

**COMPARISON BETWEEN THE PROPOSED CHANGES TO THE 4<sup>TH</sup> MONEY LAUNDERING DIRECTIVE IN JULY 2016**

**AND**

**THE PROPOSED CHANGES CONTAINED IN THE “5AMLD” AND OTHER PROPOSALS**

**References:**

**5AMLD:** Council of the European Union Proposal for a Directive of the European Parliament and of the Council 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 Directive 2009/101/EC - Presidency compromise text, 28 October 2016.

**Draft Opinion:** Draft opinion prepared by the Rapporteur for the Committee on Legal Affairs prepared for the Committee on Economic and Monetary Affairs and the Committee on Civil Liberties, Justice and Home Affairs, November 2016.

**Draft Report:** Draft Report from the Committee on Economic and Monetary Affairs Committee on Civil Liberties, Justice and Home Affairs report on the proposal for a directive of the European Parliament and of the Council 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 Directive 2009/101/EC, 7 November 2016.

**EESC:** Opinion adopted by the European Economic and Social Committee, October 2016.

**July 2016:** Reference to Draft report on the proposal for a directive of the European Parliament and of the Council 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 Directive 2009/101/EC, Strasbourg 5 July 2016.

New or replacement text proposed in the 5AMLD is written in **bold text**; deleted text is written in ~~strike-through~~ text. My comments are in **blue**.

## IMPLEMENTATION AS A WHOLE

Given the huge importance of the fight against money laundering and in order to ensure that the rules in this field are implemented uniformly and effectively across all Member States, it is crucial that the texts and concepts that frame the proposed measures be as clear as possible. (EESC)

The Committee welcomes the rapid processing of these proposals and hopes that they can come into effect quickly and in the short term without detriment to the quality of the results. A realistic timetable should be set out for the transposition and application of the legislation in the Member States and clear guidelines laid down. (EESC)

### **Considering Financial Crime Risk “In the Round”**

The fight against money laundering should be linked more closely with the efforts needed to combat tax fraud and avoidance, corruption and other connected crimes. (EESC)

### **Ensure that Changes Made Address Cooperation Challenges**

The fight against money laundering and the financing of terrorism require close cooperation between the various intelligence and security services...Despite public statements by national and European decision-makers and public support for closer cooperation, after every terrorist attack major failures of coordination come to light. Every effort must be made to put an end to this situation. (EESC)

## 1. LIST OF HIGH RISK JURISDICTIONS

The EESC has criticised the list of high-risk third countries, published by the European Commission on 14 July 2016 because it did not include many of the countries or jurisdictions believed to be acting as tax havens for money laundering, or any of the 21 territories mentioned in the *Panama Papers*.

The EESC does not feel that the FATF list should be relied upon as the basis for this list. Given that the enhanced due diligence measures mentioned in 5AMLD are applied only to third countries deemed to be high-risk, the EESC proposes that either a new list of high-risk third countries be drawn up, or the scope of the measures under Article 18a of 5AMLD be broadened.

The EESC also proposes that a single list of jurisdictions that fail to cooperate in pursuing economic crime should be drawn up.

[The 5AMLD amendments appear to have addressed some of the EESC’s comments concerning Article 18a \(See below\).](#)

## 2. APPLYING THE PRESSURE TO INFLUENCE OFFSHORE JURISDICTIONS

The EESC has urged European institutions to strengthen their policies aimed at closing down tax havens. In particular, the EESC believes that all obligations proposed in the 5AMLD, especially those relating to the identification of the beneficial owners of bank accounts, businesses, trusts and transactions, should be extended to all territories or jurisdictions whose sovereignty resides with the Member States, including those which have special tax laws.

