

Acknowledgement of the decisive role of the CARPAs and of the incentives to continue the efforts undertaken



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(*The opinions expressed in this contribution are those of the author and do not necessarily reflect the position of the institution.)

In its mutual assessment report published in May 2022¹ the 'Financial Action Task Force ("FATF") ranks France at the forefront of countries effectively combating financial crime, concluding that it has of a *"framework robust, sophisticated and efficient to fight against money laundering and the financing of terrorism"* ("AML-FT").

With regard more particularly to the legal profession, the FATF notes its good understanding of the issues and its satisfactory knowledge of the AML-FT risks and obligations.

This positive observation comes as a reward for the efforts made for several years by the profession to make up for the delay it may have had in the eyes of the FATF at the time of the former assessment of France in 2011.

However, even though improvements could be observed, the report insists on the need for the legal profession to pursue its efforts (general conclusions, point h, page 5), and makes some recommendations, which, in FATF language, must be understood as requirements.

According to the assessors, *"lawyers may be involved in high risk activities, particularly with regard to the creation of complex corporate structures, to property transactions and to the creation*

of SCIs, the management of trusts and the handling of funds". They therefore consider the profession as being of *"great importance"*

(paragraph 95, page 38).

I. The recognition of the CARPAs, essential actors in the self - regulation of the profession

The importance of the role of the CARPAs in the AML-FT system of the profession was noted by the assessors. Having stated that lawyers are legally required to go through CARPAs when handling funds, the assessors note that *"subjecting the CARPAs to the AML-FT obligations since 2020 has enhanced the most important risk identification and mitigation measures for the profession"*.

The report states in fact that for lawyers, the major risks identified relate mainly to the handling of funds on behalf of their clients, and the taking of proportionate measures to mitigate the risks therefore relies mainly on the compulsory intervention of the CARPAs, as bodies for the control of financial flows related to the legal or judicial transactions in which they assist.

It has been noted that the CARPAs have developed since being subject to the AML-FT obligations in 2020, a satisfactory understanding of AML-FT risks by establishing a classification of the risks at their level.

¹ Accessible via the following link: <https://www.fatf-gafi.org/fr/publications/evaluationsmutuelles/documents/rem-france-2022.html?hf=10&b=0&s=desc>

This finding contributes strongly to the fact that the assessors were able to conclude that *"lawyers have satisfactory knowledge of the AML-FT risks and obligations and improvements have been observed at the time of the controls (paragraph 407, page 160). This constitutes a new element of primary importance and enshrines the CARPA system² as the spearhead of commitment of the legal profession in AML-CFT.*

"The challenge is thus to incite lawyers to require that the financial flows generated by the transactions they execute pass through their CARPA accounts as often as possible".

Without doubt it must be recalled here that pursuant to the AML - FT regulations, a lawyer has the same obligations of vigilance and of reporting suspicions, whether he takes responsibility or not for the movements of funds triggered for the execution of a transaction in which he assists. In fact, refraining from taking responsibility for the financial flows related to transactions in which he assists does not reduce his risk of manipulation for the purposes of money laundering. On the contrary, making personally the financial payment discharged in a deed that he has drafted represents for him the best way of ensuring its effectiveness and of its consistency with the transaction; this is the result of a proper application of the duty of vigilance.

Once the effectiveness of the CARPA system is recognized by the FATF, the challenge is therefore to encourage lawyers to require that the financial flows generated by the transactions that they execute pass through their CARPA accounts as often as possible.

The acknowledgement of the interest, relevance and effectiveness of the CARPA in AML-FT matters even leads the assessors to regret that the handling of funds carried out by a lawyer in the framework of a fiduciary activity, identified as a high risk activity despite the very limited nature of this activity for French lawyers (only one hundred cases handled by 26 law firms), is excluded from the scope of intervention of the

which the assessors were also able to see working *in situ*, on the premises of the CARPA of the Paris Bar, during their on-site visit in July 2021.

There are legal reasons for the fact that the law excludes the handling of funds carried out by lawyers in the framework of a trust from the scope of intervention of the CARPA, which are above all due to the fact that the system has been designed to exercise, in the framework of self-regulation of the profession, the control of the handling of funds made by lawyers on behalf of third parties (their clients), while that the mechanism of the trust makes a transfer of funds into the trustee's assets and that in doing so the transactions executed by the latter no longer constitute handling of funds on behalf of the third parties but for himself. The remark made by the assessors nevertheless invites us to make an analysis on this subject. Whatever the case, it is certain that if the CARPA system did not turn out to be the right approach, after a period of in- depth examination, to deal with the ML-FT risks inherent in the trust activity, it will be up to the profession to establish a specific ordinal control system that meets the requirements of Article L 561-36 of the Monetary and Financial Code and Article 17-13 of the Law of December 31, 1971, adapted to this activity.

