25 June 2012

Our ref: ICAEW Rep 85/12

Your ref: COM(2012) 168 final

The European Commission

By email: MARKT-AML@ec.europa.eu

Dear Sirs

Report of the European Commission on the 3rd Money Laundering Directive

ICAEW welcomes the opportunity to comment on the *Report from the Commission to the European Parliament and the Council on the application of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing* published by the European Commission on 11th April 2012, a copy of which is available from this link.

ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 138,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

The ICAEW Europe Region is headquartered in Brussels and brings a pan-European perspective to ICAEW's work through regular interaction with professional bodies, firms, oversight authorities and market participants across Europe. It also engages with approximately 5,000 members in EU member states outside the UK. ICAEW is listed in the Commission's Interest Representative Register (ID number: 7719382720-34).

This response reflects consultation with the ICAEW Business Law Committee as well as the Money Laundering and Company Law Committees. These committees include representatives from public practice and the business community. The Business Law Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

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Support for the Initiative

We would like to express our support for the work of the Commission, in its review of the 3rd Money laundering Directive.

ICAEW is a member body of the Federation of European Accountants (FEE) and has been consulted by them in the preparation of their response to the report, submitted on 19 June. We would like to express our support for FEE's response.

This response is intended to provide emphasis to certain aspects of the report that are of particular concern to us and our members and to add some comments on aspects that are not covered in the FEE response. These are set out as an appendix to this letter.

Closing Remarks

We would also like to extend our thanks to the Commission for accepting this submission even after the close of the designated comment period, which has allowed us to fully take into account the comments made by FEE.

Yours sincerely

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APPENDIX

Specific points made in support of those made by FEE, or additional points raised, in response to the Commission's report on the application of the 3rd Money Laundering Directive.

2 Application of the Directive

2.1 Applying a Risk Based Approach (RBA)

RBA applied by Financial Institutions (FIs) and Designated Non-Financial Businesses and Professions (DNFBPs)

A risk-based approach allows an obliged firm to make the best use of its resources by designing its approach based upon its appetite for risk and its areas of detailed knowledge. It also improves the acceptability of the regime to clients where they see that the weight of the regime falls more heavily on riskier people.

2.3 Scope

Serious crimes

We are content that the European approach should be defined in terms of 'all serious crimes' as is currently the case. However, the United Kingdom's regime is currently stronger in that it takes an 'all crimes' approach which we believe works well in this jurisdiction. Our experience is that this releases those obliged to report, both the ordinary individual making internal reports and the officer charged by the obliged entity to communicate with the Financial Intelligence Unit, from a great burden of determining whether the information they have amounts to suspicion of a 'serious crime'. Where an individual sees a suspicious sequence of financial transactions he or she will not necessarily be in a position to know or suspect the predicate offence. Similarly, he or she may not be in a position to evaluate the total value of the predicate crime or whether individual financial transactions should be linked. For these reasons, we are strongly of the opinion that the member state option of including a more comprehensive approach to the definition of crimes within the scope of the Directive should not be removed.

We wish to stress that the Anti-Money Laundering regime must be, and be seen to be, a criminal regime. We most strongly urge that the regime should not become a method of enforcing moral or ethical attitudes. Obliged entities should be required to uphold the law: they should not be required to enforce moral (or ethical) positions that legislators have chosen not to turn into law. For example, in relation to tax crimes, tax planning activities which have not been criminalised are by definition legal. If legislators believe that a tax practice is unacceptable, they should criminalise it rather than expect obliged entities to form judgements as to what is acceptable.

Broadening the scope beyond the existing obliged entities

We commend the work of the Commission, in carrying out a thorough review of the obliged entities, to ensure that the Directive applies more consistently to entities depending on the risk of their providing money laundering opportunities for criminals and criminal entities, rather than by definitional distinctions.

2.4 Customer Due Diligence ("CDD")

€15,000 Threshold

We commend FEE's recommendation that the exemption for transactions below the threshold limit should be clarified, in relation to the provision of services. The term *transaction* is ambiguous, as it applies to professionals. We would draw your attention to the following situations:

- A lawyer charges €200 for holding €100,000 in an escrow account for 1 week.
- An accountant charges €1,000 for the audit of a company with €500,000 turnover.
- An accountant charges €100 for completing the tax return of an individual who pays €20,000 tax on income of €100,000.

