Proposal for amending 4AMLD vis-à-vis the Common Reporting Standard

Even though the EU's Fourth Anti-Money Laundering Directive (EU 849/2015) 'on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing' (hereinafter referred to '4AMLD') has only recently hatched from its legislative egg, the European Institutions and the Member States' governments agreed , in the aftermath of the Paris attacks, that further action is required to counter the novel terrorist financing trends as well as the technological advancements. This eventually led to the 'Proposal for a Directive 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' (hereinafter referred to as the 'Amending 4AMLD'), the final draft of which was published on the 7th July 2016.

The EU legislators proceeded with this Amending 4AMLD in an attempt to create a Bellerophon to the ML/FT Chimaera. However, whilst some amendments are not merely welcome but also imperative in view of the ever-evolving ML/FT landscape, the proposed Article 32a gives birth to certain legal debate.

Amending 4AMLD - Article 32a

Pursuant to Article 32a of the Amending 4AMLD, Member States will be required to put in place automated centralised mechanisms, such as registers or central data retrieval systems, with information on the identity of bank and payment account holders, their proxy holders and their beneficial owners. The information held in these centralised mechanisms should be '*directly accessible, at national level, to FIUs and competent authorities*'.

Even though the notion of 'competent authorities' is not an Amending 4AMLD novelty, the said proposal goes one step further and explicitly brings national tax authorities into this definition's scope with Article 30, paragraph 6, and Article 31, paragraph 4 (which paragraphs are proposed to replace the respective ones of the 4AMLD). This essentially means that the right for direct access to the aforementioned centralised mechanisms is de jure bestowed upon tax authorities.

Such right is further enhanced by the proposed Article 50a, according to which a request on behalf of a competent authority (including a tax authority, as per the above) shall not be denied by another competent authority on the grounds that '*the request is also considered to involve tax matters*'.

Noble as the ulterior motives behind the Amending 4AMLD may be, the legal implications vis-à-vis the Common Reporting Standard (hereinafter referred to as 'CRS') should not be disregarded.

The CRS regulatory regime

The 'Standard for Automatic Exchange of Financial Account Information', commonly referred to as the 'CRS', is a global information exchange standard released by the Organisation for Economic Co-operation and Development in July 2014 and endorsed by the G20 Finance Ministers and Central Bank Governors in September 2014. In view of this, the Council of the European Union adopted EU Council Directive 2014/107/EU (commonly known as 'DAC2') that extended the cooperation between EU tax authorities to automatic exchange of financial account information through the incorporation of the CRS into (and the consequent amendment of) the EU Council Directive 2011/16/EU (commonly known as 'DAC').

The CRS imposes upon Reporting Financial Institutions (i.e. Depository Institutions, Custodial Institutions, Investment Entities and Specified Insurance Companies) the obligation to report certain accounts to the national tax authorities on an annual basis. Having said this, it is worth mentioning here that under the pertinent legislation, a number of accounts are deemed to fall outside the scope of such reporting requirement. This is exactly where the Amending 4AMLD conundrum lies, resulting in a regulatory limbo.

Trading company envisaged scenario

In an attempt to better portray the regulatory implications emanating from the Amending 4AMLD vis-à-vis the CRS, a scenario is envisaged where an ordinary trading company is the holder of a bank account.

Pursuant to the provisions of DAC2 (which incorporates the CRS), such company falls under the definition of an Active NFE and therefore its bank account shall be treated as non-reportable. This ultimately means that the banking institution, with which such account is held, is not required to report either the account or its holder's information to the domestic Commissioner of Inland Revenue.

However, such information (i.e. the details pertaining to the trading company as well as its beneficial owner/s) should be included in the automated centralised mechanisms, pursuant to Article 32a of the Amending 4AMLD, to which the Commissioner shall have a de jure accessing right. Thus, the paradox is created whereby information, otherwise unattainable under the CRS route, is brought within the grasp of the Commissioner under the Amending 4AMLD route.

The truth of the matter is that Article 32a constitutes merely one variable of the whole equation. Even if the payment and bank account holders' registry will not come to pass (which is highly doubtful), the Commissioner would still be entitled to access the pertinent information indirectly, i.e. through the 4AMLD's beneficial owners' central registry. Therefore, in order to treat the cause rather than the symptom, tax authorities should not be brought under the umbrella definition of 'competent authorities' and therefore the wording of the Amending 4AMLD should be amended accordingly. Such legislative exclusion would essentially prevent national tax authorities from obtaining a *carte blanche,* thus retaining the current 4AMLD *status quo* (i.e. requirement for demonstration of a legitimate interest). It should be mentioned at this point that, while the exchange of information and tax transparency are most welcome goals, these should be attempted to be achieved through alternative tools available under the EU legislative arsenal, thus ensuring legal certainty.

Conclusion

The inclusion of the tax authorities under the definition of 'competent authorities' as well as the creation of central beneficial ownership registers for any natural or legal persons holding or controlling payment accounts and bank accounts is a two-sided coin. It could indeed enhance transparency and prove a powerful weapon in the fight against ML/FT. But at what cost? Should the aforementioned shortcomings not be addressed, the restrictions on access imposed by the CRS will be unavoidably circumvented through the creation of a regulatory *Kerkoporta*.