European Payment Institutions Federation aisbl

NOVEMBER 2016

EPIF POSITION PAPER ON THE COMMISSION'S PROPOSAL TO AMEND THE 4TH AML DIRECTIVE[1] (5TH AMLD)

The European Payment Institutions Federation - **EPIF**, founded in 2011, represents the interests of the non-bank payment sector at the European level. We currently have over 190 authorised payment institutions and other non-bank payment providers as our members offering services in every part of Europe. EPIF thus represents roughly one third of all authorized Payment Institutions in Europe. Our diverse membership includes a broad range of business models, including:

- 3-party Card Network Schemes
- Acquirers
- Money Transfer Operators
- FX Payment Providers
- Mobile Payments
- Payment Processing Service Providers
- Card Issuers
- Third Party Providers
- Digital Wallets

EPIF seeks to represent the voice of the PI industry and the non-bank payment sector with EU institutions, policy-makers and stakeholders. We aim to play a constructive role in shaping and developing market conditions for payments in a modern and constantly evolving environment. It is our desire to promote a single EU payments market via the removal of excessive regulatory obstacles.

We wish to be seen as a provider for efficient payments in that single market and it is our aim to increase payment product diversification and innovation tailored to the needs of payment users (e.g. via mobile and internet).

[1] AMENDING DIRECTIVE (EU) 2015/849 ON THE PREVENTION OF THE USE OF THE FINANCIAL SYSTEM FOR THE PURPOSES OF MONEY LAUNDERING OR TERRORIST FINANCING AND AMENDING DIRECTIVE 2009/101/EC

GENERAL OBSERVATIONS

EPIF is supportive of initiatives that introduce a more robust legal environment with a series of measures to better counter financing of terrorism and to ensure increased transparency of financial transactions and of corporate entities under the preventative legal framework in place in the European Union (**EU**). This objective was one of the central objectives of the 3rd AMLD (2005/60/EC) and the 4th AMLD (2015/849/EU). The 4th AMLD has been agreed after an intensive legislation process on 20 May 2015.

The European Member States are mainly working on the national implementation of the new rules introduced to ensure its enforcement from 26 June 2017 onwards. This has the effect that in several European Member States there is no draft of the upcoming national requirements available. In addition to this, interpretive guidance has to be published. The expected regulatory guidelines are not available yet. Therefore it is not possible to consider these additional interpretations such as the "Risk Factor Guidelines" including national characteristics which are to be published.

The obliged entities are facing adjustments and enhancements of the existing internal measures and safeguards. The implementation of the new requirements into the technical infrastructure requires reasonable lead time in order to allow programming, testing and acceptance tests before the new environment can actually being deployed to the productive system. We are also supporting EBA's Opinion on the Commission's proposal to bring virtual entities in the scope of the AMLD.

The 3rd AMLD (2005/60/EC) introduced the approach of a risk based approach as the potential risk of money laundering and terrorist financing is different dependant on customer segment or finance product. The 4th AMLD has extended the scope of the existing framework with the positive effect that the level playing field within the European Member States will be more harmonised. However, the individual measures become stiffer in order to comply with the more detailed and framework. Therefore the effect will be opposite in the way that it becomes easier to circumvent standardised measures and safeguards. Moreover, it is not the scope of the actual AMLD framework to prevent the use of legally available tax systems of different jurisdictions. This is and should remain the subject of regulations addressing these issues.

In addition, Article 5 of the 4th AMLD establishes that “Member States may adopt or retain in force stricter provisions in the field covered by this Directive to prevent money laundering and terrorist financing, within the limits of Union law”. We understand that the possibility for Member States to implement stricter provisions entails in practice that PIs which intend to operate in different Member States are subject to different regulations and therefore, there is a total lack of harmonization among

the different Member States and as consequence many different compliance measures and many different obligations are applicable to the PIs.

We strongly suggest that as good practice going forward the EU puts together the different existing lists of high risk third countries (because Spain, for example, has to deal with many different lists), to avoid contradictions among the different Member States.