**This is clearly aimed at European countries such as the UK, Luxembourg, Ireland and the Netherlands.**

**The 5AMLD amendments do not address the EESC's above concerns.**

## 3. VIRTUAL CURRENCIES

Changes	Definition of "Virtual Currency" Article 3 pt 18
New definition proposed in July 2016	'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.
Amendments proposed in the 5AMLD	<del>'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.</del> <b>can be digitally transferred, stored or traded and functions as a medium of exchange, but does not have legal tender status in any jurisdiction and which is not funds as defined in point (25) of Article 4 of the Directive 2015/2366/EC nor monetary value stored on instruments exempted as specified in Article 3(k) and 3(l) of that Directive.</b>

## 4. PREPAID CARDS

Changes	Recital 11 – Purpose Behind Prepaid Card Thresholds
New recital proposed in July 2016	...it is essential to lower the existing thresholds for general purpose anonymous prepaid cards and suppress the customer due diligence exemption for their online use.
Amendments proposed in the 5AMLD	...it is essential to lower the existing thresholds for general purpose anonymous prepaid cards and <del>suppress</del> <b>to limit</b> the customer due diligence exemption for their online use.

Changes	Recital 11 – Purpose Behind Prepaid Card Thresholds
Deletion proposed - Draft Report	<p>Thus, while having due regard to consumers' needs in using general purpose prepaid instruments and not preventing the use of such instruments for promoting social and financial inclusion, it is essential to lower the existing thresholds for general purpose anonymous prepaid cards <del>and suppress the customer due diligence exemption for their online use.</del></p> <p><b>The 5AMLD amendments do not include this proposed deletion.</b></p>

Changes	Articles 12(1)(a) and (2)– Grounds to Exclude Prepaid Card AML Requirements
Additions proposed in July 2016	<p>(1)(a) A Member State may allow obliged entities not to apply certain customer due diligence measures with respect to electronic money, where all of the following risk- mitigating conditions are met:</p> <p><b>(a) the payment instrument is not reloadable, or has a maximum monthly payment transactions limit of EUR 150 which can be used only in that Member State;</b></p> <p><b>(b) the maximum amount stored electronically does not exceed EUR 150</b></p> <p>(2) Member States shall ensure that the derogation provided for in paragraph 1 is not applicable in the case either of online payment or of redemption in cash or cash withdrawal of the monetary value of the electronic money where the amount redeemed exceeds EUR 50.</p>
Amendments proposed in the 5AMLD	<p>(1)(a) – no proposed changes.</p> <p>(2) Member states shall ensure that the derogation provide for in paragraph 1 is not applicable in the case of <del>either online payment or of</del> redemption of cash or cash withdrawal of the monetary value of the electronic money where the amount redeemed exceeds EU50 <b>or remote payment transactions as defined in point (6) of Article 4 of the Directive 2015/2366/EC where the amount paid exceeds EUR 50 and as from the date of entry into force of this directive + 24 months for all remote payment transactions.</b></p>

Changes	Article 12(3) – Anonymous Prepaid Cards
Addition proposed in July 2016	<p>Member States shall ensure that Union credit institutions and financial institutions acting as acquirers only accept payments carried out with prepaid cards issued in third countries where such cards meet requirements equivalent to those set out in points (a), (b), (c) of the first subparagraph of Article 13(1) and Article 14, or can be considered to meet the requirements in paragraphs 1 and 2 of this Article.</p>

Changes	Article 12(3) – Anonymous Prepaid Cards
Amendments proposed in the 5AMLD	Member States shall ensure that <b>payment card schemes as defined in point 16 of the Article 2 of the Regulation No 2015/751 allow only the use of anonymous prepaid cards issued in third country where the issuer has proven that it meets requirements equivalent to</b> those set out in points (a), (b), (c) of the first subparagraph of Article 13(1) and Article 14, or the requirements in paragraphs 1 and 2 of this Article.
Additions proposed by the EESC	Acceptance of payments made with pre-paid cards issued in third countries will also require that, <b>“The mailing or shipping of prepaid cards out of the jurisdiction of the Member States be immediately reported and registered by the competent persons.”</b>  <b>The 5AMLD amendments do not incorporate these proposed changes.</b>
Comment - Draft Opinion	Certain tighter checks on cards are approved of, as there are proven instances of their misuse. But the restrictions must not be so tight that cards become unusable in practice. The impact of the proposed measures on competitiveness and in particular on SMEs active in the field of prepaid instruments and virtual currencies needs to be more thoroughly <b>examined</b> .  <b>Unclear whether examination has taken place and informed the amendments proposed in the 5AMLD.</b>

