



FINANCIAL SERVICES

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# Transposition of the Fourth Anti-Money Laundering Directive

by **David Williams, David Naughton**

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Consultation on Member State discretions and expected implications for Dealers in High Value Goods

## 1. Department of Finance: EU Anti-Money Laundering Directive and Funds Transfer Regulation – Public Consultation on Member State Discretions

On 29th January 2016 the Department of Finance and the Department of Justice and Equality (the “Departments”) published a consultation paper (CP) on the Member State discretions available to Ireland in transposing the Fourth Anti-Money Laundering Directive (Directive (EU) 2015/849) (“AMLD4”) and the Funds Transfer Regulation (Regulation (EU) 2015/847) into Irish law.

Responses to the consultation process must be submitted by 5pm on Friday, 4 March 2016.

The CP will be of interest to persons and businesses with obligations under anti-money laundering (“AML”) and counter-terrorist financing (“CFT”) legislation (known as “Obligated Entities” under AMLD4 or as “Designated Persons” under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (as amended) (the “Act”).

The following is a high level overview of the CP and the issues raised.

### Retention of existing Member State Discretions

The Departments intend to retain the Member State discretions in AMLD4 which were also contained in the Third Anti-Money Laundering Directive (“AMLD3”) and which were transposed into Irish law by the Act.

The CP lists the following Member State discretions as being among those which it intends to retain;

1. **Article 2(3)**: the exclusion from the AML/CFT legislation of persons engaged in financial activity on an occasional or very limited basis where there is little perceived risk of money laundering or terrorist financing. This relates to businesses that do engage in certain financial activity but only in a way that is ancillary to their main business activities.
2. **Article 14 (2)**: Obligated Entities be permitted to verify the identity of customers and beneficial owners during the establishment of a business relationship, rather than before entering into such a relationship, where to do otherwise would interrupt the normal conduct of business and provided there is little risk of money laundering or terrorist financing.
3. **Article 15 (1)**: where areas of lower risk are identified, Member States can allow Obligated Persons to apply simplified customer due diligence (CDD) measures.
4. **Article 25**: Obligated Entities may rely on certain third parties to carry out CDD on customers but ultimate responsibility for the responsibility for that task remains with the Obligated Entity.
5. **Article 48 (9)**: Member States may appoint self-regulatory bodies as the competent authorities with responsibility for supervising the AML and CFT compliance of Obligated Entities such as solicitors, accountants, and estate agents.

## Gambling Services

**Article 2 (2):** The Departments are looking for feedback on the discretion available under AMLD4 for Member States to exempt certain gambling services (not including casinos) from AML and CFT laws on the basis of proven low risk based on the nature and scale of those gambling services.

The CP notes that the State is required to assess the risk of money laundering or terrorist financing associated with certain gambling services. This risk assessment will need to take into account a supra-national risk assessment which AMLD4 has mandated the European Commission to carry out on this sector. The CP also notes that AMLD4 could potentially apply to online gambling services, bingo events, local lotteries, and bookmakers (on-course and off-course), depending on the outcome of that risk assessment.

Interested parties are invited to respond to a number of questions, including the potential impact of bringing these types of gambling services within the scope of AMLD4.

## Electronic Money (e- money)

Article 12 (1): Member States have discretion to allow Obligated Entities not to apply certain customer due diligence requirements with respect to e-money, where all of the following conditions are met:

1. the payment instrument is not reloadable, or has a maximum monthly payment transactions limit of €250 which can be used only in that Member State;
2. the maximum amount stored electronically does not exceed €250;
3. the payment instrument is used exclusively to purchase goods or services;
4. the payment instrument cannot be funded with anonymous electronic money;
5. the issuer carries out sufficient monitoring of the transactions or business relationship to enable the detection of unusual or suspicious transactions.

For the purposes of condition 2 above, a Member State may increase the maximum amount to €500 for payment instruments that can be used only in that Member State.

The CP notes that in order for Member State to exercise this discretion, a risk assessment is must be carried out which demonstrates the risk associated with such e-money transactions is low. The CP cites the consultation paper published by the European Supervisory Authorities (the "ESAs") on 21 October 2015 entitled "Consultation Paper on Guidelines on risk factors and simplified and enhanced customer due diligence" as being of relevance. The ESAs paper sets out factors which indicate either increased or decreased risk of money laundering/terrorist financing to e-money.

The public are invited to submit views on what risks may need to be taken into account in relation to Article 12 (1).

## Beneficial Ownership Registers

AMLD4 requires Member States to establish central registers or databases to hold information on the beneficial ownership of corporate entities. The Departments have asked for feedback on the restrictions to be placed on the information that will be included on the central register to be maintained for corporates established in Ireland and how exemptions should be applied.

**Article 30 (1):** Member States are required to ensure that corporate entities in their territory "obtain and hold" accurate and current information on their beneficial owners (subject to the relevant ownership thresholds provided for under AMLD4) and that this is provided to Obligated Entities carrying out anti-money laundering/counter terrorist financing due diligence.

