

**DIRTY CASH (MONEY TALKS):  
4AMLD AND THE MONEY LAUNDERING REGULATIONS 2017**

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**Abstract**

Addressing the laundering of money is a key policing and policy priority, domestically and internationally. The European Union's Fourth Anti-Money Laundering Directive was transposed into domestic law in the UK in June 2017, through the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. This article is a socio-legal critique of the most significant changes brought about by these Regulations. It synthesises and analyses a number of dimensions of the Regulations, structured around the central themes of risk and transparency. By framing the critique in this way, this article not only challenges conventional views as to the necessity and benefits of the anti-money laundering regime but also provides scholars and policymakers with specific analyses which assist in justifying its existing nature and form.

## **1. Introduction**

Addressing the laundering of money has been a key policing and policy priority at the domestic and international level for decades. As a consequence, a global anti-money laundering (AML) regime has been developed, incorporating what is now an extensive compliance industry, in an effort to preserve the integrity and stability of the economy from money obtained through illicit means.<sup>1</sup> Money laundering, that is the cleaning or legitimising of "dirty" criminal money,<sup>2</sup> is an "enabling activity" of and for organised crime,<sup>3</sup> as well as being "related to grand corruption overseas – bribery and theft of public funds".<sup>4</sup> Moreover, allowing "criminals to hide, store and benefit from the proceeds of their crime" is seen as compromising the integrity of financial institutions and markets<sup>5</sup> and as distorting the economy.<sup>6</sup> Indeed, the United Nations Office on Drugs and Crime estimates that two to five per cent of global GDP (that is, \$800 billion to \$2 trillion) is laundered,<sup>7</sup> though this, of course, is a rather broad range.

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<sup>1</sup> HM Treasury and Home Office, *UK national risk assessment of money laundering and terrorist financing* (2015)

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/468210/UK\\_NRA\\_October\\_2015\\_final\\_web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468210/UK_NRA_October_2015_final_web.pdf) p3

<sup>2</sup> P. Van Duyne "Money Laundering Policy: Fears and Facts", in P. van Duyne, K. von Lampe and J. Newell (eds.) *Criminal Finances and Organizing Crime in Europe* (Wolf Legal Publishers, 2003) 67, 69.

<sup>3</sup> Home Office, *Action Plan for anti-money laundering and counter-terrorist finance* (Home Office, 2016) 1.1, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/517992/6-2118-Action\\_Plan\\_for\\_Anti-Money\\_Laundering\\_web\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/517992/6-2118-Action_Plan_for_Anti-Money_Laundering_web_.pdf); HM Treasury and Home Office, *UK national risk assessment* p.3.

<sup>4</sup> Home Office, *Action Plan*, 1.2.

<sup>5</sup> *ibid.*

<sup>6</sup> see V. Tanzi, "Macroeconomic Implications of Money Laundering" in E. Savona (ed.) *Responding to Money Laundering, International Perspectives* (Routledge, 2000) 91.

<sup>7</sup> <https://www.unodc.org/unodc/en/money-laundering/globalization.html>

There is a lack of clarity concerning the scope of the concept of money laundering, rendering it difficult to study and to assess its scale. Legally the term encompasses not only the orthodox understanding of the “cleaning” of assets, but also their concealment, conversion, transfer and removal.<sup>8</sup> Despite, or perhaps because of, these definitional ambiguities, it is fair to say that money laundering has become “one of the great moral panics of our day”<sup>9</sup>, and that there is a “crusade” against it.<sup>10</sup> This campaign has taken the form of the introduction of a complex framework of AML laws and policies, as well as uniformly supportive political rhetoric. The scheme comprises a range of (trans/) national legislation, regulations and policies, binding and otherwise, and relies on both public and private actors and institutions. It involves prohibitory and preventive dimensions, insofar as it criminalises money laundering as well as imposing numerous obligations to guard against and detect such behaviour.<sup>11</sup> Some of these provisions are mandatory or absolute in nature, whereas others encompass an assessment of risk and associated calibration of practice.<sup>12</sup> In substance, these standards derive from the Recommendations of the Financial Action Task Force (FATF), an inter-governmental, policy-making body established in 1989,<sup>13</sup> which are echoed in a series of Anti-Money Laundering Directives from the European Union, ultimately transposed through domestic legislation.

The Regulations are part of a broader AML regulatory landscape in the UK, which, as is explored below, relies heavily on private actors, and includes the creation of bodies like the Joint Money Laundering Steering Group (JMLSG) and the Joint Money Laundering Intelligence Taskforce (JMLIT). JMLSG comprises trade associations from the financial services industry specifically, and it issues guidance which is taken into account by a court when considering whether a person in the sector has committed the offence of failing to report money laundering.<sup>14</sup> Moreover, in 2014 the National Crime Agency established the Joint Money Laundering Intelligence Taskforce (JMLIT) in partnership with the financial sector, government, the British Bankers Association and law enforcement, to combat high end money laundering.

In terms of AML rules, the FATF’s most recent Recommendations of 2012 sought, *inter alia*, to take account of new technologies and sectors, which present new vulnerabilities to and new mechanisms for the laundering of money. These Recommendations are mirrored in the European Union’s Fourth Anti-Money Laundering Directive (4AMLD), adopted by the EU in May 2015. 4AMLD both extends and refines the extant AML scheme, and was transposed

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<sup>8</sup> Proceeds of Crime Act 2002 s.327.

<sup>9</sup> P. Alldridge, “Money Laundering and Globalization” (2008) 35 (4) *Journal of Law and Society* 437.

<sup>10</sup> P. Alldridge, “The Moral Limits of the Crime of Money Laundering” (2001) 5 *Buffalo Criminal Law Review* 279-319, 282.

<sup>11</sup> Alldridge, “Money Laundering and Globalization”, 442.

<sup>12</sup> See M. van den Broek “The EU’s preventive AML/CFT policy: asymmetrical harmonization” (2011) 14 *Journal of Money Laundering Control* 170-182.

<sup>13</sup> International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (FATF Recommendations), published in February 2012: <http://www.fatf-gafi.org>. The FATF Recommendations were issued first in 1990, and then revised in 1996, 2001, 2003 and 2012. In addition, the FATF monitors its members’ implementation and operation of AML measures, as well as vulnerabilities to money laundering.

<sup>14</sup> Proceeds of Crime Act 2002 ss.330 and 331.

into domestic law by the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (Money Laundering Regulations 2017).

In this article I present the first contextualised, socio-legal critique of the most noteworthy changes brought about by the Money Laundering Regulations 2017 (MLR 2017) and their interplay with existing law. This article is significant in that what commentary there is on 4AMLD and the MLR 2017 is strictly doctrinal in focus. Though that is useful in a technical and practical sense, here I offer further conceptual exploration and normative conclusions. This article synthesises and subsequently analyses a number of dimensions of the MLR 2017, structured around the central themes of *risk* and *transparency*.<sup>15</sup> By framing the critique in this way, this article not only challenges conventional views as to the benefits and necessity of AML but also provides scholars and policymakers with specific analyses which assist in whether the existing nature and form of AML measures can be justified. This is crucial, not least given that further change is on the horizon with the so-called Fifth Anti-Money Laundering Directive (5AMLD).

