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Designing Supervision under the Preventive Anti-Money Laundering Policy in the European Union

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1. Introduction

Originally based on concerns with regard to organised drug crime, the worldwide fight against money laundering has today become multi-faceted.[1] Over the past twenty years, a twin-track approach against money laundering has evolved.[2] More and more players have become involved in the fight against money laundering and terrorist financing which makes it a highly developing policy field. The European Union is one of the key players in regulating anti-money laundering efforts. The EU first became involved in the fight against money laundering in 1991 when it drafted its first directive.[3] The core framework currently consists of the Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (hereafter: Third Directive),[4] the Council Decision concerning arrangements for cooperation between financial intelligence units of the EU Member States, as well as the Wire Transfer and the Cash Control Regulations.[5] The Third Directive regulates the preventive efforts in combating money laundering and terrorist financing in the European Union. It harmonises,

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1 See W.C. Gilmore, *Dirty Money: the evolution of international measures to counter money laundering and the financing of terrorism*, 2011; V. Mitsilegas & W.C. Gilmore, 'The EU legislative framework against money laundering and terrorist finance: A critical analysis in the light of evolving global standards', 2007 *International and Comparative Law Quarterly* 56, no. 1, pp. 119-140.

2 G. Stessens, *Money laundering: a new international law enforcement model*, 2000, p. 82, pp. 108-112.

3 Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ L 166, 28.6.1991, pp. 77-82.

4 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L 309, 25.11.2005, pp. 15-36. The directive is completed by Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of 'politically exposed person' and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis, OJ L 214, 4.8.2006, pp. 29-34.

5 Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information, OJ L 271, 24.10.2000, pp. 4-6; Regulation (EC) 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfers of funds, OJ L 345, 8.12.2006, pp. 1-9; Regulation (EC) 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community, OJ L 309, 25.11.2005, pp. 9–12.

to a large extent, the substantive norms under the preventive policy.[6] This is different for the procedural norms. With respect to supervision, the Third Directive only requires Member States to ensure that obliged institutions and professionals are subject to adequate regulation and supervision. Member States must provide the designated supervisors with some minimum powers, such as compelling the production of any information that is relevant to monitoring compliance and the possibility of imposing 'effective, proportionate and dissuasive' sanctions for a failure to comply.[7] This means that, unlike other contributions in this special issue of the *Utrecht Law Review*, supervision in this policy field is strongly regulated at the national level.[8]

The limited influence on procedural matters in the preventive anti-money laundering policy is not surprising. The traditional position is that European Union law is implemented, applied and enforced within the framework of the national laws of the Member States, which means that national rules of procedure apply. The power of Member States to determine the competent (supervisory) authorities and the procedural norms is referred to as the principle of national procedural autonomy.[9] It may have the effect of causing differences between the Member States, because their procedures concerning the application and enforcement of European substantive norms are different.[10] These, in turn, can create difficulties in supervision and sanctioning in cross-border situations where businesses operate in more than one Member State.[11] This is why in various policy fields the national procedural autonomy has become more and more limited and a trend towards the Europeanisation of enforcement can be observed.[12]

> In the near future the preventive anti-money laundering regime will be revised. On the 11th of March 2014, the European Parliament adopted the first reading of the proposal for a Fourth Directive.[13] The proposal, as amended by the European Parliament, contains a considerable number of changes in relation to supervision and sanctioning, in particular with respect to the strengthening of the administrative sanctioning regimes in the Member States. It contains a range of sanctions which Member States must at least make available for breaches of preventive obligations such as customer due diligence, record keeping, reporting and internal controls.[14] The introduction of a minimum set of administrative sanctions means a step towards more harmonisation of the sanctioning regime in the preventive anti-money laundering policy.

6 Substantive norms are norms that contain the obligations imposed on obliged institutions and professionals, such as obligations on customer due diligence, record keeping, reporting and internal controls.

7 Arts. 36, 37 and 39 Third Directive.

8 Compare: M. Scholten & A. Ottow, 'Institutional Design of Enforcement in the EU: the Case of Financial Markets', 2014 *Utrecht Law Review* 10, no. 5, pp. 80-91; L. Wissink et al., 'Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection', 2014 *Utrecht Law Review* 10, no. 5, pp. 92-115; M. Luchtman & J. Vervaele, 'European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)', 2014 *Utrecht Law Review* 10, no. 5, pp. 132-150.

9 J.H. Jans et al., *Europeanisation of Public Law*, 2008, pp. 40-42; A.T. Ottow, 'The different levels of protection of national supervisors' independence in the European landscape', in S. Comtois & K.J. de Graaf (eds.), *On Judicial and Quasi-Judicial Independence*, 2013, pp. 139-155 at 139-140.

10 This principle is conditioned by the principle of equivalence that requires that rules that govern a dispute with an EU law dimension may not be less favourable than those governing similar domestic disputes, and by the principle of effectiveness. This latter principle implies that the exercise of rights conferred by the Union legal order may not be rendered virtually impossible or excessively difficult by rules of national procedural law: ECJ, Case 33/76, *Rewe* [1976] ECR-1989; ECJ, Case 45/76, *Comet* [1976] ECR-2043 and the subsequent case law of the European Court of Justice.

11 As exemplified in the *Jyske Bank* judgment of the European Court of Justice: Case C-212/11, *Jyske Bank Gibraltar Ltd v Administración del Estado*, [2013] ECR I-0000. See also: Commission Staff Working Paper on Anti-money laundering supervision of and reporting by payment institutions in various cross-border situations, SEC(2011) 1178.

12 This means that either EU legislation becomes more stringent with regard to national norms concerning supervision and sanctioning, so that supervision is transferred to the European level – as is for example the case in the field of competition law and more recently in the field of financial law – or that EU legislation facilitates transnational cooperation. See: P.C. Adriaanse et al., *Implementatie van EU-handhavingsvoorschriften*, WODC Report, 2008, pp. 52-65; A.T. Ottow, 'The New European Supervisory Architecture of the Financial Markets', in M. Everson et al. (eds.), *European Agencies in Between Institutions and Member States*, 2014, pp. 123-143; E. Ferran & V. Babis, 'The European Single Supervisory Mechanism', University of Cambridge Faculty of Law Legal Study Research Papers 10/2013.

13 *Parliament toughens up anti-money laundering rules*, EP Press release Ref.: 20140307IPR38110, available at: <http://www.europarl.europa.eu/news/en/news-room/content/20140307IPR38110/html/Parliament-toughens-up-anti-money-laundering-rules> (last visited on 21 August 2014).

14 See Section IV of the proposal on the Fourth EU Directive: Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, COM(2013) 45 final.

> For the institutional design of anti-money laundering supervision, it contains one interesting proposal as well. Article 45(9) extends the possibility for the exercise of anti-money laundering supervision by self-regulatory bodies (i.e. professional associations) to the profession of estate agents.

Due to the freedom that EU Member States have had in designing their own supervisory architectures under the Third Directive and its predecessors, their preventive policies diverge considerably from an institutional perspective. None of the Member States regulates supervision in exactly the same manner as these systems are fashioned through a process influenced by factors such as politics, culture, legal tradition, economy and finances. A patchwork of anti-money laundering and combating terrorist financing (AML/CTF) supervisory architectures exists in the European Union.[15] It is therefore important to gain more insight into these different supervisory architectures.

