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ISSUES ON FINANCIAL MARKET REGULATION, BUSINESS DEVELOPMENT AND GOVERNMENT'S POLICIES ON GLOBALIZATION

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Address

Fondazione Gerardo Capriglione Onlus

c/o Centre for Commercial Law

Studies Queen Mary, University of

London 67-69 Lincoln's Inn Fields

London, WC2A 3JB

United Kingdom

Main Contact

Fondazione G. Capriglione Onlus - fondazionecapriglione@luiss.it

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RECENT TRENDS IN DESIGNING THE EU ANTI-MONEY LAUNDERING REGULATORY LANDSCAPE: THE FOURTH AML DIRECTIVE BETWEEN LIGHTS, SHADOWS AND FUTURE PERSPECTIVES

Alberto Urbani [**] - Andrea Minto [***]

ABSTRACT: *Money laundering and terrorist financing are lately becoming high a priority on EU policy- makers' agenda as never before. This paper examines how the European Anti-Money Laundering (AML) regulatory landscape is evolving in its design, contents and purposes. In doing so, it touches upon the major innovations brought in by the Forth Anti-Money Laundering Directive and by the recent EC amending Proposal.*

On one hand, issues relating to customer due diligence and beneficial ownership are dealt with. On the other hand, perils attached to the greater prominence gained by tax crimes are pointed out, bringing to the fore the question of whether the original AML goals are possibly overcome by the prevention of tax evasion. In providing a way forward, the paper finally provides insights on the challenges of the current AML supervisory framework.

SUMMARY: 1. The link between Directive 2015/849/EU (along with the recent amending Proposal) and the previous Anti-Money Laundering Directives: the steps forward made by the Fourth Directive. – 2. "New types" of money laundering and terrorist financing activities and consequent problems for the national and supranational legal systems. – 3. The amendments regarding the customer due dili-

[**] Associate Professor of Banking law at Ca' Foscari University of Venice, Department of Economics, albeurba@unive.it

[***] Assistant Professor in Economic Law at Utrecht Law School - Utrecht University, Faculty of Law, Economics and Governance, A.Minto@uu.nl

Although this paper is the result of a joint reflection of the Authors, Andrea Minto is primarily responsible for paragraphs 1, 3 and 5, whereas Alberto Urbani is primarily responsible for paragraphs 2, 4 and 6.

gence procedures. – 4. Old and new issues relating to «*beneficial ownership*». – 5. The setting up of national central registers to enhance the beneficial ownership identification. – 6. Countering money laundering and terrorist financing in the era of the Single Supervisory Mechanism.

1. According to the original plans of the European Union, by 26 June 2017 the Member States were supposed to implement, in their national legislation, Directive 2015/849/EU (hereinafter, also referred to as "Fourth Directive") concerning the prevention of the use of the financial system for the purposes of money laundering or terrorist financing. The recent dramatic upsurge in terrorist attacks however has been a "wake-up call" for EU policy-makers to promptly go back over such plans and revise the anti-money laundering (AML) legislation. Not only did EU policy-makers push ahead the deadline to implement the new European AML rules by the Member States, but they also set up additional complementary measures aimed at effectively countering the funding of any terrorist organization or initiative. Thus, on one hand, the European Commission encouraged the Member States to do their best to transpose beforehand the Fourth Directive, namely by 1st January 2017. On the other, the European Council conclusions[1], where EU leaders called for a stronger coordinated European response to combatting terrorism, and the comprehensive Action Plan to strengthen the fight against the financing of terrorism presented by the European Commission the 2nd February 2016[2], sparked off the legislative process to amend the "still to be implemented" Fourth AML Directive.

All these efforts led eventually the Commission to present on the 6th July 2016 the «*Proposal for a Directive of the European Parliament and of the Council amending Directive 2015/849/EU on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive*

[1]See European Council, 17-18 December 2015 – Conclusions, available at http://www.consilium.europa.eu/en/press/press-releases/2015/12/18-euco-conclusions/

[2] See European Commission, *Communication from the Commission to the European Parliament and the Council on an Action Plan for strengthening the fight against terrorist financing*, COM (2016) 50 final.

2009/101/EC»[3] (hereinafter mainly referred to as amending Proposal), which is optimistically supposed to be adopted in time to let the Member State implement it together with the previous one.

As mentioned before, Directive 2015/849/EU is, and is often referred to as, the Fourth Directive on anti-money laundering. The First AML Directive, Directive 91/308/EEC, was remarkably inspired by the Italian legislation which was entering into force in those same years[4]. Despite dating back to 1991, it contained all the essential features the current regulatory architecture is still based upon. The Second AML Directive, Directive 2001/97/EC, extended the application of many of the anti-money laundering requirements, at first only designed for banks and financial intermediaries in general, to other categories of traders concerned with the production or sale of goods of high economic value, as well as to the so-called legal and accounting professionals. Finally, the Third Directive, Directive 2005/60/EC (later supplemented by Directive 2006/70/EC), added more detailed rules concerning the identification of customers by setting up diversified customers due diligence obligations depending on the estimated degree of risk of money laundering or terrorism financing[5].

Coming to present days, the Fourth Directive does not reverse the steady trend in designing the EU anti-money laundering regulatory landscape and, most certainly, does not mark a legislative overhaul: once again, the European Union has wisely chosen to intervene gradually over time without disrupting the original set of pillars and principles the anti-money laundering legislation (hereinafter AML legislation) has been built upon ever since the First Directive has been enacted. In other words, the AML legislation has always been amended by virtue of a "normal mainte-

[3]European Commission, COM (2016) 450 final.
[4] Thanks also to the dedication and visionary experience of the judge Giovanni Falcone, rightly considered by many the putative father, at least, of the Italian law 5 July 1991, n. 197, the first Italian piece of legislation on the matter.
[5] For a summary of the AML legislative evolution, see, i.e., ERLIN-KARNELL, RYDER, *The Robustness of EU Financial Crimes Legislation: A Critical Review of the EU and UK Anti-Fraud and Money Laundering Scheme* (May 2016), in *European Business Law Review*, 2017, Forthcoming, available at http://ssrn.com/abstract=2816980; VAN DER BROEK, *Preventing money laundering: A legal study on the effectiveness of supervision in the European Union*, Eleven Publishing, 2015, p. 17 ff.

nance" approach, being constantly updated on the experience gained in applying and enforcing the rules and on the predictable evolution of the phenomena these same rules have to cope with.

