Tougher EU rules and enforcement for money laundering

23/10/2018

Corporate Crime analysis: What are the main provisions and implications of the new EU Directive on money laundering? Nicola Finnerty, criminal litigation partner at Kingsley Napley LLP, and Neill Blundell, partner at Macfarlanes LLP, examine the Directive and look at whether the UK will be affected.

Original news

Council of the EU formally adopts Directive to criminalise money laundering, LNB News 11/10/2018 87

The Council of the European Union has adopted a new Directive to criminalise money laundering. The Directive will introduce new criminal law provisions to disrupt and block access by criminals to financial resources, including those used for terrorist activities. Once the Directive is published in the EU official journal, member states have up to 24 months to transpose it into national law.

Why has the EU acted to standardise the criminalisation of money laundering?

Nicola Finnerty (NF): The introduction to the Directive sets out how money laundering and the related financing of terrorism and organised crime remain significant problems at EU level despite the fairly recent overhaul of the anti-money laundering (AML) legislation—ie the fourth and fifth Anti-Money Laundering Directives (AMLDs) (EU) 2015/849, (EU) 2018/843. The EU considers the existing measures are not comprehensive enough, and that in particular, the current criminalisation of money laundering is not sufficiently coherent or uniform to effectively combat money laundering across the Union. This has resulted in enforcement gaps and obstacles to co-operation between the different Member States which is being exploited by money launderers.

Neill Blundell (NB): Put simply—because the current European legislation is not effective enough. This is acknowledged in Recital 4 of the Directive, which says 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…'.

However, the EU doesn't just see this as a chance to patch up ineffective law. The Directive hopes to usher in a new era of effective cross-border enforcement. Once the Member States have materially similar enforcement powers in place, it will be much easier for them to co-operate and exchange information, and this is a stated aim of the Directive. There are specific provisions in the Directive to facilitate this.

This Directive comes off the back of a sustained effort by the EU to combat money laundering in recent years. For example, the fourth AMLD was passed on 20 May 2015 and the fifth AMLD on 30 May 2018.

What are the key requirements of the Directive and how might they apply in practice?

NF: The key points are:

- there is a focus on virtual currencies—Member States should ensure 'those risks are addressed appropriately' (interestingly, virtual currencies fell within the scope of the fifth AMLD so this is clearly an area of priority)
- money laundering offences are defined, including punishments for individuals convicted of money laundering offences—for example, there should be a maximum term of imprisonment of at least four years with more severe penalties for public office holders
- greater co-operation between members states and third countries in terms of information sharing to improve investigation and prosecution
- extension of criminal liability to organisations, such as companies or partnerships, to ensure that such legal entities are held liable where the lack of supervision or control has made possible the commission of any of the money laundering offences

NB: A key requirement is that Member States will have to introduce new criminal offences relating to the conversion, transfer, concealment, acquisition, possession or use of property derived from criminal activity. The maximum imprisonment term for these offences will be at least four years.

In practice, these offences are likely to apply in much the same way as the offences in the Proceeds of Crime Act 2002 (POCA 2002). The language and approach of Article 3 of the Directive (which sets out these offences) is similar to that of POCA 2002, ss 327—329.

One of the more functionally important requirements of the Directive is that each Member State will be required to establish its jurisdiction over offences committed in its territory or by one of its nationals.

Member States will also be subject to a new, clear method of determining which country has jurisdiction and 'the Member States concerned shall co-operate in order to decide which of them will prosecute the offender, with the aim of centralising proceedings in a single Member State'.

This is a clear indication of the intended effect of this Directive and a hoped-for new era of cross-border co-operation. In practice, this may be subject to some of the same difficulties that afflict questions of jurisdiction in court proceedings (which haven't all been solved by regulations or Directives), but Member States should end up with materially similar jurisdiction provisions which allow for the much quicker resolution of jurisdiction issues and prosecution of criminals.

Other requirements in the Directive include giving the relevant authorities in Member States new confiscation and investigation powers. In practice, these are likely to operate in a similar way to the unexplained wealth orders and asset freezing orders recently introduced in the UK.

To what extent is the UK already compliant with the provisions of the Directive and what, if anything, would need to change in our law to implement this Directive?

