10 May 2023
EBF_046133

European Banking Federation

Reaction to Legislative Developments on the Proposed AML Regulation

- **Executive Summary**

The European Banking Federation (EBF) is fully supportive of the European Commission and the co-legislators' overarching objective to improve the effectiveness of the current EU AML/CFT framework. Bearing in mind the necessary lead-time and efforts to get the AML Package adopted and implemented, this momentum is a unique opportunity to improve the framework and cannot be missed.

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 AML Regulation from the perspective of European financial institutions.

Given the extensive nature of our analysis of the provisions contained in all three versions of the legal text, we have divided the present document into two main parts. First, we focus our analysis on the proposals which are of utmost priority from the perspective of financial institutions in Europe. Second, we offer detailed comments on other provisions which would have a major impact on AML/CFT compliance. In determining which are the outstanding issues which warrant increased attention, we have taken into account the need to achieve harmonisation, both across the Union and with regards to pertinent international standards put forward by FATF, as well as to ensure that the legal texts are aligned with the principle of proportionality/risk-based approach.

As a matter of priority, we highlight the following provisions:

1) The EBF acknowledges the intention behind the **European Parliament's proposal to include targeted financial sanctions in the scope of the AML Regulation**. **However, we hold serious concerns as to the practical implications of merging together two separate legal frameworks**. We recall that while the AML/CFT framework applies to gatekeepers only, the sanctions obligations apply *erga omnes*, i.e. all economic operators are obliged to implement them. Crucially, while the aim seems to be to codify existing practices in the banking sector with regards to sanctions compliance, it could inadvertently create two parallel sanctions supervisory systems with potentially different interpretations of the applicable law.

   Additionally, we note a number of technical amendments proposed by the **European Parliament** which include references to targeted financial sanctions. We highlight the **proposal for a new Article 37a** on monitoring of transactions

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
EU Transparency Register / ID number: 4722660838-23

www.ebf.eu

with regard to risks posed by targeted financial sanctions. We believe this provision does not distinguish between domestic and cross-border payments although the former are typically not screened. More importantly, this article would clash with the upcoming recast of the Instant Payments Regulation which would introduce a prohibition on screening transactions within the EU. **We therefore suggest that this article is either not introduced or amended so that it applies only to cross-border transfers of funds where the counterparty is located outside the EU.**

2) As a second matter of priority, we highlight the provisions in the AML Regulation pertaining to **politically exposed persons (PEPs)**. The EBF maintains that the **European Parliament's proposal** to expand the scope of PEPs to include heads of regional and local authorities, including grouping of municipalities and metropolitan regions of at least 30.000 inhabitants, as well as siblings of PEPs, is disproportionate. **The Council's proposal** which adds to the list of PEPs functions "other prominent public functions provided for by Member States" is sufficient to cover the heads of regional and local authorities where this is justified. We stress the importance of the EU aligning with FATF's recommendations and note that FATF's definition of PEP explicitly excludes "middle ranking or more junior individuals". We also stress that any expansion of the definition of PEP must be informed by, and in response to, risks identified in the EU' supranational or member state national risk assessments. Unless the expansion of definition targets a known risk, firms will have to redirect resources to a new compliance activity that does not enhance the EU's ML/TF framework, whilst newly in-scope PEPs, their close associates and immediate family members, will be subject to significant inconvenience and new demands to provide personal information without a substantiated AML/CTF purpose. With regards to siblings, they have been excluded from the scope of "family members" in the AMLD4 and there have been no identified weaknesses resulting from this exclusion which would substantiate a change in the legal framework.

3) The EBF expresses concern with **the Council's proposal in Article 17(3)** stipulating that obliged entities shall not enter into a business relationship with a legal entity incorporated outside the Union or with legal arrangement administered outside the Union, whose beneficial ownership is not help in an EU UBO register, except in cases where an obliged entity entering into business relationship with legal entity operates in sector that is associated with low ML/TF risks and the business relationship or intermediated or linked transactions do not exceed EUR 250 000 or the equivalent in national currency. This provision seems to introduce requirements which, while potentially increasing administrative burden, would not necessarily improve the overall efforts in fighting financial crime. The prohibition will likely also impact EU competitiveness and introduce friction into the ordinary course of business without a substantiated AML/CTF purpose. Obliged entities are

in any case required under the current legal framework to identify their customers' beneficial owners and verify their identity. Therefore, this information would be readily available in case it was required by competent authorities. Taking this into account, obliged entities would ultimately be required to refuse to enter into a business relationship with non-EU entities which have not yet provided the information to an EU UBO register on the basis of nothing more than a formality. **The EBF therefore proposes abstaining from introducing such a provision in the AML Regulation.**

4) Another topic of crucial importance for the banking sector concerns the requirements for ongoing monitoring and updating of customer information. **The EBF calls for a stronger focus on the risk-based approach to updating customer information**. Combining risk-sensitive and temporal requirements as set out by the co-legislators in **Article 21(2)** would result in additional complexity particularly for low-risk customers. A rigid 5-year maximum period will act as a barrier to digital innovation, increase friction for customers, and entail significant costs for banks without providing additional security from an AML/CFT perspective. Business relationships that are considered low-risk are mainly associated with natural persons or small corporates for which the information collected (such as the identity, activity and revenues) does not change often. In a timeframe between 5 and 7 years, changes in an individual's situation will be marginal and would not contribute to a better understanding of the flows through the banks' accounts. Atypical cases, such as a sudden increase in assets, can be captured by transaction monitoring tools and result in a KYC update following the trigger event. Moreover, changes in the situation of the client can also be identified through the monitoring of transactions, which is based, among other things, on changes in revenues, changes in the country of residence, changes in the status (e.g., PEPs), etc. Additionally, for institutions with sizable customer bases, the threshold will likely be impossible to comply with. We recommend that firms are permitted to apply a defensible and documented risk-based approach to ongoing monitoring, that is subject to review by supervisors.

5) **An issue of utmost importance for the banking sector is the threshold for determining beneficial ownership (Article 42(1)).** We express serious concerns over the practical implications in case **the European Parliament's proposal to lower the threshold to 15% were adopted.** This would fundamentally change the concept of beneficial ownership from being indicative of control to instead establishing a 'look-through' approach whereby those with a minimal ownership interest in the company are identified irrespective of their ability to exercise control over its affairs. **As a result, the proposal risks overwhelming obliged entities with 'white noise' which holds little meaning in determining those individuals who actually exercise control over customer entities. It will also require obliged entities to obtain**

personal information routinely from individuals who are neither owners nor controllers as defined by the FATF Recommendations, which therefore will typically be of no or little AML/CTF benefit. Such a significant change to the legal regime, especially one that may impact EU competitiveness, must be informed by an analysis of ML/TF cases and whether system-wide risk could have been detected/prevented by firms applying a lower UBO threshold. **We stress the importance of maintaining the current threshold until such analysis has been undertaken.**

Moreover, **the Parliament's proposal** departs from international standards where the 25% threshold is predominantly applied[1]. In the most recent update of its Guidance on Beneficial Ownership for Legal Persons, the FATF has confirmed this threshold as an acceptable standard[2]. **The EBF thus supports the Council's text and the Commission's one on the 25% threshold for the identification of beneficial ownership expressed in Article 42(2)**.

6) **The EBF welcomes the proposal put forward by both the Council and the European Parliament on Article 54(5)** which pertains to the prohibition of disclosure and the exceptions thereof. The proposed text now refers to "same transaction" only (rather than limiting the exception to cases related to "the same customer and the same transaction"). **However, we also see the benefit in allowing disclosure of suspicious activities reports in case of "the same customer".**

   The EBF further supports the Council's proposal for a new Article 54(3a) which introduces a derogation to the prohibition of disclosure ("tipping off") to enable partnerships for information sharing to operate, subject to the conditions established under Article 54(3a)(a) to (d). **We believe such exemption is essential in providing legal certainty with regards to exchange of information, including tactical data, within partnerships for information sharing in the AML/CFT area**.

