

**Legal Commentary by Dr Mary Alice Young, (Researcher and) Senior Lecturer in Law, University of the West of England.**

**Financial transparency in Britain's secrecy jurisdictions has just got a whole lot murkier following the UK's decision to leave the EU.**

The purpose of this commentary is to promote a general discussion concerning the effect of Brexit,<sup>1</sup> on the ability of the UK to regulate financial crime in its Overseas Territories and Crown Dependencies which operate as financial secrecy havens.

On the 23 June 2016, more than 30 million voters (71.8%) took to the polls to decide whether the (United Kingdom) UK should leave or remain in the European Union (EU). A majority vote of 52% to 48% opted to leave the EU.<sup>2</sup> The upshot of such a decision is that the status of UK legislation which has been enacted to comply with the implementation of EU Directives now faces an uncertain future. The EU's Fourth Anti-Money Laundering Directive was approved by the European Parliament on 20 May 2015 and came into force on 26 June 2015.<sup>3</sup> The Fourth Directive is one such piece of legislation that – pre-Brexit – was to be fully integrated into UK domestic anti-money laundering policy, but now forms part of a raft of EU legislation which may potentially be scrapped by the Government upon completion of the UK's exit negotiations in 2018.

One year ago, it seemed probable that the UK would remain for the foreseeable future within the EU. As a Member State, the UK was required by the Fourth Directive to update its relevant anti-money laundering policies and to implement the new requirements into updated national statutes by 26 June 2017 – these being revamped versions of the Money Laundering Regulations 2007 and the Proceeds of Crime Act 2002. Certainly, in 2015 the Office of the Parliamentary Counsel, which drafts UK legislation, would have been busy preparing to amend existing anti-money laundering legislation to comply with the Fourth Directive. However, post-Brexit it is highly likely that the Government will review the body of laws which stem from EU Directives and therefore the Fourth Directive will also be scrutinised, leaving the degree of influence that it has on UK money laundering policy, open to debate.

Currently and until Britain's exit negotiations are complete, EU Directives are enforceable and legally binding on the UK and its entire territory – including any of the Overseas Territories, or self-governing (non-EU) Crown Dependencies that wish the treaty to apply to

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<sup>1</sup> Brexit is a combination of the words 'British' and 'exit' and was coined by politicians to signify the exit of the UK from the European Union.

<sup>2</sup> B. Wheeler and A. Hunt, 'BREXIT: All you need to know about the UK leaving the EU', BBC News, 21 July 2016. <[www.bbc.co.uk/news/uk-politics-32810887](http://www.bbc.co.uk/news/uk-politics-32810887)> accessed 10 August 2016.

<sup>3</sup> Council Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance).

OJ L 141, 5.6.2015, p. 73–117

(hereafter referred to as the Fourth Directive).

them.<sup>4</sup> This means that the UK and its relevant territories are bound by the Fourth Directive until Parliament decides otherwise following the official exit from the EU. However, it may be proposed that leaving the EU was part of an agenda by the UK Government to avoid compliance with increasingly stringent financial regulations – regulations which would affect the existing opacity of the financial secrecy havens which are Britain’s Overseas Territories, encompassing some of the richest countries in the world, including Bermuda, the Cayman Islands and other notable secrecy jurisdictions such as Turks and Caicos Islands and the British Virgin Islands.<sup>5</sup>

The EU joined the global fight against money laundering in 1991. Twenty five years ago, financial secrecy was not making the headlines as it is today and the main preoccupations of the anti-money laundering laws coming out of the EU were to ensure compliance of its Member States with the international legal framework in order to combat the proceeds of drug trafficking. Indeed, the objectives of the Member States in adopting the First Directive on Money Laundering,<sup>6</sup> were pertinently highlighted by the accompanying statement of intention submitted to the Council on 26 June 1991.<sup>7</sup> The statement was evidence that Governments of Member States were uniting as a collective to ‘undertake to take all necessary steps...to enact criminal legislation enabling them to comply with their obligations’ under the 1988 United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances,<sup>8</sup> and the 1990 Council of Europe Convention on laundering, tracing, seizure and confiscation of proceeds of crime.<sup>9</sup> Under the First Directive, Member States were required to prohibit money laundering and to oblige the financial sector, comprising credit institutions and a wide range of other financial institutions, to identify their customers, keep appropriate records, establish internal procedures to train staff and

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<sup>4</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. Article 29 of the Vienna Convention on the Law of Treaties provides that “unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory”.

Note: The Crown Dependencies (Isle of Man, Jersey, Guernsey and its dependencies) voluntarily agreed to implement the Fourth Directive. The Crown Dependencies are not represented in the UK Parliament and have never been colonies of the UK. Neither are they members of the EU. Read more on the status of the CDs: The Overseas Territories: Security, Success and Sustainability. Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty. June 2012, Cm 8374.

<sup>5</sup> Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime Reference ETS No.141, Opening of the treaty Strasbourg, 08/11/1990.

<sup>6</sup> Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (hereafter referred to as the First Directive).

