The UK and the EU's Fifth Anti-Money Laundering Directive: Exceeding Expectations

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Abstract

This article considers the UK implementation of the Fifth Money Laundering Directive. It examines the key changes introduced by the new Directive and their impact on the UK anti-money laundering regime. Given the evolving nature of threats relating to money laundering and the latest technological developments, this article argues that the UK has decided to go beyond the EU minimum requirements. Divided into five parts, the article outlines the concept of money laundering and the UK legal framework of anti-money laundering, before assessing the main changes and their effects on the UK anti-money laundering regime. The article concludes that the new rules boost transparency and bolster the existing preventative measures.

1. Introduction

Money Laundering is the process whereby criminals try to clean the money obtained by their criminal activities and make it appear to come from a legitimate source. It is a method designed to make illicit acquisition appear lawful, usually by disguising the property's illegal origin.[1] Due to its economic and financial effects, money laundering can weaken the integrity and stability of the financial markets and institutions.[2] It is a global problem, and represents a significant threat to a country's financial sector. Therefore, combating money laundering contributes to the integrity of the financial system, global security, and sustainable growth. Diversion of resources to less productive activity and facilitation of domestic corruption and crime by money laundering activities would depress economic growth.[3] To illustrate, in order to protect their proceeds and avoid detection of their activities, money launderers invest their illicit money in economic activities that are not sound or based on economic principles.[4] They, for example, might invest a large amount of their illicit money on art works in a country where

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[1] M Levi and P Reuter, 'Money Laundering', in M. Tonry (ed.) *The Oxford Handbook of Crime and Public Policy* (Oxford, Oxford University Press 2009) 356.

[2] See, F Schneider and U Windischbauer, 'Money laundering: Some Facts' (2008) 26 EJLE 387-404.

[3] Ibid.

[4] See, J McDowell and G Novis, 'The Consequences of Money Laundering and Financial Crime' (2001) 6 An Electronic Journal of the US Department of State 6-8 available at https://www.hsdl.org/?abstract&did=3549 accessed 30 March 2020.

those works are not main attractions in the economy. The value of any art work is principally subjective and therefore easily manipulated. Art can also be smuggled or transported easily and related transactions can be conducted anonymously. The main driver of their investments thus is not the return, but rather finding a way to recycle the illicit money even with low return. This illogical diversion to less productive activities has far reaching consequences on economic growth. In fact, money launderers normally prefer to invest their illicit funds in countries where anti-money laundering law is lax or ineffective, especially developing countries.[5]

It is necessary to know that the expeditious growth of technological developments allows money to move anywhere in the world with speed and ease. This makes fighting money-laundering more urgent than ever. Because of the secret character of money-laundering activities, it is quite difficult to estimate the total amount of money laundered globally. The United Nations Office on Drugs and Crime (UNODC) estimates amount of money laundered globally in one year is 2 - 5% of global Gross domestic product (GDP), or $800 billion - $2 trillion.[6]

The foregoing discussion demonstrates that due to its considerable impact on the economy, stability and integrity of the global financial system, and society, money laundering is considered one of the most serious crimes that should be strictly addressed. Therefore, tackling money laundering has become an urgent priority for national policy makers and international community. The first international response to money laundering was in late 1980s in form of hard and soft anti-money laundering instruments (some of them will be discussed in section 3). The significance of the international regime comes from its influence on policies and measures implemented by national laws. This impact can be clearly seen in anti-money laundering laws in the UK influenced by international and regional regimes, including law transposed from EU Directives and policies drives by Financial Action Task Force (FATF) standards.

This article takes a closer look at the UK anti-money laundering legal framework, focusing on implementation of the Fifth Money Laundering Directive. It addresses the main changes introduced by the new Directive and their impact on the current anti-money laundering regime. In doing so, this article argues that in implementing the Fifth Directive, the UK has decided to

[5] See Schneider & Windischbauer, supra n. 2

[6] The United Nations Office on Drugs and Crime, 'Money-Laundering and Globalization' available at https://www.unodc.org/unodc/en/money-laundering/globalization.html accessed 4 March 2020.

go beyond its minimum requirements. This strengthens its position as having one of the most comprehensive and advanced anti-money laundering regime around the world.

The remainder of the article is divided into four Parts. Part 2 defines money laundering, highlighting the main stages of money laundering process. Part 3 discusses the international legal framework of anti-money laundering, with a particular focus on the leading role of Financial Action Task Force. Part 4 analyses the UK anti-money laundering regime, focusing on the key changes introduced by the Fifth Money Laundering Directive. It also points out how the UK has decided to opt out the Sixth Anti-Money Laundering Directive. Part 5 concludes that the new rules boost transparency and bolster the existing preventative measures.

2. Defining Money Laundering

While the process of cleaning the money tainted by criminal activity is obvious, it is difficult to define the concept of money laundering. This can be attributed to the existence of various competing definitions from different international organisations and jurisdictions around the world. The United Nations Convention against Transnational Organised Crime (UNCTOC), for instance, defined money laundering as:

> *"The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade legal consequences of his/her action; the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime; the acquisition, possession or use of property, knowing at the time of receipt that such property is the proceeds of crime; participation in, association with or conspiracy to commit, attempt to commit and aiding and abetting, facilitating and counselling the commission of any of the offences established in accordance with this article".*[7]

[7] United Nations Office on Drugs and Crime, 'United Nations Convention against Transnational Organized Crime' (2000) available at https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf accessed 30 March 2020.

