

## Takeaways From EU's Latest Anti-Money Laundering Rules

By **Ian Hargreaves and Deirdre Lyons Le Croy** (February 22, 2019, 3:09 PM EST)

On Oct. 11, 2018, the Council of the European Union formally adopted the Sixth Anti-Money Laundering Directive, or 6AMLD, to strengthen and advance the fight against money laundering. The directive introduces new criminal law provisions to disrupt and block access by criminals to financial resources, including those used for terrorist activities. Member states have 24 months to transpose it into national legislation. The 6AMLD will be of great interest to many business in the U.K., including but not limited to U.K. business with subsidiaries or clients in EU.

Prompted by the Panama Paper revelations and recent terror attacks in the EU, EU institutions have implemented a series of near concurrent anti-money laundering directives in recent years in order to bolster legislative machinery in the fight against money laundering. Key objectives include a crack down on virtual currencies, enhanced cross-border co-operation, the extension of criminal liability to legal entities and closing the loopholes that allow laundered money and terrorist financing to move around the EU with little fear of scrutiny.

The directive sets out how money laundering and the related financing of terrorism and organized crime remain significant problems at EU level despite the fairly recent implementation of the fourth and fifth Anti-Money Laundering Directives. Recital 4 of the directive states that the current council framework decision in this area "is not comprehensive enough and the current criminalisation of money laundering is not sufficiently coherent to effectively combat money laundering across the Union."

The drafters of the directive also aim to implement a new era of stronger cross-border enforcement, hoping that once the member states have similar enforcement powers in place, it will be easier for them to cooperate and exchange information. Member states should end up with similar jurisdiction provisions, enabling them to resolve jurisdiction issues and prosecute criminals more quickly.

### Key Requirements of the Directive

There are a number of amendments that firms operating in members states should look out for.

#### *Establishing a Standard Definition of Money Laundering*



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The directive establishes a standard definition of money laundering which criminalizes some conduct not currently illegal in EU member states — namely, self-laundering, where the same entity that committed the predicate crime tries to disguise the source of the funds. To date, in some EU countries, criminals transferring or controlling funds arising from their own criminal activities is not an offense.

### ***Unified List of Predicate Crimes[1]***

The 6AMLD provides a unified list of 22 specific predicate crimes for money laundering which all EU member states must criminalize in national law (if they have not already done so). The offenses include tax crimes, fraud, insider trading, terrorism, cybercrime, environmental crimes and corruption. Aiding, abetting and attempting to commit an offense of money laundering will also be illegal. By explicitly defining predicate offenses, 6AMLD will impose greater obligations on firms. Staff will need training to recognize possible indicators of all these predicate offenses, as well as firms having to implement monitoring systems to detect proceeds possibly linked to these offences.

### ***Extension of Criminal Liability to Organizations***

A significant change under the directive is the extension of criminal liability to organizations, such as companies or partnerships and the representatives or controlling minds of those organizations. The directive dictates that where representatives or controlling minds of an organization are either aware of the underlying criminal activity or do not provide appropriate supervision or control over employee activities which enables the money laundering offense, these individuals will be held liable and can be prosecuted.

The extension of criminal liability to legal entities (which can face a range of sanctions, e.g. exclusion from public aid, placement under judicial supervision, judicial winding up, fines, etc) is a departure from current practice in the U.K. In the U.K., before a company can be prosecuted, the prosecutor is required to identify the "controlling mind" of the company and prove that that person was complicit in the offense under investigation. This is an area in which many have called for reform in the U.K.

### ***Failure to Supervise***

Companies and other legal entities can be held independently liable for a failure to supervise or control individuals with the power to represent the entity, authority to make decisions on behalf of the entity, or authority to exercise control within the entity. Should an organization be criminally convicted for a money laundering offense, it will be still be possible to seek conviction of relevant individuals within the same organisation.

### ***Increased International Cooperation for Prosecution of Money Laundering***

Under 6AMLD, EU member states (including the European Free Trade Association) and third countries (countries outside the European Economic Area) will be expected to share information to improve the investigative and prosecutorial processes.

### ***Requirement for Predicate Offenses in Another Member State or Third Country Must Be Illegal in Both the Home Country and the Other Respective Jurisdiction***

The directive introduces the requirement of "dual criminality" for the offense of money laundering which requires the offense to be unlawful both in the country where the offense takes place and by

reference to the laws of the jurisdiction in which the offense of money laundering is committed. This can make a material difference in relation to requirements to report certain types of predicate activity, for example tax evasion, which now falls under the scope of predicate crimes.

### ***Enhanced Punitive Measures***

The 6AMLD introduces tougher punishments for individuals convicted of money laundering offenses. The directive has increased the minimum prison sentence for money laundering offenses from one year to four years. The directive also includes a variety of other dissuasive penalties, such as possible (1) exclusion from public benefits or aid, (2) exclusion from access to public funding, including tender procedures, grants and concessions, (3) a temporary or permanent ban from conducting business, (4) judicial supervision, (5) a compulsory winding-up of the organization and (6) a temporary or permanent closure of business units through which the offenses were committed. This is in addition to the previous penalties, including disgorgement of ill-gotten proceeds and instrumentalities used to commit the offense.

The directive also establishes certain aggravating factors, including a mandatory aggravating factor when the offender is a person or entity subject to anti-money laundering reporting and due diligence requirements and the offense occurs in the course of professional activities, e.g. as an employee or as an agent and those who have a contractual relationship with an obliged entity, such as a bank or a law firm. Offenses committed by organized criminal gangs are also deemed to be aggravating circumstances for the purposes of sentencing.

In addition, the directive establishes discretionary aggravating factors when the laundered property is of considerable value or derived from certain offenses, including corruption — an area where the penalties are already significant.

### **Considerations for U.K. Companies, Especially Those With Subsidiaries in the EU**

EU policymakers have complained widely that differing money laundering sanctions across the EU allow criminals to go "forum shopping" — choosing jurisdictions where sanctions are less serious. Given the breadth of the 6AMLD, U.K. companies should consider (1) whether the expanded penalties apply to them / their subsidiaries, (2) the amount of potential liability they face, and (3) how to modify existing anti-money laundering compliance programs to minimize their exposure.

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[1] A predicate crime is a serious crime that is underlying money laundering or terrorist finance activity.