As for the general tenor of the findings of the report concerning the legal profession, the fact should not be overlooked that the FATF considered that the application of proportionate measures concerning the activities of lawyers covered by the FATF standards, other than the handling of funds, is limited and deserves to be developed and deepened (paragraph 416, page 163), even if it finds generally that

"most of the of the legal and accounting professions have protocols in place for the implementation of due diligence measures (lawyers, accountants, notaries, auditors) which are generally in accordance with the risks identified within their activity, such as, for example, the risks associated with international customers and property transactions".

The search for and identification of the beneficial owners of the legal entities and other legal constructions are undoubtedly a major concern of the FATF, echoed by the work in progress within the European Union in the framework of the "Anti-Money Laundering" ("AML") package.

The assessors noted good practices in this regard implemented by lawyers, regarding customer due diligence measures including the collection of customer and beneficial owner information (paragraph 425, page 165), and regarded positively the fact that those subject to the measures said that they sought not

CARPAs. This confirms the positive assessment of the existing system,

² See. the site of presentation: <https://carpa-lbcft.org/le-dispositif-carpa>



only the beneficial owners holding 25 % of the voting rights in a company but also conduct further research to determine who has effective control (paragraph 424, page 165).

The measures taken by the CARPAs in this regard have here again been stressed, as well as their contribution with regard to the identification of politically exposed persons, with the lawyers having stated, in addition to their own due diligence, that they rely heavily on the vigilance exercised by the CARPAs on the handling of funds that may concern these persons.

A similar observation has been made about the implementation of targeted financial sanctions, with the assessors having noted that *"some self-regulated professions (notaries, lawyers) have made available to all professionals filtering systems in order to comply systematically with the obligations of vigilance"*, and that *"the vigilance of the CARPAs as regards the handling of funds of the lawyers, also allows additional filtering"* (paragraph 444, page 170).

In their conclusions regarding the "Immediate Result no 4" concerning the preventive measures, the assessors consider globally that the lawyers have taken a certain number of measures in accordance with the risks to which they are exposed, but that however, these are still recent and do not allow us to yet assess the full effectiveness thereof (page 177).

This positive assessment constitutes an encouragement to persevere to demonstrate fully, in the years to come, the full effectiveness of self-regulation thus assumed.

II. Recommendations to progress

Beyond the preventive measures, the assessors obviously examined the way in which the entities subject to this were controlled as regards the fulfilment of their AML-FT obligations.

The general finding of the report is that the accounting and legal self-regulated professions apply few sanctions and favour an educational approach. The assessors noted that the application of pecuniary sanctions is non-existent, in favour of disciplinary sanctions that are usually applied for the most serious breaches (page 180, point m).

The review focused primarily on access to the profession. Although the existence of a fairly thorough control was noted on this subject, the report nevertheless seems to regret, with regard to lawyers, that the check on the good reputation of the actual non qualified beneficiaries does not apply to the new forms of law firms (SEL, SELAS, SARL), where it is only required that a majority share be held by qualified persons (criteria 28.4,

point b, page 310). This point is primarily the responsibility of the legislator, but must necessarily challenge the representative bodies of the legal profession at the time of the considerable opening-up of the capital of law firms to investors outside of the profession who may not be qualified and not subject to the AML-FT obligations.

The measures relating to the prevention and repression of the illegal exercise of the profession also constitute a point of particular interest for the FATF, which thus states that *"some accounting and legal professionals have established controls to detect the illegal exercise of the profession going beyond the awareness campaigns"*, and more particularly, for lawyers, that *"some Bars have taken local initiatives to fight against illegal practices, however the lack of centralized data prevents having an overview of the illegal exercise of the profession"* (paragraph 487, page 189). It is surprising homework thus the FATF considers that the fight against the illegal practice of the profession is above all a matter for the supervisory bodies of the profession, rather than of the public authorities, and of course of the judicial authority, on which the regulations for exercise of the legal profession and the guarantee of its respect depend.