Unless the predicate offence was a drug trafficking, this definition confined the investigation of money laundering. A predicate offence is a crime that is a component of a more serious crime.[8] While most countries adopted this definition, they extended the predicate offences to include a broad range of offences. This raises a significant question about definition of predicate crime because what constitutes a crime in one country may not be a crime in another country. It is worth noting that several jurisdictions require the predicate offence proven before the money laundering offence.

In 1995, the Interpol General Secretariat Assembly defined money laundering as: "*Any act or attempted act to conceal or disguise the identity of illegally obtained proceeds, so that they appear to have originated from legitimate sources*".[9]

The FATF describes money laundering as "*The processing of criminal proceeds to disguise their illegal origin. This process is of critical importance, as it enables the criminal to enjoy these profits without jeopardising their source*".[10]

In the UK, money laundering is defined in s 340 (11) of the Proceeds of Crime Act 2002 (POCA) as an act which constitutes an offence under ss 327, 328, or 329, or an attempt, conspiracy or incitement to commit any of those offences, or aiding, abetting, counselling, or procuring their commission of an offence.[11] Interestingly, the POCA provides that criminal conduct is any conduct that constitutes an offence in any part of the United Kingdom. This implies that the UK adopts all crimes approach regarding predicate crimes committed in its jurisdiction. However, offences which were committed abroad are relevant predicate crimes if laundering activities are committed in the UK.[12] In drug trafficking, for instance, drug traffickers attempt to clean the proceeds of their crime by placing them into the financial system after they have supplied their drugs. The predicate offence is "supplying controlled drugs". While some jurisdictions prefer to prosecute the substantive offence first and subsequently the money laundering offence, the UK law allows prosecuting both offences jointly or separately. These variations necessitate harmonization of predicate crime definitions globally to foster the efforts of tackling money laundering crimes.

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[8] See, R, Durrieu, *Rethinking Money Laundering & Financing of Terrorism in International Law: Towards a New Global Legal Order* (Boston, Martinus Nijhoff Publishers 2013) 304.
[9] The Interpol General Secretariat Assembly, Beijing, (October, 1995).
[10] The Financial Action Task Force, available at https://www.fatf-gafi.org/faq/moneylaundering/ accessed 30 March 2020.
[11] Proceeds of Crime Act 2002, s. 340(11).
[12] Ibid, s. 241.

2.1 Money Laundering Process

Money laundering is not a single act but is in fact a complex and complicated process. This process involves several stages each of which may implicate various people and institutions. It is important to know that money launderers are smart and creative and they try to promote their techniques by benefiting from technological developments and new business opportunities. The money laundering process can be broken down into three distinct stages, namely placement, layering and integration.

1. The Placement Stage

The placement stage represents the initial entry of the funds obtained from illegal activities into the financial system. The main objective of this stage is to avoid detection of the illicit funds from authorities by transforming them into legitimate asset forms.[13] This can be done in a number of ways. For instance, money launderers might purchase financial securities through single or multiple transactions.[14] The placement stage is generally deemed to be the riskiest stage of the money laundering process and detection by the authorities is most likely. To avoid detection, money launderers use a variety of techniques including smurfing and cash smuggling. Smurfing is a technique where money launderers break up a transaction involving a huge amount of money into smaller transactions below the reporting threshold.[15] Cash smuggling is another method used by money launderers in the placement stage.[16] Most countries impose obligation on passengers to declare the amount of cash they carry if it is above a specific limit before boarding any means of transport. To circumvent this restriction, money launderers try to develop different creative ways such as concealment of cash on (or in) the body, or within the luggage.

2. The Layering Stage

The layering stage represents the point in which the illicit money is disguised, making the launderers' activity difficult to be detected. In order to separate criminal proceeds from its

[13] I Odeh, *Anti-Money Laundering and Combating Terrorist Financing for Financial Institutions* (Pennsylvania, Dorrance Publishing 2010) 3.
[14] See, D D'Agostino, *Money Laundering: Extent of Money Laundering Through Credit Cards Is Unknown* (Darby, Diane Publishing, 2002) 6.
[15] See, G Dean, P Gottschalk and I Fahsing, *Organized Crime: Policing Illegal Business Entrepreneurialism* (Oxford, Oxford University Press 2010) 55.
[16] See, J Madinger, *Money Laundering: A Guide for Criminal Investigators* (3rd edn, New York 2011) 41.

origin, complicated financial transactions are used.[17] The more complicated these transactions are, the less likely to trace any suspected money back to its illicit origin by competent authorities. The most common methods used in this stage are using offshore account, wire transfers, and reselling high-value goods, such as artwork.[18] It is significant to emphasise that cryptocurrency can provide an ideal means to transit illicit proceeds across borders.

