way as in the case of lawyers. The fulfillment of the reporting obligation and obligation to inform is the same as in the case of lawyers with the difference that notaries fulfil their duties through the Notarial Chamber of the Czech Republic.

Based on practical experience, it is possible to declare that the level of risk of notaries to be misused for money laundering is quite low, however, it cannot be completely excluded.

2.3 Tax advisors

Pursuant to Section 2(1)(e) of the AML Act, tax advisors are obliged entities for all their activities regulated by Act No. 523/1992 Coll., on tax advisory and the Chamber of Tax Advisors of the Czech Republic, as amended.

According to Section 26(1) of the AML Act (the corrective limiting the wide scope of duties stipulated for tax advisors as obliged entities), the provisions concerning the reporting obligation (Section 18(1) of the AML Act) and obligation to inform (Section 24(1) of the AML Act) shall not apply to tax advisors in relation to information obtained from their customers or about customers in the course of analysing their legal position, during their representation in court proceedings and/or in relation to such proceedings. This corrective shall not be applied, should the tax advisor think that the customer asks for the legal advice for the purpose of legitimization of the proceeds of crime or financing of terrorism.

A tax advisor files the suspicious transaction report (Section 18(1) of the AML Act) to the Chamber of Tax Advisors of the Czech Republic that analyses this report in a formal way and refers it to the FAU no later than 7 calendar days after the detection of the suspicious transaction.

³³ See Section 27(4) of the AML Act.

³⁴ See Section 56 of Act No. 358/1992 Coll., on notaries and their activity (Notarial Procedure Code), as amended.

From the practical point of view, the sector of tax advisors could be assessed as relatively risky. This risk arises mainly from their frequent knowledge of tax frauds. Especially the carousel frauds targeting the value added tax evasion are considered highly serious crimes that are very frequently detected and investigated by the law enforcement authorities despite the fact that the reporting activity of tax advisors is very low. This disproportion could be connected with the preference of the business aspect rather than the interest in detection of tax criminality and the proceeds originating from this criminal activity.

2.4 Auditors

Regarding auditors, the provision of Section 2(1)(e) of the AML Act is relevant. According to this provision, the auditors are considered obliged entities, but only provided that they perform the auditing activity as undertaking.³⁵ The activity of auditors is regulated by Act No. 93/2009 Coll., on auditors and amendments to certain acts (Act on Auditors), as amended. The corrective in the framework of the AML Act concerning auditors is the same as for tax advisors (Section 26 of the AML Act). The suspicious transaction report is filed by an auditor to the Chamber of Auditors of the Czech Republic that processes this report in the same way as other professional chambers.

Apart from the Chamber of Auditors of the Czech Republic, it is also necessary to emphasize the role of another important authority, the Public Audit Oversight Board.³⁶ Although the current AML legislation does not mention this authority, the current draft amendment to the AML Act reflects the board as the appeal body in the disciplinary proceedings conducted by the Chamber of Auditors of the Czech Republic. Based on this provision, there will be exemptions from the obligation of confidentiality for this board.

As for the practical experience, the sector of auditors is not considered highly risky from the AML point of view. Within the practical analysis of the FAU there was no detection of any intended involvement of auditors into money laundering so far. However, it is necessary to point out that given the main features of auditing activities the involvement of auditors into money laundering could be latent.

2.5 Chartered Accountants

Based on the provision of Section 2(1)(e) of the AML Act, accountants are obliged entities for all their activities provided that they perform these activities as undertaking.³⁷ The corrective stipulated in Section 26(1) of the AML Act is also valid for the sector of accountants. This provision specifies the obligations (reporting obligation and obligation to inform) that this type of obliged entities does not have to fulfil under the same conditions as already described for auditors and tax advisors (see above).

³⁵ See Section 2(3) of the AML Act.

³⁶ See Sections 37 to 40e of Act No. 93/2009 Coll., on auditors and amendments to certain acts (Act on Auditors), as amended.

³⁷ See Section 2(3) of the AML Act.

The specific feature of the sector of accountants is the non-existence of a professional chamber with obligatory membership. The Union of Accountants,³⁸ which is a voluntary and independent special-purpose national organization, fulfils the role of such an umbrella body.

