

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING DIRECTIVE (EU) 2015/849 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

COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT ACCOMPANYING THE DOCUMENT PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING DIRECTIVE (EU) 2015/849 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

Submitted by HM Treasury on

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SUBJECT MATTER

Proposals to amend the Fourth Anti-Money Laundering Directive

1. On 5 July, in response to terror attacks in Europe and the leak of the Panama papers, the European Commission published proposals to amend the Fourth Anti-Money Laundering Directive with the goal of countering the financing of terrorism and increasing the transparency of financial transactions and corporate entities. The Commission also proposed consequential changes to the relevant company law rules under the First Company Law Directive.
2. The counter-terrorist financing proposals include the following:
 - Bringing virtual currencies into the anti-money laundering/counter-terrorist financing (AML/CTF) regime by designating virtual currency exchange platforms and custodian wallet providers as obliged entities;
 - Reducing the threshold at which Customer Due Diligence must be applied to non-reloadable prepaid instruments from €250 (£213) to €150 (£128)¹ and removing the exemption from Customer Due Diligence requirements for the online use of prepaid instruments;
 - Clarifying that Financial Intelligence Units (FIUs) are given a power in Fourth Anti-Money Laundering Directive to request information concerning money laundering or terrorist financing from an obliged entity, even if that particular entity has not filed a suspicious transaction report;
 - Enabling FIUs and competent authorities to identify the holders and beneficial owners of bank and payment accounts. Member States must set up automated centralised mechanisms in the form of a central register holding the necessary data on individuals and firms or a central data retrieval system;
 - Harmonising the EU's approach to third-country jurisdictions with strategic deficiencies in their AML/CTF regimes. Obligated entities must apply the

¹ These currency conversions were calculated by the Government according to the exchange rate on 9 August 2016.

appropriate Enhanced Due Diligence measures and mitigation measures when working with natural or legal persons established in those jurisdictions.

3. The transparency proposals include the following:
 - Amending the First Company Law Directive to provide public access to a limited set of information on the beneficial owners of companies and legal entities. The Government has long called for countries to provide public access to information on the beneficial owners of companies to improve the scrutiny of these entities;
 - Reducing the criterion for beneficial ownership from 25% to 10% with respect to passive non-financial entities, which are deemed to pose a high risk of money laundering or terrorist financing;
 - Requiring Member States to establish central registers with the beneficial ownership information of trusts and other types of legal arrangements having a structure or function similar to trusts (e.g. Treuhand, fiducie, fideicomiso and similar legal arrangements). Trusts and other legal arrangements must be registered in the Member State where they are administered;
 - Providing FIUs and competent authorities with unrestricted access to beneficial ownership information on trusts and trust-like arrangements. Obligated entities must also have access when undertaking Customer Due Diligence. Persons with a legitimate interest may have access to limited information. Information should be public for trusts that comprise property that is held by, or on behalf of, a person engaged in the business of managing trusts or acting as a trustee with a view to gaining profit. The Commission argues that trusts in this final category are comparable in their activities to companies and should be subjected to similar disclosure and transparency requirements;
 - Requiring obliged entities to perform Customer Due Diligence to the beneficial owners of existing customers, and not solely to new customers; and
 - Interconnecting national beneficial ownership registers.
4. The Commission has proposed to clarify several provisions of Fourth Anti-Money Laundering Directive, including:
 - Harmonising the term “competent authorities;”
 - Excluding closed loop cards from the meaning of electronic money for the purposes of Fourth Anti-Money Laundering Directive, in recognition of the low risk they pose; and
 - Updating the AML/CTF framework to take full account of electronic means of identity verification and, in particular, Regulation 910/2014 on electronic identification and trust services for electronic transactions in the internal market (the eIDAS Regulation).
5. The transposition deadline for the original Fourth Anti-Money Laundering Directive is 26 June 2017. However, the Commission has proposed expediting this to 1 January 2017 for both the original Directive and the amendments.
6. The Commission published a 188-page Impact Assessment alongside the proposals on 7 July. This is addressed below.