The Fourth Directive, which should be implemented and come into force in the national jurisdictions by 26th June 2017 (or by 1st January 2017, according to the stricter timeline the Commission is wishing for), aims in particular to implement the recommendations of the Financial Action Task Force (hereinafter FATF) issued in February 2012[6], without any change whatsoever to the foundations of the regulatory architecture, which remain firmly entrenched in the two essential pillars of the customer due diligence and the reporting obligation[7].

At its simplest, the wider notion of "money laundering" and the greater obligations relating to the customer due diligence are the most significant new developments brought in by the Fourth Directive. The very notion of "money laundering" now expressly covers tax crimes among the possible predicate offences to money

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[6]See FATF-GAFI, *International standards on combating money laundering and the financing of terrorism & proliferation*, February 2012, available at *http://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf*. Such standards have been recently updated at the beginning of 2016. For a very first comment, see, i.e., BALDASSARRE ed GARA - PAVESI in *Profili internazionali dell'attività di prevenzione e contrasto del riciclaggio di capitali illeciti*, in Condemi e De Pasquale (eds.), Roma, 2004, p. 302 ff.; GILMORE, *Dirty Money: the evolution of international measures to counter money laundering and the financing of terrorism*[4], Council of Europe Publishing, 2011, p. 15-21; KAETZLE, KORDYS, F*ourth Money Laundering Directive: increased risk management requirements*, *Compliance & Risk*, 2015, 4(5), p. 2 ff.

[7]In that regard, it is worth noting that unlike some AML national legislation such as the Italian one (see art. 36 ff. Legislative Decree no. 21 November 2007, n. 231), the European AML legislation does not impose any obligation to record customer data and high value transactions, but it only requires to keep copies of the documents used for identification (now, art. 40 of Directive 2015/849/EU); similarly as regard the restrictions on the use of cash and (at least in part: see. In fact, the art. 10 of Directive 2015/849/EU) on bearer documents (art. 49 of the D. lgs. n. 231/2007 cit.). However, it must be pointed out that among the most significant innovations that the Proposal for amending Directive might bring in, there is also the setting up of centralised automated mechanisms, such as a register or data retrieval system in all Member States as an efficient means to get timely access to information on the identity holders of bank and payment accounts, their proxy holders, and their beneficial owners (see recital 15 and 16 and the proposed amended art. 32-*bis* of the Fourth Directive).

As far as reporting a money laundering transaction is concerned, the Proposal might bring about a useful integration of art. 32 of the Fourth Directive, according to which the Financial Intelligence Units of the Member States would be authorized to obtain information, to anti-money laundering or terrorist financing purposes, by any obliged entity even in the absence of any suspicious transaction reports.

laundering, and, on the other hand, the extension of the customer due diligence obligations aims at better identifying the beneficial owners of the monitored transactions. On a higher altitude, the new Directive prompts some considerations relating to the matter of supervision, especially in light of the new European architecture centred on the Single Supervisory Mechanism (SSM).

The next paragraphs will touch upon some critical issues stemming from the Fourth Directive. Far from being a comprehensive and thorough review of the new legislation, in fact, the analysis will be confined to some specific features of the directive in order to highlight strengths and weaknesses put in the general context of the AML legislation. Such selection of issues is supposed to shed some lights on potential perils attached to recent trends in regulating money laundering. Far from providing the last say, this article aims at opening up new avenues for further research in the field. At the same time, the recent amending Proposal will be taken into consideration whenever it could produce any relevant effects on the matters to be dealt with.

2. As aforementioned, the inclusion of tax crimes as predicate offences to money laundering is one of the main changes regarding the material scope of the AML legislation. However, the notion of money laundering itself has not been touched. Art. 1, par. 3, let. *a)*, Directive 2015/849/EU qualifies within the conducts, if committed intentionally, which shall be regarded as money laundering (and so did the Third Directive already) «*the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action*»; likewise, the following letters of par. 3 refer to other conducts, for instance, (let. b) to «*the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property*», but always these conducts being based on a «*criminal activity*»

committed beforehand[8].

Thus, to catch the innovative character of the Fourth Directive in that respect, the definition of "criminal activity" should be looked at. Indeed, art. 3, par. 4, in fleshing out such concept of criminal activity, now explicitly states at let. f) «*all offences,* including tax crimes *relating to direct taxes and indirect taxes and as defined in the national law of the Member States, which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards Member States that have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months*».

It might be argued, however, that the newly-introduced explicit reference to tax offenses does not make any real substantial change. The Third Directive in fact defined predicate offences to money laundering all «*serious crimes*» generically (see art. 3, par. 4 and 5, Directive 2005/60/CE) and, being the «*tax crimes*» obviously a subset of «*crimes*», they were already implicitly potential predicate offences, once qualified as being serious crimes[9]. There is no reason to believe that serious tax crimes could have escaped the wide net cast by the Third AML Directive. Naming overtly tax crimes within the predicate offences therefore ends up rather in recognizing a substantial overhaul of AML legislation goals, which were originally targeted at countering the re-use of money or other benefits generated by specific offenses and now increasingly oriented to the prevention and prosecution of tax evasion as such[10]. In that respect, the same European Commission acknowledged that tax crimes

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[8]On the notion of «*money laundering*» see, i.e., VAN DEN BROEK, cit., p. 4; FERWERDA, *Definitions of money laundering in practice*, in *The economic and legal effectiveness of the European Union's anti-money laundering policy*, UNGER, FERWERDA, VAN DEN BROEK, deleanu (eds.), Cheltenham, UK, Edward Elgar, 2014, p. 87 ff.