3. The Integration Stage

The final stage of the money laundering process is the integration stage. At this stage the illegal proceeds is returned to the launderer from what seem to be legitimate sources.[19] This implies that the launderer can justify the source of wealth in case of questioning by competent authorities. Nonetheless, the detection of laundered money at this stage of the process remains possible only with the help and support of one or more persons who have the knowledge of the origin of the money, and can explain what has happened. Funds may be integrated back and appear to be from legal sources by selling property to a self-owned foreign company (shell companies) at an inflated price and the difference between the selling price and cost is recorded as legitimate capital gains. False gambling winnings, salary from false businesses, false inheritances, and false loans from self-owned offshore companies are also other common methods at this stage.[20]

While a standard process of money laundering usually include those three stages, one or two of them may suffice on their own to disguise the origin of the illicit funds.

3. The Global Anti-Money Laundering Regime: The Role of the Financial Action Task Force (FATF)

To mitigate the adverse effects of money laundering activities and promote the integrity and stability of the global financial system, the international community has recognised the need for a harmonised international action against money laundering. The international anti-money-laundering regime ranges from various soft law (non-binding) rules to specific binding standards. Particularly, FATF has played a leading role in developing international standards

[17] See, P Reuter and E Truman, *Chasing Dirty Money: The Fight Against Money Laundering* (Washington, Peterson Institute 2005) 26.
[18] See Madinger, supra n. 16, at 259.
[19] Ibid, at 260.

[20] Ibid.

that require financial institutions to adopt minimum levels of transparency and disclosure to prevent financial crime.

In December 1988, the international community signed the 'United Nations (UN) Convention against Illicit Drugs in Narcotic Drugs and Psychotropic Substances' (or Vienna Convention).[21] The Convention aims at addressing the threat posed by international narcotics trafficking. It was supplemented by three important protocols regarding migrant smuggling, people trafficking, and the illegal manufacture and tracking of firearms. In the same year, the Basel Committee on Banking Supervision in 1988 issued a Statement of principles regarding the laundering of criminal proceeds through financial institutions. The Committee highlighted the obligation of banks to know their customers, avoid suspicious transactions and cooperate with law enforcement authorities, which were not common practices at that time. Nonetheless, the Committee Statement was legally not binding.[22]

Given the increase in the number and complexity of money laundering activities and their impact on the global financial system, in 1989, at the G-7 summit in Paris, the FATF was created. The FATF is an inter-governmental body that sets standards and promotes effective implementation of legal, regulatory and operational measures for fighting money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction, and other related threats to the integrity of the global financial system. With more than 200 countries committed to implement it standards, the FATF has developed Standards, which ensure a co-ordinated global response to combat organised crime, corruption and terrorism. In 1990, the FATF issued 40 Recommendations for action, to be implemented by the its member states.[23] Although not a binding international convention, many countries in the world have made a political commitment to fight money laundering by implementing the 40 Recommendations. The Recommendations aim at improving national legal systems, especially in the area of criminal law, strengthening international cooperation; and boosting the role of financial institutions in tackling money laundering. Further, to reflect evolving money laundering

[21] The United Nations (UN) Convention against Illicit Drugs in Narcotic Drugs and Psychotropic Substances, (1988) available at https://www.unodc.org/pdf/convention_1988_en.pdf accessed 30 March 2020.

[22] The Basel Committee on Banking Supervision, 'Prevention of criminal use of the banking system for the purpose of money-laundering' (1988) available at https://www.bis.org/publ/bcbsc137.htm accessed 30 March 2020.

[23] The FATF, 'The Forty Recommendations of the Financial Action Task Force on Money Laundering' (1990) available at https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf accessed 30 March 2020.

techniques and activities, and to extend their scope well beyond drug-money laundering, the 40 Recommendations were revised for the first time in 1996. In October 2001 the FATF broadened its mandate to deal with the threat of the financing of terrorist acts and organisations, and created the Eight (later extended to Nine) Special Recommendations on Terrorist Financing.[24] The FATF Recommendations were revised a second time in 2003 to include terrorist financing.[25]

On February 15, 2012, the FATF's Recommendations were revised where the proliferation of financing of weapons of mass destruction were added to FATF's areas of surveillance. The revised Recommendations intended to: (1) strengthen international surveillance of evolving criminal and terrorist threats; (2) develop a robust, practical and ongoing partnership with the private sector; (3) enhance prominence of the so-called "risk-based approach" and (4) promote global efforts to increase standards, especially in low capacity countries.[26]

The foregoing discussion demonstrates the vital and leading role of FATF in leading the fight against money laundering activities through reviewing money laundering and terrorist financing techniques and continuously strengthening its standards to address new risks, such as the regulation of virtual assets, which have spread as cryptocurrencies gain popularity. It is significant to emphasise that since 2014 the FATF has issued some important statements and guidance regarding key definitions of virtual assets and risk based approach to virtual assets.[27]

4. United Kingdom Anti Money Laundering Framework

The UK has one of the most comprehensive and advanced anti-money laundering regime around the world. The strength of this regime was evidenced by the comprehensive assessment recently published by the FATF which placed the UK as the strongest overall regime of over

[24] The FATF, 'FATF IX Special Recommendations' (2001) available at https://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf accessed 30 March 2020.
[25] The FATF, 'The Forty Recommendations' (2003) available at https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202003.pdf accessed 30 March 2020.
[26] The FATF Recommendations, 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation' (2012) available at http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html accessed 2 April 2020.
[27] Some of these statements available at https://www.fatf-gafi.org/publications/fatfrecommendations/documents/guidance-rba-virtual-assets.html accessed 2 April 2020.

