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Introduction


In this issue, we provide updates on AML developments in the UK and internationally in the Financial Services Sector. We offer the latest updates on Brexit, including the anti-money laundering and counter-terrorist financing aspects of the Political Declaration on the future UK-EU relationship and we look at the steps that firms need to take in preparation of a ‘no-deal’ Brexit.

In the EU, we comment on recent enforcement action taken by the European Commission against Member States for not implementing on time the fourth Anti-Money Laundering Directive and we discuss the next steps to reinforce AML supervision at an EU level in response to recent money laundering cases involving the EU banking sector. We also examine the guidance of the Financial Action Task Force for applying a risk-based approach to AML supervision for the securities sector as well as its mutual evaluation report for the UK.

We hope that you find this update helpful. Your feedback is important to us, therefore if you have any comments or would like further information, please contact one of our specialists listed at the end of the Bulletin.

– The DLA Piper Financial Services Regulatory Team
January 2019
UK News & Enforcement Action
HM Treasury updated advisory notice on money laundering and terrorist financing controls in higher risk jurisdictions

On 25 October 2018, HM Treasury published an updated Advisory Notice, replacing all previous advisory notices, on money laundering and terrorist financing controls in higher risk jurisdictions. The Advisory Notice is in line with the latest statement of the Financial Action Task Force (FATF) of October 2018, which identifies countries with strategic deficiencies in their Anti-Money Laundering and Counter-Terrorist Financing (AML/CTF) standards.

### The Advisory Notice

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Firms should also note that DPRK, Iran, Syria, Tunisia and Yemen are subject to further sanctions measures in the UK, requiring the implementation of additional measures.
**FATF’s statement**

DPRK creates ongoing and substantial ML/FT risks and poses a threat to the international financial system. FATF members should apply counter measures, including closing down existing branches, subsidiaries and representative offices of DPRK banks in their jurisdictions and terminating correspondent relationships with DPRK banks, where necessary under the United Nations Security Council resolutions.

Iran has adopted a high-level political declaration and has developed an action plan to address the strategic deficiencies in its AML/CTF framework. Therefore, FATF decided to continue the suspension of counter-measures. However, given that the majority of the action plan is still outstanding, the FATF warned that it will take further action if Iran fails to adopt the necessary legislation by February 2019. In the meantime, FATF members should continue applying enhanced due diligence measures, including clarifying the objective of the relevant transactions.

The last risk category includes jurisdictions (Bahamas, Botswana, Ethiopia, Ghana, Pakistan, Serbia, Sri Lanka, Syria, Trinidad and Tobago, Tunisia, Yemen) that have provided a written, high-level political commitment as well as an action plan to address their strategic AML/CTF deficiencies and are currently working with FATF and FATF-style regional bodies in this respect.
Anti-money laundering and counter-terrorist financing aspects of Brexit political declaration on future UK-EU relationship

On 25 November 2018 the European Council endorsed the Withdrawal Agreement of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement) and the accompanying Political Declaration on the future EU-UK relationship (Political Declaration), which were both agreed between the European Commission’s and the United Kingdom’s negotiators on 14 November 2018.

The future security partnership between the UK and the EU

The Political Declaration sets out the key elements for the future relationship between the UK and the EU, following this transitional period. It highlights the need for ‘a broad, comprehensive and balanced security partnership,’ whilst respecting the sovereignty of the UK and the autonomy of the EU. The security partnership should be based on shared principles, values and interests and should cover law enforcement and judicial cooperation in criminal matters, foreign policy, security and defence as well as cooperation in specific areas of shared interest, including countering terrorism.

In the area of counter-terrorism, the UK and the EU should facilitate collective dialogue and operational cooperation. In particular, the Political Declaration emphasises the need to:

- share best practice and expertise on key issues and themes;
- cooperate with the relevant intelligence analysis bodies, which should promote effective assessment sharing; and
- maintain a close dialogue on emerging threats and new capabilities.