[9]Quite instructive on this matter, for example, in the ambit of the Italian legislation the *Istruzioni operative per la segnalazione di operazioni sospette* issued by BANCA D'ITALIA, provv. 12 January 2001, Introduzione, par. 1 and Parte seconda, Introduzione alla casistica; see also BORLINI, *Issues of the International Criminal Regulation of Money Laundering in the Context of Economic Globalization,* Paolo Baffi Centre Research, Paper No. 2008-34.

[10]Such tendency has been pointed out already by BURRELL, *Preventing Tax Evasion through Money Laundering Legislation*, *Journal of Money Laundering Control*, 2000, Vol. 3 (I), p. 304 ff.;

are brought within the scope of the powers and authorities used to combat money laundering in order to contribute to better coordination between AML and Tax authorities, and to remove potential obstacles to international cooperation regarding tax crimes[11].

The objective is clear, and quite acceptable. Not only is tax evasion high a priority of policy makers' agenda, and even more so for Member States over EU itself, but tax misconduct determines first and foremost negative effects for the community, distortions of competition to the detriment of economic operators, altering the proper market dynamics[12]. Apart from the sanctions for the violations of the AML rules, such a policy begs the question of whether and how, at least in cultural contexts where tax evasion is less socially disqualifying than elsewhere, this extension may end up "watering down" the sensitivity and cooperation of operators and intermediaries, for example by getting them to consider less rigorously and carefully any suspicion of money laundering coming from evasion compared to those generated by crimes that are of greatest social impact or connected to terrorist intents.

As the recital 11 of Directive 2015/849/EU acknowledges, a main reason of concern is that criminal tax law is up until now far from being harmonised among the Member States, with the result that the very notion of money laundering can have a greater or lesser extent depending on whether or not, in that particular country, a certain tax behaviour qualifies as a criminal offense[13]. With regard to possible money-

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MARIANO-FLORENTINO, *The Tenuous Relationship between the Fight Against Money Laundering and the Disruption of Criminal Finance*, *Journal of Criminal Law and Criminology*, 2003, Vol. 93, p. 311 ff.; more recently, TAVARES, *Relationship between Money Laundering, Tax Evasion and Tax Havens*, Special Committee on Organised Crime, Corruption and Money Laundering (CRIM), Thematic Paper on Money Laundering, 2013.

[11]See European Commission, *MEMO. Frequently asked questions: Anti-Money Laundering, Brussels*, 5 February 2013, available at *http://europa.eu/rapid/press-release_MEMO-13-64_en. htm?locale=en*.

[12]INTERNATIONAL MONETARY FUND, *Financial System Abuse, Financial Crime and Money Laundering—Background Paper*, 2001; G.W. SMITH, *Competition in the European Financial Services Industry: The Free Movement of Capital Versus Regulation of Money Laundering*, in *University of Pennsylvania Journal of International Business Law*, 1993, n. 3, p. 101 ff.

[13]Consequently, the recent amendment proposal specifies, at art. 57, that «*Differences between national law definitions of tax crimes shall not impede the ability of FIUs to provide assistance to another FIU and shall not limit the exchange, dissemination and the use of information pursuant to Articles 53, 54 and 55*».

laundering operations carried out in countries other than those in which, in theory, has been committed the tax offense, it is clear, at least, the difficulty for the subjects called to identify any suspicious transactions to discern between fiscally lawful and unlawful behaviours, since these individuals are hardly in possession of such a level of expertise in tax matters.

On a different note, the brief reference above to the countering of terrorist financing provides the opportunity to highlight how the new AML legislation sees this objective as a complement to effectively cope with the more "traditional" money laundering phenomenon.

No legislative amendments have been made in this respect. In line with the Third Directive, in fact, article 1, par. 5 of the Fourth Directive, keeps defining "terrorist financing" by mentioning the offenses referred to in articles from 1 to 4 of the Council Framework Decision 2002/475/JHA on combatting terrorism. However, the recent attacks that have bloodied the French soil cannot pass by unnoticed: first the attack in Nice during Bastille Day festivities and only a few days later, the priest killed during morning Mass at the historic church in a suburb of Rouen; almost simultaneously – and just to stay in Europe – in Germany some passengers were attacked with an axe on a commuter train. Events such as those just mentioned (and many others fortunately foiled preventively) show clearly how terrorist strategies, especially those of jihadist strand, are rapidly changing their underlying connotations. In fact, not only did they result in the occupation of vast territories (the so-called well-known "Islamic State", or "Caliphate") they also lately took the shape of individual, autonomous or small informal groups initiatives. These new phenomena called upon the countries victims of such events to set up the most appropriate tools, in both a preventive and repressive fashion.

Therefore, the abovementioned decision of the Council seems to still fit the purpose since the two definitions of «*terrorist offenses*» (art. 1) and «*offenses relating to a terrorist group*» (art. 2) were already framed and phrased, in 2002, as wide as to capture each and every heterogeneous manifestation of terrorism, in a forward-

looking fashion[14]. On the sheer regulatory side, therefore, the systematic review of the alerts or anomaly indicators for suspicious transactions which are not imposed and even mentioned in the directive but that are set out by the competent supervisory authorities in many Member States (sometimes even in the form of mere red flags or warning criteria), is to be definitely seen favourably in the light, for example, of the risk-based approach (see recital 22) and of the comprehensive regulatory powers the supervisors are entrusted with (see, in particular art. 8, and the rules contained in Chapter VI of the Fourth Directive). But even apart from that, it is evident that greater attention by operators called upon to timely discern any possible symptom of behaviours potentially finalized to finance terrorist activities – even if modest, given the most recent actions were organised – can be a useful bulwark in combatting such a dangerous and deplorable phenomenon.

