Comments

on the joint EP ECON/LIBE draft report on the 4th Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

Register of Interest Representatives
Identification number in the register: 52646912360-95

Contact:
Silvia Frömbgen
Telephone: +49 30 20225-5372
Telefax: +49 30 20225-5345
E-Mail: silvia.froembgen@dsgv.de

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AZ DK: 453
AZ DSGV: 7064

The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 2,000 banks.

Coordinator:
German Savings Banks Association
Charlottenstrasse 47 | 10117 Berlin | Germany
Telephone: +49 30 20225-0
Telefax: +49 30 20225-250
www.die-deutsche-kreditwirtschaft.de

Comments on the joint EP ECON/LIBE draft report on the 4th Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

General comments on the role of the financial industry in the fight against money laundering, terrorist financing and financial crime

The European Commission's proposal for a Fourth Anti-Money Laundering Directive, published on 5 February 2013, takes into account the new 40 Recommendations of the Financial Action Task Force (FATF). The draft even goes further in a number of fields. It takes into account specificities related to the political and legal nature of the European Union and its single market.

During the past decade, the German and European credit industry has invested considerable resources in measures to combat money laundering and terrorist financing and to prevent financial crime. At present, the credit industry is by far the largest contributor to the detection of such offences. Against the backdrop of the global risks, especially after the terrorist attacks of September 2001 in the USA, the scope of the measures to prevent the laundering of drug money was extended to the prevention of terrorist financing. After the review of the 40 FATF Recommendations, they now also cover tax crime and the financing of the proliferation of weapons of mass destruction.

While credit institutions have many years of experience and are well placed to assess the money-laundering risks of certain products and to identify certain suspicious patterns of account movements, they rely to a considerable extent on external and independent sources of information (such as, for example, publicly accessible databases and company registers) in order to assess certain risk factors linked to (i) customer profiles or (ii) the ownership structure of legal entities and (iii) the beneficial owners of such entities. Past experience permits the conclusion to be drawn that the fight against money laundering, terrorist financing and financial crime can succeed only if public authorities promote greater transparency concerning information on corporate ownership structures and beneficial owners, and provide requisite support to the private sector. Successful cooperation with public authorities also necessitates that the authorities publish information on politically exposed persons (PEPs), as well as on countries that fail to implement equivalent standards to combat money laundering and terrorist financing.

Moreover, the process of customer risk identification and reporting of suspicious transactions to financial intelligence units and police authorities requires adequate employee protection from possible threats by criminals. Another essential prerequisite for combating money laundering and terrorist financing would be the inclusion of a provision exceptionally granting express permission for institution staff working in anti-money laundering and compliance to analyse and exchange customer information relevant for combating money laundering and terrorist financing without restrictions through data protection rules which have been designed mainly to avoid the use of confidential customer data for commercial purposes. It is also of paramount importance that these staff members receive concrete feedback from law enforcement authorities on the cases of suspicious transactions which they have reported so that they are able to take the necessary steps to optimise their internal control and risk management systems and to protect the integrity of the financial institution. Also the rules on customer due diligence should be proportionate and reflect the different levels of risk of customers and financial institutions' business models.

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Key points

With the current minimum level of harmonisation of the third EU AML Directive, Member States have implemented differently the European AML framework, with direct consequences on competition and foreign investment attraction in Member States where the regulation is currently stricter. The German credot industry is therefore convinced that maintaining a minimum level of harmonization for AML purposes is a point of weakness. The principle of enhancing the risk based approach is very much welcome, but it shouldn't hamper the introduction of **targeted harmonisation** which could be of relevance for specific provisions.

Against this background, we would like to congratulate the Rapporteurs for their work in the preparation of a draft opinion, which proposes changes to improve the legislative text. In particular, we welcome the following changes which have been made to the draft Directive:

Amendment 3 related to Recital 5 relating to the preventive measures of the Directive that should cover the manipulation of dirty money derived from serious crime instead of crime only.

Amendments 6 and 7 to Recital 11 referring to the establishment of beneficial ownership registers by Member States which will indeed represent a useful tool for financial institutions and other obliged entities when applying customer due diligence obligations.

Amendment 55 relating to Article 19(a) requiring the setting up of a register of politically exposed persons. Improvement could be the registration of the date of birth as it would be helpful to minimize the problem of false positive matches with other persons of the same name in the customer database of financial institutions.

Amendments 60, 62 63 and 64 related to Article 29.1 and 29.2 requiring the setting up of registers on beneficial ownership information. This addition will bring legal certainty to obliged entities by allowing the provision of a useful tool to help them meeting their customer due diligence requirements.

Amendment 69 reinforcing the protection of individuals reporting suspicious transactions.

Amendment 81 that includes the data protection authorities in the list of competent authorities that should cooperate and coordinate to develop and implement AML policies.

However, we believe that the text still requires further improvements and would strongly recommend additional amendments as detailed in the attached table.

We hope that you will find these remarks helpful and thank you in advance for taking them into consideration for your future work on the draft Directive.