This contribution presents four models of anti-money laundering supervision within the European Union. It is based on a modelling exercise that I designed and carried out within the ECOLEF study.[16] The ECOLEF study is an EU-funded project that ran from 2009-2012 and was undertaken by researchers from the School of Economics and School of Law of Utrecht University and some other partners. The homogenous team of researchers, including myself, analysed the AML/CTF policies of the at that time 27 EU Member States by measuring the money laundering and terrorist financing threats for the Member States and evaluating their policy responses from an economic and legal perspective. Within the preventive policy, three aspects were researched: the implementation of the Third Directive, the level of harmonisation with regard to the substantive norms and the way in which the Member States dealt with the matter of supervision and sanctioning.[17]

The objective of the modelling has been to devise a systematic approach to the different AML/CTF supervisory architectures, and to show in an abstract fashion the main similarities and differences throughout the European Union. This helps to illuminate differences in the supervisory architectures for those stakeholders working in this policy field and contributes to a dialogue on the key matters of the prevention of money laundering and terrorist financing. It should be pointed out that this contribution is mostly of a descriptive nature, although the strengths and weaknesses presented may give a first indication of the effectiveness of the models at an abstract level. In my PhD research (forthcoming), I analyse how these four models are implemented and applied at the national level and in which Member States included in my research anti-money laundering supervision is the most effective. It is anticipated that this allows one to say something about the effectiveness of the models as well and to demonstrate their authority.

This contribution is set up as follows. Section 2 shows how the models are built up and presents the models that can be identified on that basis. Section 3 shows which Member States apply which models. Section 4 identifies and discusses the potential strengths and weaknesses of the models. These are primarily based on interviews and discussions with representatives that took place at various regional workshops in the context of the ECOLEF study. Where possible, other data are used as a means of illustration. Finally, Section 5 ends with some concluding remarks.

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15 M. van den Broek, 'The EU's preventive AML/CFT policy: asymmetrical harmonisation', 2010 *Journal of Money Laundering Control* 14, no. 2, pp. 170-182. The notion 'supervisory architecture' used in this chapter refers to the legal norms that regulate the supervision of obliged institutions and the sanctioning in case of non-compliance (also 'enforcement').

16 Project ECOLEF: The Economic and Legal Effectiveness of Anti-Money Laundering and Combating Terrorist Financing Policy, JLS/2009/ISEC/AG/087, 2013; Van den Broek 2014, supra note *, pp. 62-86.

17 See for the results with regard to the implementation of the Third Directive, and the harmonisation of the substantive norms and the legal effectiveness thereof: B. Unger & M. van den Broek, 'Implementing international conventions and the Third EU Directive', in B. Unger et al., *The Economic and Legal Effectiveness of the European Union's Anti-Money Laundering Policy*, 2014, pp. 46-61; M. van den Broek, 'Harmonization of substantive norms in preventive AML policy', in B. Unger et al., *The Economic and Legal Effectiveness of the European Union's Anti-Money Laundering Policy*, 2014, pp. 20-45 (Van den Broek 2014a).

2. Models of AML/CTF supervisory architectures

The starting point for the building of the models has been the formal legislative texts of the EU Member States in the field of the prevention of money laundering and terrorist financing.[18] Drawing inspiration from financial law & regulation literature, I used two key elements for the modelling in the ECOLEF study.[19] The first element concerns the level of concentration of AML/CTF supervision in a particular Member State. For this, the total number of supervisors involved in the supervision of the preventive anti-money laundering policy is relevant. This number is related to the final responsibility for this supervision, which means that this element concerns the question of whether responsibility for the AML/CTF supervision is given to one supervisor or is shared among the total number of supervisors. The second element concerns the nature of the supervisors. The question is whether supervision is performed by external supervisors or by internal supervisors, viewed from the perspective of obliged institutions and professionals. External supervisors can be defined as those authorities that perform anti-money laundering supervision but which have no direct, professional relationship with their supervisees. Often these are public administrative or Government authorities. Internal supervisors, on the other hand, are professional associations that have a strong professional relationship with the members that they oversee. This element is of particular relevance to AML/CTF supervision in relation to the many legal and fiscal service providers that fall within the ambit of the preventive AML/CTF policy, like lawyers, notaries, and accountants.

Based on these elements the ECOLEF study was able to identify four models of AML/CTF supervisory architectures: the FIU model, the external model, the internal model and the hybrid model.[20] The models are presented and described in the following subsections.

2.1. The FIU model

The first supervisory model is the FIU model. It has as its main characteristic that the Financial Intelligence Unit (FIU) is the national authority with ultimate responsibility for the supervision. In principle FIUs are (part of) national authorities that are responsible for receiving, analysing and disseminating financial intelligence submitted through suspicion reports by obliged institutions or persons. The institutional embedding of FIUs differs per country.[21] Final supervisory responsibility for verifying compliance with the preventive anti-money laundering obligations is here centralised with one supervisor, namely the FIU. Because of the original functions of FIUs, they do not have direct, professional relationships with any of the obliged institutions or professionals. FIUs are thus external supervisors. Where an FIU has final responsibility for verifying compliance with AML/CTF obligations, however, this does not necessarily mean that no other authorities are involved at all. In practice other supervisors may be involved, based on legislation or secondary regulations, or based on agreements concluded between FIUs and other authorities. Decisive, however, is the fact that the responsibility for the proper carrying out of the supervision by such other authorities in respect of the preventive anti-money laundering policy remains with the FIU.

2.2. The external model

The second model is the external model. The term 'external' is used to indicate that external supervisors, which have no direct, professional relationship with the institutions and professionals they supervise,

18 Legislative changes that have taken place after August 2012 have not been included in the modelling.

19 Cf. S. Lumpkin, *Supervision of Financial services in the OECD Area*, OECD Working paper, 2002; C.A.E. Goodhart et al., *Financial Regulation: Why, how and where now?*, 1998; E. Wymeersch, 'The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors', 2007 *European Business Organization Law Review* 8, no. 2, pp. 237-306; Group of Thirty (G30), *The structure of financial supervision: Approaches and challenges in a global marketplace*, October 2008.

20 The names of the models are indicative only and the models as such are wider in content. Therefore, one needs to read the description of the models to gain a comprehensive understanding of the models.

21 Generally four models of FIUs can be distinguished: the administrative FIU, the law enforcement FIU, the judicial FIU and hybrid FIU: Egmont, *Information Paper on Financial Intelligence Units and the Egmont Group*, 2004; IMF, *Financial Intelligence Units: An Overview*, 2004; J.F. Thony, 'Processing Financial Information in Money Laundering Matters, The Financial Intelligence Units', 1996 *European Journal of Crime, Criminal Law and Criminal Justice,* pp. 257-282.

play an essential role in this model. Under this model final responsibility for supervision is shared among a number of external supervisors. The anti-money laundering legislation, or regulations drafted pursuant to this legislation, appoint the supervisory authorities in a Member State. The main characteristic of this model is that generally existing supervisory structures are used and that authorities designated for AML/CTF supervision have usually already had some supervisory tasks, possibly, but not necessarily, in this policy. This general outline of the model does not disregard the fact that in practice supervision or the sanctioning of legal or fiscal service providers can also be (partially) performed by professional associations. This is either based on legislation or supervisory agreements between the external and internal supervisors. These agreements concern the situation where professional associations take over supervisory and/or sanctioning tasks from the external supervisor, and perform anti-money laundering supervision or impose sanctions *on behalf of* the external supervisor or do so on a *complementary* basis. In that case external supervisors can mostly perform some kind of oversight supervision on the internal supervisors, but they still have the right to perform supervision themselves.