The concept of terrorist activity presupposed by the AML legislation, on the other hand, is obviously far from being perfect in contrasting all new possible ways of terrorist financing and requires a never-ending fine-tuning process. Speaking of which, in fact, the mentioned amending Proposal by the Commission to develop and enhance the Fourth Directive builds upon the awareness of such a problem, and, from the very beginning it emphasizes that «*Recent terrorist attacks have brought to light emerging new trends, in particular regarding the way terrorist groups finance and conduct their operations. Certain modern technology services are becoming more and more popular as alternative financial systems and remain outside the scope of Union legislation or benefit from exemptions that may no longer be justified. In order to keep pace with evolving trends, further measures to improve the existing preventive framework should be taken*» literally, recital 2, but see, along with it, recital 6

[14]For the purposes of the Fourth AML Directive, «terrorist financing» means the provision or collection of funds, by any means, directly or indirectly, with the intention that they be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences within the meaning of articles 1 to 4 of Council Framework Decision 2002/475/JHA (see art. 1, co. 5, Directive 2015/849/EU). On the notion of terrorism enshrined in the AML legislation see DURRIEU, *Rethinking Money Laundering & Financing of Terrorism in International Law*, 2013, Martinus Nijhoff Publisher, Leiden, p. 118.

with specific reference to the use of new virtual currencies and recital 11 and 12 in relation to the use of prepaid cards).

Hence the appropriate decision[15] to extend the AML obligations to «*providers engaged primarily and professionally in exchange services between virtual currencies*[16] *and fiat currencies*» and to «*wallet providers offering custodial services of credentials necessary to access virtual currencies*». Besides, the Member States should make the taking-up of such activities and businesses subject to or, at least, registration[17], and, the tightening of rules on the use of prepaid cards (for example, by forbidding online transactions for anonymous cards), even more so if issued in third countries. In fact, despite the undeniable advantages and promising opportunities for the development of trade, the increased success and use of Bitcoin and prepaid cards raises new perils relating to money laundering and terrorist financing. Indeed, such payment instruments can serve the purpose, better than more traditional ones, of effectively subsidizing international terrorist networks or, simply, of paying certain logistical aspects related to criminal activities, especially by means of the high degree of anonymity that they offer over traditional tools for the transfer of funds. Against this backdrop[18], EU and national policy-makers were called upon to fill the gaps of the AML legislation.

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[15]The EUROPEAN BANKING AUTHORITY welcomes the Commission's Proposal in its *Opinion […] on the EU Commission's proposal to bring Virtual Currencies into the scope of Directive 2015/849/EU (4AMLD)*, 11 August 2016 available on the institutional website.

[16]According to the amending Proposal, «"*virtual currencies" means a digital representation of value that is neither issued by a central bank or a public authority, nor necessarily attached to a fiat currency, but is accepted by natural or legal persons as a means of payment and can be transferred, stored or traded electronically»*.

[17]This would amount to something less than a real authorization: a kind of mere "supervision on the registry office", in some ways along the lines of what, until the reform of 2010, in Italy characterized the intermediaries of the general register set out by art. 106 of the Banking Law (Legislative Decree 1 September 1993, n. 385).

[18]Regarding the money laundering and terrorist financing risks attached to the "virtual currencies" (*bitcoin*), see, i.e., OGUNBADEWA, *The Virtues and Risks Inherent in the 'Bitcoin' Virtual Currency*, University of Wales System – Cardiff Law School, 2014; BRYANS, *Bitcoin and Money Laundering: Mining for an Effective Solution*, in *Indiana Law Journal*, vol. 89, 2014, p. 441 ff.; BÖHEME, CHRISTIN, EDELMAN, MOORE, *Bitcoin: Economics, Technology and Governance*, in *Journal of Economic Perspectives*, vol. 29, n. 2, spring 2015, p. 213 ff.

3. The customer due diligence obligations is the second major area where innovations were brought in by Directive 2015/849/EU. In that respect, the changes are driven by a twofold objective, inspired by the increasing belief, at the EU institutions, that the Third Directive were overly permissive on that requirement[19].

Thus, on one hand, there is a crackdown on the conditions under which the customer due diligence has to be carried out. The innovations, on this side, concern neither the case of establishing a business relationship or the occasional transaction (whether the transaction is carried out in a single operation or in several operations which appear to be linked)[20], nor the cases of suspicion of money laundering or terrorist financing, nor the ones regarding the doubts about the veracity or adequacy of previously obtained customer identification data: all these cases have already been included in the previous directive still in force.

The tightening of controls rather comes from the introduction of the customer due diligence measures in the following three new circumstances: i) the electronic transfer of funds, as defined in point (9) of art. 3 of Regulation 2015/847/EU of the European Parliament and of the Council, exceeding EUR 1.000; in the case of persons trading in goods, when carrying out occasional transactions in cash amounting to EUR 10.000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked; lastly, for providers of gambling services, upon the collection of winnings, the wagering of a stake, or both, when carrying out transactions amounting to EUR 2.000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked. This is, quite obviously and as the same experience shows, the easiest way to move wealth for illegal purposes and that in the case of electronic funds transfer (and likewise if gambling takes place via the internet) can moreover take advantage of the speed and by the

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[19]See in particular the *Commission Staff Working Document impact assessment*, accompanying the amending Proposal as regard the simplified customer due diligence measures, which are considered «*overly permissive*» (III.4.2, box 6).

