



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)
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European Association of Public Banks (EAPB)

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EBIC Position on the Commission's working paper in relation to the third EU Anti-Money Laundering Directive

The European Banking Industry Committee (EBIC) welcomes the opportunity to comment on the Commission's second consultation document on possible implementing measures for the third Anti-Money Laundering (AML) Directive.

In this regard, EBIC which is the co-operation of the main European banking associations with the mandate to provide advice and to ensure a representative and coordinated industry view throughout the process of drafting, adopting, implementing and enforcing EU-financial legislation, would like to make the following comments based on the practical experience of its members.

I. General Remarks

The principle of "risk-based approach" requires some flexibility and room for manoeuvre for its application by credit institutions. EBIC believes that these draft implementing measures would restrict the flexibility required for the application of the risk based approach to such an extent that the remaining area for discretion – for all practical purposes – hardly merits the effort to apply a risk based approach in a practically effective and meaningful manner: In particular the exhaustive list of criteria for the identification of customers and products eligible for simplified customer due diligence (CDD) gives no room for manoeuvre whatsoever and eliminates any possibility to make independent assessments on the basis of the individual business structure and experience. Due to this severe restriction of the room for the application of discretion, Member States will not be able to take account of specific situations to implement the AML Directive adequately.. On the contrary, the definition given of to Politically Exposed Persons (PEP) will be largely extended, so that financial institutions will have to apply systematically the enhanced CDD in a lot of situations. Consequently, financial institutions will be effectively impeded from making risk-assessments in respect of products and customers based on their specific

individual experience. These developments are counterproductive for the application of a true risk-based approach.

Furthermore, EBIC has concerns about the undue extension of the PEP definition and clearly favours the publication and maintenance of an official list by the EU Commission. Therefore, we propose to seriously consider deleting the PEP-related provisions in Articles 2 and 3 of the Commission's Working Document as they create insurmountable practical problems rather than providing the banking industry with a constructive and risk-based solution to tackle the issues. However, should the Commission stick to its original notion of retaining PEP-related implementing provisions then the European banking industry would clearly favour the publication of an official list by the EU Commission in order to balance the burden emanating from the aforementioned undue extension of the proposed PEP-definition. The arguments raised against the publication of such an official list seem to ignore that financial institutions will either be forced to obtain and compile the relevant lists themselves – notwithstanding the insurmountable practical difficulties and the significant legal restrictions regarding the collection of personal data – or will have to purchase the information from commercial database providers offering such lists. Against this background, the refusal to establish an official list effectively constitutes a transfer of the burdensome obligation to compile and update such a list to the industry. Considering that financial institutions are primarily acting in the public interest by assisting in and taking over investigative functions one would normally assume such functions to fall exclusively within the jurisdiction of law enforcement authorities. - Such transfer of public obligations and risks to the private sector – as conceived in the EU Commission's Working Document – is not acceptable. Therefore, we would like to emphasize once more the necessity for an official PEP list which – apart from facilitating banks to swiftly implement the provisions concerning PEP – would also reflect a coherent, constructive and consensual approach towards solving the underlying PEP-related Know Your Customer and Customer Due Diligence issues within the framework of a committed “Public Private Partnership” (PPP) between European Banks, the EU Commission and the competent authorities of the Member States.

Should the Commission nevertheless insist on its position and persist in defining only categories of PEP-functions as minimum standard instead of a more flexible approach leaving sufficient room to manoeuvre to apply a risk based approach, then EBIC correspondingly insists that a definitive/exhaustive list of clearly circumscribed categories be provided in order to avoid diverging interpretation at national level. We refer to our individual comments on this point.

