

## TECHNICAL NOTE.

### THE TRANSPOSING PROCESS OF AML EUROPEAN DIRECTIVES.

On 4<sup>th</sup> July 2019, the Italian Government submitted the parliament Act n. 95 "*Scheme of legislative decree concerning additional and corrective provisions to the legislative decree 25<sup>th</sup> May 2017, 90 and to the legislative decree 25<sup>th</sup> May 2017, 92 implementing directive 2015/849/EU, as well as the implementation of directive 2018/843/EU which amends the Directive 2015/849/EU concerning the prevention of the use of the financial system for money laundering or terrorist financing and the Directives 2009/138/EC and 2013/36/EU*".

The draft decree under review: on one hand, it integrates and corrects some provisions that have not been transposed or partially implemented by the Italian Regulator<sup>1</sup> with reference to Directive 2015/849 aka "IV Anti-Money Laundering Directive" (**4AMLD**). On the other hand, it implements the provisions in the meantime took place<sup>2</sup> with the publication of the Directive 2018/843 aka "V Directive" (**5AMLD**). With this perspective, we talk about "Amendment". The deadline for the final approval of the Amendment is set for 4<sup>th</sup> October 2019<sup>3</sup>.

On 18<sup>th</sup> September, 2019, the Italian Parliament received feedback from Italian Financial Intelligence Unit (**FIU**) on the Amendment on behalf of its Director, Claudio Clemente<sup>4</sup>. In the arguments exposed, Italian FIU Director has paid particular attention to the most relevant innovations in the prevention system defined by the 5AMLD as well as the Amendment: Virtual Assets (**VAs**) and Virtual Asset Service Providers (**VASPs**), even operating *on-line*.

In particular, the FIU warned the Italian Regulator about the need to prevent regulatory arbitrage by foreign VASPs and to provide national anti-money laundering controls on VAs carried out in the territory of the Italian Republic, to protect public order, as happened recently for the payment services industry through the central contact point.

In this perspective, apart from including VASPs among the obliged entities to anti-money laundering measures, the provision contained in 2016 delegation law for the transposition of the 4AMLD would seem to be still not accomplished to the extent that it prescribes the extension of the safeguards of prevention of telematics activities *tout court*<sup>5</sup>.

Ultimately, the Italian FIU recalls the need to provide anti-money laundering obligations based on information duties about suspicious transactions behalf on entities established abroad who carry out online financial activities in the Republic, even without the use of physical points to access the products and services offered. The VASPs are also included among the obliged entities.

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<sup>1</sup> Accepting to the *list of issues* sent by the European Commission (Procedure 2019/2042).

<sup>2</sup> 30<sup>th</sup> May, 2018.

<sup>3</sup> This deadline - which does not coincide with 10<sup>th</sup> January 2020, envisaged for national transposition of the 5AMLD - is justified because it is a amendment of the 4AMLD, which in turn provided for the possibility of interventions within twenty-four months of entry into force of the original legislative decree, *ie* Legislative Decree no. 90 of 4 July 2017, to which must be added three extra months for the expression of the parliamentary opinion.

<sup>4</sup> The full paper is published on the Italian FIU web-site:

[https://uif.bancaditalia.it/pubblicazioni/interventi/documenti/Audizione\\_Clemente\\_2019-09-18.pdf](https://uif.bancaditalia.it/pubblicazioni/interventi/documenti/Audizione_Clemente_2019-09-18.pdf)

<sup>5</sup> See art. 15 (2, m), law 12<sup>th</sup> August 2016, 170.

## CRYPTO ASSET LAB CONTRIBUTION TO ONGOING PROCESS.

The Crypto Asset Lab<sup>6</sup> had already provided similar considerations last 30<sup>th</sup> August, in its contribution paper to the consultation launched by Global Digital Finance (UK)<sup>7</sup> concerning the drafting of a Code of Conduct for the VASPs on KYC/AML rules according to FAFT Guidance for a risk-based approach to VAs and VASPs released on 21<sup>st</sup> June 2019.

The *contribution paper* spread by the Lab highlights with particular emphasis *cross-border* transactions carry out by the VASPs. In detail, it focuses on the prevention measures that foreign VASPs should implement in order to be compliant with the local anti-money laundering information required in the *host* country.

