

A Forward Look: The EU 5th Anti-Money Laundering Directive

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Definition of “Directive”

- A directive is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals.
- Directives must be incorporated by EU countries into their national legislation
- Each directive contains a deadline by which EU countries must incorporate its provisions into their national legislation and inform the Commission to that effect.
- Subject to the principle of ‘vertical direct effect’ (see case of *Van Gend en Loos*.)



EU Anti-Money Laundering and Combating the Financing of Terrorism Directives

- The purpose of the various directives is to ensure the implementation of the FATF Recommendations throughout the EU
- AML/CFT Directives enacted by European Union:

Directives	Date of Enactment
▪ First Directive - 91/308/EEC	10 th June 1991
▪ Second Directive - 2001/97/EC	4 th December 2001
▪ Third Directive - 2006/70/EC	1 st August 2006
▪ Fourth Directive - 2015/849	20 th May 2015
▪ Fifth Directive -	9 th July 2018



First EU Directive - Council Directive of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering (91/308/EEC)

- **Aim** - Passed to ensure a universal approach by Member States to combat money laundering, thus protecting the EU Single Market.
- **Key Elements of the First Directive:**
 - a) Due diligence checks by all credit and financial institutions before any business relationship or before any transaction over a certain threshold
 - b) Records to be kept for at least five years;
 - c) Close international co-operation and harmonisation between credit and financial institutions and their supervisory authorities and the establishment of a mandatory central system of reporting;
 - d) The confidentiality rules to be toned down when disclosing suspected ML offences to the authorities; and
 - e) Special protection to credit and financial institutions, their employees and their directors regarding breach confidentiality rules in order to make the disclosure.



Second EU Directive - Directive of 4 December 2001 of the European Parliament and of the Council of the European Union (2001/97/EC)

- **Aim** - To refine the existing provisions created by the First Directive and to plug the gaps in the legislation highlighted by the Financial Action Task Force (FATF) 40 recommendations.
- **Key Elements of the Second Directive:**
 - a) a broader definition of ML;
 - b) currency exchange offices, money transmitters and investment firms were included within the scope of the directive as they were susceptible to money laundering transactions; and
 - c) Establishment of the authority to identify, trace, freeze, seize and confiscate any property and proceeds linked to criminal activities.
- Proposal to extend the provisions of the Directive to the legal profession was turned down: Fear that it would encroach on client confidentiality rules and could potentially violate the integrity of court proceedings.



Third EU Directive - Commission Directive of 1 August 2006 (2006/70/EC)

- **Aim** - the directive was enacted to reflect:
 - a) the FATF (2003) revised AML/CFT standards;
 - b) the sudden realisation of the susceptibility of Designated Non-Financial Businesses and Professions; and
 - c) the changing political and economic circumstances in the wake of September 11 and the Madrid Bombings.
- **Key Elements of the Third Directive:**
 - a) The application of the Directive to non-financial businesses and professions;
 - b) Enhanced customer due diligence measures for politically exposed persons;
 - c) Simplified customer due diligence procedures for low-risk transactions involving public authorities if their identity and activities are publicly available, transparent and certain and on-going monitoring of such transactions



Fourth EU Directive – Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015

- **Aim** - Enacted to strengthen EU rules on AML/CFT taking into account the FATF (2012) Recommendations
- **Key Elements of the Fourth Directive**
 - a) Focuses on risk assessment and takes a risk-based approach - due diligence varies depending on whether there is a determined high or low risk.
 - b) Imposes minimum requirements, Member States are free to impose stricter requirements where necessary.
 - c) Requirements from all Member States to hold information on beneficial owners of all corporate and other legal entities in a national central register.
 - d) Widens the scope of the due diligence requirements. The threshold for reporting cash transactions for traders in goods is lowered to 10.000 EUR.
 - e) Extends its applicability to providers of gambling services, real estate agents and agents involved in the letting of real estate properties.
 - f) Widens the definition of PEPs to include domestic individuals.
 - g) Includes tax crimes as a predicate offence for money laundering for the first time in the EU
 - h) The European Commission can identify specifically high risk third countries, requiring additional controls for clients or funds coming from these countries



Fifth EU Directive - entered into force on 9 July 2018 – Deadline for implementation 10 January 2020.

- **Aim** - The proposal was presented in the wake of terrorist attacks and the revelations of the Panama Papers scandal
- **Key Elements of the 5th AML directive:**
 - a) Improving transparency on the real owners of companies
 - b) Improving transparency on trusts
 - c) Direct interconnection of the beneficial ownership registers to facilitate cooperation and exchange of information between Member States.
 - d) Lifting the anonymity on electronic money products (prepaid cards) in particular when used online
 - e) Extending AML/CFT rules to virtual currencies, tax related services, works of art
 - f) Improving checks on transactions involving high risk third countries
 - g) Setting up centralised bank account registers or retrieval systems
 - h) Enhancing the powers of EU FIUs and facilitating their cooperation
 - i) Enhancing cooperation between financial supervisory authorities



Establishment of centralised bank account registers

- Every Member State must establish a centralised bank account register
- Inspired by the French Fichier des Comptes Bancaires ('FICOBA')
- Enables authorities to identify bank accounts and payment accounts quickly without the need to 'fish' for information: speedy investigations and protection of confidentiality.
- Systems will be interconnected



Regulations of Virtual Currencies, tax related services and traders in works of art

- Rules relating to KYC, CDD and the obligation to file STRs will now apply to:
 - Virtual currency exchanges;
 - Persons who provide similar services to those provided by auditors, external accountants and tax advisers;
 - Persons trading in works of art.
- They will now have to identify their customers and report suspicious transactions to the FIU.



