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European AML proposals & Dutch Wwft

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Me & my firm

Pellicaan Advocaten

- Pellicaan Advocaten, small firm (around 20 lawyers), www.pellicaan.nl
- Business & labour law, mixed practice
- Alliance with auditors' / tax advisors' firm Mazars



Me & my firm

My interest



- Starting from business & company law
- Growing importance of "financial" law (administrative/civil law) for SME's > new Civil Code regulations, Wft, Wtt, Wwft, etcetera
- More supervision, more situations that licences are necessary (e.g. Wft)



Why I got interested

Curiosity

- New complicated administrative (bestuursrechtelijke) legislation
- Not only for larger companies. Also for SME's
- Bureaucratic obligations, not adapted to the characteristics of the company
- No explanation for the choice of these legal concepts



Why I got interested

Concepts

- Proving your innocence through files and records
- No intervention of an independent court
- Unclear rules and ideas; no sufficient guidance
- A myriad of organisations with authority, lists, characteristics; that are all considered to be important to everyone
- No explanation why these measures with a legal nature will be effective



Why I got interested

Concepts

Guilty of murder

Without a corpse?



Why I got interested

Concepts

Of course I like law, but it should not go too far...

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Why I got interested

Curiosity

Is it
Walhalla
or is it
Kafka in the polder?

#kafkaindepolder

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Theory

The good cause

- Thwart criminals in covering and using the proceeds of their criminal activities

(of course terrorism does not need financing; it only needs eager men that have nothing better to do)

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Theory

The good cause, but... [1]

- Crime is everywhere, where there is a lot of money
- Governments create possibilities for crime, e.g. through corporate entity law (UK limited; nominee shareholders / directors)

Remember the CO2-emission trade frauds in the EU discovered around 2010 and made possible through inadequate legislation...

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Theory

The good cause, but... [2]

- The authorities have a lot of information that they do not use in a clever way

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Theory

Solution

- Measures of a legal nature: FATF recommendations, European Directives
- Implemented in the national legislation, in very different ways & in different legal contexts
- NL: Wet ter voorkoming van witwassen en financieren van terrorisme (**Wwft**), predecessors "**Wid**" and "**Wet MOT**"

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Theory

AML legislation for you

1. Important for credit institutions & financial institutions, for their own "compliance"
2. Credit & financial institutions should also know about the duties of the other "obliged entities". Non-compliance by customers → *consequence for their relation with the institutions*

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AML in the Netherlands

AML in NL

- *1-2-1994*
Wet identificatie bij dienstverlening (Wid) > identification & verification
- *Wet melding ongebruikelijke transacties (Wet MOT)* > disclosure of unusual transactions

- *1-8-2008* replaced by:
Wet ter voorkoming van witwassen en financieren van terrorisme (Wwft)

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AML in the Netherlands

AML in NL

- *1-2-1994* AML rules in NL for credit and financial institutions
- *1-6-2003* addition of auditors, lawyers and other new types of companies to "Wid" and "Wet MOT"
- *1-8-2008* Wid & Wet MOT replaced by Wwft
- *1-7-2011* Major changes in the Wwft
- *1-1-2012* Major changes in the Wwft
- *1-1-2013* Major changes in the Wwft

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AML in the Netherlands

Changes 1-1-2013 in the Wwft [1]

New companies that have to comply with the Wwft:

- Certain financial companies
- Forensic accountants
- Assessors of real estate (*taxateurs*)

It has been kept secret that 1-7-2011 providers of domicile have also been brought under the Wwft.

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AML in the Netherlands

Changes 1-1-2013 in the Wwft [2]

- New definition of tax advisor
- New definition of PEP (also applicable to UBO)
- New definition of UBO
- New definition of "transaction"

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AML in the Netherlands

Changes 1-1-2013 in the Wwft [3]

Lawyers

- Relevant services for lawyers are broadened (from real estate, *onroerende zaken*) to al "registergoods" (*registergoederen*), i.e. e.g. ships
- (Separate) creation of mortgage (*hypotheek*) was included as a relevant service for lawyers

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AML in the Netherlands

Changes 1-1-2013 in the Wwft [4]

CDD and other

- Reformulation of several articles regarding the duties of an obliged entity

AML in the Netherlands

Other relevant developments in NL

- Proposal for a change in Dutch criminal law regarding **terrorist financing** (K. 33478)
- Discussion about the case law regarding the definition of **"money laundering"** in Dutch law (HR 8-1-2013 LJN BX6909)

AML in the Netherlands

Position of NL

- Every EU country has different legislation
- Quick changes that all those involved are unable to follow → *e.g. FIU NL website contains incomplete information*

Is there anyone who understands the current system in NL?

Proposal for the 4th Directive

A **month** after major changes in the Wwft the EC proposals were published...

- Why could NL not wait?
- Is NL defending the interests of Dutch "obliged entities" against unnecessary and non-effective new measures?

Proposal for the 4th Directive

Background of the proposal [1]

- The impact assessment takes a legal point of view
- A (non-legal*) scientific assessment of the (new) AML legislation and its effectiveness is lacking

* E.g. economic, organization science

When there are scientific foundations for the current/future EC (and NL) AML system it is being kept secret carefully...

Proposal for the 4th Directive

Background of the proposal [2]

- No attention is paid to national legislation that supports or makes possible ML
- US & UK AML concepts introduced on the continent

Proposal for the 4th Directive

Why?

