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Ужесточенные правила Европейского союза по борьбе с отмыванием денег и финансированием терроризма

Аннотация: По причине политических и религиозных разногласий, отмывание денег и финансирование терроризма являются для всех международных организаций, а также наций, наиболее важным предметом обсуждения. Нелегальные денежные потоки и финансирование террористических действий негативно влияют не только на нашу повседневную жизнь, но и на национальную целостность, стабильность и экономический рост каждого отдельно взятого государства. В борьбе с отмыванием денег и финансированием терроризма необходимо применять наиболее согласованные и эффективные действия. Четвертая директива [1] была принята 20 мая 2015 года с целью предотвращения отмывания денег или финансирования терроризма. Директива направлена на введение минимальных мер по преодолению выше указанных проблем. Тем не менее, задача этой работы состоит в оценке принятых мер, т.е. являются ли таковые меры эффективными в борьбе с международным отмыванием денег и финансированием терроризма, а также оценить возможные проблемы, связанные с реализацией этих мер в рамках государственного национального регулирования.

Ключевые слова: фактический владелец, проверка надежности клиентов, отмывание денег, финансирование терроризма, фактор риска.

Introduction

Currently, the European Union (hereinafter the EU) has 28 Member States (hereinafter MSs), where each of the countries has its own domestic legislation, traditions and beliefs. The initial aim of the EU was to establish economic union in order to promote internal market, increase competition, favour an efficient allocation of resources and set a single currency in order to establish economic stability. Today, the EU is also recognized as a political union, which sets the aim to establish an area of freedom, security and justice [2].

According to Article 26 Treaty on the Functioning of the European Union [2, Article 26], the Union shall adopt measures in order to ensure the functioning of internal market with free movement of goods, persons, services and capital. The significant problem remains in relation to capital flows, corruption, illicit money laundering and terrorism financing which undoubtedly damages the integrity, stability and reputation of the financial sectors around the world, and, consequently, threatens the internal market of the Union. Therefore, the coordinating measures at the Union's level are necessary in order to protect the society from the crime and facilitate the proper functioning of the financial mechanisms within the Union.

The recent adoption of the AMLD4, which replaces the 3rd Money Laundering Directive (hereinafter AMLD3) [3], prescribes more comprehensive minimum requirements for combating money laundering and terrorist financing. It is supposed to be achieved by using risk-based approach principle (hereinafter RBA), simplified and enhanced customer due diligence (hereinafter CDD) and by setting-up the central registers in each of the MSs to record the beneficial owners (hereinafter BOs) and their shareholding and relation to the particular business. Therefore, this paper aims to point out the main amendments brought by AMLD4.

Main Body

To begin with, it is important to mention that each of us plays an important role in the development of financial sector, as each of us is a part of the circle of the financial sectors' operation. Namely, the financial sector is all the wholesale, retail, formal and informal institutions in an economy offering financial services to customers, businesses and other financial institutions [4]. In 2013 GDP at market prices in the EU-28 was valued at EUR 13.5 trillion, which equated to an average level of ap-

proximately 26.6 thousand PPS per capita [5]. The financial sector's development is essential for the overall economic growth, increase of GDP per capita, and consequently reduction in poverty. The most damaging for the efficient operation of the financial sector are crimes of money laundering, corruption and terrorism financing which fall under the definition of ''serious crimes'' [6;7].

Background / Historical overview

In 1989 the Financial Action Task Force (hereinafter FATF), an independent intergovernmental body was established in order to set-up the standards and to promote implementation of legal, regulatory and operation measures for combating money laundering and terrorist financing. Since then FATF is taking an active role in combating financial crimes. In 1990 FATF had drawn up FATF Forty Recommendations in order to combat misuse of financial systems by persons laundering drug money [8], whereas only in 2004 those were published. In 1996 the Recommendations were revised for the first time to take into account changes in money laundering trends and to anticipate potential future threats [9]. In 2003 FAFT updated the Recommendations of 1996. The Recommendations do not have binding force, however, those are universally recognized as the international standards for anti-money laundering and countering the financing of terrorism [10].

