Verband der Auslandsbanken in Deutschland e.V.
Association of Foreign Banks in Germany

European Commission
1049 Bruxelles/Brussel
Belgium

18 November 2021

Position paper of the Association of Foreign Banks in Germany on

- **the Proposal for a Regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing** (COM (2021) 420, procedure 2021/0239/COD), hereafter: "AMLR"; **and on**
- **the Proposal for a Directive of the European Parliament and of the Council on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849** (COM (2021) 423, procedure 2021/0250/COD), hereafter: "AMLD6".

Dear Sir or Madam,

We highly appreciate the opportunity to provide input to both above-mentioned proposals of the package of 20 July 2021 that consisted of four legislative proposals to strengthen the anti-money laundering and countering terrorism financing (AML/CFT) rules in the European Union.

The Association of Foreign Banks in Germany represents the interests of currently more than 200 foreign banks and other financial services institutions which operate in Germany via subsidiary or branch. Almost all member institutions are therefore part of a cross-border banking of financial group. Those groups can highly benefit from the envisaged uniform rules regarding anti-money laundering and countering terrorist financing on EU level. We therefore appreciate the chosen path to introduce a regulation on AML/CFT rules that will become directly-applicable for obliged entities in all Member States. In the feedback of our Association dated 25 August 2020 (Reference F545580) on the consultation document that was published in the course of the public consultation on an action plan for a comprehensive Union policy on preventing money laundering and terrorist financing of 7 May 2020, we had agreed with almost all provisions that the Commission chose to transfer from the currently existing Directive 2015/849 ("AMLD4") – as amended by the "fifth" AML Directive 2018/843 – towards a new EU Regulation. Furthermore,

Andreas Kastl

Association of Foreign Banks
in Germany
Weißfrauenstraße 12-16
60311 Frankfurt am Main
Germany
Tel: +49 69 975850 0
Fax: +49 69 975850 10
andreas.kastl@vab.de
www.vab.de

Association of international banks, investment firms and asset managers

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being asked what other provisions should be harmonised by a regulation, we also advocated for a transfer of the provisions on risk assessment and risk analysis into the new Regulation, as well as the provisions on the execution of due diligence obligations by third parties. Now, we appreciate that the proposed draft Regulation contains these provisions in Art. 8 as well as in Art. 38 and 39.

In the above-mentioned public consultation, we also recommended in the above-mentioned public consultation that, in future, specific rules should be set by delegated acts (Art. 290 TFEU) and implementing regulations (Art. 291 TFEU), the so-called Level 2 measures. Although the current draft regulation expediently enables the development of for such measures, there is still potential for more uniform Level 2 legislation covering all obliged parties. We therefore suggest to exchange provisions in the AMLR that provide for setting AMLA guidelines (so-called Level 3) into provisions providing for delegated acts and implementing regulations that are to be developed by AMLA. The rationale behind this is that the regulatory content of Guidelines is implemented by the national authorities, and this can lead to divergent administrative instructions of the member states' authorities. As a result, this cannot fully contribute to a uniform application of the AML/CFT rules across the Union, but may increase the complexity for groups of obliged entities which are active in cross-border business. Regulatory content being transposed in the form of delegated acts and implementing regulations should lead to a more uniform application of AML/CFT rules throughout the Union.

In the following annex section of our position paper, we have taken the liberty of recommending amendments to several provisions of the proposed Regulation and the proposed Directive.

Please do not hesitate to contact us if you have any questions.

Kind regards

Dr Andreas Prechtel Andreas Kastl

Annexes:
Annex 1: Proposals of the Association of Foreign Banks in Germany on the draft Regulation on the prevention of the use of the financial system for the purposes of money (AMLR)
Annex 2: Proposals of the Association of Foreign Banks in Germany on the draft Directive on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849 (AMLD6)

Annex 1: Proposals of the Association of Foreign Banks in Germany on the draft Regulation on the prevention of the use of the financial system for the purposes of money (AMLR)

1) Introduction of proliferation financing-related targeted financial sanctions into the AML/CFT framework

According to recital 24, the AML/CFT framework shall in future also include proliferation financing-related targeted financial sanctions, meaning that obliged entities should be able to identify, understand, manage and mitigate risks of potential non-implementation or evasion of proliferation financing-related targeted financial sanctions. This enlargement of the AML/CFT framework materializes in an amendment of the scope of internal policies, controls and procedures, Art. 7 para. 1 lit. b AMLR as it mentions the independently existing obligation to apply targeted financial sanctions (cf. the definition in Art. 2 para. 35 AMLR) as well as proliferation financing-related targeted financial sanctions (cf. the definition in Art. 2 para. 36 AMLR). Those risks of non-implementation and evasion must be managed and, at best, mitigated. And regarding the risk analysis of obliged entities, the risks of a non-implementation and possible evasion of proliferation financing-related targeted financial sanctions shall be taken into account according to Art. 8 para. 1 AMLR. However, it has to be stated concerning both amendments that targeted financial sanctions as well as proliferation financing-related targeted financial sanctions are neither part of the current requirements on internal policies, controls and procedures in Art. 8 para. 3-5 AMLD4 nor of the current requirements on risk analysis in Art. 8 para. 1 and 2 AMLD4.

