
AML FOR CORPORATES

Introduction

Anti-money laundering (AML) and combating the financing of terrorism (CFT) are hot topics in the financial services sector. With increased attention on good governance, boards at financial institutions and companies must act to prevent this type of criminal conduct in order to safeguard corporate reputations.

This Best Friends newsletter gives a broad outline of the latest AML/CFT developments from a European and a national perspective.

Beating financial crime in Europe

The Financial Action Task Force (FATF) updated its global international standards on combating money laundering and the financing of terrorism and proliferation in March 2022. At the EU level, these standards form the basis of European AML directives. Leading up to the standards' adoption, the European Commission on 20 July 2021 presented an ambitious package of legislative proposals to strengthen European AML/CFT rules. The aim of this package is to improve the detection of suspicious transactions and activities, and to close loopholes used by criminals to launder illicit proceeds or finance terrorist activities through the financial system. Implementation is expected to take place in early 2026.

As part of the overhaul, a new European AML/CFT authority (AMLA) will be established. This central authority will coordinate national authorities to ensure that the private sector correctly and consistently applies EU rules. AMLA is expected to directly supervise and decide on some of the riskiest obliged entities in the cross-border financial sector (selected obliged entities).

With its direct supervisory powers, AMLA will be able to restrict or limit the business of an AML-regulated institution, or to require the divestment of activities that pose excessive money-laundering and terrorism-financing risks. AMLA will also have the power to require changes in governance structure or propose to licensing authorities that previously granted licences (of selected obliged entities) be withdrawn. AMLA may issue binding decisions addressed to selected obliged entities, and can impose administrative pecuniary sanctions for non-compliance with AMLA decisions.

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The current European AML directives will be amended and incorporated into a single regulation, an EU Rulebook for AML/CFT. This will include rules on customer due diligence and beneficial ownership. In addition to this new regulation, legislation at the national level will remain relevant. Further rules on national supervisors and financial intelligence units in EU member states will be set out in a sixth AML/CFT directive. The EU regulation on transfers of funds to trace crypto-assets will be extended to ensure full application of the European AML/CFT rules to the crypto sector.

Limits on large cash payments currently exist in about two-thirds of EU member states, but the amounts vary. As part of the EU Rulebook, the European Commission is proposing an EU-wide threshold of EUR 10,000, with member states having the discretion to set a lower national threshold.

National thresholds

In **Spain**, a EUR 1,000 threshold applies between Spanish residents if one of them is a professional or entrepreneurial party. A higher threshold of EUR 10,000 applies if the payor is an individual not residing in Spain and not a professional or entrepreneur.

In **Italy**, cash transfers of EUR 2,000 or more are prohibited until 31 December 2022. As of 1 January 2023, this threshold will be lowered to EUR 1,000 (or the equivalent amount in any other currency). Cash transfers of EUR 15,000 or more are prohibited for non-Italian residents if the payment takes place to buy goods and services for tourism purposes and the seller meets specific criteria (including notification to the Tax Agency).

There is currently no limit for cash payments in **Germany**. However, there are identification requirements above a threshold of generally EUR 10,000. A lower threshold of EUR 2,000 applies for precious metal trades.

A proposal is pending in the **Netherlands** to require traders of goods exchanged in the course of business to adhere to a EUR 3,000 threshold.

In **France**, the Monetary and Financial Code provides for cash payment thresholds. If the debtor is domiciled in the French Republic for tax purposes or is acting for business purposes, payments are limited to EUR 1,000, and electronic payments to EUR 3,000. Where debtors can prove they are not tax domiciled on French territory, are not acting for the purposes of a professional activity, and are paying a debt for the benefit of a person not subject to the AML-CFT regulation, the thresholds are EUR 10,000 for cash and electronic payments. If debtors can prove that they are not domiciled for tax purposes in the territory of the French Republic, are not acting for the purposes of a professional activity, and are paying a debt to a person not subject to the AML-CFT regulation, the maximum amount is limited to EUR 15,000 for payments made in cash or by means of electronic money. These restrictions do **not** apply to payments made by persons unable to commit by cheque or other means of payment, or by those without a deposit account. Nor do the restrictions apply to payments made between natural persons not acting for professional purposes, or to the payment of expenses of the State and other public bodies. There are some exemptions, such as salary paid in cash up to EUR 1,500 a month. The cash payment of taxes is allowed up to EUR 300.

