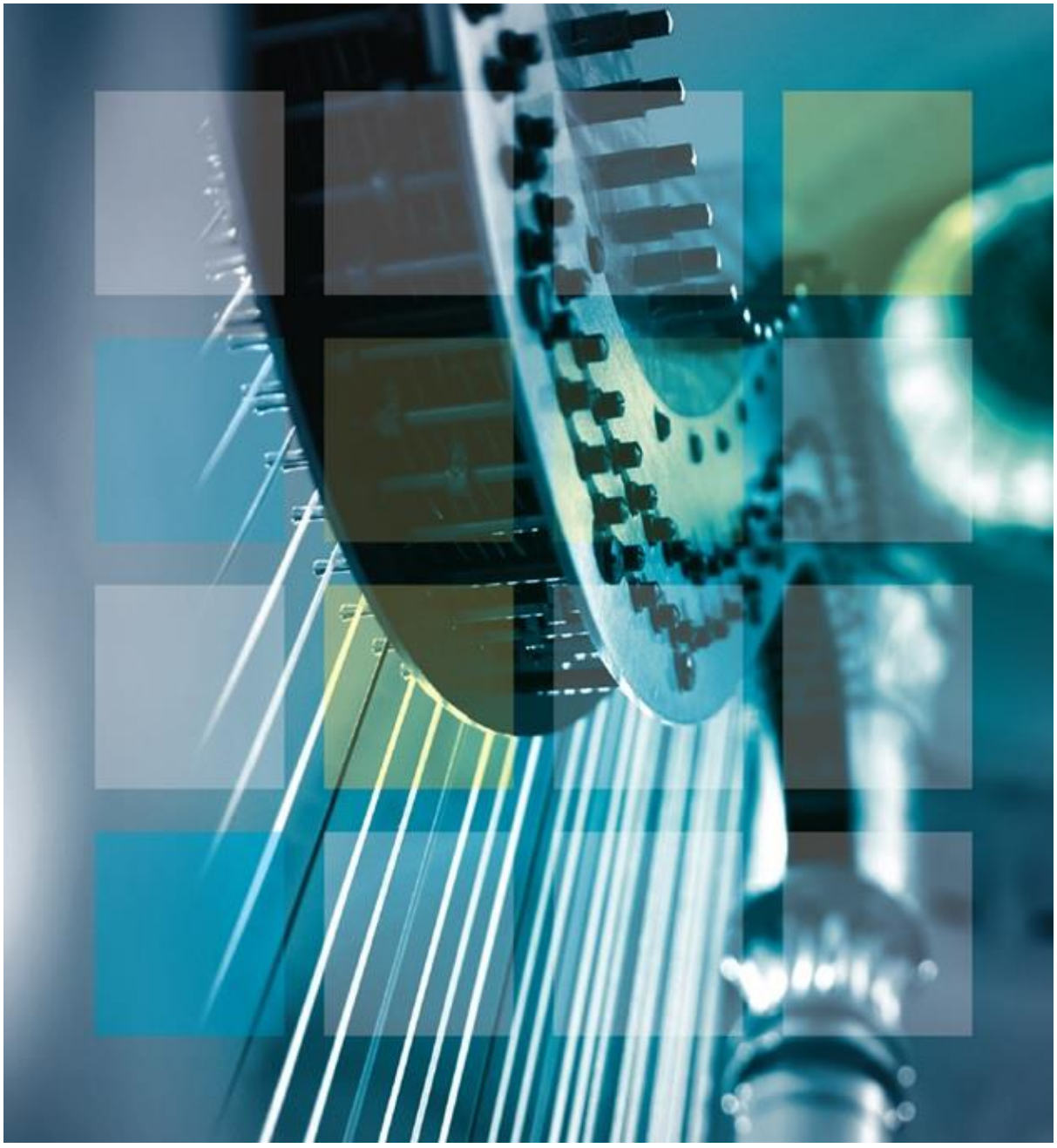

4th EU Anti-Money Laundering Directive and Funds Transfer Regulation

Public Consultation on Member State discretions

January 2016

Contents

The Consultation Process

The Department of Finance and the Department of Justice and Equality invite interested parties to make submissions in relation to member state discretions contained in the Directive (EU) 2015/849 on the Prevention of the use of the Financial System for the Purposes of Money Laundering or Terrorist Financing (referred to below as "4AMLD") and the Regulation (EU) 2015/847 on Information Accompanying Transfers of Funds (referred to below as "FTR").