The UK and the EU should also put in place arrangements to promote swift data sharing and analysis, which is vital for effective law enforcement. They should also set out the terms under which the UK will cooperate via Europol and Eurojust. Even though intelligence will be produced autonomously, the UK and the EU should ensure that it is shared on a timely and voluntary basis, especially in the area of counter-terrorism, and that it contributes to a shared understanding of the broader security environment of Europe.

The UK and the EU should ensure that law enforcement and judicial cooperation in criminal matters is comprehensive, close, balanced and reciprocal and that it facilitates the prevention, investigation, detection and prosecution of criminal offences. This should involve cooperation with regards to data exchange, operational cooperation between law enforcement authorities and judicial cooperation in criminal matters as well as anti-money laundering and counter-terrorism financing.

The UK and the EU should comply with international standards for combating money laundering and terrorism financing established by the Financial Action Task Force. At the same time, they will seek to go beyond these standards to promote beneficial ownership transparency, especially in relation to cryptocurrencies, by requiring cryptocurrency exchanges and custodian wallet providers to conduct customer due diligence.

The transitional period

The Withdrawal Agreement provides for a transitional period, until 31 December 2020, with a possibility of extension for a further two years. This will ensure a smooth transition and allow for the necessary time to adapt to the new state of affairs. During this period the UK will be treated as an EU member state and EU law will continue to apply in the UK, including for instance the provisions of the fourth Anti-Money Laundering Directive (MLD4). Moreover, any changes to EU law during this period will automatically be applicable to the UK with direct effect, which means that the UK will still need to transpose the fifth Anti-Money Laundering Directive (MLD5) by 10 January 2020. The UK will also continue being part of the EU Single Market and thus will benefit from the freedom of establishment and freedom of services. The transitional period will not apply if the UK does not accept the Withdrawal Agreement and, instead, opts for a “hard Brexit” at the end of March 2019.
Draft Money Laundering and Transfer of Funds (Information) (Amendment) (EU Exit) Regulations 2018

On 29 November 2018, HM Treasury published a draft version of the Money Laundering and Transfer of Funds (Information) (Amendment) (EU Exit) Regulations 2018, which has been laid before Parliament for approval, along with an Explanatory Memorandum. This statutory instrument forms part of the UK government’s contingency measures in preparation of a no-deal Brexit, also known as ‘onshoring’. The aim is to ensure that the UK anti-money laundering and counter-terrorist financing regime operates efficiently in all possible scenarios.

The changes introduced

The first set of changes relates to the role of EU institutions and information sharing requirements with EU authorities:

- UK authorities will no longer be required to transmit information to EU institutions or to take into account guidelines published by the European Supervisory Authorities (ESAs).

- The Financial Conduct Authority (FCA), instead of the European Commission, will be empowered to make technical standards to determine additional measures required for credit and financial institutions, which have branches or subsidiaries abroad, in cases where non-UK national law does not provide for group-wide policies and procedures at least as strong as those that are required under the MLRs.

- Any subsequent update to list of high-risk third countries, which is published by the European Commission, will be made after exit day only through UK law.

Additionally, Member States and counterparties of the European Economic Area (EEA) will no longer be granted preferential treatment in relation to third countries, as is currently the case under certain circumstances. As a result:

- UK credit and financial institutions will be required to apply enhanced due diligence measures with regards to intra-EEA correspondent banking relationships, which will not be treated differently from correspondent relationships outside the EEA.

- UK payment service providers will be required to provide greater levels of information than is currently the case to identify payers/payees accompanying electronic transfers of funds into EU Member States. On the contrary, electronic transfers of funds between the UK and Gibraltar will be deemed as equivalent to intra-UK transfers, to ensure that Gibraltar’s financial services firms have access to UK markets until 2020.