Enhancing the powers of EU FIUs and facilitating their cooperation

- Addresses the issue of gathering information from obliged entities upon request from another FIU.
- Ensures compliance of EU FIUs with the membership requirements of the Egmont Group.
- Focus on tax offences:

Paragraph 18:
"FIUs have reported difficulties in exchanging information based on differences in national definitions of certain predicate offences, such as tax crimes, which are not harmonised by Union law. Such differences, should not hamper the mutual exchange, the dissemination to competent authorities and the use of that information as defined by this Directive."

And

Article 57
"Differences between national law definitions of predicate offences as referred to in point 4 of Article 3 shall not impede the ability of FIUs to provide assistance to another FIU and shall not limit the exchange, dissemination and the use of information pursuant to Articles 53, 54 and 55."



Lifting the anonymity on electronic money products (prepaid cards)

- Transaction limits on anonymous use of prepaid cards:
 - when customers use their prepaid instrument (such as prepaid cards) directly in the shop for a maximum transaction amount of EUR 150;
 - when customers carry out an online transaction with a prepaid card below EUR 50.
- Any use over those limits will require full KYC, CDD, etc...
- Additionally, prepaid card issued outside the EU will only be permitted if they comply with requirements equivalent to those set out above (concept of equivalent jurisdictions)



Cooperation between financial supervisory authorities

- Greater cooperation between AML/CFT supervisory authorities and financial supervisory authorities.
- Removal of barriers to exchange of information.



Beneficial Ownership of legal persons and arrangements

- Countries must set up registers of beneficial ownership of legal entities and trust.
- Beneficial Ownership registers of legal entities will now be public.
- Beneficial owners of trusts and trust-like arrangements will also be public:
 - Exception is made for trusts which are set up purely for private purposes (right to privacy) or "where the information would expose the beneficial owner to disproportionate risk, of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation"
- Text of the proposal:
 - "Public access to beneficial ownership information allows greater scrutiny of information by civil society, including by the press or civil society organisations, and contributes to preserving trust in the integrity of business transactions and of the financial system. It can contribute to combatting the misuse of corporate and legal entities and arrangements for purposes of money laundering or terrorist financing, both by helping investigations and through reputational effects, given that anyone who could enter into transactions is aware of the identity of the beneficial owners. It also facilitates the timely and efficient availability of information for financial institutions as well as authorities, including authorities of third countries, involved in combating these offences."



Beneficial Ownership of legal persons and arrangements (2)

- Beneficial Ownership registers must be interconnected.
- Text of the proposal:
 - "The enhanced public scrutiny will contribute preventing the misuse of legal entities and legal arrangements, including tax avoidance. Therefore, it is essential that this information remains available through the national registers and through the system of interconnection of registers for a minimum period of 5 years after the company or the beneficial ownership information of trust or similar legal arrangement has been struck off from the register."



Broadening the criteria for assessing high-risk third countries

- European Commission will issue a list of 'high-risk third countries' deemed to have strategic deficiencies in their AML/CFT regimes.
- Text of the proposal:
- *"When dealing with cases of high-risk and with natural persons or legal entities established in high-risk third countries, Member States are to require obliged entities to apply enhanced customer due diligence measures to manage and mitigate these risks. Each Member State therefore determines at national level the type of enhanced due diligence measures to be taken towards high-risk third countries. Those different approaches between Member States create weak spots on the management of business relationships involving high risk third countries identified by the Commission. It is important to improve the effectiveness of the list of high-risk third countries established by the Commission by providing for a harmonised treatment of those countries at Union level."*



Broadening the criteria for assessing high-risk third countries (2)

- New powers of the Commission:
- *"2. The Commission is empowered to adopt delegated acts in accordance with Article 64 in order to identify high-risk third countries, taking into account strategic deficiencies in particular in the following areas:*
 - (a) the legal and institutional AML/CFT framework of the third country, in particular:*
 - (i) the criminalisation of money laundering and terrorist financing;*
 - (ii) measures relating to customer due diligence;*
 - (iii) requirements relating to record-keeping;*
 - (iv) requirements to report suspicious transactions;*
 - (c) the availability of accurate and timely information of the beneficial ownership of legal persons and arrangements to competent authorities;*



Broadening the criteria for assessing high-risk third countries (3)

- (b) the powers and, procedures of the third country's competent authorities for the purposes of combating money laundering and terrorist financing including appropriately dissuasive, proportionate and effective sanctions, as well as the third country's practice in cooperation and exchange of information with Member States' competent authorities;*
- (c) the effectiveness of the AML/CFT system in addressing money laundering or terrorist financing risks of the third country.";*

And

"4. The Commission, when drawing up the delegated acts referred to in paragraph 2, shall take into account relevant evaluations, assessments or reports drawn up by international organisations and standard setters with competence in the field of preventing money laundering and combating terrorist financing."



Observations

- The EU is addressing the ML/TF threat as a single bloc, by enhancing collaboration and ensuring that best practices learned from individual member countries are applied throughout the EU (interconnectivity).
- Practical measures to address the terrorism threat (bank account register, prepaid cards).
- While the previous AML directives were about ensuring compliance with the FATF standards throughout the EU, the 5AMLD goes beyond the minimum requirements of the FATF Recommendations (central bank account register, publicly available UBO registers).
- The publicly available and interconnected beneficial ownership registers appear to be motivated by a desire to curb 'tax avoidance'.



Issues

- Mauritius must avoid being listed as a 'high-risk third country'. Need to strengthen AML/CFT framework.
- Mauritius must address deficiencies identified in the latest mutual evaluation report (many issues addressed in the Finance (Miscellaneous Provisions) Bill).
- Issue of tax offences as predicate offences (see European Commission criteria).
- While the EU does not require third countries to have a publicly available beneficial ownership registers, this could mark the beginning of a new trend.



Thank You For Your Attention

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