Priority issues

Senior management

Amendment 28 **Article 3 -paragraph 5 -point a(!) and b- point iii a (new)**
Text proposed by the ECON-LIBE draft report: ***(iiia) where no natural person is identified under point (i) or (ii), the natural person(s) who holds the position of senior managing official. In this case, obliged entities must keep records of the actions taken in order to identify the beneficial ownership under point (i) and (ii) in order to be able to justify the lack of***

identification of such persons;
Justification
*Not all CDD measures should in this case be applied to the CEO. We believe that the Directive text should take up the wording of the FATF standards and refer to "senior management". In this context it is important to stress that such natural persons are not beneficial owners neither of corporate entities (**Art. 3 par. 5 a!)** nor of legal entities (as foundations, trusts etc. **Art. 3 par. 5 b)**.*

Data protection

Amendment 48 **Article 11 –paragraph 1 a (new)**
Text proposed by the ECON-LIBE draft report: 1a. Obliged entities shall inform the person concerned of the possible use of the personal data for money laundering prevention purposes before the collection of that data. Processing sensitive categories of data shall be done in accordance with Directive 95/46/EC.
Justification
In order for obliged entities to fully comply with both AML and Data protection requirements and allow processing of personal data in a lawful manner in accordance with Directive 95/46/EC, we suggest to include the possibility to acquire explicit consent from customer limited to anti-money laundering purposes. *This consent could be obtained introducing a specific consent approval by consumer during the pre-contractual phase of the identification procedure. In case of third party identification, the data subject in charge for the processing would remain the financial institution with whom the customer undertakes its contractual obligations.*

Examination of transactions

Amendment 52 **Article 16 paragraph 2**
Text proposed by the ECON-LIBE draft report: 2. Member States shall require obliged entities to examine, the background and purpose of all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or lawful purpose, **or which constitute tax offences within the meaning of Article 3(4) (f).** In particular, they shall increase the degree and nature of monitoring of the business relationship, in order to determine whether those transactions or activities appear unusual or suspicious.
Justification
We have some concerns with the proposed wording. Amendment 52 implies that obliged entities could judge which transactions constitute a tax offence. This is something which can only be established by a court. We would therefore suggest deleting the amendment and keep the Commission text.

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Data protection/ public interest

Amendment 77 **Article 39 –paragraph 1 a (new)**
Text proposed by the ECON-LIBE draft report: 1a.Any personal data retained ***may*** not be used for any purposes other than the purpose for which it has been retained, especially as regards any further use for commercial purposes.
Justification *In order for obliged entities, to process data in a legitimate manner and in accordance with data protection rules, we would support the explicit recognition of AML as a "public interest" and the clear statement that such processing is necessary either for the performance of the contractual agreement among the customer and the bank, and in order to comply with AML legal obligations.* *As a consequence, to restrict the processing exclusively to AML purposes we accept to strengthen the wording by replacing the expression "may" with the expression "shall".*

Amendment 92 **Annex 2 – paragraph 1-poin3-poit b**
Text proposed by the ECON-LIBE draft report: (b) third countries ***identified by credible sources, such FATF public statements, mutual evaluation or detailed assessment reports or published follow-up reports, as*** having effective anti-money laundering/combating terrorist financing systems;
Justification *Separate evaluations of the third countries carried out by the different national regulators or international organisations risk creating confusion for obliged entities. Having a high quality and regularly updated list based on the joint analysis and research of the Member States and the European Commission on the legislative AML/CFT frameworks of third countries provides objective criteria that financial institutions can integrate in their AML/CFT programmes.*

Beneficial owner

New Amendment **Article 3 paragraph 5 – point a – point i**
Text proposed by the European Commission: "beneficial owner" means any natural person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted. The beneficial owner shall at least include: (a) in the case of corporate entities: (i) the natural person(s) who ultimately owns or controls a legal entity through direct

or indirect ownership or control over a sufficient percentage of the shares or voting rights in that legal entity, including through bearer share holdings, other than a company listed on a regulated market that is subject to disclosure requirements consistent with European Union legislation or subject to equivalent international standards. A percentage of 25% plus one share shall be evidence of ownership or control through shareholding and applies to every level of direct and indirect ownership;
Justification *New Article 3.5.a.i should clearly establish that beneficial ownership refers to direct ownership. Currently, the Commission proposes to apply the same threshold to all levels of indirect ownership and also in cases where the customer is part of a multi-layered corporate structure. The FATF has already recognised the 25% threshold as sufficient with regard to direct ownership. However, it has not defined a percentage threshold for ownership and control in the entire ownership chain. By doing so the FATF has acknowledged the fact that in case of indirect shareholdings the power to exert ultimate and effective influence on the customer along the ownership chain is to be regarded as key evidence of ownership and control from a company law perspective.* *We therefore suggest to retain the wording of the current 3rd EU AMLD. Alternatively, we propose to delete the clause providing for mandatory application of the 25% threshold to indirect shareholdings and to include appropriate wording that reflects our arguments concerning the ultimate influence of a beneficial owner from a company law perspective presented above.*

Correspondent banking

New amendment **Article 17**
Text proposed by the European Commission: In respect of cross-border correspondent banking relationships with respondent institutions from third countries, Member States shall, in addition to the customer due diligence measures as set out in Article 11, require their credit institutions to: (...)
Justification *We believe that correspondent banks domiciled in third countries with AML/CFT regimes equivalent to EU standards based on the FATF-40 should not be subject to enhanced CDD as this would defeat the purpose of a risk-based approach.*

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