ABL LEGAL SOLUTIONS ACROSS BORDERS

N° 06

ANTI-MONEY LAUNDERING REGULATIONS

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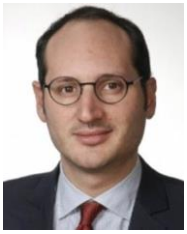

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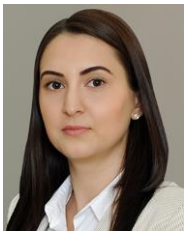

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EXECUTIVE SUMMARY

Welcome to the sixth Report of the ABL's Young Lawyers Group ("the Group").

The Group was formed in 2015 to enable young lawyers in ABL member firms to develop and work alongside the senior members of ABL and to contribute towards the continued success of ABL. As such, the Group aims to enable young lawyers to build up their own network of contacts within ABL and to develop their own legal education through the publication of reports on topical issues chosen by the Group's members on ABL's website, members' own firm websites and the ABL Insider.

The topic of "Anti-Money Laundering Regulations" was chosen as the Group's sixth Report given the onus placed on individual lawyers and on law firms to ensure that they are aware of and comply with their anti-money laundering obligations. Indeed, this is one of the greatest challenges for lawyers today.

The Report provides a brief overview of the key issues firms will need to be aware of in order to comply with the regulations in each country mentioned in this Report.

The Report was prepared with contributions from six members of the Group from the Czech Republic, Italy, Romania, Spain, Switzerland and the UK. A link to the individuals' biographies can be found on the "List of Contributors" page.

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Czech Republic

Competent authority: **Financial Analytical Office** (Finanční analytický úřad) of the Ministry of Finance

- The office was set up on 1 January 2017 (previously active: The Financial Analytical Unit of the Ministry of Finance)
- Scope of responsibilities: receiving and analysing suspicious transaction reports, supervision, preparation of anti-money laundering legislation etc.
- For more information see http://www.financnianalytickyurad.cz/ (only available in Czech language).

Furthermore, the **Czech National Bank** and the **Ministry of Finance** itself are the primary financial regulators and are also involved in the monitoring of compliance to the regulations

- The Czech Republic also follows the principle of active participation of banks as obliged entities in the prevention of money laundering.

The anti-money regulations define potentially suspicious financial transactions and stipulate procedures to be followed if the suspicious transaction is detected

Applicability: all entities operating in the financial market and some persons operating outside the market – the regulations on the implementation of international sanctions (see below) impose obligations on everybody

Main national laws and regulations reflex the commitment to meet international standards for combating money laundering. The main principles of anti-money laundering are laid down in the „Anti Money Laundering Act"

- Act No. 253/2008 Coll., **On Certain Measures Against Money Laundering and Financing of Terrorism** (the „**Anti Money Laundering Act**"): the law stipulated that certain entities (especially banks, but also credit unions and others) are obligated to **identify customers** in case of:
  - a transaction exceeding EUR 1,000
  - a suspicious transaction
  - concluding an agreement (to establish an account, to make a deposit into a deposit passbook, to make a deposit into a deposit certificate etc.)
  - a life insurance contract

Furthermore, the obliged entities shall perform customer due diligence process prior to a single transaction amounting to EUR 15.000 or more. **Customer due diligence** includes:

- collection of information on the purpose and interned nature of the transaction or business relationship
- identification of the beneficial owner
- collection of information necessary for on-going monitoring of the business relationship
- scrutinizing of the sources of funds

- Act No. 254/2004 Coll., **On the Restriction of Cash Payments**
  - imposes on all subjects the obligation to carry out payments equivalent exceeding CZK 270,000 by wire transfer. It is an offense to provide or accept a cash payment (a fine of up to CZK 5 million in certain cases)
  - the above shall not apply to payment of taxes, payments of insurance claims, required payments resulting from labour relations etc.
- Act No. 69/2006 Coll., **On the Implementation of International Sanctions**
- Decree No. 281/2008 Coll**. On selected requirements regarding the system of internal principles, procedures and control measures against legitimisation of proceeds of crime and financing of terrorism**

<u>European regulations:</u>

- Directly binding EU regulations:
  - Regulation No. 1889/2005 of the European Parliament and of the Council **on controls of cash entering or leaving the Community**
  - Regulation No. 1781/2006 of the European Parliament and of the Council **on information on the payer accompanying transfers of funds**
- Directives - implemented into national laws (including the latest **4th Anti-Money Laundering Directive**)
- Czech anti-money laundering regulations are harmonised with the community law of the European Union

<u>Methodological and interpretative documents</u>:

- **Official information of the Czech National Bank** of 26 May 2009 on certain requirements for the system of internal principles, procedures and control measures against the legitimisation of the proceeds of crime and financing of terrorism

The Czech Republic became a party to the UN Convention against Transnational Organized Crime on September 24, 2013, and to the UN Convention against Corruption on November 29, 2013.

