AFME position paper on key areas for the Anti-Money Laundering Regulation (AML-R) in the context of the trilogue negotiations

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The Association for Financial Markets in Europe (AFME) welcomes the progress achieved towards finalisation of the European Union (EU) AML/CTF framework. This paper provides views on the ongoing trilogue negotiations and recommendations aimed at achieving a harmonised, proportionate, sustainable, and risk-based approach to the EU's future AML/CTF framework.

The key considerations we highlight in this paper are:

- **Article 42(1) - Identification of Beneficial Owners (BO) for corporates and other legal entities:** the Parliament's proposal to lower the threshold to 15% plus one ownership interest is not only a significant deviation from the FATF's internationally applicable threshold, but introduces higher operational complexity and administrative burdens, and diverts resources away from ensuring effective controls. We strongly believe that obliged entities (OEs) should be given flexibility to determine the BO threshold for customers with a considerable risk exposure based on a risk-based approach.

  We also believe that the lower threshold will result in EU competitive challenges by placing disproportionate KYC requirements on non-EU branches and subsidiaries of EU based groups. Lowering the threshold will also place additional burdens on the OEs customers and risks discouraging them from using EU branches and subsidiaries of EU based groups. We do not support the Parliament's proposal and have provided views previously in our position paper (January 2023).

  Furthermore, we note that the proposal to determine BO at every level of ownership does not correspond to the FATF's internationally applied practice of multiplying through the layers of ownership/control.

  We are concerned with the proposal made under **42 (5),** which requires (OEs) to further lower the threshold (for example, 5% plus one ownership interest) for corporate entities who are associated with a higher risk of money laundering. The Commission should take a risk-based approach enabling OEs to determine the threshold limit based on individual customer risk. It is highly unlikely that an individual could exert control over a body corporate with only 5% plus one ownership interest. The proposal will also be operationally challenging in practice and will increase the administrative burden for OEs with global customers.

- **Article 42(1) (ea) - Control through debt instruments or other financing arrangements:** We acknowledge the potential beneficial ownership utility afforded by certain debt instruments to the extent they can be converted into voting equity shares reflecting control, however such instruments only confer beneficial ownership through control once the conversion clause is activated within an executed agreement. We request that this is explicitly clarified within the Regulation.

- **Article 44(1)a - Beneficial ownership information:** We are concerned with the proposal for BO information requirements, which is not in line with the risk-based approach. We note that obtaining the full set of information requirements, includes residential address, passport, and tax identification numbers. Obtaining this information from BOs will be difficult to implement in practice, as information on the BOs of legal entities is commonly obtained from the customers or directly from external sources.

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OEs do not maintain a direct business relationship with the BOs so will face significant challenges in obtaining information directly from them. We are unclear of the benefit in collecting extensive data from the BOs which does not align with the FATF's internationally acceptable standards.

- **Article 36a – Specific provisions regarding certain high-net-worth customers:** The Parliament's proposal to add new requirements for High-Net-Worth Individual's (HNWI's), places a significant burden on OEs to make extensive enquiries and, in some cases, undertake investigations. For example, to check net worth for all customers and their investments not exceeding EUR 1 million. We believe that the proposal fails to clarify on many aspects such as risk (data protection) associated with this approach. As we mentioned earlier on the competitive aspect, this will be another EU competitive challenge.

- **Article 1(a) - Subject matter:** We are concerned with the Parliament's proposal which extends the scope of the Regulations to cover the implementation and prevention of the evasion of the targeted financial sanctions. The proposed approach, which will have practical implications, could result in the creation of two parallel legal/sanctions supervisory systems under the responsibility of different regulators, each with potentially deviating interpretations.

  The sanctions framework is based on Regulations adopted by the Council with provisions for penalties in case of breaches. Such penalties must be effective, proportionate, and dissuasive. We therefore see the possibility that OEs may be penalised twice for the same breach under the AML/CFT, as well as under the sanction's framework. The Sanctions regime is an absolute regime whereas the AML / CFT regime applies a risk-based approach.

- **Article 2 (25) – Definition for political exposed persons (PEPs):** the Parliament's proposal to add Heads of Regional and Local Authorities including groupings of municipalities and metropolitan regions of at least 30,000 inhabitants into the PEP definition will generate a disproportionately high volume of triggers for enhanced due diligence and as a result focus will no longer be directed at PEP relationships that may pose ML / TF risks. This evolution of the definition does not align with the FATF's definition of the PEPs. Also, we believe that the Council's proposal to add "*other prominent public functions provided for by Member States*" should be clearly scoped and that the definition should not include middle ranking or more junior individuals in this category.

