Ensuring compliance with the Money Laundering and Terrorist Financing (Amendment) Regulations 2019

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Corporate Crime analysis: The Money Laundering and Terrorist Financing (Amendment) Regulations 2019, SI 2019/1511 come into force from 10 January 2020, bringing new requirements for financial service providers and others in 'the regulated sector' in preventing money laundering and terrorist financing. John Binns, partner at BCL Solicitors LLP, considers the impact of SI 2019/1511 on the day-to-day activities of affected businesses and how Brexit will impact the UK's future transpositions of EU anti-money-laundering (AML) directives.

How is SI 2019/1511 designed to implement the Fifth Money Laundering Directive, (EU) 2018/843 in the UK?

The UK has transposed the requirements of the EU's Fifth Money Laundering Directive, (EU) 2018/843 (MLD5), as it has those of previous MLDs, with diligence and enthusiasm—not merely ensuring that its strict terms are followed within the deadline, but also 'gold-plating' them by adding extra provisions on top.

What is the legislative and political background to this?

As a member of the Financial Action Task Force (FATF) as well as the EU, the UK is committed to following the recommendations of FATF and bound to implement most EU Directives, including those that impose AML and counter-terrorist financing (CTF) obligations on financial service providers and others in the 'regulated sector'. The government's powers to make and amend money laundering regulations (MLR 2017) come from various statutes, namely the European Communities Act 1972, the Financial Services and Markets Act 2000 (FSMA 2000), the Terrorism Act 2000 (TA 2000), and the Proceeds of Crime Act 2002 (POCA 2002).

The background to MLD5 was the 2015 terrorist attacks in Paris and the 2016 Panama Papers leaks, which prompted a tightening of the AML and CTF requirements in the Fourth MLD, 91/308/EEC even before it had been implemented. Its agenda though is broader than that would imply, and, as HM Treasury (HMT) took the opportunity to tighten the requirements in other ways

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too—as explained in their consultation paper of April 2019—SI 2019/1511 has something of a feel of 'miscellaneous changes', as well as a response to those events.

What gaps currently exist in the UK regulatory regime and what are the main changes heralded by SI 2019/1511?

SI 2019/1511 addresses a number of perceived inadequacies in the UK's MLRs. Among other things it:

• expands the UK's regulated sector in various ways, significantly broadening the definition of 'tax adviser' (so that it now includes those who provide 'material aid or assistance' rather than simply 'advice', and those who provide such services through a third party), and bringing in to the sector certain crypto-asset businesses, as well as art market participants (including operators of freeports) and letting agents (when, in both cases, dealing at or above a certain financial threshold)

• amends various due diligence requirements, including by adding a new requirement to report discrepancies between information obtained from customers and that recorded on registers at Companies House, and by tightening the provisions relating to electronic money (e-money) (particularly prepaid cards)

• requires and empowers HMT to introduce a central automated mechanism, to enable easier access by the authorities to information about accounts and safe deposit boxes

• requires the National Crime Agency to share information more efficiently with their counterparts in other states in the European Economic Area

How will this affect the day to day activities of those operating in this market?

The biggest impact will be on those businesses who are brought in to the regulated sector, as of 10 January 2020. They will now be obliged to register and cooperate with supervisors (subject to some limited transitional provisions), to conduct due diligence on customers, and to make reports where there are reasonable grounds to suspect money laundering and terrorist financing. The obligations on crypto-asset businesses are particularly onerous—though it should be noted that (despite an indication in the consultation paper that it may be broader) the definition comprises only crypto-asset exchange providers and custodian wallet providers. On the other hand (as also flagged in the consultation paper) the definition of 'crypto-asset' itself is broader than MLD5 requires, and includes any right to, or interest in, a crypto-asset.

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For those already in the regulated sector the changes to the due diligence requirements are more modest, though they will have an impact, particularly where there are discrepancies that require reporting to Companies House.

What can practitioners expect the new regulatory landscape to be both before and after Brexit?

At the time of writing, the terms of the EU-UK Withdrawal Agreement look set to be approved by the UK's departure date of 31 January 2020. These include a transition or implementation period, during which the UK must comply with the requirements of EU law as if it were a member. Notably, these do not (for the UK) include those of the Sixth MLD. This is due to be implemented in 2020, but was made as part of a subset of EU laws (on Justice and Home Affairs) from which the UK can exercise, and has exercised, an 'opt-out'. Conversely, Member States will be bound to continue to treat the UK as if it were still a member during that period. In practical terms, this will mean Brexit will have no impact until the end of the transition period, which now seems firmly fixed for 31 December 2020.

With respect to the landscape after that date, there is no formal certainty as yet. There have been no indications that the UK government has an appetite to withdraw from FATF, or to amend substantially the provisions of FSMA 2000, TA 2000, POCA 2002 or MLR 2017—although it will have the freedom to do all these things. Though practitioners may reasonably expect the UK to retain tough AML and CTF laws generally, the more interesting question is whether it will—pursuant to new treaty arrangements with the EU, or otherwise—commit to making those laws at least equivalent to the EU's on an ongoing basis ('dynamic alignment').

Some would doubtless prefer to see the UK seize the opportunity, in this as in other areas, to craft a less onerous regulatory environment. But this may be less helpful for those who hope to continue to trade with and operate within the EU, for whom the EU's AML and CTF requirements will continue to be relevant, even post-Brexit. For them, neither the prospect of having to keep up with two sets of complex requirements rather than one, nor that of EU business treating the UK as a third country without EU-equivalent AML and CTF standards, is likely to have a great deal of appeal.

Interviewed by Samantha Gilbert.

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

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