4AMLD and FTR are also collectively referred to as the "AML Package" below.

The consultation period **will run to 5pm, Friday 4 March**. Submissions after this date will not be considered.

How to Respond

The preferred means of response is by email to: 4thamldconsult@finance.gov.ie

Alternatively, you may respond by post to:

4AMLD Consultation
c/o Financial Services Division
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2
D02 R583

Please include contact details if you are responding by post. When responding, please indicate whether you are a professional adviser, representative body, corporate body or member of the public.

Freedom of Information

Responses to this consultation are subject to the provisions of the Freedom of Information Acts. The Department may receive requests for any or all information supplied as part of this process. Any information which would be considered commercially sensitive should be highlighted as appropriate. Parties should also note that responses to the consultation may be published on the website of the Department of Finance.

What happens next?

The views expressed in this consultation process will be considered in the context of the transposition of 4AMLD into Irish law.

Introduction

The grounds and objectives for the EU AML package were set out by the EU Commission as follows:

> AML Package – Objectives:
>
> "The main objectives of the measures proposed are to strengthen the Internal Market by reducing complexity across borders, to safeguard the interests of society from criminality and terrorist acts, to safeguard the economic prosperity of the European Union by ensuring an efficient business environment, to contribute to financial stability by protecting the soundness, proper functioning and integrity of the financial system.
>
> These objectives will be achieved by ensuring consistency between the EU approach and the international one; ensuring consistency between national rules, as well as flexibility in their implementation; ensuring that the rules are risk-focused and adjusted to address new emerging threats."
>
> EU Commission - 05/02/2013

The AML Package repeals the following:

- 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 ("3AMLD")
- Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European

Parliament and of the Council as regards the definition of 'politically exposed person' and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis.
- Directive 2007/64/EC of the European Parliament and the Council of 13 November 2007 on payment services in the internal market

Key features of Fourth EU Anti-Money Laundering Directive

At a high level, 4AMLD:

- Aligns EU Anti-Money Laundering ("AML") / Countering the Financing of Terrorism ("CFT") law with international standards set by the Financial Action Task Force ("FATF");

- Embraces a risk-based approach whereby the EU itself, its Member States and its supervisors and also obliged entities[1] of the Union conduct risk assessments to determine how best to allocate resources to respond to threats of money laundering and terrorist financing.

At a more detailed level, 4AMLD:

- Broadens the scope of EU AML/CFT legislation to cover gambling service providers, albeit subject to a derogation where risk assessment can prove the risks of money laundering or terrorist financing are low;

- It requires companies and trusts to hold information on persons ultimately controlling them, i.e. their beneficial owners

- It requires Member States to take measures to establish and maintain central registers of beneficial ownership data on corporate and other legal entities and certain trusts;

- It clarifies respective roles and responsibilities of 'home' and 'host' supervisory authorities in relation to obliged entities conducting cross-border business;

[1] 4AMLD refers to 'obliged entities' while the Criminal Justice (Money Laundering & Terrorist Financing) Acts 2010-2013 currently refers to 'designated persons'.

- It strengthens cross-border cooperation between Member States' Financial Intelligence Units ("FIU");

- It maintains but enhances the risk-based approach of the 3AMLD, establishing mechanisms whereby European Supervisory Agencies ("ESAs") can take a role in the development of guidelines to assist credit and financial institutions to apply the risk based approach;

- It extends to domestic politically exposed persons ("PEPs") the 3AMLD requirement for enhanced CDD;

- It lowers the threshold, (from €15,000 to €10,000) at which CDD should be carried out on cash transactions for goods.