7) **We particularly welcome the alignment between both co-legislators with regards the necessity to include legal provisions aimed at providing legal certainty and creating an enabling framework for public-private and private-private information exchange** (**Article 55**). The EBF has continuously stressed the importance of having a sound legal basis for exchanging AML/CFT data supplemented by appropriate safeguards ensuring that the data is protected, including via the use of secure channels for communication and internal procedures for documenting instances of processing. We believe that appropriate safeguards will further contribute to building trust between participants to such partnerships

[1] See International Banking Federation (IBFed) Letter to the European Commission concerning the Beneficial Ownership Threshold at https://www.ibfed.org.uk/latest-news/response-to-ecs-aml-cft-reform-package/.

[2] See FATF Guidance to Beneficial Ownership of Legal Persons (Recommendation 24), para. 37.

while striking the balance with data subjects' fundamental rights and responding to concerns voiced by data protection authorities. **The EBF remains committed to providing further detailed input with regards to the safeguards proposed by the Council and the European Parliament.**

Apart from the aforementioned texts which we identify as being of utmost priority, there are a number of provisions in the three versions of the legal text which would also have a major impact on banks' AML/CFT compliance.

8) **The EBF supports the proposal in Council with regards to Article 9 concerning the role of compliance manager**. More specifically, we welcome the amendments replacing the reference to "board of directors" with "management body". This would ensure that the legal framework would avoid creating frictions with provisions of national company law in various Member States, whereby members of the board of directors cannot be entrusted with individual responsibilities given that the board is conceived as an inseparable body through which all functions are performed.

   Moreover, as the functions of the compliance manager are described in several provisions of the AMLR, **we recommend clarifying that in principle, the compliance manager's function is not an operational one**. This is fundamental for the distinction between the role of the compliance manager and the role of the compliance officer.

9) According to the **European Parliament's proposal**, obliged entities would be required to "*identify and record the identity of nominee shareholders and nominee directors of a corporate or other legal entity and identify their status as such, where applicable*". **The EBF stresses that the identification of all nominee shareholders and nominee directors is not a feasible regulatory expectation. This would be the case if the text specifies that the concept of nominee is different from that of the strawman and that the nominee is, in accordance with the FATF definition, an individual or legal person instructed by another individual or legal person ("the nominator") to act on their behalf in a certain capacity regarding a legal person[3]. Identification of nominee directors and nominees of beneficial owners would then be possible if the contract is published.** Central registers should play a key role in ensuring that nominee status is declared.

10) With regards to **Article 18**, the EBF welcomes the proposed standardisation of key customer identity information that obliged entities have to collect and verify. **We suggest that the provision applies to new customers only, after the entry**

[3] Ibid., para. 125. Available at https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html.

into force of the AMLR, without affecting with retrospective effect the existing customer relationships in order to avoid disruptive remediation exercises of the complete customer portfolio that can divert resources away from financial crime prevention. The information on existing customers could be updated with any new requirements in line with legal requirements to update customer information on a periodical basis.

We do, however, question the proposed new requirement to identify and verify place of birth as a matter of routine. The collection of this data point is invasive for customers and beneficial owners, and would be significantly costly for regulated firms. Importantly, the AML/CTF value of identifying and verifying place of birth routinely has not been substantiated. Such a material expansion of mandatory due diligence obligations must be supported by an analysis of the effectiveness of collecting place of birth.

11) **The European Parliament proposes a new Article 36a on high-risk high net-worth individuals.** The EBF recalls that a framework for enhanced customer due diligence measures has already been put in place in **Article 28(1)** which applies in cases of increased risk of money laundering or terrorist financing pursuant to Art. 16(2). 'High net-worth individuals' are already considered higher risk than regular customers due to the fact that 'private banking activity' is part of the list of factors of potentially higher risk in Annex III of the Regulation. In this instance, enhanced customer due diligence is applied in accordance with the risk-based approach which is fundamental for the AML/CFT framework to adapt to risks accordingly. **We therefore suggest not including Article 36a in the final version of the Regulation.**

12) The EBF acknowledges that the **European Parliament has suggested to expand reporting obligations as set out in Article 50(1) to also include predicate offences.** The proposed unbounded extension of the reporting obligation is not required by the FATF Recommendations and would foreseeably lead to a further increase in reporting, although FIUs are already barely able to cope with the reporting volume. A central objective of the AML package - more quality, less quantity - would be virtually turned into its opposite. It will also lead to discrepancies between EU and non-EU obliged entities with regards to their reporting obligations**. Hence, we suggest removing this addition to the reporting obligations.**

The aforementioned executive summary comprises a selection of certain issues of potentially significant impact which need to be carefully considered going forward into trilogue discussions. We invite you to also become acquainted with our detailed argumentation included in the Appendix.

For the sake of readability, we also include a table of contents with the texts we have analysed in depth.

APPENDIX

TABLE OF CONTENTS

PRIORITY ISSUES:

European Parliament Proposal to Include Targeted Financial Sanctions in the Scope of the AML Regulation

- **The European Parliament's proposal for a new Article 1(a)** extends the scope of the Regulation to also cover implementation of sanctions, hence going beyond anti-money laundering and countering the financing of terrorism[4]. However, the EBF highlights that implementation of sanctions is regulated separately, i.e. via specific Council regulations. As opposed to the AML/CFT framework, whose legal requirements apply to gatekeepers, i.e. obliged entities, the sanctions framework applies to all persons. As a result, the text proposed by the **European Parliament**, while largely codifying existing practices in the banking sector in terms of sanctions compliance, could potentially create a parallel sanctions supervisory system which would eventually lead to different interpretations of the law by the different supervisors (AML/CFT vs sanctions).
- The sanctions framework based on regulations adopted by the Council furthermore provides for penalties in case of breaches. Such penalties must be effective, proportionate and dissuasive[5]. We therefore see the possibility that obliged entities may be penalised twice for the same breach under the AML/CFT, as well as under the sanctions framework. 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.

European Parliament proposal: Monitoring of transactions with regard to risks posed by targeted financial sanctions (Article 37a)

- According to the **European Parliament's proposal**, *"credit and financial institutions and crypto-asset service providers shall screen the information accompanying a transfer of funds or crypto-assets pursuant to the [FTR] in order to assess whether the payee or the payer of a funds transfer, or the originator or the beneficiary of a transfer of crypto-assets, are subject to targeted financial sanctions"*.
- The EBF highlights that the proposal would also encompass domestic payments (as opposed to cross-border ones). However, such domestic transactions are not screened in the majority of EU Member States given that financial institutions

[4] The European Parliament introduces references to targeted financial sanctions throughout the Regulation, including in Article 16 (Customer Due Diligence Measures), Article 21a (Timing of the Assessment whether the Customer and the Beneficial Owner is Subject to Targeted Financial Sanctions), Article 36c (Persons Subject to Restrictive Measures by International Organisations) and Article 37a (Monitoring of Transactions with regard to Risks Posed by Targeted Financial Sanctions).

[5] Standard wording in EU sanctions regulations, e.g. Article 15 of Regulation (EU) 269/2014.

operating in the same jurisdiction are generally subject to the same legal requirements and regulatory expectations.

- Moreover, we recall the Commission's Legislative proposal on instant payments currently under discussion within the co-legislators[6]. **Article 5d(2)** of the proposal explicitly prohibits payment service providers from screening instant payments within the EU. However, the legal requirements pertaining to implementation of targeted financial sanctions do not distinguish between instant payments and traditional transfer of funds. We believe the **Parliament's approach** goes counter to the Instant Payments Proposal and would potentially create contradictory legal requirements. **The EBF hence suggests abstaining from introducing Article 37a in the final text of the AMLR.**
- Alternatively, the proposed provision should specify that the screening requirements **would only apply to cross-border transfer of funds where the counterpart is located outside the EU, in accordance with the Instant Payment Regulation**.