Fraud and tax evasion are reportedly the primary sources of laundered assets in the Czech Republic.

Italy

The Italian anti-money laundering legislation has been completely rewritten few months ago by the Legislative Decree No. 90 of May 25, 2017 (the "**Decree**"), implementing the EU Directive 2015/849 on *"the prevention of the use of the financial system for the purposes of money laundering or terrorist financing*". The Decree replaced *inter alia* the Legislative Decree No. 231/2007 and compared to such previous legislation, it introduced:

- stricter measures to ensure transparency and accessibility to beneficial owner's information;
- the so-called *risk based approach* and a new technical criterion directed to the addressees of the anti-money laundering, for customer due diligence procedures;
- obligations to report "suspicious transactions" and to retain the relevant documentation;
- an articulate sanctions regime.

The Decree is applicable to **intermediaries operating on "*cross-border*" basis in Italy** and more in general to the "categories of obliged subjects" identified by the Decree, as:

- banking and financial intermediaries and other financial operators, including the Italian branches having their registered office in a foreign country;
- professionals such as accountants, auditors and, under certain conditions, notaries public and lawyers;
- "other non-financial operators" i.e. antique dealers, art dealers, collection agencies, etc.; and
- gaming service providers.

Customer Due Diligence ("**CDD**")

The obliged entities shall execute an adequate customers and beneficial owner due diligence (simplified or strengthened, depending on the low or high-risk profile of the customers[1]):

(i) in case of business relationship or occasional transaction involving the transfer or the handling of payment of an amount equal to or higher than 15,000 EUR or

(ii) in the case of transfer of funds with an amount higher than 1,000 EUR only if they are executed through payments system other than SEPA or

(iii) in any case, when there are doubts concerning the truthfulness of the data obtained and, furthermore, also when there is a suspect of money-laundering or terrorism financing.

The most significant CDD obligations are:

1. identifying the customer (the legal representative in case of legal entity) and verifying the

[1] The Decree does not identify the entities to which the simplified CDD is applicable, but provides a set of illustrative factors to be taken into account. Otherwise, the Decree establishes the presumption causes of high risk, in the presence of which is always requested the application of reinforced measures of CDD procedures.

customer's identity on the basis of documents, data or information obtained from a reliable and independent source;
2. identifying the beneficial owner and verifying his/her identity on the basis of information provided by the customers under their own responsibility;
3. obtaining information on the purpose and the intended nature of the business relationship or professional service; and
4. conducting ongoing monitoring in the course of the business relationship or professional service.

Data retention duties

The obliged entities shall:

i) retain a copy of the documents provided by customers during the CDD, indicating the relevant date;
ii) collect the data in a prompt manner within 30 days from the starting of the professional activity requested or the execution of an occasional transaction;
iii) retain the data for a period of 10 years from the termination of the professional relationship.

Reporting duties

In the event of a "*suspicious transaction*" as identified on the basis of specific anomalies indicators adopted and periodically enacted by the Financial Intelligence Unit of the Bank of Italy and therefore if there is an objective risk of money laundering or terrorism financing of the transaction realized by the customer, the obliged entities must notify such risk to the Financial Intelligence Unit.

The assessment shall be conducted by the obliged entities on the basis of the type of the business relationship in place with the different customers and the type of the transactions performed. In particular, the obliged entities shall implement effective procedures in accordance with the above mentioned criteria and in consideration of the risks connected with the type of costumers, the geographic area, the delivery channels and products or services offered.

With regard to the obligation to report suspicious transactions, the Decree sets out some criteria to determine the gravity of the violation and to which extent the penalty is applicable. The obliged entities shall evaluate, *inter alia*, the degree and intensity of the subjective element, how significant and evident are the reasons for the transaction being suspect, as well as any cooperation of the addressee with the authorities.

