European Union: Adoption of the Fifth Anti-Money Laundering Directive


Background and context of 5AMLD

5AMLD aims to further reinforce the European Union (EU) legislative framework in combating money laundering and countering financing of terrorist activities (ML/TF). It amends the current benchmark regime in this area, the 4th Anti-Money Laundering Directive (4AMLD). 4AMLD was in itself a major step forward in improving the effectiveness of the EU’s efforts to combat ML/TF.

According to the European Commission’s Impact Assessment document accompanying the proposal for 5AMLD, (the Impact Assessment) 5AMLD focuses on two main strands of action. Firstly to trace and prevent terrorists from moving funds and assets in the financial system and ensure that if any such illicit financial movement occurs, law enforcement agencies will be properly equipped to take necessary action. The second aim is to disrupt the sources of revenue used by terrorists by targeting their capacity to raise funds.

Summary of the key amendments introduced by the 5AMLD

Improving access to beneficial ownership information

Articles 30 and 31 of 4AMLD already included provisions designed to address the lack of beneficial ownership information relating to corporate and other legal entities as well as trusts. 5AMLD purports to maintain the current structure of the beneficial ownership provisions in place whilst making several amendments to eliminate the use of corrupt letterbox companies set up to launder money, hide wealth and avoid paying taxes.

Under the 4AMLD, Member States are required to identify and obtain accurate and current information on beneficial owners of legal entities and legal arrangements. This information is accessible to competent authorities and obliged entities in view of facilitating the performance of their CDD obligations. 5AMLD goes a step further and provides that at least the name, the month, year of birth, the country of residence and the nature and extent of the interest held by a beneficial owner and evident on the register should be available to any member of the general public.

The preamble to the 5AMLD makes it clear that once trusts and similar legal arrangements are registered within the Union, it is necessary to have a coherent legal framework ensuring better access to beneficial ownership information. Rules that apply to trusts and similar legal arrangements with respect to access to information relating to their beneficial ownership should be comparable to the corresponding rules that apply to corporate and other legal entities and analogous information should be collected. It is noteworthy that the access to the register of trusts will be granted to any person in relation to a trust which holds or owns a controlling interest in a company that is not incorporated in the EU.

Limited disclosure for trusts

Unlike the information on beneficial owners of legal entities and legal arrangements, public access to EU registers of trust will be limited to those who satisfy the “legitimate interest” test. In the preamble to the 5AMLD it is stated that these conditions should be defined by national law in a broader way capturing not only instances where there is a legal process in place but also instances where preventative work in the field of ML/TF and associate predicate offences is undertaken by non-governmental organisations and investigative journalists, where appropriate.

Beyond the issue of the identification of the beneficial owners of trusts, the Impact Assessment highlights two more
deficiencies in the current regime. Firstly, some Member States do not consider trusts set up under another Member State’s law (ie common law) to fall within their jurisdiction even if they are administered in their territory because they do not recognise such legal structures. 5AMLD clarifies that registration of the beneficial ownership information of trusts is required in the Member State in which the trust is administered. Secondly, in 4AMLD the requirement is for trusts to be registered in national registers where tax consequences are generated. This has been removed in 5AMLD.

**Extra focus on transparency**

In the preamble of 5AMLD, both with regards to corporate and other legal entities as well as with trust and other similar arrangements, it is clearly stated that enhanced public scrutiny will prevent the misuse of legal entities and legal arrangements, including tax avoidance. Nonetheless, a fair balance should be sought between the public interest and the personal data of individuals, hence the set of data to be made available to the public should be limited, exhaustively defined and be of a general nature. Member State will be able to caveat under their national legislation access to the register in exceptional instances where granting access would expose the beneficial owner to, disproportionate risks or other risks such as fraud or kidnapping.

Member states can choose to grant access to the information held in their national register subject to online registration which may involve the payment of a fee. In this respect, access to such informational would be traceable.

**Timing of implementation**

The current wording of the proposed text states that Member States should set up these beneficial ownership registers for corporate and other legal entities by 10 January 2020 and for trusts and similar legal arrangements 10 March 2020 within 20 months. Central registers should be interconnected via the European Central Platform by 10 March 2021. Implementation of above will increase transparency and enhance the access of FIUs to information.

**Virtual currencies**

Virtual currency operators were brought within the scope of 4AMLD to minimise the risk of terrorist organisations circumventing the traditional financial system. By way of background, virtual currencies can be used by natural or legal persons as a means of exchanging a digital representation of value that is not issued or regulated by a central bank or a public authority. This causes issues due to the anonymity surrounding the transactions as it increases the possibility that virtual currencies can be used to fund terrorism.