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In **Portugal**, legal restrictions apply to receiving or making any cash payment of EUR 3,000 or more (or the equivalent in foreign currency). This limit increases to EUR 10,000 for payments by non-residents if they do not act as entrepreneurs or merchants. For people or entities subject to corporate income tax, or to personal income tax while required to keep accounts, payments of EUR 1,000 or more (or the equivalent in foreign currency) must be made by methods that allow the recipient to be identified. Cash payment of taxes is allowed up to and including EUR 500. These restrictions do not apply to financial entities that receive deposits, provide payment services, issue electronic money, or carry out manual exchange transactions. They also do not apply to payments resulting from judicial decisions or orders and specific situations foreseen in specific laws.

In the **UK**, the UK Money Laundering Regulations 2017 (MLRs) prohibit large cash payments of more than EUR 10,000 unless the firm or sole trader is registered with HMRC as a high value dealer. A high value dealer is defined as a firm or sole trader that, by way of business, trades in goods, for which it makes or receives a payment in cash of at least EUR 10,000 in total. The EUR 10,000 threshold applies to any transaction, whether or not it is executed in a single operation or several operations which appear to be linked.

Increased attention from supervisors

We have already noticed increased attention from national supervisors – leading to a growth in the number of sanctions issued. This might be a response to the initiative to have a new European supervisor, and to strengthen the powers and uniformity of sanctions.

Following the criminal investigations in connection with the Wirecard scandal in **Germany**, the Federal Financial Supervisory Authority (BaFin) announced its intention to intensify its money laundering prevention activities, increase staff, and strengthen organisational structures in this area. In particular, BaFin intends to take a more proactive approach to AML supervision, taking the initiative to act rather than only react after cases have been reported.

In the **Netherlands**, unlike other countries, reporting must take place if a transaction is regarded as unusual, and not suspicious. The Czech Republic is the only other EU member state that also applies this threshold. All other EU member states require that suspicious transactions must be reported. In the Netherlands, the Dutch Authority for the Financial Markets (AFM), the supervisor for investment fund managers and investment firms, has intensified its investigatory efforts. After its latest annual survey, the AFM concluded that: transaction monitoring needs to be improved; nearly half of all managers did not have transaction profiles for clients in place; and that the reporting of unusual transactions was inadequate.

For its part, the Bank of **Portugal** approved Administrative Regulation (Aviso) no. 2/2018, of 26 September, which sets additional mandatory AML practices, proceedings and mechanisms that the financial institutions must comply with (that is, in addition to the obligations set in AML Portuguese Law passed by Law no. 83/2017, of 18 August). In addition, as the supervisory entity of the financial sector, the Bank of Portugal carries out inspections of transactions and control mechanisms of financial institutions, credit institutions and similar entities on a regular basis, including those related to AML issues.

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Starting in 2015-2016, the Bank of Portugal has been proactive in performing these inspections. Such inspections lead to the triggering of administrative sanctioning proceedings against financial institutions based on the breach of AML obligations and improper control mechanisms. The sanctions can include subsidiaries and branches of Portuguese financial institutions located outside of the European Union. The penalties applied by the Bank of Portugal to financial institutions and their respective directors are generally confirmed by judicial courts (while the courts often reduce the sanctions in practice, the reductions are not significant).

Occasionally, the Bank of Portugal publicly discloses its decisions in sanctioning proceedings, including those on AML obligation breaches. In 2021 and in January 2022, the Bank of Portugal issued 48 decisions in proceedings directly or indirectly related to the breach of AML obligations.

