



Luxembourg newsflash 6 June 2018

The fifth anti-money laundering and terrorist financing directive (AML 5) - Key aspects and changes

The new directive on the prevention of the use of the financial system for the purposes of money laundering or terrorism financing (2016/0208/COD) (the “**5th AML Directive**” or “**Directive**”), which partially amends 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 terrorism financing (the “**4th AML Directive**”), has been adopted by the European Parliament on 19 April 2018 and is expected to be published in the official journal of the European Union any day now.

The proposal for the 5th AML Directive, which had been released by the European Commission on 5 July 2016 amongst other considerations in the wake of recent terrorist attacks and the Panama Papers revelations, is part of the Commission's Action Plan of 2nd February 2016 to strengthen the fight against terrorism financing. The 5th AML Directive aims at better countering the financing of terrorism and at ensuring increased transparency at the level of financial transactions and of corporate entities.

It is worth highlighting in this context that such adoption of the Directive occurs in a particular moment for Luxembourg as most parts of the 4th AML Directive have only been recently implemented into Luxembourg law through the law of 13 February 2018¹, and that the related provisions relating to the register of beneficial owners (the “**BOs**”) for corporate entities and fiduciary arrangements (and which are intended to be implemented through the bills of law n°7217 (for corporate entities) and n°7216 (for fiduciary arrangements)) are currently still being discussed in Parliament.

Member States will have 18 months² after the entry into force of the Directive to implement the 5th AML Directive into national law. In this context, this newsflash aims at presenting the main changes to be brought by the Directive on the current Luxembourg legal framework so that obliged entities may start preparing for further upcoming changes in this field with the Directive.

¹ Except the provisions on the new tax predicate offences to money laundering provided for under the 4th AML Directive, which were implemented into Luxembourg law by the law of 23 December 2016 implementing the tax reform in Luxembourg.

² Note that certain provisions of the 5th AML Directive Member States are to be implemented by Member States within a longer period.

1. Main objectives of the 5th AML Directive

The 5th AML Directive essentially aims at enacting the following main changes:

- an extended scope of the persons subject to the anti-money laundering and counter terrorism financing (“**AML-CTF**”) requirements (in particular to address terrorism financing risks linked to virtual currencies and anonymous prepaid cards and the constant technological evolutions in such field);
- enhanced customer due diligence measures (in particular in the context of financial transactions involving high-risk third countries);
- new increased transparency measures (including enhanced access (for some even public!) to BO registers and through central registries of bank and payment accounts holders at Member State level); and
- enhanced powers for the relevant supervisory authorities and the EU financial intelligence units (the “**FIUs**”).

2. Scope of obliged entities subject to AML-CTF obligations and the lowering of certain thresholds in the field of prepaid cards and electronic money

2.1. Extended scope of obliged entities (Article 1(1) of the Directive)

The scope of the 5th AML Directive has been broadened so as to include:

- custodian wallet providers³;
- virtual currency⁴ and fiat currencies⁵ exchange service providers;
- traders of works of art or persons acting as intermediaries in the trade of works of art (including where this is carried out by art galleries or auction houses) and persons storing, trading or acting as intermediaries in the trade of works of art when this is carried out by freeports, where the transaction (or a series of linked transactions) amounts to at least EUR 10.000; and
- next to auditors, external accountants and tax advisors (which are already subject to AML-CTF obligations) any person that undertakes to provide (directly or indirectly or by means of other persons) material aid, assistance or advice on tax matters as principal business or professional activity.

³ Custodian wallet providers are defined under Article 1(2)(d) of the 5th AML Directive as “an entity that provides services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies”.

⁴ Virtual currencies are defined under Article 1(2)(d) of the 5th AML Directive as a “digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically”. It is specified under recital (10) of the 5th AML Directive that virtual currencies should not be confused with electronic money nor in-games currencies, the latter only being used within a specific game environment.

⁵ Fiat currencies are referred to under recital 8 of the 5th AML Directive as “coins and banknotes that are designated as legal tender and electronic money, of a country, accepted as a medium of exchange in the issuing country”.

In addition, and although it was already implied under the 4th AML Directive, it is now expressly clarified under the 5th AML Directive that estate agents acting as intermediaries with regards to the letting of immovable property (in addition to real estate agents) are included within the scope of obliged entities under the 5th AML Directive and must thus comply with all relevant AML-CTF obligations. The 5th AML Directive, however, specifies that such letting agents will only fall within the scope of such obligations where the monthly rent amounts to at least EUR 10.000.

2.2. Lowering of the thresholds for electronic money and prepaid instruments (Article 1(7) of the Directive)

As regards electronic money products, the maximum monthly transaction limit below which Member States may exempt obliged entities from the application of customer due diligence requirements has been lowered from EUR 250 to EUR 150.

In addition, the threshold pursuant to which in case of redemption in cash or cash withdrawal of monetary value the aforementioned exemption shall no longer apply, has also been lowered from EUR 100 to EUR 50.

Finally, a new derogation to the exemption has been provided as regards remote payment transactions where the amount paid exceeds EUR 50 per transaction.

When such thresholds are reached/exceeded, all customer due diligence measures must be applied by the relevant obliged entities.

3. Changes to certain customer due diligence measures

3.1. Remote and electronic identification (Article 13(1) of the Directive)

The 5th AML Directive specifies that the identification and verification of the identity of the customer (and/or BOs) may also be carried out via electronic identification means such as relevant trust services as set out in Regulation EU No 910/2014⁶, or any other secure, remote or electronic identification process regulated, recognized, approved or accepted by the relevant national authorities.

