



European Banking Industry Committee

European Banking Federation (EBF) • European Savings Banks Group (ESBG) • European Association of Cooperative Banks (EACB) European Mortgage Federation (EMF) • European Federation of Building Societies (EFBS)
European Federation of Finance House Associations (Eurofinas)/European Federation of Leasing Company Associations (Leaseurope)
European Association of Public Banks (EAPB)

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EBiC Comments on the proposal for a new EU Directive on Money Laundering

EXECUTIVE SUMMARY

I. EXTENSION OF PREDICATE OFFENCES

EBiC has some concerns about the proposed new definition of serious offences in Article 3 (7) (f). Pursuant to this definition, a very wide range of minor offences - and in some countries all offences - will be included in the scope of money laundering predicate offences. The inclusion of minor offences in the scope of the proposed Directive would run in contradiction with the risk-based approach introduced by the Directive. In addition, it could have a detrimental effect on the consumer as well as on the confidence relationship between the customer and its bank.

II. RISK-BASED APPROACH AND OTHER KEY PRINCIPLES

For reasons of efficiency, the fight against money laundering needs to be focused on the most serious forms of crimes. Resources - public and private alike – should be allocated to the fight against money laundering on a proportionate basis, i.e. in relation to concrete risks faced by banks. In this context, EBiC very much welcomes the introduction of a risk based approach in the Directive. This reference should serve as a guiding principle for interpreting and implementing the Directive's provisions. Moreover, we strongly recommend not to enter into too many details of the risk based approach, as the notion of risks is in constant evolution and specific to each bank and situation.

Essentially EBiC believes that the EU legislation in the anti-money laundering (AML) field should be guided by the following principles: the measures should be (a) risk-based, (b) proportionate and efficient, (c) workable and flexible, (d) coherent and in line with existing international standards. It should also take into account (e) the confidence relationship between a bank and its customer as well as (f) the need for cooperation and exchange of information between the authorities and the institutions and persons subject to this Directive.

III. KEY ISSUES:

EBIC considers that the Directive should be improved on several points. The most problematic provisions concern the definition of the "beneficial owner" and of "Politically Exposed Person" (PEP).

- BENEFICIAL OWNER

Current due diligence procedures in banks work properly and therefore no additional regulatory action is needed in this field. However, should the EU decide to adopt new rules as far as beneficial owners are concerned, then EBIC would recommend that those rules should foresee a principle instead of too concrete rules. Should the EU nevertheless decide to opt for a threshold, EBIC would have strong reservations related to (a) the establishment of publicly accessible registers, (b) a harmonised definition of the controlling shareholding, and (c) information which is not available to companies themselves. The proposal for a Directive would thus imply far reaching changes in Member States' Company law. Finally, the threshold of 10% is neither adequate nor practicable. EBIC insists on increasing this threshold to at least 25%, otherwise credit institutions will not be able to comply with this provision.

- PEPS

A modification of the PEP definition is essential for the banking industry. Otherwise, banks would have to check each customer for any political involvement thus requiring frequent updates. Undue bureaucracy would jeopardise the objective of ensuring special measures with regard to a high-risk customer group. Therefore, the EU should be considered as a single jurisdiction for the purpose of the PEP definition. Intra-EU PEPs should be excluded from this definition, especially since credit institutions already apply different appropriate due diligence procedures. Moreover, the PEP definition is not intended to cover middle ranking or more junior individuals, so that politicians from the sub-national level should be excluded.

- STRICTER MEASURES BY MEMBER STATES

In the context of the EU internal market, uniform rules on AML are the only adequate solution to fight against money laundering, to avoid distortions of competition and to prevent legal shopping between jurisdictions. Member States should therefore not be permitted to take stricter measures in the AML field.

- TIPPING OFF & FEEDBACK

In order to apply anti-money laundering measures efficiently, credit institutions should be able to rely on timely and specific (case-by-case) feedback provided by competent authorities. Credit institutions must also be allowed to share information among each other to prevent misuse of the financial system for money laundering purposes. A means must be found to enable this information sharing between credit institutions.

- PROTECTION OF EMPLOYEES

EBIC strongly supports the provision on protection of banks' employees who report suspicious money laundering transactions from being exposed to threats or hostile action.

- SANCTIONS

The sanctions for infringement of AML obligations could be criminal, civil or administrative as provided by FATF recommendation 17. The qualification depends on the

legal system of the Member States. Failure of obligations of best efforts (risk based approach) should not lead to criminal sanctions.

- **COMITOLOGY**

EBiC rejects the adoption of implementing measures at EU level as it would lead to a counter-productive over-regulation in this area. Therefore, we reject the current Article 37 and 38 on implementing measures. Should the EU legislator nevertheless approve such implementing measures, then EBiC would call for the application of the Lamfalussy procedure in this field.

**EBIC COMMENTS
ON THE COMMISSION PROPOSAL FOR A
NEW EU DIRECTIVE ON MONEY LAUNDERING**

The European Commission submitted on 30 June 2004 a Proposal for a Directive on the prevention of the use of the financial system for the purpose of money laundering, including terrorist financing (COM(2004) 448) - hereafter "the Third EU Money Laundering Directive" or "the proposed Directive". The European Banking Industry Committee (EBIC) is pleased to submit hereinafter some comments which are of particular importance for the banking and financial industry. These comments aim at contributing to a better assessment of the practical regulatory impact of certain proposals.

I. Introduction

The proposal was prompted, on the one hand, by a review of the definition of predicate offences as stipulated in Art. 1 (E) of the Directive 91/308/EEC and amended by Directive 2001/97/EC and, on the other hand, by the transposition in European law of the revised FATF Forty Recommendations of June 2003 and the Eight Special Recommendations on terrorist financing.

