

CLIENT ALERT

The Sixth EU Anti-Money Laundering Directive: What Will Change?

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The Sixth EU Anti-Money Laundering Directive (“6AMLD”) came into force at the EU level on 2 December 2018, and EU member states are required to implement it by 3 December 2020. It focuses on standardising the approach of EU member states to the offence of money laundering, as well as expanding the scope for potential liability for money laundering and the range of sanctions that EU member states are required to impose under local law.

Summary

The United Kingdom has opted out of 6AMLD on the basis that the UK government considers that it is ‘already largely compliant with the Directive’.¹ However, whilst some of what is contained in 6AMLD is not new in the United Kingdom, of particular note is the introduction of a ‘failure to prevent money laundering’ type of offence, which will be a requirement of EU law and is not currently within the scope of English law. Perhaps surprisingly, the decision by the United Kingdom government to opt out could see the EU adopt a stricter approach to corporate criminal liability for money laundering than exists in the United Kingdom, which has historically been one of the EU jurisdictions that has imposed stricter rules.

¹ Eighth Annual Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) in Relation to EU Justice and Home Affairs (JHA) Matters (1 December 2016 – 30 November 2017), page 7.

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We set out below a comparison of the requirements imposed on EU member states by 6AMLDD with the current state-of-play under English law and, in addition, provide some commentary on the potential implications of a change in approach within the EU to corporate liability in this area.

Detailed Analysis

6AMLDD Change	Current English Law Position
6AMLDD lists the types of criminal activity that must give rise to potential money laundering offences under national law. ²	English law does not restrict those offences that can give rise to money laundering and so is already broader.
6AMLDD requires EU member states to enforce money laundering offences covering <u>intentional</u> : ³ <ul style="list-style-type: none">• conversion or transfer of property derived from criminal activity;• concealment or disguise of the true nature of property derived from criminal activity; and• acquisition or use of property derived from criminal activity. EU member states <u>may</u> take measures to provide for offences where the offender <u>suspected or ought to have known</u> that the property was derived from criminal activity.	Equivalent offences are already in force under English law. See s.s.327-329 POCA 2002. Certain offences under English law already criminalise involvement in money laundering where a person merely suspects that what he or she is doing facilitates money laundering, or where a person in the regulated sector fails to disclose a suspicion of money laundering. See s.328 and s.s.330-332 POCA 2002.
6AMLDD requires EU member states to have in place offences of assisting, encouraging and attempting to commit the offences set out above. ⁴	Equivalent inchoate offences are already in force for money laundering under English law.

² Article 2 6AMLDD.

³ Article 3(1-2) 6AMLDD.

⁴ Article 4 6AMLDD.

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<p>6AMLD requires EU member states to penalise the above primary money laundering offences with maximum sentences of <u>at least</u> four years.⁵</p>	<p>English law currently provides for maximum sentences of 14 years for equivalent conduct. See s.334 POCA 2002.</p>
<p>6AMLD requires EU member states to include the following as aggravating circumstances when determining a penalty for money laundering:</p> <ul style="list-style-type: none"> • the offender is an obliged entity (i.e. is regulated for anti-money laundering)⁶ and committed the offence in the course of its professional activity; and • the offence was committed within the framework of a criminal organisation.⁷ <p>In addition, local law may provide for other aggravating circumstances, such as where the laundered property is of considerable value or derives from the most serious of the listed offences.⁸</p>	<p>English law already considers certain aggravating circumstances, such as the value of the money laundered, but does not expressly provide for conduct in the course of professional activities subject to AML regulation to constitute aggravating circumstances when determining a penalty.</p> <p>Note: those subject to AML regulation in the United Kingdom face potential regulatory sanction in addition to criminal penalties.</p>
<p>Corporate liability 1: 6AMLD requires EU member states to ensure that legal persons can be held liable for the mandated offences where a person with a leading position within a legal person commits the offence for the benefit of the legal person. A person has a leading position if he or she has:</p> <ul style="list-style-type: none"> • a power of representation of the legal person; • authority to take decisions for the legal person; or • authority to exercise control within the legal person.⁹ 	<p>English law currently provides for corporate criminal liability for criminal money laundering through the identification principle, where the offender was a directing mind and will (“DMW”) of the legal entity.</p> <p>Note: legal entities in the United Kingdom may also face civil recovery orders where they can be identified as in possession of criminal proceeds (even where they are not themselves criminally liable) and regulatory sanctions (where they are regulated for AML purposes).</p>

⁵ Article 5 6AMLD.

⁶ Article 2(1) 4AMLD.

⁷ Article 6(1) 6AMLD.

⁸ Article 6(2) 6AMLD.

⁹ Article 7(1 and 3) 6AMLD.

