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Final

EACB position on the proposal for a Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing

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The **European Association of Co-operative Banks** (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 4,050 locally operating banks and 58,000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 214 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 85 million members and 749,000 employees and have a total average market share of about 20%.

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Introduction to the EACB

The EACB (the European Association of Co-operative Banks) represents those banks in Europe that are based on the cooperative form of enterprise, which collectively serve 214 million customers who are mainly consumers, retailers, SMEs, and communities. Their objective is not profit maximisation but rather shareholder value maximisation, meaning that revenues are acquired to ensure the longer-term stability of the bank in the interest of its members. To achieve this, co-operative banks promote the social, environmental, and economic wellbeing of the communities they belong to. They also have a strong governance model, in which they foresee client influence in policymaking processes. As a result of their model, cooperative banks tend to have a strong physical presence, not only in the economic centres of Europe's Member States but also in more remote areas. This makes them drivers of local and social growth, and major contributors to financial and economic stability by merit of their anti-cyclical behaviour. The main service provided to the retail markets by co-operative banks is the provision of credit – the biggest market share being in consumer loans and mortgage loans.

EACB Comments on the AML Package as a whole

The EACB welcomes the AML Package put forward by the European Commission in July 2021 including the suggestion to create a centralised supervisory authority, the AMLA. The package reflects the demand for a more efficient and harmonised EU AML framework

However, we request that more work is done through level 1 legislation; the AML package hardly contains any concrete specifications but instead authorises either the AMLA or European Commission to issue numerous Regulatory Technical Standards (RTS). In order to ensure a practicable implementation and harmonised application of the provisions of the regulation by the obliged entities, the regulation should already specify the essential obligations. Credit institutions in particular, but also other obliged entities, need this legal certainty to be able to implement obligations in a timely and effective manner. The successive publication of numerous technical standards, on the other hand, considerably jeopardies efficient implementation by the obliged entities.

Secondly, the package leaves the Member States a lot of room for manoeuvre. We request a more harmonised approach to have a truly harmonised EU framework.

Furthermore, it is crucial to take into account the fact that, at least half of the money laundering activities take place outside the financial sector. To ensure an effective AML framework, also non-financial entities must be within the scope of the authorities. If the AMLA only focuses on financial sector participants, the AMLA will only partially reach its goal.

Data exchange between public and private sectors and between private sector operators is essential to combat money laundering. However, the proposals for the AMLR and the new AML Directive insufficiently address data exchange between obliged entities. In order to improve data exchange, which is arguably an essential part of AML efforts, we propose that a European beneficial owners register, and a European Know-Your-Customer (KYC) register are established with uniform standards. A European KYC register would allow banks and other obliged entities to access and use the information stored upon authorisation of the affected customer in order to

combat money laundering most effectively. In this context it is required that the obliged entities can rely on legitimate expectations when using the register. A European KYC register should also comply with the relevant data protection rules. Non-uniform KYC processes cause avoidable burden for cross-border customers and competitive disadvantages for cross-border banks, while AML policy should not serve as competition factor.

At present, the quality of local beneficial owner registers differs significantly across Europe, and they follow different approaches. Hence, the current concept of merely linking such registries is insufficient and does not provide added value if the underlying documents are not stored therein. We would welcome a register that would function as a central platform that is used to store documents required to identify and verify beneficial owners. Such documentation can be used by obliged entities for the purpose of fulfilling due diligence obligations.

Such registers would reduce the costs for the obliged entities but also increase the effectiveness of AML measures.

In view of the increasingly complex requirements for the prevention of money laundering and terrorist financing, it is of crucial importance especially for smaller and medium-sized credit institutions to be able to outsource the range of tasks or individual aspects thereof as comprehensively as possible to highly specialised and reliable service providers. We therefore urgently call to remove the blanket limitation of the possibility to outsource these from the proposal, because they can be fulfilled by outsourcing in a very high-quality manner and at the same time efficiently, without this entailing a loss of responsibility or an impairment of money laundering supervision.

Further, more specifically with regard to Public-Private Partnerships (PPP), apart from its high importance, it must be highlighted that we need harmonised specifications for PPP models to ensure a uniform quality standard (definition of KPIs, adequate resources etc.). With regards to the contents, general information on typologies, and risks etc. guidance should be also provided on exchange of personalised information from FIUs to obliged entities and feedback provided should be improved. Additionally, PPP models should in principle include all obliged entities, but specific PPP models including only banks should be implemented, because the other obliged entities' AML programs diverge significantly; depending on the topic, additional participants from other business segments such as tax consultants should be included in the meetings.