80 countries assessed to date.[28] This regime has been directly influenced by the international legal framework and the EU money laundering Directives. These Directives were transposed to the UK through successive money laundering regulations (1993, 2003, 2007, 2017 and 2020) and POCA 2002. Since the main aim of this article is to examine the key changes introduced by the 5th anti-money laundering Directive, POCA 2002 will briefly be discussed before examining the new regulations.

4.1 Proceeds of Crime Act 2002 (POCA)

POCA, which came into force on 24 February 2003, sets out the three principal money laundering offences. These offences are described in sections 327, 328 and 329 of Part 7 of POCA. POCA 2002 replaced parallel drug and non-drug money laundering offences under the Drug Trafficking Act 1994 and the Criminal Justice Act 1988. Section 327 includes the offence of concealing, disguising, converting, transferring or removing criminal property from the UK.[29] Further, section 328 states that an offence is committed when a person enters into or becomes concerned in an arrangement which he knows or suspects will facilitate another person to acquire, retain, use or control criminal property and the person knows or suspects that the property is criminal property.[30] Finally, section 329 provides that an offence is committed when a person acquires, uses or has possession of property which he knows or suspects represents the proceeds of crime.[31] As noted above, money laundering can either be charged on its own, or incorporated on an indictment which includes the underling predicate offence. Further, in addition to the three principal offences, section 330 of POCA includes the offence of 'Failure to disclose: regulated sector'.[32] This section imposes an obligation on members of the regulated sector, such as banks and other financial institutions, to report suspicious transactions if there are reasonable grounds for knowing or suspecting that they are taking place. This implies that section 330 of POCA creates obligations on individuals employed in the regulated sector, requiring them to disclose suspicious money laundering activities and the failure to report them is considered a criminal offence.

[28] See, HM Treasury, 'Transposition of the Fifth Money Laundering Directive: response to the consultation' (2020) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/860491/5MLD_Consultation_Response.pdf accessed 30 March 2020.

[29] Proceeds of Crime Act 2002, s. 327.

[30] Ibid, s. 328.

[31] Ibid, s. 329.

[32] Ibid, s. 330.

4.2 Money Laundering Regulations

The money laundering regulations implement the EU money laundering Directives. Influenced by the FATF's Recommendations, the first EU Money Laundering Directive was introduced in 1991.[33] The main objective of the Directive was to prevent and criminalise money laundering. Although the Directive prohibited the laundering of the proceeds of drug trafficking only, it encouraged member states to broaden the scope of the criminalisation to include other offences. The first Directive was implemented by the Money Laundering Regulations 1993, which came into force on 1 April 1994.[34] The principal effect of the Directive was to require financial institutions to verify the identity of all customers opening business relations with them.[35]

The second money laundering Directive was introduced in 2001. This Directive was a response to the FATF revised Recommendations (2001).[36] The second Directive was transposed into UK law by the Money Laundering Regulations 2003. The 2003 Regulations revised the Money Laundering Regulations 1995 and 2001.[37] The central change brought about by the regulation was that the expansion of the Regulations to additional activities, including tax adviser, operating a casino, estate agency work, insolvency practitioners, company and trust formation and management services ,accountancy and audit services, and legal services relating to financial or real property transactions.[38]

Further, following the introduction of the third EU Directive in 2005, the 2003 Regulations were replaced by the Money Laundering Regulations 2007. To ensure their compliance with the Regulations, members of regulated sector were required to be supervised by designated supervisory authority. The Regulations also required them to undertake customer due diligence measures.[39]

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[33] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [1991] L 166 available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31991L0308&from=FR accessed 30 March 2020.

[34] Money Laundering Regulations 1993.

[35] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [1991] L 166, article 3.

[36] Directive 2001/97/Ec of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering [2001] ojL 344/76.

[37] Money Laundering Regulations 1993 were modified in 2001 by the addition of certain categories of money service business to the meaning of relevant financial business such as bureaux de change.

[38] Money Laundering Regulations 2003.

[39] Money Laundering Regulations 2007, Part 2.