3.2. Lists of politically exposed persons (“PEPs”) (Article 1(13) of the Directive)

As regards the identification of PEPs, Member States are required under the 5th AML Directive to issue and keep up to date a list indicating the exact functions which qualify as prominent public functions according to their national laws, thus providing obliged entities with more clarity as to who should be considered as a PEP in a given Member State.

International organizations accredited on their territories as well as the Commission (as regards Union Institutions and bodies) will equally be subject to such requirement. Eventually, this will allow the drawing up of a single consolidated list at EU level which shall be made public.

⁶ Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

3.3. Clarification of the measures to be taken in relation to transactions involving high-risk third countries (Article 1(11) of the Directive)

For the purposes of harmonizing the EU approach towards high-risk third countries and accordingly limit the risk of forum-shopping (based on how Member States apply more or less stringent regulations as regards high-risk third countries), the 5th AML Directive provides for a minimum set of enhanced customer due diligence measures that shall be applied by obliged entities with respect to business relationship or transactions involving high-risk third countries. The 5th AML Directive also provides for the possibility for Member States to take additional measures in relation to high-risk third countries (e.g. refusing obliged entities to the establish subsidiaries in such countries, etc.).

The 5th AML Directive further sets out additional mitigating measures, which are to be applied in addition to the enhanced customer due diligence measures as described above, by obliged entities when carrying out transactions involving high-risk third countries in accordance with a risk based approach and taking into account the specific circumstances of business relationships or transactions (e.g. the limitation of business relationships or transactions with persons from such countries).

4. New transparency measures

4.1. Definition of BO

With respect to the definition of BO of corporate entities, the EU Commission had initially proposed to lower the threshold of 25% plus one share criterion to 10 % in respect of certain limited types of entities presenting a specific risk of money laundering and/or tax evasion. This amendment was, however, not adopted in the 5th AML Directive.

As regards the definition of BO of trusts and similar arrangements, it is now clarified that it shall include all the persons listed under Article 3 (6) point (b) of the 4th AML Directive⁷.

4.2. Changes relating to the registers of BOs (Article 1(15) of the Directive)

Pursuant to the 5th AML Directive, Member States are now required to ensure public access to certain of the BO related information (at least the name, month/year of birth, country of residence, nationality of the BO and the nature and extent of the beneficial interest) held in the national register of BOs of corporate and other legal entities in Luxembourg, the future REBECO. It is also provided that this register will be interconnected via the European Central Platform to be created to this effect⁸.

⁷ *i.e.* the settlor(s), the trustee(s), the protector(s) (if any), the beneficiaries (or where the individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates), and any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means.

⁸ Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law.

In addition, the BO related information held in the registers of BOs of trusts and other similar arrangements⁹ shall now be made accessible to obliged entities in the context of their customer due diligence measures as well as to, amongst others, any person who can demonstrate a legitimate interest.

National registers of BOs of trusts and similar legal arrangements will also have to be interconnected via the aforementioned European Central Platform.

4.3. National central register of bank, payment account and safe-deposit box holders (Article 1(19) of the Directive)

The 5th AML Directive provides for the requirement for Member States to establish centralized automated mechanisms, such as registers or data retrieval systems, so as to allow for identification, in a timely manner, of the holders of bank and payment accounts and safe-deposit boxes¹⁰ as well as their proxy holders and their BOs.

Access to information held in these centralized automated mechanisms is limited to national FIUs (in a direct, immediate and unfiltered manner) as well as to national competent authorities (to the extent that such access is necessary to fulfill their obligations under the 5th AML Directive).

5. Enhanced powers and cooperation between the FIUs (Article 1(19) of the Directive)

The scope and access to information available to FIUs has been extended in the 5th AML Directive so as to allow FIUs to obtain additional information from obliged entities and grant them access, on a timely basis, to the financial, administrative and law enforcement information they require to undertake their functions properly, even without a suspicious activities report having been filed.

In addition, FIUs are granted full and swift access to information held in the bank, payment accounts and safe-deposit boxes centralized automated mechanisms as well as to information allowing the identification in a timely manner of any natural or legal persons owning real estate, including through registers or electronic data retrieval systems.

Finally, the 5th AML Directive further strengthens the cooperation framework between Member States' financial supervisory authorities and other authorities involved in AML-CTF (including tax authorities) and more generally also bolsters the cooperation framework between FIUs.

⁹ Note that Member States are now further required to identify the trusts, if recognized by national law, and similar legal arrangements that may be set up pursuant to their national legal framework or custom and which have a structure or functions similar to trusts. It has in addition been expressly specified that similar legal arrangements include, *inter alia*, *fiducie* and certain types of *Treuhand* or *fideicomiso*, where such arrangements have a structure or functions similar to trusts.

¹⁰ It should be noted in this respect that the 5th AML Directive prohibits the use of anonymous safe-deposit boxes.



For more information, please contact:



Glenn Meyer
Partner
glenn.meyer@arendt.com



Philippe Dupont
Partner
philippe.dupont@arendt.com



Pierre-Michaël de Waersegger
Partner
pierre-michael.dewaersegger@arendt.com



Marc Mouton
Partner
marc.mouton@arendt.com

Author: Helena Finn, Associate, Banking & Financial Services

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