After setting out the role and effect of the European Union Money Laundering Directives, I examine a number of different components of the 2017 Regulations, centring on the concepts of risk and transparency. The article does not purport to be fully comprehensive in its coverage of the Regulations, rather its focus is on the two themes. In terms of risk, some changes have been made to the bodies to which the Regulations apply; the process of risk assessment; and the requirements of due diligence. I consider how private entities are circumventing and confounding the risk-based approach, and reflect on the implications of this. In addition, to improve transparency, 4AMLD requires the establishment of two registers, one for corporate bodies, the other for trusts. I assess how these have been implemented in domestic law and highlight future potential changes. Finally, I raise three critical objections to the 2017 Regulations, and the AML framework more broadly, centring on effectiveness, human rights, and unintended consequences.

## **2. The European Union Money Laundering Directives**

The European Union is the critical driver of AML in the UK, given that its money laundering Directives must be transposed into the domestic law of all member states. The latest Directive, the Fourth Anti-Money Laundering Directive 2015/849 (4AMLD), was adopted by the European Parliament on 20 May 2015, and reflects the revised FATF recommendations of 2012. As discussed below, 4AMLD requires a stricter approach to AML than its predecessors, insofar as it is more extensive and more onerous, though also more nuanced in some respects. 4AMLD repeals and replaces the Third Anti-Money Laundering Directive 2005/60/EC (3AMLD), which had been transposed in the UK through the Proceeds of Crime Act 2002, the Terrorism Act 2000 and the Money Laundering Regulations 2007 (MLR 2007). While there is some reference in the media and political discourse to the “Fifth” Anti-Money Laundering Directive (5AMLD) in fact this is a set of proposed amendments to 4AMLD,

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<sup>15</sup> I do not examine the counter-terrorist financing elements of the Regulations. See M. Levi, “Combating the financing of terrorism: a history and assessment of the control of ‘threat finance’” (2010) 50 *British Journal of Criminology* 650-669.

published on 5 July 2016 by the European Commission,<sup>16</sup> and currently being negotiated in the European Parliament. This revisiting was prompted by a number of terrorist attacks in Europe as well as the “Panama Papers”,<sup>17</sup> and seeks to take into account new means and modalities of transferring funds. So, it can be seen that the AML terrain is shifting, and expanding.

Notwithstanding the vote to leave the European Union in June 2016 and the triggering of Article 50 in March 2017, for the time being the UK remains a full member and will continue to implement and apply EU legislation. Even without the transposition of EU law as a condition of membership, it is likely that the UK would enact and adhere to the policy aims behind the Directive as steered by FATF, given that to do otherwise would compromise the UK’s reputation and compliance in this context. The FATF will be evaluating AML in the UK in October 2018; the last evaluation was in 2007 where after follow-up action the UK was deemed to be “largely compliant” with FATF standards.<sup>18</sup> Maintenance of this status, regardless of EU membership, will remain a priority.

### **3. The Money Laundering Regulations 2017**

4AMLD was enacted in the UK by means of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLR 2017), which came into force on 26 June 2017. Like their precursors, the 2017 Regulations implement the main preventative measures of the relevant EU Directive, by requiring “obliged entities”<sup>19</sup> or “relevant persons”<sup>20</sup> in the financial sector and beyond to apply customer due diligence measures and take other steps to prevent their services being used for money laundering.

There is a deliberate degree of latitude both in terms of the legislative transposition of 4AMLD as well as the practical implementation of the MLR 2017. As is outlined below, while some articles in 4AMLD are mandatory, others leave discretion to member states as to how they will enact the measures, in permitting the exemption of certain sectors from AML obligations, for instance. Moreover, both 4AMLD and the Regulations generally are framed in terms of objectives, with little to no prescription or elaboration as to how these aims must be met by the particular entity. This guarantees some discretion for businesses in interpretation and implementation. Overall, the Regulations seek to ensure that the UK’s AML regime is both effective and proportionate.<sup>21</sup> I question the realisation of both of these aims.

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<sup>16</sup> European Commission, *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*, COM(2016) 450 final 2016/0208 (COD), 5 July 2016, [http://ec.europa.eu/justice/criminal/document/files/aml-directive\\_en.pdf](http://ec.europa.eu/justice/criminal/document/files/aml-directive_en.pdf)

<sup>17</sup> <https://panamapapers.icij.org>

<sup>18</sup> FATF, *Fourth Follow-Up Report: United Kingdom* (FATF, 2009): <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/FoR%20UK.pdf>

<sup>19</sup> 4AMLD, Article 2.

<sup>20</sup> *Money Laundering Regulations 2017*. I use the terms interchangeably.

<sup>21</sup> HM Treasury, *Money Laundering Regulations 2017: consultation* (HM Treasury, 2017) <https://www.gov.uk/government/consultations/money-laundering-regulations-2017/money-laundering-regulations-2017> p1.

The system of money laundering controls has been criticised for “weak conceptual foundations”.<sup>22</sup> Regardless, a lack of foundational principles has not stymied its continuance and expansion. While a risk-based approach was central to 3AMLD, it is even more important and further disaggregated now. Transparency is also emphasised in 4AMLD. I now consider these two themes, and their manifestation in the 2017 Regulations, in turn.

#### **a. Risk**

4AMLD, like its predecessor, imposes obligations on certain business entities to establish policies and procedures to prevent money laundering. The current regime is predicated on the management of the risk, through its ascertainment by means of risk assessments, and then the subsequent shaping of the required customer due diligence measures.<sup>23</sup> A “relevant person”, as explored below, must establish adequate and appropriate policies, controls and procedures to prevent money laundering,<sup>24</sup> proportionate with regard to the size and nature of its business.<sup>25</sup> It must “regularly review and update” such policies and controls, and maintain a written record of any changes made following review and steps taken to communicate the changes to staff.<sup>26</sup> Failure to comply with these obligations risks a prison term of up to two years and/or a fine,<sup>27</sup> and individual and corporate liability is provided for.<sup>28</sup>

Under the separate, pre-existing legal framework, entities must identify and report suspicious transactions to the United Kingdom Financial Intelligence Unit, in the National Crime Agency, by means of “suspicious activity reports” (SARs).<sup>29</sup> Peter Alldridge’s observation that these policies induce “defensive over-reporting”<sup>30</sup> holds true, and this is exacerbated by the increased obligations and reporting requirements under 4AMLD. The danger of imposing criminal sanctions in this context is over-recording and over-reporting, meaning Governments (and private entities) are “drowned in data”,<sup>31</sup> with debatable benefit.

#### **i. “Obligated entities”**

Globally, AML hinges on the contribution of private bodies, firms and professionals, described in 4AMLD as “obliged entities”.<sup>32</sup> The Home Office describes the private sector as

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<sup>22</sup> M. Levi and P. Reuter, “Money Laundering” in M. Tonry (ed.) *The Oxford Handbook of Crime and Public Policy* (Oxford University Press: 2009) 356-380, 358.

<sup>23</sup> See FATF Recommendations 1 and 10; S. Ross and M. Hannan “Money laundering regulation and risk-based decision making” (2007) 10 *Journal of Money Laundering Control* 106-15.

<sup>24</sup> Regulation 19.

<sup>25</sup> Regulation 19(2).

<sup>26</sup> Regulation 19(1).

<sup>27</sup> Regulation 86.

<sup>28</sup> Regulation 92.

<sup>29</sup> Proceeds of Crime Act 2002 s.338.