RESPONSE TO THE PROPOSAL

1. Transition Period

Most Member States are still in the legislative process to transpose the 4th AMLD into the national legal and regulatory framework. The deadline 26 June 2017 is already considerably short in respect to the process. In addition it must be considered that there is no transition period available for the obliged entities as soon as the national law enters into force.

To move forward the legal transposition deadline does not only cause difficulties for the Member State to comply with this amendment. Moreover, the obliged entities are facing the legal uncertainty that the changes of the national legal and regulatory framework are not clear however they are enforced to invest financial and personal resources to implement potentially expected changes with the risk that the final requirement will require a different measurement or safeguard.

EPIF has the view that any discussion and evaluation regarding the amendment of the rules introduced by the 4th AMLD should not start before these rules are being transposed into the national regime of each Member State and are in force for a certain time period. Furthermore, it is important to allow sufficient time between both the 4th AMLD has been implemented by the obliged entities with an understanding on the practical impact of the new regulation and any amendment of regulations which have not even been tested in practice are being amended by a 5th AMLD.

2. Beneficial Owner

Where the proposal has the objective to enhance the preventive measures against tax fraud and evasion EPIF fully supports this approach. However, the historic development must be considered in this respect. The proposed adaptation by the 4th AMLD of the anti-money laundering and combating terrorist financing framework should have been fully coherent with EU policies in other areas. Amongst others the proposal of the 4th AMLD has been consistent with the approach for fighting against tax fraud and

tax evasion.[2] Already in 2013 the various available global opportunities of different tax regimes have been known. The Panama Papers are just one more example which has been discussed in public.

1. The proposed amendment of Article 3 Number 6 a) i) of the 4th AMLD by introducing an additional threshold of 10% for *Passive Non-Financial Entities* causes increased operational and review obligation without ensuring to achieve the objective. The effort required outweighs to an unacceptable level the potential benefits, particularly insofar as the identification of all beneficial owners (in the sense of the newly inserted paragraph) associated with internationally active corporate entities with multi-level shareholding structures. Long transitional periods for the retroactive collection of data for existing clients would be just as necessary as the conversion of existing systems to enable them to collect such data at all.

The starting point to prevent tax fraud and tax evasion must be a common understanding between all European Member States and with third countries. The individual national interests should not been misused in a way to offer a tax regime which attracts the uses of legal structures to avoid or circumvent taxes in another jurisdiction. This objective is a task for political discussion and the legislation. As long as this general precondition is not fulfilled this task cannot be transferred to obliged entities under the AMLD to detect and report the use of legal structures by their customers.

Moreover, the definition of a *Passive Non-Financial Entities* is by far too complex and vague and has various different elements which must be considered by the obliged parties. It has been always a practical challenge to obtain and verify the identity of the beneficial owner. With the 4th AMLD a new registration regime shall be introduced to all Member States. Already before the 4th AMLD has been concluded it was subject to intense discussions. It will take several years until every legal entity will meet the upcoming registration requirement. The obliged entities are still facing the challenge to identify the beneficial owner, especially if the upcoming registers shall not be reliable. In opposite, if the 5th AMLD is requiring that Financial Intelligence Units and responsible authorities can rely on these registers it is not understandable why obliged entities can still not ultimately rely on the register. Moreover, if a registration requirement is in force then it is questionable why personal private data must be obtained, recorded, processed and stored by various obliged entities. In compliance with the General Data Protection Regulation (2016/679/EU) it appears an unnecessary duplication of one and the same set of personal data.

Besides the consideration above it is unclear how a participation of 10% in the capital share of voting right can constitute a relevant influence of the operation of an entity with the effect that the customer is under control or ownership of this person.

[2] COM(2013) 45/3, Page 5.

It is EPIF's position that the introduction of two different thresholds (10% and 25%) must be avoided. The practical impact on the operational processes would lead to more complexity in the identification process. This complexity will cause an increased risk of shortcomings and misinterpretations of the actual classification whether an intermediary shareholder must be deemed as *Passive Non-Financial Entities* or not. If the assessment leads to a different classification every additional step during the identification process cannot lead to a result which would be in compliance with the legal requirements.

