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Anti-Money Laundering Directive - 2016 Amendment

1. *Commission proposal (relevant additions to existing AMLD4)*

- Providers of virtual currency services and exchanges are newly introduced as obliged entities (OE) to the AML framework. OEs previously already included all sorts of financial institutions as well as legal and commercial service providers. They all have to apply customer due diligence (CDD) measures as set out in the directive in order to prevent money-laundering and terrorist financing (Art 2).
- One important CDD measure is the identification of the real, i.e. beneficial owner (BO) of a structure. The threshold of participation in an entity beyond which a natural person is considered a BO is generally maintained at 25%, but reduced to 10% if the legal person is a "passive non-financial entity"[1] (Art 3).
- OE have to apply CDD measures to new customers and to existing customers "on a risk-sensitive basis" (Art 14.5) or when carrying out large or suspicious transactions (Art 11). Existing customers now also have to be checked whenever "relevant circumstances change" or when the OE contacts the customer in the process of the DAC AEOI implementation.
- "Enhanced CDD measures" that OEs have to additionally perform when dealing with high-risk customers or areas have been detailed (Art 18 & 18a). Previously, such enhanced measures were required but not made explicit in the AMLD.
- Information from company and trust BO registers (which had been introduced for the first time in the initial AMLD4) will now generally be accessible to the public. The previously prescribed "legitimate interest" test for access to BO registers is only maintained for non-commercial (family) trusts. Non profit-making corporations can never be accessed publicly (Art 30 & 31 & amended directive 2009/101).
- It has been clarified that MS are responsible for registering all trusts for which the trustee is resident in that member state.
- Tax authorities now have full access to the company and trust BO registers (i.e. to family trust and generally to non-public, detailed BO information in addition to the information accessible by the general public).
- Financial Intelligence Units (FIUs) are public bodies in Member States which constitute the link between OEs and other competent (law enforcement) authorities. They analyse information in centralised registers and from OEs in order to single out cases where money-laundering or terrorist financing can be suspected. While previously acting primarily upon receiving suspicious transaction reports (STR) by OEs, FIUs now can also request information from OEs without such reports (Art 32 ff), but only from within their own jurisdictions. OEs should receive feedback on STRs they made (Art 46 (3)), but often this does not happen or happens only very late in practice.

[1] This term is defined in Directive 2014/107/EU (DAC 2), Section VIII D7.

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- In addition, there will be a new centralised register of all bank accounts in each member state - including information on the respective BOs - to which FIUs and competent authorities have access (Art 32a).
- Exchange of AML/CTF information between FIUs and competent authorities of different member states is governed by a revision of the administrative cooperation directive (DAC5) and further provisions aimed at preventing the refusal to cooperate are inserted in the AMLD (Art 50a ff).

2. *Assessment and necessary additions*

- **Tax evasion** (at least in some forms) is no criminal offence in many MS and hence **not necessarily a predicate offence for money-laundering**, which is why AML provisions currently often do not apply. This should be amended in the AMLD's definition of criminal activity. Ideally, though, even not clearly illegal yet obviously dubious financial flows should be detected by OEs and reported to competent authorities in the AML framework.
- Some potentially problematic service providers, like those offering services in so-called **freeports** need also to be covered as obliged entities.
- The definition of "passive non-financial entity" triggering the lower 10% participation threshold in the **BO definition** may be prone to circumvention, so the lower threshold might in fact rarely apply. Even a 10% threshold can be relatively easily circumvented by a group of 10 or more people. Ideally, anybody who exercises control over/owns an entity should be recorded.
    - COM recognised that more comprehensive transparency on (possibly all) BOs of a structure would be desirable, but claims that a lower threshold would create too much "administrative burden" - without explaining or quantifying this (for instance in their impact assessment).
    - Lower BO threshold means that more individuals have to be identity checked in detail by OEs. Besides obvious merits, this would create more compliance costs for smaller banks than for large OEs which already have complex IT systems etc. in place.
    - Council plans to scrap 10% rule altogether and apply 25% threshold across the board as per the 14 November Presidency compromise.
- Likewise, in the BO definition, the **nominee director loophole** (introduced in transition from AMLD3 to AMLD4) still exists. If no BO can be identified, a senior manager can be considered BO instead, thus avoiding transparency of the actual owners. This problem was also highlighted by the German FIU in the October 2016 shadow meeting. It appears however impossible that an entity would be unable to provide any information about its owners, if it wanted to.
    - EP draft report improves on COM proposal and prescribes registering "no BO" for entities that fail to provide information.
    - If no BO is provided by an entity, such entity should not be allowed to operate and OEs should have to refrain from any business relationship with such entity (Art 14).