<sup>30</sup> Alldridge, “Money Laundering and Globalization”, 443.

<sup>31</sup> B. Unger and F. van Waarden, “How to Dodge Drowning in Data? Rule- and Risk-Based Anti Money Laundering Policies Compared” (2009) 5 *Review of Law & Economics* 953-985.

<sup>32</sup> 4AMLD Article 2(1)(3).

“the first line of defence against money laundering”,<sup>33</sup> and sees a stronger partnership with the private sector as one of its Action Plan’s four priorities.<sup>34</sup> The range of entities and sectors encompassed by AML requirements has been steadily expanding from the financial sector only, as was the situation under the terms of the first AML Council Directive of 1991.<sup>35</sup> Now “obliged entities” or “relevant persons” are defined as credit and financial institutions; auditors, external accountants and tax advisors; notaries and other independent legal professionals, trust or company services providers; estate agents; persons trading in goods with cash payments of EUR10,000 or more, and providers of gambling services.<sup>36</sup>

There are two changes of note here. First, the cash threshold for businesses handling high-value goods has been lowered, down from EUR15,000 in 3AMLD.<sup>37</sup> Moreover, 4AMLD extends its coverage to the whole gambling sector, offline and online, whereas only holders of a casino operating licence were subject previously. Though *prima facie* 4AMLD would apply to the entire gambling industry, it permits the exemption of providers of certain gambling services on the “basis of the proven low risk posed by the nature and, where appropriate, the scale of operations of such services”.<sup>38</sup> A decision has been taken in the UK to so exempt the gambling industry,<sup>39</sup> apart from casinos, thus representing a maintenance of the *status quo*. This position will be kept under review,<sup>40</sup> and will form part of HM Treasury’s ML risk assessment, detailed below.<sup>41</sup> Despite the sector’s diversity in types of business, in addition to its attraction for the spending of criminal proceeds, the Government was convinced by mitigating factors such as strict licence conditions and the role and robust approach of the Gambling Commission,<sup>42</sup> and its classification as low risk in relation to other regulated sectors.<sup>43</sup> Indeed, some sort of money laundering hierarchy seems to be recognised by the Gambling Commission, which noted that “a significant proportion of the money laundering that takes place within the gambling industry is by criminals spending the proceeds of crime, for example, for gambling purposes, rather than the traditional ‘washing’ of criminal funds”.<sup>44</sup> While I am not advocating a continued extension of the AML regime, it is still curious to see arguments in favour of exemption in this context which could well apply in other situations.

The other development in the 2017 Regulations in respect of relevant persons concerns the meaning of “business relationship”, which if established means that the AML obligations

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<sup>33</sup> Home Office, *Action Plan*, 2.1.

<sup>34</sup> Home Office, *Action Plan*, 1.8. The other priorities are enhancing the law enforcement response; improving the effectiveness of the supervisory regime; and increasing international reach.

<sup>35</sup> European Union (1991), Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering.

<sup>36</sup> 4AMLD Article 2(1)(3); Money Laundering Regulations 2017 Part 1.

<sup>37</sup> 4AMLD Article 2.

<sup>38</sup> 4AMLD Article 2(2).

<sup>39</sup> HM Treasury, *Consultation*.

<sup>40</sup> HM Treasury, *Consultation*, section 4.

<sup>41</sup> Regulation 16(3)(c).

<sup>42</sup> HM Treasury, *Consultation*, section 4.

<sup>43</sup> HM Treasury and Home Office, *UK national risk assessment*, para 6.217.

<sup>44</sup> Gambling Commission, *Money laundering and terrorist financing risk within the British gambling industry* (Gambling Commission, 2016) para 5.3: <http://www.gamblingcommission.gov.uk/PDF/AML/Money-laundering-and-terrorist-financing-risk-within-the-British-gambling-industry.pdf>

apply. These changes apply to estate agents and trust or company service providers. While estate agents were already covered by the MLR 2007, this was only in relation to the party for which they were acting, usually the seller. Now an estate agent is to be treated as entering into a business relationship with a purchaser (as well as with a seller), at the point when the purchaser's offer is accepted by the seller.<sup>45</sup> Moreover, the meaning of business relationship has been extended to include the formation of a company by a trust or company service provider, whether or not the formation is the only transaction being carried out for that customer.<sup>46</sup> This is an understandable extension, given the intensifying practitioner and academic recognition of professional facilitation of serious crime.<sup>47</sup>

Relevant persons are gatekeepers-turned-police, required to detect, monitor and report suspicions of money laundering, but are viewed also as possible facilitators or enablers,<sup>48</sup> that can be deterred or punished through criminalisation. In terms of their policing role, on the one hand this could be regarded as the quintessential "responsibilisation" of private entities in the policing of problematic behaviour.<sup>49</sup> This involves the redefinition of the role of the state to one of a partner or facilitator, "steering and regulating rather than rowing and providing".<sup>50</sup> On the other hand, this might not constitute a reappraisal of the appropriate role of the state *per se*, rather a concession to the fact that private entities are those with adequate access and data in this context. It is hard to conceive of how the state could intervene in a comparable manner.

Furthermore, the cost of this scheme to the private sector is remarkable, with the British Bankers' Association estimating that its members spend at least £5 billion in total annually on financial crime compliance, including enhanced systems and controls and recruitment of staff.<sup>51</sup> Peter Alldridge rightly notes that if this AML policing were to be performed directly at the taxpayers' expense, more questions would be raised as to its efficacy, and that policy alternatives would be contemplated.<sup>52</sup> Regardless, these costs are transferred to and absorbed by customers.

## **ii. Risk assessment and monitoring**

HM Treasury and Home Office, the various supervisory bodies of the regulated sectors (e.g. the Financial Conduct Authority, the Law Society),<sup>53</sup> and the relevant businesses/persons must carry out risk assessments under the MLR 2017.

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<sup>45</sup> Regulation 4(3).

<sup>46</sup> Regulation 4(2).

<sup>47</sup> Europol, *The EU Serious and Organised Crime Threat Assessment* (Europol 2013) 1.5; Home Office, *Serious and Organised Crime Strategy* (Cm 8715, 2013) para 2.6.

<sup>48</sup> National Crime Agency, *National Strategic Assessment of Serious and Organised Crime 2017* (National Crime Agency, 2017) p21.

<sup>49</sup> D. Garland *The Culture of Control* (Oxford University Press, 2001) 124.

<sup>50</sup> N. Rose "Government and Control" (2000) 40 *British Journal of Criminology* 321, 323-324.

<sup>51</sup> Home Office, *Action Plan*, 2.1.

<sup>52</sup> Alldridge, "Money Laundering and Globalization", 460.

<sup>53</sup> There are 25 such organisations, 22 of which are professional bodies for accountancy and legal services. The Government proposed in March 2017 to establish an Office for Professional Body Anti-Money Laundering Supervision, which will set out how supervisors should comply with their AML obligations, with the powers to penalise any breaches of the Regulations. See <https://www.gov.uk/government/news/uk-tightens-defences-against-money-laundering>. This has yet to occur.



HM Treasury and the Home Office must undertake a risk assessment in the first year of the Regulations, to identify, assess, understand and mitigate the risks of money laundering and terrorist financing affecting the United Kingdom, and must keep this updated.<sup>54</sup> The assessment must, *inter alia*, identify in what context and what sort of enhanced customer due diligence measures should be applied; sectors or areas of lower and greater risk of money laundering; and consider the appropriateness of supervisory authority rules on money laundering in the light of the risks.