2.3. The internal model

The third model is the internal model. Apart from the supervision of financial and credit institutions and casinos, AML/CTF supervision is mainly performed by professional associations. The guiding principle of this model is that where supervision can be performed by internal supervisors, these will be the designated anti-money laundering supervisors. This principle is presumably prompted by the national legislators' belief that professional associations are better able to perform anti-money laundering supervision of their members than State or Government authorities. Only where these associations have no jurisdiction, for example over unregistered professionals or dealers in goods, may other (external) authorities have supervisory competences. A characteristic of this model is that there are comparatively many supervisors, because each profession has its own professional body. Sometimes this number is even higher due to specialisations within the profession or because of territorial competences. Under this model, all external and internal supervisors share final responsibility for AML/CTF supervision. In practice, the foregoing means that it will never be the case that an AML/CTF supervisory architecture is solely composed of internal supervisors. Decisive for this model, however, is the *extent* of the presence of internal supervisors in a particular architecture. This is expressed either in scope, for the range of professionals, or in the factual number of internal supervisors as a whole.

Professional associations have close links to the professionals, because the professionals are members thereof. In general terms, professional associations have as their main objectives to further a particular profession as a whole, to protect individual professionals, as well as to protect the public interest. Tension exists in the relationship between professions and society, which has been called the 'society-profession nexus': the professions' pursuit of autonomy versus society's demand for accountability.[22] Professional ethical norms play an important role in reconciling the three objectives and are often embodied in the professions' codes of ethics. Where professional associations perform anti-money laundering supervision, the AML/CTF obligations for the professionals are often (implicitly) incorporated in the professional norms, or these obligations are at least referred to in these professions' codes. Likewise, anti-money laundering supervision is mostly part of broader supervision programmes that concern the quality of the profession and the integrity of the professional.

2.4. The hybrid model

The hybrid model combines elements of the three models mentioned before. The exact mixture differs per country and can have various gradations. Along the line of gradations, two extremes can be identified.[23] The least hybrid variant concerns a combination of both internal and external supervisors. In relation to the internal model, the difference is the extent to which internal supervisors are involved in the AML/CTF supervision of designated non-financial businesses and professions. Under the hybrid model there is generally only one professional association involved in anti-money laundering supervision,

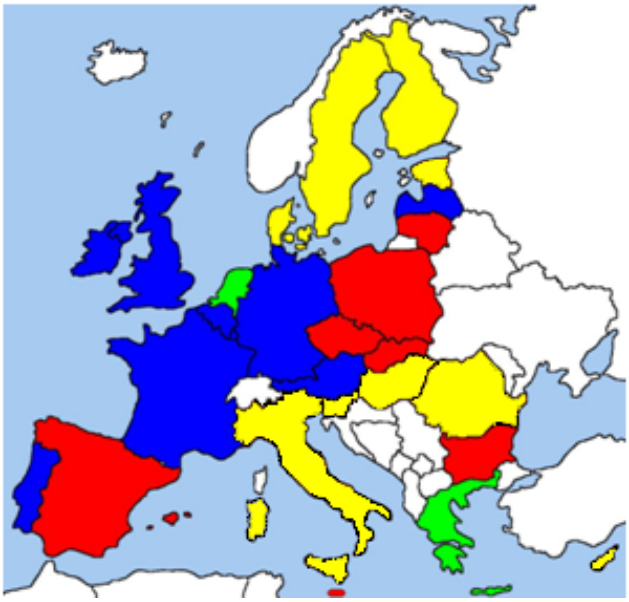
22 M.S. Frankel, 'Professional Codes: Why, How and with What Impact?', 1989 *Journal of Business Ethics* 8, pp. 109-115 at 109-110.
23 Of course, this does not do away with the fact that in the future other forms of the hybrid model may appear.

although many legal and fiscal service providers are members of professional associations. In Member States that apply this model, the professional associations which are competent in performing this type of supervision are the bar associations with respect to lawyers. Other professions are supervised by external supervisors. Final responsibility is shared among all the supervisors involved. The most hybrid variant concerns a mixture of the three models mentioned before. Responsibility for anti-money laundering supervision is shared between external and internal supervisors, and the FIU. Characteristic of this variant is the position of the FIU. It either serves as a default supervisor for those professions or businesses that traditionally have no or a very weak supervisor, or it performs anti-money laundering supervision on the entire range of obliged institutions and professions but with limitations to the scope of its supervisory activities. In the latter case, the FIU supervises compliance with one particular preventive obligation only, for example the reporting obligation. The obliged institutions and professionals must also deal with supervisors that verify compliance with the other AML/CTF obligations.

3. Categorisation of EU Member States

As explained, the legislation of the EU Member States in the field of the prevention of money laundering and terrorist financing is used to categorise the Member States. The Member States that can be categorised in the FIU model are: Bulgaria, the Czech Republic, Lithuania, Malta, Poland, Slovakia and Spain. Greece and the Netherlands are countries that belong to the external model. The Member States that can be brought under the internal model are: Austria, Belgium, France, Germany, Ireland, Latvia, Luxembourg, Portugal and the United Kingdom. Finally, the hybrid model applies in Denmark, Finland and Sweden (external/internal), as well as Cyprus, Estonia, Hungary, Italy, Romania, and Slovenia (external/internal/FIU). Brought together in a figure, the formal supervisory architectures of the EU Member States look as follows.[24] The red colour represents the FIU model, the green colour represents the external model, the blue colour represents the internal model and the hybrid model is shown in yellow.

Figure 1 AML/CTF Supervisory Architectures in the European Union



Legend: Red – FIU model. Green – External model. Blue – Internal model. Yellow – Hybrid model.

This figure demonstrates the variety which is present in the supervisory architectures in the European Union. Considering that all Member States that apply the hybrid model include FIUs in their supervisory architecture, with the exception of the three Scandinavian EU Member States, one can observe that

24 Cf. Van den Broek 2014, supra note *, p. 69.

generally all the Eastern and Southern EU Member States include the FIU in their supervisory architectures, either as the authority that is ultimately responsible for anti-money laundering supervision or as a default supervisor under the hybrid model. Exceptions to this observation are Latvia, Portugal (both internal model) and Greece (external model). By contrast, Northern and Western EU Member States are inclined to use existing institutions as anti-money laundering supervisors, either public administrative or Government authorities alone or in combination with professional associations.

The ECOLEF study discussed three reasons for the involvement of FIUs in the supervisory architectures.[25] A first explanation is that the FIU became involved in the supervision of those obliged institutions and professions that did not have any existing supervisors. This is often the case for unregulated professions. A second explanation concerns the fact that in some Member States there is a low level of trust in the existing supervisors or professional associations. Therefore, these were not considered suitable by the legislator to perform AML/CTF supervision. A third explanation is the fact that the FIU, being the central authority in the fight against money laundering and terrorist financing, is considered to be the most knowledgeable when it comes to the preventive anti-money laundering system and is therefore better able to verify non-compliance with the obligations than external (sectorial) supervisors or professional associations. This was a decisive factor in some Member States in providing the FIU with final responsibility for anti-money laundering supervision or for designing a joint supervisory system with external supervisors – that can also make use of information obtained from sectorial supervision. Both the first and the second explanation only apply to the involvement of the FIU under the hybrid model. The third explanation applies to both the FIU and the hybrid model.

4. Strengths and weaknesses of the AML/CTF supervisory models

This section attempts to give a more in-depth insight into the models by presenting the (potential) strengths and weaknesses of the models. They provide a first indication of the effectiveness of the models.[26]

4.1. Strengths and weaknesses of the FIU model

As explained, the FIU has final responsibility for anti-money laundering supervision in the FIU model. It is competent to perform the anti-money laundering supervision of all obliged institutions and professions, but it may allow on the basis of legislation or supervisory agreements – also called covenants or memoranda of understanding – that supervision is performed by other authorities (as well).