**Article 30 (2):** provides that this beneficial ownership information should be accessible in a timely manner to competent authorities and financial intelligence units.

**Article 30 (3):** places an obligation on Member States to ensure this beneficial ownership information is held

on a central register (the “Register”).

**Article 30 (4):** places an obligation on Member States to ensure the information on this Register is “adequate, accurate and current”.

**Article 30 (5):** details the levels of access to this Register and the relevant restrictions that apply. The CP notes that Member States have the discretion to allow wide access to the Register, for example, to the public, without restriction.

**Article 30 (9)** recognises that it might be undesirable to publish some types of beneficial ownership information. However, in cases where information is restricted to the public it would still need to be made available to competent authorities and financial intelligence units.

The establishment and maintenance of these types of central registers/databases was debated at length as part of the consultation process which preceded the publication of AMLD4. Ireland supported the view that corporate beneficial ownership should be known. This was despite objections from institutions such as the Law Society of Ireland which sees the maintenance of such a register as running contrary to some basic principles of company law.

It is not yet known which State body will have responsibility for maintaining the Register. The Companies Registration Office is an obvious choice given that it deals with the incorporation of Irish companies, but it may not currently have the resources or the necessary powers to take on such a role.

## Beneficial Ownership Register of Trusts

**Article 31 (4):** Member States will also be required to hold trust related information on a central register where the trust generates tax consequences. The information to be held on this central register will include accurate and up to date information on the settlor, the trustees and the beneficial ownership of the trust.

The CP provides the following non-exhaustive list of matters could give rise to tax consequences:

- Receipt by the trustees of income and capital gains
- Disposal of income or capital assets by the trust
- Movement of funds by the trust

The Revenue Commissioners have indicated that they are willing to establish and maintain this central register.

## General

The CP also invites views from the public on the Member State discretions available in relation to due diligence carried out in high risk jurisdictions by wholly owned subsidiaries of entities established in the EU (with worldwide AML policies), the appointment of central contact point for e-money issuers and generally on any other issues associated with the transposition of AMLD4.

## 2. High Value Goods Dealers

A subtle, but significant, change which is expected to be introduced by virtue of the transposition of AMLD4 will affect those entities falling within the scope of what are currently termed “high value goods dealers”.

By way of background; the recitals to the AMLD3 states that:

“... dealers in high value goods, such as precious stones or metals or works of art and auctioneers are in any event covered by this [AMLD3] to the extent that payments to them are made in cash in an amount of €15,000 or more.”

**Article 2 (1) (3) (e)** went on to provide that the following persons were included within the scope of the definition of “Designated Person” under AMLD3:

“ ... other natural or legal persons trading in goods, only to the extent payments are made in cash in an amount of €15,000 or more, whether the transaction is executed in a single operation or in several operations which appear to be linked...”

**Article 2 (1) (3) (e)** of AMLD3 is transposed into Irish law by Section 25 (1) (i) of the Act which states:

“ ... any person trading in goods, but only in respect of transactions involving payments, to the person in cash, of a total of at least €15,000 (whether in one transaction or in a series of transactions that are or appear to be linked to each other) ...”

The text underlined above is important. It provides that for the purposes of the Act, high value goods dealers are only caught within the scope of the definition of “Designated Person” in relation to cash payments they receive. The focus has changed and been expanded somewhat under AMLD4. Recital 6 of AMLD4 states:

“... the use of large cash payments is highly vulnerable to money laundering and terrorist financing. In order to increase vigilance and mitigate the risks posed by such cash payments, persons trading in goods should be covered by [AMLD4] to the extent that they make or receive cash payments of €10,000 or more. Member States should be able to adopt lower thresholds, additional general limitations to the use of cash and further stricter provisions.”

**Article 2 (1) (3) (e)** which sets out the scope of the definition of high value goods dealers for the purposes of AMLD4 is worded as follows;

“... other persons trading in goods to the extent that payments are made or received in cash in an amount of €10,000 or more, whether the transaction is carried out in a single operation or in several operations that appear to be linked.”

The result is that when AMLD4 is transposed into Irish law we expect that high value goods dealers will be caught within scope, not only in relation to cash payments they receive, but now also in relation to payments they make for goods.

The expanded nature of AMLD4 means the focus of CDD will extend to those who supply high value dealers with goods, whether those goods are motor cars, precious metals, scrap metals, fine art, jewellery or other relevant goods, if these dealers pay for such goods in an amount exceeding the monetary threshold of €10,000. The rules would apply not only where such a payment is made in a single transaction, but also where payment of amounts below the threshold is made in a number of linked transactions. Persons dealing in high value goods will need to start thinking about how this expected change will affect their business. AMLD4 may well have implications for businesses that do not currently fall within the scope of the Act.

**For further information, please contact any member of the Financial Services team at LK Shields.**

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