The numerous supervisory authorities of the regulated sectors must identify and assess the international and domestic risks of money laundering to which those relevant persons for which it is the supervisory authority are subject.<sup>55</sup> Each supervisory authority must keep an up-to-date written record of this,<sup>56</sup> and must develop and record risk profiles for each relevant person in its own sector.<sup>57</sup> It also must effectively monitor its own sector and take necessary measures for the purpose of securing compliance with the Regulations,<sup>58</sup> as well as providing up-to-date information on money laundering to its own sector.<sup>59</sup> A supervisory authority which knows or suspects, or has reasonable grounds for knowing or suspecting, that a person is or has engaged in money laundering or terrorist financing must inform the NCA as soon as practicable.<sup>60</sup>

Regulation 18 governs the assessment of risk by “relevant persons”, requiring credit institutions; financial institutions; auditors, insolvency practitioners, external accountants and tax advisers; independent legal professionals; trust or company service providers; estate agents; high value dealers and casinos to carry out business risk assessments. They must identify and assess the risks of money laundering and terrorist financing to which their business is subject, taking into account information made available to them by their supervisory authority, and risk factors relating to their customers, countries or geographic areas of operations, products, services, transactions and delivery channels. A business must provide this risk assessment and the information on which it was based to its supervisory authority on request.<sup>61</sup> These assessments affect the degree of due diligence that must be carried out.

These risk assessment processes, though not arbitrary, are not particularly standardised or categorised. There is no calculation of risk factors based on an equation like *probability x severity x detectability*, as is the case in risk assessment in other sectors such as the pharmaceutical industry.<sup>62</sup> Indeed, the JMLSG notes in its guidance that firms that do not

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<sup>54</sup> Regulation 16.

<sup>55</sup> Regulation 17.

<sup>56</sup> Regulation 17(3).

<sup>57</sup> Regulation 17(4).

<sup>58</sup> Regulation 46(1).

<sup>59</sup> Regulation 47(1).

<sup>60</sup> Regulation 46(5).

<sup>61</sup> Regulation 18(6).

<sup>62</sup> See *International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use* (2005)

[https://www.ich.org/fileadmin/Public\\_Web\\_Site/ICH\\_Products/Guidelines/Quality/Q9/Step4/Q9\\_Guideline.pdf](https://www.ich.org/fileadmin/Public_Web_Site/ICH_Products/Guidelines/Quality/Q9/Step4/Q9_Guideline.pdf) pp3-4.



offer complex products or services and that have limited or no international exposure may not need an “overly complex” risk assessment.<sup>63</sup>

Generally, risk is couched in the MLR 2017 in terms of the binary of high or low, and there is no explanation or quantification of these. Rather it is left to supervisory authorities and relevant persons to devise the standards and guidance. The only reference to “medium risk” is to be found in Schedule 4 of the MLR 2017.<sup>64</sup> A relative approach to risk is evident in the Preamble to 4AMLD, which states that a “higher risk “of money laundering may justify enhanced measures, whereas “a reduced risk” may justify less rigorous controls and Annex III to 4AMLD provides “a non-exhaustive list of factors and types of evidence of potentially higher risk referred to in Article 18(3)”. Of course, this prompts the question of “higher risk than/according to what?” The term “reduced risk” is not adopted in the Regulations, and “lower”<sup>65</sup> and “higher”<sup>66</sup> risk are used just twice each, indicating some inconsistency in drafting and overlooking the possible implication of these terms.

### **iii. Due diligence**

The persons outlined above must apply different levels of due diligence measures to customers, depending the nature and level of risk: customer due diligence (CDD), simplified due diligence (SDD) or enhanced due diligence (EDD). The rationale is that this process will act as a deterrence to offending, and will deny offenders’ access to financial and other services once their information has been checked and validated.<sup>67</sup> Firms must conduct ongoing monitoring of the business relationship with their customers.<sup>68</sup> There is no obliged reporting of due diligence and monitoring to the supervisory authority.

Relevant persons must carry out CDD where there is a suspicion of money laundering or terrorist financing, and in the case of trading in goods with cash transactions of EUR 15,000 or more, or EUR 10,000 for high-value dealers.<sup>69</sup> CDD means identifying the customer and verifying her identity on the basis of reliable information; identifying the beneficial owner and taking reasonable measures to verify that person’s identity so that the relevant person is satisfied that it knows who the beneficial owner is, including taking reasonable measures to understand the ownership and control structure of legal persons, trusts, companies, foundations and similar legal arrangements; obtaining information on the purpose and intended nature of the business relationship; and continuing to monitor the business relationship and transactions and updating documents, data or information.<sup>70</sup>

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<sup>63</sup> JMLSG, *Prevention of money laundering/ combating terrorist financing: Guidance for the UK financial sector* Part 1 (JMLSG, 2017) 4.27.

<sup>64</sup> Schedule 4, regulation 6.

<sup>65</sup> Regulations 16(2)(b) and 37(3)(a).

<sup>66</sup> Regulations 21(7)(a) and 33(1).

<sup>67</sup> M. Levi, “Money for Crime and Money from Crime: Financing crime and laundering crime proceeds” (2015) 21 *European Journal on Criminal Policy and Research* 275, 297.

<sup>68</sup> Regulation 28(11).

<sup>69</sup> 4AMLD, Article 11; Regulations 14 and 27.

<sup>70</sup> Regulation 28.

Where a Member State or relevant person identifies “areas of lower risk” simplified customer due diligence measures may be applied.<sup>71</sup> That said, the simplified customer due diligence (SDD) process has been amended to move away from its automatic deployment, resulting in an increased onus on the relevant person. Now, SDD is allowed where the relevant person has established that the business relationship or transaction presents a lower degree of money laundering risk, taking into account the risk assessment, information from the sector’s supervisory authority, and risk factors relating to the customer, product, service, transaction, delivery channel or geographical location.<sup>72</sup> This differs from the previous position where the relevant person was not required to apply customer due diligence in specified circumstances, according to a prescriptive list of customer type.<sup>73</sup>

Where higher risks are identified, relevant persons are required take enhanced measures to manage and mitigate the risks.<sup>74</sup> “Politically exposed persons”, correspondent relationships between institutions, and certain jurisdictions have been identified specifically as higher risk.<sup>75</sup> Enhanced customer due diligence is required in such cases, to manage and mitigate those risks appropriately.

#### **iv. Risky places**

In 2016, under Article 9(1)(2) of 4AMLD, the European Commission identified and published a list of “high-risk third countries” with strategic deficiencies in their national AML/CFT regimes that pose significant threats to the financial system of the EU, in order to protect the proper functioning of the internal market.<sup>76</sup> All relevant persons should apply enhanced due diligence measures in their relationship to natural persons or legal entities established in these high-risk third countries.

#### **v. Risky relationships**

Correspondent relationships (i.e. the provision of banking services by a correspondent institution to a respondent; or the relationship between credit institutions and financial institutions<sup>77</sup>) are regarded as high risk.<sup>78</sup> For this reason, financial and credit institutions engaged in cross-border correspondent relationships with a third country respondent institution must conduct enhanced due diligence.<sup>79</sup> Where the respondent is based in another European Economic Area (EEA) country, EDD is not required, unless the correspondent relationship is considered high risk.

