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European Banking Federation

Reaction to Legislative Developments on the Proposed AML Directive

- **Executive Summary**

The European Banking Federation (EBF) is fully supportive of the Commission's overarching objective in the AML Package to address the ineffectiveness of the current EU AML framework. This momentum is a unique opportunity to improve the framework and cannot be missed. The EBF believes that there is a crucial need for a paradigm shift. It should consist in moving away from the existing legalistic and bureaucratic tick-the-box approach which generates massive flows of irrelevant data that Financial Intelligence Units (FIUs) cannot exploit in an efficient manner. In our view, it is also absolutely key to develop an intelligence-led approach with the aim to effectively mitigate money laundering risks and detect financial crime.

We hence recognize the importance of establishing an effective and cooperative AML/CFT environment which requires the combined efforts of obliged entities, competent authorities, FIUs, law enforcement and the new AML Authority (AMLA). The new AML/CFT Directive (AMLD6) should provide the appropriate institutional framework for optimizing the efforts of all parties involved.

The EBF particularly welcomes that the AMLD6 introduces standards for risk-based supervision and harmonises the FIU function. However, in its initial version, the package does not address sufficiently some fundamental dimensions of information sharing which must leverage on new technologies and involve all actors of the AML framework, including law enforcement. We strongly believe that public private partnerships (PPPs) should be encouraged and strengthened.

The EBF has elaborated the following comments in light of the Council's general approach of 7 December 2022 and of the European Parliament's (EP) final compromise text of 22 March 2023. The most notable amendments introduced by the **Council** involve securing the alignment with the other instruments of the AML package as well as clarification on the general rules regarding discrepancy reporting and access to beneficial ownership (BO) registers. We strongly support the **European Parliament's** proposals, that are more

European Banking Federation aisbl
Brussels / Avenue des Arts 56, 1000 Brussels, Belgium / +32 2 508 3711 / info@ebf.eu
Frankfurt / Weißfrauenstraße 12-16, 60311 Frankfurt, Germany
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ambitious than the Council's ones, to strengthen the reliability of BO registers by requiring entities in charge of the central registers to verify that BO information is adequate, accurate and up to date. The **Parliament's** proposals also include some provisions on a stronger role of AMLA in the BO registers. None of the co-legislators, however, addresses in substance the provisions on discrepancy reporting which remains problematic for Financial Institutions.

As regards the suspension period under Article 20(1), we note that the **Council** would opt for a minimum of 10 days and a maximum of 60 days, while the **Parliament** advocates for a maximum of 15 days. We would call for a maximum of 10 days.

The EBF welcomes the **Parliament's** approach focusing on risk-based supervision. We would like to stress that, particularly with regards to Art. 31a on enhanced supervision of specific obliged entities, the methodology for selection and supervisory standards should be aligned with AMLA's methodology and standards to avoid any potential discrepancies in supervisory expectations.

- **Risk Assessments (ART. 7 – 9)**

  Background

  - The EBF believes the Supranational Risk Assessment (SNRA) should be reformed. First, clear and consistent criteria and weighting for risk assessment are key to an effective AML/CFT regime, regulatory harmonization of key definitions used for risk assessment processes is needed and should take into account the 2017 EBA Guidelines for AML/CFT Risk Factors. Complementary guidance on particular risk factors and sectoral issues should be provided in this framework.
  - Second, since ML/TF risks are changing quickly and significantly, and taking into account the requirements for obliged entities to carry out and keep up-to-date risk assessments as per the proposed **Article 8** of the AMLR, the SNRA and National Risk Assessments (NRAs) need to be updated in a more timely manner to reflect these changes.

  Supra-national risk assessment (Article 7) and National Risk Assessment (Article 8)

- **The EBF maintains that both the SNRA and NRAs should be updated more frequently as opposed to the period of at least every four years set out in the proposed Article 7 and Article 9 of the AMLD, in order to provide obliged entities with updated information in support of their general risk assessments, as required by the FATF recommendation 1.** The methodology of the SNRA and the NRA for assessing ML/TF risks should also be harmonised in order to permit a better implementation by obliged entities.
- More generally, we also consider that a standard set of risk-sensitive measures is needed, which Member States would be able to supplement based on the national risks identified.
- We would like to reiterate our general remark, that inconsistent implementation of risk-sensitive measures under the previous AMLDs has weakened the Risk-based approach (RBA) and has undermined the flexibility and discretion of obliged entities to follow their data and develop high-quality intelligence. This includes inconsistent national approaches to define higher risk categories set out in the current AMLD, in some cases extending the scope of risk-sensitive measures and restricting obliged entities' flexibility in how to apply these measures according to the varied risks of particular cases.

- **Registers / Mechanisms of BO, bank accounts and real estate (ART. 10 – 16)**

Background

- The EBF welcomes the idea of a Commission Implementing Act on the format for the submission of UBO Registers. Despite the establishment of these registers, the collection of data to identify the UBOs has not improved transparency and does not ensure timely access to adequate, accurate and current information in line with FATF. This is due to the lack of commitment in many Member States to set up these registers consistently in terms of technologies, data requirements and access conditions and with a high level of data quality and supervision of obliged entities providing trust and company formation services. It is also due to the discrepancy reporting requirements and the discussion between obliged entities and the register administrations about inaccuracies or inconsistencies.