Registration of the beneficial owner

The Decree provides for the creation of a special section of the Italian Business Register to collect and storing information about the beneficial owners of legal entities or companies.
Each legal entity must provide such relevant information and data and, in the event of an inactivity or unjustified refusal by the shareholders, the voting rights related to the shares owned by the

beneficial owner will be frozen.

The secondary legislation

The Decree entered into force on July 4th, 2017 and, by July 4th, 2018, the Supervisory Authorities and the competent self-regulatory bodies shall issue the secondary legislation regarding the procedures and instruments for mitigating the risk. At this stage, the secondary legislation has not yet been issued, therefore, it will be appropriate to take a look at the whole legal framework upon its issuance.

Romania

Legal framework

The prevention and sanctioning of money laundering, as well as the prevention and combating of terrorism financing are mainly regulated by the following legal enactments:

1. Law no. 656/2002 for the prevention and sanctioning of money laundering, as well as for measures to prevent and combat terrorism financing, which transposed most of the provisions of Directive 2005/60/EC and Directive 2006/70/EC, both repealed by the new Directive (EU) 2015/849;
2. Government Decision no. 594/2008 on the approval of the Regulation for the application of Law no. 656/2002 provisions;
3. Law no. 535/2004 on the prevention and combating of terrorism;
4. Government Decision no. 1599/2008 for the approval of the Regulation on the organization and functioning of the National Office for Preventing and Combating Money Laundering; and
5. Law no. 217/2009 for the approval of Government Emergency Ordinance no. 202/2008 on the implementation of international sanctions.

As a Member State of the European Union, Romania also applies the European provisions of direct application in all Member States. In this field, the provisions of the former Regulation (EC) no. 1781/2006 were incumbent, but it was repealed by the new Regulation (EU) no. 847/2015, which entered into force starting with June 26, 2017.

Subjects of the anti-money laundering legislation

The Romanian anti-money laundering legislation applies to all subjects mentioned by the former Directive 2005/60/EC, such as Romanian credit institutions and the Romanian branches of foreign credit institutions (banks), Romanian financial institutions and the Romanian branches of foreign financial institutions (including payment services providers, currency exchange offices, insurance companies, insurance brokers, financial investment services companies, investment consultants, investment management companies, investment companies, capital market operators, system operators), auditors, individuals or legal entities who provide tax or accounting advising services, public notaries, lawyers, trust or company service providers, real estate agents, casinos and to any other individuals or legal entities trading in goods and/or services, only to the extent that payments are made in cash, in Romanian currency (RON) or other foreign currency, in minimum amount of EUR 15,000, whether the transaction is executed in a single operation or in several operations which appear to be linked.

In addition to the above mentioned subjects, the Romanian anti-money laundering legislation is also applicable to private pension fund managers for their own account and for the private

pension funds they manage, marketing agents authorized in the private pension system, persons with attributions in the privatization process, as well as to associations and foundations.

Customer due diligence measures

As provided by the European and national regulations, the above-mentioned persons are required to adopt measures to prevent money laundering and terrorist financing when performing their professional activities and to apply, for this purpose, on the basis of risk, different measures applicable to transactions, allowing the identification, as appropriate, of the real beneficiary of a transaction. These measures are classified by the Romanian legislation in three categories, similarly to those provided by the European provisions, namely standard, simplified or additional measures.

All subjects to which the anti-money laundering legislation is applicable, shall draft and transmit to the financial intelligence unit three types of reports:

1. Suspect Transaction Report – applicable in case of any reasonably motivated suspicious transactions;
2. Cash Transaction Report – applicable to all transactions in cash, in RON or in foreign currency, for the minimum amount of EUR 15,000, regardless of whether the transaction is carried out by one or several operations which might have a connection between them;
3. External Transfers Report – applicable to all external transfers to and from accounts for amounts of minimum EUR 15,000.

In respect to the obligation of collaboration and reporting to the competent authority of the above-mentioned persons, subject to the anti-money laundering legislation, the banking and professional secrecy cannot be opposed to the Romanian designated financial intelligence unit.

According to the European Union regulations in this field, all persons subject to anti-money laundering legislation must designate at least one person responsible with the implementation and compliance with Law no. 656/2002, whose identity shall be notified to the Romanian designated financial intelligence unit.

The National Office for Preventing and Combating Money Laundering

In accordance with the obligations stipulated by Directive 2005/60/EC, Romania has designated as financial intelligence unit the National Office for Preventing and Combating Money Laundering, organized and functioning in the subordination of the Government and in the coordination of the Prime Minister.