4.1.1. Strengths

Focus

One of the strengths identified in the ECOLEF study is that when the FIU is the single authority with final responsibility for AML/CTF supervision there is a clear focus on money laundering and terrorist financing matters. As FIUs are generally considered to exercise their tasks at the heart of the AML/CTF policy, these authorities possess a great deal of knowledge on specific money laundering and terrorist financing trends, typologies and risks. In this way the verification of compliance with the preventive obligations receives full attention throughout the supervisory process. This can be different where, for example, financial regulators are competent to perform AML/CTF supervision alongside their other supervisory tasks. In that case anti-money laundering supervision is for a large part included in the general prudential or conduct-of-business supervision programmes. Professional associations also tend to include AML/CTF compliance within their broader disciplinary standards and controls. The anti-money laundering obligations are in these circumstances not always (sufficiently) included in supervision.[27]

25 Ibid., pp. 69-70.

26 Please note that when strengths or weaknesses are mentioned for a particular model that can be related to the nature of supervisors (external or internal), it may be that these are (to a certain extent) present in the other models as well. This will be obvious for the hybrid model, but may hold true for the other models as well.

27 Compare, for example, FATF, Third Follow Up Report on Denmark, 2010, pp. 14-15 and FATF, Third Mutual Evaluation on the Netherlands, 2011, p. 211.

Cross-over analytical and supervisory functions of the FIU

A second strong aspect that was reported in the ECOLEF study is that information that FIUs gather from disclosed suspicions can help in the supervisory process. The information contained in a disclosure of a suspicion of money laundering or terrorist financing can indicate the level of internal measures adopted by an obliged institution or professional. There is a clear link between the function of the FIU as a central receiving authority for suspicions of money laundering and terrorist financing and the tasks related to supervision. Supervision can benefit from information available in the databases of FIUs that contain information on reported suspicions of (transactions related to) money laundering or terrorist financing. Delays in reporting, a lack of cooperation with the FIU or a lack of adequate supporting documentation in the reporting process can trigger a compliance visit.[28] The ECOLEF study showed that various FIUs have praised the possibility of cross-checking names and data from the STR databases for supervisory purposes. The general idea is that this is allowed, unless specific legislation prohibits this. There is no evidence that in any Member State an FIU is prohibited from using data obtained under its analytical functions for its own supervisory purposes.

Comprehensive overview of compliance

When responsibility for AML/CTF supervision is centralised with an FIU there is a good and complete overview of compliance by the obliged institutions and professionals as well. The FIU is ultimately responsible for the supervision and should thus be aware of the compliance level of all obliged institutions. The compliance information is not fragmented between (too) many authorities, which may be the case under the other three models.

4.1.2. Weaknesses

Resource issues

A weakness reported in the ECOLEF study is that the supervisory tasks distract FIUs from their core tasks, which are the receiving, analysing and disseminating of reported suspicions of money laundering and terrorist financing.[29] As many FIUs already have quite a broad range of tasks and often have limited resources available, there is also a likelihood of staff capacity and resource problems in relation to supervision.[30] The ECOLEF study showed that in various FATF and MONEYVAL evaluations this was considered a problem.[31, 32] In some Member States the supervision of certain categories of professionals was only deemed theoretical, or particular categories of professionals had never received any supervisory controls. The tension between FIU resources devoted to supervision in terms of the number of staff and the persons to be (partially) supervised by FIUs can be illustrated by some examples presented in the ECOLEF study. In 2011, the Spanish FIU had 10 FTE (full-time equivalent) available for supervision, while (in 2010) it had to supervise 19,322 institutions and professionals. In Malta 3 FTE were available for supervision in 2011, which were responsible for the supervision of 900 institutions and professionals.

28 Van den Broek 2014, supra note *, p. 71.

29 See for the exact description: Art. 21(2) Third Directive.

30 I. Deleanu, 'FIUs in the European Union – facts and figures, functions and facilities', in B. Unger et al., *The Economic and Legal Effectiveness of the European Union's Anti-Money Laundering Policy*, 2014, pp. 97-124 at 110-117.

31 The Financial Action Task Force (FATF) is the international standard-setting body in the field of countering money laundering, terrorist financing and the proliferation of weapons of mass destruction. It was first established in 1989 and since then its mandate has been expanded on various occasions. The FATF assesses the AML/CTF policies of the member jurisdictions, thereby evaluating the level of compliance with its Forty Recommendations. These mutual evaluation reports are published on the FATF's website. See for more information: <http://www.fatf-gafi.org/>. The Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) is a so-called FATF regional-style body, established in 1997, and it operates under the mandate of the Council of Europe. FATF regional-style bodies are regional bodies that are established to ensure that jurisdictions within their regions have in place systems for combating money laundering and terrorist financing. Like the FATF, they perform reviews in these jurisdictions concerning the levels of compliance with the international standards. Countries and jurisdictions subject to MONEYVAL's evaluations are the Council of Europe Members that are not members of FATF, with the exception of the Russian Federation that is a member of both organisations, and a number of non-Council of Europe Members like the Holy See, Israel and the Channel Islands. MONEYVAL is an associate member of the FATF. See for more information: <http://www.coe.int/t/dghl/monitoring/moneyval/>.

32 Van den Broek 2014, supra note *, p. 72. This was reported for Bulgaria, Spain, Malta, the Czech Republic, Poland and Slovakia.

A last example concerns the Czech FIU, which had 5 FTE available for supervision in 2011 but which had a supervisory population of 141,346 in 2012.[33]

In order to diminish resource tensions, FIUs and legislators have been seeking additional supervisory tools, for example by entering into supervisory agreements with financial regulators and other supervisors to exercise anti-money laundering supervision on their behalf. For Malta, Section 27 of the Prevention of Money Laundering Act allows the Maltese FIU (FIAU) to enter into arrangements with other supervisors to carry out on-site supervision on its behalf.[34] In this respect, MONEYVAL evaluators considered that '(…) in view of the arrangements entered into by the FIAU with other supervisory authorities for on-site visits to be carried out on its behalf by officers of the supervisory authorities, compliance monitoring for AML/CFT purposes is being conducted by a sufficient number of officers working within the FIAU, the MFSA and the LGA'.[35] Similar considerations can be found in the MONEYVAL report for the Czech Republic in 2011 and were also mentioned in the Fourth follow-up report on Spain.[36] In Slovakia, anti-money laundering supervision can also be performed by the National Bank of Slovakia and the Ministry of Finance and in the Czech Republic by the Czech National Bank, the Czech Trade Inspection Authority (*Česká obchodní inspekce*) and some professional associations. In Bulgaria the financial regulators should include anti-money laundering supervision in their wider supervisory responsibilities. Resource tensions of the Polish FIU are mitigated by the anti-money laundering legislation, which states that supervision may also be performed by a number of other authorities.[37] That these structures are very important is demonstrated by the annual reports of the Polish FIU, which show that the number of inspections performed by other authorities on behalf of the FIU by far outweighs the number of the FIU's own inspections.[38]

A second supervisory tool concerns the obligation to submit annual compliance reports to the FIU. In Spain, considering that the Spanish FIU has sole responsibility for AML/CTF supervision but cannot supervise all obliged institutions and professionals in practice, legislation requires that in principle all obliged institutions and professionals must have their internal policies assessed annually by a so-called external expert. Pursuant to Section 26 of the Spanish AML/CTF Act and secondary regulations, these external experts must notify the Spanish FIU and make their annual assessments available.[39] The board of directors or directors of the obliged institutions are obliged to adopt necessary measures to solve identified deficiencies. The Spanish FIU may decide, based on the external report, to perform an on-site inspection or to require corrective measures.[40] In Malta a similar system applies, although annual compliance reports have to be reported by the money laundering reporting officers (MLRO) of the obliged institutions themselves.[41] The Implementing Procedures introduced this obligation for MLROs.[42] These annual compliance reports assist the Maltese FIU in deciding on its supervisory activities.[43]

