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# Anti-Money Laundering Directive - 2016 Recast

## 1. *Commission proposal (relevant additions to AMLD4)*

- Providers of virtual currency services and exchanges are newly introduced as obliged entities (OE) to the AML framework. OEs previously already included all sorts of financial institutions and legal service providers. They all have to apply customer due diligence (CDD) measures as set out in the directive in order to prevent money-laundering and terrorist financing (Art 2).
- One important CDD measure is the identification of the real, i.e. beneficial owner (BO) of a structure. The threshold of participation in an entity beyond which a natural person is considered a BO is generally maintained at 25%, but reduced to 10% if the legal person is a “passive non-financial entity” (Art 3).
- OE have to apply CDD measures to new customers and to existing customers “on a risk-sensitive basis” (Art 14.5) or when carrying out large or suspicious transactions (Art 11). Existing customers now also have to be checked whenever “relevant circumstances change” or when the OE contacts the customer in the process of the DAC AEOI implementation.
- “Enhanced CDD measures” that OEs have to additionally perform when dealing with high-risk customers or areas have been detailed (Art 18 & 18a). Previously, those enhanced measures were required but not made explicit in the AMLD.
- Information from company and trust BO registers will now generally be accessible to the public. The previously prescribed “legitimate interest” test for access to BO registers is only maintained for non-commercial (family) trusts. Non profit-making corporations can never be accessed publicly (Art 30 & 31 & amended directive 2009/101).
- It has been clarified that MS are responsible for registering all trusts for which the trustee is resident in that member state.
- Tax authorities now have full access to the company and trust BO registers (i.e. to family trust and generally to non-public, detailed BO information in addition to the information accessible by the general public).
- Financial Intelligence Units (FIUs) are public bodies or teams in member states which constitute the link between OE and other competent (law enforcement) authorities. They analyse information in centralised registers and from OEs in order to single out cases where money-laundering or terrorist financing can be suspected. While previously acting primarily after receiving suspicious transaction reports (STR) by OEs, FIUs now can also request information from OEs without such reports (including from OEs in other member states?) (Art 32 ff).
- In addition, there will be a new centralised register of all bank accounts in each member state - including information on the respective BOs - to which FIUs and competent authorities have access (Art 32a).
- Exchange of AML/CTF information between FIUs and competent authorities of different member states is governed by a revision of the administrative cooperation directive (DAC5) and further provisions aimed at preventing the refusal to cooperate are inserted in the AMLD (Art 50a ff).

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## 2. *Criticism and necessary additions*

- The definition of "passive non-financial entity" (from DAC 2) triggering the lower 10% participation threshold in the BO definition seems to be relatively easy to circumvent, so the lower threshold might in fact be rarely applicable. The threshold should have been reduced to at most 10% for all structures. COM actually recognised that more comprehensive transparency on (possibly all) BOs of a structure would be desirable, but claims that a lower threshold would create too much "administrative burden" - without further explaining or even quantifying this (for instance in their own impact assessment).
- Likewise, in the BO definition, the nominee director loophole still exists. If no BO can be identified, a senior manager can be considered BO instead, thus avoiding transparency of the actual owners. This is particularly irritating as the public disclosure of basic BO information in the centralised registers depends on self-declaration of entities and each entity should at least know its own BO. If no real BO can be identified for an entity (despite wider test and lower thresholds - e.g. because a company refuses to provide or verify information), then an entity should not be allowed to operate and OEs should have to refrain from any business relationship with such entity.
- As a back-stop for ensuring accuracy and completeness of BO information in public registers, OE should generally check any information they receive by clients against the register and inform competent authorities of any discrepancy.
- Family trusts and non-profit-making companies should in principle (except cases involving minors or incapable persons already included in the directive or very good case-by-case reasons against) be included in a fully accessible public BO register[1]. Trusts should be registered not only through the residence of the trustee but also if the trust is based on a member states' law or if any relevant person (settlor, protector, beneficiary - not just the trustee) or assets are managed/reside in a member state[2]. Otherwise, a lot of trust structures with material consequences for member states would not be covered by registers simply because a non-EU resident trustee is chosen.
- The list of high-risk areas/countries triggering enhanced CDD measures (delegated act from Commission) is a mere copy of the respective FATF list and does not include any of the major tax havens worldwide. FSI, for instance, would be a more appropriate tool[3].
- MS' public registers should be based on accepted open data standards (Open Data Charter or G20 Open Data Principles) so as to reduce costs and ensure unhindered usability and transparency. UK does this.
- Art 15/16 provide for simplified CDD measures in cases of lower risk. Looking at the underlying annex 2 and the indicators of lower risk described therein, it seems that this carve-out is potentially very large as, for instance, any country with supposedly strong AML provisions will be considered lower risk.

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[1] For non-profits in a traditional sense, it may be true that there is no beneficial owner as such (as there is never a benefit). For those, the insertion of final decision-makers in the register makes sense, but this should be made explicit (i.e. that there is no BO) instead of pretending that directors are BOs.
For family purposes, more traditional forms like wills may as well be used to organise inheritance without registering but also without risk of criminal activity, so often no need to use trusts.
[2] This seems to be fulfilled by a recently introduced trust register in France. The application of the law is however currently on hold following a law suit by an American citizen on the grounds of data protection rules.
[3] See for instance http://www.cgdev.org/blog/panama-papers-and-correlates-hidden-activity

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