European Banks have always co-operated in the fight against money laundering and terrorist financing and are committed to continue to do so. EBIC has however some concerns about the proposed new definition of serious offences in Article 3 (7) (f)¹. Pursuant to this definition, a very wide range of minor offences - and in some countries all offences - will be included in the scope of money laundering predicate offences. Although there is a trend to extend considerably the scope of money laundering predicate offences, we continue to believe that such a trend will not serve the fight against money laundering: intermediaries will be tempted to report transactions more than necessary in order to protect themselves and as the experience has shown in the past, Financial Intelligence Units (FIUs) would most likely not be able to handle such an increase of Suspicious Transaction Reports (STRs) due to a lack of resources. A non-focused fight on the most serious crimes will lead to a scattering of resources, private and public alike.

One particular problem for banks arising from an enlarged scope of money laundering predicate offences relates to tax offences in some countries. Banks cannot guarantee their customers' tax loyalty.

¹ Article 3 (7) (f) provides that "*all offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards those States which Have a minimum threshold for offences in their legal system, all offences punishable by deprivation of liberty or a detention order for a minimum of more than six months*". This definition is the one of the Joint Action of 3 December 1998 (Now replaced by Council Framework Decision 2001/500/JHA).

In addition, the inclusion of minor offences in the scope of the proposed directive could have a detrimental effect on the consumer as well as on the confidence relationship between the customer and its bank.

Finally, the proposed definition would run in contradiction with the risk-based approach, which is set forth in the proposed directive. The European banking industry has always pleaded that in order to be efficient, the fight against money laundering needs to be focused on the most serious forms of crimes. Such a focused approach is even more necessary today. Resources - public and private alike – should be allocated to the fight against money laundering on a proportionate basis, i.e. in relation to concrete risks faced by banks. Experience has proved that a non-focused approach in the absence of complementary action by law enforcement authorities leads to a waste of resources and does not achieve efficiency.

In the light of the aforementioned, the EU legislator should be guided by the following principles when designing new laws and regulations:

The measures should:

- be risk-based (in terms of real dangers and risks faced by banks in the context of their business operations),
- be proportionate and efficient (in terms of resource deployment and objectives to be achieved),
- be workable and flexible enough to be applied by banks in day-to-day business,
- be coherent as regards EU legislation and in line with existing international standards in order to ensure an uniform as well as effective implementation and to avoid unnecessary duplication of rules,
- take into account that business relationship between a bank and its customer strongly depends on confidence,
- ensure cooperation and exchange of information between authorities and institutions/persons covered by the Directive.

II. General comments on the principle of a risk based approach

First and foremost, EBIC very much welcomes the introduction of a risk based approach in the proposed Directive, thus transposing FATF Recommendations 5 to 10 in this respect. It must be recognised indeed that a "one size fits all" approach is not appropriate to address contemporary challenges in the fight against money laundering and terrorist financing.

This risk based approach would allow the best allocation of resources to the fight against money laundering. EBIC therefore strongly supports the reference to the risk-based approach in Recital (15) and (16) of the proposed Directive. This reference should serve as a guiding principle for interpreting and implementing the Directive's provisions.

As regards the new rules of the Directive, the provisions concerning customer due diligence are an example for such a risk-based approach: Art. 10, 10a allow simplified customer due diligence in cases of low risk while more rigorous, enhanced customer due diligence shall be applied in situations which present a greater risk.

Although Art. 5 to 11 establish concrete rules for situations which are perceived to be of higher risk, we strongly recommend not to enter into too many details of the risk based approach, as the notion of risks is in constant evolution. Indeed, it is almost impossible to propose an overall prescribed risk based approach covering all possible forms of banking situations in day-to-day practice. Each credit institutions will have to make its own individual risk assessment. This assessment based on objective criteria will vary depending on the business activities of the bank. Moreover those risk criteria and indicators as well as their assessment will have to evolve rapidly given the fast moving environment in which credit institutions operate. As far as risk assessment is concerned, individual banks will have to take several criteria into consideration, such as the relevant type of business, the product and type of operations, the citizenship or residence of the customer, and the type of economic activity and transaction. Against this background, a risk-based approach, as is already stipulated for customer due diligence requirements in the proposed directive, remains more appropriate as a guiding principle for financial institutions than overly detailed, cumbersome, and quickly out-of date provisions.

Another important point is that the risk-based approach is in constant need of valuable information about the “real risks”. Credit institutions assumptions about their risks are based on the information in their possession about methods and patterns of criminals. Without valuable and up-to-date information from the competent authorities banks may quickly be misled in their research for relevant indicators for money laundering. It is therefore crucial that authorities give feedback and information to the private sector to help credit institutions to permanently adjust their risk sensitive countermeasures.

EBIC therefore very much welcomes the recognition of the risk-based approach in the directive. We regret however that this approach has not been generalised to the whole proposed Directive as our comments on individual provisions will show hereinafter.

III. Comments on individual provisions of the proposal for a Directive

1. Article 3 (8): Definition of the beneficial owner

The definition of a legal person's beneficial owner provided by the Commission in Art. 3 (8) (a) of the proposed directive is not compatible with the requirements concerning the identification of the beneficial owner (cf. Art. 7, Par. 1 (b) of the Directive). In addition, such an obligation to identify and verify the identity of the beneficial owner would be very difficult to comply with in practice.

- Currently, banks already apply due diligence procedures as far as beneficial owners are concerned. They identify beneficial owners and in case of doubt about the identity they

take adequate measures to verify such identity. Current due diligence procedures work properly and therefore EBIC does not believe that any additional regulatory action is needed in this field.

