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European Banking Federation

Reaction to Legislative Developments on the Proposed AMLA Regulation

- **Executive Summary**

The European Banking Federation (EBF) supports the objectives of the Anti-Money Laundering Authority (AMLA) Regulation, which aims to strengthen the fight against financial crime in Europe, and acknowledges that the set-up of the Authority is a crucial component of the upcoming AML Package.

The EBF has carefully studied the positions reached in both the Council and the European Parliament. In doing so, we propose below our considerations on some of the key articles of the proposed AMLA Regulation from the perspective of European financial institutions. However, first we would like to bring the attention to our view on the key provisions for the financial industry:

Our main priority point concerns the methodology for the selection of entities, a crucial provision in the Regulation. Overall, we welcome the proposed amendments aimed at expanding the scope of entities eligible to fall under AMLA's direct supervision as opposed to focusing on big banks only.

Moreover, we welcome the co-legislators' proposed amendments, in particular those of the **European Parliament**, which focus on the residual risk as opposed to the inherent risk, as initially envisaged by the Commission. Yet, we remain uncertain of the co-legislators' "one entity per Member State" approach since it does not seem to be risk-based. It is our view that this might unintendedly lead to AMLA's limited resources being employed to supervise entities that might not necessarily run the highest AML/CFT. To maximise the effective use of AMLA's limited resources, we propose granting AMLA the mandate to target the riskiest entities based on their residual risk profile, as of the first selection process.

A second issue pertains to the proposed expansion of tasks to be carried out by AMLA. We support the **European Parliament's** position, which includes cross-border transactions in the scope along AMLA's participation in public-private partnerships. For the purpose of

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developing a common understanding of ML/TF risks and threats facing the internal market, it is key to facilitate and support the work and exchange of information between the members of such partnerships.

Linked to our previous point, another crucial issue are the proposed competences on targeted financial sanctions in the scope of the Regulation. Although banks see the need for uniform application of sanctions across the EU and, considering that there is no blocking point to transferринг the competences on targeted financial sanctions from national competent Authorities to AMLA, we highlight that on top of its role as supervisor and FIU coordinator, the inclusion of sanctions would add a third pillar to the Authority's competences. In our view, this would require a review of AMLA's budget and, potentially, of the Regulation as a whole to ensure that the inclusion of a third pillar is feasible and to avoid any possible unintended consequences.

Finally, it would be necessary to provide more clarity with regards to the administrative pecuniary sanctions that AMLA may impose to avoid "double jeopardy" in view of Member States' competences to impose administrative and criminal penalties. Moreover, it is important to make a clear distinction between AMLA's competences and those of national competent Authorities with regard to national asset freezing measures.

- **Establishment, legal status and definitions (Article 1-4)**

  Definitions (Article 2)

  - According to the co-legislators' proposals, selected obliged entities falling under AMLA's direct supervision are credit institutions, other financial institutions or groups of credit or financial institutions at the highest level of consolidation in the Union. Similarly, non-selected obliged entities are credit institutions, financial institutions or a groups of credit or financial institutions at the highest level of consolidation in the Union other than a selected obliged entity (**Article 2(1)(1) and 2(1)(2)**).
  - The EBF maintains that the notion of consolidation needs to be clarified to avoid any ambiguity. **We support the definition given by the European Parliament on Article 2(5a) which refers to prudential consolidation.**

- **Tasks and powers of the Authority (Art. 5 - 6)**

Tasks (Article 5)

- **The Parliament's text** in reference to the tasks carried out by the Authority explicitly includes in **Article 5(1)(a)** cross-border transactions. Additionally, the **Parliament** proposes supplementing **Article 5(g)** whereby as part of its tasks AMLA shall support, facilitate and strengthen cooperation and exchange of information between obliged entities and public authorities in order to develop a common understanding of ML/TF risks and threats facing the internal market, **including by participating in public-private partnerships or similar collaborative arrangements**. **The EBF welcomes the Parliament's proposal which recognises that financial activities, as well as criminal activities, are cross-border.** In view of the reference to threats facing the EU internal market as a whole, pertinent legal rules should be carefully calibrated to foster both national and transnational cooperation, taking into account the cross-border dimensions of financial crime.