NF: This Directive will not apply to the UK as they did not choose to be bound by it from the outset (this is the so-called 'opt-in' on criminal justice matters). The UK will not therefore need to implement this Directive.

That said, if the UK had decided to adopt the Directive, we would be mostly compliant in any event. For example, the 22 predicate offences which have to be criminalised are already offences in the UK. We also have a comprehensive array of primary legislation setting out money laundering offences, for example POCA 2002, which incidentally applies to all crimes, not just the 22 predicate offences set out in the Directive. The punishment is up to 14 years' imprisonment.

The area which would be a big change for the UK is the extension of criminal liability to the corporates. There is a current campaign in the UK to reform the law on corporate criminal liability as it is seen as unfit for purpose. As the law stands, 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 offence under investigation. This is known as the 'identification principle'.

Back in 2016, the former director of the Serious Fraud Office (SFO), Sir David Green, set the scene: 'In a world of increasingly complex corporate structures, the identification principle can hobble the prosecutor in those cases where it is right to prosecute the company.' This has meant that it has often been impossible to prosecute the company—notwithstanding that it may be the beneficiary of the wrongdoing.

It has been proposed therefore that the identification doctrine is replaced with a new principle of attribution of corporate liability, which would set out the circumstances in which a company would be criminally liable. In particular, the creation of a new offence of failing to prevent economic crime similar to section 7 of the Bribery Act 2010 (which the SFO maintains has been a success) and failure to prevent tax evasion under the Criminal Finances Act 2017.

It will be interesting to see if the sixth AMLD will assist the debate on this matter (which is likely because, for the UK to benefit from a favourable trade agreement with the EU post-Brexit, it will be required (politically) to ensure that its AML standards are in line with the standards expected by the EU).

NB: Interestingly, the UK is not taking part in the adoption of the Directive. The UK will not be bound by it or subject to its application. This is also true of Ireland and Denmark.

This is most likely because the UK is already largely compliant with the Directive's requirements. This was the conclusion of a European Scrutiny Select Committee meeting in March 2017, which also concluded that the Directive's impact on UK law would not be substantial.

If the UK were to opt in, then it appears that little would need to change in its current AML offences arsenal—which has itself been fortified a lot in recent years—to be compliant with the Directive.

Given the lead time on the implementation of such measures, do you think this is the first area where we will see divergence between EU and UK law post exit-day and why?

NF: As referred to above, notwithstanding Brexit, the UK did not choose to 'opt in' to this Directive. Therefore there was always a possibility that there would be divergence in this area—UK withdrawal from the EU or not.

With a view to Brexit, it is worth considering that the UK (which will remain a member of the Financial Task Force from where the key developments and requirements in AML commence) will want to ensure that it remains a leader in the field of AML and counterterrorist financing. The Anti-Corruption Plan 2017–22 sets out that further enhancing AML and counterterrorist financing capability, alongside stronger law enforcement, prosecutorial and criminal justice action, are core steps to 'strengthen the integrity of the UK as an international financial centre' and tackle illicit financing. Although in reality our enforcement record is low under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692, and Oversight of Professional Body Anti-Money Laundering and Counter Terrorist Financing Supervision Regulations 2017, SI 2017/1301.

In addition, as referred to above, for the UK to benefit from a favourable trade agreement with the EU post-Brexit, it will be required (politically) to ensure that its AML standards are in line with the standards expected by the EU.

NB: The fact that the UK will not take part in the Directive does not appear to be any kind of Brexit-related decision or desire to 'diverge'. This is largely illustrated by the fact that Ireland and Denmark are also not participating.

It actually could be the case that the implementation of this Directive will result in the UK and EU being closer together in terms of their criminal AML regimes than they are currently. If we accept that the UK is in a largely compliant position already, then it stands to reason that once other Member States have adopted the Directive's measures, the UK and the Member States may be very similar.

The European-wide desire to step up measures against financial crime, and in particular money laundering, mean that the UK and EU are likely to stay closely aligned in this area and co-operate ever more closely, even if they are not strictly subject to the same laws.

Interviewed by Lucy Trevelyan.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.