- However, should the EU decide to adopt new rules as far as beneficial owners are concerned, then EBIC would recommend that those rules should foresee a principle instead of too concrete rules. A possible way of implementing such an approach could be the adoption of the respective FATF Recommendation (*“taking reasonable measures to verify the identity of the beneficial owner such that the financial institution is satisfied that it knows who the beneficial owner is.”*²).
- Should the EU nevertheless decide to opt for a threshold as stipulated in the proposed Directive, EBIC would like to express the following strong reservations:
 - The first reservation relates to the fact that in some Member States, legal persons are under no statutory obligation to disclose natural persons or to register their names into publicly accessible registers. Therefore, applying customer due diligence procedures in order to systematically verify the shareholder’s identity and percentage on the basis of publicly accessible registers, documents or publications will be impossible for credit institutions willing to enter into a business relationship with such legal persons. They would thus have to rely exclusively on the information given to them by the person who is opening the bank account for and on behalf of such legal person. Such a policy would offer no guarantee of transparency concerning the legal person’s shareholding, since the credit institutions would have no means of verifying such information. The only solution would be for Member States to grant access to public registries which must provide reliable shareholding information on non-listed companies, as is recommended by the FATF³. But such a solution would inevitably require substantial and costly changes in Member States’ Company Law which by no means seem adequate compared to the effect of the proposed rules for the fight against money laundering.
 - The second reservation relates to the fact that there is no harmonisation of thresholds concerning the definition of the controlling shareholding of companies in the Member States.
 - The third reservation relates to the information that unlisted stock companies have at their disposal. In most Member States, the corporation itself does not have to be familiar with the identity of shareholders holding less than 25% of the shares in a corporation. As unlisted stock companies do not have this information at their disposal, it will be impossible for banks to apply this requirement.

EBIC would like to emphasize that in most Member States, the approach which has been outlined by the proposed Directive would tie up considerable resources - the resulting costs of which can hardly be estimated - and this would apply to all parties involved (including the authorities responsible for keeping business registers). Indirectly, the new Money Laundering Directive would cause tremendous changes to the existing company law

² Recommendation 5

³ Countries could consider measures to facilitate access to beneficial ownership and control information to financial institutions undertaking the requirements set out in Recommendation 5 (Recommendation 33).

regimes of the Member States. It seems therefore paradoxical that EU provisions on Anti-Money Laundering will contribute to a reform and modernisation of Company law throughout Europe - changes which go far beyond those outlined by the Commission in its Action Plan on Company Law (COM (2003) 284). EBIC therefore draws the attention of the EU legislator on these adverse consequences. In addition to what has been said above, it would therefore appear advantageous to return to FATF's initial approach: FATF's initial criticism was exclusively levelled at the lack of transparency of threshold relevant shareholdings in unlisted stock corporations and its initial aim was to provide additional measures for the creation of a transparency regime for these corporations only.

Such an obligation would in any event only apply to shareholdings of non listed companies as for listed companies adequate disclosure and transparency requirements do already exist in Community law. We understand that foreign stock listed companies that meet "*equivalent international standards*" shall also fall out of the scope of the definition of beneficial owner. But how shall this determination of equivalence be made? The criteria triggering the obligation to identify the beneficial owner should be unambiguous. This is the reason why we would be in favour of a mandatory (non optional) threshold and against the vague notion of "*who otherwise exercises a comparable influence over the management of a legal person*". As far as the threshold is concerned, the amount of 10% specified under item a) and b) is not adequate as shareholders do not usually have a blocking minority with such a stake. As a matter of fact, Member States usually warrant a blocking minority against changes in company statutes and similar structural measures if the shareholding exceeds 25%. Therefore, should the EU legislator decide to maintain a threshold in the proposed directive, EBIC insists on raising this threshold to an appropriate and workable level (i.e. at least 25 %).

Finally, the notion of "indirect ownership or control" should be dropped as banks would *a fortiori* have no means to identify indirect beneficial owners.

In summary, we recommend that an obligation to identify direct beneficial owners of non listed companies be imposed on banks only subject to access to official publication of the shareholding in those companies. According Article 7 Par. 1 (b), credit institutions must identify "where applicable" the beneficial owner. It must be clear that this provision entails a limitation of the banks' obligation within the bounds made possible by the legislative system of each Member State.

The same comments above apply to the definition of beneficial owner of foundations, trusts or similar legal arrangements. In addition, the notion of "similar legal arrangements" should be clarified.

Against this background and should the EU decide to maintain a threshold in the proposed directive EBIC recommends the following amended wording:

(8) "beneficial owner"

(a) *the natural person who holds directly 25% or more of the shares issued to the bearer or voting rights of a company that has not been admitted for dealings on an*

official stock exchange and whose identity and shareholdings have been published officially;

- (b) the natural person who is *the direct beneficiary of at least 25%* of the property of a foundation, **or** a trust *and the identity of such natural person has been published officially when entering the legal arrangement*;
- (c) ...

2. Article 3 Par. (10): Politically exposed persons

EBIC considers that the definition of Politically exposed persons (PEPs) runs in contradiction with the risk-based approach of the proposed directive.

We regret that the definition of Article 3 Par. (10) goes far beyond the scope laid down in the revised FATF 40 Recommendations. The FATF Recommendations' glossary provides that: *"Politically Exposed Persons (PEPs) are individuals who are or have been entrusted with prominent public functions in a foreign country, 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. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories."*

Pursuant to the above definition, national (non-foreign) PEPs are excluded. In this context, the EU should be considered as a single jurisdiction for the purpose of the above PEP definition. Intra-EU PEPs should therefore be deemed domestic PEPs and be excluded from the definition. A limitation to PEPs from third countries would also be in line with the reference in Recital 17 of the proposed directive to high risk persons *"coming from countries where corruption is widespread(...)"*. It would also be in line with the implementation in EU law of Special Recommendation VII - Wire transfers (see Commission's proposal for a Regulation on payer's information accompanying credit transfers). A limitation of the PEP definition to citizens from third countries will therefore be consistent with other EU legislation in this field.