This enlargement will expectedly lead to more complexity in the prevention measures of obliged entities, especially as – for the purposes of internal policies, controls and procedures – the obliged entities shall be further obliged to comply with the whole continuum of applicable proliferation financing-related targeted financial sanctions. In consequence, these new risks of non-implementation and evasion of such sanctions shall be taken into account in (individual) risk assessments and the (company-wide) risk analysis, too.

Many obliged entities must comply with EU financial sanctions, but this compliance has so far stood beside the prevention measures of the AML/CFT framework. Of course, there have always been interconnections, especially regarding the financial sanctions that are related to the financing of terrorism. But until now, the compliance was mostly not controlled by the AML/CFT authorities but by other authorities, e. g. central banks. By elevating the proliferation financing-related targeted financial sanctions into the AML/CFT framework that are anyway applicable to many obliged entities, the efforts of obliged entities must surely increase to comply with these added requirements. As compliance with financial sanctions is still observed by other authorities, this amendment would lead to redundant requirements. In order to focus the obliged entities' prevention measures on the original requirements to prevent money laundering and the financing of terrorism, **we therefore propose to remove the proliferation financing-related targeted financial sanctions from the AML/CFT framework** (in Art. 7 and 8 AMLR and in consequently in Art. 7, 8 and 45 of the presented draft for an AMLD6).

2) Introduction of an (AML/CFT) Compliance Officer

According to Art. 9 para. 1 AMLR, obliged entities shall appoint one executive member of their board of directors or, if there is no board, of its equivalent governing body who shall be responsible for the implementation of measures to ensure compliance with AMLR (so-called 'compliance manager'). This provision can be compared to Art. 46 para. 4 AMLD4. The compliance manager of an obliged parent undertaking shall also be responsible for overseeing group-wide policies, controls and procedures. In addition to this, obliged entities shall also have a compliance officer who shall be in charge of the day-to-day operation of the obliged entity's AML/CFT policies and be responsible for reporting suspicious transactions to the Financial Intelligence Unit (FIU) according to Art. 9 para. 9 AMLR. This requirement goes beyond the current provision in Art. 8 para. 4 lit. a AMLD4 on the appointment of a compliance officer at management level and could be compared with the money laundering (reporting) officer in sec. 7 of the German AML Act.

In this context, Art. 9 para. 3 subpara. 2 AMLR states that: "*An obliged entity that is part of a group may appoint as its compliance officer an individual who performs that function in another entity within that group*." **We recommend to clarify in this regard that this provision should also be applicable in cross-border groups of obliged entities** (cf. Art. 2 para. 29 AMLR) **and in an obliged entity operating on a cross-border basis** (cf. Art. 2 para. 7 AMLD6)**, as the final AMLR – with its uniform rules – will apply also to groups of obliged entities being domiciled in different Member States.** With regards to this possible clarification, it must be taken into account, that the European Banking Authority (EBA) is currently developing Guidelines on the role of AML/CFT compliance officers (cf. the EBA consultation paper EBA/CP/2021/31 of 29 July 2021). Although this Guidelines refer to the currently valid AMLD4, it is obvious that EBA aims at developing supervisory expectations that could also be applied to the new AML/CFT framework. The presented draft Guidelines state that the AML/CFT compliance officer should normally be located in the country of establishment of the financial sector operator. In our response to this public consultation, our Association already indicated to EBA that this should not be mistaken as a ruling stipulating that the AML/CFT compliance officer should not only work in the country of establishment, but should also actually live there, as this would be incompatible with the EU freedom of movement for workers. As the proposed AMLR will be applicable in all Member States, the application of the provision in Art. 9 para. 3 subpara. 2 AMLR should further be clarified **that there will be no location restriction for the compliance officer in cases of Art. 9 para. 3 subpara. 2 AMLR**.

3) Involvement in the processing of an occasional transaction

Art. 15 para. 1 AMLR specifies the triggers for the application of customer due diligence (CDD) procedures and can in this regard be compared with Art. 11 AMLD4. In comparison to Art. 11 lit. b AMLD4, CDD measures are not only to be applied when carrying out an occasional transaction, but also when being **involved** in the processing of an occasional transaction. As there is no further guidance in the text of AMLR what kind of involvement in the processing of an occasional transaction exactly could trigger CDD measures, **this new trigger** (as AMLD4 did not mention any

involvement in Art. 11) **should also be subject to the envisaged regulatory technical standards (RTS) being developed by AMLA according to Art. 15 para. 5 AMLR**.