Politically Exposed Persons (Article 2(25) and 2(26)

- The EBF notes the **European Parliament's proposal** to expand the scope of Politically Exposed Persons ("PEPs") to include heads of regional and local authorities, including grouping of municipalities and metropolitan regions of at least 30.000 inhabitants, as well as siblings of said PEPs (**Articles 2(25(a)(viia)) and 2(26(c) of Parliament's position**).
- The inclusion to the list of PEPs of heads of regional and local authorities with a population of as little as 30.000 inhabitants does not appear to be aligned with the FATF definition which refers to an individual who is or has been entrusted with prominent public functions[7]. For instance, the AMLD4 has excluded non-prominent public functions by referring exclusively to PEPs who 'may expose the financial sector in particular to significant reputational and legal risks'. It is questionable to what extent all heads of regional and local authorities with a population of 30.000, without any other risk factor, expose the financial sector to significant risks. As a result, the provision may lead to disproportionate outcomes given the increase of burden for both financial institutions and the persons which would fall under the

[6] COM(2022) 546 final, available at https://ec.europa.eu/finance/docs/law/221026-proposal-instant-payments_en.pdf.

[7] According to FATF, domestic PEPs are individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Persons who are or have been entrusted with a prominent function by an international organisation refers to members of senior management, i.e. directors, deputy directors and members of the board or equivalent functions.
See FATF 40 Recommendations at https://www.fatf-gafi.org/content/dam/recommandations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf.

PEP definition given that a substantial number of these persons would not be responsible for managing large budgets.

- The administrative organisation of Member States is very different from each other. This is reflected in the number, the size and the role of local authorities and in the enterprises they own. That is why, for functions that are not national, each Member State should be responsible, at its level, for identifying the functions that should be considered politically exposed. **The Council's proposal which goes in this direction by adding to the list of PEP's functions "other prominent public functions provided for by Member States" (article 2(25(viii)) is sufficient to cover the heads of local authorities and of their majority owned enterprises**.
- Moreover, expanding the scope of PEPs to include siblings of PEPs constitutes a similar disproportionate obligation. Siblings have been excluded from the scope of 'family members' in the AMLD4 and there have been no identified resulting weaknesses which would substantiate a change in the legal framework.
- **The EBF supports the Council's approach which adds a provision to Article 2(25) explicitly stating that no public function shall be understood as covering middle-ranking or more junior officials.** However, the **Council's** proposal to include in the list of PEPs the members of the administrative, management or supervisory bodies of enterprises majorly owned by local authorities **(Article 2(25)(vii)** does not seem to be aligned with the FATF definition mentioned above (fn 2). In some EU countries, these enterprises are owned by communities, often of less than 30.000 habitants, and with limited budget.

Inability to comply with the requirement to apply customer due diligence measures (Article 17)

- The EBF expresses concern with the **Council's proposal in Article 17(3)** stipulating that obliged entities shall not enter into a business relationship with a legal entity incorporated outside the Union or with legal arrangement administered outside the Union, whose beneficial ownership information is not held in an EU UBO register, except in cases where an obliged entity entering into business relationship with legal entity operates in a sector that is associated with low ML/TF risks and the business relationship or intermediated or linked transactions do not exceed EUR 250 000 or the equivalent in national currency. The aforementioned text should be read in conjunction with the **Council's proposal for a new Article 48(1)(d)** whereby BO information of legal entities incorporated outside the Union or of legal arrangements administered outside the Union or whose trustee or the person holding an equivalent position is established or resides outside the Union shall be held in the central register.

- The requirements to obtain excerpts from UBO registers from EU/EEA Member States already create problems when starting a client relationship with trusts or similar legal agreements managed in a third country. Customers are obliged to enter themselves into an EU/EEA UBO register, but this is often complicated without a registered office in the chosen EU/EEA country. For example, the registers' language may render the process more difficult, as well as the additional costs related to obtaining a local correspondent address and other requirements to manage the entry, such as guidance to navigate the national legal landscape.
- **Article 17(3)** seems to introduce requirements which, while potentially increasing administrative burden, would not necessarily improve the overall efforts in fighting financial crime. Obliged entities are in any case required under the pertinent legal framework to identify their customers' beneficial owners and verify their identity. Therefore, this information would be readily available in case it was required by competent authorities. Taking this into account, obliged entities would ultimately be required to refuse to enter into a business relationship with non-EU entities which have not yet provided the information to an EU UBO register on the basis of nothing more than a formality Moreover, in view of the EBF, the restriction introduced in this Article does not seem to be based on a risk-based approach. Instead of basing the assessment on one risk factor, it should be based on an objective risk assessment. **The EBF therefore proposes abstaining from introducing such a provision in the AML Regulation.**

Ongoing monitoring of the business relationship and monitoring of transactions performed by customers (Article 21)

- In relation to the aforementioned requirements to update customer information, the EBF notes that both the **Council and the European Parliament's proposals on Article 21(2)** provide for risk-based updates while maintaining the maximum 5-year period envisaged initially. **The EBF calls for a stronger focus on the risk-based approach to updating customer information**. Combining risk-sensitive and temporal requirements would result in additional complexity particularly for low-risk customers. We highlight that in general the maximum period of 5 years is not the maximum period applied in the banking sector for such low-risk customers. A rigid 5-year maximum period will entail significant costs for banks without providing additional security from an AML/CFT perspective.

Identification of Beneficial Owners for corporate and other legal entities (Article 42)

- The EBF expresses serious concerns over **the European Parliament's proposal on Article 42 which suggests lowering the threshold for determining a beneficial ownership down to 15%**. We stress that beneficial ownership is not

synonymous with mere ownership. According to FATF, it refers to the natural persons who exert effective control over the entity regardless of whether they occupy a formal position within the establishment[8]. The 15% threshold proposed by the **European Parliament** does not necessarily point to a natural person having control over a legal entity. Reducing the threshold for beneficial ownership to 15% would fundamentally change the concept of beneficial ownership from being indicative of control to instead establishing a 'look-through' approach whereby those with a minimal ownership interest in the company are identified irrespective of their ability to exercise control over its affairs. **As a result, the proposal risks overwhelming obliged entities with 'white noise' which holds little meaning in determining those individuals who actually exercise control over customer entities.**

- Moreover, the **Parliament's proposal** departs from international standards where the 25% threshold is predominantly applied[9]. In the most recent update of its Guidance on Beneficial Ownership for Legal Persons, the FATF has confirmed this threshold as an acceptable standard[10]. If there would be an intention to depart from the international standard, we believe this should be based on a comprehensive risk assessment demonstrating such need.
- Finally, the **European Parliament's** proposal raises additional questions from a **personal data protection perspective**. There would be a substantial increase in information to be collected by obliged entities as a whole, not only banks. If the threshold was lowered, the personal data which would need to be collected would significantly increase, prompting concerns with regards to the fundamental principles of proportionality and data minimisation set out in Article 5 of the GDPR.
- **The EBF supports the Council's position and the Commissions' one on the 25% threshold for the identification of beneficial ownership expressed in Article 42(2)**.

Prohibition of disclosure (Article 54)

- **The EBF welcomes the proposal put forward by both the Council and the European Parliament on Article 54(5)** which pertains to the prohibition of disclosure and the exceptions thereof. The proposed text now refers to "same transaction" only (rather than limiting the exception to cases related to "the same customer and the same transaction"). **However, we also see the benefit in**

[8] See FATF Guidance on Recommendation 24, particularly paras. 32, 34 and Box 2 „Definition of "beneficial owner".