Imposing the enhanced due diligence requirements of Article 11 to intra-EU PEPs would be redundant with current legislation and practice and counter-productive. For intra-EU PEPs (i.e. whenever issues occur involving PEPs from the Home Member State and from other EU Member States), credit institutions have already in place risk-based in-house due diligence policies and controls that have been implemented pursuant to Article 11 of the first EU Money Laundering (91/308/EEC). Therefore, credit institutions can already identify unusual transactions within the normal operation of an account pursuant to the current due diligence requirements. Accordingly, credit institutions currently apply to those intra-EU PEPs other due diligence procedures than the very specific ones used for foreign PEPs. These procedures applied for intra-EU PEPs proved to be fully appropriate and efficient; additional enhanced due diligence requirements based on Article 11 could only

lead to counter-productive effects.

In addition, the PEP definition is not intended to cover middle ranking or more junior individuals, as mentioned in the FATF 40 recommendations' glossary. Such a mention in combination with the criterion of "*prominent public functions*" should exclude from the definition at least all politicians at sub-national level. Therefore, it should be clarified that PEPs only include persons having prominent public functions at national level. Without such a limitation, this target group would cover an excessive and inappropriate number of individuals, thus hindering an efficient implementation of the risk-based approach by credit institutions.

Finally, as far as close family members or close associates of PEPs are concerned, the tasks of a bank would be even more difficult. Therefore, they should only be included in the PEP definition provided that banks are able to identify them as PEPs-related persons.

An adequate definition of PEPs is to be found in Switzerland, which transposed faithfully the FATF definition⁴.

A modification of the PEP definition is therefore essential for the banking and financial industry. Otherwise, particularly when it comes to the identification and the establishment of a business relationship, the requirement under Article 11, Par. (1), i.e. "*identification of PEPs via appropriate risk management systems*" would prove unworkable in practice. A risk management system can only detect risks inherent to customer relations when there is advanced knowledge of risk enhancing factors, e.g. membership of a politically exposed group of persons. Only on the basis of such data which must be verified under banks' in-house "know your customer policies" (KYC), the risks can subsequently be assessed during the ongoing monitoring process. That means that a broad definition of the term PEP would necessarily have to lead to an amendment of credit institutions' customer identification measures and procedures. Should the present proposal of including intra-EU PEPs and non-national politicians in the scope of the directive be maintained, then banks would have to check for each customer any political involvement (e.g. in the capacity of a mayor or in the capacity of a party chairman in a small municipality); this would require frequent updates. In effect, as a result of the present definition, undue bureaucracy would jeopardise the actual objective, i.e. ensuring special measures with regard to a high-risk customer group.

In view of the above, EBIC urges the EU legislator to revise the PEP definition under Article 3 (10) with a view to bring it into line with the definition provided in the Glossary of the revised FATF Forty Recommendations.

Furthermore, EBIC would also strongly support the establishment of an "official" FATF or

⁴ Pursuant to Article 1 the Ordinance of the Swiss Federal Banking Commission concerning the Prevention on money laundering of 18 December 2002, Politically exposed persons are:

"1. the following persons holding prominent public positions abroad: heads of state or of government, senior politicians on the national level, senior government, judicial, military or party officials on the national level, or senior executives of state-owned enterprises of national importance;
2. Individuals or undertakings identified as having close family ties or personal or business connections to the aforementioned persons."

EU list of PEPs. Such a list would greatly facilitate the implementation of AML measures by credit institutions and represent a positive contribution to the fight against money laundering. In the absence of such a list, banks could only do their best efforts as far as enhanced due diligence requirements for PEPs are concerned.

Against this background, EBIC recommends the following amended wording:

a) PEP definition

(10) “Politically Exposed Persons” means natural persons

*a) who are not citizens of the European Union and who are or have been entrusted with prominent public functions **at national level** and whose substantial or complex financial or business transactions may represent enhanced money laundering **and reputational risks** and*

(b) identified as close family members or close associates of such persons;

b) Customer due diligence with regard to business relations to PEP

In order to find an adequate solution to the above mentioned issue, we should like to propose the following wording for the presentations on PEP identification as contained in Article 11 (1):

Article 11 (1)

(...)

In respect of relations with politically exposed persons, Member States shall require those institutions and persons to:

*(a) have appropriate **procedures in place** to determine whether the customer is a politically exposed person; (...)*

3. Article 3 Par. (11): Definition of “business relationship”

The term “business relationship” defined in Article 3 Par. (11) is not precise and should - in our opinion - only cover such business relationships which in case of banking are specifically related to or carried out in close conjunction with the mainstream activities of the financial institution (for example securities trading and safe custody).

Against this background, EBIC supports the following wording:

„(11) “*Business relationship*“ means a business, professional or commercial relationship which is ***maintained in close conjunction with corresponding activities of the institutions and persons subject to this Directive and which is expected, at the time when the contact is established, to have an element of duration.***“

4. Article 4: Implementation by way of stricter provisions

Article 4 of the proposed Directive provides that "Member States may adopt or retain in force stricter provisions in the field covered by this Directive to prevent money laundering". The provision is identical with a provision previously contained under Art. 15 of Directive 91/308/EEC. Pursuant to this provision, for the purposes of preventing money laundering, Member States may adopt stricter provisions in the area covered by this Directive. Nevertheless, the provisions of the proposed new Directive would go far beyond those of the previous Money Laundering Directives, thus questioning the need for stricter provisions adopted by Member States. Moreover, this regulation is incompatible with the needed principle of uniform European-wide money laundering standards. In the context of the EU internal market, uniform and common rules on AML are the only adequate solution to effectively fight against money laundering. It is also the only solution to avoid competition distortion between economic operators due to potential differences in AML-legislation in Member States. Therefore, based on the overall approach of the current proposal for a Directive, the remaining provision under Article 4 appears obsolete.