4) Identification of the person acting on behalf of the contractual partner ("customer")

Besides the identification of the contractual partner (i. e. the "customer"), the application of customer due diligence measures includes certain measures regarding any person acting on behalf of the contractual partner (or the "customer"). According to Art. 16 sent. 2 AMLR, obliged entities shall verify that a person purporting to act on behalf of the customer is authorised to do so and shall identify and verify the identity of that person in accordance with Article 18, which sets out the kind of information to be recorded. Although these requirements are already part of the existing AML/CFT framework (cf. Art. 13 para. 1 sent. 2, Art. 16 para. 1 subpara. 2 AMLD4), there are hints that the implementation of CDD measures towards persons acting on behalf of the contractual partner has varied in the past from Member State to Member State. Therefore, we recommend to extend the envisaged regulatory technical standards (RTS) on the information necessary for the performance of customer due diligence according to Art. 22 AMLR by the following contents: **on the one hand, exemplary cases which persons should be seen as acting on behalf of the contractual partner, dependent on the kind and nature of the business relationship, and on the other hand, what kind of information, documents and data can be seen as necessary for the verification of the person acting on behalf of the contractual partner, under application of the risk-based approach.**

5) Involvement of a high risk third country

Obliged entities shall apply enhanced due diligence measures according to Art. 23 para. 4 AMLR when a business relationships or occasional transactions involve natural or legal persons from a high risk third country. In this context, we advocate for **not** deleting "occasional". If all transactions would be subject to this rule, obliged entities could tend to de-risk their services.

6) Performance by third parties: reliance and outsourcing regarding monitoring of business relationship and transactions

Pursuant to Art. 38 para. 1 AMLR, obliged entities may rely on other obliged entities to provide CDD measures only within the scope defined by Art. 16 para. 1 points (a), (b) and (c) AMLR. As a result, the conduct of an ongoing monitoring of the business relationship including the scrutiny of transactions undertaken throughout the course of the business relationship acc. to Art. 16 para. 1 point (d) AMLR is exempted by the reliance provisions of Art. 38 and 39 AMLR.

Therefore, the only other possible performance by a third party of the above-mentioned monitoring of business relationship and transactions seems to be via outsourcing. According to Art. 40 para. 1 AMLR, obliged entities can outsource tasks for the purpose of performing customer due diligence, which should consequently include the monitoring of business relationship and transactions acc. to Art. 16 para. 1 point (d) AMLR.

But the (personal) scope of the outsourcing provisions only include outsourcing to an agent or to an external service provider acc. to Art. 40 para. 1 AMLR; outsourcing to another obliged entity – meaning outside of the scope of the reliance provisions of Art. 38 and 39 AMLR – is not addressed in Art. 40 AMLR.

This missing link to outsourcing to other obliged entities can also be found in Art. 40 para. 3 AMLR, where it is stated that there must be a written agreement between the obliged entity and the outsourced entity; this is justified by the need of the outsourcing obliged entity to ensure that the agent or external service provider applies the measures and procedures adopted by the obliged entity, meaning which are compliant with the upcoming AML/CFT framework. This interpretation is also based on the following passage of recital 62 of the proposed Regulation: "*In the case of agency or outsourcing relationships on a contractual basis between obliged entities and external service providers not covered by AML/CFT requirements, any AML/CFT obligations upon those agents or outsourcing service providers could arise only from the contract between the parties and not from this Regulation*."

Therefore, the outsourcing provisions of Art. 40 para. 1 AMLR should be generally amended to include outsourcing to other obliged entities; and it should be stated in Art. 40 para. 3 AMLR that outsourcing agreements between obliged entities should acknowledge that the contract partners are subject to AML/CFT obligations. Additionally, in terms of clarification, the conduct of an ongoing monitoring of the business relationship including the scrutiny of transactions undertaken throughout the course of the business relationship acc. to Art. 16 para. 1 point (d) AMLR should be listed as an example of tasks that could be generally outsourced.

7) Performance by third parties: outsourcing within a group of obliged entities

In addition to the explanations in the previous section 6 of this position paper, Art. 40 para. 1 AMLR should not only be amended by a clarifying provision on the possibility of outsourcing to other obliged entities, **but also be extended on special rules for outsourcing to other obliged entities that belong to the same group** (cf. Art. 2 para. 29 AMLR). In these cases, the compliance with the AML/CFT requirements could be ensured through certain group-wide policies, controls and procedures instead of the contractual agreements mentioned in Art. 40 para. 3 AMLR. This would represent a comparable approach to the one in Art. 38 para. 3 AMLR, stating that with regards to those CDD measures that are in scope of Art. 38 para. 1 AMLR, the compliance with the requirements of the Art. 38 and 39 AMLR in the case of obliged entities that are part of a group may be ensured through certain group-wide policies, controls and procedures.