Shortly after that, on October 15 and 16, 1999 the European Council held a special meeting in Tampere on the creation of an area of freedom, security and justice in the EU, whereas it was decided on the need for special actions to be taken against money laundering [11]. Based on the conclusions, the EU took the initiative to implement the money laundering directive based on the principles prescribed by 1990 Strasbourg Convention [12] and FATF Recommendations in all its member states. In this regards, on 10 June 1991 the Council Directive on prevention of the use of the financial system for the purpose of money-laundering [13] was adopted containing only 18 articles (hereinafter AMLD1). In 2001 the AMLD1 was replaced by the 2nd Directive on Money Laundering [14] (hereinafter AMLD2) which replaced and/or revised a number of articles of the

AMLD1. Unfortunately, both directives failed to cover all the areas where preventive measures for protecting the financial sector needed to be applied [15]. Moreover, the directives contained relatively little detail on the procedures imposing a customer identification obligation and contained no provisions imposing the criminal and administrative penalties for the non-compliance with or for the prohibition of the AMLD2. After the second FATF revision took place in 2003, the AMLD2 was revised by AMDLD3 in 2005 and contained in total 47 articles. AMLD3 significantly extended the scope of persons' subject to directive, including, for the first time, trust and company service providers. Moreover, the AMLD3 extended the definition of such terms as ''financial institution'', ''money laundering'', ''serious crime'' and for the first time introduced the definition on ''beneficial owner'', ''trust and company service providers'' as well as ''politically exposed persons'' [16]. As it was mentioned above, the AMLD3 added a great deal to the CDD procedures, outlined the risk-based approach principle [3, Preamble 22; 37; 43; Article 8 (1 (b)); 9(6); 13(1) and (4(a)] for the simplified CDD and enhanced CDD. The simplified CDD was allowed in exceptional cases, whereas in case of higher risk countries or on risk sensitive basis the enhanced CDD should have had been applied. Moreover, the AMLD3 placed an absolute prohibition on keeping anonymous accounts (without any transitional period) [3, Article 6]. The AMLD4 provided the derogations for certain cases, imposed more extended reporting obligations [3, Articles 20-29] as well as forced to keep records and statistical data for a period of five (5) years after the business relationship with the customer has ended [3, Article 30(a)]. Additionally, it prohibited to enter into correspondent banking relationship with a shell bank or with a bank that permits its accounts to be used by a shell bank [3, Article 6; 13(5)]. In 2012 FATF revised the recommendations for the third time [9] and consequently the EU had to take necessary steps in order to company with the revised international standards. On 11 April 2012 the European Commission presented the report to the European Parliament and

the Council on a number of identified key themes, such as risk-based approach, the need for extending the scope of the existing framework, adjusting the approach to customer due diligence, clarifying reporting obligations, enhancing Financial Intelligence Units' (hereinafter FIU) co-operation and others [17]. The Proposal for the amendment of AMLD3 was submitted on 5 February 2013 and on 20 May 2015 the AMLD4 was adopted.

4th MLA Directive: changes to the existing regime

The main changes that the AMLD4 brought into force can be summarized in the following points:

1. Clarification on a RBA;
2. Stricter and more descriptive CDD procedures and requirements;
3. Establishment of central registers on BOs;
4. Tightening up rules for politically exposed persons;
5. More effective cooperation between FIUs;
6. Penalties.

Adoption of a RBA

RBA is the main principle in order to establish whether a potential client represents low, or high risk of money laundering and terrorist financing. RBA mechanics differ per member state, as the AMLD4 leaves a wide discretion to MSs' to design their own RBA and to decide on the degree of risk based measures. FATF recommendations prescribes that countries should identify, assess, and understand the money laundering and terrorist financing risks for the country, and should apply resources to mitigate those risks [9, Introduction, paragraph 5]. The Directive sets the minimum requirements for evaluating risks, namely the obliged entities shall take into account risk factors including that relation to the customers, countries or geographic areas, products, services transactions or delivery channels [1, Article 8(1)]. Moreover, the evidence-based decision making should be used in order to target the risks of money laundering and terrorist financing [1, Preamble paragraph 22]. Currently Annex II and Annex III of the Directive represent non-exhaustive lists of factors and types of evidence of potentially lower and higher risks. However, based on the up-coming report from the Commission (due date 26 June 2017) on the risks in the areas of the internal market, relevant sectors, the most widespread means used by criminals, those non-exhaustive lists most probably will be revised. The main issue that may appear in the application of the RBA is a wide diversity of national measures applied which consequently complicate cross border compliance [18].