- **On AML/CFT Supervisory System (Art. 7 - 11)**

AML/CFT supervisory methodology (Article 8)

- The EBF welcomes the alignment of both co-legislators with regards to the need for risk-based supervision as stipulated in **Article 8**. In particular, we support the **European Parliament's** proposal whereby the AML/CFT methodology shall be developed and maintained in cooperation with the supervisory authorities.

Central AML/CFT database (Article 11)

- **The Council's proposal on Article 11(1)** expands the types of entities to whom the information contained in the central AML/CFT database would be made available to include not only supervisory authorities, but also non-AML/CFT authorities as well as other national authorities and bodies competent for ensuring compliance with the requirements of the Consumer Credit Directive, the PSD, the e-Money Directive, the Solvency II Directive and the MiCA Regulation on a need-to-know and confidential basis.

- **Article 11(1) of the Parliament's proposal** builds upon the amendments proposed by the **Council** but goes a step further and also includes the European Supervisory Authorities in the list of entities that should have access to the information provided in the database. The **Parliament's** proposal allows for the sharing by AMLA, on its own initiative, of the results of its analysis and inspections with non-AML/CFT authorities. **Given the sensitivity of the AML/CFT data, we believe that non-AML authorities should be informed of AMLA's activities only on a need-to-know and confidential basis.**
- **We support the European Parliament's proposal to extend the data that supervisory Authorities shall transmit to AMLA** (**Article 11(2) (ba); (ca); (ha); (hb) and (hc)**) considering that such data is essential for both the direct and indirect supervisory tasks carried out by AMLA.
- **Furthermore, we support the Parliament's proposal to make available to obliged entities a summary of non-confidential findings regarding the information collected pursuant to paragraph 2 point (c), (d), (e), (f), (ha), (hb), (hc) (Article 11(2a)) as well as the proposal to make available to all supervisors relevant consolidated information of obliged entities (Article 11 (4)).** This information can be useful to obliged entities as well as to supervisors in their risk assessment processes.
- The **Parliament's** proposal introduces an obligation for non-AML authorities, other national authorities, and bodies competent for ensuring compliance with some EU directives and European Supervisory Authorities to transmit to AMLA the weaknesses identified within the boundaries of their mandates and tasks (**Article 11 (3)**). **In view of the EBF, it is fundamental that AMLA receives information from other supervisors.**
- We also highlight that, in its proposal, the **Parliament** lays down **concrete means for cooperation between AMLA and Member States' competent authorities, as well as with the European Supervisory Authorities.**
- **The EBF supports the position of the European Parliament. We highlight that as a minimum, prudential supervisors should have access to the database referred to in Art 11(1) for the purpose of carrying out their tasks and in particular for drawing up the Supervisory Review and Evaluation**

Process (SREP) under the Basel II framework. Likewise, AMLA should have access to the prudential supervisors' analysis and investigations.

Information requests directly to obliged entities (Article 11a of European Parliament's position) and Information sharing with FIUs and Europol (Article 11b of the European Parliament's position)

- We note that the **Parliament proposes a new Article 11a** whereby supervisory authorities and AMLA shall provide each other with all the necessary information regarding selected and non-selected obliged entities in order to carry out their respective duties.
- The EBF supports the aforementioned proposal. We believe that the success of AMLA depends heavily on its cooperation with national supervisory authorities. To this aim, it is necessary to provide a precise and clear framework for such cooperation to ensure AMLA's effectiveness. In this respect, we highlight that the AMLA Regulation does not include a definition of "supervisory authorities". We propose considering the latter to be the "financial supervisors" and the "non-financial supervisor" as defined in Article 2 of AMLA Regulation.
- On information requests addressed directly to obliged entities, the EBF welcomes the explicit recognition in the provision of **Article 11a that the request shall be duly justified, include the legal basis of the request, specify the information required and fix a reasonable time limit within which the information is to be provided**. We believe a reasonable time limit should take into account the complexity of the respective request. However, to encourage supervisory Authorities to respond to AMLA quickly, we recommend removing the provision whereby AMLA may address a request directly to obliged entities where information is not made available by supervisory Authorities in a timely manner. We also maintain that the request should be addressed to the obliged entities as a last resort, meaning when the information is not available publicly or through the national supervisors or other competent Authorities.
- With regards to the **Parliament's** proposed new **Article 11b,** it states that in cases where as part of its activities AMLA suspects that facts that it has examined in the framework of those supervisory activities could be related to money laundering, to a predicate offence or to terrorist financing, it shall promptly transmit such

