


THE IMPLEMENTATION OF THE 4TH AML DIRECTIVE AND THE KEY ELEMENTS



MARTINE SAMUELIAN,
JEANTET
&
DR. VINZENZ BÖDEKER,
HEUKING KÜHN LÜER WOJTEK

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INTRODUCTION





→ CIRCUMSTANCES OF THE 4TH AML DIRECTIVE DEVELOPMENT

➤ Release of 40 updated recommendations by the Financial Action Task Force (FATF) in 2012

→ OBJECTIVES OF THE 4TH AML DIRECTIVE DEVELOPMENT

- Develop the EU regulatory framework
- Complement the FATF's recommendations

→ ACHIEVEMENT

- Update the 3rd AML Directive
- Many measures are unchanged or rewritten
- Longer text : 69 articles instead of 47

→ NATIONAL LEGAL INSTRUMENT OF IMPLEMENTATION IN FRANCE

- Law n°2016-731 of 3rd June 2016
- Order n°2016-1635 of 1st December 2016
- Article 139, Law n° 2016-1692 of 9th December 2016

→ NATIONAL LEGAL INSTRUMENT OF IMPLEMENTATION IN GERMANY

- Ministerial draft of 15th December 2016

NEW PREVENTION MEASURES





→ ENLARGEMENT OF THE OBLIGED ENTITIES BY THE DIRECTIVE

➤ Persons trading in goods

-Lowering the cash payment threshold from EUR 15 000 to EUR 10 000

➤ Providers of gambling services

-Possibility of exemptions by Member States, except for casinos

➤ Possibility to consider leasing agents as estate agents

→ IMPLEMENTATION IN FRANCE :

- Persons dealing in some specific goods or providing services for cash payment or e-money payment of more than a certain amount which would be set by decree
- N.B. :Cash payments up to EUR 1000 are already prohibited for residents
- Legal representatives and managers of providers of gambling services were already concerned by the French legislation
- Extension to providers of gambling services
- Removal of the exception relating to leasing agents

→ IMPLEMENTATION IN GERMANY:

- Persons who execute payment services in the name of a payment service provider
- Pension funds, if they offer insurance that goes beyond company pension
- Insurance companies and intermediaries, if they practice special kinds of credit business
- Gambling services (not only in the internet) – State lotteries are excluded

→ IMPLEMENTATION OF A SUPRANATIONAL RISK ASSESSMENT BY THE DIRECTIVE

→ EUROPEAN COMMISSION LEVEL

- Reporting obligation in order to identify, analyse and assess the risks affecting the internal market and relating to cross-border activities
- Power to identify high-risk third countries

→ EUROPEAN SUPERVISORY AUTHORITIES LEVEL

- European Banking Authority
 - European Insurance and Occupational Pensions Authority
 - European Securities and Markets Authority
- Obligation to publish a joint opinion on the risks in the European financial sector
 - In charged of drafting regulatory technical standards

→ MEMBER STATES LEVEL

- Identification of sectors which require simplified or enhanced due diligence measures
- Obligation to take into account criterion specified by the Directive in the risk assessment
 - Risk variables to consider in the determination of due diligence measures
 - Factors and types of indicative elements of a potentially lower risk
 - Factors and types of indicative material of a potentially higher risk

→ OBLIGED ENTITIES LEVEL

- Obligation to implement due diligence procedures at a Group level
- Obligation for payment institutions and e-money institutions headquartered in another Member State to appoint a permanent representative

→ IMPLEMENTATION IN FRANCE:

- Concerning due diligence procedures at a Group level, AML procedures taking into account the membership in a financial group were already recommended by the ACPR
- Extension of the obligation to appoint a permanent representative to the credit institutions

→ IMPLEMENTATION IN GERMANY:

- Obligated entities must define and implement mechanisms of identification and assessment of risks and to classify these risks depending on the activities of the entity.
- In the context of a group, these mechanisms must be implemented at a group level.
- The risk analysis is to be documented and to be provided to the competent supervisory authorities.



DUE DILIGENCE REQUIREMENTS



→ INNOVATIONS ABOUT STANDARD DUE DILIGENCE WITHIN THE DIRECTIVE

➤ Application of due diligence measures to occasional transactions

-Of EUR 15 000 or more

-Constituting transfer of funds exceeding EUR 1 000

➤ In the context of life insurance or investment policies : obligation to identify the beneficiary of the contract, in addition to the obligation relating to the customer and his beneficial owner

➤ Obligation to consider at least 3 variables pointed out by the Directive within the risk assessment

-Purpose of an account or relationship

-Level of assets to be deposited by a customer or the size of transactions undertaken

-Regularity or duration of the business relationship

→ IMPLEMENTATION IN FRANCE :

➤ Existing due diligence provisions applicable to occasional transactions :

-Where the amount exceeds EUR 15 000, except for currency exchanged offices and providers of gambling services

-Where the amount exceeds EUR 1 000 for currency exchanged offices

-Irrespective of the amount, in the case of a transfer of funds or a manual exchange operation, while the client or his legal representative is not physically present for identification, or when providing asset custody services

-Whatever the amount, for the sums and the operations suspected to be related to an offense punishable by deprivation of liberty for more than one year , financing of terrorism or tax crime.