Lack of sectorial knowledge

Another weakness which the ECOLEF study identified is the fact that some sectors or professions require specialised knowledge or expertise about the sector or profession as such. For various Member States, for example, this has been the reason for establishing the bar association as the competent supervisor for lawyers. The argument is that bar associations are better able to balance legal professional privilege with

33 Ibid., p. 72.
34 Prevention of Money Laundering Act, Cap. 373 of Laws of Malta. See also: FIAU, *Annual report 2012*, p. 29.
35 MONEYVAL, *Report on Fourth Assessment Visit on Malta*, 2012, p. 122.
36 MONEYVAL, *Report on Fourth Assessment Visit on Czech Republic*, 2011, pp. 190-192; FATF, *Fourth Follow Up Report on Spain*, 2010, pp. 15-16.
37 Section 21(3) Act of 16 November 2000 on counteracting money laundering and terrorism financing (Polish AML Act).
38 Polish FIU, *Report of the General Inspector of Financial Information on the implementation of the Act of 16 November 2000 on counteracting money laundering and terrorism financing in 2012*, pp. 21-22.
39 Order EHA/2444/2007.
40 FATF, *Fourth Follow Up Report on Spain*, 2010, p. 18.
41 MONEYVAL, *Report on Fourth Assessment Visit on Malta*, 2012, p. 122.
42 Regulation 17 Maltese AML/CTF Regulations. The Implementing Procedures are guidance drafted by the FIAU pursuant to the Prevention of Money Laundering and Funding of Terrorism Regulations. The Implementing Procedures are legally binding and enforceable where an obliged institution or professional does not comply therewith.
43 FIAU, *Annual Report 2012*, pp. 10-11.

the reporting obligation. An FIU, which is exactly the authority to which reports must be submitted,[44] may be more biased in this respect and will not always have sufficient knowledge in determining whether a particular situation is privileged or not. Not forgetting the fact that privilege is already breached if the information is submitted to the FIU in the first place. For this reason, cooperation may be sought with other authorities which can provide the FIU with the necessary expertise.

4.2. Strengths and weaknesses of the external model

Under the external model, responsibility for AML/CTF supervision is formally shared between public administrative and Government authorities. In practice, however, internal supervisors may play an indirect role in supervising and/or enforcing compliance with anti-money laundering obligations.

4.2.1. Strengths

Sectorial knowledge

Because of the fact that external supervisors often, though not necessarily, have supervisory experience with the group of obliged institutions or professionals, they are knowledgeable concerning the specifics of the sector, the latest developments, the risks, the vulnerabilities and so on. The ECOLEF study reported that this potential strength had been mentioned on various occasions by representatives. For example, in the Netherlands the financial regulators already had knowledge about the respective sectors for which they have AML supervisory responsibility, and also the Financial Supervision Office (*Bureau Financieel Toezicht, BFT*) had already been competent for a long time in the sphere of the financial supervision of notaries and bailiffs. The Dutch Tax and Customs Administration (DTCA) clearly has powers in the field of taxation and revenue, although functionally the Dutch Tax and Customs Administration and its Bureau Supervision Wwft are separate. The Tax and Customs Administration/Bureau Supervision Wwft (*Belastingdienst/Bureau Toezicht Wwft*) operates independently and receives information from other DTCA divisions, but does not provide information to the other divisions. In Greece, the three financial regulators all have previous supervisory experience with their supervisees. Furthermore, the Hellenic Accounting and Auditing Standard Oversight Board (*Epitropi Logistikis Tipopiisis kai Elehon, ELTE*) was established in 2003. Since 2008 the Board has the task of carrying out public oversight of the accounting profession.[45] Also the Gambling Control Commission has had years of supervisory experience. The General Directorate for Tax Audits of the Greek Ministry of Economy and Finance has transferred its supervisory responsibility to local tax offices that have supervisory experience in the field of taxation and revenue. The Ministries of Justice and Development were also reported to have previous supervisory experience.

External supervisors more suitable for anti-money laundering supervision

A characteristic of the external model is the fact that external supervisors do not have any direct, professional relationship with the supervisees. This leads to a certain distance between the two. Because there is no professional relationship to be maintained, the supervisor does not need to 'satisfy' any wishes of the members. As a result, a supervisor has a more independent position in relation to the supervisees and it can act more strictly in case of non-compliance. Another argument for reasoning that external supervision is more suitable in the fight against money laundering and terrorist financing is that combating money laundering is a prerogative of the State. It is the State which has the primary interest in combating these phenomena. The anti-money laundering policy is, after all, pursued for the protection of the public interest. Because external supervisors act either directly or indirectly on behalf of the State they can be said to provide a more adequate type of supervision which is necessary for the anti-money laundering policy. In contrast, professional associations have as their main task to retain a high level of integrity for the profession as a whole for which a workable and continuous relationship between the two is required.

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44 If Member States have not decided to make use of indirect reporting through Self-Regulatory Bodies: Deloitte, *Final Study on the Application of the Anti-Money Laundering Directive*, ETD/2009/IM/F2/90, report ordered by the European Commission, 2011, pp. 245-246.

45 Law 3148/2003 as amended by Law 3693/2008.

4.2.2. Weaknesses

Lack of supervisory powers or difficulties in applying those powers

The risk of problems with the use of supervisory powers is comparatively higher for external supervisors than for internal supervisors, which can generally rely on their internal norms, disciplinary powers and procedures. Especially due to the protection of fundamental rights, it may be that an external supervisor encounters more difficulties in performing on-site inspections than internal supervisors. This is the case in the Netherlands, where BFT does not have access to lawyers' and – up until the 1st of January 2013[46] – to civil-law notaries' records and cannot thus perform adequate on-site inspections. For lawyers this problem still exists. BFT used to have a supervisory agreement with the Dutch Bar Association (*Nederlandse Orde van Advocaten, NOvA*) which included that NOvA would perform a number of AML/CTF inspections annually and report this to BFT. The latter would still have its own supervisory authority, but would oversee this supervision on a systematic basis. However, this supervisory agreement was terminated due to the impression on the side of BFT that the audits performed by the NOvA did not contain a sufficient investigation into compliance with anti-money laundering obligations. The fact that BFT cannot perform supervision itself clearly diminishes the effectiveness of its supervision of lawyers. The Dutch legislator currently intends to move the anti-money laundering supervision of lawyers to an independent division within the NOvA, although there is quite some criticism of this plan.[47]

A matter that also gave rise to attention during the FATF evaluation of the Netherlands in 2010 is the fact that the Dutch financial regulators explained that in the performance of verifying compliance with anti-money laundering obligations they mostly rely on their powers under the Financial Supervision Act (*Wet op het financieel toezicht, Wft*). The reasons brought forward were the fact that obligations regarding internal controls are lacking in the Dutch AML/CTF Act and because the supervisors have more extensive and a wider palette of supervisory and sanctioning powers under this Act than under the Dutch AML/CTF Act.[48] FATF assessors were willing to accept this interpretation at the time of the evaluation, but provided various reasons on the basis of which this interpretation could be challenged in the courts and stated that this interpretation is not robust.[49]

Knowledge of the supervisees

A second potential weakness relates to the supervisors' knowledge of the supervisory population. Contrary to internal supervisors that generally supervise their members, and thus know who they are, external supervisors may encounter difficulties in discovering who they should supervise. Especially where a profession is not regulated and thus no or limited licensing or registration systems apply, it is difficult for the supervisor to find out which institutions or professionals fall under its supervisory responsibility. As a consequence, it will also have more difficulties in understanding and recognising the risks in the sector(s) and understanding the general level of compliance by the institutions or professionals with the norms in place. Where a sector or profession is entirely unregulated, this weakness can be limited where there are registration requirements for these institutions or professionals in place. If there is also no (central) register, then even a more considerable effort must be made by the supervisor to identify the institutions or professionals that fall under its supervision and, subsequently, to formulate a proper risk-based supervision programme.