Additionally, in the case of an obliged entity operating on a cross-border basis (cf. Art. 2 para. 7 AMLD6), it should be clarified if the execution of tasks by the head quarter of the obliged entity for a branch in another Member State should not be subject to the outsourcing provisions of Art. 40 AMLR because it is the same legal entity.

Furthermore, the outsourcing restrictions of Art. 40 para. 2 AMLR should not be applicable to outsourcing to other obliged entities of the same group of obliged entities within the Union or to obliged entities operating on a cross-border basis within the Union (cf. Art. 2 para. 7 AMLD6), which execute tasks for branches in other Member States, as all entities and branches will be

subject to the future EU AML/CFT framework in general and the group-wide requirements of Art. 13 AMLR and the oversight of AML/CFT supervisory colleges according to Art. 36 AMLD6 in particular.

8) Beneficial ownership and the exemptions for companies listed on a regulated market and for bodies governed by public law

Art. 2 para. 22 AMLR provides for a rudimentary definition of beneficial owner that does not (at this point) exempt companies listed on a regulated market that is subject to disclosure requirements consistent with Union law or subject to equivalent international standards which ensure adequate transparency of ownership information (compare to the definition in Art. 3 para. 6 lit. a no. i sent. 1 AMLD4), as well as bodies governed by public law. However, these two exemptions can be found in Art. 42 para. 5 AMLR in the context of the AMLR's chapter IV on beneficial ownership transparency. In view of this, it should additionally be noted that Art. 10 para. 1 AMLD6 also provides for an exemption for companies listed on a regulated market that are subject to disclosure requirements equivalent to the requirements laid down in AMLD6 or subject to equivalent international standards.

In order to avoid possible misinterpretations about which definition of beneficial owner must be applied while performing customer due diligence measures, **we suggest to amend the definition of Art. 2 para. 22 AMLR with a reference to both exemptions of Art. 42 para. 5 AMLR.**

Furthermore, we propose to specify that the exemption of in Art. 42 para. 5 lit. b AMLR does not only encompass bodies governed by public law as defined under Article 2 para. 1 point (4) of Directive 2014/24/EU, but also companies/subsidiaries of those bodies.

9) Introduction of a transparency register obligation for third country clients

According to Art. 48 AMLR, legal entities incorporated outside the Union and express trusts or similar legal arrangements administered outside the Union should be required to disclose their beneficial owners whenever they operate in the Union by entering into a business relationship with an obliged entity or by acquiring real estate in the Union to the central register of the respective Member State. This transparency register obligation for third country clients will clearly disadvantage obliged entities in the EU with regards to their business relationships with third country customers. It must be kept in mind that many EU-based obliged entities compete with companies and financial sector providers outside the Union. Furthermore, this represents a European legislation with extraterritorial effect. **We therefore recommend the abolishment of the provisions of Art. 48 AMLR.**

Annex 2: Proposals of the Association of Foreign Banks in Germany on the draft Directive on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849 (AMLD6)

1) Exemption for bodies governed by public law from beneficial ownership registers

Concerning beneficial ownership registers, Art. 10 para. 1 sent. 2 AMLD6 provides for an exemption for companies listed on a regulated market that are subject to disclosure requirements equivalent to the requirements laid down in AMLD6 or subject to equivalent international standards.

In alignment to Art. 42 para. 5 lit. b AMLR, there should be a clarification in Art. 10 AMLD6 that bodies governed by public law as defined under Article 2 para. 1 point (4) of Directive 2014/24/EU and furthermore also companies/subsidiaries of those bodies **have no obligation to register** to those registers.

2) Clarification on proxy holders

The proposal also lays down the creation of a cross-border interconnection between the Member States' bank account information mechanisms, meaning both central registers or data retrieval systems. In this context, Art. 14 para. 3 lit a AMLD6 also states that information on any person purporting to act on behalf of the customer must be included.

Interestingly, recital 39 of the draft directive describes this provision and hereby mentions also the identity of **proxy holders**: "*It is therefore essential to establish centralised automated mechanisms, such as a register or data retrieval system, in all Member States as an efficient means to get timely access to information on the identity of holders of bank and payment accounts and safe-deposit boxes, their proxy holders, and their beneficial owners*."

It must be noted that "proxy holders" and "any person purporting to act on behalf of the customer" cannot be taken as the same category. For example, there can be many proxy holders to one account that never make an appearance as person purporting to act on behalf of the customer. Contrary, proxy holders may have power of disposal of an account, but cannot act on behalf of the customer in other ways. We therefore recommend to concretize "proxy holders" in the context of Art. 14 para. 3 lit a AMLD6, at best including an own definition of "proxy holders" in Art. 2 of AMLD6.

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