Together we can do more

Enhancing the efficiency of measures to fight against Anti-Money Loundering and Countering the Financing of Terrorism

ELTI Position Paper

Brussels, 25 May 2022

On July 20, 2021, the European Commission published a new legislative package revising the Anti-Money Laundering and Countering the Financing of Terrorism regulation (AML-CFT)[1]. National Promotional Banks and Institutions (NPBIs) such as i.e. Caisse des Dépôts Group (CDC), Kreditanstalt für Wiederaufbau (KfW) or Bank Gospodarstwa Krajowego (BGK) are impacted by this initiative in regard to the draft regulation on *the prevention of the use of the financial system for the purpose of money laundering* (AMLR) and/or the revised regulation on *information accompanying transfers of funds and certain crypto-assets* (Transfer of funds regulation).

From a general perspective, we welcome the objectives pursued by the European Commission. As public financial institutions, we support the ambition of this new package. The following remarks are intended to enhance the efficiency of the new measures and facilitate the proper conditions for their application. In this perspective, we would like to share three main challenges:

- The benefits of an approach based on actual risks, which avoids a disproportionate burdening of already efficient procedures for identification or reporting;
- A need for clarification to ensure that new requirements are fully consistent;
- Highlighting points of attention related to the nature of certain NPBIs' specific activities.

1) Adoption of a risk-based approach for the collection of information on beneficial owners - Art. 44

Regarding current requirements in national legislations, the proposed EU regulation (AML-CFT regulation significantly increases the level/type of information obliged entities would have to collect on beneficial owner(s) (BO), regardless of the level of risk associated with the performed transactions. We understand the European Commission's focus is to provide an alternative for collecting national identification number. Indeed, a recording of this information, regardless of the level of risk, would imply to systematically collect BO's identity documents. Currently, an extract from the register of BOs, or, where applicable, a written statement signed by the customer, is sufficient in several member states to verify the customer's identity under low risk (See as an example *ACPR, guidelines on the identification, verification of identity and knowledge of customers adopted in December 2021, §27 and annexes on pp. 54 and 58*). ELTI members suggest clarifying this point to favour a risk-based approach, so that, under low risk, national identification number does not have to be collected.

[1] Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending regulations – COM(2021) 421 final

A similar risk-based approach should equally apply to the intended updates timing for BOs. In this respect, updates could also be subject to a risk-based approach without being systematically annual.

2) Exemption for verifying the identity of beneficial owners - Art. 27 and 42

NPBIs stress a need for consistency in the draft Regulation (AML-CFT regulation) regarding the exception for listed companies and public bodies to verify beneficial owner's identity. Indeed, Art. 42 of the draft EU Regulation provides that specifications in Chapter IV on beneficial ownership are not applicable to listed companies and public bodies. As the text currently stands, this exemption does not cover other chapters, even though reference is made to beneficial owners. Article 27 on simplified due diligence refers to the obligation to authenticate the BO (point a), without mentioning this requirement does not apply to listed companies and public bodies. This exemption is also not provided by Art. 19 by which time the identity of the customer and the BO is verified.

Regarding the common system applicable to identification of beneficial owners for corporate entities, EU parliament draft report introduces a reduction – from 25% to 5% - of the percentage threshold indicating ownership of a legal entity Article 42 (1.2) : "*For the purpose of this Article, where 'control through an ownership interest' is based on a threshold, it shall be determined based on a maximum ownership of 5% plus one of the shares or voting rights or other ownership interest in the corporate entity, including through bearer shareholdings, on every level of ownership*."

The current proposal could foresee an immense increase of entities that would need to be reported. We agree on the principle of this position and the logic behind, but we must emphasise that such a sudden decrease of the threshold would substantially increase the administrative burden for financing institutions in terms of KYC processes and documentation without creating objective value added for the fight against money laundering.

3) Extension of the definition of politically exposed persons (PEP) – Art. 2

Amendment 26 in the draft report of the EU Parliament (AML-CFT regulation) would lead to include "heads of regional and local authorities including groupings of municipalities and metropolitan regions" in the list of politically exposed persons (PEP). We understand and agree to the logic behind this position. However, it should be stressed that an extension of the PEP definition would turn the whole domestic public sector lending into high-risk rating. It would result in significant increase in administrative workload, e.g. shorter review cycles, documentation. We rather see the approach as described in the EBA Guideline 2021/02 2.4 f) as a good way to treat them, as it focuses on actual risk. The regulation could also leave the responsibility to each member state to define at its own level what a "regional and local authorities" covers.