<sup>7</sup> Official Journal of the European Communities No L 166/83. Statement by the representatives of the Governments of the Member States meeting within the Council. OJ L 166, 28.6.1991, p. 83–83.

<sup>8</sup> 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 20 December 1988, Vienna, Austria. U.N. Doc. E/CONF.82/15 (1988) / 28 ILM.493 (1989).

<sup>9</sup> Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. ETS No.141, Strasbourg, 08/11/1990.

This was subsequently updated and replaced by the:

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, CETS No.198, Warsaw, 16/05/2005 – to take into account the fact that not only could terrorism be financed through money laundering from criminal activity, but also through legitimate activities.

guard against money laundering and to report any indications of money laundering to the competent authorities.<sup>10</sup>

The Second Directive<sup>11</sup> which was adopted on 4 December 2001, was concerned with a widening of the predicate offences and importantly, the legislation acknowledged that organised crime is linked closely to money laundering. Such an acknowledgement, meant the restrictive measures of the First Directive now had a wider scope of application as they no longer applied only to drug related money laundering offences. The objective of the Third Directive,<sup>12</sup> adopted by Member States on 26 October 2005, was to align the money laundering regulatory regimes of European governments with the FATF Recommendations applicable to tackling money laundering and terrorist financing.<sup>13</sup> In response to the Third Directive, the UK repealed and replaced the Money Laundering Regulations 2003 with the 2007 Regulations.<sup>14</sup>

It is evident that each mutation of the EU Money Laundering Directive is generated by the initial gut response of the Commission to the current state of affairs concerning money laundering issues at the given time. Ergo, in the early nineties, the focus of 'going after the money' was the war on drugs – a disastrous movement popularised by Nixonian US policy making in the 1970s and adopted by other Western countries. Following the terrorist attacks on the US on 11 September 2001, the noughties global anti-money laundering policies reflected a focal shift away from drugs to combating the financing of terrorism. In 2015 the Fourth Directive was ushered in to reflect a different concern of EU policy makers, one which centres on an increased need for financial transparency in light of the HSBC and Panama Papers scandals. In the Communication from the Commission to the European Parliament, the reasons for revising the Third Directive include the need to strengthen the Internal Market, 'safeguard the interests of society from criminality and terrorist acts, and contribute to the financial stability of the EU by means of protecting the soundness, proper functioning and integrity of the financial system'.<sup>15</sup>

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<sup>10</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. OJ L 309, 25.11.2005, p. 15–3.

<sup>11</sup> Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering - Commission Declaration OJ L 344, 28.12.2001, p. 76–82

<sup>12</sup> Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. OJ L 309, 25.11.2005, p. 15–36.

<sup>13</sup> Most current version: The Financial Action Task Force Recommendations, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, February 2012. Updated June 2016

<sup>14</sup> The Money Laundering Regulations 2003, No. 3075 replaced by The Money Laundering Regulations 2007, No. 2157.

<sup>15</sup> 4th directive 27 April 2015: COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the position of the Council on the adoption of a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing /\* COM/2015/0188 final - 2013/0025 (COD) \* Objectives of the proposal of the Commission.

Importantly, the Fourth Directive requires Member States to ensure, 'that corporate and other legal entities incorporated in their territory obtain and hold accurate and current information on their beneficial ownership' and 'that the information is held in a central register in each member state or in a public central register'.<sup>16</sup> Information on the beneficial owner includes their names, month and year of birth, nationality, residency and ownership details. A wide range of applicants will be able to access the registers including competent authorities which encompasses financial intelligence units (unrestricted access), obliged entities such as banks conducting customer due diligence checks. Controversially, members of the public or organisations with legitimate interests, such as investigative journalists and other concerned citizens, can also access the central registers.<sup>17</sup> For this reason, the Fourth Directive, in its preamble (paragraph 15) states that, 'Member States should be able, under national law, to allow for access that is wider than the access provided for under this Directive.' However, following the aforementioned requirements of the Fourth Directive, it is extremely worrying to note that a 2015 briefing by the All Party Parliamentary Group (APPG) on Anti-Corruption, states that, 'there is a concern that come transposition, the definition of 'legitimate interest' will be purposefully narrowed by member states to exclude concerned citizens'.<sup>18</sup> Simply put, it seems that some Overseas Territories simply refuse to engage with the concept of a public register, as evidenced by the APPG's statement that 'Bermuda refused to consult and ruled out introducing a register altogether'.<sup>19</sup>

In 2015, after the Fourth Directive was adopted, the European Commission continued its mission to water down financial secrecy when it published a tax haven blacklist.<sup>20</sup> A list of the world's thirty worst offending tax havens that includes UK the overseas territories of Bermuda and the Cayman Islands. Each country on the list has been blacklisted by the EU and to be so, it had to be nominated by at least 10 EU Member States. The UK did not make any suggestions. It is important at this juncture, to note that the same harmful secrecy laws which enable tax evasion, are also conducive to laundering the proceeds of crime and creating a criminogenic environment in which financial crime thrives. The very same secrecy laws, it could be argued, uphold the economy in small islands states which are UK Overseas Territories or Crown Dependencies; a very good reason for some of the most significant Brexit backers to advocate for the UK to leave the EU.