The Commission seems willing to adopt its implementing measures through a Directive. This option is indeed possible since the third AML Directive does not prescribe a specific legal instrument. In all cases, the chosen legal instrument should foster a level playing field to allow group-wide AML policies by banks and at the same time give adequate room for manoeuvre for the concrete application given the national or bank specific situations. A Directive could be an adequate instrument for this purpose. However, as it presently states, the draft Directive does not meet these two criteria since it harmonises too widely some points (simplified CDD) but does not regulate other points which are essential for a level playing field (cf. only minimum requirements on PEPs) to the same extent.

Finally, EBIC regrets that the EU Commission does not intend at this stage to provide further guidance regarding the identification of third countries which do not impose requirements equivalent to those laid down in the EU Anti-Money Laundering Directive. In this respect EBIC deems it absolutely necessary that the EU Commission adopts a negative list of third countries that would certainly facilitate the application of the Directive's provisions.

II. Specific comments

- **Article 2 item (1): Definition of high level judicial body**

The definition of “high level judicial body” is insufficiently circumscribed, thus unduly wide and therefore not workable. The definition would expect that persons subject to the Directive possess an in depth knowledge of the judicial systems, in particular the appeals system, of all countries – whereas even legal experts will face difficulties in coping with this task. Furthermore, the definition would encompass a huge number of courts to be monitored – including all “courts of appeal” (i.e. such a definition is unworkable for federal countries, countries having administrative and civil courts etc.). The number of judges and public prosecutors covered by this definition is incommensurable and without any proportion to the intended aim of the Directive. The terminology chosen to indicate that only high-level courts are to fall within the scope of the definition is also less clear than it may appear. For example, the term supreme court at least in the state of New York indicates the court of first instance and not the highest state court.

EBIC therefore suggests the following amendments:

“high level judicial body’ shall mean a body on the highest national level whose decisions cannot generally be subject to further appeal, except in exceptional circumstances, and shall encompass ~~as a minimum~~: courts specialised in dealing with constitutional affairs on a national level or final courts of appeal on the national, European or international level ~~courts generally dealing with appeals from lower courts~~”

- **Article 2 item (2): Definition of person able to discharge managerial responsibilities**

As in the case of the definition for high-level judicial bodies, the definition for persons who are able to discharge managerial responsibilities presupposes the possession of information which in many cases is not readily available; it is also too broad for a practical application. Already in respect of the persons falling within the scope of lit. (a), information on their formal position within a company is not necessarily publicly available. Even where such information may be publicly available from registers, there may not be any centralised electronic registers so that access to the information is practically impossible to obtain. This holds even more true in respect of information on informal positions within a company. In recognition of these practical limitations it should

at least be clarified, that a classification can only be made on the basis of actual knowledge of such a position of influence within a company.

- **Article 3: Politically Exposed Persons (PEPs)**

EBIC considers that the categories proposed to define PEPs are not sufficiently clearly circumscribed and therefore far too wide. Consequently they should be restricted to cover **only relevant high level PEPs**. The intended aim of the PEP provisions (i.e. to concentrate resources on cases representing a real risk of money laundering) cannot be achieved through the suggested categories. Therefore the definition should either leave sufficient room for discretion in order to make independent assessments on the basis of the individual business structure and experience or be clarified so that only PEPs who effectively represent a high risk of money laundering are covered. Indeed, banks are obligated to apply the very specific measures described in Article 13 (4) to persons who are entrusted with prominent public functions **and** accumulate additional risk factors/characteristics. Concretely, this means that financial institutions are obligated to apply appropriate measures where additional evidence, information or indications raise doubts about his/her integrity and/or activities. Against this background either sufficient room for discretion or categories with clearly circumscribed and limited scope are essential if financial institutions are to exercise effective monitoring of PEPs. Otherwise, financial institutions will have to *de facto* monitor any politician within the European Union and worldwide which will lead to problematic situations and restrict the access to the credit/financial services, especially in border regions.