Lastly, the new regulation and the subsequently planned regulatory technical standards on parameters and criteria for AML transaction monitoring should lead to a harmonised approach for transaction monitoring what we welcome. In the next step this harmonisation should serve as a basis for the establishment of a central EU authority, which should take over the monitoring of all EU-wide transactions as well as the role of an EU FIU investigating identified suspicious transactions. As financial institutions see only very limited information about transactions, this measure would dramatically increase the effectiveness and efficiency of AML transaction monitoring. It would be more effective if financial institutions provide transaction data of defined criteria to one EU authority which then monitors and assesses the transactions in consideration of other transaction data provided by other financial institutions. The respective tasks could be taken over by the AMLA or other authorities. Example: A bank in an EU member state filed more than 50 SARs (relating to criminal activities such as drug trafficking and organised crime) to the national FIU based on a request for legal assistance from another member state, but the SARs were not delivered to the respective country that originally requested for the information.

For more detailed observations on the AML regulation, please refer to the section below.

Detailed feedback on the proposal for a Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing

Definitions – article 2

The EACB wishes draw attention to the fact that the proposal uses terms such as "group" and "parent undertaking", which relate to shareholder organisation. Other types of organisations, e.g., cooperative, are active too in the financial markets. We urge the co-legislators to make sure that terminology and definitions do not create an unlevel playing field, and to take into account the diversity of organisation types.

This particularly concerns the specific characteristics of decentralised cooperative banking groups. It is of utmost importance that an efficient flow and exchange of data within the different models of European banking groups are ensured – wholly independent from their legal structure and organisational form. Taking such an approach is crucial to combat money laundering most effectively.

Furthermore, it should be ensured that the definitions are comprehensive and include all necessary notions referred to in the proposal (e.g., "express trust" and "close relationship").

Compliance functions – article 9

Article 9 of the proposal requires one executive member of the board of directors to be appointed responsible for the implementation of measures to ensure compliance with the regulation. The board of directors has a collective liability in some European jurisdictions. Therefore, having a sole single member responsible conflicts with the nature of collective liability as prescribed by national laws. Secondly, appointing a single member responsible for compliance, may decrease the interest of other board members to educate themselves in this regard. Such a requirement may also decrease the interest of experts to take up a role as a member of the board of a credit or financial institution hampering the compilation of diverse and expert boards.

Integrity of employees – article 11

According to article 11 paragraph 2 employees entrusted with tasks related to the obliged entity's compliance with the proposed regulation shall inform the compliance officer of any close private or professional relationship established with the obliged entity's customers or prospective customers and shall be prevented from undertaking any tasks related to the obliged entity's compliance in relation to those customers.

From our point of view, the employee's obligation to inform the compliance officer of any close relationship with the obliged entity's prospective customers is too extensive. Oftentimes it will be unclear, when a natural or legal person can be seen as a "prospective customer". Hence, it is debatable, when an employee is required to inform the compliance officer of their close relationship with the prospective customer. Therefore, the application of article 11(2) should be limited to the obliged entity's customers. We request to omit "*or prospective customers*" from article 11(2) of the proposal.

Group-wide requirements – article 13

Article 13 obliges to exchange AML/CFT-relevant information within the group. It should be clarified that a group entity is entitled to use CDD-information and KYC documents as 'current' information, that is provided by another group member, taken that both entities have no knowledge that the information would not be up to date, as long as this information can be regarded as current information for the business relationship by the sharing group member.

As an example, Bank A1 (member of banking group A) has an existing customer, company X, which KYC data had been updated periodically in accordance with the customer risk, nine months ago, and are deemed to be up to date for Bank A1 for further three months. Bank A2 (also member of banking group A) intends to open a business relationship with company X and to use the KYC documents on company X held by Bank A1. Bank A2 should be permitted to use the KYC documents provided by Bank A1 as long as these documents are regarded to be up to date for Bank A1 based on the customer risk insofar Bank A1 and Bank A2 have no diverging information proposing that these KYC documents are not up to date anymore.

Customer due diligence – articles 15 and 16

Article 15, in conjunction with article 16, stipulates that all due diligence obligations[1] also apply in those cases in which an occasional transaction within the provisions of the Transfer of Funds Regulation is executed with an amount more than €1000, or several occasional transactions amounting to €10 000 or more.