#### 5. E-MONEY ISSUERS, E-WALLET PROVIDERS ET AL.

Changes	Article 2(1)(3) – Obligated Entities (i.e. Who Must Comply with the 4AMLD)
Additions proposed in July 2016	g) providers engaged primarily and professionally in exchange services between virtual currencies and fiat currencies; (h) wallet providers offering custodial services of credentials necessary to access virtual currencies.
Amendments proposed in the 5AMLD	g) providers engaged <del>primarily and professionally</del> in exchange services between virtual currencies and fiat currencies; (h) <b>custodian</b> wallet providers <del>offering custodial services of credentials necessary to access virtual currencies.</del>
Additions proposed to the 5AMLD	<b>Article 3(19) ‘custodian wallet provider’ means an entity that provides services to safeguard private keys on behalf of their customers, to holding, store and transfer virtual currencies.</b>

Changes	Article 47(1) – Registration of E-Wallet Providers, E-Currency Exchanges
Addition proposed in July 2016	Member States shall ensure that providers of exchanging services between virtual currencies and fiat currencies, custodian wallet providers, currency exchange and cheque cashing offices, and trust or company service providers are licensed or registered, and that providers of gambling services are regulated.
Amendments proposed in the 5AMLD	Member States shall ensure that providers of <del>exchanging</del> <b>exchange</b> services between virtual currencies and fiat currencies, <b>and</b> custodian wallet providers, <b>are registered, that</b> currency exchange and cheque cashing offices, and trust or company service providers are licensed or registered, and that providers of gambling services are regulated.

## 6. CUSTOMER DUE DILIGENCE

Changes	Article 14(5) - Customer Due Diligence (“CDD”) on Existing Customers
New wording proposed in July 2016	Member States shall require that obliged entities apply the customer due diligence measures not only to all new customers but also at appropriate times to existing customers on a risk-sensitive basis, or when the relevant circumstances of a customer change, or when the obliged entity has a duty in the course of the relevant calendar year, to contact the customer for the purpose of reviewing any information related to the beneficial owner(s), in particular under Directive 2011/16/EU.
Changes proposed in the 5AMLD	Member States shall require that obliged entities apply the customer due diligence measures not only to all new customers but also at appropriate times to existing customers on a risk-sensitive basis, or when the relevant circumstances of a customer change, or when the obliged entity has <del>any</del> <b>legal</b> duty in the course of the relevant calendar year, to contact the customer for the purpose of reviewing any information related to the beneficial owner(s), in particular under Directive 2011/16/EU,
Additions Proposed – Draft Report	Member States shall require that obliged entities contact the customer for the purpose of reviewing any information related to the beneficial <i>owner(s)</i> <b>not later than ... [one year after the date of the entry into force of this amending Directive].</b> <b>The 5AMLD amendments do not include these additional measures.</b>

Changes	Article 31(1) - CDD for Trusts and Other Legal Arrangements
New wording proposed in July 2016	<p><del>Member States shall require that trustees of any express trust governed under their law obtain and hold adequate, accurate and up-to-date information on beneficial ownership regarding the trust</del></p> <p>Member States shall ensure that this Article applies to trusts and other types of legal arrangements having a structure or functions similar to trusts, such as, inter alia, fiducie, Treuhand or fideicomiso.</p>
Amendments proposed in the 5AMLD	<p>Member States shall ensure that this Article applies to trusts and other types of legal arrangements having a structure or functions similar to trusts, such as, inter alia, fiducie, Treuhand or fideicomiso <b>when having a structure and functions similar to trusts.</b></p> <p>For the purposes of this Article, a trust is considered to be administered in each Member State where the trustees are established.</p> <p><b>10a. By 26 June 2020, the Commission shall submit a report to the European Parliament and to the Council assessing whether all legal arrangements which have a structure and function similar to trusts governed under the law of Member States were duly identified and made subject to the obligations as set out in this Directive. Where appropriate, the Commission shall take the necessary steps to act upon the findings of that report.</b></p>
Proposed Additions in the 5AMLD - Draft Report	<p>Member States shall ensure that this Article applies to trusts and other types of legal arrangements having a structure or functions similar to trusts, such as, inter alia, fiducie, Treuhand, <b>waqf</b> or fideicomiso, <b>and all other similar, in terms of structure or function, existing or future legal arrangements.</b></p> <p>Each Member State shall require that trustees of any express trust <b>created</b>, administered <b>or operated</b> in that Member State under <b>the law of a Member State or of a third country</b> obtain and hold adequate, accurate and up-to-date information on beneficial ownership regarding the trust.</p> <p><b>The 5AMLD amendments do not include these proposed revisions.</b></p>