Against this background, EBIC would recommend the following:

Deletion of Article 4

5. Article 6: occasional transactions

Article 6 provides that the customer due diligence procedures shall apply when carrying out occasional transactions amounting to EUR 15,000 or more - a provision which was already stipulated in Directive 91/308/EEC. However, EBIC considers that the maintaining of a general threshold of EUR 15,000 is neither necessary, nor efficient. Indeed, identification obligations related to such a threshold currently lead to unnecessary paper work and are not appropriate from the point of view of a risk based approach. Having this widespread experience in mind, it does not seem to be efficient to maintain this threshold and at the same time call for full customer due diligence requirements. Strong consideration should be given to raise this threshold in the future, in order to concentrate AML-measures on more relevant risks of investigation.

6. Article 8: Prohibition to enter into a business relationship/Obligation to terminate a business relationship

The proposed Directive would introduce a new provision according to which credit institutions should not enter into a business relationship or open accounts if they are unable to comply with the requirements on customer due diligence. In EBIC's view, the interpretation and implementation of this article must take due account of the business practices. Therefore credit institutions shall not be forced to terminate a business relationship or prohibited from entering into a business relationship if they cannot fulfil all KYC procedures on a temporary basis - provided that they are able to comply with those requirements after a reasonable period of time. Only in cases where credit institutions are really unable to comply with KYC requirements, the prohibition shall apply. This situation is especially problematic if the EU legislator confirms the definition of "beneficial owner" of the current proposal, as credit institutions cannot obtain the required information from companies or public registries (cf. comments on Article 3 Par. 8). The combination of those two provision could have serious adverse effects on the financing of companies (especially SME) and a negative impact on the economy. Moreover, this provision might seriously undermine the interests of law enforcement and prosecution authorities to monitor the business activities of persons suspected of being involved in crimes or terrorist activities and hence frustrate the efforts of the authorities to maintain a trail on such cases.

Against this background, EBIC supports the following wording:

Article 8 Par. 2

*Member States shall require that, where the institution or person concerned is unable to comply with points (a), (b) and (c) of Article 7 Par. (1), it may **only open an account provided there are adequate safeguards in place to ensure that financial transactions are not performed on behalf of the customer until final clarification on the basis of full compliance with the aforementioned provisions is obtained; in case of continued non-compliance with the aforementioned provisions the institution or person concerned shall not establish a business relationship or perform any transaction, or shall terminate any existing business relationship, and shall consider making a report to the financial intelligence unit in accordance with Article 19 in relation to the customer.***

7. Article 8 Par. 3: Obligation of applying customer due diligence procedures to existing customers

Article 8 par. 3 requires that credit institutions apply customer due diligence procedures not only to all new customer but also "at appropriate times to existing customers on a risk-sensitive basis". EBIC would like to stress that the retroactive effectiveness of this provision will be problematic and even counterproductive since similar obligations were already fulfilled. On the basis of the risk based approach, this obligation of retroactive effectiveness shall be limited only to situations which represent a high risk of money laundering. In any case, credit institutions will need an acceptable timeframe to fulfil this obligation given the high number of existing customers covered by this provision.

8. Article 11: Cross-border business relations with correspondent institutions

The risk-based approach set forth by the proposed directive rests on the assumption that there are various degrees of money laundering risks. Together with non face-to-face transactions and PEPs, Article 11 classifies cross-border correspondent banking relations as transactions involving a higher risk of money laundering, which triggers the need for enhanced due diligence. We regret that this provision includes correspondent banking relationships between Member States and between EU Member States and other FATF countries. Again, this provision runs against the risk-based approach. Although Article 11 is deemed to transpose FATF Recommendation 7, there is absolutely no need to subject correspondent banking relationships between FATF countries and EU Member States to such a provision, as FATF countries and *a fortiori* EU Member States apply similar standards in the fight against money laundering.

This provision should therefore be limited to correspondent banking relationships with third countries, i.e. it should in no way be applied to correspondent banking relationships between EU Member States. However, it would be strongly desirable in the future to limit this provision to correspondent banking relationships with non-FATF countries. As EBIC recognises the work and legitimacy of the FATF, we seriously expect from the EU legislator to be consistent and coherent in its approach.

In addition, we cannot agree with Article 11 (2) which prohibits credit institutions from entering into or continuing a correspondent banking relationship with a respondent bank which permits its accounts to be used by shell banks. Such a provision raises the issue of indirect relationships with shell banks. It would not be applicable in practice as banks would have no means of verifying whether their respondents have relations with shell banks. An obligation to know “the customer’s customer” is generally not workable, regardless of whether the customer be another credit institution, legal entity or natural person.

Against this background, EBIC would recommend the following amended wording:

Article 11:

1. (...)

In respect of cross-frontier correspondent banking relationships with credit institutions from ~~other Member States or third countries~~, Member States shall require their credit institutions to:

(...)

2. *Member States shall prohibit credit institutions from entering into or continuing a correspondent banking relationship with a shell bank ~~or a respondent bank which permits its accounts to be used by shell banks~~.*

9. Article 11: non face to face operations

Article 11 (1) provides for enhanced customer due diligence for cases which present a greater risk of money laundering such as non face to face operations. In this context, credit institutions shall apply measures such as establishing the customer's identity by additional documentary evidence. However, EBIC would plead for a greater flexibility for identifying the customer's identity - the reference to documentary evidence should therefore only have an illustrative nature. Such an approach was already adopted in the Second Money Laundering Directive⁵, thus allowing credit institutions to use other appropriate methods for identification. It also gave the possibility to adapt KYC requirements to technological progress, especially with the development of E-commerce and initiatives to promote electronic signatures as an identification element (cf. Electronic Signature Directive). This Directive should therefore not unduly limit the progress of electronic commerce in the financial services' area.

