

November 2018

### The Fifth and Sixth Anti-Money Laundering Directives

#### Overview

The Fifth Anti-Money Laundering Directive (**MLD5**) came into effect on 9 July 2018 and the text of the Directive is to be transposed by Member States by 10 January 2020. On this date, it will amend the Fourth Anti-Money Laundering Directive (**MLD4**). See our briefing on the legislation transposing MLD4 [here](#). On 12 November 2018, a sixth anti-money laundering Directive came into effect titled *Directive on combatting money laundering by criminal law* (**MLD6**) and Member States have until 3 December 2020 to transpose the laws and regulations necessary to comply with it.

#### Background

MLD5 was published in 2016 as part of an action plan at EU-level to combat terrorist financing in the aftermath of the Paris terrorist attacks the previous year. MLD5 contains a renewed focus on gatekeepers of financial systems – with a view to increasing transparency, bringing further institutions within scope, and combatting the use of new trends and technologies employed by criminals/terrorists.

#### Key Amendments to MLD4

##### EXPANDED SCOPE OF OBLIGED ENTITIES

MLD5 expands the definition of obliged entities (or designated persons) to include service providers such as virtual currency exchange platforms and custodian wallet providers.

One effect of MLD5 is that in-scope virtual currency exchange platforms are required to undertake the various customer due diligence (**CDD**) checks and other requirements when onboarding new customers. Such entities must adopt controls and procedures to counter money laundering or terrorist financing (**ML/TF**) risks, report suspicious transactions and become registered with the relevant competent authority.



However, MLD5's reach only extends to virtual currency exchange platforms exchanging virtual currencies for fiat currencies (and vice versa) and does not include platforms which only facilitate exchange from one virtual currency to another.

MLD5 additionally provides that persons trading or acting as intermediaries in the trade of works of art where the value of the transaction or series of transactions amounts to €10,000 are obliged entities.

## ENHANCED CDD FOR HIGH-RISK THIRD COUNTRIES

MLD5 provides clarification and harmonisation of the measures required of obliged entities when performing enhanced CDD relating to business relationships or transactions involving countries identified by the EU Commission as 'high-risk'.

MLD5 also introduces specific mitigation measures aimed at streamlining the processes that obliged entities must execute when dealing with customers or transactions involving high-risk third countries.

## PREPAID CARDS

Under MLD4, designated persons are exempt from carrying out CDD requirements with respect to certain electronic money products (ie certain prepaid cards).

Under MLD4, prepaid cards that are not reloadable, cannot be used outside the State, and have a maximum monthly transaction limit of €250 are exempt. MLD5 amends this provision of MLD4 by providing that such prepaid cards carrying these conditions can only avail of the exemption if the maximum monthly payment transaction limit is €150.

Under MLD4, prepaid cards that are reloadable and that carry a maximum store of value of €250 are exempt. MLD5 amends this provision by reducing the maximum store of value to qualify for the exemption for reloadable cards to €150.

The derogation in MLD4 that enabled Member States to exempt issuers of reloadable cards that carry a maximum store of value of €500 if they can only be used in that Member State is removed. Accordingly, the threshold to qualify for the exemption for reloadable cards is €150 regardless of whether the card can be used inside or outside the State.

Additionally, anonymous prepaid cards issued outside the EU will not be permitted to be used in the EU unless they comply with requirements equivalent to those contained in MLD4.

## POLITICALLY EXPOSED PERSONS (PEPs)

Member States are required to identify and maintain a list of activities that qualify as 'prominent public functions' in their jurisdictions. Any individual executing these functions shall be considered a PEP. The Commission is to maintain an equivalent EU-level list. The Commission will then aggregate the prominent public functions lists provided by Member States with its EU wide-list to create a combined list of all such functions in the EU.

## POWERS OF FINANCIAL INTELLIGENCE UNITS (FIUs)

Additional investigative powers will be granted to FIUs. Prior to MLD5, FIUs relied primarily on Suspicious Activity Reports (**SARs**) being submitted by obliged entities. The new regime enables FIUs to request, obtain and use information from any obliged entity for the purposes of detecting, preventing and effectively combating ML/TF. An FIU's powers may be invoked even in the absence of a SAR.

FIUs must compile information related to ML/TF risks on a centralised database. The information contained therein must be readily available to that Member State's competent authority and other FIUs.

## IDENTIFICATION OF ACCOUNT HOLDERS AND SAFE DEPOSIT BOXES

Member States must create automated and centralised mechanisms, such as a computerised database or register, to facilitate the timely identification of bank and payment account holders and holders of safe deposit boxes held by financial and credit institutions. The information must include, inter alia, the names of account holders and their agents, any beneficial owners and the account's IBAN. Such information is to be made accessible to FIUs in an unfiltered manner and to competent authorities for the purposes of fulfilling their obligations under MLD5.

MLD4's prohibition on anonymity in relation to bank and payment accounts held by financial and credit institutions is extended to safe deposit boxes held by those institutions.