Key features of Funds Transfer Regulation

The FTR:

- Aligns EU law with the revised FATF recommendation 16 on "wire transfers"[2];

- It enhances the traceability of credit transfers by imposing requirements to include additional information in messages accompanying wire transfers; specifically, payee information will be necessary where previously only payer information was included[3];

- Places obligations on payment service providers to establish risk-based procedures for determining when to execute, reject or suspend a transfer of funds which lacks the required payer/payee information;

- Tasks the ESAs with issuing guidelines for use by Member States' competent authorities and by EU payment service providers in relation to measures they will need to take to implement Articles 7, 8, 11 and 12 of the FTR.

[2] FATF, International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation, The FATF Recommendations, last accessed on 09/12/15 at: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

[3] Directive 2007/64/EC of the European Parliament and the Council of 13 November 2007 on payment services in the internal market

General Approach to Consultation

4AMLD builds upon the framework established under 3AMLD and as such contains a number of provisions and national discretions which have already been transposed into Irish law. To illustrate, articles 2(3), 14(2), 15(1), 25 & 48(9) of 4AMLD contain a number of discretions, which were previously included in the transposition of 3AMLD.

The Departments, in the interest of continuity and in the absence of any concerns brought to their attention, are minded to propose that such provisions be retained. However, the Departments are open to considering views from stakeholders in this regard.

National Discretions in 4th Anti-Money Laundering Directive

1. Discretion to exempt gambling services on proof of low risk

Article 2(2) With the exception of casinos, and following an appropriate risk assessment, Member States may decide to exempt, in full or in part, providers of certain gambling services from national provisions transposing this Directive on the basis of the proven low risk posed by the nature and, where appropriate, the scale of operations of such services. Among the factors considered in their risk assessments, Member States shall assess the degree of vulnerability of the applicable transactions, including with respect to the payment methods used.

Comment:

Article 2(2) provides that following an appropriate risk assessment, member states may decide to exempt certain gambling services providers (with the exception of casinos) from the requirements of 4AMLD on the basis of proven low risk posed by such services.

The State is required to conduct a risk assessment to determine whether there are risks that gambling services could be used to perpetrate money laundering or terrorist financing. The assessment will look at the nature and scale of the gambling operations in Ireland and at the payment methods used to pay for gambling services. Under the Directive, member states are required to indicate how they have taken into account any relevant findings in the forthcoming EU Commission supra-national risk assessment (article 6).

Article 3(14) of 4AMLD defines 'gambling services' as:

a service which involves wagering a stake with monetary value in games of chance, including those with an element of skill such as lotteries, casino games, poker games and betting transactions that are provided at a physical location, or by any means at a distance, by electronic means or any other technology for facilitating communication, and at the individual request of a recipient of services;

The 4AMLD could therefore apply to online gambling services; services provided face-to-face; activities such as bingo events and lotteries and the more recognisable and traditional services offered in Ireland through bookmakers and on course at race meetings.

Question Box 1

1. What are the types of gambling services currently occurring in Ireland and what is their nature, scale and what are the payment methods involved?

2. What are the ML/TF risks associated with the types of gambling services identified in response to Question 1? What is the level of risk for those risks? What is the rationale for the levels identified?

3. What "customer identification" and transaction monitoring procedures are currently employed in each type of gambling service identified in response to Question 1 and what is their effectiveness in addressing the risks identified in response to Question 2?

4. What impact would introducing "customer identification" and transaction monitoring procedures have on the types of gambling services identified in response to Question 1?

5. What are the differences, if any, between the various offline (traditional) gambling services and online gambling services in respect of their ML/TF risks?