4) Questions regarding exemption for suspicious transactions reporting obligations in specific situations – Art. 17, 50 and 51

a) Suspicious transactions reporting obligations applied to notaries account keeper

Articles 17 and 50 require that entities included in the scope of the proposed regulation (AML-CFT regulation) must file suspicious transaction report when suspecting that funds are the proceeds of a criminal activity or related to terrorist financing. Regarding European parliament draft report, we understand that amended Article 51 and recitals 9 and 10 of the draft proposal provide exemptions for these requirements.

Article 51(2) of the European Parliament's draft report states that notaries, lawyers and other independent legal professionals *"shall be exempted from the requirements laid down in Article 51(1), referring to Article 50(1), to the extent that such exemption relates to information that they receive from, or obtain on, one of their clients, in the course of ascertaining the legal position of their client, except where:*

(a) the ascertainment is inconsistent with applicable law and the legal position is sought in bad faith; or

(b) the ascertainment clearly exceeds legal matters pertaining to the client's legal position;

(c) *the notary, lawyer, other independent legal professional, auditor, external accountant or tax advisor provide information to the client for the purpose of money laundering, or its predicate offences, or terrorist financing and has the knowledge or a well-grounded suspicion that the client requested it for that purpose.*"

New article 51(2a) specifies that the same legal professionals shall be exempted from suspicious transactions reporting "*when performing their task of defending or representing a client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding judicial proceedings, regardless of whether such advice is received or obtained before, during or after judicial proceedings*".

In our view, these amendments could benefit from some clarification in order not to allow for room for interpretation. Indeed, the new formulation could be interpreted against the intended objective of a strengthening of AML/CFT measures.

Moreover, in contrast to notaries, an exemption for notaries' account keepers from suspicious transactions reporting obligations is not provided by the report. Since notaries' account keepers operate in a monopoly situation with regard to notarial transactions, particularly in the area of real estate, we suggest extending the scope of exemption to notaries' account keepers as well.

In order to take into account institution holding the funds of defendants or parties in the context of legal or criminal proceedings, we propose to include in the proposed AML-CFT regulation (or in the technical standards) that an entity required to hold funds on request/on behalf of judicial authorities, should be exempted, in this context, from obligations to report suspicions, following the model applied to legal professionals. Indeed, funds held by such an entity are retained until the final decision in criminal matters, which often rules on the origin and legality of the funds. As follows, it appears that submitting a suspicious transaction reporting would be redundant with the said judicial procedure.

b) Suspension of transactions in case of suspicions and due diligence measures relating to the knowledge of the beneficial owner

In the same perspective, it would be helpful to specify, for example in paragraph 2 of Article 17 of the Regulation, the procedure to be followed by legal professionals account keepers, in the context of their monopolistic mandates, in a situation of suspicions of money laundering.

5) Clarification of due diligence requirements when outsourcing to a third party subject to the AML/CFT regime

Article 38 of the AML-CFT regulation provides that obliged entities may rely on due diligence measures mentioned in points a, b and c of Article 16 (2) (verification of the beneficiary and the customer's identity, assessment and, where appropriate, procurement of information on the purpose and intended nature of the business relationship) when these are outsourced to a third-party obliged entity.

In the context of relationship between legal professionals and their account keepers, legal professionals' clients can't be defined as clients of account keepers. Then, we suggest clarifying account keepers' obligations, since the business relationship is not realised with the clients mentioned above.

Nevertheless, it seems appropriate to also refer to due diligence monitoring delivered by third party entity to which certain AML/CFT obligations are delegated as part of the ongoing exercise of the business relationship. This obligation is described in Article 16 (2) point d. It would be appropriate to rely on due diligence measures undertaken by the delegate throughout the course of the business relationship, and not only on scrutiny conducted in the context of the establishment of a new business relationship.

Another important point is the range of third parties that may be used for any outsourced services. Particularly the fact, that it will no longer be accepted to contract third parties (e.g. individual contracts with embassies/consulates for remote customer identification are no longer permitted even when a country is a member of FATF as wells as the EU) that are not obliged entities themselves.

6) Provisions regarding information accompanying transfers of funds and crypto-assets

Regarding European Parliament's draft report (Article 31b), the new AML-CFT supervisory authority (AMLA) would establish and update a non-exhaustive public register of information on non-compliant crypto-asset service providers (CSPs), referring to the definition provided by Article 2 (1) point 20 in AML-CFT regulation, i.e., not based in a jurisdiction, without a point of contact or an operator established in an EU jurisdiction and/or operating in the EU without authorisation. Such information will be collected from other institutions. This would facilitate KYC due diligence process for such entities in case our institutions are considered entering into a business relationship with CSPs.