CDD checking requirements

The AMLD1 and AMLD2 stated that it should be ensured that credit and financial institutions shall identify who their clients are. The exemption was provided for insurance undertakings and pension schemes [13;14, Article 3]. The AMLD3 implemented more detailed and substantive provisions, including prohibition for the credit and financial institutions from keeping anonymous accounts or anonymous passbooks [3, Articles 6 and 7], as well as it implemented more substantive procedural provisions in relation to source of information obtained on the customer concerned, namely such information should be obtained from reliable and independent source. The AMLD3 for the first time referred to the identification of the BO. Such identification included obtaining information on the purpose of the business, conducting on-going monitoring and keeping all information up-to date [3, Chapter II on CDD]. Directive did not specify which institutions would be considered as providing reliable and independent source of information, and did not specify what period of time falls under the term''up-to date'', thus leaving the direction for the MSs to decide upon. The AMLD3 also distinguished simplified CDD from enhanced CDD. The distinction was based on the risk based approach [10, Recommendation 1], namely simplified CDD applied when exemptions were applicable, for instance, when the client is listed company, domestic public authority or customer representing law risk of money laundering or terrorist financing [10, Recommendation 10 and Interpretive note to Recommendation 10]. In such cases it would not per se be

mandatory to apply CDD [13;14, Article 11]. By way of comparison, the AMLD4 introduced the obligation for the MSs to take measures preventing misuse of bearer shares and bearer shares warrants [1, Article 10(2)]. For instance, according to the National Decree on the obligation to retain securities to bearer states that the trust company that provides management services to an international company with regard to which bearer securities exist or will be issued, is under an obligation to take such bearer securities into safe custody without delay against issue of a depositary receipt to the party entitled to the bearer securities [19;20]. In such way it is possible to identify who the bearer of the shares is and evaluate, monitor and analyse whether the bearer has any related risks for money laundering and terrorism financing. Moreover, the substantive and procedural provisions for simplified [1, Articles 15 and 16] and enhanced CDD [1, Articles 18-24] are more descriptive and extensive, for instance, the BO shall be identified, as well as it should be understood why particular customer owns and controls particular business. The AMLD4 also has expanded circumstances in which CDD should be carried out by obliged entities [1, Articles 11 and 12].

Registers on BOs

The AMLD3 defined BO as the natural person who ultimately owns or controls the entity/ business. Such control is meant as by having 25% or more of the property of the legal arrangement or entity [13;14, Article 3(6)]. The AMLD4 provides more descriptive provisions on BO identification [1, Article 3(6)]. The main novelty in respect to the BO is the requirement of establishing central registry within the state, outside the companies, where the adequate, accurate and current information on BO would be held for the purposes of to enhance transparency in order to combat the misuse of legal entities. MSs has discretion to choose what type of the register to establish, namely whether it would be commercial register, company register or public register which would be limited in access for obtaining information on BO concerned. In other words, those central registers should be accessible without any restriction for competent authorities and FIU's, obliged entities which are performing CDD procedures only in accordance with CDD articles (Chapter II of the Directive) and any other person or organization that can provide legitimate interest. The directive itself does not define what the legitimate interest means. Moreover, such other persons or organizations should have limited access to information, namely such information shall at least include name, month and year of birth of the BO, the nationality, country of residence and the nature and extent of the interest held. Thus, the central registries would not be publicly available. The FATF recommendations state that all companies created should be registered in country's company register which should also include the basic information on the company incorporated, including a register of its shareholders and legal ownership, thus make it possible to identify who the BO is [10, Recommendation 24]. Currently, domestic company registers and chambers of commerce are mostly publicly available either for fee or without, depending on country. Such registers as usual include basic information on the company, its incorporation date, registered business address, its issued capital and business activities. Other registers, are more extensive and make it possible to determine who the shareholders and managing directors are, date of filling of annual accounts. For instance, the Netherlands has Chamber of Commerce (Kamer van Koophandel, hereinafter CoC) which is publicly available. The CoC collects information on the Dutch companies; such information is available to the public for certain fee. Since January 26, 2001 the members of the Second Chamber (Tweede Kamerleden), Mr. De Groot and Mr. Recourt, issued an initiative for establishing central shareholders register for private and public limited liability companies (centraal aandeelhoudersregister register - hereinafter CAH register) [21]. Such register is considered to contain information explicitly on shareholders of the companies and not BOs and would be available only to notary public, relevant shareholder and government agencies responsible for monitoring, supervision and enforcement, such us tax authorities, FIU, police, Public Ministry and other related authorities. CAH register will be managed by the Dutch CoC as will