The impact on firms

Certain credit institutions, financial institutions and payment service providers will need to take steps as a result of the above changes. These will include expanding existing IT systems to be able to comply with the higher levels of scrutiny in relation to intra-EEA corresponding banking relationships as well as the increased level of information on transfers of funds between the UK and EEA Member States. However, HM Treasury maintains that the impact on the market will be small (less than GBP 5 million a year), given that many institutions that may be affected already apply stricter measures than those currently required under the applicable rules.

Background

Following the UK’s withdrawal from the EU, it will no longer be appropriate to maintain certain provisions of retained EU law, which are solely related to the UK’s membership of the EU. In general, after exit day, the UK will be treated as a third country in relation to the EU and vice versa. The draft statutory instrument amends the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs), as well as other relevant legislation to reflect this new position.
International News
Commission refers Luxembourg to the Court of Justice for not completely implementing MLD4

On 8 November 2018, the European Commission referred Luxembourg to the Court of Justice of the European Union (CJEU) for failing to fully transpose the fourth Anti-Money Laundering Directive (MLD4) into national law. On the same day, the Commission also sent Estonia a reasoned opinion and Denmark a letter of formal notice to assess compliance with MLD4.

Background
MLD4 was introduced to reinforce the EU Anti-Money Laundering and Counter-Terrorist Financing (AML/CTF) framework by:

- strengthening risk assessment obligations for banks, lawyers, and accountants;
- establishing clearer transparency requirements on beneficial ownership for companies and trusts;
- facilitating cooperation and exchange of information between Financial Intelligence Units across the EU for the identification and tracking of suspicious transfers of money;
- introducing a coherent policy towards third countries without appropriate AML/CTF regimes;
- enhancing the sanctioning powers of competent authorities.

Failure of EU Member States to implement MLD4
Even though EU Member States had to transpose MLD4 by 26 June 2017, most Member States failed to adopt the necessary implementation measures on time. Therefore, the Commission opened non-communication infringement procedures against 21 Member States. In her speech of 25 June 2018, Věra Jourová, Commissioner for Justice, Consumers and Gender Equality, gave a damning assessment of the implementation of MLD4, describing it as ‘slow and unsatisfactory’.

Currently, three Member States are at the stage of court referrals (Romania, Ireland and now Luxembourg), one is on hold (Greece), nine at the stage of Reasoned Opinions, and eight at the stage of letters of formal notice.

The Commission proposed that the CJEU charges a lump sum and daily penalties until Luxembourg takes appropriate action. Estonia and Denmark were given two months to respond to the relevant formal notices and take the necessary action. If they fail to do so then the Commission may take further infringement action, including referral to the CJEU.

Adoption of MLD5
In the meantime, following the Panama Papers revelations and the terrorist attacks in Europe, the EU adopted the fifth Anti-Money Laundering Directive (MLD5). MLD5 seeks to strengthen the EU AML/CTF regime by:

- enhancing safeguards for financial flows from high-risk third countries;
- facilitating access of Financial Intelligence Units to information;
- introducing centralised bank account registers; and
- bringing into scope virtual currencies and pre-paid cards.

MLD5 entered into force on 9 July 2018 and Member States will need to transpose its provisions into national law by 10 January 2020.

“We have stringent anti-money laundering rules at EU level, but we need all Member States to implement these rules on the ground. We don’t want any weak point in the EU that criminals could exploit. The recent scandals have shown that Member States should treat this as a matter of urgency,”

Věra Jourová, commenting on Luxembourg’s referral.
ESAs consult on cooperation and information exchange under MLD4

On 8 November 2018, the Joint Committee of the European Supervisory Authorities (ESAs), which include the European Banking Authority (EBA), European Insurance and Occupational Pensions Authority (EIOPA), and the European Securities and Markets Authority (ESMA), published a Consultation Paper on Draft Guidelines on cooperation and information exchange between competent authorities supervising credit and financial institutions in the area of Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) supervision (Draft Guidelines).

