# European Commission Adopts Controversial Anti-Money Laundering Measures as Proposed Date for Transposing New Directive is Brought Forward

The European Commission adopted a proposal on 5 July 2016[1] that brings in new controversial measures to amend the Fourth Anti-Money Laundering Directive,[2] (**"4MLD"**) not least bringing the proposed transposition date forward to the end of 2016. 4MLD was adopted on 20 May 2015[3] as part of EU efforts to combat the laundering of money from criminal activities and to prevent the financing of terrorist activities, in recognition of the fact that funds can be hidden and moved across the world with increasing ease.

The amendments are the first initiative to implement the Commission's Action Plan to strengthen the fight against terrorist financing which was published on 2 February 2016 and was instigated following the terrorist attacks in Paris. The Action Plan sets out a strategy for the Commission to close any existing gaps in legislation that may enable terrorists to fund their activities.[4] The measures also seek to increase the transparency of global financial transactions, a topic that has been shifted further up the Commission's agenda following the publication of the Panama Papers which allegedly highlighted how offshore jurisdictions could be being used for tax evasion or avoidance purposes.

1 Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC: http://ec.europa.eu/justice/criminal/document/files/aml-directive_en.pdf .

2 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0849 .

3 4MLD entered into force on 25 June 2015, 20 days after it was published in the Official Journal.

4 Communication from the Commission to the European Parliament and the Council on an Action Plan for strengthening the fight against terrorist financing: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1455113825366&uri=CELEX:52016DC0050 .

The latest amendments to 4MLD are also consistent with global developments. The UN Security Council Resolutions 2199(2015)[5] and 2253(2015)[6] called for measures to prevent terrorist groups gaining access to international financial institutions and the G20 announced in April 2015 that there should be improvements in the implementation of international standards on transparency, including improving the availability of beneficial ownership information.

Given the importance of the amendments to the Commission and at the international level, Finance Ministers have committed to accelerating the speed of legislative change, bringing forward the date for effective transposition and entry into force of 4MLD (including these latest rules) from 26 June 2017 to 1 January 2017. The narrowing of this window of implementation therefore places pressure on firms to ensure they have the correct systems and controls in place by the end of 2016.

## What anti-money laundering legislation is already in place?

The existing Third Money Laundering Directive (**"3MLD"**)[7] came into force on 15 December 2005 and was implemented into UK law mainly through the Money Laundering Regulations 2007 that came into force on 15 December 2007. The changes brought in by 3MLD were largely already part of the UK regime

5 UN Security Council Resolution 2911 (2015): http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2199(2015).

6 UN Security Council Resolution 2253 (2015): http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2253.pdf .

7 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: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:309:0015:0036:en:PDF .

and in fact the provisions and principles that were already embedded in the UK's anti-money laundering regime heavily influenced the development of 3MLD.

4MLD will repeal and replace 3MLD. 4MLD is designed to counter anti-money laundering and terrorist financing in the EU, ensuring increased transparency of financial transactions and legal entities to bring the EU in line with the Financial Action Task Force's (**"FATF"**) anti-money laundering and counter terrorist financing recommendations. The most recent proposed amendments further strengthen the aims of 4MLD although many have expressed concern that they could impact ordinary banking customers even though they are aimed at preventing terrorist financing.

## What do the amendments introduce?

The proposal introduces a number of amendments to 4MLD:

**1. Enhancement of the powers of EU Financial Intelligence Units ("FIUs")**

FIUs are public authorities that exist in every Member State and collect and analyse information about suspicious transactions spotted by banks or any other relevant information related to money laundering or terrorism financing. If the FIUs' analysis raises concerns about possible criminal activity, FIUs alert law enforcement authorities to take action. However, the Commission found that FIUs are prevented from gaining timely access to and exchange of information held by entities on the identity of holders of bank and payment accounts, therefore delaying counter terrorist and financial crime initiatives.