[9] See International Banking Federation (IBFed) Letter to the European Commission concerning the Beneficial Ownership Threshold at https://www.ibfed.org.uk/latest-news/response-to-ecs-aml-cft-reform-package/.

[10] See FATF Guidance on Recommendation 24, para. 37.

allowing disclosure of suspicious activities reports in case of "the same customer".

- **The EBF further supports the Council's proposal for a new Article 54(3a)** which introduces a derogation to the prohibition of disclosure ("tipping off") to enable partnerships for information sharing to operate, subject to the conditions established under Article 54(3a)(a) to (d). **We believe such exemption is essential in providing legal certainty with regards to exchange of information, including tactical data, within partnerships for information sharing in the AML/CFT area**.

Processing of personal data (Article 55)

- We welcome the clarification provided in reference to the processing of personal data covered by articles 9 and 10 of the GDPR. However, the **European Parliament's** proposal has introduced conditions that are either unnecessary (**Article 55(2)(ba)**) since this issue is addressed in the draft Artificial Intelligence Act and in the GDPR, or insufficiently clear (**Article 55(2)(bc)**).
- As a general remark, the **Council** text introduces legal provisions which acknowledge the increasingly important role of (public-)private partnerships for cooperation and information exchange fora between FIUs, various national supervisory and law enforcement authorities, and obliged entities. The **European Parliament** has adopted a similar approach, i.e. a proposal for a **new Article 55a** laying down a legal basis for exchange of information within partnerships for information sharing in the AML/CFT field. The aforementioned proposals constitute important additions to the existing legal framework. Consideration should be given to ensure they are carefully calibrated to foster both national and transnational cooperation, taking into account the cross-border dimensions of financial crime.
- **The EBF welcomes the approach of the Council, supported by the European Parliament, to strengthen the AML/CFT collaboration framework and foster enhanced information exchange with the ultimate aim of improving the outcomes of financial crime prevention efforts.** More specifically, the EBF expresses support for the proposed **Article 2(42)** introducing a definition of 'partnership for information sharing in AML/CFT field' and **Article 55(5) and 55(7) of the Council's proposal** which provide legal grounds for sharing personal data, including within such partnerships. **However, the EBF notes that the definition encompasses only those partnerships which are established under national law**. We highlight that many existing national PPPs are not explicitly established via a legal act under national law. Moreover, we highlight the importance of cross-border cooperation. A transnational perspective would also be in alignment with the objectives pursued by the Proposal for a Regulation establishing the Authority for Anti-Money Laundering and Countering the Financing

of Terrorism ("AMLA Regulation"). According to **Article 79** of the Proposal, AMLA may participate in existing cooperation arrangements established in one or across several Member States. Both pillars of AMLA's activities, namely directly supervising a number of entities operating across several Member States, on the one hand, as well as its role as an FIU Support and Coordination Mechanism, on the other, would greatly benefit from the possibility that AMLA participates in transnational PPPs. We note that the **European Parliament's** proposal includes the partnerships for information sharing in AML/CFT under national law in one or across several Members states (**Article 55a(1)**). Moreover, it is necessary to clarify that **Article 55(5)** shall be without prejudice to the possibility to share data within the group.

- The EBF has continuously stressed the importance of having a sound legal basis for exchanging AML/CFT data supplemented by appropriate safeguards ensuring that the data is protected, including via the use of secure channels for communication and internal procedures for documenting instances of processing. We believe that appropriate safeguards will further contribute to building trust between participants to such partnerships while striking the balance with data subjects' fundamental rights. **The EBF remains committed to providing further detailed input with regards to the safeguards proposed by the Council and the European Parliament.**
- We also acknowledge the recent letter sent out by the European Data Protection Board which questions whether exchange of information for the purposes of fighting financial crime and countering the financing of terrorism is necessary and proportionate. **The EBF emphasises that exchange of data is not only necessary, but crucial for the disruption of financial crime and related predicate offences such as organised crime, human trafficking, terrorism, sexual exploitation, drug trafficking and fraud, among others**. Having appropriate safeguards in place should be the guarantee that this exchange is not disproportionate and we believe that this is where the discussion should focus on at the present stage of the political dialogue. **Therefore, we fully support the view of the co-legislators to explicitly recognise the importance and benefits stemming not only from public-public, but also from public-private and private-private cooperation as already evidenced by numerous instances of successful AML/CFT partnerships operating across a number of Member States already[11].**
- The EBF further welcomes **the Council's proposal** on processing personal data by means of automated decision-making, including profiling, or artificial intelligence (**Article 55(6)**). However, the condition that only data collected in the course of

[11] See COMMISSION STAFF WORKING DOCUMENT on the use of public-private partnerships in the framework of preventing and fighting money laundering and terrorist financing SWD(2022) 347 final at https://finance.ec.europa.eu/system/files/2022-10/221028-staff-working-document-aml-public-private-partnerships_en.pdf.

performing the customer due diligence can be processed may ultimately limit the use of automated-decision making. Moreover, Article 22 of the GDPR already defines the legal regime for automatic decision-making, as well as EDPB Guidelines on this topic.

OTHER PROVISIONS WITH MAJOR IMPACT ON THE BANKS' AML/CFT COMPLIANCE

- **Additional considerations related to the European Parliament's proposal to introduce targeted financial sanctions in the scope of the AML Regulation:**

Scope of internal policies, controls and procedures (Article 7)

- **The European Parliament** proposes an addition to Article 7 whereby obliged entities shall have in place policies, controls and procedures in order to mitigate and to manage the risk of divergent implementation of targeted financial sanctions. The sanctions against Russia have shown that Member States can have divergent interpretation of sanctions. As a result, economic operators, including obliged entities under the AML/CFT framework, face significant implementation challenges. However, they have no choice but to apply the sanctions in accordance with Member States' interpretation.
- **Based on the above, the EBF suggests that this amendment is not included in the final text of the AML Regulation.**

Risk assessment (Article 8)

- **The European Parliament** proposes an amendment whereby obliged entities shall take appropriate measures to identify and assess the risks of non-implementation and evasion of targeted financial sanctions taking into account at least the list of documents stated in Article 8, the risk variables set out in Annex I and the risks factors set out in Annexes II and III.
- The EBF stresses that most of this information, particularly the one mentioned in let. "a", "b", "c" and "ca" is not specific to targeted financial sanctions but to AML/CFT. Therefore, it should be clarified that the list stated in Article 8 is only an indicative list. **To that aim, we suggest removing the words "at least" from the legal text.**

Simplified customer due diligence measures (Article 27)

- **The European Parliament** proposes an addition whereby obliged entities shall refrain from applying simplified due diligence measures if, *inter alia*, the customer is a family member, or a person known to be a close associate of persons subject to targeted financial sanctions. Although the EBF takes the issue of preventing circumvention of sanctions very seriously, we recall that simplified customer due diligence measures could be applied to customers with low-risk profile only. This

framework is not compatible with exploring in detail the customer's family or social environment.

- We agree that the low-risk profile cannot be maintained in certain situations such as those mentioned in Article 27. Nonetheless, there are situations where a certain trigger event is the basis for the application of more extensive CDD measures. This may include, e.g. doubts in the veracity of information provided, an anomaly in the monitoring of the transactions or other suspicion of money laundering or terrorist financing. Regarding the family members or a person known to be a close associate of a person subject to targeted financial sanctions, the same reasoning should apply. It could be provided that obliged entities should refrain from applying simplified due diligence measures in such cases to the extent that they have determined on a previous occasion that a customer is a family member, or a person known to be a close associate of a person subject to targeted financial sanctions.

Higher risk factors (Annex III)

- We agree that it is necessary to take into account some risk variables related to sanctions. However, the text of Annex III needs to be clarified. We propose to enumerate only the EU sanctions and the United Nations sanctions as they constitute the international legal framework applicable to EU obliged entities.