6. Are there any other controls that are in place or should be put in place to mitigate any risks?

7. Are there any other views in relation to this discretion?

2. Discretion to allow obliged entities not to apply certain CDD measures in relation to e-money

Article 12(1) By way of derogation from points (a), (b) and (c) of the first subparagraph of Article 13(1) and Article 14, and based on an appropriate risk assessment which demonstrates a low risk, a Member State may allow obliged entities not to apply certain customer due diligence measures with respect to electronic money, where all of the following risk- mitigating conditions are met:

> *(a) the payment instrument is not reloadable, or has a maximum monthly payment transactions limit of EUR 250 which can be used only in that Member State;*
>
> *(b) the maximum amount stored electronically does not exceed EUR 250;*
>
> *(c) the payment instrument is used exclusively to purchase goods or services;*
>
> *(d) the payment instrument cannot be funded with anonymous electronic money;*
>
> *(e) the issuer carries out sufficient monitoring of the transactions or business relationship to enable the detection of unusual or suspicious transactions.*

For the purposes of point (b) of the first subparagraph, a Member State may increase the maximum amount to EUR 500 for payment instruments that can be used only in that Member State.

Comment

The Central Bank of Ireland is responsible for authorisation[4] and ongoing regulation of entities offering e-money services.

To grant a derogation from the obligation to carry out normal CDD, there is a need for "*an appropriate risk assessment which demonstrates a low risk".*

[4] https://www.centralbank.ie/regulation/industry-sectors/electronic-money-institutions/Pages/authorisation.aspx

The FATF's interpretive note on recommendation 10 (CDD) clarifies that countries or entities would identify lower risk scenarios and decide to allow simplified measures under certain conditions.[5]

The FATF Interpretive Note to recommendation 10 (CDD)[6], provides that:

"Where the risks of money laundering or terrorist financing are lower, financial institutions could be allowed to conduct simplified CDD measures, which should take into account the nature of the lower risk.

The simplified measures should be commensurate with the lower risk factors (e.g. the simplified measures could relate only to customer acceptance measures or to aspects of ongoing monitoring).

Examples of possible measures are:

- Verifying the identity of the customer and the beneficial owner after the establishment of the business relationship (e.g. if account transactions rise above a defined monetary threshold).

-Reducing the frequency of customer identification updates.

-Reducing the degree of on-going monitoring and scrutinising transactions, based on a reasonable monetary threshold.

-Not collecting specific information or carrying out specific measures to understand the purpose and intended nature of the business relationship, but inferring the purpose and nature from the type of transactions or business relationship established.

Simplified CDD measures are not acceptable whenever there is a suspicion of money laundering or terrorist financing, or where specific higher-risk scenarios apply."

The European Supervisory Authorities (ESAs) have recently consulted on 'risk factors' associated with a wide range of financial services and products through

[5] International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation, The FATF Recommendations : http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

[6] International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation, The FATF Recommendations: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

their *"Consultation Paper on Guidelines on risk factors and simplified and enhanced customer due diligence"*[7]. Chapter 3, pages 44-49 outline factors which both increase and decrease the ML/TF risks associated with e-money.

Because e-money institutions are considered "financial institutions" for the purposes of the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 – 2013, the ESAs' (draft) guidelines may be relevant to responses to this public consultation.

The draft guidelines on which the ESAs seek input will ultimately *"provide credit and financial institutions with the tools they need to make informed, risk-based and proportionate decisions on the effective management of individual business relationships and occasional transactions for anti-money laundering and countering the financing of terrorism purposes."*

They provide guidance on the factors firms should consider when assessing the money laundering and terrorist financing risk associated with a business relationship or occasional transaction and set out how credit and financial institutions can adjust the extent of their customer due diligence measures in a way that is commensurate to the money laundering and terrorist financing risk they have identified.

Competent authorities are expected to use these ESAs' guidelines when assessing whether the money laundering and terrorist financing risk assessment and management systems and controls of EU credit and financial institutions are adequate.