The ECOLEF study observed that problems existed for the Netherlands and Greece in relation to supervisors of dealers in (high-value) goods and real estate agents. In the Netherlands, there are strategies in place to enable the supervisor to focus on the most risky institutions or professionals. The Bureau Supervision Wwft has also sought cooperation with professional associations, where possible. In Greece,

46 On this date amendments to the Dutch Notaries Act (*Wet op het notarisambt, Wna*) and the AML/CTF Act (*Wwft*) entered into force. Section 111a(3) Wna provided BFT with the authority to access notaries' records, including client files. Legal privilege vis-à-vis the Bureau has therefore been explicitly set aside. Before, BFT was able to access notaries' records indirectly. See: M.G. Faure et al., *Evaluatie tuchtrechtelijke handhaving Wwft,* 2009, p. 81.

47 Press Release by the Dutch Government, *Herziening toezicht advocatuur*, 6 July 2012, available at <http://www.rijksoverheid.nl/nieuws/2012/07/06/toezicht-advocatuur-herzien.html> (last visited on 21 August 2014). Already in May 2012 the Dutch Council of State was very critical of the proposal: *Staatscourant* 2012, 15879.

48 FATF, *Third Mutual Evaluation on the Netherlands*, 2011, pp. 184 et seq.

49 Ibid., pp. 185-187.

real estate agents and dealers in high-value goods are required to register with the tax authorities.[50] In practical terms, however, it seems that this obligation is not strictly enforced. FATF evaluators mentioned in relation to estate agents that 'more than half are not registered and are not members of the national association of real estate agents (OMASE)' and that 'real estate agents are generally not subject to *any* supervision or oversight (…)' (emphasis added).[51]

In some Member States, not necessarily those falling under the external model, the anti-money laundering legislation specifically designs a registration system for the purpose of AML/CTF supervision for the unregulated professions and institutions. This is, for example, the case in the United Kingdom. Under the Money Laundering Regulations 2007, Her Majesty's Revenue and Customs (HMRC) is assigned the duty to maintain registers.[52] HRMC may keep the register in any form it thinks fit and may publish or make available for public inspection all or part of the register maintained under Regulation 25.[53] Regulation 26 obliges a number institutions and persons, such as dealers in high-value goods and trust or company service providers, to be registered. If these do not register themselves, they are not allowed to act as such.[54] The Financial Conduct Authority and Office of Fair Trading have also been given the power to maintain such an AML register under Regulation 32 MLR 2007 in relation to the institutions and professionals that they supervise. Another example of a Member State with a registration system is Sweden.[55] Dealers in precious metals and stones and other professional traders in goods, providers of other bookkeeping or auditing services than those subject to supervision by the Supervisory Board of Public Auditors (*Revisorsnämnden, RN*) and other independent legal professionals and trust and company service providers are supervised by county administrative boards. Pursuant to Chapter 6, Section 16, of the Swedish AML/CTF Act these institutions and professionals are required to notify the Swedish Companies Registration Office (*Bolagsverket, BV*) that keeps a register for companies subject to supervision. County administrative boards have access to this register and can find out who they should supervise.

AML registration systems may appear very helpful for those institutions and professionals that are not regulated elsewhere and thus enable supervisors to devote their scarce time and resources to the actual performance of anti-money laundering supervision. This way, a potential weakness of appointing external supervisors as AML/CTF supervisors can be overcome.

Anti-money laundering supervision entirely integrated in general supervision

A third potential weakness might be that anti-money laundering supervision becomes entirely integrated in the overall supervision performed by the external supervisor, with the risk that insufficient attention is paid to AML/CTF matters or that the specific money laundering or terrorist financing risks are not (sufficiently) recognised. This was, for example, reported for the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten, AFM*), where FATF evaluators stated that '[t]he mission was concerned that this approach may result in too low a priority being given to AML/CFT matters'.[56] This was reported for some external supervisors in other Member States, for example for the Insurance Supervisory Authority in Finland[57] and the FSA in Denmark (*Finanstilsynet*), which are external supervisors but both fall under the hybrid model.[58]

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50 FATF, *Third Mutual Evaluation on Greece*, 2007, p. 23.

51 Ibid., at. 23.

52 HMRC is a default supervisor because it supervises all institutions and professionals that fall outside the scope of any of the other AML Supervisors: high-value dealers, money services businesses, trust and company service providers, but for example also accountants who are not members of any of the professional associations. Cf.: Regulation 21(1)(d) MLR 2007 and the insertion of subparagraphs, inserted by SE 2009/209, Regulation 126, Schedule 6, point 2, paragraph 6(e).

53 Regulations 25(2) and 25(3) MLR 2007.

54 Regulation 26(1) MLR 2007.

55 On the 1st of April 2014 the Office of Fair Trading merged with the Competition Commission to become the Competition and Markets Authority (CMA). The CMA is established through the Enterprise and Regulatory Reform Act 2013. The CMA will not take over OFT's anti-money laundering responsibility. The supervision of estate agents is brought under the HMRC's responsibility.

56 FATF, *Third Mutual Evaluation on the Netherlands*, 2011, p. 217.

57 On the 1st January 2009, the Finnish Insurance Supervisory Authority merged with the Financial Supervision Authority into the Finnish Financial Supervisory Authority (*Finanssivalvonta, Fiva*).

58 FATF, *Third Mutual Evaluation on Finland*, 2007, p. 8; FATF, Third Mutual Evaluation on Denmark, 2006, pp. 127, 132 and 143. See also: FATF, *Third Follow Up Report on Denmark*, 2010, pp. 14-15.

4.3. Strengths and weaknesses of the internal model

The internal model is characterised by a large presence of internal supervisors. As explained, where possible, professional associations are responsible for AML/CTF supervision of their members.

4.3.1. Strengths

Dialogue with obliged institutions to stimulate compliance

The internal model can be found in a considerable number of EU Member States, although the exact appearance varies from country to country. A strength of anti-money laundering supervision performed by internal supervisors is that professional associations have close relationships with their supervisees and that a culture of dialogue could potentially stimulate compliance within the professional sector. In the regulatory literature this style of enforcement is known as a conciliatory or co-operative style. It concerns the prevention of violations, the remedying of underlying problems, and interaction with the private sector through advice, negotiations, meetings, or seminars.[59] Under this style, supervisors tend to turn to informal processes in striving for compliance. The imposition of sanctions is useful as a threat, but only used as a last resort.[60] This fits with the close relationship that professional associations wish to maintain with their members. A prerequisite for the success of the internal model and this potential strength in particular is, however, that the professional associations and the professionals themselves must both be convinced of the need to combat money laundering, that they find this policy important and that they are willing to apply the norms.

The ECOLEF study reported that internal supervisors generally expend a considerable effort in creating awareness by means of guidance and training, and often by giving members an opportunity to correct behaviour before imposing a sanction. In the UK, HM Treasury noted in 2011 that: '[s]upervisors seek to promote compliant behaviour, which generally means that members who are found to be non-compliant are given an opportunity to correct their behaviour before sanctions are imposed'.[61] In its 2012-13 report, HM Treasury again emphasised that '(…) supervisors continue to give firms the opportunity to correct their behaviour before sanctions are imposed'.[62] Enforcement action taken by internal supervisors ended in a fine in 2% and 3% of the actions respectively, whereas enforcement action taken by external supervisors amounted to a fine in 11% of the cases.[63] The mentioned strength for external supervisors that they can impose more severe sanctions because they are distanced from their supervisees, may not even be necessary or may be less applicable under this model.[64] Nevertheless, this strength remains mostly of a theoretical nature.