[20]For transactions of not less than 15.000 EURO (however with some important exceptions, related primarily to those who operate on an occasional or very limited basis, as enshrined in art. 2, par. 3 and 4).

more opaque character of computer and data channels[21].

Consequently, differentiated thresholds depending on the type of operation concerned and the degree of risk that the EU legislation attaches to it are set out. However, this was already the case in some Member States by application of the rule – reaffirmed in art. 5 of the new directive – which allows the national jurisdiction to impose stricter requirements than the European ones. Because such differentiation is by subjects, there is no risk that the person/subject to whom that requirement applies does not recall easily the threshold relating to their specific activity. Such risk is instead real in national legislation, like the Italian one, where, according to its AML rules, different limitations apply depending on whether you transfer money by using cash, check or a bank or postal saving book bearer[22].

The Fourth AML Directive, in line with the previous directive as well as with the banking supervision methodology, is structured and implemented according to the risk-based approach[23].

In fact, the Third Directive, once having laid down the general rules for customer due diligence obligations, provided for the «*simplified customer due diligence*» (art. 11-12), first, and the «*enhanced customer due diligence*» (art. 13), then, precisely depending on the level of risk of the transaction or operation presumed by the lawmaker. The Fourth Directive, despite confirming such a distinction, treats differently

[21]See recital 19 of the Fourth AML Directive. Within the academic literature, see already POMANTE, Internet *e criminalità*, Torino, 1999; URBANI, *Disciplina antiriciclaggio e ordinamento del credito*, Padova, 2005, p. 39 ff.; LEVI, *E-gaming, money laundering and the problem of risk assessment*, in *Research Handbook on Money Laundering*, UNGER, VAN DER LINDE (eds.), Edward Elgar, Cheltenham, 2013, p. 332 ff.; CHONG, LOPEZ-DE-SILANES, *Money Laundering and its Regulation*, *IDB Working Paper*, 2007, No. 493; CHAIKIN, *Risk-Based Approaches to Combating Financial Crime*, *Journal of Law and Financial Management*, 2009, Vol. 8, No. 2, p. 20-27. It is quite evident these reasons are the same the amendment Proposal puts forward regarding the virtual currencies, aforementioned in the previous paragraph.

[22]See VERHAGE, *Global governance = global compliance? The uneven playing field in anti-money laundering*, in *The Routledge Handbook of White-Collar and Corporate Crime in Europe*, in VAN ERP, HUISMAN, VANDE WALLE (eds.), 2015, p. 479.

[23]See PISANI, *L'adeguata verifica e l'approccio basato sul rischio nella disciplina antiriciclaggio*, in *Il fisco*, 2012, 1, p. 1151; DALLAPELLEGRINA, MASCIANDARO, *The Risk Based Approach in the New European Anti-Money Laundering Legislation: A Law and Economics View*, *Paolo Baffi Centre Research Paper No. 2008-22*.

the “simplified” and “enhanced” obligations. For the latter, the changes brought in by the new directive are not particularly relevant (except for the extension of the “en-hanced” obligations to cases of involvement of «*politically exposed persons*» residing in the same member State of the obliged entity/subject required to carry out the due diligence, whereas previously it was confined to politically exposed persons residing in another member State or in a third country[24]). For the former, unlike the third di-rective, there is no precise indication of the circumstances under which the simplified customer due diligence must be applied (for example, if the counterparty of the transaction or operation was a credit or financial institution bound by the same or at least similar AML obligations). Thus, the Fourth Directive makes the Member States or the same obliged entity responsible for identifying areas of lower risk of money laundering or terrorist financing rather than making that assessment itself. At least in the intention of the legislator, such a change is not to be interpreted as making Member States or the obliged entity completely free to adopt simplified customer due diligences measures. Indeed, the presumable discretion enjoyed by the Member States or the obliged entity is actually confined by a detailed list of criteria collected in the Annex II of the Directive, and, by the sanctions measures that might be im-posed either to the Member States or the obliged entity.

4. The criteria for determining the so-called «*beneficial owner*» of the transac-tion or operation is the second major area of innovation regarding the customer due diligence.

As well known[25], the customer due diligence is to be performed not so much

[24]See, comparatively, art. 13, par. 4, Directive n. 2005/60/CE and art. 20 Directive n. 2015 /849/ EU. However, the recent amending Proposal includes new enhanced customer due diligence measures in case of transactions involving high risk third countries: see art. 18 *bis* of the amended Directive n. 2015/849.

[25] See art. 13, par. 1, let. *a)* and *b)*, Directive n. 2015/849/EU. See, i.e., PISANI, *Gli obblighi di adeguata verifica della clientela nella disciplina antiriciclaggio*, *Il fisco*, 2008, 1, p. 1789 ff.; STAROLA, *I criteri connessi agli obblighi di adeguata verifica e di identificazione della clientela*, in *Corr. trib*., 2009, p. 882 ff.; COSTANZO, *The risk-based approach to anti-money laundering and*

on the client itself, which by hypothesis could be a company, but on the beneficial owner of the operation or transaction. According to the definition the Fourth Directive provides for in art. 3, n. 6, «*beneficial owner*» is any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted. The experiences gained in the AML implementation and enforcement over the last years led the EU policy- and law-makers to revise the very criteria to determine the beneficial ownership, both by specifying some circumstances and by broadening the net as to capture situations that were overlooked in the previous Directive.