Background
Under EU AML/CFT rules competent authorities must cooperate and exchange information. However, this is only a high-level requirement without a sufficiently detailed framework, which undermines the effectiveness of AML/CFT supervision in the EU. Therefore, the ESAs have developed the Draft Guidelines with a view to clarifying the practical aspects of cooperation and information exchange both at a national and a cross-border level.

The Draft Guidelines
The ESAs propose to introduce AML/CFT supervisory colleges to facilitate cooperation and information exchange between competent authorities, which are responsible for supervising the same firm. The rules for the establishment and operation of these colleges will build on the similar concept of supervisory colleges, which already exists in the prudential context. More specifically the Draft Guidelines propose the following:

- **Mapping of firms:** First, competent authorities will need to undertake a ‘mapping exercise’ of all authorised firms under their supervision to determine the ones that meet the qualifying criteria for an AML college. This mapping will also include branches and subsidiaries of authorised firms in other jurisdictions as well as branches and subsidiaries with a head office in third countries, which are under the supervision of the competent authority completing the mapping.

- **Qualifying criteria:** AML/CFT colleges will be established in cases where the AML/CFT supervision of the same credit or financial institution and its establishments is undertaken by three or more competent authorities from different Member States. In certain cases this may involve the conversion of already existing AML/CFT sub-college structures, which are attached to some prudential colleges. The frequency and way of operation of each AML/CFT college will depend on the risk profile of each firm.

- **Cooperation with prudential supervisors:** Prudential supervisors will be able to participate as observers in AML/CFT colleges and information from AML/CFT college meetings will become available to colleges of prudential supervisors under certain circumstances.

- **Bilateral relationships:** In cases where the qualifying criteria for setting up an AML/CFT college are not met, a more formalised process for cooperation and information exchange will be introduced.

Stakeholders can provide their comments on the Draft Guidelines by 8 February 2019.
Next steps to reinforce anti-money laundering supervision for EU banks

On 17 December 2018, the Council of the EU (Council) adopted its position regarding the proposed reforms to the European system of financial supervision to strengthen the role of the European Banking Authority (EBA) in the area of Anti-Money Laundering and Counter-Terrorist Financing (AML/CTF) supervision for EU banks. On 4 December 2018, the Council also published an Action Plan setting out short term non-legislative actions to address AML challenges in the EU.

Background

The EU has taken significant steps to reinforce its AML/CTF legal framework over recent years. Since 2015, it has adopted two consecutive legislative reforms, namely the fourth and the fifth Anti-Money Laundering Directive (MLD4 and MLD5 respectively). However, Member States have been slow in implementing MLD4 resulting in the European Commission taking enforcement action against some of them, as discussed elsewhere in this publication.

Even though the EU has a strong AML/CTF legal framework in place, recent scandals involving EU banks have raised doubts as to the effectiveness of supervision and enforcement of existing rules by individual Member States. Poor monitoring of money laundering and terrorist financing threats may result in reputational risks for the EU banking sector as a whole and may undermine the financial stability of particular institutions.

Strengthening the role of EBA

The EU seeks to enhance AML/CTF supervision at an EU level by reinforcing the role of the EBA in this area. This will ensure that the relevant rules are implemented across the EU and will facilitate cooperation between prudential and AML supervisory authorities. More specifically, the EBA should:

- collect information from National Competent Authorities (NCAs) relating to AML/CTF weakness identified by the NCAs;
- develop common regulatory and supervisory standards and coordinate the activities of NCAs;
- review and perform risk assessments of the strategies and resources used by competent authorities to tackle AML risks;
- facilitate cross-border cooperation with third-country competent authorities; and
- take decisions addressed directly to individual institutions, should NCAs fail to take the necessary action.

The proposed rules are at the stage of negotiation with the European Parliament.