In parallel to the international process, the European Parliament finally approved the Fourth Money Laundering Directive on 20th May 2015, which came into force on 26th June 2015.[40] The Directive was implemented in the UK by the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.[41] One of the key changes under the 2017 Regulations is the shift away from a purely rules based approach to a risk based approach. A risk-based approach means that competent authorities and banks must identify, assess, and understand the money laundering risk to which they are exposed, and take the proper mitigation measures in accordance with the level of risk.[42] Other significant changes are: (1) the introduction of tax crimes as a predicate offence; (2) the tightening up of the EU's Simplified Due Diligence regime; (3) further clarification and guidance in areas such as customer due diligence, beneficial owner; and (4) amendments in regard to politically exposed persons.[43]

Following the European Commission's release, in February 2016, of an Action Plan for boosting the fight against terrorist financing, EU Member States agreed to revisit some areas of the 4th Money Laundering Directive to promote transparency and counter-terrorist provisions.[44] Therefore, on 19 June 2018, the 5th Anti-Money Laundering Directive (5MLD) was published in the EU Official Journal and entered into force on 10 July 2018.[45] On 20 December 2019, the U.K. Government published the Money Laundering and Terrorist Financing (Amendment) Regulations 2019 (the 2019 Regulations). The 2019 Regulations implement 5MLD and incorporate international standards set by FATF. The majority of the provisions set out under the 2019 Regulations came into force on 10 January 2020, with the exception of those related to customer due diligence on anonymous prepaid cards and requests for information about accounts and safe-deposit boxes, which will come into force on 10 July

[40] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC

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

[42] Ibid., reg. 46 (2) (a).

[43] See, J Ulph, 'Legal perspectives on heritage crime: reviewing due diligence measures for the art market', in V Mitsilegas, S Hufnagel and A Moiseienko (eds) *Research Handbook on Transnational Crime* (Cheltenham, Edward Elgar Publishing 2019) 367.

[44] European Commission, 'Communication from the Commission to the European Parliament and the Council on an Action Plan for strengthening the fight against terrorist financing' (2016) available at https://eur-lex.europa.eu/resource.html?uri=cellar:e6e0de37-ca7c-11e5-a4b5-01aa75ed71a1.0002.02/DOC_1&format=PDF accessed 30 March 2020.

[45] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] ojL 156/43.

and 10 September 2020 respectively. The following section will analyse the main amendments under the 2019 Regulations and their impact on the current money laundering legal framework.

4.3 What changes do 2019 Regulations introduce?

In order to keep pace with evolving trends and modern technology services, the UK has decided to go further than specific of the 5MLD's requirements, especially in relation to virtual currencies and the scope of persons subject to money laundering obligations. This comes from its position as a leading global financial centre, and its continuous work to combat money laundering activities and strengthen the existing preventive framework. The 2019 Regulations impact the U.K.'s anti-money laundering regulations in a number of ways, including: (1) expanding the scope of persons subject to the 2017 Regulations; (2) extending customer due diligence measures; and (3) establishing bank account portals to be accessed by financial intelligence units ("FIUs") and national regulators

1. Expanded Scope of Obliged Entities

Under the 2019 Regulations, the scope of persons subject to the 2017 Regulations has been extended to include art market participants, letting agents, crypto-asset exchange providers and custodian wallet providers. Regulation 11(d) also extends the definition of a 'tax advisor' to include companies and sole practitioners who arrange material aid, assistance or advice about the tax affairs of other persons.[46] The scope of obliged entities within the property sector is expanded to include letting agents involved in high value transactions with monthly rent of EUR 10,000 or more.[47] Letting agency work, for example, includes full property management, lets only, rent collection, commercial lettings and introductory services. They have to complete customer due diligence (CDD) before a business relationship is established. Further art market participants involved in transactions exceeding EUR 10,000 or more are now also considered obliged entities. This includes all transactions exceeding EUR 10,000, not just cash transactions.[48] Similar to letting agency, CDD must be completed prior to the transaction taking place.

One of the significant changes under the 2019 Regulations is that crypto-asset exchange providers and custodian wallet providers have been included within the scope of obliged

[46] Money Laundering and Terrorist Financing (Amendment) Regulations 2019, reg.11 (d).
[47] Ibid, reg. 13
[48] Ibid, reg. 4 (6) (d).

entities. Because of their accessibility online and their global reach, cryptoassets pose risks around criminal activity such as money laundering. In fact, cryptoassets have become increasingly more common and integrated into global financial system. In addition to financial crime concerns, international regulators have recognised that cryptoassets can pose a prudential risk to financial systems. In January 2019, in its "Guidance on Cryptoassets: Consultation Paper", the Financial Conduct Authority (FCA) suggested around 15 exchanges are currently headquartered in the UK out of a global market of 231, and they have a combined daily trading volume of close to $200 million USD.[49] In Europe, for instance, Europol estimates that £3-4 billion is laundered using cryptoassets each year.[50] Since the 2017 national risk assessment, UK law enforcement authorities have increasingly identified cases of cryptoassets being used to launder illicit proceeds of offline crime. Cryptoassets can act as a technique for payments between criminals and for the purchase of illicit services sold online in criminal marketplaces. Although the scale of this activity is unknown, specific features of cryptoassets are notably attractive to criminals. The UK Cryptoasset Taskforce revealed evidence of illicit activity in the cryptoassets sector as posing consumer and market risks and therefore mitigating these potential risks should be an "immediate priority".[51] It is worth noting that due to the complexity of certain types of cryptoassets, it is difficult to determine whether they fall within the regulatory perimeter. The regulatory perimeter refers to the types of financial services activity to which regulation is applied.