Professional knowledge

Another potential strength is that professional associations in some Member States already have experience with supervision and monitoring, though not specifically with anti-money laundering obligations.[65] Due to the experience with quality assurance and the fact that professional associations have as their main objective to further the profession as a whole and to represent the interests of the individual professionals, there is expert knowledge on the side of professional organisations about the nature of the profession, the risks and vulnerabilities present, and about ongoing developments.[66] It goes without saying that this does not necessarily mean that the professional associations have expertise in AML/CTF matters in relation to their professionals. This strength is more directed to the knowledge of the profession as a whole.

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59 K. Hawkins & J.M. Thomas, *Enforcing Regulation*, 1984, p. 13.
60 Ibid., p. 13.
61 HM Treasury, *Supervision Report 2010-2011*, p. 11.
62 HM Treasury, *Supervision Report 2012-2013*, § 5.4.
63 Ibid.
64 Cf. HM Treasury, *Supervision Report 2010-2011*, p. 11*:* '(…) There is, however, evidence that some Supervisors have taken robust action where necessary. For example, Supervisors have struck businesses off their membership list for breaching their AML/CTF obligations. Others have taken decisions to suspend members for up to five years.'
65 This was also mentioned under the external model for those supervisors that already had other supervisory competences with respect to their supervisees before becoming an AML/CTF supervisor as well.
66 Cf. HM Treasury, *Supervision Report 2010-2011*, p. 6.

Adequate resources

Another point is that professional associations are unlikely to have resource issues. In a considerable number of Member States, external supervisors are often funded through the State budget. Professional associations, however, are funded through fees paid by the members. Professional associations can raise their fees according to the tasks they perform.

In the UK, for example, members of accountancy professional associations must apply for anti-money laundering supervision. Members pay an additional fee to be supervised for compliance with the Money Laundering Regulations 2007. The Institute of Chartered Accountants in England and Wales (ICAEW), the professional association for chartered accountants in England and Wales, indicates on its website that '[w]e agree fees on a firm-by-firm basis based on individual circumstances, and risk which we assess during the application process. As an indication, a firm with one ICAEW principal and one non-ICAEW member principal should expect to pay no more than £310 (plus VAT) per year. Fees for larger firms will depend on the information provided at the time of application, including the firm's size, complexity and risk-profile, and the amount of affiliate fees already paid by the firm.'[67] The Association of Accounting Technicians (AAT) applies a '(…) full money laundering supervision fee of £80 and a reduced fee of £20, payable by each sole trader and principal of a firm (except principals providing only administrative support) regulated by the AAT. (…)'.[68] In other Member States professional associations are independent from the Government in terms of funding as well. The ECOLEF study was able to report this for Germany, Latvia, Denmark, Finland and Hungary, but could not provide more insights into how fees for anti-money laundering supervision are calculated, whether and how this is integrated in the annual contributions of members.

4.3.2. Weaknesses

Conflict of interests

It could be argued that despite the fact that professional associations often have supervisory experience and professional knowledge, the nature of that kind of supervision is different from what is needed for verifying compliance with the anti-money laundering obligations.[69] Professional associations tend to base their supervision on quality checks of professional standards thereby verifying the quality of the professionals concerned in order to maintain the quality and reputability of the profession as a whole. The cooperative supervisory style is thereby important in order to maintain a good professional relationship between the professional organisation and the members. This, however, may not always be in line with the type of supervision needed for compliance supervision under the preventive anti-money laundering policy. In fact, sometimes the two may be incompatible with each other. In the wider setting of professional self-regulation, Frankel summarises the conflict of interests as follows: '[s]hielding members from outside knowledge of their deviance also shields the profession from embarrassment, with its potential for precipitating a decline in public trust'.[70] The ECOLEF study illustrated this conflict of interest as follows: 'while non-compliance with AML/CTF obligations sometimes requires robust action due to the severity of the breaches and to show other professionals that the professional association is taking the matter seriously, a high number of sanctions imposed by the professional association could lead to the impression that the professionals do not maintain a high quality standard. This, in turn, may lead to a decreased level of trust in the profession as a whole. Obviously this goes against what the professional associations stand for, which is to further the quality of the profession. It may therefore not always be favourable for the professional associations themselves to actively verify compliance with AML/CTF obligations and impose sanctions'.[71]

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67 ICAEW, *Applying for anti-money laundering supervision*, available at <http://www.icaew.com/en/technical/legal-and-regulatory/money-laundering/anti-money-laundering-supervision> (last visited on 21 August 2014).

68 AAT, *MIP Guidance*, available at <https://www.aat.org.uk/mip-guidance> (last visited on 21 August 2014).

69 Cf. M. Stouten, *De witwasmeldplicht: Omvang en handhaving van de Wwft-meldplicht voor juridische en fiscale dienstverleners* (dissertation Utrecht University), 2012 who is of the opinion that internal supervision in the AML/CTF policy is only possible when it is backed by a form of external supervision.

70 Frankel 1989, supra note 22, p. 113.

71 Van den Broek 2014, supra note *, p. 81.

This matter becomes especially problematic where the professional associations themselves are not convinced of the need and importance of combating money laundering and terrorist financing. Dutch research on the involvement of professional associations in enforcing AML/CTF obligations through disciplinary law has shown that in the Netherlands professional associations hardly impose sanctions or refer cases to the disciplinary courts for the imposition of sanctions in relation to non-compliance with AML/CTF norms, and that the disciplinary sanctions ultimately imposed are often very mild compared to the administrative sanctions.[72] In addition, disciplinary procedures for non-compliance with anti-money laundering obligations tend to take a lot of time.[73]

Independence of the supervisor

There can be doubts about the actual independence of the internal supervisor and about its possibility to be really critical vis-à-vis its members. Independence requires that the supervisors' daily activities should not be subject to external direction or be influenced in any way, either by Government or Parliament, or the private sector.[74] In the literature, the independence of the supervisor is seen as a precondition for effective supervision.[75] In some Member States supervisors working for professional associations are generally also professionals. Generally, they tend to be less critical of their colleagues than an external supervisor would be. Hence, while the above close relationship between professional associations and professionals was considered a potential strength, the downside may be that professional associations are being influenced too much by the desire of their members and are not, or are insufficiently, in a position to take their own decisions in relation to their supervisory activities.

Cooperation and consistency of supervisory practice

A special point of attention for the internal model is the cooperation and consistency of supervisory practice. In some Member States there are many professional associations due to the fact that one profession has various professional associations or because of a territorial limitation for professional associations. This is sometimes further complicated because actual supervision is performed by regional associations which, in turn, fall under the umbrella of the national professional association.[76] The two outliers in the European Union are the United Kingdom, with 22 professional associations, and Ireland, with 11 professional associations supervising AML compliance.