- **Article 37a - Monitoring of transactions with regard to risks posed by targeted financial sanctions:** The Parliament's proposal to insert this new requirement requires credit, financial institutions and CASPs to screen the information accompanying a transfer of funds or crypto-assets pursuant to the [FTR] to assess whether the payee or the payer of a funds transfer, or the originator or the beneficiary of a transfer of crypto-assets, are subject to targeted financial sanctions. This proposal encompass domestic payments whereby domestic transactions are not screened in most of the EU Member States given that financial institutions operating in the same jurisdiction are generally subject to the same legal requirements and regulatory expectations.

  Furthermore, we refer to the Commission's Legislative proposal on instant payments currently under discussion within the co-legislators. Article 5d (2) of the proposal explicitly prohibits payment service providers from screening instant payments within the EU. The Parliament's approach runs counter to the Instant Payments Proposal and would potentially create contradictory legal requirements.

  We note that the Parliament proposal imposes screening requirements and tasks the AMLA and Commission to prepare regulatory technical standards. From the implementation perspective of financial

institutions, it is important to understand that compliance with EU restrictive measures has become a stand-alone matter for compliance professionals, with its own set of laws, court rulings, guidance, regulatory expectations, industry practices and specialised SMEs, largely separate from AML/CTF. A pre-requisite for adding a provision such as Article 37a would therefore be adequate staffing and expertise in the AMLA that can consider and appropriately cover the depth of this topic.

There is a concern that this has not been sufficiently considered in the resource planning for the AMLA thus far, and therefore there is risk that the AMLA will not be able to meet the needs of the industry in terms of providing guidance. We believe that the insertion of a single provision on screening does not cover the complexity this topic has developed into on the implementation side.

Overall, this provision risks disrupting the existing set of rules and practices, causing more confusion than regulatory clarity, and setting the AMLA up to a task it is not able to meet. Regulators for the sanctions regime already exist and the new rule would jeopardize existing clear responsibilities in adding a second regulator for the very same topic.

- **Article 21(2) Ongoing monitoring of the business relationship and monitoring of transactions performed by customers:** We note that the Parliament has not fully considered the risk-based approach while drafting this proposal. We welcome the first part of the proposal which allows OEs to take risk-based approach while deciding the frequency of updating the customer information. This approach appears more rule-based than risk-based and will have a significant impact on the KYC process. We see no benefits in the Parliament's partial risk-based approach and we support the Commission's proposal.

- **Article 17 (3) - Inability to comply with the requirement to apply customer due diligence measures:** We are concerned with the Council's proposal. It stipulates that OEs shall not enter into a business relationship with a legal entity incorporated outside the Union or with legal arrangement administered outside the Union, whose BO is not held in an EU Ultimate Beneficial Owner register (except in cases where an OE entering into business relationship with legal entity operates in sector that is associated with low ML/TF risks and the business relationship or intermediated or linked transactions do not exceed EUR 250,000 or the equivalent in national currency). This provision appears to introduce requirements which, while potentially increasing administrative burden, would not necessarily result in meaningful outcomes and may also potentially lead to a competitive disadvantage. We noted the exception, but this will only apply to small entities and even for them since the threshold cannot with sufficient certainty be determined for the duration of the relationship as well as the administrative burden it causes, can factually not be applied by obliged entities as exemption.

- **Article 23(5a) - Identification of third countries with significant strategic deficiencies in their national AML/CFT regimes:** We welcome the Council's proposal under Article 23(1). Which aligns the EU list of High Risk Third Countries (HRTC) with the FATF list. However, we have a concern with insertion of new provision under Article 23(5a) which permits Member States to supplement the HRTC list. We strongly recommend not allowing Member States to supplement these lists. It is against the purpose of the EU-single-rulebook, and it will lead to unnecessary divergence between the Member States.

- **Article 50(1) - Reporting of suspicious transactions:** We are concerned with Parliament's proposal to expand reporting obligations to also include "predicate offences". We strongly ask not to add "predicate offences" into the definition. This would constitute a significant expansion of and a fundamental change to the role and responsibilities of OEs. By wider scoping the reporting obligations, the focus will shift from potential illicit funds or funds potentially aimed at terrorist financing (which is an inherent activity for a

financial institution being the gatekeeper of the financial system and dealing with customers and funds) to detect potential predicate offences. We support the EBF's position in their recent paper.[1]

- **Article 54 - Prohibition of disclosure**: We recommend that a further revision to Article 54 (5) to include both the same transaction or same client would be helpful for an effective exchange between OEs in the fight against financial crime. To facilitate the important work that is being done within public private partnerships, we support a further lifting of the prohibition of disclosure for this specific category as proposed by the Council in article 54 (3a).