In addition, the draft *Regulation on information accompanying transfers of funds and certain crypto-assets* states that obligations to collect information accompanying transfers of funds for AML/CFT purposes should also apply to transfers of crypto-assets. Article 14 specifies for crypto-assets providers, that transfers of crypto-assets shall be documented by the names of the issuer and the beneficiary.

However, institutions may sometimes face difficulties in identifying them, as they are not systematically known. Crypto-assets transfers rely on blockchain technology, likely to make access to

this information more complex as each user owns a public address and a private key represented by a unique sequence of numbers and letters.

Then, it would be useful for the draft regulation to consider the technical specificities of blockchain in the operational implementation of the collection of information accompanying crypto asset transfers.

7) Other issues to be clarified

Regarding, specific provisions applicable to certain high-net-worth individuals, the draft report of the EU parliament introduces a new article 36a. It should be clarified by the regulator if these new requirements are limited to deposits. Otherwise, this would lead to a significant increase in the due diligence process regarding grants/loans.

The EU parliament also provides several amendments on the question of citizenship and residence by investment schemes (new articles 6a and 31c). We believe it should be clarified by the regulator if these new obligations could have consequences regarding BO requirements ["golden visa or passports"]. Indeed, it is not apparent to report from the ID document how the citizenship has been obtained.

The European Association of Long-Term Investors – ELTI

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The 31 members of the European Long-Term Investors Association (ELTI) a.i.s.b.l. are major long-term investors and represent a combined balance sheet of EUR 2,5 trillion. The Association promotes and attracts quality long- term investment in the real economy, including:

- strengthening cooperation, including at an operational level, between European financial institutions as well as with other Institutions of the European Union (EU) acting as long-term financiers;
- informing the EU and its Institutions on the role and potential of the Members as institutions and agencies for long-term financing;
- strengthening the access of the Members to information on matters related to the EU;
- exchanging information and experiences among Members and with national and international organisations sharing the Association's interest in the promotion of long-term investment;
- developing the concept of long-term investment within the economic and financial sector and promoting academic research on long-term investments;
- representing, promoting and defending the shared interests of its Members in the field of Long-Term Investment in full transparency.

The Full Members of ELTI are generally national official financial institutions dedicated to the promotion of public policies at national and EU level[2]. The European Investment Bank (EIB) as the status of a permanent observer. ELTI also includes Associate Members notably multilateral financial institutions, regional financial institutions and non-banking institutions[3].

[2] Oesterreichische Kontrollbank (OeKB) Austria, Federal Holding and Investment Company (SFPI) Belgium, Bulgarian Development Bank (BDB) Bulgaria, Croatian Bank for Reconstruction and Development (HBOR) Croatia, National Development Bank-CZ (NDB CZ) Czech Republic, Caisse des Dépôts et Consignations (CDC) France, La Banque publique d'Investissement (bpifrance) France, KfW Bankengruppe (KfW) Germany, Hellenic Develoment Bank (HDB) Greece, Hungarian Development Bank (MFB) Hungary, Strategic Banking Corporation of Ireland (SBCI) Ireland, Cassa Depositi e Prestiti (CDP) Italy, Latvian Development Finance Institution (ALTUM) Latvia, Public Investment Development Agency (VIPA) Lithuania, Société Nationale de Credit et d'Investissement (SNCI) Luxembourg, Malta Development Bank (MDB), Malta, Invest-NL Netherlands, Bank Gospodarstwa Krajowego (BGK) Poland, Banco Português de Fomento (BPF) Portugal, Slovak Investment Holding (SIH) Slovakia, Slovenska Izvozna in Razvojna Banka (SID) Slovenia, Instituto de Credito Oficial (ICO) Spain

[3] Nordic Investment Bank (NIB), Council of Europe Development Bank (CEB), Long-Term Infrastructure Investors Association (LTIIA), Participatiemaatschappij Vlaanderen NV (PMV) Belgium, Fund Manager of Financial Instruments in Bulgaria (FMFIB) Bulgaria, NRW.Bank Germany, Consignment Deposits and Loans Fund (CDLF) Greece, INVEGA Lithuania, Turkiye Sinai Kalkinma Bankasi (TSKB) Turkey