As an aside, it must be stressed that cooperation between anti-money laundering supervisors is very important *notwithstanding* the supervisory architecture that is in place. The ECOLEF study identified forms of cooperation between supervisors in all Member States, although the extent and intensity of the cooperation differs. In all Member States cooperation between supervisors takes place through informal means, and in the large majority of Member States through a combination of informal and formal means. Informal cooperation is very important and takes place through ad hoc meetings, telephone calls, the exchange of supervisory information and the publication of information. The most commonly identified formal tool for cooperation is the conclusion of supervisory agreements (covenants, memoranda of understanding) between two or more supervisors.[77] In some Member States there are also more formalised cooperation platforms, either exclusively for anti-money laundering supervisors or with a broader range of institutions. Examples of specialised AML/CTF supervisors' platforms can be found in the UK with the Anti-Money Laundering Supervisors' Forum (AMLSF) and in Sweden with the AML Coordination

72 Stouten 2012, supra note 69, pp. 467-469; Faure et al. 2009, supra note 46, pp. 152-153.

73 Faure et al. 2009, supra note 46, pp. 152-153.

74 These types of independence are known as political independence and market independence.

75 In particular in economic and financial law, there is a strong argument for the independence of supervisors. See for example: M. Aelen, *Beginselen van goed markttoezicht: Gedefinieerd, verklaard en uitgewerkt voor het toezicht op de financiële markten* (dissertation Utrecht University), 2014; A. Ottow & S. Lavrijssen, 'Independent Supervisory Authorities: A Fragile Concept', 2012 *Legal Issues of Economic Integration* 39, no. 4, pp. 419-445; M. Quintyn et al., *The Fear of Freedom: Politicians and the Independence and Accountability of Financial Sector Supervisors*, IMF Working Paper 2007, WP/07/25; H. Winter, 'Regulatory enforcement in the Netherlands: Struggling with Independence', in S. Comtois & K.J. de Graaf (eds.), *On Judicial and Quasi-Judicial Independence*, 2013, pp. 157-166.

76 This is for instance the case in Germany and was also reported by the Hungarian Bar Association (although Hungary falls under the hybrid model).

77 The ECOLEF study found this for Cyprus, Estonia, Ireland, Italy, Lithuania, Luxembourg, Malta, Spain, and the United Kingdom: Van den Broek 2014, supra note *, p. 83.

Body (*Samordningsorgan för tillsyn över åtgärder mot penningtvätt och finansiering av terrorism)*. Wider cooperation platforms in which AML/CTF supervisors participate or in which anti-money laundering supervision is considered a part are – inter alia – reported in Cyprus (the Advisory Authority), Denmark (*Hvidvaskforum*), the Netherlands (*Wwft Toezichthoudersoverleg*), and Portugal (*Conselho Nacional de Supervisores Financeiros*).[78]

The ECOLEF study concluded that under the internal model, however, cooperation is even more important because the professional category must be supervised in a consistent and equivalent way, notwithstanding the professional association. Hence, such cooperation efforts cannot solely focus on general legal or policy issues and general supervisory issues, but must focus on the day to day practice of professional associations to ensure that throughout the same professional category, professionals are supervised in an equivalent manner. It must be ensured that the methodology of supervision and the level of sanctions imposed is more or less the same. This, combined with the presence of a large(r) number of internal supervisors designated as AML/CTF supervisors, makes it more challenging to ensure the proper coordination and coherence of supervisory practice.

Anti-money laundering supervision entirely integrated in general supervision

As for external supervisors, a potential weakness of the internal model might be that AML/CTF supervision is entirely integrated in the overall supervision performed by the internal supervisor with the risk that insufficient attention is paid to AML/CTF matters or that the specific anti-money laundering risks are insufficiently recognised. Various professional associations from different Member States include the verification of compliance with anti-money laundering obligations in wider supervisory programmes, like quality assurance programmes. Professional associations can regard compliance with AML/CTF requirements as a professional duty. The integration of anti-money laundering supervision in general supervision may lead to situations where professional associations perform insufficient AML/CTF supervision. The ECOLEF study found some indications of this potential weakness in Member States.

4.4. Strengths and weaknesses of the hybrid model

Obviously, in the hybrid model the strengths and weaknesses of the three described models above can be found as well. Some examples follow hereafter to illustrate this.

With regard to the least hybrid variant, a combination of internal and external supervisors, some weaknesses of the external model are present. The possible weakness of a lack of supervisory powers has been identified in Denmark, Finland[79] and Sweden. In Sweden, for example, legal problems exist in relation to the power to perform on-site inspections for the Swedish Estate Agents Inspectorate (*Fastighetsmäklarinspektionen, FMI*). The Swedish AML/CTF Act refers to the Estate Agents Act and the FMI thus obtains its supervisory powers from that act. However, due to the terminology used, the supervisor cannot perform on-site inspections at estate agents' business premises. Obviously this hinders the FMI in performing its task effectively, because with off-site AML inspections it must always rely on the information provided by the supervisees.[80] The potential weakness that supervision may become too integrated in the sectorial supervisory activities of external supervisors is present as well. As already explained, both in Finland and Denmark remarks have been made about the integration of AML/CTF supervision in broader supervisory programmes, which resulted in too low a priority for AML/CTF in inspections.[81]

Regarding the most hybrid variant (internal/external/FIU) it is self-evident that the strengths named in the context of the FIU model apply as well. FIUs have a special anti-money laundering focus. Obviously, under the hybrid model this strength is limited to the institutions or professionals over which they have supervisory responsibilities. Also, with respect to its supervisees the FIU can use data present in the

78 Van den Broek 2014, supra note *, p. 83.
79 FATF 2007, *Third Mutual Evaluation on Finland*, p. 136.
80 Van den Broek 2014, supra note *, p. 84.
81 Note 58, supra.

'STR database' in the process of supervision and for designing the risk-based supervisory programme.[82] This is why Hungary included the FIU as the default supervisor. Also in Romania there is a clear link between the analytical functions of the FIU and the supervisory activities.[83] In Italy, the FIU supervises all obliged institutions with regard to the reporting obligation, alongside their regular AML supervisors. In particular the access to the STR database plays a role in providing the FIU with this power. As regards the strength of sectorial knowledge mentioned earlier for both the external and internal model, the FATF mentioned that for Italy the current authorities already had supervisory responsibilities over their supervisees under different legislation.[84] Also in Hungary the experience of supervisors, both internal and external, was praised.[85] The earlier mentioned weaknesses of resource problems applies here as well. In Slovenia, for example, the FIU lacks the power to perform on-site inspections.[86] This gap in the FIU's supervisory powers negatively affects the effectiveness of AML/CTF supervision. Resource problems for the FIU were also found to be present in Cyprus which resulted in the fact that there had not been on-site inspections for real estate agents and dealers in high-value goods, as well as in Romania.[87] This weakness, however, is limited because FIUs have a less important role than under the FIU model.

5. Concluding remarks

Because of the fact that the procedural norms are only minimally harmonised at the international and EU level, supervision and sanctioning in the preventive anti-money laundering policy is strongly regulated at the national level. As a result, a patchwork of supervisory architectures exists within the European Union. This contribution presented four different models of anti-money laundering supervisory architectures: the FIU model, the external model, the internal model and the hybrid model. Together they show the diversity which is present in the European Union. Each of the models has (potential) strengths and weaknesses, which were here presented at an abstract level. These provide a first insight into the institutional differences between the EU Member States on the point of supervision under the preventive anti-money laundering policy and give a first indication of the effectiveness of the models. The true effectiveness, however, ultimately depends on the way in which the models are implemented and applied at the national level. With my forthcoming PhD research, I aim to provide an answer to this question. ¶

82 An STR database is a database in which data on suspicious transactions (suspicious transaction reports) that have been reported by obliged institutions and professionals to the FIU is held.
83 MONEYVAL, *Second Follow Up Report on Romania*, 2011, p. 21.
84 FATF, *Third Follow Up Report on Italy*, 2009, p. 13.
85 MONEYVAL, *Report on Fourth Assessment Visit on Hungary*, 2010, p. 138.
86 MONEYVAL, *Report on Fourth Assessment Visit on Slovenia*, 2011, p. 113; MONEYVAL, *Second Follow Up Report on Slovenia*, 2013, p. 23.
87 MONEYVAL, *Report on Fourth Assessment Visit on Cyprus*, 2011, p. 144; MONEYVAL, *Second Follow Up Report on Romania*, 2011, p. 16.