Against this background, EBIC would support the following wording:

Article 11 (1):...

*Where the customer has not been physically present for identification purposes, Member States shall require those institutions and persons to apply, **for example**, one or more of the following measures:*

(a) measures such as ensuring that the customer's identity is established by additional documentary evidence;
(...)

10. Article 15: mutual recognition of customer due diligence procedures

Some domestic customer due diligence procedures are an obstacle to cross-border banking. For instance, compliance with national KYC standards is required in cross-border direct banking, although it is actually impossible in business with potential customers from certain Member States. The aforementioned requirements set by the supervisory authorities constitute a serious obstacle to cross-border business relations.

⁵ Article 3 Par. 11: "Such measures shall ensure that the customer's identity is established, for example, by requiring additional documentary evidence, or supplementary measures to verify or certify the documents supplied, or confirmatory certification by an institution subject to this Directive, or by requiring that the first payment of the operations is carried out through an account opened in the customer's name with a credit institution subject to this Directive. The internal control procedures laid down in Article 11(1) shall take specific account of these measures."

We therefore very much welcome Article 15 of the proposed directive, which acknowledges for the first time the principle of mutual recognition of customer due diligence procedures between Member States. Such principle should greatly contribute to the EU Internal Market for Financial Services

11. Article 18, Article 31 Par. (3): Financial Intelligence Unit

Article 18 and 31, paragraph 3 of the proposal for a Directive contains information on the creation and activities and also on the duty of a "central intelligence unit" to give specific feedback to credit institutions. EBIC strongly welcomes and emphasises the importance of these provisions for credit institutions. In order to apply anti-money laundering measures efficiently, credit institutions must be able to rely on timely and specific (case-by-case) feedback provided by Financial Intelligence Units (FIUs). Such general need of feedback from FIU was acknowledged by the FATF in its revised Forty Recommendations⁶. On grounds of transparency, it would be helpful to subsume all provisions dealing with the feed-back from FIU in a single article (i.e. in Article 18). It also remains of paramount importance that these FIU receive adequate resources from Member States and are properly staffed.

Against this background, EBIC would recommend the following amended wording:

Article 18:

- 1. Each Member State shall establish a financial intelligence unit in order to effectively combat money laundering.*
- 2. That financial intelligence unit shall be established as a central national unit, with adequate resources. It shall be responsible for receiving, and, to the extent permitted, for requesting, analysing and disseminating to the competent authorities, disclosures of financial information which concern suspected proceeds of crime or which are required by national legislation or regulation.*
- 3. The adequate resources of Member States shall ensure that the financial intelligence unit provides to the institutions and persons covered by this Directive timely and specific feedback on the effectiveness of and follow-up to reports of suspected money laundering transactions.*

Recommendation 25: The competent authorities should establish guidelines, and provide feedback which will assist financial institutions and designated non-financial businesses and professions in applying national measures to combat money laundering and terrorist financing, and in particular, in detecting and reporting suspicious transactions.

12. Article 24: Protection of Bank employees

Article 24 of the proposed Directive provides that Member States shall take all appropriate measures in order to protect banks' employees who report suspicions of money laundering from being exposed to threats or hostile action.

As bank employees can face retaliatory acts from criminals after having made a suspicious transaction report (STR), as their protection varies from Member State to Member State⁷ and as such a lack of protection may be counterproductive for the fight against money laundering, EBIC would like to express its strong support of this provision.

Against this background, EBIC recommends the insertion of the following amended wording:

“Article 24:

*Member States shall take all appropriate measures in order to protect employees of the institutions or persons covered by this Directive who report suspicions of money laundering either internally or to the financial intelligence unit from being exposed to threats or hostile **retaliatory** action.”*

13. Article 25: Prohibition of Tipping-Off

Pursuant to Article 25 of the proposed directive, credit institutions, their managers and staff are not allowed to inform neither the customer nor third persons of any notification made to the financial intelligence unit. Accordingly, the criminal prosecution authorities and other banks may not receive any direct information from reporting banks. The scope of the tipping off prohibition runs counter to legislation in some Member States and would render risk-adequate prevention of money laundering by credit institutions impossible.

First, in some Member States suspicious transaction reports must not only be reported to the FIU, but to law enforcement and police authorities as well. EBIC therefore encourages the inclusion in the Directive of an exemption from the total non-disclosure obligation when a person or institution covered by the Directive has specific disclosure obligations under national legislation.

Furthermore, it is vital under certain circumstances, to allow banks to inform other banks of possible subsequent money laundering attempts. For example, a bank may have reported a customer to the competent authorities because of the suspicion of money laundering. In addition, this bank may already have closed the account and the reported customer may then moves his funds to another bank. Without information of the reporting bank the other bank will not be able to take appropriate measures to counter the risk of being misused by

⁷ As is demonstrated in a Commission Issues Paper (MARKT/MLCC, May 2003).

the reported customer. Art. 25 should be amended and allow the described exchange of information.

Finally, it must also be clear that the sharing of information between credit institutions (or even within the same institution) under the conditions set in the directive, does not constitute any breach of confidentiality. Accordingly, liability of the credit institutions should be excluded when sharing the information. Similarly, it must also be clear that the tipping-off and the sharing of information under this Directive do not constitute any violation of data protection and banking secrecy rules.

Against this background, EBIC would recommend the insertion of the following wording:

“Article 25:

*The institutions and persons covered by this Directive and their directors and employees shall not disclose to the customer concerned nor to other third persons that information has been transmitted to the financial intelligence unit in accordance with Articles 19, 20 and 21 or that a money laundering investigation is being or may be carried out. **Member States may however opt to permit the competent authorities to inform institutions and persons subject to the Directive of information transmitted to the FIU or that a money laundering investigation is being carried out.***

The term "third persons" covers neither criminal prosecution authorities nor the institutions and persons referred to in Article 2.1 (1) and (2) .