Alongside with other authorities competent in specific sectors, the National Office for Preventing and Combating Money Laundering is entitled to receive, analyse, process information and notify the competent authorities (the Prosecutor's Office attached to the High Court of Cassation and Justice or the Romanian Intelligence Service) or perform ex officio verifications in respect to any suspicious transaction of which it becomes aware.

Other competent authorities in preventing and combating money laundering

In addition to the general supervision performed by the National Office for Preventing and Combating Money Laundering, the implementation and compliance with the provisions of Law no. 656/2002 in various specific sectors is conducted as well by other competent authorities.

Such authorities have issued in their area of competence specific rules for preventing and combating money laundering, complementary to the general legal framework in this matter.

The activities performed by the credit institutions, payment institutions, electronic money institutions and non-banking financial institutions are also supervised by the National Bank of Romania, based on the NBR Regulation No. 9/2008 on "know-your-customer" rules for the prevention of money laundering and terrorist financing.

In the sector of capital market, insurance-reinsurance market and private pensions market, the Financial Supervisory Authority is entitled to oversee the conduct of the participants' activities, including in matters of money laundering.

The National Office for Preventing and Combating Money Laundering is entitled to directly supervise the activities of all individuals and legal entities subject to the money laundering legislation, except those falling under the direct competence of the above-mentioned authorities, the National Agency for Fiscal Administration or the governing bodies in case of liberal professions.

However, all competent authorities having anti-money laundering responsibilities must immediately inform the National Office for Preventing and Combating Money Laundering if from the information obtained by them there are suspicions of money laundering, terrorist financing or other violations of the provisions of Law no. 656/2002.

Sanctions

Infringement of the provisions of money laundering and financing of terrorism legislation may involve civil, disciplinary, contraventional or criminal liability.

Violation of the obligation to report to the National Office for Preventing and Combating Money Laundering suspicious transactions represents contravention and it is sanctioned with fine in amount of 10,000 RON up to 30,000 RON. Also, in case of breaching the obligation to transmit to the National Office the requested data and information or in case of not adopting the customer due diligence measures the fine shall be in amount of 15,000 RON up to 50,000 RON.

In case of legal entities, in addition to the above mentioned fines, complementary sanctions might be applied, such as: suspension of the activity or of the necessary permit, approval or authorization for the performance of the respective activity for a period of one month to 6 months, license or permit withdrawal for a determined period or definitively or bank account lockout.

The competent authorities for different sectors are entitled to determine any infringements of this legislation and apply, in addition to the above mentioned sanctions, specific sanctions measures.
The action of money laundering, performed in the conditions provided by the law, represents a criminal offence and it is sanction with imprisonment from 3 to 10 years.

New European Union regulations

In view of the new European regulations, adapting the Romanian legislation accordingly is a must. In this respect, a legislative project for the amendment of Law no. 656/2002 has been drafted in order to transpose the provisions of Directive (EU) no. 2015/849 and to comply with Regulation (EU) no. 847/2015, taking also into account the Recommendations of the Financial Action Task Force (FATF) in this matter.

The most important changes concern the new obligation of the competent authorities to perform risk assessments, the establishment of registers of the real beneficiaries of legal entities carrying out transactions and the interconnection of the existing national registers, the tightening of the administrative sanctions and the decrease of the reporting threshold to 10,000 EUR, including for external transfers.

SPAIN

Money laundering in Spain is an ongoing problem, with the largest source of laundered funds in the country resulting from terrorist financing and organized crime.

The Government of Spain (GOS) remains committed to combating narcotics trafficking, terrorism, and financial crimes, and continues to work to tighten financial controls. The criminalization of money laundering was added to the penal code in 1988 when laundering the proceeds from narcotics trafficking was made a criminal offense. In 1995, the law was expanded to cover all serious crimes that require a prison sentence greater than three years. Amendments to the code on November 25, 2003 made all forms of money laundering financial crimes. The penal code can also apply to individuals in financial firms if their institutions have been used for financial crimes. An amendment to the penal code in 1991 made such persons culpable for both fraudulent acts and negligence connected with money laundering.