## 7. HIGH RISK JURISDICTIONS

Changes	Article 18a – Enhanced Due Diligence and High Risk Jurisdictions
New wording proposed in July 2016	<p>With respect to transactions involving high risk third countries, Member States shall require that, when dealing with natural persons or legal entities established in the third countries identified as high-risk third countries pursuant to Article 9 (2), obliged entities shall apply at least all the following enhanced customer due diligence measures:</p> <ul style="list-style-type: none"> <li>(a) obtaining additional information on the customer;</li> <li>(b) obtaining addition information on the intended nature of the business relationship;</li> <li>(c) obtaining information on the source of funds or source of wealth of the customer;</li> <li>(d) obtaining information on the reasons for the intended or performed transactions;</li> <li>(e) obtaining the approval of senior management for establishing or continuing the business relationship;</li> <li>(f) conducting enhanced monitoring of the business relationship by increasing the number and timing of controls applied, and selecting patterns of transactions that need further examination;</li> <li>(g) requiring the first payment to be carried out through an account in the customer's name with a bank subject to similar CDD standards.</li> </ul>
Amendments proposed in the 5AMLD	<p>With respect to <b>business relationships or</b> transactions involving high risk third countries <b>identified pursuant to Article 9 (2)</b>, Member States shall require <del>that, when dealing with natural persons or legal entities established in the third countries identified as high-risk third countries pursuant to Article 9 (2),</del> obliged entities shall <b>to</b> apply at least all the following enhanced customer due diligence measures:</p> <ul style="list-style-type: none"> <li>(a) obtaining additional information on the customer <b>and on the beneficial owner</b>;</li> <li>(b) obtaining <del>addition</del><b>additional</b> information on the intended nature of the business relationship;</li> <li>(c) obtaining information on the source of funds <del>or</del><b>and</b> source of wealth of the customer <b>and of the beneficial owner</b>;</li> <li>(d) obtaining information on the reasons for the intended or performed transactions;</li> <li>(e) obtaining the approval of senior management for establishing or continuing the business relationship;</li> </ul>

Changes	Article 18a – Enhanced Due Diligence and High Risk Jurisdictions
	<p>(f) conducting enhanced monitoring of the business relationship by increasing the number and timing of controls applied, and selecting patterns of transactions that need further examination;</p> <p>(g) requiring the first payment to be carried out through an account in the customer's name with a bank subject to similar CDD standards.</p> <p><b>Member States shall ensure that the obliged entities as far as reasonably possible:</b></p> <p><b>(a) conduct monitoring of the business relationship by increasing the number and timing of controls applied, and selecting patterns of transactions that need further examination;</b></p> <p><b>(b) require the first payment to be carried out through an account in the customer's name with a credit institution subject to CDD standards that are not less robust than those laid down in this Directive.</b></p>

## 8. BENEFICIAL OWNERSHIP

Changes	Article 3(6)(1)(a)(i) - Beneficial Ownership of Legal Entities
New wording proposed in July 2016	For the purposes of Article 13(1)(b) and Article 30 of this Directive, the indication of ownership or control set out in the second paragraph is reduced to 10% whenever the legal entity is a Passive Non-Financial Entity as defined in Directive 2011/16/EU.
Deletions proposed in the 5AMLD	<p>(a) in point (6)(a)(i), the following subparagraph is added:</p> <p>"For the purposes of Article 13(1)(b) and Article 30 of this Directive, the indication of ownership or control set out in the second paragraph is reduced to 10% whenever the legal entity is a Passive Non-Financial Entity as defined in Directive 2011/16/EU." <b>[DELETED IN FULL but may remain as amendment to Directive 2011/16/EU]</b></p>