It means that accountants, in contrast to other legal and advisory professionals, file suspicious transaction reports (Section 18 of the AML Act) directly to the FAU and they are also under the direct supervision of the FAU.

According to some experts,³⁹ accountants (similarly to tax advisors and auditors) do not commonly participate in transactions as a business party directly, they receive information on transactions of their customers ex post, and therefore pursuant to Section 20 of the AML Act, the application of suspension of transaction or seizure of property of their customers are excluded. Despite this provision, the FAU has experienced a practical situation when the seizure of property was applied by the accountant as obliged entity in relation to the accounting and tax documentation of the customer. The accountant had this documentation at his disposal and regarding the suspicion of a serious tax crime he refused to return this documentation to his customer, applied the process according to Section 20 of the AML Act, and reported the suspicious transaction to the FAU according to Section 18 of the AML Act. It is possible to correctly argue that the documentation cannot be considered proceeds of crime. However, this documentation could be surely considered an instrument used for the criminal activity pursuant to Section 135a of Act No. 40/2009 Coll., Criminal Code, as amended.

2.6 Court bailiffs

Court bailiffs are obliged entities pursuant to Section 2(1)(f) of the AML Act when performing other activities of an executor under the Chapter VI of Act No. 120/2001 Coll., on court bailiffs and the execution activity (Execution Procedure Act) and on amendments to other acts, as amended (hereinafter “Execution Procedure Act”), as well as safekeeping of money, securities or other valuables. In practice, it is possible to detect especially the safekeeping of money or other valuables or auctions of property pursuant to Section 76(2) of the Execution Procedure Act.⁴⁰

The AML Act contains exemptions concerning the reporting and information obligation for court bailiffs as well. These exemptions are stipulated in the same way as for tax advisors or auditors (see above).

The suspicious transaction report is filed by a court bailiff to the Chamber of Bailiff of the Czech Republic that processes this report in the same way as the other professional chambers.

³⁸ Svaz účetních České republiky. In: *Svaz účetních České republiky* [online]. [2021-03-24]. Available at: <<http://www.svaz-ucetnich.cz>>.

³⁹ TVRDÝ, J., VAVRUŠKOVÁ, A. *Zákon o některých opatřeních proti legalizaci výnosů z trestné činnosti a financování terorismu*. 2nd ed. Prague: C. H. Beck, 2018, 581 p. For more details concerning specific types of obliged entities see p. 10 and following.

⁴⁰ In these cases, auctions of movable or immovable property upon the proposal of the owner or the person authorized to dispose of the given thing are meant (the so-called voluntary auctions).

Although the involvement or misuse of court bailiffs for money laundering has been detected very rarely until nowadays, it cannot be ignored that the sale of debtors' property in an auction (especially the real estate) could be a very attractive opportunity for perpetrators laundering proceeds of crime. In this context, *de lege ferenda* it would be very useful to involve also the executory activity into the scope of duties of the court bailiffs as obliged entities, and not only their other activities.

3. GENERAL DESCRIPTION OF AML SUPERVISORY PROCESSES

The AML supervision is generally described in the Chapter II (called “Administrative Supervision”) of the Third Part of the AML Act. In this Chapter there are enumeratively stipulated the authorities in charge of AML supervision. According to the legal framework effective until 31st December 2020, these authorities were the FAU, the Czech National Bank, the administrative authorities with powers to supervise compliance with legislation regulating gambling services, and the Czech Trade Inspection.

According to this previous legal framework, this Chapter of the AML Act did not apply to lawyers, notaries, auditors, court bailiffs, and tax advisors. In this respect, the supervision of the fulfillment of AML duties was left in the hands of the respective professional chambers. The respective professional chamber was obliged to perform the check of compliance with obligations imposed by the AML Act upon a written motion sent by the FAU and notify the FAU on results of this check in written form within a period specified by the FAU.

Moreover, the AML Act stipulated⁴¹ for the AML supervisory authorities the obligation to immediately refer the matter to the competent professional chamber in case of detection of an action taken by a lawyer, notary, auditor, court bailiff or tax advisor in the capacity of the obliged entity, which bore elements of an administrative offence presumed by the AML Act.⁴² These actions were then handled as disciplinary offences according to the relevant sectoral act.