The money laundering law applies to most entities active in the financial system, including banks, mutual savings associations, credit companies, insurance companies, financial advisers, brokerage and securities firms, postal services, currency exchange outlets, casinos, and individuals and unofficial financial institutions exchanging or transmitting money (alternative remittance systems). The 2003 amendments added lawyers and notaries as covered entities.

The Commission for the Prevention of Money Laundering and Financial Crimes (CPBC) coordinates the fight against money laundering in Spain. The Secretary of State for Economy heads the commission and all of the agencies involved in the prevention of money laundering participate. Agencies represented include the National Drug Plan Office, the Ministry of Economy, the Public Prosecutor's Office (Fiscalia), Customs, the Spanish National Police, the Guardia Civil, the National Stock Market Committee, the Treasury, the Bank of Spain, and the Director General of Insurance and Pension Funds. Any member of the Commission may request an investigation.

THE THIRD EU ANTI-MONEY LAUNDERING DIRECTIVE IN SPAIN

The Third Directive was implemented by the enactment of the new Law Act 10/2010 for Prevention of Money Laundering and Financing of Terrorism, which was passed unanimously by the Spanish Parliament on 28 April 2010. It unifies the previous regulation and modifies the proposed regimen for anti-money laundering and terrorist financing previously set forth in the law 19/1993 of 23 December, the royal Decree 925/1995 of 9 June and law 12/2003.

PREVENTIVE MEASURES

The risk-based approach to AML/CFT was introduced in Spain in 2010 and the initial supervisory findings since its introduction appear to be generally positive. Most obliged entities have a historically-based culture of compliance, and tend to approach the risk-based AML/CFT obligations in a rules-based manner, though there is visible progress in adapting to the risk-based approach (albeit mostly in larger banks).

The banking sector is the key gatekeeper to the financial system in Spain. Banks are well aware of their AML/CFT obligations and have a low risk appetite when implementing AML/CFT measures. Consolidation in the banking sector has also resulted in better systems and a more professional attitude towards AML/CFT compliance. While there is generally a high level of compliance and awareness among the financial institutions and most DNBFPs, there are several weaknesses noted by the supervisors – though these do not seem to be systemic.

Supervisory work by SEPBLAC triggered the detection of major criminal abuse of the MVTS sector by complicit agents in recent years. This has led to a number of criminal convictions of agents, the exit of some providers from the sector, and a comprehensive response from supervisors, operational authorities, and the industry. The sector has been very active over the past years in raising awareness and ensuring compliance, for instance by setting up a register of high risk agents. Supervisors have also intensified their supervision of (licensed) MVTS and indirectly their agents. This has caused a cleansing effect in the sector with less money transfers to certain countries. Sustained efforts are necessary given the very high risks in this sector. However, ongoing monitoring for unregistered MVTS operators is at a very low level.

Notaries have a critical gatekeeper role in Spain. The profession has actively worked with the authorities to develop systems to effectively analyse potentially suspicious activity and to provide relevant information to the authorities. They also play a key role in ensuring the transparency of legal persons and arrangements, as noted below. Nevertheless, there have been cases where notaries were used by criminal organisations. Lawyers have a low level of awareness of ML/TF risks. Lawyers do not recognise the ML/TF risks in their profession and feel the AML/CFT obligations pose an unnecessary burden, despite the role of lawyers in high-profile ML networks. Supervisors should intensify inspections of this sector, and in particular raise awareness of risks among members of the profession.

INTERNATIONAL COOPERATION

Spain can provide a wide range of international cooperation including mutual legal assistance (MLA), extradition, and other forms of cooperation, and is able to do so in a timely manner. These mechanisms are particularly effective in the EU context, as there is a comprehensive legal framework that provides simplified procedures for judicial cooperation, extradition, and the execution of foreign confiscation orders.

Overall, the Spanish authorities are proactive in seeking international cooperation to pursue criminals and their assets. Spain has successfully investigated and prosecuted a number of large complex ML cases involving transnational criminal organisations through international cooperation with their operational and law enforcement counterparts. FIU to FIU cooperation works well.
International cooperation on AML/CFT supervision has been limited, but there are no obstacles. Asset sharing appears to work particularly well with EU counterparts, and is also possible with non-EU counterparts although the procedures and mechanisms are less comprehensive in this context and should be strengthened.