form part of it. It is planned to establish CAH at the end of 2015. Establishing CAH does not exclude the Netherlands from the obligation to establish BO register. The main difference between CAH and BO registers will be that CAH will contain information on direct shareholders of private and public limited companies and available to the authorities concerned, whereas the latter will contain information on BOs of all Dutch companies, including foundations, cooperations and other types of legal entities as well as BO register will be available to a wider group of authorities and people with legitimate interest. Ms. Nagelkerke from Norton Rose Fulbright LLP in Amsterdam, in his article on CAH and BO registers writes that ''she is in favour of BO register as CAH register collects data only on direct shareholders, thus excluding foreign legal persons who may hide the real criminals. Moreover, BO registers will cover more types of legal persons than CAH register'' [22]. Today none of the registers provide information in regards to the BO/s, due to the confidentiality principle. Therefore, many of BOs currently use this advantage in order to avoid declaring taxes on the income obtained, or simply hide the fact that they own business or part of it in another state. The central BOs register will play a core role in the identification and monitoring of the BOs concerned.

PEPs / Tightening up of rules for politically exposed persons

Under the AMLD3 the PEPs are meant as natural persons who are or have been entrusted with prominent public functions. The family members or persons with close business connections would also be considered are related persons and would automatically fall under the PEP definition. On August 1, 2006 the Commission adopted directive on PEPs [16]. It specifically defines the PEP and their immediate family members and business relations. The AMLD4 interposed the definition prescribed by the PEP Directive as well extended it with additional criterions, namely PEP may be considered as a natural person who is member of the governing bodies of political parties [1, Article 3((9)(c))] or is a director, deputy director and member of the board or equivalent function of an international organization [1, Article 3(9(h))]. Today, there are available a number of virtual/online data bases recognizing PEPs, among those can be pointed out such data bases as WorldCheck, Relian, Accuity, Kyc360, and Veda which upon the entrance of the name and surname of the person concerned automatically shows whether the person is considered as PEP or is merely linked to the PEP. It is important to mention that having a PEP sanction, does not per se mean that person perpetrated criminal activity; it is more of bearing a preventive character [1, Recital 33]. Moreover, a person simply determined as PEP should not be automatically refused in obtaining business services or relationship. Person being considered as PEP should be identified and appropriate measures should be taken in order to have proper risk assessment and management systems, on-going screening and monitoring should be performed more often, as well adequate measures should be taken in order to establish source of wealth of such person [1, Article 20]. Even in cases when PEP is no longer entrusted with a prominent public function, obliged entities has to for at least 12 month take into account possible risks and consequently take necessary preventive risk measures until no further risks are established [1, Article 22].

More effective cooperation between FIUs

The AMLD3 lied down the requirement for the MSs to establish the financial intelligence unit (hereinafter FIU) which in turn should have established a central national unit for the purposes of receiving, analysing and disseminating to the competent authorities, disclosures of information concerning money laundering and potential terrorist financing [13;14, Article 21]. Article 38 of the AMLD3 sets the requirement for the Commission to assist for the facilitation of coordination, including the exchange of information between FIU's, but no more than that. The directive further does not describe the relevant procedures of possible cooperation. More extensive framework on the FIUs mandate and functioning is set out in Council's Decision concerning arrangements for cooperation between financial intelligence units [23].