Further steps regarding AML supervision

At the same time, the EU is considering ways to promote better coordination between prudential and AML supervisors. In its Action Plan, the Council recommended the following actions:

- conducting a ‘post mortem’ analysis of recent money laundering scandals involving EU banks to identify the contributing factors and inform further action;
- identifying the AML/CTF aspects that are relevant to and may be integrated into prudential supervision;
- clarifying how prudential supervisors should take into account money laundering risks and facilitating cooperation and information exchange between prudential and AML supervisors;
- specifying the circumstances under which authorisation may be withdrawn in the event of a serious breach of AML/CTF rules;
- promoting the implementation of the Risk-Based Supervision Joint Guidelines issued by the European Supervisory Authorities (ESAs), sharing best practices and ensuring the ESAs use their supervisory tools efficiently.
FATF guidance for a risk-based approach for the securities sector

On 26 October 2018, the Financial Action Task Force (FATF) published a Risk-Based Approach (RBA) Guidance for the securities sector (RBA Guidance). The RBA Guidance was produced, following a public consultation in July 2018, in collaboration with the private sector and incorporates input from the industry. It is non-binding and clarifies how securities providers as well as supervisors should apply a RBA in managing Money Laundering and Terrorist Financing (ML/TF) risks.

Background
In line with its 2012 Recommendations on combating ML/TF, the FATF expects supervisors, financial institutions and intermediaries to apply a RBA approach to identify, assess and understand ML/TF risks and apply the appropriate mitigation measures. This way resources will be allocated more efficiently to address higher-risk situations.

Securities transactions may create opportunities for money laundering due to certain characteristics of the sector, such as the high level of interaction between counterparties, high volumes, speed and anonymity. However, different securities products and services may involve different ML/TF risks. At the same time, securities transactions may involve several types of securities providers with different business models as well as intermediaries.

The RBA Guidance
The RBA Guidance examines the main elements of securities transactions that may be a source of ML/TF risks and provides examples of appropriate risk mitigation tools to address these vulnerabilities.

MORE SPECIFICALLY:

• ML/TF risk assessment should reflect the nature, size and complexity of the securities providers’ business. The RBA Guidance provides specific examples of risk indicators associated with commonly used risk categories, such as country or geographic risk, customer risk, product or service risk and intermediary risk.

• Senior management of securities providers should promote a culture of compliance with Anti-Money Laundering and Counter-Terrorist Financing (AML/CTF) requirements and ensure that ML/TF risks are managed before establishing or maintaining business relationships.

• ML/TF risk management may vary depending on the nature of the business relationship between the securities provider, the intermediary and the underlying customers. When deciding which type of Customer Due Diligence (CDD) is necessary, securities providers should clarify whether their client is acting on their own behalf or as an intermediary for their own clients. Regardless of who is responsible for undertaking CDD, securities providers should understand the customer base of the intermediary to determine the risk level associated with the latter.

• The Guidance also clarifies how AML/CTF requirements apply to cross-border correspondent banking relationships, which may share characteristics with certain business relationships in the securities sector.

• Securities providers should pay due regard to their ongoing transaction monitoring and reporting of suspicious activities obligations. The Guidance provides examples of risk factors that may require the filing of a suspicious transaction report, enhanced CDD measures, further inquiries or ongoing transaction monitoring.

• Securities providers as well as supervisors should develop a group level approach to address ML/TF risks, which may include developing a group-wide assessment of ML/TF risks and may require information sharing between the various supervisors involved.

• Lastly, supervisors should provide guidance and feedback to securities providers with regards to regulatory expectations and quality of reporting. The Guidance provides examples of supervisory practices applying RBA in the securities sector.

Overall, when applying a RBA:

• securities providers should understand the ML/TF risk related to the sector in general as well as the specific products and services, their customer base and the capacity under which their clients operate and the jurisdictions involved.