From the point of view of credit institutions, this is too excessive, practically unfeasible, and unsuitable for the prevention of money laundering and terrorist financing in particular when determining the beneficial owner of the contracting entity, collecting and verifying the purpose of the business relationship and collection of the origin of funds.

The proposed rules would make it de facto impossible for credit institutions to maintain occasional transactions for non-customers.

Deadlines for AMLA RTS and guidelines

More specifically with regard to paragraph 3 of article 16 on AMLA regulatory technical standards (RTS), the deadline should be shortened to six months after the entry into force of the regulation. Given the considerably high level of staffing for the AMLA, the proposed deadline of two years after the entry into force of the regulation for the guidelines is too long. Relatedly, the proposal provides deadlines of two or three years for AMLA to issue guidelines and RTS, should also be shortened to six months. While we understand that the regulator requires a certain amount of time to publish such RTS and guidelines, taking up the pace would allow tackling money laundering in a more efficient and harmonised manner, while not imposing uncertainty and additional costs on businesses.

Upkeeping of the proposed deadlines would require immense efforts from obliged entities and local regulators to interpret the regulation and adapt their IT systems which requires mobilisation of substantial human and financial resources. Furthermore, the deadlines proposed by the Commission would lead to a disproportional degree of legal uncertainty for relatively long periods of two and three years. Additionally, this will result in stranded costs for obliged entities insofar interpretation by AMLA will turn out to be different. Finally, this will lead to fragmented implementation within the Member States based on the local interpretations for the upcoming years, which conflicts with the intention to establish a harmonised framework.

[1] First sentence of article 16 of the proposal stipulates that *for the purpose of conducting customer due diligence, obliged entities shall apply all of the following measures* (…).

Identification and verification of the customer's identity – article 18

With regard to paragraph 1 of article 18, we request for a clarification. We propose to replace "where possible" under subsection (a)(iv) by "where applicable".

Secondly, with regard to paragraph 4 of article 18, it should be noted that since often there is no direct contact with beneficial owner on the part of the bank, the proposed provision is unpracticable. The presentation of an identity document may only be organised with a considerable level of difficulty due to lack of contact and distance between the beneficial owner and the bank. Simultaneously, there appears to be a lack of acceptance and trust with regard to electronic means of identification.

More specifically, with regard to paragraph 4(a) of article 18, we request that the provision is amended in the following manner:

the submission of the identity document, passport or equivalent ~~and~~ ***or*** *the acquisition of information from reliable and independent sources, whether accessed directly or provided by the customer.*

This is to ensure that a passport does not have to be additionally checked via reliable and independent sources. Also, it should be clarified that beneficial owners are not required to submit their identity document, passport or equivalent to obliged entities.

Finally, regarding the last paragraph, as we strongly argue in favour of the creation of a European Beneficial Owners (BO) register with uniform standards and the protection of legitimate expectations, the last paraph should be amended in a manner that allows the obliged entities to rely on the information of the BO register, unless they have knowledge of a discrepancy derived from a reliable source.

Identification of the purpose and intended nature of a business relationship or occasional transaction – article 20(d)

The obligation to obtain the information on the destination of funds should be deleted or at least it should be limited to cases involving an exceptionally high risk in order to reflect the risk-based approach.

Ongoing monitoring of the business relationship and monitoring of transactions performed by customers – article 21

According to the provision, the maximum period for updating customer data is five years. Setting such frequency is not practicable and ultimately leads to a continuous update loop. Also, the administrative effort needed to copy (e.g., ID cards, register extracts, articles of association) and their archival would be unreasonable. Furthermore, all customers would have to be contacted on a regular basis and such contacts would also have to be followed up, adding many layers of extra administrative actions needed. Typically, however, customers only respond directly such requests in low percentages, which raises the question of the legal consequence.

It is therefore clear that this provision would significantly increase expenditure without reducing the actual risk of money laundering. The risk-based approach is not reflected here.

More specifically, the formulation of article 21(3) is extremely unclear, which proposes the risk that that an excessive obligation to carry out annual KYC reviews will be derived from it.

Identification of third countries – articles 23, 24 and 25

In addition to empowering the Commission to adopt delegated acts to identify third countries defined in articles 23 to 25, the Commission should also be mandated to set up a list of equivalent countries, and also a list of offshore countries, should there be a specific regulatory need to differentiate between offshore countries and countries defined in articles 23 to 25.

Furthermore, the Commission should be mandated to set up a list of trusted exchanges or countries with regulated markets that are subject to disclosure requirements consistent with Union legislation or subject to equivalent international standards (Article 42(5)(a).