SCRUTINY HISTORY

7. On 4 March 2013, HM Treasury submitted EM 6231/13 on a Proposal for a Directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and a Proposal for a Regulation on information accompanying transfers of funds. It was cleared by the House of Lords European Union Committee on 18 June 2014. It was cleared by the House of Commons European Scrutiny Committee on 10 December 2014 and reported by the Committee to the House as 'Politically Important.' Since that the Directive contained provisions relating to domestic Financial Intelligence Units, the Government considered that a Justice and Home Affairs legal base should have been cited.

MINISTERIAL RESPONSIBILITY

8. The Chancellor of the Exchequer has responsibility for United Kingdom policy on European Union monetary and economic issues. The Foreign and Commonwealth Secretary is responsible for overall United Kingdom policy towards the European Union. The Home Secretary has responsibility for United Kingdom policy on counter-terrorism. The Business Secretary has responsibility for business law.

INTEREST OF DEVOLVED ADMINISTRATIONS

9. Money laundering is a reserved matter under the UK's devolution settlements and no devolved administration interests arise. The devolved administrations have therefore not been consulted in the preparation of this EM.

LEGAL AND PROCEDURAL ISSUES

i. Legal basis

10. The Commission has proposed to amend the Fourth Anti-Money Laundering Directive and the First Company Law Directive. The proposals are based on Articles 114 and 50 of the Treaty on the Functioning of the EU (TFEU).
11. In line with the Government's current approach to the application of the opt-in to Justice and Home Affairs (JHA) obligations, and in line with the previous Government's position that there were JHA obligations in the Fourth Anti-Money Laundering Directive, the Government is considering whether there are JHA obligations in this proposal that would trigger the opt-in.

ii. European Parliament Procedure

12. In accordance with Article 114 of the TFEU, the Ordinary Legislative Procedure applies to these proposals.

iii. Voting procedure

13. Member States will vote on these amendments by Qualified Majority Voting.

iv. Impact on United Kingdom Law

14. The Government intends to implement Fourth Anti-Money Laundering Directive in domestic legislation. Any amendments to the Directive will also need to be implemented in domestic legislation. The Third Anti-Money Laundering Directive has already been implemented by the Money Laundering Regulations 2007 (as amended), the Proceeds of Crime Act 2002 and reflected in the Terrorism Act 2000. New domestic regulations will replace the 2007 Regulations.

v. Application to Gibraltar

15. The proposal will apply to Gibraltar under the terms of Article 355(3) of the TFEU.

vi. Fundamental Rights analysis

16. Some elements of the proposals – such as the requirement for Member States to provide public access to information on the beneficial owners of trusts and other legal arrangements – may relate to the right to respect for private and family life and the protection of personal data. The Government will carefully consider the proposals to assess their impact.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

17. The Fourth Anti-Money Laundering Directive and the Fund Transfer Regulation have EEA relevance.

SUBSIDIARITY

18. The Government considers it appropriate for action to be taken at EU level. Money laundering and terrorist financing cross borders so it is appropriate to take coordinated action against them. In the forthcoming negotiations, the Government will monitor the situation to ensure that the principles of subsidiarity are fulfilled regarding all of the proposals.

POLICY IMPLICATIONS

19. On 23 June, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation.

20. The Government welcomes the proposals, particularly for public registers of company beneficial ownership. The Government has led the way in this area: its register of Persons with Significant Control went live in June 2016. The register is accessible by the public free of charge, making it the first such register in the G20.

21. The Government also welcomes the proposal to clarify particular provisions of the Directive. These include clarifying that trusts and other legal arrangements must be registered where they are administered; explicitly defining the term “competent authorities;” excluding closed loop cards from Fourth Anti-Money Laundering Directive in recognition of the low risk they pose; and updating the AML/CTF framework to take full account of the eIDAS Regulation and electronic means of identity verification. These measures provide clarity which will help in the implementation and enforcement of these provisions.