Inclusion of virtual currency platforms and custodial wallet providers

5AMLD introduces closer regulation to virtual currencies and brings virtual currency platforms and custodian wallet providers within the definition of “obliged entities” in order to enable FIUs to monitor the use of virtual currencies.

Amongst others, this means that as obliged entities they will be under an obligation to identify and report suspicious activities. This imposes the same obligations and regulatory requirements as those imposed on financial and credit institutions. The inclusion of such providers which engage in exchange services between virtual currencies and fiat currencies is designed to address, to a large extent, the issue of anonymity. These include, among others, obligations to register with national anti-money laundering authorities, carry out adequate due diligence procedures on their customers, regularly monitor virtual currency transactions and report suspicious activity to government authorities. The Joint Committee of the European Supervisory Authorities is expected to issue new guidelines on virtual currency exchange platforms, and amend other guidelines in light of 5AMLD.

**Setting a lower beneficial ownership threshold in relation to passive non-financial entities**

According to the Impact Assessment, the beneficial ownership threshold in 4AMLD (currently set at 25 per cent) does not distinguish between genuine commercial corporate entities and those that have no active business and are mostly used as an intermediary structure between the assets/ income and the real beneficial owner. MLD5 lowers the threshold to 10 per cent for those non-financial entities which do not engage in an active business activity.

**Developing a consistent EU approach towards high-risk third countries**

Under the current regime, obliged entities are required to apply enhanced due diligence (EDD) measures in respect of business conducted with individuals or companies established in high-risk third countries. At present, Member States are not required to incorporate into their national regimes, a specific list of EDD measures to be applied in such instances.

**Introduction of a formalised EDD approach**

Even though 4AMLD clarifies the factors to be considered (including geography and customer type) to ascertain whether EDD should be applied, it does not go to the extent of clarifying the nature of these EDD measures. This has caused several disparities in the application of EDD measures across the EU and may lead to failure in efficiently detecting suspicious transactions involving third countries. 5AMLD aims to provide a solution to these regulatory discrepancies by requiring Member State to apply a minimum set of predefined EDD requirements that obliged entities will have to apply in these instances. This formalised approach aims to lessen differences in the application of regulatory requirements between Member State and ultimately between obliged entities, harmonising these measures on an EU level.
Enhancing the powers of the European Financial Intelligence Units (FIUs)

FIUs comprise of the public authorities of each Member State assigned with the responsibility of handling any matters pertaining to the fight against ML/TF. In the Impact Assessment, shortcomings relating to the FIU cooperation were highlighted following both the Paris and the Brussels attacks. It should therefore be ensured that FIUs cooperate fully and have timely and unfettered access to all relevant information.

4AMLD encouraged the implementation of a centralised banking register or electronic data retrieval system which contains information on all financial transactions conducted by persons involved in suspicious transactions. However, as there is no obligation to do so, many member states do not have such mechanisms in place and if they do, the FIUs do not necessarily have access to them. As a result, where there is no or delayed access to the relevant information, there is an increased risk that illicit funds remain within the financial system and are available to be laundered. 5AMLD strengthens the FIUs by the introduction of centralised bank and payment account registers and by aligning the rules with the latest international standards.

Timing of implementation

Member State will be required to introduce centralised national bank and payment account registers or central data retrieval systems which will be directly accessible by FIUs, by 10 September 2020. However, in order to respect privacy and protect personal data, the minimum data necessary for the carrying out of investigations should be held in the centralised automated mechanisms for bank and payment accounts.

Prepaid cards

Although prepaid cards present important economic benefits, their use in the Paris attacks to book hotels and rent cars has raised questions as to whether these instruments should be more regulated. 5AMLD highlights that it is necessary to ensure that anonymous prepaid cards issued outside the EU can be used in the EU only where they comply with equivalent EU requirements. To limit the use of prepaid cards without performing customer due diligence, 5AMLD reduces the existing monthly threshold for identifying holders from EUR 250 to EUR 150. Furthermore, the maximum amount of money stored electronically in prepaid cards shall not exceed this threshold either. In the explanatory memorandum to 5AMLD, the Commission explained that lowering the threshold ensures that EU legislation reflects current market practice for non-re-loadable cards, while at the same time respects the needs and legitimate interests of users of these cards.

Concluding Remarks

5AMLD contains a number of innovations designed to further enhance the Union’s drive towards transparency and anti-money laundering compliance. In our view, two of the most fascinating developments to keep track of in the member state transposition phase will be the role out of public UBO registers for companies and the regulation of virtual currency service providers as obliged entities.

Bearing in mind the EU is the world’s largest economy (GDP per capita) it would be no surprise if these developments lead, in due course, to further movement on what is perceived to be the global benchmark.

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