- **The EBF maintains that the proposal should ensure that Member States are responsible for ensuring that the centralised automated mechanisms referred to in Article 14 are interlinked. If that burden is put on obliged entities, that would require extensive rebuilding of current IT infrastructures to adapt to a new technical European standard.**

Beneficial Ownership registers (Article 10) and Specific access rules to BO registers for the persons having a legitimate interest (Article 12)

- The registers need to be not just harmonized and interlinked, but also significantly strengthened. The authorities responsible should collect the necessary data independently and with the legal powers and competence to verify the accuracy of information and to impose sanctions in the event of lack of support. With its proposed amendments to **Article 10(2),** the **Council** is going in the right direction.
- We are supportive of the **Parliament's** proposal in **Article 10(3),** whereby Member States shall ensure that in cases where no beneficial owner has been identified, a statement accompanied by a justification and other supporting documents will be made available to the FIU, AMLA, the supervisory authorities and obliged entities.
- In particular, the EBF supports **the amendments that the European Parliament proposes to bring to Article 10(5)(-a), since it contains an obligation for the entities in charge of the central registers to verify, at the time the beneficial ownership information is submitted and on a regular basis thereafter, that such information is adequate, accurate and up to date. We believe that the entity in charge of the central register has a crucial role to play in harmonising the application of the rules on the identification of beneficial ownership. Obliged entities and all persons that have a legitimate interest should legitimately expect that the register contains the right beneficial ownership information.**
- The EBF supports the **Parliament's** proposal for a **new paragraph 5(a) to Article 10 ,** which places an obligation on the central registers to verify whether beneficial ownership information held in the register concerns persons or entities designated in relation to targeted financial sanctions. We support the concept of centralised screening, however, we note that procedures need to be put in place

with regards to how the changes would be notified. Moreover, the added value of this provision would be limited in case obliged entities could not rely on the information contained therein.

- The EBF supports **Article 10(9)** of the **co-legislators** whereby Member States shall ensure that the entity in charge of the central register is empowered to impose effective, proportionate and dissuasive measures or sanctions for failures to provide the register with accurate, adequate and up-to-date information on their beneficial ownership. **We believe such dissuasive measures or sanctions should also apply to failures to provide the obliged entities with such information. Indeed, false information will undermine the application of customer due diligence and, hence, the fight against ML/TF.**

- The EBF maintains that the reporting of discrepancies is a source of instability in the application of AML/CFT requirements. In fact, even if the AML Regulation will specify how to identify the beneficial owner(s) of a legal entity, there is a risk that obliged entities might apply the Regulation in different ways, leading to identification of different beneficial owners. Thus, the latter will report a discrepancy that may simply be a wrong application of the legislation. This reporting, together with others, might overcrowd the entity in charge of the register. **That is why, in principle, the EBF is not in favour of the reporting of discrepancies and believes that the application of the Regulation will be more efficient if obliged entities can rely on the central register. If this requirement is maintained, the EBF supports Article 10(7) of the European Parliament's proposal according to which** Member States shall ensure that the entity in charge of the central register takes within 30 working days after the reporting of the discrepancy, takes appropriate actions to cease the discrepancies and ensures up-to-date information, including amending information included in the central register.

- We are concerned that the proposed amendments still do not provide for sufficiently strong registers that obliged entities could be allowed to rely on. Since obliged entities cannot rely on the BO register, we welcome **the Council's newly-suggested Article 18(5) of the AML Regulation**, which stipulates that verification of BO information should be carried out using sources other than the UBO registers.

- We note that the amendment in **Article 10(1)** as proposed by the **Council** concerning express trusts already exists in **Article 31(3a)** of **AMLD5** and is therefore superfluous.
- **The EBF also cautions that the European Parliament and the Council's positions do not address in substance the provisions related to discrepancy reporting. We maintain that the current wording does not distinguish between actual discrepancies and technical errors and typos.** We believe discrepancy reporting should include a risk-based element whereby only material discrepancies which are of actual value to competent authorities should be reported.

- **FIUS (ART. 17 – 28)**

  Background

  - The proposed enhanced coordination of FIUs together with the use of state-of-the-art technologies will create synergies, facilitating the work of law enforcement and competent authorities and enhancing effectiveness.

  FIU's feedback and yearly report (Article 21)

  - The EBF very much welcomes the requirement for FIUs under **Article 21(1)** to produce regular reports containing information on trends and typologies identified, although the yearly frequency may not be sufficient.
  - The EBF fully supports the provision of **Article 21(2)** whereby Member States shall ensure that FIUs provide obliged entities, at least once per year, with feedback on the submitted SARs, which would cover at least the quality of the information provided, the timeliness of reporting, the description of the suspicion and the documentation provided at submission stage. Here also the frequency and delays for such feedback should be stricter. In addition, we believe that this standard should evolve taking into account the development of PPPs. We stress that this feedback is essential for obliged entities to allow them to improve their organisation and monitoring systems. This feedback should be individualised for each obliged entity. Hence, we are not in favour of the **European Parliament's** proposal to give feedback to categories of obliged entities.