22. The Government has concerns about the proposal to reduce the registration threshold from 25% to 10% for some companies. This is a significant divergence from current conditions of becoming a Person with Significant Control, which include holding more than 25% in shares or voting rights. Reducing the threshold would increase the number of persons on the register and the costs to businesses. It could also create a mismatch of the PSC thresholds on the register: for example, in a complex structure with several layers of companies, there could be some companies that meet the 25% threshold and others that meet the 10% threshold.
23. The Government has concerns about the requirement to register the beneficial owners of all trusts and trust-like legal arrangements and to make this information widely accessible. Whilst the Commission argues that some trusts operate in a similar way to companies and should be treated in a comparable way, the private and family-oriented nature of most trusts raises privacy concerns. The Government will seek to ensure that the provisions on trusts are deliverable, proportionate and risk-based.
24. The Government also has concerns about the requirement to introduce automated centralised mechanisms which allow the identification of any natural or legal person holding or controlling payment or bank accounts. This is a significant change to the current system in the UK whereby the FIU accesses information on bank and payment accounts via credit reference agencies (CRAs) and through established contacts with account providers. The requirement to introduce a central data retrieval system is likely to be less onerous than the alternative option of compelling all financial institutions to report data on all bank accounts to a centralised mechanism. There may also be impacts on the UK's CRAs. Again, the Government will seek to ensure that these provisions are deliverable, proportionate and risk-based and that options for allowing the UK's existing system to continue are examined closely.

CONSULTATION

25. The Government is considering the proposed amendments and will consult on the implementation of the rest of Fourth Anti-Money Laundering Directive in the second half of this year.

IMPACT ASSESSMENT

26. The Commission published an inception Impact Assessment on 7 April and a detailed Impact Assessment on 7 July. However, these do not provide quantitative estimates of the costs to businesses or individuals of all of the proposals. In particular, there does not appear to have been a quantitative assessment of the impacts of the beneficial ownership proposals for trusts, either in terms of the number of individuals and trusts who would be affected or the administrative burdens associated with these changes.
27. The discussion of the impact of the measures on pre-paid instruments also lacks detail. While some figures are offered for the potential costs of Customer Due Diligence on issuers, these do not take into account the costs of developing online systems for those issuers that currently do not have them or the difficulties that might be experienced in Member States that lack robust frameworks for online Customer Due Diligence.

FINANCIAL IMPLICATIONS

28. The main costs relate to the proposals on bank account information and beneficial ownership. The Impact Assessment estimates the costs of setting up a both a central register of bank account information, as well as an automated data retrieval system. However, it is likely to underestimate the costs to both Government and firms. The Impact Assessment estimates that a central register of bank account information, would carry one-off costs as a result of the need to acquire hardware, software and labour (ranging from €170,000 to €1,000,000) as well as recurring costs of maintaining and updating the tool (estimated to be between €3,000 and €600,000). The Impact Assessment states that one Member State has already set up an automated data retrieval system, which carried one-off costs of €1,200,000 and recurring costs of €480,000 per year. However, it notes that this sample is too small to draw any hypothetical conclusions about the costs of setting up such a system in other countries.
29. The beneficial ownership measures also have financial implications. As noted above, the Impact Assessment does not provide detail on the expected costs of the proposals, either to the users of trusts and companies or to the administrations of Member States. The Government is currently setting up a register of trusts with tax consequences: it will cover around 170,000 trusts at a cost of approximately £10 million. Broadening the scope of this register to include all 1.5 to 2 million trusts in the UK would increase these costs.

TIMETABLE

30. The first working group took place on Tuesday 19 July and the next one will be on Monday 5 September. The EU Presidency considers this to be a priority file in the area of financial services and aims to reach agreement on the general approach in the coming months.
31. The Commission has called for the amendments to come into force at the same time as the rest of the Fourth Anti-Money Laundering Directive and the related amendments to the Directive on Administrative Cooperation (2011/16/EU). This would require transposing the amendments by 1 January 2017, though a large number of Member States have expressed concerns about this timetable and it may be liable to change.



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