At this point in time and with the absence of an internationally standardised register, the requirements specified in the newly inserted paragraph in Article 3(6)(a)(i) are either not practicable or only feasible with extensive costs and efforts for all financial institutions in Europe .

Furthermore it is still not clear which factual effect the new rules of the 4th AMLD will have. EPIF suggests to postpone the requirement in respect to the beneficial owner and an additional threshold of 10% until the first update of the Risk Assessment pursuant to Article 6 of the 4th AMLD or rather the report pursuant to Article 65 of the 4th AMLD has been issued. and that the newly inserted paragraph does not offer any added value whatsoever in terms of achieving the objective of the Directive, the EPIF suggests a deletion of this newly added paragraph.

3. E-Money Products

The proposal suggests an amendment of Article 12 (1) a) of the 4th AMLD whereby the newly introduced monthly maximum limit for payment transactions of EUR 250 shall be reduced to EUR 150. Already the new regime of the 4th AMLD has a significant impact on the issuers of e-money products. Prepaid cards have legitimate purposes as part of the financial eco system and constitute a cashless payment instrument contributing to financial inclusion as by recital 11. This is has not changed since the 4th AMLD entered into force. It is not evident how a reduction of the spending limit up to EUR 100 can ensure that the objectives are better achieved as by an unamended limit. This is especially the case as there is no experience how the unique monthly limit of EUR 250 will already affect the prevention of money laundering or terrorist financing. This must be also seen in connection with the identification threshold for persons trading in goods. Where it is still possible to make anonymous payments up to an amount of EUR 10.000 basically on a transactional basis it is unclear how this threshold must be seen in relation to the monthly access limit of EUR 250 (or in future EUR 150) for anonymous e-money products. The same applies to the proposed amendment of the limit in Article 12 (1) b) of the 4th AMLD.

The new provision of Article 12 (3) introduced by the 5th AMLD would be a step back in terms of ensuring paper trail for payment transactions. As per today the available set of information within the transaction data does not allow any evaluation whether the particular prepaid card is:

a) an anonymous prepaid card
   or
b) an identified card

The transaction data does not allow any evaluation on what kind of anonymous prepaid card is being used as the individual specification of the conditions of the card product is subject to the discretionary decision of the issuer of the anonymous prepaid card. These conditions are in no way required for processing the particular payment transaction by the involved payment service provider who has the business relationship as acquirer with the merchant.

Considering this, Article 12 (3) would cause the situation that every acquirer would have to deny to process any type of card transaction where the issuer of the card is established in a third country. The proposed amendment would have the negative effect that the paper trail for cards issued by issuer established in third countries will not be available in the future. This means that e.g. tourists from third countries are enforced to pay in cash only. Those cash payments are possible up to an amount of EUR 10.000 completely anonymously and even without any kind of paper trail.

EPIF also rejects the suppression of anonymous online payments as planned in Article 12(2) as we fundamentally support the application of the risk-based approach with an exception-regime based on the actual product risks. In our view, a blanket ban does not contribute to achieving the objectives defined in this Directive.

EPIF strongly believes that these effects are not in the interest of the Commission and requests that Article 12 of the 4th AMLD shall remain unaffected. All proposed amendments should be deleted.

4. Obligation to update

Article 14 (5) of the 4th AMLD shall be amended in connection to the update periods considering the risk-based approach. However, the proposed amendment is unclear. It is impractical to connect the update period to a Directive 2011/16/EU on the administrative cooperation in the flied of taxation and repealing Directive 77/799/EEC. Most of the obliged entities do not fall into the scope of this Directive.