information to the competent FIUs or to Europol, where a cross-border element is present. **The EBF welcomes the Parliament's proposal.** Given AMLA's role and resulting overview of an array of entities in different Member States across the EU, we believe this puts it in a position to also identify suspicion which could be transmitted to competent authorities in furtherance of a more intelligence-led approach. We believe that, in order to protect the reputation of the EU financial sector, this exchange of information should be covered by the professional secrecy both at the level of the AMLA and at the level of the agents providing such information to FIUs or EUROPOL.

- **Direct Supervision of Selected Obliged Entities (Art. 12 - 13)**

  <u>Assessment of financial sector obliged entities for the purposes of selection for direct supervision (Article 12)</u>

  - We welcome the **European Parliament's** proposal whereby AMLA shall carry out the periodic assessment of obliged entities **with the collaboration of financial supervisors (Article 12(1))**.
  - With regards to **Article 12(2), the European Parliament** lays down a common pre-condition for credit institutions, financial institutions, and crypto-asset service providers to be operating in at least **four Member States**, including through the freedom to provide services. This proposal significantly expands the number and scope of eligible entities as opposed to the Commission and Council's proposals.
  - **Nonetheless, we caution that both co-legislators' positions maintain a size-based criteria given the requirements for obliged entities to be operating in a minimum number of Member States.** The EBF maintains that the largest entities are not necessarily the ones carrying the largest AML/CFT risk, as also demonstrated by the European Parliament in its in-depth analysis[1]. We therefore call for a stronger focus on the risk-based approach to the selection of obliged entities, rather than concentrating on their size and **therefore express support for the Parliament's proposal which introduces more risk-based elements.**

[1] European Parliament, "Preventing money laundering in the banking sector - reinforcing the supervisory and regulatory framework" (https://www.europarl.europa.eu/RegData/etudes/IDAN/2021/659654/IPOL_IDA(2021)659654_EN.pdf), Annex 2.

- **We also support the European Parliament's proposal considering that, where no obliged entities respond to the criteria related to the number of establishments in a particular Member State, AMLA shall carry out the periodic assessment on the obliged entities established in that Member State (Article 12(1a)). This provision compensates to some extent the shortcomings of the selection criteria.**
- **We believe that it is essential to make a distinction between the selection of groups and the selection of obliged entities that are not part of a group.** Indeed, for large groups, the selection of a group on a basis of two or four entities that have a high-risk profile appears disproportionate since these two entities can, for example, represent a very small part of the group (for example 2% of the revenues). The selection of such a group could lead to a misuse of the resources of AMLA. **We hence support the Council proposal's whereby where a credit institution or financial institution is part of a group, the risk profile should be classified at group wide level (Article 12(5)(b)).**

The process of listing selected obliged entities (Article 13)

- **The EBF welcomes the European Parliament's proposal whereby as of the first selection process, the 40 obliged entities assessed pursuant to Article 12 that have the highest residual risk profile in at least two Member States shall qualify as a selected obliged entity.** In accordance with the above comment, it is necessary to clarify that the 40 obliged entities which shall qualify as selected obliged entities are credit or financial institutions that have the highest residual risk profile in at least two Member States (through branches or freedom to provides services) or groups that have the highest risk residual profile.
- We also note that in its position, **the Council acknowledges the need to focus on the residual risk, but only as of the second selection process (Article 12(6) of Council partial approach).**
- Given that the first selection process is envisaged to start in mid-2025 at the earliest, we believe this would provide Member States with sufficient time to update their national assessments so that they take into account the residual risks. This would be in furtherance of the European Banking Authority (EBA)'s Guidelines on risk-based supervision published in December 2021. These guidelines require

national supervisors to develop a good understanding of inherent and residual risk factors to which subjects of assessment are exposed[2]. These Guidelines are in alignment with FATF's Guidance on Risk-Based Supervision[3]. We hence believe a selection process based on residual risk from the very start is an attainable goal which would result in a stronger risk-based approach to direct supervision.