The non-disclosure obligation shall not be applied when a person or institution subject to this Directive is charged with specific disclosure obligations under the national legislation.

(...)"

14. Article 27: extra-territorial application

Article 27 of the proposed Directive would require credit institutions *"to apply in their branches and majority owned subsidiaries located in third countries measures at least equivalent to those set out in the Directive with regard to customer due diligence and record keeping"*. EBIC agrees as a matter of principle to apply the Directive requirements in third countries in which domestic legislation is deemed to fall below the level of the Directive, with two reservations. On the one hand, it should be assumed that FATF countries by applying similar standards do not fall below the level of the Directive. On the other hand, it is not clear in the present proposal what would be the consequences for a bank which is unable to apply such a provision due to a conflict with local legislation besides the obligation for the bank to inform its home state authorities.

Therefore, EBIC agrees that Member States implementing the EU Directives on money laundering shall be considered as having equivalent AML measures in place. However, it would be strongly desirable in the future to include FATF-countries which are also applying equivalent measures based on internationally recognised standards, in the same category as EU Member States and to extend equal treatment to them. As EBIC recognises the work and legitimacy of the FATF, we seriously expect from the EU legislator to be consistent and coherent in its approach.

Finally, it could also be helpful for banks to be able to rely on a list of third countries, which are deemed to fall below the standards of the Directive.

15. Article 29: use of statistics

The proposed directive introduces a provision concerning the use of statistics. Statistics are undoubtedly useful. Such statistics on the number of investigations, prosecutions and convictions following suspicious activity reports must be improved. In order to ensure full transparency of such statistics, Member States should be required to publish these statistics.

EBIC has however a reservation as far as statistics are concerned. The number of suspicious activity reports must be considered with caution, as the reporting systems throughout the EU still differ significantly. The use of statistics should not lead to the misunderstanding that (only) a large number of suspicious activity reports demonstrates that banks fulfil their obligations properly. Accordingly, the number of suspicious activity reports should in no way serve as a measurement tool for banks' efficiency when applying AML measures. Furthermore, EBIC maintains the banking industry's demand for better empirical data and statistics about AML investigations to be published by the competent authorities. In this context, statistics shall cover not only the number of suspicious transaction reports but also the follow-up given to these reports, the number of cases investigated, the number of persons prosecuted and the number of persons convicted.

Against this background, EBIC would recommend the insertion of the following amended wording:

“Article 29:

(...)

Member States shall ensure that a consolidated review of these statistical reports is published”

16. Article 31: training programmes for bank staff

Pursuant to Article 31, Member States shall require that credit institutions take appropriate measures so that their employees are aware of the Directive's provisions. Such measures shall include participation of their relevant employees in so-called "*special ongoing training programmes*" to help them recognise operations which may be related to money laundering as well as to instruct them as to how to proceed in such cases. EBIC fully shares the view that credit institutions shall provide ongoing training programmes dedicated to Anti-Money Laundering. Applying the risk based approach in this area, credit institutions will have to provide sophisticated and focused training to their staff, depending of their individual working duties. In this context, the word "*special*" is misleading as it does not take into account the need for differentiated training programme which should be dedicated to AML. Therefore, the reference to "*special*" programmes is not appropriate and should be clarified.

Against this background, EBIC supports the following wording:

Article 31

1. Member States shall require that the institutions and persons covered by this Directive take appropriate measures so that their employees are aware of the provisions contained in this Directive.

*These measures shall include participation of their relevant employees in **dedicated** ongoing training programmes to help them recognise operations which may be related to money laundering as well as to instruct them as to how to proceed in such cases. (...)*

17. Article 31, Paragraph 3: Timely feedback from Financial Intelligence Units (FIUs)

Article 31, paragraph 3 of the proposed directive provides that "*Member States shall ensure that, wherever practicable, timely feedback on their effectiveness of and follow-up to reports of suspected money laundering is provided.*"

EBIC welcomes this provision and would like to insist on its importance for credit institutions. In order to apply efficiently anti-money laundering measures, credit institutions must be able to rely not only on general feedback as already set forth in the Second EU Money Laundering Directive and stipulated again in Article 31, para 2 of the proposed directive but also on specific (case-by-case) feedback provided by competent authorities (i.e. Financial Intelligence Units -FIUs, law enforcement and police authorities, prosecutor etc.). Moreover, the wording of the feedback obligation pursuant to this provision is too noncommittal and should therefore be amended to reflect a binding obligation in line with FATF-Recommendation 25.

In order to guarantee such an essential specific feedback, we recommend a more binding wording in Article 31, Para 3.

Against this background, EBIC would recommend the following amended wording:

“Article 31:

(...)

3. Member States shall ensure that, ~~wherever practicable~~, timely and specific feedback on the effectiveness of and follow-up to reports of suspected money laundering is provided.”

18. Article 35 and Recital 8: Penalties

Recital 8 (a) as well as the current wording of Articles 34 to 36 could impose criminal sanctions on credit institutions which do not comply with the Directive's due diligence requirements. This could be justified as long as credit institutions are subject to an obligation of results concerning requirements which do not leave any interpretation open. However, as previously stated, several provisions are far from being clear or even impose an obligation of best effort. As the directive pretends to follow the risk-based approach, most requirements indeed constitute an obligation of best effort according to the risk involved.

Moreover, the identification of the beneficial owner of a legal person or the proposed PEP definitions give a good example of ill-conceived provisions which cannot be fully applied by credit institutions. It remains irresponsible to subject economic operators to legal obligations which are impossible to comply with, especially since the Directive would provide for effective, proportionate and dissuasive penalties in case of infringements. The similar treatment of money laundering offences and the non-compliance of due diligence requirements based on the risk-based approach, would be inappropriate and counter-productive.