Because of the fast-moving nature of the cryptoasset market and the corresponding understanding of the money laundering risks has evolved considerably since 5MLD was finalised in 2018, the UK has decided to go beyond the minimum requirements of 5MLD and to use the definition of "cryptoassets" rather than "virtual currency" as it captures a wide range of activities involving cryptoassets. Under the 2019 Regulations, a "cryptoasset" is defined as "*cryptographically secured digital representation of value or contractual rights that use a form of distributed ledger technology and can be transferred, stored and traded electronically*".[52] This definition adopts the UK Cryptoasset Taskforce's definition of cryptoasset, which established a framework of three broad types of cryptoassets: exchange tokens, security tokens,

[49] The FCA, 'Guidance on Cryptoassets: Consultation Paper' (2019) available at https://www.fca.org.uk/publication/consultation/cp19-03.pdf accessed 31 March 2019.

[50] HM Treasury, the FCA and the Bank of England Cryptoassets Taskforce, 'Cryptoassets Taskforce: final report' (2018) available at https://www.gov.uk/government/publications/cryptoassets-taskforce accessed 31 March 2020.

[51] Ibid.

[52] Money Laundering and Terrorist Financing, supra n. 46, reg. 14 (13) (a).

and utility tokens. It is obvious that this definition is broad, and it covers a right to, or interest in, the cryptoasset, involving all classifications of cryptoassets: utility, exchange, security and e-money. This wide approach implies that a large number of cryptoassets would be within scope in the U.K. By contrast, 5MLD defines virtual currencies as

> *"a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically".*[53]

Comparing to the UK definition, this definition is quite narrow and it does not cover all cryptoasset activities.

A "crypto exchange provider" means a firm or person who by the way of business provides one or more of the services provided by regulation 14A (1).[54] Whereas a "custodian wallet provider" means a firm or person who by way of business provides services to safeguard, or to safeguard and administer (i) cryptoassets on behalf of customers or (ii) private cryptographic keys on behalf of customers in order to hold, store or transfer cryptoassets.[55] Under the 2019 Regulations, crypto exchange providers and custodian wallet providers are required to implement CDD obligations, assess the money laundering and terrorist financing risks they face, and report any suspicious activity they detect.[56] This will ensure that those providers will verify the identity of their customers, and that will assist law enforcement agencies to use this information to identify the perpetrators of illicit activity. It should be noted that the 2019 Regulations appoint the FCA as the supervisor of UK cryptoasset businesses for anti-money laundering purposes.[57] Before conducting cryptoasset activities, new cryptoasset businesses are required to be registered with the FCA. Regarding cryptoasset businesses that are already operating in the UK prior to 10 January 2020, they will be offered transitional period until 10

[53] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] ojL 156/43, article 1 (2) (d).
[54] Money Laundering and Terrorist Financing (Amendment) Regulations 2019, reg. 14 (12) (a).
[55] Ibid., reg. 14 (12) (b).
[56] Ibid., Amendment of Part 3.
[57] Ibid., reg. 52B (9).

January 2021 in which to register.[58] To be registered, a cryptoasset exchange provider or a custodian wallet provider must demonstrate that it and its beneficial owners and senior managers or officials are "fit and proper." to carry on the business of a cryptoasset. Cryptoasset exchange providers and custodian wallet providers must also comply with specific reporting requirements and the FCA will maintain a register of those entities.

2. Extending and Enhancing Customer Due Diligence Measures

CDD is the process where relevant information about the customer is collected and evaluated for money laundering activities or any potential risk for the organization.[59] It is a central pillar of the anti-money laundering regime. The application of CDD is required when a firm or person covered by money laundering regulations, 'enters into a business relationship' with a customer or a potential customer. This includes occasional 'one off' transactions.[60] The 2017 Regulations require obliged entities to apply CDD measures on a risk-sensitive basis.[61] This comprises the identification and verification of the customer's (and, where applicable, the beneficial owner's) identity and obtaining information on the purpose and intended nature of the business relationship or transaction. This obligation will help those entities to know their customers (KYC), and that there is no legal barrier to providing them with the product or service requested such as government sanctions. It also enables them to assist law enforcement, by providing available information on customers and their activities.

Further, there are three levels of CDD, namely standard, simplified and enhanced. Simplified due diligence (SDD) is where the business relationship or transaction is considered low risk in terms of money laundering.[62] To decide whether a customer is suitable for simplified due diligence, firms should consider among other factors the underlying product or service, the type of customer, and the geographical factors, in your risk assessment.[63] It is significant to emphasise that SDD must always involve the identification and verification of the customer. Nonetheless, the extent of identification and verification can be varied depending on the risk. Enhanced due diligence (EDD) applies in business relationships or transactions that are high

[58] Ibid., reg. 52B (11) (b).
[59] See, D Hopton, *Money Laundering: A Concise Guide for All Business* (2nd edn New York, CRC Press 2016) 103.
[60] Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, reg. 4.
[61] Ibid., reg. 33 (2) (c).
[62] See, R Booth, G Bastable and N Yeo, *Money Laundering Law and Regulation: A Practical Guide* (Oxford, OUP 2011) 218.
[63] Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, regs. 37(3) and 37(4).