As a matter of principle, EBIC strongly favours the proposal of adopting an official EU list of Politically Exposed Persons published by the European Commission. Such a list of names should be provided in an appropriate electronic format, similar to the one already provided by the Commission for the application of EU financial sanctions¹ (e.g. freezing of assets). As banks using the list prepared by the EU Commission would act in the public interest, this would represent a truly PPP-driven approach, which in our opinion is the only realistic solution for banks to manage the future challenges in the area of Anti-Money Laundering and Counter-Terrorist Financing.

The proposed definition is far too unclear and complex. It expects banks to possess in depth knowledge of the internal political, judicial, administrative structures of the different countries in the world. Financial institutions will face severe difficulties when attempting to implement such definition which, as it has already been pointed out above, does not allow the application of a true risk-based approach by financial institutions. Should the Commission nevertheless go forward with the proposed listing of PEP categories, then EBIC would strongly propose to incorporate the following improvements:

- 1. No minimum requirements for this definition**

The definition provides only minimum requirements (cf. “shall at least include” and “or any other person that, although not falling ... in the public domain”). Such an

¹ http://www.europa.eu.int/comm/external_relations/cfsp/sanctions/list/consol-list.htm

approach does not allow for a consistent and uniform implementation throughout the EU, since Member States would be able to adopt differing additional requirements. This would prevent the establishment of group-wide policies and jeopardise a level playing field. Furthermore, there is nothing which impedes the Commission to adopt an exhaustive list of clearly circumscribed functions – and if necessary, to amend this functions’ list in the future. We therefore propose the deletion of the words “at least”(in Art. 3 (1)) and the two lines immediately following lit. (f) starting with the word “or” and ending with the word “domain”.

2. Limitation to PEPs at national level.

According to a possible recital, the definition would normally cover public functions exercised at levels lower than national, “at least in relation to members of governments and of parliaments of federated states or similar level of government”. It might even cover mayors of major cities. This approach does not correspond to the FATF recommendation which makes only reference to “heads of state or of government, senior politicians and senior government”. Furthermore, the definition would thus cover an incalculable amount of persons worldwide which renders a close monitoring of this target group almost impossible. Therefore EBIC does not support such an extension to cover PEPs from sub-national level. Accordingly we propose to delete any recital extending to definition to cover PEPs from sub-national level.

3. Limitation to senior officials of governments

The list of functions in Article 3 (1) (c) (d), (e), and (f) – e.g. public prosecutors, judges from control bodies, members of central banks, senior officials, managers of state owned enterprises - supposes a far reaching and in depth knowledge of the internal structures of the different countries in the world. EU decision makers cannot expect such a deep knowledge from financial institutions. Furthermore the reference to “any other persons which exercise similar powers or influence in the public domain” contributes to a practically limitless extension of the definition. A practical and reasonable solution should be found in order to cover only officials of the highest national level – in manner which can be applied by persons subject to the Directive. To this end, all categories should be circumscribed more clearly by indicating that only persons acting at the highest national level fall within their scope. With regard to lit. (f), it should be clarified that only the most senior/highest-level managerial positions qualify as PEPs. Furthermore, it should be clearly stated that any classification of a person as a PEP in accordance with this Art. 3 can only be made where the relevant party having to make the classification has actual knowledge of the necessary facts.

4. Limitation of the definition of immediate family members and close associates

The current wording of Art. 3 (2) and Art. 3 (3) which clarifies the definition of immediate family members and close associations, extends the target group beyond workable borders. We propose to concentrate only to relevant family members and close associates und thus suggest at least the deletion of the reference to “in-laws”.

5. Exemption of liability for banks when acting in good faith.

According to a proposed recital, if a bank fails to identify a customer as falling within one of the PEP categories, despite having taken reasonable and adequate measures, Member States “should give due consideration to the need to avoid an automatic liability of those persons for such failure”. This needs to be clarified: financial institutions cannot be expected to do more than taking adequate and reasonable measures. The current proposal for a recital can, however, be misunderstood to imply that it is at least conceivable that financial institutions become liable despite having taken such measures (after all, Member States are only requested to take into consideration to avoid an automatic liability). Any strict liability would, however, be clearly unreasonable. Thus it should be stated unequivocally that in the event adequate and reasonable measures have been taken, there can be no liability. Member States should additionally consider facilitating compliance with the Directive by providing the necessary guidance to institutions and persons in this connection. EBIC strongly supports this provision and would suggest to add it into the core of the Directive’s text – i.e. as an article.