- **Article 55 – Processing of certain categories of personal data:** A critical step forward in supporting the important work done in public private partnerships, but also, private partnerships, would be a solid legal basis to support the exchange of tactical information aligning the aims of AML / CFT regimes with the principles laid down in the GDPR. We support the Council as well as the Parliament for introducing wording to this effect and offer our support in helping to further shape safeguards. We also support the Parliament's proposal to add Article 55(a) - Exchange of data under partnerships for information sharing in AML/CFT field.

- **Article 38 (4) – General provision relating to reliance on other obliged entities:** We note that the Parliament's proposal deletes the possibility to allow reliance of customer due diligence measures within a group when performed in branches and subsidiaries established in high-risk third counties. We maintain that reliance, with the necessary conditions set out in **Article 38(3),** on an OE within a group should be allowed even when performed in branches and subsidiaries established in high-risk third countries as proposed by the Commission and the Council.

- **Article 40 – Outsourcing:** We welcome the Council's and Parliament's proposals which enlarge the scope of activities that can be outsourced but we do consider that outsourcing in high-risk third countries should remain possible within the same group as these entities are subject to the same group-wide policies. This prohibition can have severe consequences should a country in which a financial institution that has outsourced tasks, be put on the HRTC. It will be very difficult and long for the financial institution to reallocate these tasks in another country.

AFME stands ready to provide additional views. Please see Annex 1 below which provides implementation issues on the above-mentioned priority topics and Annex 2 which proposes drafting amendments to the text.

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[1] https://www.ebf.eu/wp-content/uploads/2023/05/EBF_046133-EBF-reaction-to-EP-and-Council-AMLR-position.pdf

Annex 1 – Additional technical implementation issues to support our position.

Article 42 (1) - Identification of beneficial owners for corporates and other legal entities: The Parliament proposal of 15% plus one share ownership interest (ostensibly affecting all low-medium risk corporate customers across the Union and beyond) as a baseline requirement is materially mis-aligned from the FATF's internationally applicable threshold and global implementation of beneficial ownership identification requirements across international markets. This will likely result in EU competitive challenges due to heightened disproportionate KYC requirements for customers on non-EU branches and subsidiaries of EU based groups. The general principle of transparency in all cases does not necessarily yield effective ML/TF prevention outcomes and is likely to result in significant duplication and information requests from OEs burdening legitimate corporate customers and institutions across the EU and further afield. Meanwhile not necessarily, on a risk-based approach, identifying the bad actors who are illicitly circumventing, hiding, or otherwise obfuscating beneficial ownership of suspicious/criminal enterprises.

Article 42(1) (ea) - Control through debt instruments or other financing arrangements: We acknowledge the potential beneficial ownership utility afforded by certain debt instruments to the extent they can be converted into voting equity shares reflecting control, however such instruments only confer beneficial ownership through control once the conversion clause is activated within an executed agreement. We suggest that this must be explicitly clarified within the Regulation.

There is significant proportionality, practical and financial information confidentiality concerns pertaining to OEs being recommended to view convertible financial instruments as reflecting BO when they have not been activated for conversion to voting equity and may not ever be activated. It is likely that the structure of a corporate/wholesale client's complex capital financing arrangements and securities issuances/holders will be confidential financial information which clients are not legally obliged to disclose unless already made public. In addition, as the Regulation is drafted, this would require OEs to undertake and resource a forensic-level financial analysis of capital financing arrangements (including complex calculations of % un-activated debt holding counterparty distribution) of each client, to determine potential BO through control/other means. We view this disproportionate approach would divert resources from focussing on the true controlling beneficial owners, on a risk-based approach.

Article 44 - Beneficial ownership information: As we mentioned above that the amendment is incompatible with a risk-based approach. We consider that the identification requirements should be flexible and based on the individual risk level of customers. The information such as copy of an individual's passport, tax identification number and details of jurisdictions where a BO has a main place of business have always been very difficult for OEs and the type of documents listed is not always relevant. We are of the view that the requirement proposed is misaligned with the FATF's internationally applied AML/CTF standards, and will lead to duplicative, costly, and operationally complicated implementation for OEs. We note that in certain jurisdictions, asking for a residential address is not mandatory. We are of the view that collecting name, surname, date and place of birth and the country of residence are sufficient to check the customers identity.