## BENEFICIAL OWNERSHIP REGISTERS

MLD5 builds on the changes introduced by MLD4 which required corporate (and other legal entities) to obtain and hold adequate, accurate and current information on their beneficial ownership. MLD5 extends the deadline for establishing national/central registers of beneficial ownership of bodies corporate to 10 January 2020 and beneficial ownership of trusts and other similar legal arrangements to 10 March 2020. The Commission is also given power to adopt implementing acts to facilitate Member States' beneficial ownership registers to become interconnected by 10 March 2021.

### Extended access to registers

MLD5 extends access rights significantly to information contained in the central register of beneficial ownership of corporates to any member of the general public (and FIUs, enforcement bodies and obliged entities). Under MLD4, access to this information was restricted to persons who could demonstrate a legitimate interest for the purposes of carrying out CDD.

MLD5 will provide any member of the general public with a right to access information contained in the beneficial ownership register of trusts for the purposes of carrying out CDD provided they can demonstrate a 'legitimate interest' in the information. The concept of 'legitimate interest' is not defined in MLD5 and is to be defined by Member States, both as a general concept and as a criterion for accessing beneficial ownership information, in their transposing legislation. A recital to MLD5 expands on the concept of 'legitimate interest' and provides that Member States should not limit the definition of legitimate interest to cases pending administrative or legal proceedings. The term should take account of preventive work in

the field of anti-money laundering and counter-terrorist financing and associated offences undertaken by non-governmental organisations and investigative journalists, where appropriate.

MLD5 provides that Member States may choose to make the information held in their national registers available to entitled persons on the condition of online registration and the payment of an administrative fee.

#### Beneficial ownership of trusts

MLD4 obliges the trustees of any express trust that generates tax consequences to obtain and hold adequate, accurate and up-to-date information on the beneficial ownership of the trust. MLD5 requires Member States to ensure that trustees of any express trust administered in that State, and other types of legal arrangements where such arrangements have a structure or function similar to trusts, hold such beneficial ownership information regarding the trust, regardless of whether the trust generates tax consequences.

Member States are required to identify the characteristics that are indicative of whether a particular legal arrangement within its jurisdiction is sufficiently similar to a trust and thereby falls within scope by 10 July 2019.

## GUIDELINES

The Central Bank of Ireland has indicated that it will publish draft money laundering and terrorist financing guidelines in November 2018 to accompany the Irish legislation transposing MLD4 (the *Criminal Justice (Money Laundering and Terrorist Financing)(Amendment) Act 2018*). The draft guidelines will be subject to a public consultation period of three months before they become final.

The Department of Finance and the Department of Justice co-authored the previous 2012 Guidelines which will be replaced. Neither of these Departments nor the Central Bank of Ireland proposes to publish renewed sector-specific guidelines. However, the Central Bank of Ireland has indicated that it will endorse Guidelines issued by the European Supervisory Authorities (**ESAs**). Additionally, the Financial Action Task Force has recently published some sector-specific guidance.

On 8 November 2018, the Joint Committee of the ESAs launched a three-month public consultation on draft guidelines on the cooperation and information exchange between competent authorities supervising credit and financial institutions for the purposes of anti-money laundering and counter-terrorist financing supervision. The draft guidelines propose that 'AML/CTF colleges' be established where there are three or more competent authorities from different Member States involved in supervising the same entity. The purpose of an AML/CTF college is to provide a framework for cross-border supervision by Member States' competent authorities.

Considering the transposition deadline for MLD5 is 10 January 2020 for most provisions, guidelines reflecting the amendments introduced by MLD5 are yet to be addressed by competent authorities.

## SIXTH ANTI-MONEY LAUNDERING DIRECTIVE (MLD6)

MLD6 introduces new criminal provisions aimed at disrupting and blocking access by criminals to financial resources, including those used for terrorist activities. Highlights include a comprehensive definition of 'criminal activity', the identification of 22 separate predicate offences, increased maximum imprisonment terms of 4 years and the ability of judges to impose additional sanctions and measures (e.g. temporary or permanent exclusion from access to public funding, the imposition of fines, etc). MLD6 also aims to enhance Member States' cooperation by setting uniform provisions regarding investigative tools and rules to determine which Member State has jurisdiction when an offence falls within the jurisdiction of more than one Member State.

## HOW CAN WILLIAM FRY HELP?

William Fry can assist obliged entities in relation to:

- reviewing internal policies and procedures, and contracts, to ensure they comply with current ML/TF legislation;
- reviewing and updating processes in carrying out CDD;
- providing training and advice with regards to anti-money laundering/counter-terrorist financing compliance under MLD4, MLD5 and MLD6; and
- AML/CTF inspections and regulatory enforcement action.

## CONTACT OUR FINANCIAL REGULATION UNIT

For further information, please contact Shane Kelleher, Louise McNabola or any member of the William Fry Financial Regulation Unit.



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