- The EBF also welcomes the legislative efforts aimed at fostering a secure information exchange between FIUs within FIU.net **(Article 23)**, which would be hosted by AMLA in accordance with **Article 37** of the AMLA regulation.
- The EBF cautions that information provided by obliged entities must be subject to sufficient safeguards, on the part of the responsible authority in order to preserve the safety of employees dealing with the information.

Article 21a of the Council's proposal

- The **Council** proposes the introduction of a new **Article 21a** whereby Member States shall be able to set out in their national legislation that their FIU's are empowered to alert obliged entities for the performance of their due diligence obligations on types of transaction, specific persons or specific geographic areas which present a significant risk of ML/TF. This mechanism already exists in some Member States, however, it is not fully efficient because the FIU's are not required to explain the significant risks that motivate the alert. Therefore, we recommend supplementing this article by stating that when the FIUs use this power, they must explain why the person or the geographical or the type of transaction presents significant risks. Otherwise, obliged entities will not be able to properly monitor and follow up the cases submitted by FIUs.

Suspension or withholding of consent to a transaction and suspension of an account (Article 20)

- The EBF notes that the **European Parliament's** proposal is more precise that those of the Commission and the Council. In particular, in the **European Parliament's** proposal, the withholding of consent is replaced by the prohibition of a transaction. This wording is more appropriate since it is not always possible to withhold consent to a transaction. Moreover, it is not always possible to suspend a transaction. **Hence, we recommend replacing "suspension or withhold of a consent" to a transaction by "prohibition" to carry out a transaction**.
- **The co-legislators** state that the mechanism of **Article 20** aims to allow FIUs to analyse the transaction and disseminate the results to competent authorities. **Obliged entities are also legitimated to receive such results, especially as**

they could use this information to do further research and eventually identify new suspicious transactions. The **European Parliament's** proposal states that the use of the power of **Article 20** shall be shared with the other FIUs (**Article 20(1a) and (1b)**). The EBF is supportive of this approach.

- **The Council's general approach on Article 20(1) sets out a minimum suspension period of 10 days and a maximum of 60 days, while the Parliament's compromise text sets out a maximum of 15 days for the suspension. The EBF would be in favour of a maximum of 10 days.**
- **The EBF notes that the Council's proposal deletes Article 20(3) whereby** Member States shall provide for the effective possibility for the person whose bank or payment account is affected to challenge the suspension before a court in accordance with the procedures provided for in national law. **The EBF is opposed to this deletion and welcomes that the European Parliament did not remove it from its proposal**. However, we suggest supplementing the provision with the possibility to also challenge the prohibition to carry out a transaction or, if it is maintained, the possibility to withhold the consent to a transaction.
- **The Council** also proposes a new **Article 20(5)** to include in the operational text that FIUs cannot be held liable for the suspension. The EBF does not support such provision. The suspension can cause undue damage to the person concerned. We believe that it is right that the FIUs can be held liable for this situation. On the contrary, obliged entities that execute the FIU's order should not be held liable in cases of damages suffered by its customer. Therefore, we propose that the provision on non-liability refers to obliged entities and not to FIUs.

- **AML Supervision (ART. 29 – 37)**

  Background

  - AML Supervisors tend to supervise obliged entities only through the prism of compliance. The extent of supervisory actions should be commensurate to the ML/TF risks, and not determined solely on the grounds of nature and/or size of the enterprise. We welcome the proposal for standards on risk-based supervision, including explicit reference to the need for a degree of risk tolerance based on a professional evaluation of the entity's risk-based approach. Moreover, the EBF

acknowledges the importance of cooperation between supervisors, together with law enforcement, competent authorities and obliged entities. Therefore, achieving coherence in the work of national supervisors and law enforcement authorities is of great importance. This process could be facilitated by EU-wide guidelines and recommendations issued by the new AMLA.

- **The EBF welcomes the European Parliament's approach focusing on risk-based supervision. We stress that, particularly with regards to Article 31a on an enhanced supervision of specific obliged entities, the methodology for selection and the supervisory standards should be aligned with AMLA's methodology and standards to avoid any potential discrepancies in supervisory expectations.**

- **Administrative sanctions and measures (ART. 39-44)**
  - The EBF cautions against fixing a minimum amount of administrative pecuniary sanctions (**Article 40**) since such approach does not allow for individualisation of penalties in accordance with the seriousness of the damage and, hence, is contradictory with **Article 49** of the EU Charter of Fundamental Rights.

- **Cooperation (ART. 45 – 52)**

AML/CFT Cooperation (Article 45)

- To improve cooperation, **Article 45** of the **European Parliament's** proposal has been expanded to ensure there are effective mechanisms in place and includes a new reference to targeted financial sanctions.
- We support amendments that tend to enhance effective cross-border cooperation, information sharing and public-private partnerships, including in relation with financial sanctions.