- **Subject Matter and Scope, including List of Obliged Entities (Art. 1-6)**

Definitions (Article 2)

- The EBF notes that, in both **the Council's and the European Parliament's** proposals, the beneficial owner is defined as, inter alia, the natural person for the benefit of whom a business relationship is conducted (**Article 2(22)**). This extension goes beyond the FATF definition of beneficial owner. Moreover, it may lead to a confusion between the person who controls or owns a legal person (who is the beneficial owner) and the person who benefits from the activity of a legal person (who is the customer). This is exacerbated by the obligation introduced by **the Council** to obtain information over the end user of the services provided through the business relationship or the occasional transaction (**Article 18(2a)**). **The EBF supports maintaining the FATF definition which is also the one proposed by the Commission.**

List of obliged entities (Article 3)

- The EBF welcomes the **European Parliament's** proposal to expand the list of obliged entities under **Article 3(3)**, particularly persons trading in luxury goods other than metals and stones.
- Nevertheless, the EBF does not support the **European Parliament's proposal** for lowering the amount of monthly rents from 10 000 euros to 5 000 euros for estate agents acting as intermediaries in the letting of immovable property. While the real estate sector can be classified as high-risk when referring to acquisition, no specific ML/TF risk situations related to the letting activity have been identified by regulators (national/supranational.

- **Internal Policies, Controls and Procedures of Obliged Entities (Art. 7-14)**

Internal governance (Article 9)

- **The EBF supports the proposal in Council with regards to Article 9 concerning the role of compliance manager**. More specifically, we welcome the amendments replacing the reference to "board of directors" with "management body". This would ensure that the legal framework would avoid creating frictions with provisions of national company law in various Member States whereby members of the board of directors cannot be entrusted with individual responsibilities given that the board is conceived as an inseparable body through which all functions are performed. In this perspective, **we welcome the Council's approach (paragraph 2)** whereby, in the case of collective responsibility of the board, the compliance manager would hold role of support and information ("*Where the management body in its management function is a body collectively responsible for its decisions, the compliance manager is in charge to assist and advise it and to prepare the decisions referred to in this Article*").
- We further welcome **the European Parliament's proposal (Article 9(1))** clarifying that the provisions of Article 9 do not affect the national provisions on joint civil or criminal liability of management bodies *("This paragraph is without prejudice to national provisions on joint civil or criminal liability of management bodies liability"*) if these can be understood in the sense that in a legal systems providing for collective responsibility of the board, the compliance manager would assist and advise the board on AML/CFT issues **but is not individually responsible for their implementation**. Moreover, the EBF also assesses as positive the proposals to refer to the compliance manager's role to *ensure* compliance with the Regulation rather than being responsible for the practical implementation of measures which would render the role too operational. As the functions of the compliance manager are described in several provisions of the AMLR, we recommend clarifying that in principle, the compliance manager's

function is not an operational one. This principle is fundamental for the distinction between the role of the compliance manager and the role of the compliance officer.

- We also welcome the **European Parliament's proposal (Article 9(5) and 9(6))** whereby the management body, and not the compliance manager, takes the necessary actions to remedy any deficiencies identified in a timely manner, and whereby the compliance officer may cumulate the functions of compliance manager and compliance officer.
- However, we caution about the **European Parliament's proposal in Article 9(3)** which stipulates that an obliged entity that is part of a group may appoint as its compliance officer an individual who performs that function in another entity within that group, **provided that that entity is established in the same Member State in which the obliged entity is established**. The EBF maintains that the proposed approach is too narrow and not in alignment with the approach in Article 13 whereby a parent company must ensure implementation of group wide policies in branches and subsidiaries. The proposal could therefore diminish the benefits from a central oversight function within financial groups that operate across borders. **We hence propose removing said amendment.**

Scope of internal policies, procedures and controls (Article 7 of the Parliament and the Commission's proposal or 8 of the Council's proposal)

- The EBF notes that the policies, procedures and controls are addressed jointly, without distinguishing between the three concepts. Given their operational nature, we believe that they should be approved by the compliance officer. **We hence support the Council's proposal in Article 8 to the extent that it allows the approval of the internal procedures, including controls, to the compliance officer. However, we are not in favour of assigning the approval of policies to the management body in its management function.** A policy is not a strategic document but a high-level procedure that will be implemented and adapted in the different business lines and activities of the obliged entities.

Integrity of employees (Art. 11)

- The EBF supports **the Council's proposal** which introduces some proportionality in the scope of employees subject to an assessment of their skills, knowledge and expertise, as well as good repute, honesty and integrity. We also support the clarification that the compliance officer needs to approve the methodology and not the assessment itself.

Group-wide requirements (Article 13)

- In line with our comments above, **we do not support the Council's proposal whereby the compliance manager shall regularly report on the**

implementation of the group's policies, procedures and controls to the management body (**Article 13(1)).** We consider that the compliance officer is better placed to do so.

- **Customer Due Diligence (Art. 15-41)**

Application of customer due diligence (Article 15)

- In relation to occasional transactions, **the Council's proposal** clarifies that customer due diligence measures shall apply when an obliged entity carries out such occasional transaction **(Article 15(1)(b))**. The original wording which refers to cases when an obliged entity "is involved in an occasional transaction" is unclear.
- We also note the **Council's proposed addition of let. "e" to Article 15(1)** referring to doubts that the person who, as part of a business relationship, wishes to carry out a transaction, is actually the customer or person authorized to act on his behalf and who was identified and whose identity was verified. It seems that the proposed text does not introduce a hypothesis which would not be covered in let. "a" to "d" and could only lead to unclear requirements.
- **The European Parliament** introduces specific provisions regarding electronic money. We support these provisions since in certain circumstances, such instrument can be low risk.

Customer due diligence measures (Article 16)

- According to the **European Parliament's proposal**, obliged entities would be required to "*identify and record the identity of nominee shareholders and nominee directors of a corporate or other legal entity and identify their status as such, where applicable*". **The EBF stresses that the identification of all nominee shareholders and nominee directors is not a feasible regulatory expectation**. **This would be the case if the text specifies that the concept of nominee is different from that of the strawman and that the nominee is, in accordance with the FATF definition, an individual or legal person instructed by another individual or legal person ("the nominator") to act on their behalf in a certain capacity regarding a legal person[12]. Identification of nominee directors and nominees of beneficial owners would then be possible if the contract is published.**

[12] See FATF Guidance on Recommendation 24, para. 125.

Inability to comply with the requirement to apply customer due diligence measures (Article 17)

- The EBF supports the **Council's proposal** allowing obliged entities to adopt alternative measures with equivalent effect to refraining from carrying out a transaction or establishing a business relationship **(Article 17(1))**.

Identification and verification of the customer's identity (Article 18)

- The EBF welcomes the proposed standardisation of key customer identity information that obliged entities have to collect and verify pursuant to **Article 18**. This would potentially reduce fragmentation and legal uncertainty and could also enable multinational banking groups to develop more consistent group-wide policies and processes.
- Nevertheless, **we caution that the proposed mandatory KYC requirements in Article 18 are very detailed and go beyond what is currently prescribed in many national jurisdictions across the EU**. For many financial institutions this would entail difficult and burdensome remediation exercises with regards to the existing customer databases. Any new requirement to collect personal data routinely should be based on a risk assessment showing how the new data is valuable to mitigate identified ML/TF risks, and how it is necessary and proportionate in terms of customer's data privacy rights. We recommend that this required analysis and discussion is progressed through an obligation for the AMLA to set mandatory KYC requirements in regulatory technical standards.
- In view of the considerations above, **the EBF calls for Article 18 to apply to new customers only, after the entry into force of the AMLR, without affecting with retrospective effect the existing customer relationships** in order to avoid disruptive remediation exercises of the complete customer portfolio that can divert resources away from financial crime prevention. The information on existing customers could be updated with any new requirements in line with legal requirements to update customer information on a periodical basis.
- We do, however, question the proposed new requirement to identify and verify place of birth as a matter of routine. The collection of this data point is invasive for customers and beneficial owners, and would be significantly costly for regulated firms. Importantly, the AML/CTF value of identifying and verifying place of birth routinely has not been substantiated. Such a material expansion of mandatory due diligence obligations must be supported by an analysis of the effectiveness of collecting place of birth.
- The EBF recalls that in case there are doubts that the person identified is the beneficial owner, obliged entities shall not enter into a relationship. This situation is different from the one where, legitimately, there is no natural person which qualifies as beneficial owner. We hence suggest deleting the part of the co-

legislators proposal where the natural person holding the position of senior managing official should be considered to be the beneficial owner of the legal entity *in cases where there are doubts about who is the beneficial owner* (**Article 18(2)**). This possibility should be used where, legitimately, there is no beneficial owner identified.