Changes	Article 3(6)(a)(ii) - Beneficial Owner of Corporate Entities
Original 4AMLD text	[I]f, after having exhausted all possible means and provided there are no grounds for suspicion, no person under point (i) is identified, or if there is any doubt that the person(s) identified are the beneficial owner(s), the natural person(s) who hold the position of senior managing official(s), the obliged entities shall keep records of the actions taken in order to identify the beneficial ownership under point (i) and this point.

## 9. REGISTERS

Changes	Article 30(5) Corporate and Trust Registers
Changes proposed in July 2016	Member States shall ensure that the information on the beneficial ownership is accessible in all cases to: (a) competent authorities and FIUs, without any restriction; (b) obliged entities, within the framework of customer due diligence in accordance with Chapter II; (c) <del>any person or organisation that can demonstrate a legitimate interest.</del>
Amendments proposed in the 5AMLD – Corporate Registers	<p><b>5a. Member States shall take the necessary measures to ensure public access to information on the beneficial ownership of the entities referred to in paragraph 1. This information shall consist of the name, the month and year of birth and the country of residence of the beneficial owner as well as the nature and extent of the beneficial interest held.</b></p> <p><b>For the purposes of this paragraph, access to the information on beneficial ownership shall be in accordance with data protection rules and may be subject to online registration and to the payment of a fee. The fee charged for obtaining the information shall not exceed the administrative costs thereof.</b></p> <p><b>The personal data of beneficial owners of the entities referred to in paragraph 1 shall be disclosed for the purpose of enabling third parties and civil society at large to know who are the beneficial owners, thus contributing through enhanced public scrutiny to prevent the misuse of corporate and other legal entities for the purposes of money laundering and terrorist financing.</b></p>

Changes	Article 30(5) Corporate and Trust Registers
Additions proposed in the 5AMLD – Trust Register	<p data-bbox="450 237 1910 480"><b>Article 31(4a-1)(4a)(4b)</b>  <b>Member States shall take the necessary measures to ensure public access to information on the beneficial ownership of trusts which comprise any property held by, or on behalf of, a person carrying on a business which consists of or includes the management of trusts, and acting as trustee of a trust in the course of that business with a view to gain profit, and other types of legal arrangements having a structure or functions similar to such trusts. This information shall consist of the name, the month and year of birth and the country of residence of the beneficial owner as well as the nature and extent of the beneficial interest held.</b></p> <p data-bbox="450 504 1910 603"><b>For the purposes of this paragraph, access to the information on beneficial ownership shall be in accordance with data protection rules and may be subject to online registration and to the payment of a fee. The fee charged for obtaining the information shall not exceed the administrative costs thereof.</b></p> <p data-bbox="450 627 1910 772"><b>The personal data of beneficial owners of the trusts and other legal arrangements similar to trusts referred to in the first subparagraph shall be disclosed for the purpose of enabling third parties and civil society at large to know who are the beneficial owners, thus contributing through enhanced public scrutiny to prevent the misuse of trust and other legal arrangements similar to trusts for the purposes of money laundering and terrorist financing.</b></p>