#### **vi. Risky people**

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<sup>71</sup> 4AMLD, Article 15.

<sup>72</sup> Regulation 37.

<sup>73</sup> Money Laundering Regulations 2007, Regulation 13.

<sup>74</sup> 4AMLD, Article 18.

<sup>75</sup> Regulation 33.

<sup>76</sup> *Commission Delegated Regulation (EU) 2016/1675 of 14 July 2016 supplementing Directive (EU) 2015/849 of the European Parliament and of the Council by identifying high-risk third countries with strategic deficiencies:* [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2016.254.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2016.254.01.0001.01.ENG).

<sup>77</sup> Regulation 34(4).

<sup>78</sup> FATF, *Correspondent Banking Services* (FATF, 2016) p10.

<sup>79</sup> Regulations 33 and 44.

As was the case under 3AMLD, politically exposed persons (PEPs) are viewed as posing a heightened risk of financial criminality or corruption, and so AML regulations impose more onerous obligations on them. PEPs are those with a prominent public function, such as heads of State, ministers, members of parliament, members of the governing bodies of political parties; members of supreme courts, courts of auditors or the boards of central banks; ambassadors, high-ranking officers in the armed forces, members of the administrative, management or supervisory bodies of State-owned enterprises; directors, deputy directors and members of the board or equivalent function of international organisations.<sup>80</sup> This does not include middle-ranking or more junior officials. The rationale for focusing on those at senior levels is the perception that they will have more power and assets, and are likely to encounter more opportunities for corruption. One could dispute this by noting that lower ranking public servants are less well paid and this may affect their motivations. Of course, a critical consequence of such a line of argument is extension of the scheme, which I do not advocate. Rather I highlight these competing arguments to emphasise the contested underpinnings of this dimension of the AML scheme.

PEPs were first described and targeted in 2003 by the FATF,<sup>81</sup> and distinct rules have been in place in the EU since 2005 requiring “enhanced due diligence” and enhanced ongoing monitoring when dealing with them, their family members or close associates. While these duties once applied to international PEPs only, 4AMLD extends these obligations to domestic PEPs, that is, a politically exposed person who is or who has been entrusted with prominent public functions by any Member State or by an institution of the European Union.<sup>82</sup> Even after a PEP ceases to be entrusted with a prominent public function, EDD must be carried out for at least 12 months.<sup>83</sup> However, firms are no longer required to apply EDD in relation to the family members or known close associates of a former PEP.

The extension to domestic PEPs is logical in so far as it is more consistent and arguably more fair. Moreover, the multinational nature of many institutions as well as clients/customers means that distinguishing between domestic and non-domestic PEPs is not practicable or useful. Then again, this is still further evidence of the creeping expansion of AML. To mitigate this development, HM Treasury advocates a moderate approach in terms of application, citing the UK’s position as a world leader in the fight against corruption, money laundering and terrorist financing, its strong and stable democratic institutions, free press, independent judiciary and free and fair elections, indicating that “PEPs entrusted with prominent public functions by the UK should generally be treated as lower-risk”.<sup>84</sup>

The level of risk posed by PEPs varies substantially from case to case, and so a uniform approach is not appropriate nor required. There is no automatic refusal of banking or other services on the basis that a person is a PEP or a family member of associate. As the FATF asserts, “these requirements are preventive (not criminal) in nature, and should not be

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<sup>80</sup> Regulation 35(14).

<sup>81</sup> See FATF, *FATF 40 Recommendations (2003)*, Recommendation 6 <http://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf>

<sup>82</sup> 4AMLD, Article 9a.

<sup>83</sup> 4AMLD, Article 22.

<sup>84</sup> HM Treasury, *Consultation*, 8.

interpreted as stigmatising PEPs as such being involved in criminal activity”.<sup>85</sup> Nonetheless, these provisions can have problematic consequences, as overzealous use by certain financial institutions will have a disproportionate effect on PEPs, family and associates.

#### **vii. “De-risking” – and ignoring risk**

Difficulties arise because of the imposition of onerous reporting and monitoring requirements on the private sector, and nothing in the 2017 Regulations addresses this adequately. One obvious “workaround”, to minimise compliance cost and effort, is through the process of what is called “de-risking” whereby entities terminate or restrict business relationships with categories of clients to avoid, rather than manage, risk.<sup>86</sup> This is something of a misnomer, as this is risk avoidance, essentially. Though understandable from a business perspective, this runs counter to the aim and purpose of the risk-based approach advocated by the FATF and embedded across the EU. Undeniably, these are commercial decisions based on the “risk appetite” of banks, and so the extent to which regulatory intervention is feasible or desirable is open to discussion. Nonetheless, de-risking impacts on particular sectors, countries and people particularly,<sup>87</sup> such as money service businesses, and correspondent banks, PEPs and migrant populations seeking to send remittance payments.

For instance, in 2013, Barclays terminated the accounts of over 140 UK-based remittance companies, including Dahabshiil Transfer Services Ltd, the largest African Money Transfer Operator. Dahabshiil successfully sought an interim injunction, based on the claim that where allegations of abuse of a dominant position had been brought against a bank following its decision to partially withdraw from the money service business sector,<sup>88</sup> there was a triable issue as to whether it held a dominant position in that market. This matter was resolved ultimately out of court.<sup>89</sup>

The effects of de-risking in relation to PEPs was sought to be mitigated by section 333U of the Financial Services and Markets Act 2000 (as inserted by section 30 of the Bank of England and Financial Services Act 2016), which requires the Financial Conduct Authority (FCA) to produce guidance to ensure a “proportional, risk-based and differentiated approach to conducting transactions or business relationships” with PEPs. Though section 333U has yet to be commenced, regulation 48(1) of the MLR 2017 also requires the FCA to

<sup>85</sup> FATF, *FATF Guidance, politically exposed persons (recommendations 12 and 22)* 2013: [www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf) p3.

<sup>86</sup> See Financial Conduct Authority, “FCA Research into the issue of de-risking” 24/5/17: <https://www.fca.org.uk/news/news-stories/fca-research-issue-de-risking> and FATF, “FATF clarifies risk-based approach: case-by-case, not wholesale de-risking” (23/10/2014): <http://www.fatf-gafi.org/publications/fatfgeneral/documents/rba-and-de-risking.html> See T Boyce “De-risking, pre-risking and re-risking of correspondent banking relationships” [2016] *Journal of International Banking Law and Regulation* 305.

<sup>87</sup> World Bank, *Fact finding summary from de-risking surveys* (World Bank Group, 2015): <http://documents.worldbank.org/curated/en/534371468197058296/Fact-finding-summary-from-de-risking-surveys>; Center for Global Development, *Unintended Consequences of Anti-Money Laundering Policies for Poor Countries* (CGD Working Group: 2015).

<sup>88</sup> *Dahabshiil Transfer Services Ltd v Barclays Bank Plc Harada Ltd v Barclays Bank Plc* [2013] EWHC 3379 (Ch); [2014] U.K.C.L.R. 215.