In **Spain**, the Financial Intelligence Unit (FIU) is quite active in carrying out inspections throughout the financial sector. Recently, the FIU carried out inspections in the private banking boutique sector, specifically on entities with foreign shareholders or acting in Spain in accordance with the freedom of provision of services. In the past, inspections of large entities have been carried out on cash transactions made by Chinese immigrants in Spain. These inspections have increased after several criminal investigations. Finally, inspections on Spanish large entities are periodically carried out. Many such inspections have led to important legal decisions by the Spanish courts, such as a 2021 decision by the Spanish Supreme Court, where the court clarified the concept of “suspicious transaction”.

In **France**, on 15 March 2022, the French AMF (Autorité des Marchés Financiers is an independent public authority whose mission is to ensure the protection of savings invested in financial products, the information of investors, and the proper functioning of markets) updated its documentation on approving and registering digital asset service providers.

The AMF website includes a presentation on crypto-asset service providers, and the main rules that apply under the French regime. However, these rules are likely to evolve, particularly in view of the European Markets in crypto-assets regulation, submitted to a vote by the European Parliament on 14 March 2022.

In November 2021, the AMF also modified its risk factor position in accordance with the changes made to the European Banking Authority (EBA) guidance on money laundering and terrorist financing (ML/FT) risk factors. The AMF guidance listed the factors that financial institutions should consider when assessing the ML/TF risk associated with a business relationship or transaction entered into on an occasional basis.

The AMF guidance also explains the extent to which institutions should adapt their customer due diligence measures to ensure that these are commensurate with the risk of money laundering being proportionate to the identified risk of ML/TF.

The AMF includes general information on how to carry out a risk assessment, such as how to identify ML/TF risks (draw up a non-exhaustive list of risk factors that should be taken into account by

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taxable persons or that may be relevant); and how to assess and categorise the ML/TF risk associated with a business relationship or a transaction concluded on an occasional basis (base the assessment on a weighting of the risk factors).

There are four developments in **Italy**. First, the Italian FIU has issued new monitoring and reporting duties for regulated entities with clients that own accounts valued at over EUR 100,000. These assets are also subject to being frozen. Second, the Italian FIU strengthened the technological and procedural support that it provides to regulated entities for the reporting of suspicious transactions. Third, the Italian FIU enhanced the exchange of information among the Italian FIU, the Tax Authority, the Tax Police, public authorities and foreign FIUs. Last, the Italian FIU has increased the number of inspection and sanction proceedings.

In the **UK**, four AML enforcement actions were taken against firms (none against individuals) in 2021, each resulting in a substantial fine. In one case, the fine incurred was in excess of GBP 260 million. This represents the largest number of enforcement actions carried out in the last five years. 2021 may, therefore, mark the beginning of the FCA's increasing willingness to bring enforcement actions for AML breaches.

There is also evidence that the FCA has increased its appetite for using its criminal law powers against AML offences. In 2021, the FCA brought criminal proceedings against a firm under the MLRs for the first time, and in January 2022 the FCA confirmed that there are two criminal probes among its current AML investigations.

Following Russia's invasion of Ukraine, the government is considering increasing the resources of the authority in charge of enforcing UK sanctions, the Office of Financial Sanctions Implementation (OFSI). It is likely that such resources, in conjunction with an expanded Russia sanctions regime, will result in a significant uptick in enforcement activity. To date, OFSI has only taken enforcement action against six entities.

UBO register for legal entities

Per the fifth AML Directive, two UBO registers have been introduced. The first relates to corporate and other legal entities; the second relates to trusts and similar arrangements. While the goal is to eventually unify all UBO registers into one single UBO register, each EU member state currently has its own national UBO register. While there are proceedings pending at the European Court on whether the UBO register violates the privacy of individuals, for now, the following UBO information is publicly available: full names; month and year of birth; country of residence; nationality; and nature and size of the interest.