Question Box 2

What are the views from the public on article 12 and what risks may need to be taken account in the risk assessment referred to in article 12(1)?

3. Beneficial ownership register (corporates)

Comment

Article 30(1) requires Member States to ensure that corporate entities in their territory 'obtain and hold' adequate, accurate and current information on their

[7] https://www.eba.europa.eu/news-press/calendar?p_p_id=8&_8_struts_action=/calendar/view_event&_8_eventId=1240371

beneficial ownership and that they provide this information to designated persons undertaking customer due diligence.

Article 30(2) provides that the above beneficial ownership information on companies should be accessible (in a timely manner) to competent authorities and financial intelligence units.

Article 30(3) requires Member States to ensure the above beneficial ownership data on corporate entities is held in a central register or database established in accordance with national systems and article 30(4) further obliges Member States to ensure the beneficial ownership information is 'adequate, accurate and current'.

Article 30(5) relates to levels of access to the beneficial ownership information referred to in article 30(1); Member States are required to ensure that the information on the beneficial ownership is accessible in all cases to:

(a) competent authorities and FIUs, without any restriction;

(b) obliged entities, within the framework of customer due diligence in accordance with Chapter II;

(c) any person or organisation that can demonstrate a legitimate interest.

Member States may decide to allow for wider access to the beneficial ownership register beyond the categories listed in Article 30(5), for example to the public without restriction.

Article 30(9) recognises it may be undesirable to publish some types of beneficial ownership information:

> *Article 30(9) Member States may provide for an exemption to the access referred to in points (b) and (c) of paragraph 5 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. Exemptions granted pursuant to this paragraph shall not apply to the credit institutions and financial institutions, and to obliged entities referred to in point (3)(b) of Article 2(1) that are public officials.*

In certain cases, special provision may be needed to allow beneficial owners to apply to have restrictions placed on public access to:

- beneficial owners' residential addresses;
- beneficial owners' dates of birth;
- other types of beneficial ownership data where either the personal characteristics of the beneficial owner, or the company's activities are such that persons may be exposed to fraud, kidnapping, blackmail, violence or intimidation, or where the beneficial owner is a minor or otherwise incapable.

Under Article 30(9) these restrictions would not prevent competent authorities or FIUs from accessing all data on the beneficial ownership register.

Question Box 3

What are the views from the public on the level of access to the register of beneficial ownership for corporate and other legal entities. Do you think access to this register should be restricted as set out in Article 30(5), (a)-(c) or should access be extended to the public at large? What are the views from the public as to whether the beneficial owners or controllers of companies should be able apply, on a case by case basis, to restrict public access to some types of personal information such as - residential addresses or dates of birth (article 30(9))? What categories of personal data might enjoy such exemption? What circumstances could justify the exempting of data?

4. Beneficial ownership register of trusts

Under Article 31(4) Member States shall require that the information referred to in paragraph 1 is held in a central register when the trust generates tax consequences. The central register shall ensure timely and unrestricted access by competent authorities and FIUs, without alerting the parties to the trust concerned. It may also allow timely access by obliged entities, within the framework of customer due diligence in accordance with Chapter II. Member States shall notify to the Commission the characteristics of those national mechanisms.

Commentary

Article 31(4) requires Member States to hold trust-related information in a central register when trusts generate 'tax consequences'. The Revenue Commissioners

have indicated an openness to be the body that will establish and maintain this central register of trusts.

It is envisaged that the following could evidence the generation of a tax consequence for trusts – please note that this list is not exhaustive.

- Receipt by the trustees of income or capital gains.
- Disposal of income or capital assets by the trust.
- Movement of funds by the trust.

Rationale and operational approach

Mechanisms to gather, store and maintain this trust-related data would need to be aligned with confidentiality procedures established by the Revenue Commissioners to protect data disclosed to them in confidence.

Where a tax consequence occurs, trustees would be required, through enhanced reporting mechanisms, to provide accurate and up-to-date information to the Revenue Commissioners.