In that respect, it is worth noting that now, in contrast to the previous Directive, when it comes to corporate entities, the «*ownership*» (of a sufficient percentage of the shares or voting rights) or «*control*» in that entity could occur even through «*ownership interest in that entity*». Such an extension is most likely driven by the intention to make the scope of the AML legislation include corporate entities which capital is not formed technically by shares but by "ownership interests" (non-stock entity such as a partnership or an LLC) or quotas (as, for instance, the Società a Responsabilità Limitata in the Italian company law system). Likewise, «ownership interest in that entity» is certainly be added as to comprise in the material scope of the legislation the financial instruments which enable the holder, irrespective of the entitlement to specific voting rights, to eventually influence the company (the so called "participating financial instruments" that might or might not have economic or voting rights depending on the company statutes).

Besides, by means of a disposition which looks like a closure declaration, the Fourth Directive adds to the other situations of beneficial ownership the case of «*the natural person(s) who hold the position of senior managing official(s)*», but only «*after having exhausted all possible means and provided there are no grounds for suspicion, no person under point (i) is identified* [*id est*, direct or indirect ownership or con-

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counter-terrorist financing in international and EU standards: What it is, what it entails, in *Research Handbook on Money Laundering*, B. Unger e D. van der Linde (eds.), cit., p. 349 ff.

trol], *or, if there is any doubt that the person(s) identified are the beneficial owner(s)*» (art. 3, n. 6), let. *a), ii)*). Completely different was the case, under the previous Directive, of the «*the natural person(s) who otherwise exercises control over the management of a legal entity*».

Coming back to the case of ownership or control through direct or indirect ownership of a sufficient percentage of the shares or voting rights, bearer shareholdings are to be considered relevant for determining the beneficial ownership (in accordance with the Third Directive). The inclusion of bearer shares, which might at first sight beg some questions, seems to be driven by a twofold objective.

First of all, the easy transferability of ownership by delivering the physical document makes it quite impossible for those who have to carry the customer due diligence (obliged entities) to constantly monitor the evolution of the shareholder structure. For that reason, the intention of the EU legislator might be traced in consequently asking the obliged entity to assess whether or not the conditions under which a shareholder qualifies as «*beneficial owner*» (i.e. more than 25% of total voting rights) occur at the time of the shareholders meeting[26]. In fact, what matters at the end of the day is above all the capability of affecting and influencing the corporate decisions (starting from the nomination of the members of the board and the audit committee) and this typically comes about during the shareholder meeting. However in this way, the "real" beneficial owner would be possibly allowed – and hence the reason for concern – to deliver the shares to a complacent and loyal nominee right before the shareholders' checks in order not to bring up their name in that forum,

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[26]According to the amending Proposal the relevant threshold would be reduced to 10% «*whenever the legal entity is a Passive Non-Financial Entity as defined in Directive 2011/16/EU*»: once again, this is another step toward a more rigorous AML legislation, given that – as explained in the Explanatory Memorandum at par. 5, let. *i)*, as well as in the recital 18 – «*For intermediary entities that do not have any economic activity and only serve to distance the beneficial owners from the assets, the 25% threshold is fairly easy to circumvent. Establishing a lower threshold where there is a specific risk will limit the scope of entities on which the obliged entities would need to collect additional information to those where the risk of use for illicit purposes is high. Accordingly, this enables the better detection of beneficial owner(s) with particular focus on entities that function as intermediary structures, do not create income on their own, but mostly channel income from other sources (defined as Passive Non-Financial Entities under Directive 2011/16/EU)*».

making sure to have the shares back a moment later, and therefore retaining full control over the company on the factual level. In light of the perils and potential circumventions, the reason why plenty of national company law systems[27] impose the shares with voting rights to be nominative (for companies not listed on regulated markets, which are the only ones relevant here) is now clear[28]. In that respect, however, the EU legislator had their hands tied, since in designing the AML legislation it had to take into account also the national company law systems which, on the contrary, allow non-listed companies to issue bearer shares with voting rights (as happens for instance in Luxemburg[29] and in The Netherlands[30]). Therefore, the EU legislator prudently came to the conclusion to frame as the notion of «*beneficial ownership*» as wide as possible for anti-money laundering purposes, despite being well aware of some inner limitations as highlighted above.

However, there is a second objective behind the inclusion of bearer shares. Put in perspective, the "control" as capability of influencing the corporate decisions might not necessarily be the relevant factor for the purposes of the AML legislation, but rather the economic benefit that the hypothetical money launderer[31] draws from being a shareholder, in that they invest the "dirty" money in the subscription or purchase of stocks and thus obtain financial benefits under the umbrella of legality. Con-

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[27]This is the case for example in France (see art. L. 212-3 *Code monétaire et financier*; art R224-2 *Code de commerce* narrows down the possibility to issue either nominative shares or bearer shares to listed companies only, which are not relevant here; see LE CANNU - DONDERO, *Droit del sociétés*[6], Paris, LGDJ, 2015, p. 726), in Italy (see, art. 2354, co. 1, Italian Civil Code and r.d.l. 25 October 1941, n. 1148, converted in law 9 February 1942, n. 96), in UK (see Sec. 112(2) Companies Act 2006).

[28]See also the FATF Recommendation 24: «*Countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities… countries that have legal persons that are able to issue bearer shares or bearer share warrants, or which allow nominee shareholders or nominee directors, should take effective measures to ensure that they are not misused for money laundering or terrorist financing*».

[29]See art. 37 ff. law 10 August 1915 «*concernant les sociétés commerciales*». For anti-money laundering purposes, however, the recent law 28 July 2014 requires mandatory deposit of bearer shares to a depository company authorized to do so: on this subject, see CHARLIER- TAKERKART-WOLF-LICATA, *Réforme du régime des actions au porteurs*, in *ACE Compta- bilité, fiscalité, audit, droit des affaires au Luxembourg*, 2014, n. 10, p. 21 ff.

[30]See art. 2:82 Dutch Civil Code regarding the NV («*Naamloze Vennootschap*»).