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- Family trusts and non-profit-making companies should in principle (except cases involving minors or incapable persons already included in the directive or very good case-by-case reasons against) be included in a **fully accessible public BO register**[2].
    - Trusts should be registered not only through the residence of the trustee but also if the trust is based on a member states' law or if any relevant person (settlor, protector, beneficiary - not just the trustee) or assets are managed/reside in a member state. Otherwise, a lot of trust structures with material consequences for member states would not be covered by registers simply because a non-EU resident trustee is chosen.
    - MS' public registers should be based on accepted open data standards (Open Data Charter or G20 Open Data Principles) and not be subject to user fees so as to reduce costs and ensure unhindered usability and transparency. UK does this.
    - As a back-stop for ensuring accuracy and completeness of BO information in public registers, OE should generally check any information they receive by clients against the register and inform competent authorities of any discrepancy.
    - The Council Legal Service but also the European Data Protection Supervisor and others argue that the publication of BO information is actually not necessary an infringement on privacy to achieve the purpose of the AMLD (and hence potentially illegal as privacy can only be breached if necessary to meet a legitimate purpose). They claim that access to and exchange of information between authorities would be sufficient to this end. The Presidency compromise already foresees to exclude entities that serve non-commercial purpose from the public register, in the same way that the COM had proposed for trusts. EP draft report requires all trusts to register (better than COM) but maintains exclusion of non-commercial trusts from public register.
    - This can be countered by pointing to the evident weaknesses of authorities when it comes to fighting money laundering and financial crime - as a consequence of insufficient resources, third-party capture or political inference.
    - In addition, all individuals setting up a company or a trust gain specific privileges (limited liability, company law more broadly) guaranteed by society. Hence, they can assess whether those are sufficiently important to waive a small part of their privacy in exchange.
- In addition to the newly introduced centralised bank account register accessible to authorities, there should be **centralised asset registers** for securities, life insurances, land, real estate and other assets.
    - This has been underlined by the FIU hearing where this point was made in particular by IT and DE side. UK and BE, for instance, already have real estate registers.

[2] For non-profits in a traditional sense, it may be true that there is no beneficial owner as such (as there is never a benefit). For those, the insertion of final decision-makers in the register makes sense, but this should be made explicit (i.e. that there is no BO) instead of pretending that directors are BOs. For family purposes, more traditional forms like wills may as well be used to organise inheritance without registering but also without risk of criminal activity, so often no need to use trusts.

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- The EP draft report introduces a proposal for land and real estate register.
- For such non-public information (including also the more sensitive BO information provided to OEs and authorities but not required for the public register), certain data protection and privacy concerns are more warranted as the danger of bulk data collection and mass surveillance exists.

- **Customer due diligence measures** by OEs should be clearly set out and not determined by the OEs' own risk management.
  - Simplified CDD measures in cases of lower risk (Art. 15/16 & Annex 2) would effectively make it possible to not apply the entire AML framework in the case of most jurisdictions clients and should hence be dropped or at least be made a lot more precise.
- The list of **high-risk jurisdictions** triggering enhanced CDD measures is a mere copy of the respective FATF list and does not include any of the major global tax or secrecy havens[3].
  - The FSI, for instance, would be a more appropriate tool[4]. At the least, jurisdictions that lack transparency provisions, thwart international cooperation or don't properly implement and enforce seemingly good laws should be included on the list (Art. 9).
  - In addition to enhanced CDD measures, OEs should report any transactions originating from or destined to a high-risk country to the FIU and tax authority (Art. 18a). This would in particular be necessary as, once better and more transparent registers are introduced in the EU, there will be incentive to move even more corporate structures to secrecy jurisdictions.
- A major weakness of the current framework concerns the **enforcement of AML provisions**. OEs need to be facing effective and dissuasive penalties and those need to be enforced strictly by authorities. Equally there needs to be a sufficiently robust accountability mechanism to ensure compliance of public authorities with the AML framework.
  - Penalties need to cover all breaches, not just those *that are serious, repeated, systematic, or a combination thereof* as in the current text. Corporations need to be directly liable themselves in addition to individual liability for senior managers responsible.
  - For such serious, repeated or systematic breaches, particularly strong sanctions such as revoking business licences need to apply.

[3] This list is being drawn up as part of the implementation of the original AMLD4. A first delegated act has been adopted by the COM in summer 2016. COM argues that deficiencies with regard to tax and other related fields are deliberately excluded from this exercise and covered elsewhere (e.g. tax haven blacklisting process). This is however against the mandate provided by the AMLD as well as the European Parliament's explicit demands in September 2016. Regarding the FATF list, Panama, for instance, was covered in the past 1970-2015 (time from when dates PP data), but has since reformed laws and become FATF compliant.

[4] See for instance http://www.cgdev.org/blog/panama-papers-and-correlates-hidden-activity

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