Brussels, 22 December 2016

Mr Olivier Guersent
Director-General for DG FISMA

By e-mail: Olivier.Guersent@ec.europa.eu

Subject: 5th Anti-money laundering Directive

Dear Mr Guersent,

Directive 2015/849 EC of the European Parliament and of the Council, of 20 May 2015, on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, and amending Directive 2009/101 / EC of the European Parliament and of the Council of 16 September 2009, on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent, is currently under review.

The draft of the proposed amendment to both directives, known as 5AMLD, is the fifth revision of the so-called *"Money Laundering Directive"* in a relatively short period of time, and the deadline for processing such a modification is also very short.

In contrast with **Directive 2015/849**, the proposal intends to provide the competent authorities and the so-called FIUs (Financial Intelligence Units) with minimum and uniformed powers within the EU. These homogeneous powers include:

• The power of authorities to have a quick access to an official Registry of products and services, beneficial owners and trustees subject to investigations of money-laundering to be set up by Members states which will contain the identification of the actual owners of those products and services, without further communicating by the authorities to the individuals concerned of any access to the Registry.

• The power of authorities and FIUs to request the information they need from the entities obliged, on their own initiative, in the framework of their investigations. (Previously some authorities and FIU's could not request information from the obligated entities if previously the latter had not reported suspicious transactions).

• The power of exchange of information between authorities and FIU's. (Previously some could not share with their counterparts of other Member states).

The WP29 understands that this new scenario raises a risk in terms of possible illegal personal data processing considerably, since it can lead to massive and generalized data processing to a degree much larger than the one deriving from the current situation.

The WP29 is aware that, unlike the case of routine police investigations, where personal data processing are carried out within the framework of previous and specific investigations, in the effective fight against money laundering and terrorism prevention, many of the specific investigations arise from the processing of considerable amount of data aimed at this purpose, which, in certain cases, may be compatible with the legitimate purpose of combating money laundering.

In this regard, the WP29 wishes to express its concern that this qualitative and quantitative leap forward in the processing of personal data, contemplated in the draft proposal, while legitimate, increases significantly the risk of violation of data protection rights, without the proposal setting any set of controls that minimize such risk to an acceptable level, in line with the provisions of the General Data Protection Regulation[1], where it is essential to ensure that the duly empowered staff with a right to access to such data processing is limited to those who 'have a need to know' and possess appropriate knowledge about data security and data protection rules.

These controls should cover the ex-ante and ex-post phases of the data processing so that any processing should be covered and controlled by a previous investigation plan (ex-ante control), setting out its legal basis, its objectives and strategy, as well as the necessary controls and safeguards to ensure that such processing cannot be carried out for any other purpose especially in the light of the intended interconnection. The investigation plan should include a record of the data processing performed so that they can be audited in a proactive manner.

Ex-ante controls should be complemented by security controls and self-assessment and supervisory controls (ex-post controls) by competent supervisory authorities, all in a similar way to controls already set up in other areas such as the *Schengen acquis*, but in this case in relation to the General Data Protection Regulation.

With regards to **Directive 2009/101**, new section (Article 1a) has been added on the scope of application by making measures relating to the disclosure of information on actual ownership extensive to:

[1] REGULATION (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

A) Companies and other legal persons under art. 30 of Directive 2015/849.

This section obliges MS to each have a central register (for illustrative purposes a commercial register or a company registered according to article 3 of Directive 2009/101, or even a public register are quoted) where companies and other legal entities incorporated in its territory are required to record and keep up-to-date information on the actual ownership, including details of the ultimate interest shown.

Companies are also obliged to provide information on real ownership to the FIUs, to the obligated entities and to any person or organization that can demonstrate a legitimate interest. For access based on legitimate interest, at least the following data must be disclosed: **name, surname, month and year of birth, nationality, country of residence and the nature and scope of the actual participation.**

According with the above mentioned section such access will be made in accordance with the data protection rules and may be subject to a fee that does not exceed administrative costs.

B) Trusts constituted by the holding of assets by a person whose activity includes the management of trusts, and who acts as trustee in the course of that for-profit activity, (it also extends to other types of legal structures to these trusts).

Section 2 goes on amending directive 2009/101 by adding an article 7b entitled "*Disclosure of beneficial ownership information"* which basically obliges the MS to take the necessary measures to ensure the mandatory disclosure of the beneficial ownership of the entities referred to in Article 1a(a) and (b).

The disclosure of information on actual ownership will be made through the central registries (referred to in Articles 30(3) and 31(3a) of Directive 2015/849).

Regarding the data of the beneficial ownership subject to mandatory disclosure, *the name, surname, month and year of birth, nationality, country of residence and the nature and scope of the actual participation* are expressly mentioned.

It is striking that the current wording of art. 30 of Directive 2015/849 (see above) provides for access to this register on the basis of a **legitimate interest** whereas in the drafting of the new Article 7b added to Directive 2009/101 there is no mention of legitimate interest but of **mandatory disclosure** with no more barriers than a possible cost-oriented rate. This, in a first approximation, leads to a lack of consistency in the literalness of the two texts resulting from both directives, to which it should be added that an analysis should be made of such a publication on the basis of the principle of proportionality and where appropriate, compensatory measures should be also enforced. To guarantee that these data are only used for the purpose for which they are collected a limitation of the term legitimate interest might be helpful.

In this regard, the WP29 expresses its deep concern about the proposal included in the draft directive of the publishing of a central Registry that would include, in a generalized manner and with mandatory disclosure, personal data of holders of certain financial products, resulting in the access to this registry for consultation without being subject in practice to any clear criteria concerning purposes and access requirements, which in the view of the WP29 could be considered disproportionate[2].

Conclusions

The WP29 is aware that combating money laundering and terrorist financing requires significant data processing as well as collaboration and exchange of data between the authorities responsible for such investigations. For that purpose a set of common standards related to powers of investigation and exchange of information for such authorities have been included in the 5AMLD proposal. However, The WP29 understands that such common standards must include the necessary controls to ensure an adequate level of security and that such personal data processing cannot be used for secondary purposes.

The WP29 understands the need to create a register of beneficial ownership of financial products and services to which the authorities responsible for combating money laundering and terrorist financing have access in an efficient manner. However, the WP29 is in the opinion that facilitating universal access to such a registry could be considered disproportionate and that, where appropriate, access criteria should be established based on an analysis of necessity, purpose and proportionality.

Yours sincerely,

On behalf of the Article 29 Working Party,

Isabelle FALQUE-PIERROTIN
Chairwoman

[2]Furthermore, the French Constitutional Court declared the French Public Register of Trusts unconstitutional in a ruling on October 21, 2016. The French Constitutional Court held that the Register imposes a disproportionate infringement of the right to privacy compared to the constitutional aim of the fight against tax fraud and evasion. http://www.wealthmanagement.com/estate-planning/french-public-register-trusts-declared-unconstitutional