In accordance with Article 31(4), Revenue would be required, on request, to provide competent authorities and FIU's with timely and accurate information held on the central register of trusts without alerting the parties to the trust concerned.

Please note: 4AMLD does not require the establishment of a central register to hold information on trusts which do not generate tax consequences, however it is important to note that trustees of 'any express trust' will be required to:

- obtain and hold adequate, accurate and up-to-date information on beneficial ownership regarding the trust;
- disclose their status (as trustee) and provide the information referred to in articles 31.1 a) – e) to 'obliged entities' i.e. to credit and financial institutions or other reporting entities where the trustee is about to form a business relationship with them.

Obliged entities will have access to the information which trustees are required to maintain under Article 31(2) as trustees would be required to declare their status and provide such information when establishing a business relationship or carrying out an occasional transaction above certain thresholds.

Question Box 4

Views are sought as to the registration requirements for trusts under Article 31(4).

Views are sought as to the list of tax consequences that would result in a requirement to register under Article 31 (4).

Are there any other views on how we might transpose this article?

5. Discretion to allow obliged entities to mitigate risk through group structures

Article 26(2) Member States shall prohibit obliged entities from relying on third parties established in high-risk third countries. Member States may exempt branches and majority-owned subsidiaries of obliged entities established in the Union from that prohibition where those branches and majority-owned subsidiaries fully comply with the group-wide policies and procedures in accordance with Article 45.

Commentary

This discretion may be aligned with FATF recommendation 17 (paragraph 3)[8] and also aligned with the risk based approach. It is possible that group AML/CFT programmes can effectively mitigate risks posed by doing business with higher risk jurisdictions.

[8] FATF, International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation, The FATF Recommendations, last accessed on 09/12/15 at: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

Question Box 5

What are the views from the public on this issue?

6. Discretion to require appointment of 'Central Contact Points'

Article 45(9) Member States may require electronic money issuers as defined in point (3) of Article 2 of Directive 2009/110/EC and payment service providers as defined in point (9) of Article 4 of Directive 2007/64/EC established on their territory in forms other than a branch, and whose head office is situated in another Member State, to appoint a central contact point in their territory to ensure, on behalf of the appointing institution, compliance with AML/CFT rules and to facilitate supervision by competent authorities, including by providing competent authorities with documents and information on request

Commentary

Article 45(9) allows Member States to require electronic money issuers and payment service providers to appoint central contact points. The State invites submissions on this discretion.

Question Box 6

What are the views from the public on this issue?

National Discretions in the Funds Transfer Regulation

7. Discretion to exclude certain types of payments from scope of FTR

> *Article 2(5) A Member State may decide not to apply this Regulation to transfers of funds within its territory to a payee's payment account permitting payment exclusively for the provision of goods or services where all of the following conditions are met: (a) the payment service provider of the payee is subject to Directive (EU) 2015/849; (b) the payment service provider of the payee is able to trace back, through the payee, by means of a unique transaction identifier, the transfer of funds from the person who has an agreement with the payee for the provision of goods or services; (c) the amount of the transfer of funds does not exceed EUR 1 000.*

Commentary

Member States may exempt from the scope of the Regulation certain domestic low-value transfers of funds that are made to purchase goods or services.

Member States can only grant such exemption where the payment services provider of the payee can back-trace the payment, by means of a unique identifier, to the purchaser of goods or services.

The State invites submissions on this discretion.

Question Box 7

Do you operate a payment service which uses unique transaction identifiers which allow funds transfers to be traced back to the payer in the manner outlined? If so, please advise the State on possible impacts of the FTR's requirements to append payer and payee details to transfers.

8. Other Issues – Public submissions

The public is invited below to comment generally on how Ireland can best implement 4AMLD and FTR with a view to deterring, detecting and disrupting money laundering and terrorist financing in Ireland

Question 8

Are there any other issues related to the transposition of 4AMLD and FTR that you wish to outline?