

## EPFSF Briefing

# “Anti-Money Laundering and Data Protection: compatible challenges for the EU financial industry”

### Summary

On 5 February 2013, the European Commission adopted two proposals for legislation to update the EU's existing [Third Anti-Money Laundering Directive](#) and [Fund Transfers Regulation](#). Both proposals implement in EU law the most recent Financial Action Task Force (FATF) global standards on anti-money laundering and combatting the financing of terrorism (AML/CFT) adopted in February 2012.

The proposals provide for a more targeted and focussed risk-based approach, moving from prescriptive towards a risk-based set of standards to improve clarity and consistency of the rules across the Member States. The new AML Directive promotes high standards and goes beyond the FATF requirements in bringing within its scope all persons dealing in goods or providing services for cash payment of 7.500 € or more. Such persons will now be covered by the provisions of the Directive including the need to carry out customer due diligence, maintain records, have internal controls and file suspicious transaction reports.

As the Directive is providing for minimum harmonisation, Member States can go beyond the already far reaching rules as they have done in the past. Notably the Directive also extends its scope to address new threats and vulnerabilities by ensuring for instance coverage of gambling services providers (the previous Directive covered only casinos) and by including an explicit reference to tax crimes.

The Fund Transfers Regulation has been changed in a similar way to the AML Directive, updating the rules to a more risk-based approach as well as to respond to new vulnerabilities. The Regulation will require Payment Service Providers to include and verify originator and beneficiary information in the funds transfer. Moreover, the scope now covers credit cards, debit cards, mobile telephone or any other digital or IT pre-paid or post-paid device if they are used to make a person-to-person transfer. A simplified procedure is included for low value transfers (up to 1.000 €).

Discussions regarding the proposals will start in both the Council and the Parliament in the coming months. The EP Committee leading on both proposals will be the Civil Liberties, Justice & Home Affairs (LIBE) Committee and while it should be tasked with taking a broad perspective, it naturally may look at the proposals from a more justice/home affairs perspective and be less concerned with the impact of current proposals on the financial services sector.

At the same time, a recent proposal of the European Commission to review the EU data protection framework aims to clarify some essential issues: definition of consent, data breach notification, use of profiling. Ensuring the utmost level of protection of customers' data with a legal framework providing the necessary legal certainty is essential for European financial institutions. However, obvious conflicting objectives and requirements exist between AML and Data protection legislation, which represent a real challenge for financial institutions.

### Main Proposals in the 4<sup>th</sup> AMLD and Positioning of the Financial Industry in the Fight against Money Laundering

**Extension of the scope:** two main changes are proposed (a) the threshold for traders in high value goods dealing with cash payments is reduced from 15.000 € to 7.500 € and (b) providers of gambling services are covered (only casinos previously).

**Risk-based approach:** The Directive recognises that the use of a risk-based approach is an effective way to identify and mitigate risks to the financial system and wider economic stability in the internal market area. The European Supervisory Authorities (ESA) shall develop a minimum list of factors to be taken into consideration.

- (a) **Member States** will be required to identify, understand and mitigate the risks facing them. This would be the starting point for the risk-based approach;
- (b) Entities operating within the scope of the Directive (**obliged entities**) would be required to identify, understand and mitigate their risks, and to document and update the assessments of risk that they undertake. This would allow competent authorities (such as supervisors) within Member States to thoroughly review and understand the decisions made by obliged entities under their supervision;
- (c) The resources of **supervisors** can be used to concentrate on areas where the risks of money laundering and terrorist financing are greater. The use of a risk-based approach would mean that evidence is used to better target the risks.

**Simplified and Enhanced Customer Due Diligence:** in the proposal, obliged entities would be required to take enhanced measures where risks are greater and may be permitted to take simplified measures where risks are demonstrated to be less. The revised Directive tightens the rules on simplified due diligence and does not permit exemptions.

**Politically Exposed Persons (PEP):** enhanced due diligence should always be conducted for PEPs. The proposal includes PEPs who are entrusted with prominent public functions domestically, as well as those who work for international organisations. The financial industry would have liked to see an updated PEP lists published (at least for intra-EU PEPs) in order for financial institutions to use it as a substantive tool to discharge their customer due diligence (CDD) obligations independently of any commercial lists.