[31]The same applies obviously to the terrorist financing.

sequently, the shares without voting rights – and even more so if bearer shares, given they are transferable by delivery – can, like those registered, be used for those purposes. Such an interpretative approach has been recently endorsed by an interesting decision of the Italian Banking and Financial Ombudsman (ABF)[32] which qualifies the threshold of 25% of the total shareholding enshrined in the AML legislation as a sort of irrebuttable presumption of "beneficial ownership". Such decision brings to the fore the economic benefit attached to a share irrespective of any additional (voting) rights which might entitle to influence the corporate governance[33]. If the shareholder owns a sufficient percentage of the shares (25% of the total shares) they are presumed to being able of deriving an economic advantage from it: this is the relevant factor in detecting the "beneficial owner".

Finally, the trusts are the last area relating to the identification of the «beneficial owner» to be dealt with. The previous Directive already provided for a set of rules on trusts, but those rules were addressed in the broader context of the legal entities, such as foundations, and legal arrangements, such as precisely the trusts, which administer and distribute funds. Furthermore, for the purposes of AML legislation, trusts were subject to the same threshold of 25% applied for companies, but of course in this case it refers to the future beneficiaries or to the exercise of control over the assets of the trust. The new Directive once again aims to broaden its scope of application by, on the one hand, listing as possible beneficial owners, the settlor, the trustee or the protector if any, the beneficiaries, or where the individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates, as well as any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means. On the other hand, the

[32]The Italian Banking and Financial Ombudsman (Arbitro Bancario e Finanziario) is an alternative dispute resolution system for customer complaints about banks and other financial intermediaries.
[33]See Arbitro Bancario Finanziario, Collegio di Milano, dec. n. 488, 22 January 2015 who also points out in this regard the need to put the specific purpose of the provision in question in the context of the customer due diligence requirements.

scope of its application is broadened by eliminating any reference to the 25% threshold. According to a strict reading, in most cases the beneficial ownership of a trust is to be attributed to several individuals, making therefore the customer due diligence particularly heavy to be performed.

Aiming at implementing concretely the principle of proportionality to the specific degree of risk of money laundering, the recent proposal of a new Directive draws a dividing line (just foreshadowed by the directive 2015/849/EU, where art. 31, par. 4, considers the trust that «*generates tax consequences*» only, expression which is not reproduced in the amended text), in brief, between trusts with a view to gain profit and other trusts such as having charitable intent or safeguarding of the family assets. Only the former type, like profit-making companies, are obliged (through integration not of the AML Directive, but rather of the already mentioned directive 2009/101/EC) to disclose the requirements regarding the beneficial ownership and other essential information to any third party and civil society in general, but at the same time – here instead revising the Fourth Directive – subjecting all trusts, without distinction, to the anti-money laundering requirements regarding beneficial ownership but by making available the information concerning the second type trusts no at anyone, but only to legitimate stakeholders (so the "new" par. 4a that would be added to the art. 31 of Directive 2015/849/EU).

On this point, however, the proposal appears lame and does not fit the purpose of effectively countering money laundering and terrorist financing. Most likely, the Commission has ambitiously aimed at more general objectives of “market transparency”, which are not easily matching the AML ones. For that reason, it seems appropriate to make some adjustments along the way of drafting the final text of the amending directive.

5. In pair with the rules set out for the customer due diligence, the Fourth AML Directive introduces some new provisions (i.e. those of Chapter III, art. 30-31) specifically aimed at facilitating the investigations by the authorities entrusted with enforcement tasks. In that respect, according to art. 30, par. 1, the Member States en-

sure that corporate and other legal entities incorporated within their territory obtain and hold «*adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held*». Par. 3 requires the Members States to set up – where not already established – national central registers where all such information are collected, for example a commercial register, companies register as referred to in art. 3 of Directive 2009/101/EC, or a public register. The characteristics of those national mechanisms must be notified to the Commission, which will submit a report to the European Parliament and to the Council assessing the conditions and the technical specifications and procedures for ensuring the safe and efficient interconnection of the central registers referred to in par. 3 via the European central platform established by art. 4a(1) of abovementioned Directive 2009/101/EC.

In this regard, the proposal for amending the Fourth AML Directive, however, seems to head to a sudden and unexpected *revirement* by the European policy-makers. According to the current wording of the Fourth Directive, in fact, the access to the information at issue[34] should have been allowed not only to those subjects who are abide by customer due diligence obligations, to the competent authorities and the Financial Intelligence Units of the various countries, as obvious, but also «*to any person or organization that can demonstrate a legitimate interest*» (see art. 30, par. 4, par. 1, let. c). This, obviously, would open up (or, rather, would have opened up) the consultation of such databases to a potentially very large and diverse audience of stakeholders, for example, for investigative journalism purposes or scientific research, according to a clear and, in many ways, appreciable intent of increasing transparency of economic relations. At the same time, however, the AML regulatory system would ended up pursuing a range of different purposes: the contrast of terrorist financing activities, the fight – as seen above – of tax evasion and now the increase of information disclosure of the beneficial ownership regarding a wide set of relationships and

[34]The access to information must take place in compliance with the rules on data protection and for which the prior online registration might be provided for as well as the payment of a fee not exceeding the related administrative costs.

transactions. Hence, a legitimate doubt arises: only experience, in fact, could answer the question of whether such a trend *would* bring about positive synergies or if the original purposes of preventing and contrasting money laundering (nowadays unfortunately more relevant than ever) would be watered down in a patchwork of heterogeneous objectives.

We are using "would" because, even before such a provision comes into force in the national jurisdictions, the amending Directive opts for deleting the just mentioned let. c), with the first consequence that regarding companies and other «*legal entity*», if the amendment is confirmed, the access to information on the beneficial ownership would be guaranteed to the competent authorities, the FIU, the subjects obliged to perform the customer due diligence, but no longer to those who bear a legitimate interest. Nonetheless, should we take into account the simultaneous plan to amend Directive 2009/101 / EC, as already mentioned above, the exclusion of legitimate interest bearers does not concern profit-making companies (by far the majority), thus ending up partially confirming the trend marked by the Fourth Directive in favour of greater transparency in corporate disclosure and, consequently, the detected increasing versatility of the anti-money laundering measures.