It can be no coincidence that those who were driving the Brexit campaign are also those who would have the most to lose if the UK increased financial transparency in line with the Fourth Directive, to combat tax frauds and financial crimes. Specifically, high profile voters who signed the Brexit support letter include offshore-tax planners working for the super-rich and the heads of dormant businesses. According to Rob Davies of the Guardian, the signatures on the letter include: Former CEO of HSBC, Michael Geoghegan; Robert Hilcox of Hilcox Insurance and ardent supporter of tax avoidance who also uses Bermuda as a tax

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<sup>16</sup> All Party Parliamentary Group (APPG) on Anti-Corruption, Briefing: Beneficial ownership transparency and the Overseas Territories & Crown Dependencies, November 2015. pp 1-2.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> 2015 – European Commission: published on 17 June 2015.

haven; Martin Bellamy CEO of Salamanca Group who advises the mega wealthy on offshore trust formation and foreign investment opportunities; and Clive Thorne of Wedlake Bell who Davies describes as a magician of 'imaginative tax planning for onshore and offshore' business.<sup>21</sup>

On the 5 July 2016, the European Commission further underlined its commitment to cracking down on tax havens by adopting a proposal to bolster existing EU rules on anti-money laundering to counter terrorist financing and increase transparency about who really owns trusts and companies. There is no hiding the fact that the Commission's proposal was prompted by the recent terrorist attacks in the EU and the Panama Papers scandal and that the new proposals were drafted to recognise the need for increased and strengthened efforts to combat money laundering in offshore financial centres operating as secrecy havens. Indeed, on the same day the Commission released the proposals, Věra Jourová, the EU's Commissioner for Justice, Consumers and Gender Equality said:

"Today, we are putting forward stricter transparency rules to cut terrorist financing and step up our fight against money laundering and tax avoidance. The update of the Fourth Anti-Money Laundering Directive will prevent any loopholes in Europe for terrorists, criminals or anyone trying to play with taxation rules to finance their activities."<sup>22</sup>

Also on 5 July and parallel to the proposal to amend the Fourth Anti-Money Laundering Directive, the Commission presented a Communication to the European Parliament setting out priorities for its work towards fairer, more transparent and more effective taxation.<sup>23</sup> The Communication, pushes for increased financial transparency and recognises that, 'while some complex transactions and corporate structures may have entirely legitimate purposes, other offshore activities may be less justifiable or even illegal.' The Communication also indicates that:

'there appears to be a strong case for introducing further measures – either through horizontal or sectorial provisions which specifically focus on those who promote or enable tax evasion and avoidance schemes. This would help competent authorities to identify and block such activity at an early stage and to address loopholes in

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<sup>21</sup> R. Davies, 'Pro-Brexit bosses include retirees and tax avoidance experts', Monday 16 May 2016.  
<http://www.theguardian.com/politics/2016/may/16/pro-brexit-bosses-include-retirees-and-tax-avoidance-experts>

<sup>22</sup> European Commission - Press release  
Commission strengthens transparency rules to tackle terrorism financing, tax avoidance and money laundering  
Strasbourg, 5 July 2016  
[http://europa.eu/rapid/press-release\\_IP-16-2380\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2380_en.htm)

<sup>23</sup> Strasbourg, 5.7.2016  
COM(2016) 451 final  
COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT AND THE COUNCIL  
Communication on further measures to enhance transparency and the fight against tax  
evasion and avoidance  
[http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/fairer\\_corporate\\_taxation/com\\_2016\\_451\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/fairer_corporate_taxation/com_2016_451_en.pdf)

legislation allowing for it. It would also have a dissuasive effect on those who actively encourage and use aggressive tax planning'.<sup>24</sup>

The adoption by the UK of the EU's strengthened measures to combat money laundering could have a substantial impact on the opaque surroundings of Britain's secrecy havens; effectively watering down financial secrecy so that jurisdictions like the Caymans and Jersey are unable to operate as they currently do. Therefore, leaving the EU would create a *cordon sanitaire* whereby nobody questions the financial secrecy structures of Britain's offshore territories, simply because the UK will exist outside of the EU anti-money laundering framework and will no longer be answerable to the Commission.

The Brexit process will take a number of years and while the Council of Europe is pushing for greater financial regulation and increased transparency, company service providers registered in the UK and its Crown Dependencies and Overseas Territories, in particular, the British Virgin Islands and the Cayman Islands are among the worst offenders for enabling secrecy company ownership. A pessimist would see here only the kind of opportunities for obfuscation that have, to date, rendered the global anti-money laundering regime largely ineffective.<sup>25</sup>

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<sup>24</sup> Ibid at p.7

<sup>25</sup> For more read the report by: Terence C. Halliday, Michael Levi, and Peter Reuter. GLOBAL SURVEILLANCE OF DIRTY MONEY: ASSESSING ASSESSMENTS OF REGIMES TO CONTROL MONEY-LAUNDERING AND COMBAT THE FINANCING OF TERRORISM. 30 January 2014. Centre on Law and Globalization.