**Information on the beneficial owner (BO):** the revised Directive proposes new measures in order to provide enhanced clarity and accessibility of beneficial ownership information especially for trusts. It requires legal persons to hold information on their own beneficial ownership. This information should be made available to both competent authorities and obliged entities. From an industry point of view, the obligations concerning the identification of a potential beneficial owner is the most challenging element of the CDD-requirements imposed by the Directive from an implementation perspective. The inclusion of harmonized, reliable, transparent, detailed, updated and relevant shareholding as well as BO information concerning non-listed companies in public registries would therefore have been welcome in the proposal of the European Commission. This is an imperative to ensure high standards of integrity of the CDD process of financial institutions and would have helped providing financial institutions with the required legal certainty.

**Administrative sanctions:** Member States should ensure that administrative sanctions are available for systematic breaches of key requirements, including customer due diligence, record keeping, suspicious transaction reporting and internal controls.

**Financial Intelligence Units (FIUs):** A better cooperation between FIUs of the Member States is provided mainly in respect of exchanging information.

**European Supervisory Authorities (ESA):** ESAs are asked to carry out an assessment and provide an opinion on the money laundering and terrorist financing risks facing the EU. In addition, ESAs should develop guidance for Member States and financial institutions on what factors should be taken into account when applying simplified customer due diligence and enhanced customer due diligence and when applying a risk-based approach to supervision.

## Interaction between AML/CFT Rules and Data Protection

The draft AML Directive contains provisions to try and clarify the relationship between AML/CFT and data protection obligations.

In addition, the recent proposal of the European Commission to review the EU Data Protection framework aims to clarify some broad and complex issues with a direct impact on financial institutions and their compliance with AML/CFT requirements.

Obvious conflicting objectives and requirements exist between AML and Data protection legislation:

On one hand, Know Your Customer (KYC) obligations require the collection of all necessary data to ensure the best knowledge of the client and avoid being misused for money laundering/counter terrorist financing purposes. On the other hand, collecting the minimum information needed for the processing of data on the agreed purpose is a necessary principle of the protection of banks' customers' data.

Being able to process customers' data with legal certainty is a priority for the EU financial industry.

In his context, the proposed AML Directive recognises the need to strike a balance between allowing robust systems, controls and preventative measures against money laundering and terrorist financing on the one hand, and protecting the rights of data subjects on the other.

The revised AML directive provides that with respect to data protection, the proposed clarifications to the Third AMLD are fully in line with the approach set out in the Commission's recent data protection proposals (currently in discussion in the Parliament), whereby a specific provision (Article 21 of the draft Data Protection Regulation) empowers EU or national legislation to restrict the scope of the obligations and rights provided for in the draft regulation on a number of specified grounds, including the prevention, investigation, detection and prosecution of criminal offences.

It is obvious from the above that the proposed AML rules will affect the existing (and forthcoming) data protection standards in the EU. Given that both instruments are revised during the same period, it is important that the financial sector is given clear guidance on how to tackle the possible inconsistencies from a compliance perspective between EU data protection legislation and AMLD as well as other domestic, European and international regulations or standards.

## Interaction between AML/CFT Rules and Payments

The current Payments Services Directive (PSD) is a **maximum harmonisation** Directive, which aims at establishing a single market for payments in the EU, eliminating barriers of entry and enabling firms to act on a cross-border basis. This objective is far from being achieved, however, partly as a result of the fact that financial institutions have to adapt to local AML legislation. As the proposed 4<sup>th</sup> AML Directive remains a **minimum harmonisation** Directive, the offering of payment products and services on a cross-border basis may still be plagued with inefficiencies.

The fact that both the AML directive and the PSD (proposal expected in May) are expected to be under review simultaneously opens up an opportunity for the Parliament to work towards a truly harmonised Single Market for Payments.

## Conclusion

- During the past decade, the European financial industry has heavily invested in money laundering prevention. It is by far the largest private contributor to the detection of money laundering criminal offences and remains committed to apply high standards of AML/CFT in line with global standards defined by FATF.

- A more harmonised approach regarding AML rules is beneficial to the whole financial industry and to the EU single market for financial services. It remains unclear why a higher degree of harmonisation is not achievable in the AML/CFT environment, also in light of criminals and criminal organisations increasingly operating on a cross-border basis.
- Data protection standards should be well defined to minimise inconsistencies with AML/CFT rules.
- The fight against financial crime can only succeed if there is stronger transparency in company ownership structures and informational support from public authorities to the private sector.
- ECON members should be involved in the discussions on the AML proposals as their impact on the EU single market for financial services is very important.

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Briefing notes are prepared by the Financial Industry Committee to the European Parliamentary Financial Services Forum. For further information on the subjects raised in the briefs please contact the Chairman, Members or Secretariat of the Financial Industry Committee.

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