SWITZERLAND

Legal Basis

The Swiss legislation regarding the prevention of money laundering and terrorist financing implements the Financial Action Task Force's (FATF – GAFI) international standards and is mainly composed of the following legal acts:

- The Federal Act on Combating Money Laundering and Terrorist Financing (Anti-Money Laundering Act, AMLA) of 10 October 1997;
- The Federal Council Anti-Money Laundering Ordinance of 11 November 2015 (Anti-Money Laundering Ordinance, AMLO)
- The Swiss Independent Financial-Markets Regulator (FINMA) Anti-Money Laundering and Terrorist Financing Ordinance of 3 June 2015 (FINMA Anti-Money Laundering Ordinance, FINMA-AMLO)

These regulations are completed by Articles 305bis and 305ter of the Swiss Criminal Code of 21 December 1937 (SCC).

The Anti-Money Laundering Act (AMLA)

The AMLA applies to all Financial Intermediaries (FI), i.e. banks governed by the Federal Banking Act of 8 November 1934, but also, at certain conditions to other intermediaries, such as fund managers, investment companies, life insurance institutions, securities dealers and depositories, "payment systems" and casinos (Art. 2 § 1-2 AMLA).

Persons who, on a professional basis accept or hold on deposit assets belonging to others or who assist in the investment or transfer of such assets, such as persons providing consumer loans or mortgages, services related to payment transactions (including credit cards) and electronic transfers, assets managers and investment advisers, may be subject to the Anti-Money Laundering legislation as well (Art. 2 § 3 AMLA).

The AMLA mainly specifies the due diligence requirements imposed to the Financial Intermediaries in the conduct of financial transactions, concerning the verification of the contracting partner identity, the establishment of the identity of the beneficial owner of the assets, the renewal of the due diligence requirements within a relationship, the obligation to keep records and the necessary organizational measures (Art. 3-5, 7 and 8 AMLA).

In particular, the Financial Intermediary is required to ascertain the nature and purpose of the business relationship wanted by its customer (Art. 6 § 1 AMLA).

The extent of the due diligence duty is to be determined by the risk represented by the customer or the transaction (**risk-based analysis)**. As a consequence, a higher level of due diligence is required in the case of transactions or business relationships that would appear "unusual" or when indications appear that assets might be the proceeds of a crime[2] or, since 2016, of an aggravated tax offence[3] (see Art. 305bis SCC) or would be subject to the power of disposal of a criminal organization (see Art. 260ter § 1 SCC) or would serve the financing of terrorism (see Art. 260^{quinquies} § 1 SCC), as well as in the case of a business relationship with "Politically Exposed Persons" (PEP[4]) and their family members or close associates (art. 6 § 2-4 AMLA).

On the other hand, the Financial Intermediaries may be released from their due diligence duties if the business relationship only involves assets of low value and if there is no suspicion of money laundering or terrorist financing.

Since 2016, natural persons and legal entities that deal in goods (movable or immovable assets) commercially and in doing so accept cash (Commercial Dealers) are also submitted to the AMLA (Art. 2 § 1, let. b AMLA). Their specific due diligence duties apply as soon as they accept payments that are not made through a Financial Intermediary of more than 100'000 Swiss francs in cash in the course of a commercial transaction (even if the cash payment is made in two or more instalments). They must in particular clarify the economic background and purpose of a transaction if it appears unusual (unless its legality is clear) or when there are indications that assets are the proceeds of a crime or an aggravated tax offence or are subject to the power of disposal of a criminal organization (Art. 8a AMLA).

In the event of suspicion of money laundering, the Financial Intermediaries and Commercial Dealers must immediately file a report with the Money Laundering Reporting Office of Switzerland (MLROS, Art. 9 AMLA). Lawyers and notaries are however not subject to this duty insofar as they are bound in their activities by their professional secrecy, as long as they are not acting as Financial Intermediaries, but strictly acting as lawyers or notaries.

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[2] A crime is defined by Article 10 of the Swiss Criminal Code (SCC) as offences that may carry a custodial sentence of more than three years. It includes, among others, Misappropriation (Art. 138 SCC), Theft (Art. 139 SCC), Robbery (Art. 140 SCC), Unauthorized obtaining of data (Art. 143 SCC), Fraud and Computer fraud (Art. 146 – 147 SCC), Extortion (Art. 156 SCC), Profiteering (Art. 157 SCC), Serious disloyal mismanagement (Art. 158 SCC), etc.

[3] Aggravated tax offences are considered as "tax fraud" or "tax evasion" (which implies the use of falsified documents) when the tax evaded in any tax period exceeds 300'000 Swiss francs (Art. 305bis § 1bis SCC).