Annex 2 - AFME Recommendations for the AML Regulation (AML-R)

Article	Commission proposal	Council Mandate	EP Mandate	AFME recommendation
Art 42(1) (second paragraph)	For the purpose of this Article, 'control through an ownership interest' shall mean an ownership of 25% plus one of the shares or voting rights or other ownership interest in the corporate entity, including through bearer shareholdings, on every level of ownership.	~~*For the purpose of this Article, 'control through an ownership interest' shall mean an ownership of 25% plus one of the shares or voting rights or other ownership interest in the corporate entity, including through bearer shareholdings, on every level of ownership.*~~ ***deleted***	For the purpose of this Article~~, 'control through~~ an ownership interest' shall mean an ownership of ~~25%~~***15 %*** plus one of the shares or voting rights or other ***direct or indirect*** ownership interest in the corporate entity, including through bearer shareholdings, on every level of ownership. ***In assessing whether there is an ownership interest in the corporate entity, shareholdings on every level of ownership shall be taken into account. Indirect ownership shall be calculated by multiplying the shares or voting rights or other ownership interests held by the intermediate entities in the chain and by adding together the results from the various chains.*** ***For the purpose of this Article, 'control of the corporate or legal entity' means the possibility to exercise, directly or indirectly, significant influence and impose relevant decisions within the corporate or legal entity. The 'indirect control of the corporate or legal entity' means control of intermediate entities in the chain or in various chains of the structure, where the direct control is identified on each level of the structure, insofar the control over intermediate entities allows for a natural person to control the legal entity.***	Art 42(1) • AFME supports the Council's text to keep the threshold aligned with the FATF standards. AFME would encourage standardised baseline requirement at 25% plus 1 share, to promote harmonisation globally. • AFME suggest aligning with the FATF standards for all the technical implementation concerns articulated in Annex 1.

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Art 42 (1) (third sub paragraph - point d)	d) links with family members of managers or directors/those owning or controlling the corporate entity;	d) ~~*links with family members of managers or directors/those owning or controlling the corporate entity;*~~***are the beneficial owner(s) of:*** ***(i) legal persons referred to in Article 42a which have, directly or indirectly, an ownership interest in the corporate entity, whether individually or cumulatively; or*** ***(ii) legal arrangements, which hold, directly or indirectly, an ownership interest of the corporate entity, whether individually or cumulatively.***	(d) ~~*links with family members*~~***control through informal means, such as close personal connections with relatives or associates*** of managers or directors/those owning or controlling the corporate entity;	Art 42 (1)d • AFME does not support the Parliament's proposal. As it is unclear how the OEs are expected to determine 'informal means'. The OEs could record it if the 'informal means' has been disclosed by the clients. In the absence of the definition, its is practically not possible to get information about it from the clients. • We suggest not to putting the obligation on the OEs to report it if it is not made available to the OEs by the clients or we welcome a clear definition of what 'informal means'.
Art 42 (1) (third sub paragraph – point e)	(e) use of formal or informal nominee arrangements.	(e) ~~*use of formal or informal nominee arrangements.*~~ ***deleted***	(e) use of formal or informal nominee arrangements~~.~~***, including powers to manage or dispose of the corporate entity's assets or income, in particular its bank or financial accounts;***	• AFME does not support the Parliament's proposal. As per Article 47, the formal nominee arrangements could be identified by the licence and could be requested as a part of the customer due diligence (CDD). However, as mentioned in the column above it is unclear how to investigate

				informal nominee arrangements by the OEs.
			(ea) control through debt instruments or other financing arrangements.	• AFME has concerns on adding this new element to the definition of the BO. Although we understand that this element has been adopted from the FATF recommendations. We have mentioned technical implementation concerns in Annex 1. • We suggest adding context to scope the wider possible conditions attached to the debt instruments.
Art 44(1)(a)	(a) the first name and surname, full place and date of birth, residential address, country of residence and nationality or nationalities of the beneficial owner, national identification number and source of it, such as passport or national identity document, and, where applicable, the tax identification	(a) ~~*the first name and surname*~~***all names and surnames***, full place and date of birth, residential address, country of residence and nationality or nationalities of the beneficial owner, ~~*national identification number and source of it, such as passport or national identity document, and, where applicable, the tax identification*~~***and if available, unique personal identification number assigned to the***	(a) the first name and surname, full place and date of birth, residential address, country of residence and nationality or nationalities of the beneficial owner, national identification number and source of it, such as passport or national identity document, ~~*and, where applicable, the tax identification number or other equivalent number assigned to the person by his or her country of usual residence*~~	• AFME does not support Council's proposal as it disregards the risk-based approach. • The OEs should be given flexibility to obtain information from customers based on their risk level. Obtaining all additional information/ documents creates unnecessary operational burden on OEs. • We suggest that the OEs should be provided with the separate list of documents required for the customers and BOs.

	number or other equivalent number assigned to the person by his or her country of usual residence;	***person by his or her country of usual residence or*** number ~~*or other equivalent number assigned to the person by his or her country of usual residence*~~***of identity document, and general description of the source of such number, such as passport or national identity document***;		Or The Commission should provide guidance on list documents required from the customers according to their risk level.