The existing arrangements had a number of shortcomings, such as cooperation on terrorist financing was not foreseen in the Decision, or due to different types of FIUs' powers that FIUs have at national level for exchange of or access to information for specific types of cooperation jeopardised the effectiveness of cooperation. The FATF recommendation No. 29 [10, Recommendation 29] sets that FIU shall serve as the central agency for the receipt and disclosures filed by reporting entities. At a minimum such information shall include suspicious transaction reports. The AMLD4 lays down reporting obligations to FIUs which should be recognized as operationally independent and autonomous bodies with the capacity to carry out its functions freely, to take autonomous decision to analyse, request and disseminate specific information regarding suspicious transactions, possible money laundering and terrorist financing. The AMLD4 sets more detailed provisions on cooperation between MSs' FIUs at national level [1, Article 49], between FIUs and obliged entities, their directors and employees [1, Article 33] and between FIUs and the Commission [1, Article 51].

Penalties

The AMLD4 has a number of articles in relation to the administrative sanctions for noncompliance with the Directive. There is less presented for criminal sanctions. However, provisions on criminal sanctions are not excluded and can be implemented under national law which beforehand shall be communicated to the Commission. A maximum administrative pecuniary sanctions are of at least twice the amount of the benefit derived from the breach where that benefit may be determined, or at least EUR 1 000 000 may be imposed. In case of a legal person, a maximum administrative pecuniary sanctions are of at least EUR 5 000 000 or 10% if the total annual turnover according to the rates available accounts approved by the management body may be imposed. The main reason of such minimum however, very extensive provisions defined by the Directive are due to desire of harmonizing sanctioning regime among the member states.

Related problems

First of all, the AMLD4 is minimum harmonization directive, which consequently leaves the discretion for the MSs to adopt the more stringent rules. Differentiation in criminal and administrative sanctions' regime may lead to the shortcomings such as forum shopping. Potential BOs may choose for the countries with have more favourable sanction regime in case of their noncompliance with the provisions lied down by the Directive. Moreover, the Directive does not define what is considered as bearing a legitimate interest in cases when persons wish to access central registries for obtaining information on particular BO. Each of MS may define or interpret ''legitimate interest'' in its own way, which again will lead to inconsistences, for instance, in cross border cases. What is more, currently information on BOs are confidential which without doubt favours them and consequently in most cases it is difficult for national authorities to establish where one or another BO invests funds and favours from the tax avoidance. Again it depends on each and single state how the central registries will operate, how the data will be proceeded and protected from public-people not having legitimate interest and other interventions in private data of BOs. The Directive shall be implemented into national laws until 26 June 2017, and as soon as the Commission will draw up the report on the implementation of the Directive (deadline 26 June 2019), it will be possible to react on the shortcomings and related problems.

Conclusion

AMLD4 brought into force more extensive substantive and procedural provisions in relation to combating anti money laundering and terrorist financing. The main novelties concerned the assessment of the risks and applying risk-based approach. Additionally, customer due diligence was clarified, whereas FATF recommendations offers interpretive notes with factors which either fall under the high and low risk assessment. Another novelty relates to the central registers for BOs, which will not be publicly available, however, other persons having legitimate interest may have access to it.

The term 'legitimate interest' is not yet defined, therefore each MS has discretion to implement the own definition on the term in its domestic legislation. The AMLD4 extended the definition on the politically exposed persons by stating that members of the governing bodies of political parties and directors, deputy directors and members of the board or equivalent function of an international organization, which are entrusted with prominent public function fall under the definition of PEP. In order to monitor, analyse and collect such data on natural and legal entities that may have risk of money laundering and terrorist financing the financial intelligence unit should have been established in the MS. It was already succeeded, however, the cooperation between the MSs' FIUs was lacking. Therefore, the AMLD4 introduced more clea r provisions a nd obligations for the FIUs functioning and cooperation with obliged entities, their directors and employees, with the Commission and other FIUs of within the EU. Finally, the AMLD4 introduced administrative penalties for the non-compliance with the directive. The criminal penalties are not prohibited by the AMLD4, however, such penalties should be consulted with the Commission first. The AMLD4 shall be implemented into national laws until 26 June 2017, afterwards it will be possible to determine the problems arising from the Directive, such as inconsistences in definitions applied in each member state, difference in operation of central registers on BOs, as well as review whether the cooperation among FIUs has become more effective and strengthened.

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