

# ***STUDY ON THE APPLICATION OF THE ANTI-MONEY LAUNDERING DIRECTIVE***

## **The objectives of the study<sup>1</sup> (January 2010)**

### **OBJECTIVES**

The objectives of the study are:

- (I) to examine the operation of the AML Directive (and its implementing measures) with regard to selected issues; and
- (II) to undertake a specific examination of the impact of the AML Directive on the independent legal professionals and on other professionals providing similar services with regard to the corporate sector, the real estate sector and the financial intermediation sector (so-called "non-financial professions").
- It should also provide (III) analytical conclusions.

### **I. The examination of the operation of the AML Directive (and its implementing measures) with regard to selected issues.**

The study should provide a detailed **examination** of the operation of the AML Directive (and its implementing measures) with regard to **selected issues** in a minimum number of EU Member States<sup>2</sup>.

This **examination** should include:

- (i) an examination of how Member States have transposed the AML obligations (and those of its implementing measures) with regard to the selected issues; and
- (ii) an examination of the practical implementation of those obligations by covered entities with regard to the selected issues.

The **selected issues** should, as a minimum, be the following:

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<sup>1</sup> This paper has been prepared by staff of DG Internal Market and Services of the European Commission for information purposes. The paper is based on the technical specifications communicated to interested bidders in the context of the "Invitation to tender MARKT/2009/6/F. However, this paper should not be considered as part of the invitation to tender nor as giving contractual information or providing contractual rights. The views expressed in this paper are those of its authors and should not be interpreted as stating the official position of the European Commission.

<sup>2</sup> Concerning the geographical coverage, the minimum number of EU Member States to be covered requested in the invitation to tender was 18. Bidders were allowed to offer full coverage of the EU.

- (1) Scope: the question of the financial activity on an occasional and/or limited basis (application of Article 2(2) of the AML Directive and of Article 4 of its implementing measures).
- (2) Scope: stricter national measures (application of Article 5 of the AML Directive).
- (3) CDD: the application of the risk-based approach by the covered entities (application of Article 8(2) of the AML Directive).
- (4) CDD: the question of the beneficial owners (application of Articles 8(1) and 3(6)).
- (5) Simplified CDD (application of Article 11 of the AML Directive and Article 3 of the implementing measures).
- (6) Enhanced CDD: politically exposed persons – PEPs (application of Articles 13(4) and 3(8) of the AML Directive and Article 2 of the implementing measures).
- (7) Enhanced CDD: international trade-related transactions (application of Article 13(1) of the AML Directive).
- (8) Reporting obligations: postponement of transactions (application of Article 24 of the AML Directive).
- (9) Protection of employees after reporting (application of Article 27 of the AML Directive).
- (10) Internal organisation: replies to FIUs and other authorities by credit and financial institutions (application of Article 32 of the AML Directive).
- (11) Penalties (application of Article 39 of the AML Directive).
- (12) Member States review of the effectiveness of their AML systems (application of article 33 of the AML Directive).
- (13) Supervision and monitoring (application of Article 37 of the AML Directive).

## **II. The specific examination of the impact of the AML Directive on identified non-financial professions.**

The study should provide an **examination** of the treatment of the non-financial professions<sup>3</sup> covered by the AML Directive (and its implementing measures) in a minimum number of EU Member States<sup>4</sup>.

The **examination** should assess: (1) the extent of the problem; (2) the impact of the AML Directive solution; (3) the existence and practicability of alternative solutions.

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<sup>3</sup> Auditors, external accountants, tax advisors, notaries, other independent legal professionals, trust and company service providers and real estate agents (see Article 2(1)(a) to (d))

<sup>4</sup> Concerning the geographical coverage, the minimum number of EU Member States to be covered requested in the invitation to tender was 18. Bidders were allowed to offer full coverage of the EU.

- (1) The extent of the problem. The examination should describe the money laundering (and terrorist financing) typologies where non-financial professionals, in the exercise of their professional activities, are directly and indirectly involved, by examining the following situations:
- (a) Real estate situations;
  - (b) Business related situations;
  - (c) Financial related situations; and
  - (d) Corporate related situations.

The examination should assess the attractiveness of these situations for money laundering (and terrorist financing), from the perspective of: ease to move money, to conceal property etc. For instance, the use of bearer shares, sleeping partners etc. could be considered. The focus should be on the infiltration of proceeds of crime in the financial system by using schemes involving the above situation. The examination should include the identification and systematic presentation of cases before the national judiciary authorities and/or FIUs involving the type of situations described above<sup>5</sup>.