The **German** UBO register was established in 2017. Following a legislative amendment in 2021, all legal entities (including listed companies) must now register their UBOs in the UBO register. This obligation also applies to foreign entities if they directly or indirectly acquire real estate in Germany and are not registered in another EU member state. Violations are subject to a fine of up to EUR 1 million.

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In **France**, the UBO register has been operational since 2017. Relevant legal entities must register the personal information of the ultimate beneficial owners, including the terms and conditions of the control they exercise over the legal entity. Individuals that fail to register may be: fined (EUR 7,500); sentenced up to six months' imprisonment; or prohibited from managing a company; and subject to the partial deprivation of their civil rights. Legal entities may be fined up to EUR 37,500.

In **Portugal**, the UBO register became effective on 1 October 2018. The final date for registration was 30 November 2019. Failure to update the UBO Central Register is subject to a fine from anywhere between EUR 1,000 up to EUR 50,000.

In the **Netherlands**, the UBO register for corporate and other legal entities was introduced on 27 September 2020. A Dutch listed company and its direct and indirect 100% subsidiaries are exempted from registering their UBOs in the UBO register. As of 27 September 2020, every newly incorporated entity must register its UBOs with the Dutch UBO register. Existing legal entities must register their UBOs by 27 March 2022. If a senior managing official (also called a pseudo-UBO) has to be determined in the Netherlands, all statutory managing directors of that legal entity are regarded as such. Now that the transitional period has ended, legal entities and their UBOs may be fined (EUR 22,500) for incomplete UBO registration.

In the **UK**, UK companies (except listed companies) and LLPs have to declare information about "persons with significant control" (PSC) in a PSC register since 2016. This PSC regime was subsequently amended to implement aspects of the fourth AML Directive that did not already apply in the UK. The amendments came into effect on 26 June 2017 and, among other things, expanded the scope of the PSC regime to include UK-registered companies admitted to trading on a prescribed market (such as AIM), and required companies to submit a filing at Companies House within 14 days after making an entry or change to a PSC register. Notably, a company with voting shares admitted to trading on a UK or EU-regulated market does not fall within the scope of the PSC regime. The PSC regime had already met the majority of requirements introduced under the fifth AML Directive, with the exception of a process to ensure that the central PSC register is adequate, accurate and current.

A criminal offence is committed by the company and every officer who is in default if a company fails to comply with the requirement to notify changes to its PSC register to Companies House. A person guilty of this offence is liable on summary conviction to a fine up to GBP 1,000 and for continued breach, a daily default fine of up to GBP 100.

Spain and **Italy** currently do not have UBO registers in place. However, Spain has other types of UBO registries, such as registries at the Commercial Registry and at the Notaries Bar. These registers are not open to the public.

In **Italy**, the UBO register is expected to become operational in late 2022. Once operational, failure to notify the UBO register of the UBO information will be subject to a fine between EUR 103 and EUR 1,032, which may be reduced by one-third if notification takes place within thirty calendar days from the due date (the date as per implementation of the Ministerial Decree).

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Limiting access to UBO information

Only in exceptional circumstances is it possible to limit access to the publicly available personal information of UBOs. Such circumstances include: disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or where the UBO is a minor or otherwise legally incapable. Member states can include this exemption in national law on a case-by-case basis. Member states differ in terms of limiting access to the personal information of UBOs. In any event, the information will be available to relevant authorities.

In the **Netherlands**, the excluding of the UBO's personal information is only possible upon request and if the UBO is: a minor, legally incapable, or on a police protection list. If the UBO falls under one of these categories, the information open to the public must be limited to the nature and size of the UBO's interest.

In **Germany**, UBOs are entitled to request the full or partial restriction of access to information submitted to the UBO register if the UBO is a minor, is legally incapable or if there is a justified risk of fraud, threat, persecution, kidnapping, extortion or other types of violence or intimidation. The National Institute of Registries assesses requests to restrict information on UBOs on a case-by-case basis.