Scope of application of enhanced customer due diligence measures – article 28

The requirement of paragraph (4) to obtain additional information on the source of funds and wealth of the beneficial owners should be restricted to legal entities as customers, which beneficial owners make initial or current payments to the respective entity owned by them.

Outsourcing – article 40

Article 40(2) subsections (b) – (f) significantly restricts the possibility to outsource tasks by a blanket limitation. In view of the increasingly complex requirements for the prevention of money laundering and terrorist financing through the AMLR, the new AMLD, transposing national law, future AMLA RTS and guidelines of national supervisory authorities, it is of crucial importance especially for smaller and medium-sized credit institutions to be able to outsource the range of tasks of the money laundering officer or individual aspects thereof as comprehensively as possible to highly-specialised and reliable service providers.

Some of the European cooperative banks currently outsource in this manner under the full responsibility of the outsourcing credit institution while being under the supervision of the relevant authority. Neither the management of the obliged entities or the supervision by the supervisory authority are impaired. Outsourcing of safeguards to prevent money laundering and terrorist financing has not only proven its worth during the past decades but has constantly improved the prevention measures (e.g., added value of overlapping findings by a multi-client service). Article 40 of the draft regulation already contains detailed requirements, which may be supplemented, if necessary, by a duty to notify the competent authority of the outsourcing and by a right of the supervisory authority to audit the service provider.

We therefore urgently call to remove the above provisions from the proposal, because these tasks can be fulfilled by outsourcing in a very high quality and at the same time efficiently, without this entailing a loss of responsibility or an impairment of money laundering supervision.

Identification of Beneficial Owners for corporate and other legal entities – article 42

The proposed threshold value of 25% plus one of the shares or voting rights on every level of ownership would drastically increase the number of beneficial owners – and thus the burden on the obliged entities. Since the controlling beneficial owner is ultimately concerned with finding the natural person who ultimately owns or controls the contracting party, the application of the 25% threshold at every level of ownership is not appropriate. From the second level of participation in the costumer onwards, it is more important to identify those persons who actually exercise control over the customer. An indirect participant only exercises control if they can exert a dominant influence on the costumer, namely if they hold more than 50% of the capital shares or controls more than 50% of the voting rights. In order to be consistent with the common definition of "controlling interest" ("at least 50% of the outstanding shares of a given company plus one") the threshold should be kept as it is.

However, if the proposed new calculation method is adopted, a generous transitional period is needed to ensure an efficient transition towards the new calculation method since the new calculation of the beneficial owner again leads to comprehensive changes, requiring significant efforts from the obliged entities (e.g., adaptation of IT systems and document management, training).

Secondly, with regard to the categories of "control via other means", it should be noted that these proposed provisions are excessive. It should be elaborated what is meant by "significant influence' under subparagraph (b). Otherwise, put or call options for unsignificant amount of the shares could constitute control by other means.

Thirdly, we request to delete subparagraph (d) of the proposal. The ability to exert a significant influence is already stipulated in subsection (b), which should be sufficient to cover also forms of significant influence that are executed via family members of managers etc. Implementing the proposed subsection (d) is unpracticable; it is necessary to define what is meant by "link", which may mean e.g., acquaintance, friendship. It is unclear why a person who has connections to managers, among others, can automatically exercise control in any other way. Such a formulation is too unclear and boundless, which should be specified directly in the regulation and not be reserved for a later publication by the EU Commission.

Additionally, we ask for clarification to what extent subparagraph (e) differs from subparagraph (c) or any other trusteeship.

Finally, with regard to article 42(5)(a), it should be stated that (defined) listed companies should be exempted from Chapter IV both in their capacity as customers and in their capacity as subject to standards.

It should also be clarified that article 42(5)(a) applies not only to customers of obliged entities but also to entities in the ownership chain of customers.

Identification of beneficial owners for express trusts and similar legal entities or arrangements – article 43

It should be clarified whether members of the management board of (private) foundations are to be qualified as beneficial owners via control.

Beneficial ownership information – article 44

The proposed article requires information to be recorded which do not have to be collected in the case of beneficial owners, their additional collection can be based exclusively on the information provided by the customer and thus does not lead to a qualitative improvement of the findings but does entail considerable additional efforts of obliged entities. Such information is also unavailable in many cases. We therefore propose to not require obliged entities to collect and verify place of residence and birth, date of birth, national identification number and source thereof, all nationalities, and tax identification number as mandatory beneficial owner information.