The examination should consider the possibility that more than one type of non-financial profession could be involved in the same transaction concerning the situations described above (e.g. a lawyer and a notary).

- (2) The impact of the AML Directive solution. The AML Directive extends the AML obligations that were developed for credit and financial institutions (e.g. know-your-customer and reporting to the FIUs about suspicious transactions) to the non-financial professions. The examination should assess: (i) how the AML Directive obligations for non-financial professions are transposed into national legislation and (ii) how the obligations are put into practice by the non-financial professions. The paper prepared by the Commission services in 2006 could be used as a starting point<sup>6</sup> for the examination and the following selected issues should necessarily be addressed:
- (a) Scope: Which are the non-financial professions covered at national level (e.g. the definition of independent legal professional is open-ended)?
  - (b) CDD: How are professionals dealing with CDD issues?
  - (c) Reporting issues: which are the reasons for the relatively low number of reports from non-financial professions compared to credit and financial institutions?
  - (d) Supervision. Which is the role of professional associations and/or self regulatory bodies in supervision?

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<sup>5</sup> N.B. the question to be examined is not on whether "professionals" are guilty of money laundering offences (or, *mutatis mutandis*, terrorist financing) because they were involved in money laundering schemes but rather whether in money laundering cases real estate laundering schemes or corporate vehicles are systematically used – irrespective of whether professionals were prosecuted for money laundering.

<sup>6</sup> Cf. the report prepared by the Commission services in December 2006:  
[http://ec.europa.eu/internal\\_market/company/financial-crime/index\\_en.htm#moneylaundering](http://ec.europa.eu/internal_market/company/financial-crime/index_en.htm#moneylaundering)

- (e) Penalties for non-compliance with the AML Directive.
  - (f) Role of lawyers in the AML system.
- (3) Existence and practicability of alternative solutions. The examination should assess whether, as an alternative to the AML Directive rules, there are other options to deal with the money laundering (or terrorist financing) risks that arise in the circumstances in which non-financial professions are involved (see above).
- (a) Solutions in third countries. The examination should describe how the non-financial professions (with a special focus on the legal professions) are treated in the AML legislation of Switzerland and two other third countries (to be proposed by the bidder among the non-European FATF members, with the exception of the US and Canada).

In assessing where there are other options, the following issues could, inter alia, be considered:

- (b) The application of CDD. To what extent would it be desirable to adapt the existing rules on CDD in the AML Directive to the nature and specificities of the non-financial professions? If so, how the rules should be adapted?
- (c) The duplication issue. Contrary to credit and financial institutions, non-financial professions will rarely be sole interveners in a transaction. It is likely that other professionals from a different category will be involved (and/or that credit institutions be involved (as financial transactions are needed to launder money)). In some cases, this involvement will be consecutive. To what extent is it desirable that all non-financial professions intervening in the same transaction be subject to the same AML obligations: e.g. should notaries and credit institutions keep the reporting obligation and lawyers only a duty to reply to the FIU if asked?
- (d) The reporting issue. Should the obligation for non-financial professionals to report on suspicious transactions be reconsidered?
- (e) The possible application of enhanced CDD by credit and financial institutions to non-financial professions. To the extent that non-financial professions are subject to the AML Directive rules, credit and financial institutions, when dealing with customers represented by or manifestly advised by non-financial professionals may be inclined to consider those situations as representing a low risk of money laundering or terrorist financing: i.e. checks are previously applied by non-financial professionals too. However, at the same time, the involvement of non-financial professionals in financial transactions will generally mean that the customer activities are more sophisticated, which in turn could increase the risk of money laundering or terrorist financing. Should there be a shift in risk perception?

Finally, the study should provide **(III) analytical conclusions** regarding the above issues.

## **IMPACT**

The results of the study should allow the Commission services to feed the reports to be prepared under Articles 41, 42 and 43 of the AML Directive.

The results of the study should also allow the Commission services, the Member States and generally stakeholders to examine how the AML Directive is being implemented in certain areas and/or certain sectors. Such examination could lead to improvements in the overall AML regime.

Finally, the results of the study would be the basis for a future evaluation of whether the measures of the AML Directive are adapted to the objective pursued by legislation.

## **METHODOLOGY**

Stakeholders may be contacted by the contractor during the completion of the study in order to gather information, feedback, opinions etc. Stakeholders may be asked to reply to written questionnaires or to participate in interviews.

## **TIMING**

The final report of the study should normally be available at the end of 2010.

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