LINDEMANN LAW

December 2021

Newsletter

The 6th AML Directive in Europe is firmly knocking on the door. Are you ready?

*Is your financial institution operating in the EU, Liechtenstein or Switzerland? Are you personally a Board member, Senior executive or even a member of middle management within Legal and Compliance? Then you should get updated about the new Union AML framework and figure out the safe way forward. We can assist you on your journey, especially advising the **banking sector** on concrete measures to comply with the **AMLD6**, while the clock is ticking.*

1. Why is the basic change needed in spite of a 30-year continues development of AML/CFT in Europe?

*The concept of the AML/CFT laid down in June 1991 by the EU Council Directive (**AMLD1**) was based on three pillars, which are still holding today:*

- ✓ *Customer Due Diligence*
- ✓ *Internal Preventative Measures*
- ✓ *Suspicious Activity Reporting*

*This was basically all, for the first decade, until the Second AML Directive brought the necessity of **Face-to-Face customer identification** and first hints for the **Risk-Based Approach (RBA)** - in December 2001.*

*The Third AML Directive came into action in 2005, when the Complexity explosion brought **first** – Introduction of **RBA**, Concept of **UBO** (ultimate beneficial owner) and KYC developed to **CDD** (customer due diligence), where the verifying of the customer's identity on basis of documents, data or information obtained from reliable and independent sources was added.*

*The Fourth AML Directive in 2015 saw Complexity explosion for the **second time** – imposing **specific rules on Trusts** and implementation of UBO registers.*

*The Fifth AML Directive of 2018 imposed in its turn – **Stricter rules on high-risk countries** and legalised the **Recognition of electronic identification**.*

*The **ongoing challenge**, however, appears to be - that the **total number of SARs** (Suspicious activity reports) filed to authorities in the EU on an annual basis **has grown** from 590'762 in 2009, to 960'463 in 2014, or by 61,5% (Europol data from 2017), During the same period, while only **1,1%** of criminally obtained assets were confiscated. **Just over 10%** of the SARS are estimated as **useful to EUL law enforcement** and are further investigated after collection, a figure that is unchanged since 2006.*

Public Prosecution authorities in the EU member states have admitted, that basically – "the bigger the bank, the more SARS and more scrap" and "There are a lot of reports and we have difficulties processing them. We are at the absolute limit with our capacities."

Conclusions to the recently existing AML/CFT regime was:

- ✓ ***Problems** in the international judicial cooperation **remain***
- ✓ ***High risk countries have to be handled with specific care** – but this started to **pose problems for international financial inclusion***
- ✓ *Due to the **constantly tightened sanctions**, pressure on obliged entities to **file even more SARs** remains*
- ✓ ***Evaluation of the SAR-System impossible** due to the lack of data about the causality for convictions and seizures*
- ✓ ***Not enough systematic criminological research** as a basis for further developments of the system as a whole*

Some proposals, room for improvement areas for the current AML/CFT include:

- ✓ ***KYC/CDD** regime urgently needs **harmonisation, simplification and technological progress***
- ✓ *Standardisation of the relevant information on clients and CBs **largely practical***
- ✓ *The **SAR reporting threshold** should be **recalibrated** to minimise defensive reporting*

Newsletter

- ✓ ***Single-rule-book approach*** *to be welcomed – important progress for uniform KYC rules in the internal market*
- ✓ ***Limitation of cash transactions*** *of EUR 10'000 or more - politically sensitive*
- ✓ ***Approach of the crypto-assets regulation – technologically difficult***

2. Criminal and Regulatory enforcement of AML legislation in Europe

While Suspicious Activity Reporting is in distress in EU, it can be addressed by the practice that focuses more on ***quality rather than quantity****.*

- ✓ *Use of big data analysis by artificial intelligence could significantly* ***reduce the number of false positives****.*
- ✓ *Overburdened reporting system often leads to detection of suspicious cases only after a* ***considerable time delay***
- ✓ *AML proceedings frequently target business relationship that have long since ended*

Complete documentation of all steps in AML matters *is crucial to enable defence (e.g., initiation of internal investigation or for which transactions bank files SARs as a result of media reports)*

Increasing prosecution of individuals:

- ✓ *There is a global trend towards* ***parallel or even stand-alone regulatory or criminal prosecution*** *of board members and other executives for alleged noncompliance or corporate misconduct.*
- ✓ ***Particularly high personal administrative fine risks in AML proceedings***
- ✓ *Maintaining business relationship despite slightest indications for money laundering sufficient for* ***accusation of aiding and abetting criminal money laundering***
- ✓ ***Prison sentences of several years possible***
- ✓ *Proceedings target not only board members and most senior executives, but also* ***middle management (especially AML Officers)***
- ✓ *Irrespective of type of proceedings (regulatory or criminal) and outcome (dismissal or sanction), allegations may have* ***severe career and personal consequences***
- ✓ *Despite presumption of innocence, institutions sometimes see themselves forced to* ***replace executive*** *or they* ***chose to suspend their management activities on their own initiatives***
- ✓ *Personal prosecution encouraged by* ***Directive on combating money laundering by criminal law*** *(Directive (EU) 2018/1673)*

3. The new EU AML Framework

The Commission published a legislative package on AML on 20 July 2021:

- ✓ *Main pillars are* ***two draft regulations directly applicable in member states****:*
  - o *EU single rulebook on AML/CFT*
  - o *Regulation to create a new AML/CFT supervisory authority at EU level*
- ✓ ***Complemented by recast of AML Directive (AMLD6)*** *which further strengthens powers at national level and promotes information exchange*

Probable practical implications, based on the Commission Action Plan of 7 May 2020 and 20 July 2021 Package - ***4 proposals****:*

- ✓ *AML Regulation*
- ✓ *AML Directive*
- ✓ *Transfer of Funds Regulation (****TFR****)*
- ✓ *AML Authority Regulation*

When will the AML/CFT package enter into force?

- ✓ *The package is for the Authority to start most of its activities in **2024**.*
- ✓ *Direct supervision of certain high-risk financial entities only in **2026***
- ✓ *New Regulation/Directive will apply in **2026***

Focus: Cash

- ✓ ***EU-wide limit of EUR 10'000 on large cash payments***
  - *Limits are already set in about two-thirds of Member States, but amounts vary*
  - *National limits under EUR 10'000 can remain, but all Member States will have to introduce at least a limit of EUR 10'000 on large cash payments*
  - *Review clause to further decrease that ceiling, where appropriate*
- ✓ *Provision of services for anonymous **crypto-assets wallets** will be prohibited, just as anonymous bank accounts were already prohibited by EU AML/CFT rules.*

AML Directive: Stronger mechanisms at international level

AML Directive governs tasks and powers of supervisors, FIUs (Financial Intelligence Units), exchange of information and registers

Main novelties:

- ✓ *Joint analysis by FIUs*
- ✓ *AML/CFT supervisory colleges*
- ✓ *Public oversight over self-regulatory bodies*
- ✓ *Powers for beneficial ownership registers to carry out checks*
- ✓ *Interconnection of bank account registers*

TFR: ensuring traceability of crypto assets

Currently, only certain categories of Crypto-assets services providers (CASPs) are recognised as obliged entities – AML Regulation will broaden the scope to cover all categories of CASPs recognised at FATF

European AML authority (AMLA):

The new Authority will transform the landscape of AML/CFT supervision in the EU, by:

- ✓ *Acting as centrepiece of a **single integrated AML/CFT supervisory system** with **staff of 250** and **budget of EUR 45.6 million**, alongside national AML authorities*
- ✓ *Taking over direct supervision for certain selected obliged entities – expected to **include some of the major banks operating across Europe** and performing indirect supervision of non-selected obliged entities*
- ✓ ***Supporting cooperation and joint analyses by national FIUs** and facilitating communication among them, to contribute to better detecting illicit flow of a cross-border nature.*

Please feel free to contact us for more information, we are happy to help.

LINDEMANN LAW

Dr. iur. Alexander Lindemann +41 44 570 73 51 alexander.lindemann@lindemannlaw.ch
Dr. oec. publ. Jakob Schaad +41 44 570 73 56 jakob.schaad@lindemannlaw.ch
Tatyana Davidoff, LL.M. +41 44 570 73 50 tatyana.davidoff@lindemannlaw.ch
Seefeldstrasse 33 (next to the Opera) 8008 Zürich www.lindemannlaw.ch