<sup>89</sup> M. Arnold, “Barclays and remittance group reach deal on Somalia services”, *Financial Times*, 16 April 2014.

issue such guidance. The FCA's Guidance, issued in July 2017, states that a PEP who is entrusted with a prominent public function in the UK should be treated as low risk, unless a firm has assessed that other risk factors not linked to their position as a PEP mean they pose a higher risk.<sup>90</sup> Furthermore, the Financial Ombudsman Service (FOS) can consider complaints from PEPs against financial institutions,<sup>91</sup> though banks cannot be forced to provide a service to a customer deemed to be inappropriate.

As well as wholesale de-risking, there is evidence that banks fail to take account of the risks posed by PEPs. The FCA carried out a study of 27 banking groups, representative of banks dealing with higher risk customers and products, and found that a third of these would assume very high levels of money laundering risk if the immediate reputational and regulatory risk was acceptable.<sup>92</sup> They were unwilling to refuse or exit very profitable business relationships even where there was what was called an "unacceptable" risk of handling the proceeds of crime. Moreover, Barclays was fined £72m in 2015 for applying a lower level of due diligence than its own policies required to clients who were PEPs and so should have been subject to enhanced levels of due diligence and monitoring.<sup>93</sup> Barclays did not wish to inconvenience the clients. These examples underline the irregularities and inconsistency in the application of the risk-based approach.

#### **viii. Concluding remarks**

As noted, the implementation of an ostensibly risk-based approach is distorted by business imperatives, an inevitability when the "police" are profit-making entities. The FCA found banks' compliance with the 2007 regulations to be patchy, and in some instances poor;<sup>94</sup> there is little to suggest that the 2017 Regulations will be applied more uniformly or appropriately. Regardless, the evangelical nature of the risk discourse is exemplified in the exhortation of the JMLSG for the risk-based approach to be embedded "as part of the firm's philosophy".<sup>95</sup> More pragmatically, the JMLSG concedes that while no system of checks will detect and prevent all money laundering, this approach balances the cost burden on individual firms and customers with a realistic assessment of the threat of the firm being used in connection with money laundering.<sup>96</sup> Though the objectives behind this gradation are understandable, I take issue with its extent, irregularities, and questionable efficacy. While Unger and van Waarden suggest that a risk-based approach may not be sustainable,

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<sup>90</sup> Financial Conduct Authority, *The treatment of politically exposed persons for anti-money laundering purposes* (para 2.29) <https://www.fca.org.uk/publication/finalised-guidance/fg17-06.pdf>

<sup>91</sup> Schedule 7, Part 1 of the 2017 Regulations makes the requisite amendments to the Financial Services and Markets Act 2000.

<sup>92</sup> Financial Services Authority, *Banks' Management of High Money-Laundering Risk Situations* (Financial Services Authority 2011), p4: <http://www.fca.org.uk/your-fca/documents/fsa-aml-final-report>.

<sup>93</sup> Financial Services Authority Press Release, "FCA fines Barclays £72 million for poor handling of financial crime risks", 26/11/2015: <https://www.fca.org.uk/news/press-releases/fca-fines-barclays-£72-million-poor-handling-financial-crime-risks>

<sup>94</sup> Financial Services Authority, *Banks' Management of High Money-Laundering Risk Situations* (Financial Services Authority 2011), p4: <http://www.fca.org.uk/your-fca/documents/fsa-aml-final-report>.

<sup>95</sup> JMLSG, *Guidance*, 4.27.

<sup>96</sup> JMLSG, *Guidance*, 4.27.

as litigation eventually may result in its replacement by a rule-based approach,<sup>97</sup> the risk-based approach is secure, for now.

## **b. Transparency**

As well as an augmented scheme for assessing and reporting risk, the other central theme to 4AMLD and the 2017 Regulations is transparency. In a radical and noteworthy development, 4AMLD requires “beneficial ownership” registers to be established for certain corporates and trusts. Transparency is to the fore increasingly in the global political setting, and there is growing focus on the misuse of different legal entities and their ability to conceal the identity of the ultimate, potentially criminal, beneficiaries of property.<sup>98</sup> These concerns were given added impetus by the revelations in the “Panama papers” in April 2016, followed closely by the commitments about the disclosure of beneficial ownership made at the Anti-Corruption Summit in London, May 2016.<sup>99</sup> This view is shared in an operational sense domestically, with the National Crime Agency stating that “high end money laundering” relies on structures set up specifically with obscured beneficial ownership, in order to hide the nature and ownership of the funds.<sup>100</sup>

The crux of the issue here is the inherent capacity of different legal structures to hide the true or ultimate “beneficial owner” of property that is implicated in or the proceeds of criminality. The term “beneficial owner” now is deployed more broadly than its original usage in trust law, to denote the person who will benefit from or can use particular assets. Though issues of definition and scope of “beneficial owner” arise,<sup>101</sup> 4AMLD describes “beneficial owner” as “the natural person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted”, or as the natural person(s) who ultimately owns or controls 25% of legal entity, or the beneficiary of 25% or more of the property of a legal arrangement or entity.<sup>102</sup> “5AMLD” may lower this to 10% for certain entities which present a specific risk of being used for money laundering and tax evasion.<sup>103</sup>

<sup>97</sup> Unger and van Waarden, “How to Dodge Drowning in Data?”.

<sup>98</sup> See T.M.C. Asser Institut, *Prevention of organised crime: The registration of legal persons and their directors and the international exchange of information*, commissioned by the European Commission, 1 March 2000, p. 11; Organisation for Economic Co-operation and Development, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes* (OECD 2001), p3; G8, *Action Plan: Principles To Prevent the Misuse Of Companies and Legal Arrangements* <https://www.gov.uk/government/publications/g8-action-plan-principles-to-prevent-the-misuse-of-companies-and-legal-arrangements>; <https://www.ag.gov.au/CrimeAndCorruption/AntiCorruption/Documents/G20High-LevelPrinciplesOnBeneficialOwnershipTransparency.pdf>

<sup>99</sup> L. Campbell, “The organisation of corruption in commercial enterprise: Concealing (and revealing) the beneficial ownership of assets” in *Corruption in Commercial Enterprise: Law, Theory and Practice* in L. Campbell & N. Lord (ed) (Routledge, forthcoming 2018).

<sup>100</sup> National Crime Agency *National Strategic Assessment of Serious and Organised Crime 2016* (National Crime Agency, 2016) [90], [93].

<sup>101</sup> FATF, *Money Laundering Using Trust and Company Service Providers* (FATF, 2010) Pt 86(v).

<sup>102</sup> Article 3(6).

<sup>103</sup> European Commission, *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*



### *i. Register of corporates*

Though the trend towards greater transparency was already manifest in the UK with the introduction of the “register of people with significant control” in 2015, the EU provisions are broader in application and scope. Article 30 of 4AMLD requires EU member states to hold adequate, accurate and current information on the beneficial ownership of corporate and other legal entities incorporated within their territory in a central register and provides that such information should be made available to specific authorities, organisations and those with a legitimate interest across the EU. “5AMLD” proposes to require Member States to put in place mechanisms to ensure the information in the register is verified on a regular basis.<sup>104</sup>

4AMLD provides for an exemption from access to all or part of the information on the beneficial ownership on a case-by-case basis in exceptional circumstances, where such access 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.<sup>105</sup> Further elaboration on this is likely in “5AMLD”.