- The EBF welcomes the distinction introduced by the **European Parliament and the Council** between the verification of the identity of the customer, on the one hand, and the beneficial owner, on the other hand. However, we acknowledge that **the European Parliament's proposal** seems to contain a three-step process which is overly complex (**Article 18(4)**). Since the identity documents of the beneficial owners are very sensitive documents, **it is hence, necessary to allow obliged entities to verify the identity of the beneficial owner by taking appropriate measures on a risk basis** such as obtaining information from the customer, independent and reliable sources or by the consultation of the UBO register. We suggest simplifying Article 18(4) in this way.

Identification of the purpose and intended nature of a business relationship or occasional transaction (Article 20)

- **The Council's proposal** introduces flexibility in the elements to be obtained by obliged entities to identify the purpose and intended nature of business relationship or occasional transaction. Such flexibility would allow obliged entities to modulate their due diligence according to the risk associated to a customer.

Identification of third countries with significant strategic deficiencies in their national AML/CFT regime (Articles 23, 24 and 25)

- **The Council's approach** consists in aligning the EU list of high-risk third countries with the FATF lists and permitting Member States to supplement this list by national lists (**Article 23 (5a)**). This will ultimately lead to divergence between Member States leading to operational burden for obliged entities. The EBF therefore calls for an EU list of high-risk third countries that could go beyond the FATF list to take into account specific risks while maintaining a harmonised approach.

European Parliament proposal: Identification of credit institutions or financial institutions or crypto-asset service providers not established in the Union posing a specific threat to the Union's financial system (Article 25a)

- The **European Parliament's proposal for a new Article 25a** states that AMLA would have the powers to assess whether specific credit or financial institutions not established in the Union pose a specific and serious threat to the financial system of the Union. The proposed provision could undermine the collective FATF

framework for assessing whether each jurisdiction is meeting its obligations to regulate, supervise and enforce. **We caution it might leave the door open for arbitrarily targeting certain financial institutions.**

Enhanced customer due diligence (Article 28)

- In relation to **Article 28**, while the European Commission's text states that obliged entities shall examine the origin and destination of funds involved in, and the purpose of, all transactions that fulfil at least one of the conditions listed below in the provision[13], the **European Parliament's proposal** consists in expanding the scope of the legal text by requiring obliged entities to also examine transactions that are atypical and may fulfil one of said conditions. Particularly the latter part of the proposal raises significant uncertainty as to when a transaction may be e.g. of complex nature. **We hence recommend maintaining the initial version of the text, as also supported by the Council.**
- Moreover, **in its position, the European Parliament suggests deleting Article 28(6)**. Said article stipulates that EDD measures shall not be invoked automatically with respect to branches or subsidiaries of obliged entities established in the Union which are located in high-risk third countries where those branches or subsidiaries fully comply with the group-wide policies, controls and procedures. This deletion seems to imply that EDD requirements may be extended to such branches and subsidiaries. **Considering that group-wide policies are respected, the EBF sees no reason why mandatory EDD requirements be extended to said branches and subsidiaries.**

Specific provisions regarding politically exposed persons (Article 32)

- The EBF supports **the Council's proposal** to clarify that the provisions regarding politically exposed persons should be applied in accordance with a risk-based approach. This is important since not all the PEPs run the same level of risk. We also welcome the **Council's** amendment whereby the provisions apply either to occasional transactions or/and to business relationships.

Measures towards persons who cease to be politically exposed persons (Article 35)

- The EBF has noted that **the European Parliament has proposed extending the period of time during which requirements towards PEPs apply to those persons who ceased to hold a prominent public function from 12 to 24**

[13] (a) the transactions are of a complex nature;
(b) the transactions are unusually large;
(c) the transactions are conducted in an unusual pattern;
(d) the transactions do not have an apparent economic or lawful purpose.

months. Taking into account the other Parliament proposals to expand the definition of PEPs, the EBF maintains that the outcomes of this amendment would be disproportionate in terms of costs and burdens for both obliged entities and PEPs who do not necessarily pose a high risk. We also stress that any expansion of the definition of PEP must be informed by, and in response to, risks identified in the EU supranational risk assessment (SNRA) or Member States' national risk assessments (NRAs). Unless the expansion of definition targets a known risk, obliged entities would have to redirect resources to a new compliance activity that does not enhance the EU's ML/TF framework, whilst newly in-scope PEPs, their close associates and immediate family members, will be subject to significant inconvenience and new demands to provide personal information without a substantiated AML/CTF purpose. **The EBF therefore expresses support for the Council and the European Commission's alternative position on this article**.

European Parliament proposal: Specific provisions regarding certain high-net-worth customers (Article 36a)

- The EBF notes the **European Parliament's proposal for a new Article 36a on High Net-Worth Individuals (HNWI)**. The text of the article stipulates that "*A customer whose wealth derives from the extractive industry or from links with politically exposed persons, or from the exploitation of monopolies in third countries identified by credible sources/acknowledged processes as having significant levels of corruption or other criminal activity shall be considered to be a high-risk high-net-worth individual".* It further specifies that in the case of banks, it will apply to those entities that have a business relationship with that customer that exceeds EUR 1 000 0000, calculated on the basis of the customer's financial or investable wealth or assets either under management by the obliged entity or relating to which the obliged entity offers material aid, assistance or advice, excluding the customer's main private residence, regardless of whether that amount is reached at the time of establishment of the business relationship or in the course of one year.
- The text of **Article 36a** significantly narrows down the scope of persons considered as HNWI and introduces certain risk-based elements. Regardless, the provisions referring to "reported link with politically exposed persons" or "exploitation of monopolies" remain unclear and might lead to divergent outcomes.
- Finally, the EBF recalls that **a framework for enhanced customer due diligence measures has already been put in place in Article 28(1)** which applies in cases of increased risk of money laundering or terrorist financing pursuant to **Art. 16(2)**. 'High net-worth individuals' are already considered higher risk than regular customers due to the fact that 'private banking activity' is part of the list of factors of potentially higher risk in Annex III of the Regulation. In this instance, enhanced customer due diligence is applied in accordance with the risk-based approach which is fundamental for the AML/CFT framework to adapt to risks accordingly.