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<p>Corporate liability 2: 6AMLD requires EU member states to ensure that legal persons can be held liable where a lack of supervision or control by a person with a leading position in the legal person has made possible the commission of money laundering for the legal person's benefit by a person under its authority (i.e. any employee or representative).¹⁰</p>	<p>Although there has been much discussion about the possibility of introducing a 'failure to prevent financial crime' type of offence in the United Kingdom (similar to that already in place for bribery and facilitation of tax evasion), no equivalent offence for failure to prevent money laundering is currently in place.</p> <p>Note: those subject to AML regulation in the United Kingdom face potential regulatory sanction for failure to have in place adequate systems and controls to prevent money laundering.</p>
<p>Sanctions for legal persons: 6AMLD requires EU member states to have 'effective, proportionate and dissuasive' penalties for corporates held to be liable under local law, including criminal or non-criminal fines. In addition, 6AMLD suggests that local law may provide for other penalties such as:¹¹</p> <ul style="list-style-type: none">• exclusion from entitlement to public benefits or aid;• temporary or permanent exclusion from access to public funding, including tender procedures, grants and concessions;• temporary or permanent disqualification from the practice of commercial activities;• placement under judicial supervision;• a judicial winding-up order;• temporary or permanent closure of establishments which have been used for committing the offence.	<p>Corporate entities may face an unlimited fine under s.164 Criminal Justice Act 2003.</p> <p>Companies under investigation may face a subsequent winding-up petition on the grounds of public interest brought by the Secretary of State under s.124A of the Insolvency Act 1986.</p> <p>Money laundering is already a predicate offence for mandatory debarment for five years under The Public Contracts Regulations 2015, Regulation 57(11).</p>

¹⁰ Article 7(2 and 3) 6AMLD.

¹¹ Article 8 6AMLD.

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Confiscation or freezing of proceeds of money laundering. ¹²	English law currently provides for confiscation powers to recover the proceeds of a crime following a conviction. In addition, certain UK enforcement bodies (including the Serious Fraud Office (“SFO”)) may use civil recovery powers to, in effect, confiscate the proceeds of crime even where no underlying criminal conviction is sought or obtained. See s.6 POCA 2002 and Part 5 POCA 2002. The SFO can apply for an Account Freezing Order under s.303Z1 of the Criminal Finances Act 2017 over the proceeds of money laundering.
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Commentary on the Failure to Prevent Offence

Among the most significant changes in 6AMLD are the requirements for EU member states to incorporate corporate liability for money laundering into national law for both the primary money laundering offences, and for failures in a legal person’s supervision or control leading to money laundering on its behalf.

English law allows for corporate liability where a directing mind and will (“DMW”) of a legal person commits an offence. In certain specific scenarios, legal persons may also be guilty of failing to prevent specific offences, such as bribery and tax evasion. However, English law does not currently consider failure to prevent money laundering to be a basis for a corporate offence.

The EU’s list of those individuals whose actions a legal person will be held liable for (i.e. those with a power of representation, authority to take decisions, or authority to exercise control within the legal person) is not fundamentally different from the principles of corporate attribution developed under English law. However, there is scope for divergence based on the approaches taken in local enacting legislation in different European jurisdictions and in EU jurisprudence as these principles come to be considered in EU courts. By way of example, a person with a power of representation could encompass a potentially broad set of scenarios whereby an individual employee has been given the power to make representations and negotiate terms on behalf of a company, but does not have delegated authority to finalise a particular transaction.

The scenarios in which corporate liability may apply for money laundering where companies are said to have failed in supervision or control are likely to lead to an increasing number of companies outside of the regulated sector

¹² Article 9 6AMLD.

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incorporating anti-money laundering controls into their compliance programmes. Such controls are already required for businesses in sectors subject to existing AML controls, such as the financial services industry. Many UK businesses may seek to implement additional controls regardless of the position under English law if they conduct significant business with or in the EU through European subsidiaries or branches.

There will be much debate regarding the standards required, since 6AMLD requires corporate responsibility for inadequate supervision or control only where that failure has ‘made possible’ the money laundering in question – arguably, this is a higher standard of proof for a prosecutor than under the Bribery Act, where corporate liability is (in certain specific circumstances) presumed but a company has a defence where it can demonstrate that it had in place adequate procedures to prevent bribery. Such distinctions may be relevant to defending a corporate accused of money laundering. However, when it comes to designing effective controls, a similar approach to that already taken in the regulated sector is likely to be considered best practice.

A business will be expected to identify its money laundering risks and to implement controls to mitigate them. The role of senior management will be a key consideration in designing any such compliance procedures, since 6AMLD mandates that the lack of supervision or control must itself be by a person “with a leading position” in the company. Therefore, a lack of senior management oversight and control of key AML risks in a business could open the door to corporate liability for any underlying money laundering offences.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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