In the **UK**, the PSC's usual residential address will be omitted from the public register and can only be accessed by specified public authorities and credit reference agencies (CRAs) which fulfil certain conditions. However, if a PSC feels that they or somebody they live with would be at serious risk of violence or intimidation due to the activities of the company they are involved with, they can apply to prevent this disclosure. Beyond residential addresses, a PSC may apply to Companies House for information to be withheld from the public register or from being shared with CRAs on the grounds that they or a person living with them would be at serious risk of violence or intimidation due to the company's activities, or to a particular characteristic or attribute of the PSC taken together with the activities of the company.

In **Spain**, access may be limited if the UBO is a minor or is a person whose legal capacity is limited or subject to special protection, or when it may expose the UBO to disproportionate risks, fraud, kidnapping, blackmailing, violence, or other serious criminal offence.

In **Portugal**, access may be limited if the UBO is a minor, legally incapable, or when it may expose the UBO to disproportionate risks of fraud, threat, persecution, kidnapping, extortion, or other ways of violence or intimidation.

In **Italy**, access to the UBO register is forbidden if the UBO has the "counter interested status". This status results from any reasons for which publishing the UBO would expose the UBO itself to an unproportionate risk of fraud, kidnapping, blackmail, extortion, harassment, violence, or threat. It is likely that the draft Decree will adhere to a strict interpretation of "unproportionate risk" and will list a limited number of circumstances.

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In **France**, limiting access to publicly available information is not possible under any circumstances.

UBO register for trusts

If a trustee is an individual or legal entity registered in an EU member state, a trust must be registered in the UBO register for trusts of that member state. If a trustee is a European company, the trust must be registered in the UBO register of Trusts of that European country. Based on article 31 fifth AML Directive, a trust must be registered in the Trust register if the trustee acting on behalf of the trust enters into a business relationship or acquires real estate in the name of the trust.

The **UK** implemented the HMRC Trust Register, which is required to be maintained under the MLRs for relevant taxable trusts. This requirement came into effect on 26 June 2017 following the adoption of the MLRs. The UBO requirements apply to relevant taxable trusts. Certain trusts are expressly excluded (for example, charitable trusts, pension scheme trusts and trusts having effect on death).

The PSC regime covers legal entities. The HMRC Trust Register requirements apply to relevant taxable trusts. To the extent that a fund qualifies as a relevant taxable trust, it will be subject to both sets of requirements.

The MLRs exclude (from the requirement to register beneficial ownership information) trusts created for the purpose of enabling or facilitating the holdings of sums or assets in connection with which the trustee is: carrying on by way of business the activity of safeguarding and administering investments or acting by way of business as the trustee of an authorised unit trust scheme. Funds constituted as trusts that fall within this exclusion are therefore not required to register such information.

In **Germany** and **Portugal**, the central UBO register for legal entities includes the trust as well.

In **Italy**, there is no separate UBO register for trusts. The trust will be included in a trust section in the UBO register for legal entities. The draft Ministerial Decree covers institutions that are similar to trusts (*istituti giuridici affini al trust*); that is, institutions whose mission and governance is the same as the trusts' mission and governance.

A trust registered in the **French** UBO register must also register the market value on 1 January (of the respective year) for persons domiciled in France for tax purposes, assets and rights located in France or outside France; and for capitalised income placed in the trust and for other persons, only property and rights located in France and capitalised income placed in the trust. In France, mutual funds (for collective investments, not including legal entities) and fiducies are not subject to registration in the UBO register (*fiducies* must, however, be registered in a special register). However, they are required to obtain and keep accurate and updated information on UBOs.

In **Spain**, a fund (not including legal entities) must be registered in the UBO register if it is managed in Spain and not registered in another EU member state.

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In the **Netherlands**, on 23 November 2021 the Dutch Senate approved a bill to introduce the UBO register for Trusts. Implementation is expected in the course of 2022. A fund for joint account will be regarded as an arrangement similar to a trust, and any such fund needs to register its UBOs in the UBO register for Trusts.

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