Article 14 (5) of the 4th AMLD should remain unaffected. Alternatively it is necessary to concretize the proposed amendment

5. Enhanced Due Diligence Measures for Transactions with Customers in Third Countries

The newly inserted Article 18a requires obliged entities to apply enhanced customer due diligence (ECDD measures) when dealing with natural or legal entities established in identified high risk third countries and seeks to harmonise the approach of the EU towards third countries. Paragraph 1 introduces a series of additional obligations that are to be applied as minimum requirements for dealings of all obliged entities with those high-risk third countries. This catalogue of measures is taken from the Recommendations of the Financial Action Task Force (on Money Laundering) (FATF). However, the individual measures contained therein are only listed as examples of possible due diligence obligations (see Interpretive Note to recommendation 10, para. 20). The blanket adoption as mandatory statutory requirements of all the examples listed by the FATF without any further differentiation of "high-risk third countries" actually contradicts the intended risk-based approach of the Directive. According to the risk-based approach, every third country is to be individually assessed and the measures for implementing the enhanced due diligence obligations are to be correspondingly adapted. Moreover, not all of the listed measures are actually practicable, especially when examining the proposed Article 18a(1)(f). Due to these reasons, the EPIF suggests a stronger focus on the real risk associated with a third country insofar as the extent of application of enhanced due diligence obligations.

The depth of regulation of the new Article 18a is also extremely expansive. A reference to a third country, for example, the nationality of the customer, may already suffice to trigger the application of enhanced due diligence obligations - even if the customer has been residing in an EU Member State for years. The phrasing "With respect to transactions involving high risk third countries, Member States shall require that" should therefore be deleted entirely.

Article 18a is contradictory to the required harmonization of AML regimes in all EU Member States. Where it is proposed to introduce an effective standard it is suggested to develop a general and complete approach by the FATF. This international standard would have a global effect. The transposition of the FATF standard would also ensure into European AML regime would also ensure that one and the same standard applies in a harmonized economic area.

Where each Member State is allowed to develop its own set of rules obliged entities established in one Member State must evaluate and fulfill in a worst case scenario 27 different requirements of European Member States and 3 different requirements of the Member States of the Economic Area. It is the opinion of EPIF that this is not in compliance with the EU-Treaty.

6. Beneficial ownership information

EPIF is supportive of the proposed amendments of Article 30 and Article 31 of the 4th AMLD. The integration of the relevant registers of each Member State into the central European Register will help to establish a harmonized understanding between all Member States of required data on the identity of beneficial owners. The amendments will ensure that it becomes possible for the law enforcement

authorities to review relevant entries on a cross border basis without the need to request for administrative assistance in the first instance.

This can be also seen as a clear statement that the registers must be reliable. All competent authorities and FIU must be in a position where they can rely on the information held in the central register. If the quality of register is not given, there would be now ground to establish a case for a law enforcement action.

Considering this position it must also be possible for the obliged entity to rely on the register. It is not evident, why an obliged entity should has still the obligation to undertake additional measures to ensure that the correctness of the information received from the register.

Article 30 or 31 of the 4th AMLD should be amended by a further provision which allows it to rely on the register. Additionally a provision should be implemented that the enforcement of the registration and updating requirement of all relevant persons is sufficient. The quality of these registers is important. Therefore the Commission should provide a range of administrative sanctions and measures by Member State at least for serious, repeated or systematic breaches of the registration requirements.

7. Register for "*Payment Accounts*" and "*Bank Accounts*"

The introduction of a national central register in each Member State which includes information regarding any natural or legal person holding or controlling a "*payment account*" or a "*bank account*" might be a further safeguarding measure and might be help for law enforcement authorities. Besides this, the actual draft of Article 32a of the 5th AMLD includes several requirements where the definition is unclear and allows room for interpretation. The term "*payment account*" is legally defined but not the term "*bank account*". Without a harmonized definition of this term there is room for regulatory gaps. EPIF suggest narrowing down the definition: Payment account reachable for transactions within an industry - wide payment system.

Germany has introduced such a register many years ago. In order to setup the relevant set of data in the technical infrastructure of the obliged entity it is important that a detailed specification is available at least one year before any data must be submitted by the obliged party into the central register.

In terms to ensure a homogeneous level playing field between the Member States it should be subject to regulated the details of the national central registers by a European Regulatory Technical Standard drafted by EBA after consultation with all relevant stakeholders, including credit institutions and payment service providers. Otherwise there is again the risk that an obliged entity with branch offices outside its home Member State must comply with different technical requirements as well as a different scope of data which must be provided to the applicable national register.