- Additionally with regards to **Article 13**, **the Council's proposal on Article 13(4)** fixes a cap of 40 obliged entities that can be selected. **The Parliament's proposal** also maintains the 40 obliged entities **(Article 13)** that will be selected while also providing for the possibility that the cap is increased to up to 60 obliged entities following an impact assessment conducted by the European Commission.
- The EBF is aware that the proposed number of obliged entities under direct supervision (between 40 and 60) is very ambitious and requires that AMLA's budget and resources accordingly reflect this ambitious scope. It also requires that AMLA relies on the resources of national competent Authorities and delegates to them the execution of its tasks (see below).
- **We also note that both co-legislators opt for an "one entity per Member State" approach.** However, we caution that this might not necessarily follow a risk-based approach. For example, an obliged entity with the highest residual risk profile in one Member State might not be among the riskiest entities overall. Should this approach be applied, certain entities which would normally not be classified as high-risk in accordance with AMLA's methodology for classifying risk, would still be selected. This would be solely due to the fact that no other entity in their respective jurisdiction is sufficiently risky to be supervised by AMLA. This would inevitably lead to lower-risk entities falling under its scope. It might inadvertently lead to situations where at the EU level an entity with a significantly lower risk profile would be directly supervised, and a much riskier one would not. **As a result, AMLA would need to focus its already limited resources towards supervising entities where, based on a conducted risk assessment, not the biggest risks would lie.** This would be a clear scenario of acting in contradiction with the risk-based

[2] https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Guidelines/2021/EBA-GL-2021-16%20GL%20on%20RBA%20to%20AML%20CFT/1025507/EBA%20Final%20Report%20on%20GL%20on%20RBA%20AML%20CFT.pdf. Most notably, see paras. 45, 51 and 71, inter alia.

[3] **In its Guidance, FATF highlights that supervisory risk models usually also consider residual risk and that the residual risk may influence the intensity/scope, and where necessary be used to prioritise between entities.** See FATF Guidance on Risk-Based Supervision, para. 44 at https://www.fatf-gafi.org/media/fatf/documents/Guidance-Risk-Based-Supervision.pdf.

approach. **The EBF therefore calls for reconsidering such an approach and to rather give AMLA the mandate to target the riskiest entities based on their residual risk profile, as of the first selection process.** Only then would it be able to bring actual added value to our common AML/CFT efforts.

- We understand that the aforementioned approach could have the benefit of capturing small entities that might otherwise not be affected by the application of the selection criteria but, as mentioned above, these would not be necessarily the riskiest entities.
- We further understand that the above approach would allow AMLA to have an overview of national supervisory practices and ensure AMLA's involvement across the internal market. **However, the proposed provision would not achieve this objective**. **Recital 20a**, last paragraph, states that the entity that will fall under the rule of "one entity per Member State" may be a parent undertaking of a group, a subsidiary of a group authorised and headquartered in another Member State or an obliged entity that does not belong to a group and which is authorised or registered in a Member State. Considering that AMLA's supervision applies at the highest level of consolidation of a group, the subsidiaries of a group fall automatically in the supervision of AMLA. These subsidiaries should hence be excluded from the obliged entities that could be taken into account for the application of the rule "one entity per Member State". Otherwise, a single group could allow numerous Member States to comply with it even though the supervision is shared between the supervisor of the parent undertaking ("home supervisor") and the local supervisor ("host supervisor"). **Hence, if this approach is maintained, the EBF proposes that it applies to the parent undertaking of a group authorised or registered in a particular Member State or an obliged entity that does not belong to a group and which is authorised or registered in that Member State and not to subsidiaries of a group or authorised and headquartered in another Member State.**

- **On Cooperation, general investigations and on-site inspections (Art. 14 -19)**

Cooperation within the AML/CFT supervisory system for the purposes of direct supervision (Article 14)

- **The EBF supports the Parliament's proposal whereby when an obliged entity becomes a selected obliged entity, the Authority and the national competent authority of the obliged entity shall agree on working arrangements to ensure smooth transition and conduct of their respective supervisory responsibilities (Article 14(1a))**.
- However, we maintain that the AMLA Regulation should go further. **The EBF recommends supplementing this provision by clarifying that when AMLA takes up the direct supervision of an obliged entity, national competent authorities would no longer have supervisory responsibilities over the obliged entities unless explicitly delegated by AMLA**. This is essential to avoid duplication of supervision over the same obliged entities, which could be burdensome for the obliged entities and possibly lead to contradictions between supervisors. **We also recommend specifying that guidelines or recommendations of national supervisors no longer apply unless validated by AMLA, pending their replacement by those of AMLA.**