- A lot of attention for ML itself. Why is there no attention for the scientific reasons to shape AML in the way it is done in the proposal
- Differences in AML between the EU countries: advantage for obliged entities of certain countries?

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Proposal for the 4th Directive

Why?

- Is it effective to let all obliged entities do the same thing on their common customers? (All the double work.)
- Is it fruitful to go after "small" ML and will the costs of that offset the result?
- Is it effective to have the same set of rules for all those different types of companies?
- Many obliged entities have their own legislation, why not amending that?

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Proposal for the 4th Directive

Will it work?

Will ML decrease?

Or will it only cause problems & costs for decent companies?

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Proposal for the 4th Directive

Will it work?

CC BE on the draft AML directive:

- "Will the changes ensure more effective AML regimes? I doubt it.
- But likely to result in excessive costs and unnecessary compliance requirements disproportionate to the risks involved."

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Proposal for the 4th Directive

Highlights of the proposal

New obliged entities [1]

- All corporate and legal entities: obligation of holding information on beneficial ownership !!! (no CDD) (29)

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Proposal for the 4th Directive

Highlights of the proposal

General UBO obligation of article 29

1. Member States shall ensure that corporate or legal entities established within their territory obtain and hold adequate, accurate and current information on their beneficial ownership.
2. Member States shall ensure that the information referred to in paragraph 1 of this Article can be accessed in a timely manner by competent authorities and by obliged entities.

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Proposal for the 4th Directive

Highlights of the proposal

New obliged entities [2]

- Letting agents (2-1-3-c)
- Providers of gambling services (2-1-3-f), now only casinos

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Proposal for the 4th Directive

Highlights of the proposal

Additional requirements [1]

- "Fit & proper" test for certain persons [*] related to providers of gambling services (already in force for TCSP and currency exchange providers)

[*] persons who will effectively direct or will direct the business or are the beneficial owners

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Proposal for the 4th Directive

Highlights of the proposal

Additional requirements [2]

- Measures to prevent criminals to be related [*] to credit institutions, auditors & tax advisors, lawyers, real estate & letting agents, traders in goods > EUR 7500

[*] beneficial owner of a significant or controlling interest or holding a management function

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Proposal for the 4th Directive

Highlights of the proposal

Limited possibility to deviate in case of limited "financial activity", many requirements (2-2)

("financial activity" is not explained)

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Proposal for the 4th Directive

Highlights of the proposal

Many new definitions [1]

- Beneficial owner (3-5)
- PEP, in three types, domestic PEP, foreign PEP, international organisation PE (3-7)
- Gambling services (3-10)

Why trust or company service provider instead of trust and company service provider (3-6)?

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Proposal for the 4th Directive

Highlights of the proposal

Many new definitions [2]

- Reporting obligation (32-1-a)

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Proposal for the 4th Directive

Highlights of the proposal

Three different amounts for cash transactions (10)

- Traders in goods EUR 7500
- Providers of gambling services EUR 2000
- The rest EUR 15000

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Proposal for the 4th Directive

Highlights of the proposal

CDD

- New rules regarding risk assessment (6-8)
- Simplified CDD is made complicated (13)
- Complete makeover of section regarding performance by third parties (24-28)
- New privacy rules, deletion of personal data (39)

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Proposal for the 4th Directive

Highlights of the proposal

Enhanced CDD [1]

- New rules for enhanced CDD (16-23)
- Continuing business with a foreign PEP requires approval (18-b)
- For non-foreign PEPs only extra measures in case of higher risk (19-b)

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Proposal for the 4th Directive

Highlights of the proposal

Enhanced CDD [2]

- PEP-check if beneficiary or UBO of life/investment insurance policy is PEP (20)
- PEP-being ends 18 months after end of function (22)

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Proposal for the 4th Directive

Highlights of the proposal

Procedures

- Group-wide policies and procedures (42)
- Role for EBA, EIOPA and ESMA (42-9 etcetera)

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Proposal for the 4th Directive

Highlights of the proposal

Sanctions (55-58)

- Minimum requirement of national sanctions
- Naming & shaming, as a separate sanction (56-2-a) and by publishing all sanctions (57-1-a)
- Order to cease/desist (57-1-b)
- Withdrawal of authorisation (57-1-c)

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Proposal for the 4th Directive

Highlights of the proposal

Sanctions (55-58) [2]

- Temporary ban of function (57-2-d)
- Administrative sanction legal person up to 10% of the annual turnover (57-2-e)
- Administrative sanction natural person up to EUR 5.000.000 (57-2-f)
- Administrative sanction 2x profits

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Proposal for the 4th Directive

Highlights of the proposal

Governments should do more according to the proposal

But they could have done a lot more under the current AML Directive already...

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Proposal for the 4th Directive

Consequences for NL

- It is getting more complicated again
- A lot of changes in the Wwft are necessary
- No relation with other NL measures against financial crime
- NL wants to maintain the differences with other EU-countries and the EU-proposals; why?

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Proposal for the 4th Directive

NL government

- Defend the interests of Dutch obliged entities
- Promote more differentiation between the different types of obliged entities
- Don't ask NL companies to use expensive systems to go after small crime
- Use your resources better
- Create a better general information system (or ask for a European system)
- Keep it simple

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thx for listening

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