[4] Politically exposed persons are considered as (1) individuals who are or have been entrusted with prominent public functions by a foreign country, such as heads of state or of government, senior politicians at national level, senior government, judicial, military or political party officials at national level, and senior executives of state-owned corporations of national significance (foreign politically exposed persons); (2) individuals who are or have been entrusted with prominent public functions at national level in Switzerland in politics, government, the armed forces or the judiciary, or who are or have been senior executives of state-owned corporations of national significance (domestic politically exposed persons – note that they are no longer regarded as being politically exposed when 18 months have elapsed since they relinquished their position) and (3) individuals who are or have been entrusted with a prominent function by an intergovernmental organization or international sports federations, such as secretaries general, directors, deputy directors and members of the board or individuals who have been entrusted with equivalent functions (politically exposed persons in international organizations).

In addition, the Financial Intermediaries may be obliged to provide further information to the MLROS, to freeze the assets concerned and are prohibited from informing the persons concerned or third parties that they have filed a report with the MLROS (Art. 10, 10a and 11a AMLA). The prohibition to inform also applies to Commercial Dealers (Art. 10a § 5 AMLA).
Persons who file a report to the MLROS or freeze assets in accordance with the AMLA in good faith may not be prosecuted for a breach of official, professional or trade secrecy or be held liable for a breach of contract (Art. 11 AMLA).

The Anti-Money Laundering Ordinance (AMLO), the FINMA Anti-Money Laundering Ordinance (FINMA-AMLO) and other applicable due diligence rules

The AMLO and FINMA-AMLO contain definitions regarding the persons considered as Financial Intermediaries under Art. 2 § 3 AMLA and Commercial Dealers as per Art. 2 § 1, let. b AMLA that are submitted to the Anti-Money Laundering legislation. It also provide detailed rules about the due diligence duties of these persons.

As far as banks and securities dealers domiciled in Switzerland are concerned, the Agreement on the Swiss banks' Code of conduct with regard to the exercise of due diligence between the Swiss Bankers Association and the signatory banks of 1 June 2015 (CDB 16) contains as well a set of due diligence rules to be followed by the signatory banks.

The detailed due diligence duties may also be specified by the Federal Gaming Board for the Financial Intermediaries under their supervision, or through the regulations of recognized Self-Regulatory Organizations for the duties of diligence of their affiliated Financial Intermediaries.

Articles 305bis and 305ter of the Swiss Criminal Code (SCC)

Among the offences against the administration of justice, Article 305bis SCC penalizes the carrying out of acts that are aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which the person concerned knew or must have assumed that it originated from a crime or aggravated tax offence[5]. A prison sentence up to three years or a monetary penalty may be imposed.

In serious cases, such as when the offender acts as a member of a criminal organization or of a group formed for the purpose of the continued conduct of money laundering activities or achieves a large turnover or substantial profit through commercial money laundering, a prison sentence up to five years and / or a monetary penalty may be imposed.

The offender is also liable where the offence was committed abroad, provided that such an offence is also liable to prosecution at the place of commission. As a consequence, tax offences committed abroad will also qualify as an offence to money laundering in Switzerland if the tax offense abroad is punishable under the foreign laws of that state and if it fills the requirements of a qualified tax offence as defined under Swiss law.
According to Art. 305ter SCC**,** the persons failing to ascertain the identity of the beneficial owner of the assets with the care that is required under the circumstances when accepting, holding on

[5] Money laundering offences; for the definition of crime or aggravated tax offence, see above, note n° 1 and 2.

deposit, or assisting in investing or transferring assets are liable to a custodial sentence of a maximum of one year or to a monetary penalty. They are however authorized to report to the MLROS any observations that would indicate the suspicious origin of the assets in order to avoid to be liable under Art. 305ter SCC.

The determination of the legal and natural persons subjected to the Anti Money Laundering legislation and of the specific due diligence duties of the Financial Intermediaries and Commercial Dealers in a certain case, as well as the communication and freezing procedures, may be rather complex. It is therefore strongly advised to anyone that may be concerned by this legislation to require appropriate legal advice taking into account all the circumstances of their personal situation.