Joint supervisory teams (Article 15)

- The internal market is composed of different banking structures with different ways of functioning and modes of organisation. For instance, some banks have a pyramidal organisation with a parent undertaking and subsidiaries and branches, while other banks have an inverted pyramidal organisation with a central body and affiliates that are not linked to the central body by capitalistic ties. It is necessary that AMLA's supervision applies to the different models of banks without disrupting their organisation. To this end, **the EBF recommends supplementing Article 15 by providing that, to respect the different models of banks, JSTs shall firstly define with the supervised obliged entities the communication arrangements**. This could include, e.g. agreement on who will receive AMLA's requests. Different methods exists depending on the organisation of the bank: the parent undertaking or the central body receives the request and dispatches it to the subsidiaries or affiliates concerned; or the latter receives directly AMLA's request whilst the parent undertaking or the central body is being informed in parallel, etc.

Request for information (Article 16)

- **Article 16 of the Council's text** adds an express reference to "*agents and distributors*" in relation to the natural or legal persons employed by the obliged entity. **According to the Parliament's text, Article 16** states that the Authority may require selected obliged entities and natural persons, including their employees, to provide all information necessary to carry out its tasks. Unlike the Council's text, when referring to the employees the **Parliament** wording includes "*if necessary*".
- **We believe the aim of the provision should be to target entities falling under AMLA, not the employees. We hence suggest removing the possibility to request information from natural persons because the latter have no legal powers to act on behalf of the company.**

- **Supervisory powers and Sanctions (Art 20 - 22)**
  Administrative pecuniary sanctions (Article 21)
  - The EBF cautions against fixing a minimum amount of administrative pecuniary sanctions (**Article 21(3)**) since such approach does not allow for individualisation of penalties in accordance with the seriousness of the damage and, **which would contradict Article 49 of the EU Charter of Fundamental Rights.**
  - In the context of the supervision at the highest level of consolidation it is necessary to clarify that, in the event of a breach of the AML/CFT requirements, the administrative pecuniary sanctions will apply to the branch or the subsidiary responsible for the breaches and not at the level of the group. This is of a particular importance regarding not only the amount of the administrative pecuniary sanctions, but also the reputation of the group as a whole. The wording used in the **co-legislators'** proposals is confusing as it is referred to "selected obliged entities", which may be a group of credit or financial institutions.

Common instruments (Articles 38 - 44)

- **Guidelines and recommendations (Article 43)**

- As part of the AML package's overarching objectives, we believe the new legal framework should ensure, on the one hand, the harmonisation of rules relating to AML/CFT and, on the other hand, eliminate as much as possible the divergences in national supervisory practices. The EBF is supportive of these objectives and is of the opinion that to them, it is essential to harmonise national supervisors' the guidelines and recommendations with those of EBA and AMLA. **We therefore support Article 43(3a)) of the European Parliament whereby:**
  - the guidelines and recommendations issued by the Authority shall replace the guidelines and recommendations previously issued by the EBA or the competent authorities on the same subject;
  - the guidelines and recommendations issued by the EBA or the competent authorities shall remain applicable until new guidelines and recommendations issued by the Authority enter into force.
- However, **the EBF recommends supplementing this provision by stating that AMLA is empowered to consider, on its own initiative, at the request of a national competent authority or an obliged entity, that guidelines or recommendations issued by EBA or national competent authorities are no longer valid, in particular under the new rules introduced by the AML package. Otherwise, discrepancies in the application of the law and in supervisory practices will remain until AMLA adopts new guidelines or recommendations**. Such provision will be particularly useful in the event, for example, that a member of a JST adopts guidelines or recommendations that are not consistent with those of other members of the JST. It is important that AMLA's position, to be adopted in this context, is applicable to all obliged entities in the Member States concerned so as not to introduce differences in supervision between entities subject to the AMLA and entities subject to national supervision.
- Finally, we recommend that AMLA conducts open public consultations before issuing guidelines and recommendations as envisaged, for instance, for regulatory and implementing technical standards (RTS/ITS). These instruments are often practical and operational. Therefore, it is necessary that the public sector is consulted to ensure that these guidelines and recommendations can be implemented in a proportionate manner. We would recommend, whatever the instruments are (RTS, ITS, guidelines, or recommendations) that a public consultation is held in a systematic manner, and that it takes place in a reasonable timeframe (e.g., at least 4 months).