➤ Special extension of due diligence procedures to the wagers in the betting and gaming sector

→ IMPLEMENTATION IN GERMANY :

➤ Obligation to clarify whether the acting person is authorized to represent the contracting party

➤ Obligation to clarify whether contracting party or beneficial owner is a politically exposed person.

➤ The obligation of identification remains the same

→ NEW CONDITIONS OF SIMPLIFIED DUE DILIGENCE FOLLOWING THE DIRECTIVE

- Automatic derogation only applicable to electronic money, subject to conditions

- Obligation to justify simplified measures on the sole basis of the relevant risk assessment under conditions :
 - The business relationship or the occasional transaction presents a real lower risk degree
 - A transactions and business relationship control exists to enable the detection of any suspicious or unusual transactions

- Specific factors of a potentially lower risk to consider within an appropriate risk assessment
 - Customer risk factors
 - Product, service, transaction or delivery channel risk factors
 - Geographical risk factors

→ IMPLEMENTATION IN FRANCE:

➤ Restrictions of the cases of simplified due diligence in France to :

- Weak risk of laundering
- Low-risk persons or products in addition to absence of suspicions about money laundering

➤ Conditions of application would be set by Decree

➤ Derogation for the electronic money issuers, in the absence of suspicion about money laundering, subject to conditions of amount which would be set by decree

→ IMPLEMENTATION IN GERMANY:

➤ Restriction of the cases of simplified due diligence in Germany to:

- Weak risk of laundering
- Low-risk persons or product in addition to absence of suspicions about money laundering

➤ Conditions of application could be set by Decree



→ NEW DEFINITION OF THE “POLITICALLY EXPOSED PERSONS” BY THE DIRECTIVE

➤ Specific nomenclature including national persons

- Members of the administrative, management or supervisory bodies of State-owned enterprises
- Directors, deputy directors and members of the board or equivalent function of an international organization

➤ All PPEs are concerned by the enhanced due diligence measures

→ IMPLEMENTATION IN FRANCE:

- Existing ACPR recommendation in France :
 - Already recommended to assess risks according to a special professional activity of a French person regarding the PPE's functions

→ IMPLEMENTATION IN GERMANY:

- Extension of the PEP regime to cover domestic PEP's
- Federal Ministry of Finance can state further groups of persons who will be classified as PEPs



→ NEW WAY TO IDENTIFY THE “BENEFICIAL OWNER” FOLLOWING THE DIRECTIVE

➤Reminder of Legal entities’ beneficial owners

- Quantitative criterion of share capital ownership
- Secondary criterion pointing out the natural person(s) who hold the position of senior managing official(s)

➤New definition of Trusts’ beneficial owners

- The settlor
- The trustee(s)
- The protector
- The beneficiaries
- Any other natural person exercising ultimate control over the trust

➤Obligations of identification applicable to legal entities and trusts

- To obtain and hold adequate, accurate and current information on their beneficial ownership
- To provide these informations to obliged entities
 - To hold these informations adequate, accurate and current in a central register available to competent authorities and FIUs or CRF

→ IMPLEMENTATION IN FRANCE:

➤ Obligation of identification concerns :

- Companies and economic interest groups
- Commercial companies
- Other registered legal persons

➤ Creation of a public register of legal persons' beneficial owners

- Integrated in the Companies register

➤ Information available for :

- Competent authorities
- Obligated entities
- Third parties having a legitimate interest for legal persons information

→ IMPLEMENTATION IN GERMANY:

➤ Obligation of identification concerns :

- Legal persons
- Judicable partnerships
- Trusts

➤ Creation of a public register of legal persons' beneficial owners

➤ Information available for:

- Everyone, only a registration on the internet is needed
- Access may be excluded when an inspection is unreasonable



→ OBLIGATION FOR THE OBLIGED ENTITIES TO REPORT SUSPICIOUS TRANSACTION INCLUDING

➤ Tax crimes relating to direct taxes and indirect taxes punishable by deprivation of liberty or a detention order for a minimum of more than six months and a maximum of more than one year

→ SPECIFIC SITUATION IN FRANCE:

- French monetary and financial Code already includes tax crime into the scope of offences concerned by reporting obligations
- Obligation subject to the condition of identify one of 16 defined criteria

→ SPECIFIC SITUATION IN GERMANY:

- German criminal Code includes tax crime into the scope of offences concerned by reporting obligations only if it is committed commercial
- An obliged entity without subsidiary in Germany has no reporting obligation.