As noted, an equivalent scheme has already been introduced in the UK by means of the register of people with significant control (“PSC register”) through the Small Business, Enterprise and Employment Act 2015. Under section 81 as enacted, UK companies, limited liability partnerships and *societates europaeae* must maintain a PSC register and provide this to Companies House annually. This is a central, searchable and annually updated register, which can be used to determine who controls certain entities in the UK. “Significant control” (as defined in the rather complex Schedule 1A of the Companies Act 2006) includes holding directly or indirectly more than 25% of company’s shares or voting rights, or having the right to appoint or remove a majority of the directors. It also includes an individual who exercises significant influence or control over a trust or firm which does not have separate legal personality and has significant influence or control over the company. The consequences of non-compliance with this provision are not insignificant, in that failure to provide accurate information on a PSC register or to comply with notices requiring PSCs to provide information is a criminal offence for both the company and its officers, punishable by up to two years imprisonment.<sup>106</sup> The majority of companies and LLPs need to comply with the provisions or risk being convicted of a criminal offence (listed companies are broadly exempt as they are already subject to transparency obligations under the FCA’s Disclosure and Transparency Rules<sup>107</sup>). There is no statutory defence available to a company for breach of the provisions.

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*laundrying or terrorist financing and amending Directive 2009/101/EC*, COM(2016) 450 final 2016/0208 (COD), 5 July 2016.

<sup>104</sup> European Commission, *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 laundrying or terrorist financing and amending Directive 2009/101/EC*, COM(2016) 450 final 2016/0208 (COD), 5 July 2016.

<sup>105</sup> Article 30(9).

<sup>106</sup> Companies Act 2006, s.790F.

<sup>107</sup> <https://www.handbook.fca.org.uk/handbook/DTR.pdf>



The requirement of annual updating under the 2015 Act was not sufficient to meet 4AMLD's requirement for information to be "current", and so a requirement to notify changes in beneficial ownership within a shorter time frame was introduced, under the Information about People with Significant Control (Amendment) Regulations 2017. Entities must record changes to information on their PSC register within 14 days of obtaining the information and file that information with the registrar within a further 14 days.<sup>108</sup> Also, a modified form of the regime now applies to Scottish limited partnerships.<sup>109</sup> Despite these recent changes, there is no exemption on the grounds of possible danger to the beneficial owner.

## **ii. Register of trusts**

Similarly, Article 31 of 4AMLD requires the trustees of any express trust with tax consequences<sup>110</sup> to hold adequate, accurate and up-to-date information on the beneficial ownership of the trust. In contrast to the aforementioned companies' beneficial owner register, the information is not publically available but can be accessed by law enforcement and the UK Financial Intelligence Unit (UKFIU).<sup>111</sup> HMRC plans to launch its register in summer 2017 as an online service.<sup>112</sup>

Trusts have major advantages over other structures in terms of profit maximisation and capital mobility.<sup>113</sup> The perception is that in addition to legitimate personal and financial planning purposes, trusts can be employed for illicit ends, due to their autonomous and relatively unregulated nature, and their ability and purpose to conceal the identity of the beneficiaries.<sup>114</sup> That said, empirical evidence is lacking as to their use in money laundering, though this may be an inevitable consequence of their secretive nature. A World Bank review of 150 grand corruption investigations found that trusts were used infrequently,<sup>115</sup> comprising five percent of the corporate vehicles identified and appearing in c.15 percent of the investigations, mostly in Latin America, the Caribbean, and high-income nations. These findings may challenge widespread presumption about misuse of trusts. It is unclear whether this pattern would be replicated in the UK, and whether there is a connection between the scale of the corruption and the trust used. Moreover, one must be mindful that the cases explored in the World Bank review may not be representative, as they comprise cases under investigation; in other words, the "successful" misuse of trusts may never come to light. It is this phenomenon that the register seeks to address.

## **iii. Registering concern**

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<sup>108</sup> Information about People with Significant Control (Amendment) Regulations 2017, Regulations 7 & 8.

<sup>109</sup> The Scottish Partnerships (Register of People with Significant Control) Regulations 2017.

<sup>110</sup> HM Treasury states that "The term "express trust" should be taken to mean a trust that was deliberately created by a settlor expressly transferring property to a trustee for a valid purpose, as opposed to a statutory, resulting or constructive trust." HM Treasury, *Consultation*, 9.2.

<sup>111</sup> Regulation 45.

<sup>112</sup> <https://www.gov.uk/government/publications/hm-revenue-and-customs-trusts-and-estates-newsletters/hmrc-trusts-and-estates-newsletter-april-2017>

<sup>113</sup> B. Harrington, "Trusts and financialization" (2017) 15 *Socio-economic Review* 31-63.

<sup>114</sup> Organisation for Economic Co-operation and Development, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes* (OECD 2001), 25.

<sup>115</sup> E. van der Does et al., *The Puppet Masters, How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (World Bank / UNODC StAR 2011) 3.2.2.

While the sentiment behind these beneficial ownership initiatives is understandable, I suggest that both in doctrine and implementation they are questionable. The threshold, whether of 25% or 10%, is arbitrary and can be circumvented. When AMLD3 was agreed, a 25% baseline was deemed to be sufficient, following the example in the FATF Guidance on Transparency and Beneficial Ownership (which, however, was careful to note that its Recommendations do not specify an appropriate threshold<sup>116</sup>). Article 43 of 3AMLD required the Commission to present a report to the European Parliament and the Council on the “possible expediency and consequences of a reduction ... from 25% to 20%”.<sup>117</sup> Though the Commission contemplated whether such modification was appropriate, it has not been changed in 4AMLD, and it remains to be seen whether “5AMLD” alters it. In any event, this (or any) threshold can be circumvented by dividing the ownership into smaller elements by those who seek to hide ownership and control. Second, the scheme hinges to a large extent on self-reporting. Maintenance and monitoring is likely to be onerous for Companies House, and unless resource is increased, this scheme is not likely to achieve its aim.

Overall, the value of such registries is partial. As was noted in the World Bank study, they “are almost invariably archival in nature; they rarely conduct independent verification; and in many cases, they are already stretched for resources”.<sup>118</sup> They present a static outline of information that is likely to be partial and could possibly be false. Crucially, ascertaining the accuracy of the data contained within them is very difficult, though the UK government asserts that inaccurate or fraudulent information will be detected by virtue of the openness and frequency of access of the registers.<sup>119</sup> This is an optimistic claim, and a curious, if not unfamiliar, displacement of responsibility for validating a state repository. Nonetheless the very presence of registries may deter or at least displace criminality. Moreover, they are a useful starting point in identifying, monitoring and addressing criminal behaviour, and may indicate connections or jurisdictions that prove fruitful in investigations. All that said, they will need to be complemented and corroborated by other sources of data.

### **c. Objections to the MLR 2017**

There is political unanimity as to the need to address money laundering robustly, in preventive and reactive modes. As Halliday *et al.* note, the orthodoxy is that the implementation of an effective AML regime delivers only public and private goods and imposes no “bads.”<sup>120</sup> Despite this, the benefits of the system have not been demonstrated.<sup>121</sup> Now I outline some critical objections, both principled and pragmatic, to current AML laws and policies in the UK, centring on 1. effectiveness, 2. human rights, and 3. unintended consequences.

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<sup>116</sup> FATF, *Guidance on Transparency and Beneficial Ownership* 2014, p15.