It would be more appropriate to rely on the FATF recommendation 17 which proposes that in cases of an infringement of AML obligations countries should provide for proportionate and dissuasive sanctions, whether criminal, civil or administrative. The ultimate choice depends on the legal system of the respective Member State based on the principle of subsidiarity. However, failure on the side of credit institutions to comply with AML provisions on a best efforts basis (i.e. risk based approach), should not lead to criminal sanctions but rather to administrative or civil sanctions. Credit institutions should therefore be required to put in place reasonable measures in order to fulfil their obligation of best effort. Consequently, the failure to observe these obligations of best efforts should lead to non criminal sanctions, such as professional sanctions adopted by the supervisory authority. Article 34 to 36 should be interpreted accordingly.

Moreover, the Directive introduces the principle of the liability of legal persons for violations of the obligations of identification, registration and reporting of suspicious transactions committed for the benefit of these same entities by natural persons who hold

leading positions within the entity. This liability would also exist in cases where the violations in question are made possible by situations characterised by a lack of supervision and control. In this regard, it should be expressly stipulated that suitable organisational measures adopted for adequate application of the customer due diligence requirements, as well as the conservation of documents, reporting, internal control and the evaluation and management of risk, as per art. 30, should represent a specific discriminating factor for this form of liability.

Against this background, EBIC calls for a deletion of the word "*criminal*" in Recital (8a), as the nature of effective and dissuasive sanctions should be left to Member States according to the principle of subsidiarity.

Against this background, EBIC would recommend the following amended wording:

Recital 8 (a)

The general obligation to adopt effective, proportionate and dissuasive sanctions, combined with the criminalisation obligation of Article 1, means that ~~criminal~~ sanctions should apply to natural persons who (...)

19. Article 37 and 38: Implementing measures and amendment measures

The proposed Directive would set general principles while implementing measures would be taken by the European Commission according to the comitology procedure. Under Article 37, the proposal for a Directive lays down those areas where the Committee may adopt implementing measures. Furthermore, article 38 envisages the establishment of a new Committee on the Prevention of Money Laundering. EBIC rejects the adoption of detailed implementing measures at EU level as it would lead to a counter-productive over-regulation in this area. We do not see any need for more detailed rules at EU level and therefore do not support the current Article 37 and 38.

First and foremost, more detailed implementing measures would run counter to the risk-based approach and lead to an inefficient over-regulation. There is a real risk that a newly created committee would extend its scope and would adopt very detailed measures. This is especially problematic since Article 37 Para. 1 would cover almost all important and sensitive provisions of the Directive. Such a situation would lead to the adoption of theoretical, unpractical and ultimately useless rules. For instance, detailed rules would be adopted for identifying situations presenting a low/high risk of money laundering, thus being totally inappropriate to cover all possible forms of banking situations in day-to-day practice (cf. our comments in section II. on the risk-based approach). It is essential not to enter into too many details of the risk based approach, as the notion of risks is in constant evolution and depends on various factors.

Secondly, most "technical issues" covered by Article 37 Para. 1 would have far-reaching implications for banks' established procedures. In our view, the measures to be adopted under this comitology procedure are not purely technical matters but concern the core of

anti-money laundering measures. Accordingly, any new technical development or further measure for uniform application of AML measures in the EU, should be reflected in the Directive itself and adopted according to the normal legislative procedure (co-decision). This legislative process will also be more appropriate to respect the rights of the European Parliament and of the Council of Ministers.

Thirdly, we consider that the proposed Directive does already provide for a far-reaching improvement of AML legislation in the EU. Therefore, there is no need for further measures to ensure uniform application by Member States. According to the principle of subsidiarity, Member States shall be responsible for implementing the Directive's provision. If the EU legislator feels the necessity to ensure a better uniform application, EBIC would call for the maintenance of the existing "Contact Committee" established by Article 13 of Directive 91/308/EEC with, however, the setting up of a mechanism of consultation of the industry (such a mechanism of consultation has been absent until now). This Contact Committee could facilitate a coherent implementation by Member States by regular consultation and advise the Commission on any amendment to be made to the directive.

Should the EU legislator nevertheless approve the adoption of implementing measures by the Commission, then EBIC would definitely call for greater transparency and involvement of market practitioners by applying the so-called Lamfalussy procedure for the adoption of implementing measures. This procedure which is already applied in the banking and financial services area for the adoption of technical rules with the consultation of practitioners, is more appropriate than the classical comitology procedure proposed in the Directive, on condition that this does not lead to over-regulation and the involvement of the banking industry is ensured. Although the Directive covers other persons the fact that the main focus is on banking and financial services' issues speaks in favour of adopting the Lamfalussy procedure.

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Annex

Introduction of EBIC

EBIC is a co-operation of banking associations with a mandate to provide advice, assure a comprehensive consultation of market participants and ensure a representative industry view throughout the process of drafting, adopting, implementing and enforcing EU-financial legislation and thereby provide input for the European institutions and their relevant sectoral committees. It is amongst the declared aims of EBIC to advise the Commission on relevant legislative banking and cross-sectoral initiatives and any developments at Community level affecting the banking and financial services activities associated with the establishment of a European Single Market for financial services.

EBIC has been established by the main banking industry federations: the European Banking Federation (EBF), the European Savings Banks Group (ESBG), the European Association of Cooperative banks (EACB), the European Mortgage Federation (EMF), the European Federation of Building Societies (EFBS), the European Federation of Finance House Associations (Eurofinas) / the European Federation of Leasing Company Associations (Leaseurope), and the European Association of Public Banks (EAPB).