risk.[64] To illustrate, a firm must apply EDD measures on a risk-sensitive basis in any situation which by its nature involves a higher risk of money laundering. A firm, for instance, may conclude, under its risk-based approach, that the information it has collected after investigation is insufficient in connection with the money laundering risk, and therefore it must obtain more information about a particular customer, the customer's beneficial owner, where applicable, and the purpose and intended nature of the business relationship. The 2017 Regulations require CDD measures to be undertaken in all situations where the risk of money laundering is perceived to be high. This includes, for example, business relationship or transaction with a person established in a high-risk third country,[65] business relationships with politically exposed persons (PEPs), complex transactions, and transactions that have no apparent economic or legal purpose.[66] Standard CDD applies where SDD and EDD do not.

As discussed above, under the changes introduced by the 2019 Regulations, crypto-asset exchange providers and custodian wallet providers, as well as letting agency and art market participants will be required to apply CDD measures. While the 2017 Regulations requires firms to conduct EDD if a transaction is complex **and** unusually large, or there is an unusual pattern of transactions, under the 2019 Regulations, EDD requirements must apply if a transaction is complex **or** unusually large **or** unusual patterns of transactions.[67] The risk factors that firm must consider when applying EDD under the 2017 Regulations have been supplemented by extra factor including (1) the customer is the beneficiary of a life insurance policy; (2) The customer is a third country national applying for residency or citizenship in an EEA state in exchange for transfers of capital, the purchase of property, government bonds or investment; (3) There is a transaction related to oil, arms, precious metals, tobacco products, cultural artefacts, ivory and other items related to protected species.[68] Further, the 2019 Regulations specify certain EDD measures that must be conducted when a client is established in a high risk third country or a relevant transaction involves a client in a high risk third country.[69]

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[64] See Booth, Bastable & Yeo, supra n. 62, at 219.

[65] A "high-risk third country" means a country which has been identified by the European Commission in delegated acts adopted under Article 9.2 of the fourth money laundering directive as a high-risk third country.

[66] Terrorist Financing and Transfer of Funds, supra n. 41 , reg. 33.

[67] Money Laundering and Terrorist Financing, supra n. 46, reg. 30A (4) (b).

[68] Ibid, reg. 30A (4) (f).

[69] Ibid, reg. 30A (4) (a).

Another significant change brought by the 2019 Regulation is electronic ID verification from independent and reliable sources is acceptable for CDD purposes provided that it is free from fraud and provides appropriate assurance as to the identity of the individual.[70] Nonetheless, this does not make electronic ID mandatory, but it facilitates meeting CDD requirements.

As part of their CDD requirements, obliged entities are required to identify and take appropriate measures to verify the identity of the beneficial owner(s) of their customers so that the relevant person is satisfied that it knows who the beneficial owner is.[71] To fulfil this, they may use the Companies House Registers, including the Register of People with Significant Control (PSC Register). However, they cannot rely solely on this information. Where an obliged entity notices discrepancies between the information it holds on their customers and that held in the Companies House Register, it could be required to report this to Companies House, which in turn investigates and, as required, takes further action to resolve the discrepancies.

3. Bank Account Portals

To improve the fight against money laundering, Article 32(a) of 5MLD requires Member States to establish a centralised automated mechanism which allows identification of natural and legal persons which hold or control bank accounts, payment accounts or safe- deposit boxes held by credit institutions.[72] It suggests two potential models for the centralised automated mechanism: a central registry or an electronic data retrieval mechanism. This new requirement aims at giving Financial Intelligence Units (FIUs) completely unfettered access to information from any obliged entity even where no prior report has been made by the FIU. FIUs are key players in the EU's anti-money laundering and terrorist financing regime.[73] They are operationally independent and autonomous units, which their main tasks are to receive and analyse reports and information relevant about suspicious transactions, and distribute the results of their investigation and any other information to the national competent authorities and to other FIUs.

To comply with 5MLD requirements, under Regulation 45A, the Secretary of State or the Treasury must ensure that a central automated mechanism is established. FIUs and national regulators must be given access to information about UK bank accounts, building society

[70] Ibid, reg. 5 (2) (c).
[71] Ibid, reg. 30A.
[72] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] ojL 156/43, article 32a.
[73] L Forget and V Hočevar, *Financial Intelligence Units: An Overview* (Washington, International Monetary Fund 2004) 4.

accounts and safe deposit boxes for particular specified purposes, including where any law enforcement authority is investigating money laundering, terrorism or carrying out its supervisory functions or a national crime agency is carrying out its FIU functions.[74] The details that can be accessed are limited to (1) details about the account/safe-deposit box itself, including the IBAN number, date of account opening/lease beginning, roll number or alternative, date of account closing/lease ending, and duration of a lease; and (2) details about the account holder and beneficial owner, or safe deposit box owner, lessee, controller or key holder, including their name, date of birth, address and ID number.[75] It should be noted that the new mechanism does not impose any additional requirements for institutions to collect data and does not allow law enforcement to access details about transaction history or contents of an account or safe deposit box.