Specific provisions regarding offshore financial centres (Article 36b)

- We note that **the European Parliament** proposes to create a list of offshore financial centres. We are concerned about the creation of this new list as it may overlap with the EU Hight Risk Third Countries and with the EU list of third country jurisdictions for tax purposes. Managing too many lists inevitably introduces significant burden. **We are not convinced about the utility of the new list proposed by the Parliament and, therefore, we propose not to maintain this article.**

Performance by third parties (Articles 38-41)

- The EBF maintains that within a financial group it should be possible to rely on other group entities for all measures performed, and not only those referred to in **Article 16(1), points (a), (b) and (c)** of the Commission's proposal, under the condition that the entities are subject to the same group-wide policies. Under the same condition, outsourcing within a group should be possible for tasks listed in Article 40(2). We believe that the prohibitions on outsourcing are unnecessary and disproportionate, given broader requirements for proper oversight and risk-based escalations for senior management approvals of high-risk cases.
- The EBF welcomes the **European Parliament's proposal on Article 38(1).** According to the Parliament's position, this would extend the possibility to rely on another obliged entities to meet a broader scope of CDD requirements. However, **we caution against the suggestion to remove the part of Article 38(4)** whereby obliged entities established in the Union whose branches and subsidiaries are established in high-risk third countries may rely on those branches and subsidiaries, where all the necessary conditions set out in Article 38(3) are met. The EBF maintains that this would be disproportionate. Reliance on an obliged entity within the group generally offers more guarantees than reliance to entities outside the group because i) there is certainty that group procedures will be applied; and ii) there are more regular reporting and controls. **The EBF thus calls for maintaining the possibility as set out in Article 38(4) to rely on such branches and subsidiaries where the necessary conditions are met.**
- We further note that **the European Parliament proposes removing Article 39** on the process of relying on another obliged entity. We believe this article should be maintained in the final version of the Regulation as it provides important guidance which is useful for obliged entities.
- The EBF stresses the importance of having sufficiently flexible provisions on outsourcing which would particularly benefit smaller obliged entities who do not have the capacity to make substantial investments in designing in-house processes.

We therefore support the Council's approach to Article 40 (Article 6a of the Council's position) which is less restrictive in terms of outsourcing.

Unwarranted de-risking, non-discrimination and financial inclusion (Article 41a)

- The EBF cautions against **Article 41a(1) second sub-paragraph of the European Parliament's proposal** according to which credit and financial institutions shall include options and criteria to adjust the features of products or services offered to a given customer on an individual and risk-sensitive basis and, where applicable, in accordance with the level of services offered under Directive 2014/92/EU. Such adaptations of the products or services offered would lead to complications in terms of customer relations given that explanations would need to be provided to customers about why certain services or products offered need to be downgraded. **We therefore suggest deleting this part of the amendment.**
- Moreover, we believe that **Article 41a(1)** will affect banks' processes in a fundamental way by requiring them to include in their internal policies, controls and procedures options for mitigating the risks of ML/TF before deciding to reject a customer on ML/TF risk grounds. This requirement is difficult to implement in practice given that the decision to enter into a relationship or to terminate it is taken in a case-by-case basis. It is impossible to formalise all possible hypotheses in a procedure or a policy.
- In general terms, **Article 41a** interferes with the freedom to conduct business principle whereby EU operators are free to conduct their business as they see fit in accordance with applicable law[14]. The imposition of such targeted restrictions on financial products and services will create tension with Article 17 of Directive 2014/92/E. **We hence suggest deleting said article.**

- **Beneficial Ownership Transparency (Art. 42-49)**

Identification of Beneficial Owners for corporate and other legal entities (Article 42)

- As mentioned above in the section emphasising the texts the banking sector identifies as a priority, **the EBF supports the Council's position and the Commission's one on the 25% threshold for determining beneficial ownership.** We caution, however, that **the Council's proposal in Article 42(1)** is very detailed which might render the provision difficult to understand without

[14] This principle is explicitly referred to, e.g. in the Guidance note on the Blocking Statute (see para. 5) at EUR-Lex - 52018XC0807(01) - EN - EUR-Lex (europa.eu).

providing examples of application. It therefore may be advisable that AMLA specifies how the beneficial owner shall be identified in practice.

- We further note the **Council's suggestion in Article 42(8)** to empower the European Commission to identify the categories of corporate entities that are associated with higher money laundering and terrorist financing risk and for which a lower threshold would apply. However, rather than categories of corporate entities, **we suggest that the European Commission identifies risks criteria based on which a lower threshold may be applied**. Apart from the type of corporate or legal entity, other variables may point to a higher risk such as, for example, the type of activity and the localities where the activities are carried out..
- Nonetheless, we caution that, if this approach is included in the final version of the Regulation, several other aspects would have a negative impact over obliged entities' operations. We recall that, as proposed by the co-legislators, and in line with the FATF guidance[15], the beneficial owner is either the natural person(s) who ultimately have a controlling ownership interest in a legal person or the natural person(s) exercising ultimate effective control over the legal person through other means than ownership interest. The controlling interest is fixed at 25% of the shares or the voting rights, directly or indirectly. A lowered threshold, whatever it is, cannot be indicative of control over a legal person without any other considerations such as, for example, contracts among shareholders. These considerations would under the concept of **control through other means**. **We hence believe that fixing a lower threshold to identify the beneficial owner of a legal person will lead to identifying fictitious beneficial owners (i.e., identifying a person who has no power over the legal entity) and will divert obliged entities' resources allocated to AML/CFT.**
- **It is also a question of feasibility and efficient management of resources**. A "changing" beneficial owner threshold according to the Commission's RTS would imply regular remediations of KYC files. This would have a significant operational impact on banks. The impact would also be significant for the beneficial owner registers as each Member State would have to retrieve again the information on the BOs of companies registered in their country.
- We fully support the objective to identify the beneficial owners of legal persons. However, **as suggested by FATF, we believe that the way of improvement is to ask legal persons and beneficial owners to be more transparent, particularly regarding formal and informal arrangements, to accompany them in this process and sanction them where necessary**[16]. In this context,

[15] Guidance-Beneficial-Ownership-Legal-Persons.pdf : point 32

[16] See FATF Guidance on Recommendation 24, para. 77.
Countries should consider the following:

we stress the importance of EU beneficial ownership registers applying any potential lower threshold in a manner consistent with AML/CTF obligation of obliged entities, including verification.

- **We highlight that lowering the threshold for identifying the beneficial owner will not improve the efficiency of financial sanctions either**. We stress that the notion of control is different in the framework of sanctions and in the framework of AML/CFT. In the former, the control by ownership interest is the possession of more than 50% of the proprietary rights of an entity or having majority interest in it[17].
- Moreover, in relation to the **European Parliament's proposal to change the wording of Article 42(1)(d) from 'family' to 'relatives',** we believe that the relationships between family members are too subjective, fluctuant, unpredictable and difficult to capture to consider that they can, systematically, be considered to identify a beneficial owner. **We strongly oppose the co-legislators' proposal whereby the family members or the relatives or associates of managers or directors or those owning or controlling the corporate entity could be beneficial owners through control by informal means**. The rationale of this proposal is all the more unclear as the manager or director may not be a beneficial owner themselves.
- There are corresponding concerns about the calculation of the beneficial calculation-method to determine (indirect) control remains unclear. This only leads to the collection of data and the increase in the number of BOs, but also has no benefit for anti-money laundering in consequence.
- Regarding the notion of control via other means, the three versions of the legal text are quite similar. However, **the Commission's** version is more

a) Are there mechanisms (e.g., established procedures/protocols) in place to ensure that the beneficial ownership information collected by companies is adequate, accurate and up-to-date, and that such information is accessible in a timely manner by the competent authorities? Do companies have powers to require updated information from their shareholders (including the power to request beneficial ownership information at any time)?
b) Are shareholders required to disclose the names of person(s) on whose behalf shares are held (i.e., nominators)? When there are any changes in ownership or control, are shareholders and beneficial owners required to notify the company within a set time period? Are companies required to validate, review and verify information on beneficial owners periodically?
c) Are there effective, proportionate and dissuasive sanctions against the company and its representatives for failing to carry out their obligations (e.g., to collect beneficial ownership information and keep it adequate, accurate and up-to-date)?
d) Do competent authorities have powers to require the cooperation of companies, and are there effective, proportionate and dissuasive sanctions for non-cooperation? Is beneficial ownership information required to be accessible within the country of incorporation? How are companies that have no physical presence in the country of incorporation dealt with?
e) Have authorities provided financial institutions/DNFBPs with clear guidance on what measures they expect them to take if companies do not cooperate with them (e.g., reporting the non-cooperation to the relevant authorities, not engage with or continue the business relationship).
f) How will companies become aware of their obligations and the necessary resources required to fulfil these obligations? Is there adequate guidance explaining their obligations, and is this guidance publicly available? Are there adequate avenues for companies to be engaged and educated on their obligations?