<sup>117</sup> See European Commission, *Report from The Commission to The European Parliament and The Council on the application of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing* (European Commission, 2012).

<sup>118</sup> E. van der Does *et al.*, *The Puppet Masters*, p5.

<sup>119</sup> HM Treasury, *Consultation*.

<sup>120</sup> T. Halliday, M. Levi, and P. Reuter, *Global Surveillance of Dirty Money: Assessing Assessments of Regimes to Control Money-Laundering and Combat the Financing of Terrorism* (American Bar Foundation, 2014) p47 [105].

<sup>121</sup> Halliday *et al.* p47 [104].

First, there was limited empirical evidence of the effectiveness of the previous scheme,<sup>122</sup> undermining any claims that its extension through 4MLD and the MLR 2017 would be beneficial. As Mike Levi and Peter Reuter noted in 2006 the effects of “the increasingly global, intrusive, and routinized set of measures to affect criminal revenues passing through the financial system” “[e]xcept at an anecdotal level... are “unknown”, and “[a]vailable data weakly suggest that the anti-money laundering (AML) regime has not had major effects in suppressing crimes”.<sup>123</sup> While they note that the regime eases the investigation and prosecution of some criminal participants who would otherwise evade justice, this is fewer than expected, and the recovery of funds “is very slight compared with income or even profits from crime”.<sup>124</sup> To this I would add, very slight when compared to the overall costs of compliance.<sup>125</sup>

Second, elements of the MLR 2017 have significant implications for human rights, not just those of “bad guys”,<sup>126</sup> which it what may make these schemes palatable or appealing. Registers of personal data engage and potentially breach the right to privacy, as protected by Article 8 of the European Convention on Human Rights. This is especially pronounced in relation to publically accessible registers. In relation to trusts and the right to privacy, it is instructive to consider the jurisprudence of the French courts considering the public trust register there. A register was created in France in 2013 requiring disclosure to the French tax authorities of full details of any trusts with a French resident settlor or beneficiary, or which have assets in France. This register was made public online in July 2016, leading to a legal challenge from an American citizen, who is resident in France and a beneficiary of one of the publicised trusts. Later that month, the *Conseil d’Etat*, France’s highest administrative court, provisionally suspended the register with immediate effect, and in October 2016 the *Conseil Constitutionnel* ruled that inclusion in a publicly accessible register of the names of the settlor, beneficiary and administrator of a trust which provides information on how a person intends to dispose of his or her estate is a “manifestly disproportionate” encroachment on the right to respect for private life.<sup>127</sup> This resulted in the relevant paragraph of the Tax Code being declared unconstitutional.<sup>128</sup> It appears that the determination hinged on the “public” aspect of the register and the extent of the information. Nonetheless, this decision underlines the contentious nature of such measures, and suggests potential challenges on human rights grounds to the EU’s requirement of public registers of trusts. All that said, it is unlikely that any comparable challenge could be raised to the UK’s PSC register, even in its amended form, on the ground that this is a proportionate response to a legitimate aim.

The Commission is proposing even more open, public access to the registries under 5AMLD; this is likely to be incompatible with EU data protection laws. Indeed, the European Data Protection Supervisor (EDPS) has expressed concern about the fact that the amendments

<sup>122</sup> M. Levi and P. Reuter, “Money Laundering” (2006) 34 *Crime and Justice* 289, 294.

<sup>123</sup> *Ibid.*

<sup>124</sup> *ibid.*

<sup>125</sup> Also see J. Harvey, “Just how effective is money laundering legislation?” (2008) 21 *Security Journal* 189.

<sup>126</sup> R. Ivory, *Corruption, asset recovery, and the protection of property in public international law: the human rights of bad guys* (Cambridge University Press, 2014).

<sup>127</sup> Décision n° 2016-591 QPC du 21 Octobre 2016.

<sup>128</sup> Second paragraph of Article 1649 AB of the General Tax Code.

introduce policy purposes other than countering anti-money laundering and terrorism financing that do not seem clearly identified and so breach the data protection principle of purpose limitation.<sup>129</sup> The EDPS also states that the amendments are disproportionate in departing from the risk-based approach and remove existing safeguards that would have granted a certain degree of proportionality, for example, in setting the conditions for access to information on financial transactions by Financial Intelligence Units and limiting access to beneficial ownership information by both competent authorities and the public.

Third, the scheme of AML has a number of unintended consequences. As outlined above, the risk-based approach has prompted a backlash which impacts detrimentally on the provision of services to certain communities, individuals, and sectors. Furthermore, as Halliday *et al.* remind us, AML is open to misuse by authoritarian rulers.<sup>130</sup> Moreover, AML overlooks to a large extent the human dimension and the fact that like any scheme of regulation, it can be circumvented by insiders. It is easiest to launder money with the help of a coerced or bribed employee in a financial institution,<sup>131</sup> and the current Regulations may make this a preferable option for those with money to “clean”.

#### 4. Conclusion

Peter Alldridge described AML as strongly expansionist in three important respects: geographically, by area of the economy, and in the treatment of legal impediments to effective regulation.<sup>132</sup> Though 4AMLD purports to be more nuanced and ostensibly more sensitive to risk and new technologies, it maintains the growth of AML for dubious purposes and unsustainable reasons, and this will continue with the changes mooted in 5AMLD. As has been explored in this article, the animating principles of risk-management and transparency are defensible and understandable. The problems, rather, lie in the realisation and governance of these concepts, the questionable efficacy of 4AMLD and the MLR 2017, their impact on human rights, and unarticulated likely side effects.

Ultimately there appears to be a “core contradiction” between a dominant economic policy that seeks to liberalise financial flows and a crime control policy seeking to hamper them.<sup>133</sup> Such tension between market freedom and regulation seems unavoidable and intractable in relation to AML. Following Doreen McBarnet, I question the degree to which AML “in the books” translates into the compromising of financial flows “in action”.<sup>134</sup> McBarnet identified a paradox in the law, in relation to the gap between its principle and practice: she argued that the gap exists *within* the law and legal authority itself, rather than arising as a result of its application. I extend this insight to the current AML scheme, which I argue is

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<sup>129</sup> European Data Protection Supervisor, Opinion 1/2017 of the European Data Protection Supervisor on a Commission Proposal amending Directive (EU) 2015/849 and Directive 2009/101/EC, Access to beneficial ownership information and data protection implications [https://edps.europa.eu/sites/edp/files/publication/17-02-02\\_opinion\\_aml\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/17-02-02_opinion_aml_en.pdf) Brussels, 2 February 2017.

<sup>130</sup> Halliday *et al.* 50-51.

<sup>131</sup> Levi and Reuter, “Money Laundering”, 318.

<sup>132</sup> Alldridge, “Money Laundering and Globalization”, 459.

<sup>133</sup> M. Levi, “Money for Crime and Money from Crime: Financing crime and laundering crime proceeds” (2015) 21 *European Journal on Criminal Policy and Research* 275-297.

<sup>134</sup> D. McBarnet, *Conviction: The Law, the State and the Construction of Justice* (1981).

internally inconsistent, and fails to incorporate its own aims and principles. The risk-based approach pays lip service to the aims of crime control, while simultaneously creating exceptions and undermining its own substance. And the crux of this problem and of its resolution lies in the pivotal role of the private sector, in the divesting of duties to those very institutions that are both responsible for and subject to the Regulations.

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