Out of the whole scope of legal and advisory professionals, the general AML supervisory approach was applied only for the category of accountants who were directly supervised by the FAU.

The current amendment to the AML Act goes the other, very different way,⁴³ as described in detail below. This amendment very significantly involves the FAU into the AML supervisory processes over legal and advisory professionals. This step has been driven by an effort to put the legal and advisory professionals on the same level as other obliged entities in the area of administrative procedures and administrative punishments, especially as far as the amount of the possibly imposed fines is concerned.

⁴¹ See former Section 53 of the AML Act (effective until 31st December 2020).

⁴² These actions were referred to the respective professional chambers according to the relevant sectoral acts.

⁴³ Chamber press No 909/0, Senat press No. 327/0 – Vládní návrh zákona, kterým se mění zákon č. 253/2008 Sb., o některých opatřeních proti legalizaci vynosů z trestné činnosti a financování terorismu, ve znění pozdějších předpisů, a další související zákona, zákony související s přijetím zákona o evidenci skutečných majitelů a zákon č. 186/2016 Sb., o hazardních hrách, ve znění pozdějších předpisů. In: *Poslanecká sněmovna Parlamentu České republiky* [online]. [2021-03-24]. Available at: <<https://www.psp.cz/sqw/text/tiskt.sqw?O=8&CT=909&CT1=0#prilohy>>; (Act No. 257/2020 Coll.).

In the framework of the evaluation of the effectiveness of supervisory processes by the Moneyval of the Council of Europe, this effectivity was not assessed very positively.⁴⁴ The Czech Republic reached only the second lowest level, i.e. the level “moderate” with a lot of recommendations for improvement of the effectiveness of AML supervisory processes applied in practice.

Just for illustration, the authors offer the comparison of effectiveness of supervisory processes and sanction proceedings applied in practice by financial intelligence units (hereinafter “FIU”) of the Czech Republic (FAU)⁴⁵ and Malta.⁴⁶ See below the Table No. 1 concerning the number of performed AML supervisory controls and the amount of imposed fines in the given years.⁴⁷

Table No. 1:

FIU / Year	2017	2018	2019
FAU (CZ) – number of supervisory controls	48	33	27
FIAU (Malta) – number of supervisory controls	69	55	41
FAU (CZ) – amount of imposed fines	2.490.000 CZK	2.114.000 CZK	1.950.000 CZK
FIAU (Malta) – amount of imposed fines	61.145 EUR	996.180 EUR	3.932.801 EUR

⁴⁴ See p. 115 and following of the document Czech Republic – Fifth Round Mutual Evaluation Report. In: *Council of Europe* [online]. [2021-03-24]. Available at: <<https://www.coe.int/en/web/moneyval/jurisdictions/czech-republic>>.

⁴⁵ From the point of view of international and European law the FAU plays the role of an FIU, which means the authority responsible for AML measures and AML international cooperation. The FIUs of all countries are joined in the Egmont Group of Financial Intelligence Units, which primarily focuses on the issues connected with the international exchange of operational information.

⁴⁶ In Malta, the role of FIU is fulfilled by the authority FIAU (Financial Intelligence Analysis Unit). Although the FIUs all over the world are very different concerning their administration, extent, or powers, the FIU of Malta is very well comparable with the FAU since it is also the administrative FIU (as opposite to police FIU) operating within the structure of the Ministry of Finance, with the very similar number of employees (60-70), and with the AML supervisory powers.

⁴⁷ Sources: FIAU – Annual report 2019. In: *Financial Intelligence Analysis Unit* [online]. [2021-03-24]. Available at: <<https://fiaumalta.org/consultation-publications/#annual-reports>>. FAU – Výroční zpráva 2019. In: Finanční analytický úřad [online]. [2021-03-24]. Available at: <https://www.financnianalytickyyurad.cz/download/FileUploadComponent-526990861/1588148007_cs_29042020_vyrocní_zpráva_fau_2019.pdf>.