In recognition of the many practical difficulties described above in relation to the information required to apply the categories contained in Art. 3, the wording of the proposed recital in footnote 7 should be clarified as follows:

“For the avoidance of doubt, institutions or persons covered by the Directive 2005/60/EC are not under any obligation to actively research the relation between PEPs and other persons”

6. Introducing pragmatic procedures enabling the identification of PEPs

Given the very broad definition of the functions considered for PEPs, financial institutions will face serious difficulties to identify properly such PEPs. This challenge will become even harder when it comes to identifying changes to the status of an existing client following marriage, promotion, elections, changes in its family situation etc. In order to address these difficulties, the only solution would be to introduce an obligation for these persons qualifying as PEPs to disclose the facts making them PEPs to financial institutions. Specifically, a client should indicate that he is a PEP when entering into a business relationship with a bank (or reveal his new status if it concerns a current client whose status changes). This could be done by adding a general recital in this sense so that Member States implement this approach accordingly.

- **Article 4: Simplified CDD**

Regarding the list of criteria for low risk situations justifying simplified CDD, we welcome the reference to public authorities and bodies from the EU and from the Member States. Similarly, we would propose the inclusion of public authorities and bodies from countries belonging to the European Economic Area.

However, even in the case of an inclusion of further public authorities, the draft Directive would nevertheless provide an exhaustive list of criteria allowing simplified CDD. This does not reflect the need for the application of a true risk-based approach – which requires flexibility and room to manoeuvre. Especially, the criteria for legal entities which are not public authorities/bodies, are too narrow, formalistic and detailed.

EBiC would like to point out again the difficulties arising when defining long list of cumulative technical criteria to be met. Indeed, the identification of simplified CDD cases by financial institutions **should be simple and self-evident** and sufficiently broad to allow an independent assessment of low-risk customers and products in accordance with the specific experience and business structure. Simplified CDD procedures were introduced in order to avoid that financial institutions spend too much time and resources on cases which do not justify it. In doing so, financial institutions can concentrate their resources on situations representing real risks. Accordingly, resources needed to assess whether a concrete case qualifies for simplified CDD should not be more extensive than for conducting a normal CDD procedure. Otherwise, the potential benefits of simplified CDD are outweighed by the disadvantages.

We consider that the simplified CDD should also be applicable to a number of other products and customers. However, as regards products, the criteria set out in Art. 4 (2) circumscribing products which may be classified as low-risk by Member States are too narrow as they still limit the types of products covered unnecessarily and thus leave insufficient room for a risk-based approach. Consequently, in order to introduce the necessary flexibility, there should be a general clause allowing financial institutions, or at least Member States, to classify further products and customers as low-risk based on their specific business structure and experience. At least, the technical criteria should be drafted in such a way that they do not constitute an exhaustive list of categories and at least cover the following product/transaction groups:

- standard retail products
- contracts on capital-forming investments
- consumer loans
- loan agreement, in which the loan account is used for loan processing only, and the loan repayment is to be debited from an account opened in the customer's name with a credit institution subject to the Third Directive.
- transactions with associations of flat owners (i.e. in jointly-owned buildings)
- dealing in foreign exchange with own customers
- transactions concerning prepaid cards which represent a similar low risk as E-money transactions (i.e. due to the very limited threshold of money to be used with pre-paid cards)

However, we would once more like to emphasize that such a list of products should not be an exhaustive one in order to leave sufficient room to manoeuvre for a risk based approach.

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