As for the verification of ongoing understanding of ML-FT's risks, the assessors noted that the sector risk analysis ("SRA") of the legal profession was satisfactory and presented sufficient granularity, which is not according to them the case of the supervisory authorities of other designated non-financial businesses and professions ("DNFBPs").

The report nevertheless specifies globally that *"the recent taking into account of the risks in the preparation of control strategies does not make it possible to fully assess the impact of the activity of the supervisory authorities on the compliance of the DNFBPs. However, the supervisory authorities the awareness of the DNFBPs as regards the AML-FT regulations with however different rhythms of development depending on the categories of DNFBPs. This awareness generally entails a constant increase in the number of declarations of suspicion and a decrease in some cases of breaches found during the controls"* (paragraph 541, page 204).

However, we will see that when it comes to lawyers, the question of the declarations of suspicion is the subject of a specific comment.

Let us remember again that the assessors welcomed the implementation by the supervisory authorities of awareness-raising actions, the sharing of the SRA, which constitutes in some way a keystone of the AML-CFT policy of the profession, the organization of training to continuously promote

a better comprehension of the AML-FT regulations, and the provision for lawyers of online tools to facilitate the performance of the obligations. Cartography and classification tools prepared by the National Bar Association and proposed free of charge to lawyers have turned out, in this regard, to be quite relevant and appropriate.

Lastly, we should welcome the fact that the report does not call into question the effectiveness of the self-regulation of the profession granted to the Bar Associations (with possible assistance from the National Bar Association (Conseil National des Barreaux)), designated as responsible for monitoring and compliance with AML-CFT obligations by lawyers, in accordance with what recommendation 28 of the FATF allows.

The assessors could have noted that the lawyers' profession indeed has specific AML-FT controls, based on the risks. They have also noted that since their being subject in February 2020, the CARPAs themselves were subject to a control concerning AML-FT by the Control Commission of the CARPAs, with each CARPA being controlled as a minimum every five years.

The assessors complain nevertheless that *"for notaries and lawyers, the absence of statistical feedback to the central level does not allow however the full observation of the impact of control activities"* (paragraph 541, page 204). The profession will therefore have to learn to document its actions and strive to report in a recurring manner, it being hereby recalled that since February 12, 2020, the Bar Association have the obligation to publish an activity report annually dedicated to AML-CFT (Article L. 561-36, V of the Monetary and Financial Code).

"The low number of reports by French lawyers can above all be explained by the dissuasive character for criminals of the CARPA system and the ethics of the profession".

Lastly, a recommendation made by the report balances the positive assessment of the commitment of the legal profession to AML-CFT in accordance with FATF standards, by making a reservation to which the other self-regulated accounting and legal professions are not subject.

In fact, the report noted that *"to lawyers, the controllers are of peers from the same Bar, which could affect the impartiality of the process and not represent a good practice"* (paragraph 518).

Accordingly, the following recommendation is made: *"To ensure that the lawyers take specific measures to guarantee the independence of the controllers"*. (Page 182).

The ethical rules that also apply to AML-CFT controls, particularly with regard to the prevention of conflicts of interest, thus do not seem to have convinced the FATF assessors that they were sufficient to guarantee this independence.

This point constitutes for the coming months a major subject of reflection for the legal profession, which must also be put into perspective with that of the supervision of self-regulatory bodies that the proposal of European Directive 2021/0250 seems to establish, relating to the mechanisms to be put in place by the Member States to prevent the use of the financial system for purposes of money laundering or the financing of terrorism, currently under discussion.

Lastly, the profession does not escape, on the occasion of this 2022, assessment, from a recurring criticism of the FATF regarding declarations of suspicion.

In the summary which begins the report, regarding the overall level of effectiveness and technical compliance, the FATF generally considers that DNFBPs still submit too few suspicious transaction reports ("STR"s) (paragraph 30, page 11), and concerning especially lawyers, that they *"are the only self-regulated profession that virtually does not declare with only 16 STRs in 2020, the majority of which were made by the CARPAs, because of their recently being subjected thereto"* (paragraph 458, page 173).

The AML-CFT world, with its essentially financial culture, struggles to understand that the number of suspicious transaction reports is not the unit of measurement of lawyers' involvement in AML-CFT, and that the small number of reports by French lawyers can above all be explained by the dissuasive nature for criminals of the CARPA system and the extremely demanding ethics of the profession concerning the duty of prudence, which also prohibits them from carrying out certain activities, particularly financial ones.

But undoubtedly the profession can prove this reality more clearly by pursuing the strengthening of its control systems, as the FATF report requests it to do.