[17] See EU best practices for the implementing of restrictive measures, para. 62. Available at https://data.consilium.europa.eu/doc/document/ST-10572-2022-INIT/en/pdf.

understandable (**Article 42(1)**). In particular, the distinction made by the **Council** in Article 42(4) and 42(5) could lead to confusion.

- Regarding the identification of the beneficial owners of legal entities other than corporate entities, we consider that the Commission should adopt a delegated act as proposed by the **European Parliament** rather than a recommendation as proposed by the Commission (**Article 42(4)**).
- Regarding the companies listed on a regulated market, **we support the Commission's proposal** (**Article 42(5)**) whereby the provisions on beneficial owner shall not apply if these companies are subject to disclosure requirements consistent with Union legislation or equivalent international standards. The conditions imposed by the **Council's** proposal (**Article 45a**) would virtually exclude all listed companies from the scope of the exemption, regardless of the fact that they meet the aforementioned disclosure requirements.

Beneficial ownership information (Article 44)

- The EBF maintains that the requirements for obtaining beneficial ownership information cannot be the same as those concerning customer information since beneficial owners are not in a formal relation with obliged entities. We note that **the Council's proposal** is more realistic but, the nationality or nationalities of beneficial owners are still required, as in the European Parliament and the Commission's proposal (**Article 44(1) (a)**). This information will be very difficult to obtain as it may be perceived as discriminatory and will require disproportionate resources to be verified. Hence, if this requirement is maintained, this information should be collected through a declaration.

Obligations of legal entities (Article 45)

- The EBF supports **the European Parliament's proposal** which strengthens the obligations of legal entities towards obliged entities. Legal entities' collaboration is fundamental in ensuring correct implementation of the Regulation.

Foreign legal entities and arrangements (Article 48)

- The EBF also cautions that the **amendment proposed by the European Parliament with regards to Article 48(2a) is unclear.** The article seems to imply that obliged entities will be liable for third-country legal entities in their disclosure obligations which was not the initial objective of Article 48. As a result, this additional obligation will generate significant operational burden for obliged entities. In this context, it is important to emphasise that Chapter III (Art. 18) already requires obliged entities to identify and verify their clients' beneficial

owners as well as ensure that this information is consistent with the information available in the relevant registries. Given that Article 48 pertains to obligations of foreign legal entities and arrangements, **we believe the proposed text, which introduces obligations for obliged entities, would have unintended consequences**.

- The **Council's proposal on Article 48** appears to be a good compromise between the three versions of the legal text.

- **Reporting Obligations (Art. 50-54)**

Reporting of suspicious transactions (Article 50)

- The EBF acknowledges that the **European Parliament has suggested to expand reporting obligations as set out in Article 50(1) to also include predicate offences.** We highlight that this would constitute a significant expansion and a fundamental change in the role and responsibilities of the obliged entities, shifting the balance between obliged entities and authorities. By adding predicate offences to the reporting obligations, the focus shifts from looking at potential illicit funds or funds potentially aimed at terrorist financing (which is an inherent activity for a financial institution dealing with customers and funds) to obliging financial institutions to detect potential predicate offences. This would otherwise normally be the role of law enforcement authorities acting under judicial administration rules ensuring the right legal balance between investigations and the protection of the fundamental rights of a suspect. This seems to blur the lines between the preventative framework characterising the AML/CFT efforts and criminal investigations carried out by law enforcement authorities. Additionally, the proposal to report predicate offences instead of suspicious activities contradicts the international basis of the suspicious activity reporting obligation under FATF Recommendation 20, which explicitly requires a suspicious transaction[18]. The proposed unbounded extension of the reporting obligation would foreseeably lead to a further increase in reporting, although FIUs are already barely able to cope with the reporting volume. A central objective of the AML package - more quality, less quantity - would be virtually turned into its opposite. It will also lead to discrepancies between EU and non-EU obliged entities with regards to their reporting obligations**. Hence, we suggest removing this addition to the reporting obligations.**

[18] FATF Recommendation 20 states that "If a financial institution **suspects or has reasonable grounds to suspect** that funds are the proceeds of a criminal activity, or are related to terrorist financing, it should be required, by law, to report promptly its suspicions to the financial intelligence unit (FIU)". Available at https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf, p. 19.

- **The EBF expresses support for the Council's proposal in Article 50(1a) whereby obliged entities shall reply to a request for information by the FIU promptly, within the deadline set by the FIU, taking account of the urgency and the complexity of the query**. We maintain that the timeline for responding should be based on the urgency and complexity of the cases and not be constrained by rigid requirements for response time. This being said, it is not entirely clear how the passage on reporting "criminal activities" (**para. 1 no. (b)**) is to be interpreted, since at first glance this is more far-reaching than the criminal offense of money laundering itself. It is to be hoped that the fact that the recitals and the law generally refer to criminal activities in connection with money laundering or terrorist financing means that only such activities are covered and that the scope of the offense cannot/should not be expanded. **In this case, we suggest a clarification and specification that what the law means is: "criminal activity in connection with AML/TF".**
- **The EBF welcomes the Council's proposal for a new Article 50(1b)** to allow for certain reporting exemptions in situation where Member States identify that such exemptions concern low-level criminal activity. We believe that this might reduce over-reporting, hence preventing FIUs from being overwhelmed by reports often containing irrelevant information and hence foster a move from a rule-based approach in favour of a risk-based one.

Consent by FIU to the performance of a transaction (Article 52)

- With regards to **Article 52**, we note that **the European Parliament** proposed linking the execution of a transaction after the expiration of the 3-day stopping period without feedback from the FIU to a risk assessment carried out by the obliged entity. What this risk assessment should contain and what the consequence will be in case an obliged entity determines a case to be "high risk" or "continuing (ML) suspicion" is unclear. This newly-inserted sentence is an attempt to shift the responsibility or the sole decision on the execution of the reported transaction to the obligated party ("may carry out"). The relationship to the civil law execution obligations of the authorized transaction is not taken into consideration.

- **Data protection (Art. 55-57)**

Record retention (Article 56)

- As regards keeping records of financial transactions within an ongoing business relationship, **the provisions of the proposed Article 56** have largely remained unchanged going into trilogue. According to the article, obliged entities are required to retain data on financial transactions for a period of at least 5 years after the end

of the business relationship, whereas FATF Recommendation 11 requires the retention of financial transactions data for at least 5 years after the transactions occurred for the purposes of complying with information requests from competent authorities. It is therefore important that uniformity in establishing retention periods is sought and coherence with other local law retention periods is observed, including clarifying that obliged entities can continue to hold data beyond the period prescribed by EU AML/CFT rules where they may lawfully do so under the GDPR.

- **Annexes I, II and III**

  - Annexes I, II and III require a substantial amount of information and documents on the beneficial to be collected, regardless of the individual risk associated with each business relationship. Among this information, much of it is not always relevant for assessing the risk posed by clients (e.g. information regarding the place of business and residency, personal links with certain jurisdiction, the collection of a copy of an ID document). Moreover, this information is often not easily available (since no relationship exists between the obliged entities and the beneficial owner).
  - Therefore, maintaining such due diligence requirements would be disproportionate and could hamper the use of resources dedicated to AML/CFT by obliged entities.