Instead of providing place of residence, the country of residence should be sufficient to be provided. With regard to information on place of birth, these data should be required on a best effort base, but obliged entities should be entitled to identify the beneficial owner via other information required from reliable sources (e.g., country of residence in combination with other information).

Furthermore, the scope of addressees is not clear and leads to legal uncertainty. It should be clarified, who is the addressee: the beneficial owners, corporate and other legal entities as per article 45, or obliged entities as per article 3.

In connection with article 44 (1) (b), we request the deletion of "date of acquisition of the beneficial interest held", since the date of the acquisition of beneficial ownership cannot be determined in practice, especially with regard to "control via other means" as described in this proposal (see article 42 (1) (d).

Finally, it must be made clear in the text of the regulation that article 44 (2) does not lead to any obligation for obliged entities in terms of customer relationships. Naturally, the information must be kept up to date, but the period of 14 days is too short. In addition, it is not in accordance with the proportionality principle, that credit institutions are obliged to update the beneficial ownership information annually for all customers regardless of the risk class. Such an obligation can only be applicable and meaningful for the reporting entities themselves and not for the updating obligations of the obligated credit institutions.

Obligations of legal entities – article 45

Article 45 (1) should provide that corporate and other legal entities incorporated in the EU must inform obliged entities where these are taking customer due diligence measures regarding any change of the beneficial owner, and to provide the respective updated beneficial owner information without delay.

With regard to paragraph (5), it must be noted that this provision concerns only those undertakings that are subject to reporting obligations. Also, reporting upon the identity and contact details of the person responsible for the storage of the information to the register must be refused. This information should only be available to the authorities, and here too the authority should seek the usual contact route with the company subject to the standard (via letter, secure information channel).

Reporting of suspicious transactions – article 50

The deadlines proposed in paragraph (1) need to be adapted for business practice; 5-day and 24-hour deadlines are unrealistically short, not only when overlapping with weekends. Usually, in the event of urgency, the money loundering officers are contacted directly. Otherwise, a reasonable deadline is specified in the letter from the relevant authority. This approach has proven itself in practice to date.

Consent by FIU to the performance of a transaction – article 52

The proposed provision provides that the detention period for suspicious transactions is to be dropped. Suspicion would remain until further specific instructions are received from the authority. In practice, this regulation will lead to massive problems in customer communication for the obliged entities, who have to observe the tipping-off prohibition.

Prohibition of disclosure – article 54

We request for clarification with regard to paragraph (6) in more detail, especially the term "dissuade a client from engaging in illegal activity".

Processing of certain categories of personal data – article 55

This article requires information to be provided to the client on, among other things, data processing for AML purposes, as well as a declaration of confidentiality from the obligated parties. Due to corresponding data processing obligations, such information is also not required by the GDPR.

Limits to large cash payments – article 59

From the point of cooperative banks, the proposed limit to large cash payments leads to a gradual removal of cash. This is not acceptable, since the ability to hold cash and make cash payments is an expression of personal freedom and safety and consequentially, population of certain Member States strongly support the preservation of cash. Especially vulnerable groups of the society and

older generations, who may not as tech-savvy, could be financially excluded, if cash would be removed.

Furthermore, in cases of large cyberattacks or even unpredictable blackouts, when digital payment systems do not work anymore, the ability to make cash payments is indispensable.

Hence, article 59 of the proposal should be deleted.

However, if the proposed article is to be maintained, with regard to paragraph (4) of article 59, the proposed reporting obligations should be restricted to suspicious activities and transactions, considering the disproportionately high ratio of false positives. For example, supermarkets deposit daily cash receipts at their banks that often exceed the threshold of €10 000. In those cases, the respective banks would have to file daily suspicious activity reports to the FIU irrespective of the fact that these cash deposits are unsuspicious and fully coherent with the bank's KYC information.

Finally, with regards to paragraph (5), from our point of view, measures and sanctions should not be taken against natural or legal persons acting in their professional capacity which are suspected of having violated the limit to large cash payments. Instead, such measures and sanctions should only be taken against natural and legal persons who have been proved guilty of a breach of the limit to large cash payments to respect the fundamental principle of presumption of innocence as per the European Convention of Human Rights.

Article 59 (5) should therefore be amended as follows:

*"Member States shall ensure that appropriate measures, including sanctions, are taken against natural or legal persons acting in their professional capacity which ~~are suspected~~ **have been finally proved guilty** of a breach of the limit set out in paragraph 1, or of a lower limit adopted by the Member States."*