4. THE AML SUPERVISION OVER LEGAL AND ADVISORY PROFESSIONALS BEFORE AND AFTER THE AMENDMENT TO THE AML ACT, AND DE LEGE FERENDA

As already stated above, the system of AML supervision and sanctions relevant to legal and advisory professionals was significantly different from the system relevant to other obliged entities before the amendment to the AML Act effective since 1st January 2020. An exception in this regard were accountants, who are subject to the same system of supervision and sanctions as other obliged entities listed in the AML Act. This former state was in contradiction to Article 58(1) of the 5th AML Directive, which requires the member states to ensure that all obliged entities are subject to effective, reasonable and dissuasive sanctions.

The former Section 53 of the AML Act stipulated that actions taken by a lawyer, notary, auditor, court bailiff or tax advisor in the capacity of an obliged entity, which bore the elements of an offence according to the AML Act,⁴⁸ were decided upon according to another law. The AML supervisory authority had to refer the matter to the authority competent under such other law (to the competent professional chamber) immediately. Based on this provision, the liability of the specified legal and advisory professionals for the actions having characteristics of an administrative offence under the AML Act was discussed in the disciplinary proceedings. The sanctions that might have been imposed on obliged entities in the disciplinary proceedings were disproportionately lower than sanctions that might have been imposed on other obliged entities for commitment of an administrative offence according to the AML Act.

As already mentioned above, the current amendment to the AML Act brings a significantly different framework of AML supervision and sanctioning for legal and advisory professionals. In this respect, there are four main groups of proposed changes: extension of the scale of supervisory authorities, reform of supervisory processes, reform of sanctioning, and significant increase in sanctions.

According to the former legal framework, the competent professional chambers were not involved within the scale of AML supervisory authorities. This aspect has been changed on the basis of the current amendment to the AML Act, which lists the professional chambers among supervisory authorities.

The supervisory processes, i.e. the control of fulfillment of obligations stipulated in the AML Act in respect to the legal and advisory professionals, were in the exclusive competence of the professional chambers, of course with the exception of the sector of accountants with no professional chamber. The FAU was only empowered to file a written motion to the respective professional chamber to conduct the check of compliance with AML duties. The respective professional chamber had the duty to conduct such a check and inform the FAU on the results.

In this respect, the current amendment to the AML Act suggests significant changes as well. The core of this proposal is the subsidiary power of the FAU to perform the supervi-

⁴⁸ Sections 43 to 48 of the AML Act.

sory control of the compliance with AML duties of legal and advisory professionals in case of non-activity of the respective chamber. This provision safeguards against possible cases of resignation of the chamber to perform the check over its members. For these purposes, it is subsequently necessary to adjust the conditions for the supervisory checks performed by the FAU over the members of professional chambers taking into account the specific features of legal and advisory professionals (especially their obligation of confidentiality). Especially the physical on-site checks at the premises, where the professional activity is carried out, could be very sensitive and problematic. The amendment to the AML Act takes these specific problems into account and reflects the respective provisions of the Tax Procedure Act as inspiration.⁴⁹

Moreover, the amendment to the AML Act deals with the disproportional exemption of legal and advisory professionals from the scope of administrative proceedings and sanctioning, or more precisely with the exemption from the liability for commitment of administrative offences stipulated in the AML Act. Until 31st December 2020, this exemption was replaced by the disciplinary proceedings and sanctioning according to the relevant sectoral acts. The amendment to the AML Act aims to eliminate the current fragmentation of the particular acts – legal and advisory professionals shall be subject to a unified standard regime of administrative offence procedure, which would be conducted by the competent professional chamber or by the FAU. Precisely, the amendment gives the FAU the power to conduct administrative offence proceedings with members of professional chambers that were detected by the FAU if the competent chamber is not active.

As for sanctions imposed on legal and advisory professionals, there were large differences between maximum amounts of a possible sanction for an offence under the AML Act and for a disciplinary offence for legal and advisory professionals. At the same time, there were significant differences among particular sectors of legal and advisory professions. An example supporting this statement was the maximum fine of 10.000.000 CZK, which could have been imposed for an offence under the AML Act, while the Chamber of Tax Advisers of the Czech Republic was entitled to impose a sanction only in the maximum amount of 100.000 CZK on its member.⁵⁰ The above-mentioned aspects of the amendment to the AML Act target the unification of sanctions for legal and advisory professionals and other obliged entities. Moreover, the amendment to the AML Act envisages a significant increase in the maximum levels of sanctions in accordance with the requirements of the 5th AML Directive.⁵¹

The new amendment to the AML Act introduces many other new obligations for legal and advisory professions, e.g. the obligation to publish specific information, obligation to inform the FAU on the numbers of received suspicious transaction reports, elaboration of risk assessment, etc.