Under the new measures, the scope of information accessible by the FIUs will be widened and harmonised. The Commission will introduce centralised bank and payment account registers that identify all national bank accounts belonging to one person to facilitate financial investigations and provide FIUs with information on the identity of holders of bank and payment accounts. Member States will be given freedom to set up either a central bank registry or a bank retrieval system, whichever fits best within their existing framework. Access will be on a "need to know" basis and security and confidentiality principles must be respected when dealing with such information.

The Commission will also look into the possibility of broadening the scope for accessing centralised bank and payment account registers for other purposes, such as law enforcement investigations and tax offences and by other authorities, such as tax authorities, so that responses between organisations can be more effective and better coordinated, improving the detection of suspicious transactions.

The proposals are particularly controversial because of concerns about data security. Any data breach could potentially provide a hacker with access to records of every single bank account within a state.

**2. Tackling terrorist financing risks linked to virtual currencies**

The Commission is concerned that suspicious transactions made through virtual currencies are not sufficiently monitored as authorities are unable to link transactions to identified persons, increasing the risk that terrorist organisations are using these currencies to conceal financial transfers. As a result, virtual currency exchange platforms and custodian wallet providers will be brought under the scope of 4MLD and customer due diligence controls will need to be applied when exchanging virtual for real currencies.

Within the industry there will be mixed views about the proposal to regulate virtual currency exchanges. On the one hand, a few purists will regard any regulation of virtual currency (however tangential) to be the antithesis of the virtual currency movement. However, in practice, such regulation is probably vital to the currencies' continued existence and development. A recent research report into de-risking commissioned by the FCA[8] reported on some difficulties that firms working with new payment technologies had in obtaining access to the banking system because of anti-money laundering concerns on the part of established banks. Bringing virtual currency exchanges into the regulatory fold is likely to assuage many of those concerns and increase their acceptance.

8 "Drivers and Impacts of Derisking: a study of representative views and data in the UK" by John Howell & Co. Ltd. for the Financial Conduct Authority: https://www.fca.org.uk/static/documents/research/drivers-impacts-of-derisking.pdf .

### 3. Tackling risks linked to anonymous pre-paid instruments

Pre-paid cards were linked to the perpetrators of the Paris terrorist attacks, however, the Commission recognises that financially vulnerable citizens in some Member States use these cards to receive social benefits and that such cards must remain accessible to promote financial inclusion. Nevertheless, the Commission proposes to minimise the use of anonymous payments through pre-paid cards (both from within and outside the EU) by lowering thresholds for identification from EUR250 to EUR150 and by widening customer verification requirements to make these cards less attractive to terrorist or criminal organisations.

### 4. Stronger checks on "risky" third countries

The Commission's research found that suspicious transactions involving high-risk third countries are not efficiently monitored owing to unclear and uncoordinated customer due diligence requirements. The Commission will therefore harmonise the list of checks applicable to high-risk countries with deficiencies in their 4MLD and countering terrorist financing regimes. Banks will then have to carry out additional checks on funds coming from these countries. The list of high-risk countries was adopted on 14 July 2016[9] and is broadly the same as the FATF's list.[10] While 3MLD calls for a risk-based approach that requires enhanced due diligence to be performed on those from high-risk countries, the Commission has now set out those countries that it deems are high-risk to improve harmonisation at an EU level and fully implement international commitments.

### 5. Full public access to the beneficial ownership register

Member States will make certain information regarding the beneficial ownership of companies and business-related trusts public on a centralised register to improve transparency for shareholders and investors, reduce financial crime and make it easier for business to comply with requirements. Amendments to 4MLD and company law contained in Directive 2009/101/EC[11] will allow limited information on all other trusts to be included in the national registers and such information will only be available to parties who can show a legitimate interest in accessing the information.

If a company is at risk of money laundering and tax evasion, beneficial owners who have 10% ownership in certain companies will be included in the registries. However, the threshold will remain at 25% for all other companies. The Commission has said rules regarding protection of privacy and personal data must be respected and there should be a clear distinction between categories of legal entities engaged in the management of trust as a business with a view to gaining profit and other categories.