→ STRENGTHENING OF THE FIUS' PREROGATIVES BY THE DIRECTIVE

- Cooperation between the FIUs and the Commission
- Exchange of informations between FIUs
- Affirmation of the FIU's independence

→ IMPLEMENTATION IN FRANCE:

- Enlargement of Tracfin's rights to communicate with obliged entities
- Creation of a Tracfin's power of alert
- Creation of a direct access to the criminal records file
- New rules of communication and exchange of informations with other State services and with foreign Financial intelligence units

→ IMPLEMENTATION IN GERMANY:

- Operational analysis and evaluation of notifications
- Prohibition of transactions and other immediate measures

NEW REPRESSION MEASURES





→ IMPLEMENTATION OF NATIONAL COOPERATION MEASURES

- Obligation to implement effective mechanisms of cooperation and coordination between FIUs, supervisors and other competent authorities involved in AML/CFT

→ IMPLEMENTATION IN FRANCE

- Identification of competent authorities for each sector concerned
- Extension of the National Sanctions Commission's powers according to the new obliged entities
- Definition of the competent authorities' prerogatives and powers
- Especially, enlargement of the ARJEL's prerogatives

→ IMPLEMENTATION IN GERMANY

- No concrete measures



→ HARMONISATION OF ADMINISTRATIVE SANCTIONS BY THE DIRECTIVE

➤ Breaches concerned :

- Customer due diligence
- Suspicious transaction reporting
- Record-keeping
- Internal controls

➤ Increase of maximum administrative pecuniary sanctions to at least EUR 1 000 000

➤ Increase of pecuniary fines for credit or financial institutions

- At least EUR 5 000 000 or 10 % of the total annual turnover for legal persons
- At least EUR 5 000 000 for natural persons

➤ Public statement identifying the natural or legal person and the nature of the breach

➤ Possibility of sanctioning the members of the management body and other natural persons responsible for the breach of a legal person

→ IMPLEMENTATION IN FRANCE

- Minimum level of pecuniary fines is already set at EUR 1 000 000 and varying according to the nature of entities
- Existing publicity about fines

→ IMPLEMENTATION IN GERMANY

- Minimum level of pecuniary fines up to EUR 200 000 (for breaches that are not serious, systematic or a combination thereof)
- Apart from that implementation of the AMLD
- “Naming and Shaming”
- Contracting parties and shareholders can be sanctioned

CONCLUSION AND DISCUSSION





TOWARDS A NEW DIRECTIVE WITH A MASTER WORD :

TRANSPARENCY

OUR OFFICES - JEANTET

PARIS



87 avenue Kléber
75116 Paris
France

CASABLANCA



2-4 rue Zaidane
20170 Anfa
Casablanca
Morocco

LUXEMBOURG



8-10 avenue
Marie-Thérèse
L-2132 Luxembourg
Luxembourg

GENEVA



Avenue de France 23
1202 Genève
Switzerland

BUDAPEST



Széchenyi István tér 7-8
H-1051 Budapest
Hungary

KIEV



4, Volodymyrska Street
Kyiv 01001
Ukraine

MOSCOW



B. Ordynka, 37/4,
build. 3
119017 Moscow
Russia

OUR OFFICES – HEUKING KÜHN LÜER WOJTEK



Berlin

Kurfürstendamm 32 · 10119 Berlin
T +49 30 88 00 97-0 · F +49 30 88 00 97-99
berlin@heuking.de



Brüssel

Rue Froissart 95 · B-1040 Brüssel
T +32 2 646 20-00 · F +32 2 646 20-40
brussels@heuking.de



Chemnitz

Weststraße 16 · 09112 Chemnitz
T +49 371 382 03-0 · F +49 371 382 03-100
chemnitz@heuking.de



Düsseldorf

Georg-Glock-Straße 4 · 40474 Düsseldorf
T +49 211 600 55-00 · F +49 211 600 55-050
duesseldorf@heuking.de



Frankfurt am Main

Goetheplatz 5-7 · 60313 Frankfurt am Main
T +49 69 975 61-0 · F +49 69 975 61-200
frankfurt@heuking.de



Hamburg

Neuer Wall 63 · 20354 Hamburg
T +49 40 35 52 80-0 · F +49 40 35 52 80-80
hamburg@heuking.de



Köln

Magnusstraße 13 · 50672 Köln
T +49 221 20 52-0 · F +49 221 20 52-1
koeln@heuking.de



München

Prinzregentenstraße 48 · 80538 München
T +49 89 540 31-0 · F +49 89 540 31-540
muenchen@heuking.de



Stuttgart

Augustenstraße 1 · 70178 Stuttgart
T +49 711 22 04 579-0 · F +49 711 22 04 579-44
stuttgart@heuking.de



Zürich

Bahnhofstrasse 3 · 8001 Zürich
T +41 44 200 71-00 · F +41 44 200 71-01
zuerich@heuking.ch