- **Competences on targeted financial sanctions (Art. -38 - -38c)**

  - The EBF notes the **European Parliament's proposals for new Articles -38, -38a, -38b** and -**38c** provides for an expansion of AMLA's competences with regards to targeted financial sanctions. This should be read in conjunction with, *inter alia,* **Article 5(1)(b)** whereby AMLA shall monitor and support the implementation of targeted financial sanctions, asset freezes and confiscations under the Union restrictive measures across the internal market, and **Article 5(4a)(b)** stating that AMLA shall act as a central contact point for Member States´ competent authorities on the enforcement of targeted financial sanctions, notably for sharing information on designated persons, assets held by designated persons and legal entities controlled by designated persons.
  - Particularly in the context of the Russian invasion of Ukraine and the ensuing unprecedented sanctions, European banks have been facing numerous implementation challenges resulting from a lack of legal clarity and divergences in interpretation across different EU Member States. Therefore, **the EBF acknowledges the benefit of a dedicated EU body coordinating national competent authorities, providing guidance and ensuring uniform interpretation and implementation, as well as facilitating the exchange of information.**
  - The EBF also acknowledges that such proposal would add an entirely new pillar to AMLA's activities (apart from the supervisory pillar and the FIU support and coordination pillar) which would require a thorough review of the Authority's budget and resourcing and potentially a complete revamp of the proposed Regulation as a whole. **Therefore, we believe that AMLA's competences regarding targeted financial sanctions should be carefully calibrated to ensure that the proposals are feasible and bring the desired outcomes.**
  - In relation to the above, we note that it seems to be the **European Parliament's** intention for AMLA to be entrusted with competences not only with regards to targeted financial sanctions, including asset freezes, but also on confiscations (**Article 5(1)(f)**). We stress, however, that obliged entities are not involved in confiscations. It is a prerogative of Member States only. In the same article, the **European Parliament** also envisages the publication of information on asset

freezes, seizure and confiscations by AMLA. **It is important that this information be readily available to obliged entities.**

- **Financial provisions (Art. 64 – 72)**

  Budget (Article 64)

  - Indirect supervision of the non-financial sector by the AMLA will cover a wide range of sectors, all of which have an important role to play in the fight against money laundering and terrorist financing. Currently, the co-legislators have not made steps toward including the non-financial sector in the contribution to the budget of AMLA. **However, we highlight that the participation of the non-financial sector to the budget of AMLA is of an absolute necessity.** First, the indirect supervision of said sector will inevitably require AMLA resources. We understand the difficulties in estimating the budget and the modalities of collection, however, we recall that most self-regulated bodies already collect fees from their members. Thus, it should be possible to attribute a percentage of these fees to the budget of the Authority.

  - Regarding the fees that will be levied on selected and non-selected financial sector entities, we believe that fairness would dictate that there should be a balance between the fees due to the AMLA and those due to the national supervisory authority, so that obliged entities only pay for one supervision, i.e. avoiding duplication of levies.

- **Cooperation (Art. 77 – 81)**

  Cooperation in the context of partnerships for information sharing in the field of AML/CFT (Article 79)

  - The EBF welcomes the approach of the **Commission and the co-legislators** to strengthen the AML/CFT collaboration framework by including a provision on AMLA's participation in public-private partnerships. **The EBF is particularly supportive of the related Article 5(1)(g) proposed by the European Parliament whereby as part of its tasks, AMLA shall support, facilitate and**

strengthen cooperation and exchange of information between obliged entities and public authorities in order to develop a common understanding of ML/TF risks and threats facing the internal market, including by participating in public-private partnerships or similar collaborative arrangements.

- We also welcome the **Parliament's proposal to extend the text of Article 79** to refer to FIUs, Europol and DPAs, among others.