The new powers given to FIUs emphasise their critical in identifying money laundering activities and transaction, especially cross-border. Accessing relevant information and exchanging it with law enforcement authorities quickly without undue delays or impediments would certainly boost the effectiveness and efficiency of FIUs.

4.4 The Sixth Anti-Money Laundering Directive (6MLD) and Brexit

On 12 November 2018, nearly 6 months after the adoption of the 5MLD, the European Parliament published further rules to boost the fight against money laundering through the 6th EU Money Laundering Directive (6MLD).[76] 6MLD came into force on 2 December 2018, and EU member states are required to implement it by 3 December 2020. The UK formally left the EU on 31 January 2020. While the UK has agreed the terms of its EU departure, a stand-still transition period ends on December 31, 2020. The most significant change proposed under the 6MLD is the harmonisation of 22 predicate offences, including tax crimes, cybercrimes and environmental crimes.[77] Because the severity of punishments for money laundering crimes varies considerably among Member States, 6MLD will also introduce a maximum term of four years' imprisonment for anyone found guilty of ML offences.[78] Under Article 7 of the 6MLD, any company operating in an EU member state can be held criminally liable for both the

[74] Money Laundering and Terrorist Financing, supra n. 46, reg. 45A.
[75] Ibid., reg. 45C.
[76] Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law OJ L 284.
[77] Ibid, article 3.
[78] Ibid, article 5.

primary money laundering offences, and for failures in a legal person's supervision or control leading to money laundering on its behalf.[79]

The UK has decided to opt out of 6MLD on the basis that the UK government considers that it is already largely compliant with the Directive.[80] English law, for instance, allows for corporate liability where a directing mind and will of a legal person commits an offence.[81] In particular scenarios, legal persons may also be guilty of failing to prevent certain offences, such as tax evasion and bribery. It is significant to know that 6AMLD requires EU member states to ensure that legal persons can be held liable where a lack of supervision or control by a person with a leading position in the legal person has made possible the commission of money laundering for the legal person's benefit by a person under its authority.[82] However, in the UK, no equivalent offence for failure to prevent money laundering is currently in place. Further, under English law, the principle money laundering offences already carry a maximum term of 14 years' imprisonment, which is considerably stricter than the maximum four-year sentence under the 6MLD. However, it is important to note that UK businesses willing to operate within the EU should comply with the new rules.

It is worth noting that, in exercise of the powers conferred by the European Union (Withdrawal) Act 2018, the Treasury made Statutory Instrument (SI) to fix deficiencies in UK anti-money laundering law arising from the withdrawal of the UK from the EU and to ensure it continues to operate effectively post exit.[83] The SI is not intended to make policy changes, other than where appropriate to reflect the UK's new position outside the EU, and to smooth the transition. Changes introduced by the SI, for instance, include removal of references to EU institutions, and an equalisation of the regulatory treatment of EEA Member States and third countries.

While the UK is not any more an EU Member, as a leading and founding member of the FATF, it will remain at the forefront of international standards and respond to emerging threats. To

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[79] Ibid, article 7.
[80] Home Office, Eighth Annual Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the Union (TFEU) in Relation to EU Justice and Home Affairs (JHA) Matters (1 December 2016 – 30 November 2017) (2018) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684374/eighth-annual-report-to-parliament-eu-justice-home-affairs-matters.PDF accessed 31 March 2020.
[81] See, See, B Hannigan, Company Law (Oxford, Oxford University Press 2018) 85.
[82] Directive (EU) 2018/1673 of the European Parliament, supra n. 76, Art. 7 (2).
[83] The Money Laundering and Transfer of Funds (Information) (Amendment) (EU Exit) Regulations 2019.

maintain strong protections and standards, the UK authorities have always shown commitment to building on the progress already made against money laundering and terrorist financing.

5. Conclusion

This article has considered the changes to the UK anti-money laundering legal framework introduced by the 2019 Regulations. Improving anti-money laundering rules to keep pace with innovation in financial services and technology is vital to tackle new techniques and activities of money laundering. The article has focused on the key changes of the 2019 Regulations, namely expanding the scope of persons subject to the 2017 Regulations, extending customer due diligence measures, and establishing bank account portals to be accessed by financial intelligence units ("FIUs") and national regulators. The 2019 Regulations widen the regulated sector markedly and introduce new anti- money laundering duties which are backed by civil and criminal sanction. The article has considered how the scope of persons subject to the 2017 Regulations has been extended to include art market participants, letting agents, crypto-asset exchange providers and custodian wallet providers. It has argued that the UK has decided to go beyond the minimum requirements of 5MLD and to use the definition of "cryptoassets" rather than "virtual currency" as it captures a broad array of activities involving cryptoassets. New CDD measures brought by the 2019 Regulations have also been examined, including the obligations of the new obliged entities, electronic ID verification and reporting discrepancies to the Companies House Registers. The article has also highlighted how the UK is already largely compliant with the 6MLD Directive, so it has decided to opt out of it. Although the UK has officially left the EU, as a leading member of the FATF, it will make sure that its anti-money laundering standards are strict and up-to-date.