Whilst all of these situations are likely to be part of an on-going relationship, they might be one-off transactions. If they were to what value should the transaction threshold be applied? We echo the belief of FEE that it should not in any situation relate to the level of fees for the provision of a professional service.

Simplified Due Diligence ("SDD")

We fully support the clarification that SDD is not a full exemption from CDD. We would make the following points:

- SDD should never be applied where knowledge or suspicion of money laundering exists.
- In the majority of cases, it will be sufficient to conduct sufficient due diligence to evidence that the intended client is actually within a category of entities where SDD is appropriate.

2.5 Politically Exposed Persons

Risk-Based Approach and one year limit

We support the application of a risk based approach to all aspects of the application of initial and continuing CDD and other provisions relating to PEPs in the Directive, whether they are still in office or have left it but are still at high risk of being in the possession of criminal proceeds. Strict time limits over the period after leaving office are less important than the likelihood of their having committed serious crimes while in office and be attempting to launder the proceeds.

2.6 Beneficial Ownership

Transparency of legal persons

We consider that the provisions of the current Directive, whereby obliged entities are required to obtain and retain beneficial ownership information on their customers who are legal persons, are sufficient for compliance with the revised FATF Recommendation. To require publication of the ultimate beneficial ownership of companies could have unacceptable implications for the protection of personal data and for legitimate commercial confidentiality. However, we agree with FEE's recommendation that the directors of companies should have a duty to assist in the identification of ultimate beneficial owners, providing all information that is or may be relevant to obliged entities acting for those companies, where these are bound by appropriate obligations of professional confidentiality.

2.7 Reporting Obligations

We note and agree with the comments made by FEE is response to the queries raised by the Commission. We question, however, how much these points will increase the consistent application of the Directive and in particular some low levels of reporting, as identified in section 3.2 of the report. Rather, we suggest that low levels of reporting may be at least in part due to confusion of some professionals on which of their services are included within the scope of the Directive; the extent to which they will be liable to their client, if the suspicion on which a report is based is later found out to be unfounded; and the extent to which their services come within the exemption from reporting when ascertaining the legal position of their client or in defending or representing their client in legal proceedings.

We suggest that in order to improve the consistency of the application of the Directive, the following points should be covered:

- The carrying out of administrative functions, such as the preparation of tax returns or the maintenance of financial or other records, should be included within both the CDD requirements of the Directive and the suspicion reporting obligations, whether these are carried out by a lawyer, an external accountant or tax adviser, or by a financial institution.

- Tax and other commercial and business advisory services should also be included within the scope of the Directive for the purposes of CDD, though reporting obligations should depend on whether they fall within the existing provisions exempting lawyers, external accountants and tax advisers from making suspicion reports when ascertaining the legal position of their clients or representing them in legal proceedings.

- Clarification should be made that obliged entities should not be considered to be in breach of any obligations of client confidentiality when they make a suspicion report where they are not in a position to know which predicate offence may have been committed. They should not be put in a position of risk where the underlying crime could be a serious or less serious offence – or indeed an obscure civil liability that the client wishes to escape.

2.9 Group compliance

We support FEE's comments on the desirability of expanding the definition of a group, to allow the sharing of information of information within professional networks. This should also apply to the passing of information to the auditors of both head office and the auditors of the parent company of a group, whether or not the auditors of such entities are members of the same professional network. We note that where information is shared outside the deemed group, the tipping off law will still apply. This should assist in preventing the prejudicing of investigations or the undermining rights of data subjects.

2.14 Protection of Personal Data

It is clearly vital for the effective implementation of both the anti-money laundering and the data protection provisions, that there are no actual or perceived conflicts between their requirements, and that the dividing lines between them are clear and easy to apply. The privacy and other rights of those making suspicion reports should be preserved, as well as those about whom their suspicions relate.

3 Directive's Treatment of Lawyers and Other Independent Legal Professionals

In drawing their conclusions under this section of the report, we consider it essential that the Commission retain and strengthen the operation of opening paragraph 21 of the Directive, that directly comparable services need to be treated in the same manner when provided by any of the professionals covered by the Directive. We have made some suggestions under section 2.7 above, which may assist in this.

ICAEW
25 June 2012