The arguments implying the indications provided by FATF dossier in conjunction with the 4AMLD provisions, for payment services in the European landscape, regarding anti-money laundering safeguards are meant to be activated for providers with “EU passports”, offering their products/services also in another *host* member country.

The ID 80 of FATF guidance recommends to foreign VASPs, operating in a *host* jurisdiction, to appoint a “*resident executive director, substantive management presence*” in order to consent to the competent authorities the effective KYC / AML supervision of the VASP, even in a domestic context.<sup>8</sup>

*A fortiori*, the ID 81 FAFT-GAFI guidance specifies that VASPs have to be licensed or registered also in the territory whose services can be accessed by or are made available to people residing or living within their jurisdiction.<sup>9</sup>

The art. 45 of the 4AMLD, imposes to *cross-border* financial operators to implement effectively anti-money laundering group policies, including at the level of branches and majority-controlled subsidiaries located in EU Member States and third countries.

Assuming the telematics nature of the financial services provided, paragraph 9 of the mentioned art. 45 clarifies that payment service providers (and e-money) with a “EU passport” established in the territory of the *host* country - in forms other than a branch – must appoint a central contact point in order to be compliant with local anti-money laundering regulations as well as facilitate supervision by competent authorities “*including by providing competent authorities with documents and information on request.*”

In addition to the scenario just above mentioned, Commission Delegated Regulation (EU) 2018/1108 of 7<sup>th</sup> May 2018 has defined the regulatory technical standards on the criteria for the appointment of a central contact point for the payment services industry and regulated operating principles.

In light of the arguments presented, the Crypto Asset Lab, glad to give its contribution to draft a code of conduct valid for virtual currencies service providers promoted by Global Digital Finance (UK), has proposed an integration to the paragraph on anti-money laundering *governance*.

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<sup>6</sup> Please refer to the “*mission statement*” available online: <https://cryptoassetlab.diseade.unimib.it/>

<sup>7</sup> For more info please refer to the following link:  
<https://www.gdf.io/docsconsultations/part-viii-code-of-conduct-principles-for-know-your-customer-kyc-anti-money-laundering-aml/>

<sup>8</sup> The ID 80 of FAFT guidance set out: “*VASPs that are licensed or registered should be required to meet appropriate licensing and registration criteria set by relevant authorities. Authorities should impose such conditions on licenced or registered VASPs to be able to effectively supervise the VASPs. Such conditions should allow for sufficient supervisory hold and could potentially include, depending on the size and nature of the VASP activities, requiring a resident executive director, substantive management presence, or specific financial requirements.*”

<sup>9</sup> L’ID 81, provides that: “*Jurisdictions may also require VASPs that offer products and/or services to customers in, or that conduct operations from, their jurisdiction to be licensed or registered in the jurisdiction. Host jurisdictions may therefore require registration or licencing of VASPs whose services can be accessed by or are made available to people residing or living within their jurisdiction.*”

**More in detail, the Lab suggested to VASPs, who offer services in a *host* jurisdiction - in forms other than a branch - to appoint a local central contact point to comply local AML provisions and to facilitate the local supervision activity including Suspicious Transaction Report - SAR<sup>10</sup>.**

In this perspective, the contribution paper provided by the Crypto Asset Lab on 30<sup>th</sup> August 2019 was foresight placed, considering regulatory gaps set out by Italian FIU, during parliamentary hearings useful to transpose draft decree "Amendment" above mentioned.

**Definitively, assuming that in the face of public order requirements "domestic activities" must be undergo to national anti-money laundering controls, in the near future the Crypto Asset Lab wish for an intervention of the European regulator to extend the prevention measures also local VASPs, in analogy with payment services industries.**

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<sup>10</sup> "Entities which are part of Group, operating in a host jurisdiction in forms other than a branch, and whose Parent Company's HQ is situated in another jurisdiction, will appoint a central contact point in order to ensure, on behalf of the Parent Company, compliance with AML/CFT rules and to facilitate supervision by competent authorities, including by providing documents and information on request".