UNITED KINGDOM

Introduction

The anti-money laundering ("AML") regime in England and Wales is governed by a number of key pieces of legislation. The Proceeds of Crime Act 2002 ("POCA") defines a number of principal money laundering offences. The Terrorism Act 2000 ("TA") creates further offences of entering into, or becoming concerned in, an arrangement that facilitates the retention or control of terrorist property by or on behalf of another person. Finally, the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 ("MLR"), came into force on 26 June 2017, giving effect to the Fourth Money Laundering Directive (EU Directive 2015/849). The MLR set administrative requirements that run parallel to the AML regime found in the POCA and the TA, particularly in relation to customer due diligence.

Proceeds of Crime Act 2002

The principal offences defined in the POCA are:

1. concealing, disguising, converting, transferring or removing criminal property out of the jurisdiction (POCA s327);
2. entering into or becoming concerned in an arrangement that facilitates the acquisition, retention, use or control of criminal property (POCA s328); and
3. acquiring, using or possessing criminal property (POCA s329).
   (the "Principal Offences")

The Principal Offences apply to all persons. Several additional offences also apply to persons carrying on a regulated activity, as defined in the Financial Services and Markets Act 2000 ("FSMA"). These further offences relate to failing to disclose suspected money laundering and tipping-off, i.e. alerting an individual to a potential criminal / regulatory investigation.

Terrorism Act 2000

The TA creates separate, terrorism-specific, offences. These include, *inter alia*, fund-raising for, providing or receiving money or other property for, using or possessing money of other property for, and providing or becoming concerned in a funding arrangement for the purposes of terrorism. As with the POCA, these offences apply to all persons, with additional failure to disclose and tipping-off offences applying to persons carrying on a regulated activity for the purposes of FSMA.

Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017

The MLR apply to 'relevant persons', a definition that includes financial institutions, trust or company service providers, and independent legal professionals (Regulation 8 of the MLR). Relevant persons must adopt a risk-based approach towards AML, with a particular focus as to how they conduct customer due diligence ("CDD").

Under the MLR, relevant persons are required to identify and verify customers on the basis of a reliable independent source (such as a passport), identify and verify the ultimate beneficial owners of the customer (for example, where the customer is a corporate body), assess and obtain information on the purpose and intended nature of the business relationship or transaction, and identify and verify the identity of a person who purports to act on behalf of a customer. Where the customer is a corporate body, relevant persons must obtain and verify its name, company number or other similar form of registration, and its registered office and, if different, its principal place of business. Additional steps must be taken where the corporate body is a listed company.

Regulation 33(1) of the MLR sets out instances where enhanced due diligence must be applied. This includes any transaction or business relationship involving a person in a 'high-risk third country' or any transaction or business relationship involving a politically exposed person. In such scenarios, as a minimum, relevant persons must examine the background and purpose of the transaction and increase their monitoring of the business relationship.

Conversely, simplified due diligence is permitted in limited circumstances where the relevant person determines that the business relationship or transaction is low risk. Regulation 37(3) of the MLR sets out a number of factors that can indicate where the business relationship or transaction is low risk, such as where the customer is a public administration, is a company whose securities are listed on a regulated market, or is an individual resident in a geographical area of lower risk.

Further requirements under the MLR include:

1. Undertaking a general risk assessment of the relevant person's potential exposure to money laundering and / or terrorist financing;
2. Putting in writing risk mitigation policies that are proportionate to the risks identified and approved by senior management;
3. Limiting the circumstances in which 'simplified' CDD is permissible in comparison to previous legislation in this area; and
4. Requiring third parties upon whose CDD a regulated person seeks to rely to enter into a written agreement under which the third party agrees to provide within two working days copies of all CDD documentation in respect of the customer and / or its beneficial owner.

Recent Changes

On 30 September 2017, the Criminal Finances Act 2017 ("CFA") came into force. The CFA further extends the AML regime in England and Wales, creating a criminal offence for any entity that fails to prevent the criminal facilitation of tax evasion by associated persons. Two separate facilitation offences exist, the first related to UK tax evasion and the second related to the evasion of foreign tax.

It has been recognized by the Law Society, the representative body for solicitors in England and Wales, that the CFA brings a risk of criminal liability to solicitors' firms both for the actions of their employees and the actions of those with whom they associate. Published guidance suggests that there is no requirement under the CFA to actively investigate and prevent clients from committing tax evasion. However, it is reasonable to conclude that the coming into force of the CFA shall impact the ways in which solicitors' firms approach CDD so as to minimize the chances of an offence being committed.

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