• supervisors should understand the ML/TF risks related to the particular securities providers under their supervision and assess the effectiveness of the risk mitigation tools in place.
On 7 December 2018, the Financial Action Task Force (FATF) published its mutual evaluation report assessing the UK's anti-money laundering and counter-terrorist financing system (Report). The Report provides an overview of the strengths and weaknesses of the UK regime and sets out priority actions for its improvement.

The risks
The UK is a major global financial centre and the world's largest centre for cross-border banking. As a result, it faces significant money laundering risks from overseas, including high-end and cash-based money laundering as well as money laundering associated with fraud, tax offences, drug offending, human trafficking and organised crime.

The strengths of the system
According to the Report, the UK Anti-Money Laundering and Counter-Terrorist Financing (AML/CFT) system is effective in many respects:

- All financial institutions and Designated Non-Financial Businesses and Professions (DNFBPs), which include lawyers, accountants and trustees, are required to comply with AML/CFT rules and are supervised accordingly. The creation of the Office for Professional Body Anti-Money Laundering Supervision (OPBAS) is a positive step in addressing inconsistencies in the supervision of lawyers and accountants.
- The UK is proactive in investigating, prosecuting and convicting ML/TF-related activities. According to the Report, "the UK has been a leader in designating terrorists at the UN and EU level, and takes a leading role promoting effective global implementation of proliferation-related TFS."
- Moreover, high-end ML has been an area of recent focus and therefore it remains to be seen whether further action would be necessary in this regard. The UK's proliferation financing sanctions program as well as its Targeted Financial Sanctions (TFS) regime are also strong and efficient.
- The Joint Money Laundering Intelligence Task Force (JMLIT) is considered as a particularly strong feature of the UK regime and an example of best practice. The JMLIT was introduced in 2015 and is designed to facilitate information sharing between the private and the public sector.
The vulnerabilities of the system

According to the Report measures in connection with correspondent banking and financial intelligence are the only two areas of the UK system that need significant improvements. More specifically, the Report identified the following weaknesses:

- The UK Financial Intelligence Unit (UKFIU) lacks human and IT resources and analytical capabilities. Even though limiting UKFIU’s role in conducting operational and strategic analysis has been a conscious policy decision, FATF is concerned with the quality of financial intelligence available to investigators as a result. This may also undermine cooperation with foreign Financial Intelligence Units.
- The Suspicious Activity Reports (SARs) regime needs significant improvement. Even though some high-quality SARs are received, FATF is concerned with the large number of poor quality SARs and the fact that the level of reporting from higher risk sectors such as trust and company service providers, lawyers and accountants is still relatively low.
- The level of understanding of ML/TF risks varies and is generally less developed among DNFBPs compared to banks. The existence of multiple, and in particular 22, legal and accountancy sector supervisors adds complexity and undermines a risk-based approach to supervision.

Priority Actions

The Report sets out the following key priority actions for the UK:

- Increasing human resources, improving IT capacity of the UKFIU and re-assessing its role to ensure that financial intelligence is used to the fullest to address ML/TF risks and to facilitate cooperation with international partners.
- Reforming and modernising the SAR regime to adjust to the business-profile of the different reporting entities and to become more user-friendly.
- Improving the quality of information available on the People with Significant Control register by assessing the relevant information against sanctions lists and sharing this information as appropriate and ensuring that identified discrepancies are reported to Companies House and flagged in the register.
- The Financial Conduct Authority needs to ensure that all entities under its supervision are supervised adequately in accordance with the relevant risks, rather than focusing solely on the firms that form part of its systematic and proactive supervision programs.
- The ‘overwhelming majority’ of international cooperation of the UK involves EU Member States. In light of Brexit, the UK needs to work with international partners to ensure that co-operation tools and information-sharing channels will be at least as strong as the ones available to the UK under the EU framework.

“*The assessment team was not convinced that the gaps in the UKFIU are being adequately filled by other agencies such that financial intelligence is fully exploited in the context of the significant ML/TF risks faced by the UK.”*
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