⁴⁹ See Section 255 of Act No. 280/2009 Coll., Tax Procedure Act, as amended.

⁵⁰ For more details see Explanatory Memorandum, p. 105, tab. No. 1, Chamber Press No 909/0 (see the reference above).

⁵¹ In contrast with the current maximum level of fines, which is 10.000.000 CZK, the draft amendment to the AML Act proposes fines up to 130.000.000 CZK for the most serious breaches of AML duties for some particular obliged entities (credit and financial institutions).

The above-described changes, i.e. the inclusion of legal and advisory professionals in the fulfillment of AML duties, need to be assessed as a very positive and useful progress within the AML legal framework. The above described changes were obviously subject to wide and critical discussion before consideration in the Parliament of the Czech Republic and will be subject to such discussion ex post during the practical application as well. However, this discussion is very much needed and should add value to the effective application of the principle of proportionality in the framework of searching the balance between the constitutionally guaranteed right to legal assistance and the professional confidentiality on one side and the general interest in detection of the proceeds originating from the serious crimes on the other side.

It would be very useful here to add at least some information concerning international comparison of AML supervisory processes, especially in relation to the legal and advisory professionals, in selected European countries.

In Malta, the scope of legal and advisory professionals and their AML duties are almost the same as in the Czech Republic, except of court bailiffs, that are excluded from the scope of obliged entities. The very significant aspect is that legal and advisory professionals fulfil their reporting obligation directly to the FIAU (FIU of Malta) and they are also under direct supervision of this authority. It is also necessary to stress that Malta applies risk based approach to AML supervision and assesses individually each obliged entity according to its risk indicators.⁵²

The AML system in Slovak Republic is very similar to the system of the Czech Republic. The FIU of the Slovak Republic is police unit and has supervisory powers. The scope, obligations and correctives concerning legal and advisory professionals as obliged entities are the same as in the Czech Republic. However, these obliged entities report suspicious transactions directly to the FIU and they are under direct supervision of this unit.⁵³

In Hungary, the AML supervisory system related to legal and advisory professionals bears some similarities as the Czech system as well. The Hungarian FIU is equipped with supervisory powers, but only in relation to very limited (residual) scope of obliged entities (e.g. real-estate agents or accountants). Concerning the other legal and advisory professionals, the significant role is fulfilled by respective chambers, including the exclusive role of supervisory authority.⁵⁴

On the basis of the above describe very short comparison of supervision in selected European countries, it is obvious that the systems bear different elements concerning the scope of supervisory authorities and their powers, the scope of duties of legal and advisory professionals, the roles of respective chambers, etc. All these differences influence the

⁵² Malta – Fifth Round Mutual Evaluation Report. In: *Council of Europe* [online]. [2021-03-24]. Available at: <<https://www.coe.int/en/web/moneyval/jurisdictions/malta>>. For information concerning supervision see p. 94 and following.

⁵³ Slovak Republic – Fifth Round Mutual Evaluation Report. In: *Council of Europe* [online]. [2021-03-24]. Available at: <https://www.coe.int/en/web/moneyval/jurisdictions/slovak_republic>. For information concerning supervision see p. 123 and following.

⁵⁴ Hungary – Fifth Round Mutual Evaluation Report. In: *Council of Europe* [online]. [2021-03-24]. Available at: <<https://www.coe.int/en/web/moneyval/jurisdictions/hungary>>. For information concerning supervision see p. 99 and following.

effectiveness of the AML supervisory systems. Therefore the higher harmonisation in relation to the legal and advisory professionals and their AML duties in the role of obliged entities would be required.

5. THE PROBLEMS DETECTED IN PRACTICE AND SUGGESTIONS FOR THEIR SOLUTION

This part of the article aims to describe the most frequent and the most typical problems that have been detected in the framework of practical application of AML measures in relation to legal and advisory professionals and to suggest possible solutions to these problems for the future discussion, also taking into account the current amendment to the AML Act.