Beneficial ownership will also not need to be disclosed in exceptional circumstances, such as where it exposes the beneficial owner to a risk of fraud, kidnap, blackmail, violence or intimidation or where the beneficial owner is a minor or otherwise incapable. However, it is currently unclear what process would be applied to determine who is entitled to remain anonymous. If individuals are to be allowed to self certify then this would significantly limit the utility of the register.

9 Annex to the Commission Delegated Regulation supplementing Directive (EU) 2015/849 by identifying high-risk third countries with strategic deficiencies: https://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-4180-EN-F1-1-ANNEX-1.PDF .

10 "Improving Global AML/CFT Compliance: on going process – 24 June 2016": http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/documents/fatf-compliance-june-2016.html .

The EU Commission and FATF's lists both include the following countries: Afghanistan, Bosnia and Herzegovina, Guyana, Iraq, Lao PDR, Syria, Uganda, Vanuatu and Yemen. The EU Commission's list also includes Iran and the Democratic People's Republic of Korea who are considered non-cooperative by the FATF and therefore do not appear on their official list.

11 Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:258:0011:0019:EN:PDF .

### 6. Interconnection of the registers

The 4MLD emphasises the need to have direct interconnection of the registers to facilitate cooperation between Member States. The Commission will draw up a report by June 2019 to assess the conditions and technical specifications and procedure to allow this to happen.

### 7. Extending the information available to authorities

The Commission has proposed that existing as well as new accounts should be subject to due diligence controls to prevent existing accounts being used for illicit activities. Passive companies and trusts will also be subject to greater scrutiny and tighter rules as these are the entities that are of most concern following the release of the Panama Papers.

## What's Next?

The amendments proposed on 5 July 2016 will be adopted following agreement on the text by the European Parliament and the Council of Ministers under the ordinary legislative procedure (the main legislative procedure of the EU's decision making system). Although the UK has decided to leave the EU, the FCA stressed in its Anti-Money Laundering Annual Report 2015/6[12] that it continues to work with the Joint Money Laundering Steering Group[13] and HM Treasury on what it described as "key" areas, which include the transposition of 4MLD.

The FCA explicitly recognises in its annual report that the nature of the UK as a global hub makes it attractive to investors across the world but its size and openness also make it attractive to criminals seeking to hide proceeds of crime among legitimate business. The UK will still be in the EU in 2017, the current deadline for transposing 4MLD into national law and will still be required to comply with this timeline.

Furthermore, given that any future amendments to anti-money laundering legislation are likely to implement international standards and the UK is keen to maintain legislative equivalence to the rest of the EU to support its negotiations for exit, it is unlikely that Brexit will have any effect on the UK's implementation of future anti-money and counter terrorist financing legislation with a post-Brexit transposition date.

Firms cannot afford to wait until the amendments are adopted before taking steps to ensure they will be able to comply. For example, for some firms, the requirement to have all accounts on an up to date single register will require a significant upgrading of IT systems. Changes to due diligence requirements around high-risk countries will also require amendments to procedure. For firms that will be subject to regulation for the first time, a significant amount of work will be required to ensure they are ready.


***Guy Wilkes***
Partner, London
E: gwilkes@mayerbrown.com
T: +44 20 3130 3355

***Mark Compton***
Partner, London
E: mcompton@mayerbrown.com
T: +44 20 3130 3388

***Susan Rosser***
Partner, London
E: srosser@mayerbrown.com
T: +44 20 3130 3358

***Lauren Smith***
Associate, London
E: lsmith@mayerbrown.com
T: +44 20 3130 3134


12 FCA's Anti-money laundering annual report 2015/6 https://www.the-fca.org.uk/anti-money-laundering-annual-report-2015-16 .

13 The Group is The Joint Money Laundering Steering Group is made up of the leading UK Trade Associations in the Financial Services Industry.

Americas | Asia | Europe | Middle East | www.mayerbrown.com

Mayer Brown is a global legal services provider advising many of the world's largest companies, including a significant portion of Fortune 100, FTSE 100, CAC 40, DAX, Hang Seng and Nikkei index companies and more than half of the world's largest banks. Our legal services include banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory and enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

Please visit www.mayerbrown.com for comprehensive contact information for all Mayer Brown offices.