6. As far as the supervisory architecture goes, the Fourth Directive pays much greater attention that the Third Directive to the matter of national and international cooperation between supervisors (as clearly emphasised in recital 54 of the Fourth Directive). The Third Directive in fact devoted only one concise article to cooperation (art. 38), which entrusted the Commission with the task to facilitate both coordination and sharing of information between the different Financial Intelligence Units (FIU, hereinafter). The Fourth Directive flashes out this subject in nine articles (from art. 49 to art. 57), distinguishing between national cooperation, cooperation with the ESA (i.e. with EBA, EIOPA and ESMA, the three authorities of the ESFS microprudential supervision, the European System of Financial Supervisors) and co-operation between

the FIU and the Commission[35]. Regarding the latter cooperation, the Fourth Directive is worded less rigorously than the previous one, since the Commission now «*may*» (instead of «*shall*», used in the Third Directive) lend assistance as may be needed to facilitate coordination. However, such a change is not to be overestimated, especially looking at the bigger picture and at the great deal of attention now paid to the cooperation.

The analysis on cooperation should be rather conducted from a different angle. When the Third Directive was enacted in 2005, the Single Supervisory Mechanism was obviously still far from even being intellectually conceived and the division of competences was based upon the distinction between banking supervision and monetary policy. Against that backdrop, it comes as no surprise that the Third Directive lacked any reference to the European System of Financial Supervision and its components, which came into existence a few years later, nor to the European Central Bank, which at the time was not familiar with the supervision of banks.

The architecture of banking supervision in Europe has however changed dramatically in the wake of the financial crisis. . After the entry into force of Regulation 1024/2013/EU and the subsequent setting up of the Banking Union, banking supervision is centralized in the hands of the European Central Bank, despite still being deeply rooted in the workflow carried out by the national supervisory authorities.

Nevertheless, despite mentioning the ESAs, no reference is made to the European Central Bank. And indeed, according to the reformed regulatory framework, at the epicenter of the system there is rather the European Commission, which is assumed to be «*well placed to review specific cross-border threats that could affect the internal market and that cannot be identified and effectively combatted by individual Member State*»; it should therefore be entrusted «*with the responsibility for coordinating the assessment of risks relating to cross-border activities*» (recital 24). This is

[35]The amending Proposal adds a fourth area of cooperation between competent authorities, listing a series of cases where any authority cannot in any way refuse the request for assistance from one or more of the others (see art. 50a, to be inserted in Directive n. 2015/849/EU).

reflected both in the aforementioned art. 51, which, despite the wording less strict than in the past, entrust the EC with an the role of facilitating the cooperation between FIUs, and, most importantly, in art. 6, according to which the EC in endowed with the role of conducting an «*assessment of the risks of money laundering and terrorist financing affecting the internal market and relating to cross-border activities*». To that end, the Commission is requested, by the date the Directive is to be transposed, to draw up a report identifying, analysing and evaluating those risks at the Union level. Thereafter, it has to update its report every two years, or more frequently if appropriate.

Therefore, while the EU banking supervisory architecture resulted in a composite system leaded by the European Central Bank and supported in the day-to-day activity by the national supervisory authorities[36], for the AML system of supervision it has not been opted for setting up a sort of European central FIU. Indeed, establishing yet another European institution mostly engaged in the financial and banking supervision would not be welcomed. Instead, the Commission operates in the capacity of a sui generis central FIU, and to that end it provides guidance, regulation and control under its oversight powers[37]. The ESAs, on their side, have instead the responsibility of setting out «*draft regulatory technical standards*» (see art. 45, par. 6, par. 1, Directive 2015/849/EU), for example with reference to the compliance with the anti-money laundering requirements by the obliged entities that are part of a group, then to be brought to the attention, again once again, of the Commission.

Supposedly, the European legislator opted for not exploiting the proven synergies between banking supervision and the contrast of the criminal economy[38], neglecting, on the one hand, that the fight against the phenomena in question cannot be separated from the forefront involvement of banking supervisors that, precisely

[36]Regardless, here, to the interaction between the ESAs (primarily EBA) and the ECB. On this subject, among the many, see WEISSMAN, *European Agencies and Risk Governance in EU Financial Market Law*, Routledge, London, 2016.

[37]See in particular art. 45, par. 7 of the Fourth Directive.

[38]On this matter please refer to URBANI, cit., partic. p. 89 ff.

because of their mission, know very well the dynamics of circulation of money and, on the other hand, that a bank or financial intermediary “bent” to criminal economy is more vulnerable especially in light of its core business, and of its potential capability of altering the proper competition process in the market.

It casts no doubt, however, that new European supervisory landscape sees actively involved national supervisory authorities and, moreover, that the Fourth AML Directive requires the Member States to make sure that such authorities have adequate powers to ensure compliance with the AML legislation (see art. 48). Besides, since the material scope goes beyond just banking and financial intermediaries and indeed affects many other categories of persons who perform different activities, the Commission should be best placed, in the eyes of EU legislator, to counter any form of activity relating to money laundering or terrorist financing. However, in our humble view, the boundaries of AML regulatory and supervisory architecture are lately fading mainly as the result of the unintended consequences of considering the fight against money laundering to be intrinsically separated from banking supervision, ending up with the dispersion of potential synergies coming out from a more integrated system.

Such issue will most certainly gather momentum as soon as a proposal for a Fifth AML Directive will be drafted, as the recent amending directive unfortunately does not touch upon.