The most serious problem is the low number of suspicious transaction reports filed by the legal and advisory professionals. The precise statistical data on this issue in relation to the total numbers of suspicious transaction reports in the given years are provided in the Table No. 2⁵⁵ below.

Table No. 2:

Obligated entity / Year	2017	2018	2019
Total number	3524	4028	3954
Lawyers	4	7	6
Public notaries	0	0	3
Tax advisors	1	4	3
Auditors	0	0	3
Chartered accountants	0	2	8
Court bailiffs	1	0	0

Another important problem is the level of quality of the submitted suspicious transaction reports from legal and advisory professionals. For example, these obliged entities quite often file suspicious transaction reports not in relation to their clients but in relation to the counterparties in the court trial where they represent their clients.

There are also many situations in practice when the members of the professional chamber file suspicious transaction report directly to the FAU and not through the respective chamber as stipulated in the AML Act. These suspicious transaction reports cannot be considered as correctly filed, but they could be considered as other motion

⁵⁵ Source: Internal information system of the FAU.

filed to the FAU.⁵⁶ The reason for this conduct is mainly the concern of the members of the professional chambers about information leakage. In this regard and also regarding the systems in other jurisdictions (see above), it seems necessary to raise the question of whether this process being presumed by the AML Act would bring a higher quantity and quality of the suspicious transaction reports filed by the legal and advisory professionals.

From the practical point of view, it is necessary to consider the custody (escrow) accounts (lawyers', notarial, or court bailiffs' safekeeping of money) quite risky. In these cases, there are two obliged entities involved simultaneously: the bank and the member of the professional chamber. Both of these obliged entities shall fulfil their AML duties, especially customer due diligence obligation (identification of the customer and obtaining information on the sources of money used in the transaction and on the purpose of the transaction). In practice, both obliged entities wrongfully rely on each other, which results in the absence of information on the origin of money used in the transaction.

Another problem that occurs in practice is the fairly common refusal of the legal and advisory professionals to fulfil the obligation to provide information concerning suspicious transactions upon the request of the FAU (Section 24(1) of the AML Act). This refusal is justified by exemptions stipulated in Sections 26 and 27 of the AML Act. Although in many cases the justification by using these exemptions might be reasonable, it is really doubtful whether the disposing of client's property (even for example the deposit of the bail in criminal proceedings or the payment of the court fee) could be subsumed under the exemptions.

Generally speaking, the involvement of legal and advisory professionals into money laundering activities could be observed on the scale starting from the intentional involvement with knowledge of the criminal background, through the willful blindness and ignorance of red flags, to unwitting participation.⁵⁷

6. CONCLUSIONS

It could be concluded that involvement of legal and advisory professionals into the scope of obliged entities and putting these professionals under the AML supervision is a very controversial issue. However, it is necessary to stress that regarding the information that these professionals have on their clients, regarding the transactions that they perform on behalf of their clients, and regarding their high level of knowledge and legal experience, it is quite legitimate to cover these professionals by the AML system.

It is possible to raise the question for the discussion, to what extent it is useful to apply the exemptions and correctives in relation to legal and advisory professionals when performing the AML obligations. Of course, confidentiality shall be exempted in cases that

⁵⁶ See Section 55(2) of the AML Act.

⁵⁷ A Lawyer's Guide to Detecting and Preventing Money Laundering. In: *Anti Money Laundering Forum* [online]. [2021-03-24]. Available at: <<https://www.anti-moneylaundering.org>>. For more details concerning involvement of legal and advisory professionals into money laundering activities, see p. 25 and following.

could be subsumed under the constitutionally guaranteed right to legal assistance. On the other hand, legal and advisory professionals should perform their AML duties and be involved in the AML regime in cases of any disposing of client's property.

Another issue is the question of AML supervision and sanctioning regime being applied to legal and advisory professionals. It is possible to state that the amendment to the AML Act, which applies the general AML system of supervision and sanctioning to these professionals, makes a step in the right direction. Otherwise, the system of AML supervision and sanctioning of legal and advisory professionals would be discriminatory in relation to other obliged entities.

It is possible to conclude that a wide expert discussion on this controversial topic could be expected in the near future.