Changes	Article 30(9) / Article 31(7a)- Exemptions Regarding Access to Register Information
Changes proposed in July 2016	<p data-bbox="468 893 1910 1031">In exceptional circumstances to be laid down in national law, where the access referred to in point (b) of paragraph 5 would expose the beneficial owner to the risk of fraud, kidnapping, blackmail, violence or intimidation, or where the beneficial owner is a minor or otherwise incapable, Member States may provide for an exemption from such access to all or part of the information on the beneficial ownership on a case-by-case basis.</p>
Amendments proposed in the 5AMLD	<p data-bbox="468 1054 1910 1262">In exceptional circumstances to be laid down in national law, where the access referred to in point (b) of paragraph 5 <b>and paragraph 5a</b> would expose the beneficial owner to the risk of fraud, kidnapping, blackmail, violence or intimidation, or where the beneficial owner is a minor or otherwise incapable, Member States may <b>shall</b> provide for an exemption from such access to all or part of the information on the beneficial ownership on a case-by-case basis. <b>Member States shall ensure that these exemptions are granted upon a detailed evaluation of the exceptional nature of the circumstances.</b></p> <p data-bbox="468 1286 1910 1318"><b>Similar amendments made to Article 31(7a) proposed in July 2016 regarding trust registers.</b></p>

Changes	Article 30(9) / Article 31(7a)- Exemptions Regarding Access to Register Information
Proposed addition to the 5AMLD - Draft Report	<p><b>Exemptions must be reassessed at regular intervals in order to avoid abuse. Where an exemption is granted, this must be clearly indicated in the register and justified in writing.</b></p> <p><b>5AMLD amendments do not include this proposed addition.</b></p>

Changes	Article 30(10)/ Article 31(9) – Duration Information Can Be Held on Registers
Addition proposed in the 5AMLD	<p><b>The information referred to in paragraph 1 of this Article shall be publicly available through the national registers and through the system of interconnection of registers for no longer than 10 years after the corporate or other legal entity has been struck off from the commercial or company register.</b></p> <p><b>Similar amendment made for trust registers at Article 31(9).</b></p>

Changes	Article 31(10) - Jurisdiction Where a Trust is Administered
Addition made in July 2016	For the purposes of this Article, a trust is considered to be administered in each Member State where the trustees are established. <b>[NO CHANGE TO THIS DEFINITION IN THE 5AMLD]</b>
Article 31(10) Changes Proposed – Draft Report	<p>For the purpose of this Article, a trust is considered to be <b>created</b>, administered <b>or operated</b> in a Member State where:</p> <ul style="list-style-type: none"> <li><b>a) it is created according to or governed by the Member State’s law or has its ultimate court of appeal in the Member State’s jurisdiction; or</b></li> <li><b>b) It is connected to the Member State by:</b> <ul style="list-style-type: none"> <li><b>i. having one or more of the beneficial owners of the trust as defined in Article 3(6)(b), resident in that Member State;</b></li> <li><b>ii. having one of more beneficial owners of the trust as defined in Article 3(6)(b), resident in that Member State;</b></li> <li><b>iii. holding real estate in that Member State.</b></li> </ul> </li> </ul> <p><b>5AMLD amendments do not include this proposed addition.</b></p>

Changes	Article 32(a)(3) –(3a) - Information accessible on centralised register/ retrieval system for payment and bank accounts
Addition proposed in July 2016	Provisions concerning the establishment of an account registry/ retrieval system. (Article 32a)
Amendments proposed in the 5AMLD	Member States shall put in place <del>automated</del> centralised <b>automated</b> mechanisms, such as central registries or central electronic data retrieval systems, which allow the identification, in a timely manner, of any natural or legal persons holding or controlling payment accounts as defined in <del>Directive 2007/64/EC</del> <b>2015/2366 identified by IBAN</b> , and bank accounts held by a credit institution <b>identified by IBAN</b> within their territory. Member States shall notify the Commission of the characteristics of those national mechanisms.

#### 10. REAL ESTATE SECTOR

Changes	Article 32 – Real Estate Registers & Letting Agents
Proposed Additions - Draft Report	Member States should <b>establish automated centralised mechanisms</b> , such as central registries or central electronic data retrieval systems that <b>allow for the timely identification of any natural or legal persons holding or controlling land and buildings within their territory.</b>
	Member States are expected to work together and with Commission in order to establish by 1 January 2018 a European real property register.  <b>The 5AMLD amendments do not include this proposed addition.</b>
	<b>Letting agents should be included in the list of entities at Article 3(1) obliged to comply with the 4AMLD.</b>  <b>The 5AMLD amendments do not include this proposed addition.</b>