ASSOCIATION FRANÇAISE DES MARCHÉS FINANCIERS

FINANCIAL MARKET PROFESSIONALS

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AML/CFT PACKAGE OF LEGISLATIVE PROPOSALS
European Commission's consultations

AMAFI's Position Paper

AMAFI welcomes the opportunity to comment the European Commission (EC)'s AML/CFT[1] package of four (4) legislative proposals[2] and supports the European Union (EU)'s ambition on this topic[3].

Considering the significance of AML/CFT issues for its members, AMAFI set up a dedicated working group few years ago in order to help them better understand developments taking place at international, European and national levels as well as to implement various pieces of legislations. More particularly, this working group has recently focused its work on the transposition of the 5th Directive[4] and the specificities of financial markets. That is why, AMAFI is keen to contribute to the EC ongoing reflections and discussions in highlighting what AMAFI considers as particularly important to improve the European framework on AML/CFT, notably taking into account the necessity for regulated entities to allocate their resources more efficiently.

Therefore, this Position Paper highlights AMAFI's views on certain main topics of two (2) out of the EC's 4 legislative proposals (EC's proposals for a Regulation on AML/CFT and for a 6th Directive on AML/CFT) as well as additional proposals to discuss.

EUROPEAN COMMISSION'S PROPOSAL FOR A REGULATION ON AML/CFT

AMAFI wishes to draw the attention of the European Commission on the following subjects:

General provisions (*AML/CFT Regulation, Chapter I*)

- **Definition of 'correspondent relationship' (*AML/CFT Regulation, art. 2*)**

AMAFI wishes to draw point (19) (b) of the proposed Article 2 of AML/CFT Regulation to the attention of the Commission which provides: "*'correspondent relationship' means:* (…) *(b) the relationships between and among credit institutions and financial institutions including where similar services are provided by a correspondent institution to a respondent institution, and including relationships established for securities transactions or funds transfers*".

For harmonisation purposes of EU's AML/CFT framework and for clarity purposes of the EC's proposal for a regulation on AML/CFT, AMAFI suggests the Commission to clarify the mention "***relationships between and among credit institutions and financial institutions***".

[1] Anti-money laundering and countering terrorism financing - AML/CFT.
[2] Press release from the Commission on the presentation of an ambitious package of legislative proposals to strengthen the EU's AML/CFT rules, European Commission, 20 July 2021 (link).
[3] For further details, see AMAFI's previous answers to the EC's consultations on its roadmap regarding its action plan on AML/CFT (*AMAFI / 20-25*) and on its final Action plan on AML/CFT published in May 2020 (*AMAFI / 20-51* and *20-52*).
[4] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 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 Directives 2009/138/EC and 2013/36/EU.

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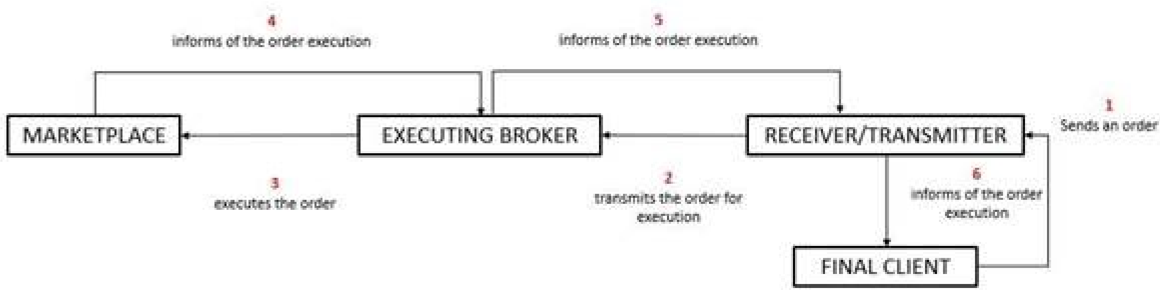
Indeed, it should be recalled the terms "*correspondent relationship*" were (first) defined by Article 3 (8) of the 4th AML Directive[5] which provides that a "'*correspondent relationship' means:*
(a) the provision of banking services by one bank as the correspondent to another bank as the respondent, including providing a current or other liability account and related services, such as cash management, international funds transfers, cheque clearing, payable-through accounts and foreign exchange services;
*(b) the relationships between and among credit institutions and financial institutions including where similar services are provided by a correspondent institution to a respondent institution, and **including relationships established for securities transactions** or funds transfers*;".

If this European definition was transposed into French law in February 2020[6] there are questions / discussions about the terms "*relationships established for **securities transactions***" and what they in practice mean and which relationships those terms really cover.

In AMAFI's view the actual European definition does not apply to investment services (including the service of order(s) execution for a third party – provided by a broker to its client, asset manager), notably in light of the Wolfsberg Correspondent Banking Due Diligence Questionnaire ("CBBDQ") which provides that "*Correspondent Banking is the provision of a current or other liability account, and related services, to another financial institution, including affiliates, used for the execution of third party payments and trade finance, as well as its own cash clearing, liquidity management and short-term borrowing or investment needs in a particular currency*." (*Wolfsberg's CBDDQ, Glossary, p. 4*). Thus, the Wolfsberg definition of correspondent banking, which seems very complete and precise, does not cover the services of order(s) execution neither any mediation activity.

More precisely, and for example, AMAFI believes the nature of the "business relationship" between an entity receiving / transmitting orders (a "RTO", in French a "*récepteur/transmetteur d'ordres*") and an executing broker (in French a "*négociateur*") in the context of services of reception or transmission of orders (see the graphic below) presents in practice low risks of ML/FT[7].



The terms "business relationship" in France refers to a precise definition. Two (2) conditions need to be fulfilled in this regard: (i) characterisation of a business relationship or "commercial relationship"; and (ii) the relationship has to stand the test of time.

[5] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (it is also referred to as "AMLD 4"), amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.
[6] See *French Code monétaire et financier, art. L. 561-10-3, III.*
[7] In this context, when a client, an investment service provider, is located in an EU, or EEA, country, it can be considered as ''low-risk'' (see *French Code monétaire et financier, art. R. 561-15*). Therefore, according to article L. 561-9 of the French Code monétaire et financier, it is possible to apply towards this investment service provider simplified CDD measures (see *French Code monétaire et financier, art. R. 561-14-2*). In other words, there is no obligation, in France, to check the identity and the knowledge elements related to the business affairs of / with the investment service provider and, as the case may be, of its beneficial owners. For example when the investment service provider is listed on a French, or in another EU or EEA country's regulated market (see *French Code monétaire et financier, art. R. 561-8*), it is not mandatory to identify its beneficial owners.

Thus, in the hypothesis given hereabove, AMAFI considers the following business relationships are characterised between:

- the executing broker and the receiver/transmitter of the order;
- the receiver/transmitter of the order and the final client (end customer).

Nevertheless, according to AMAFI, **there is no business relationship between the executing broker and the final client**. Furthermore, in AMAFI's view **a correspondent banking relationship cannot be established between the executing broker and the RTO**. Considering otherwise would concern highly AMAFI's members since there would be significant impacts to retain this qualification of correspondent banking relationship, in particular the reinforcement of CDD measures to be undertaken by broker / dealer on their RTO clients (like asset managers). All the more so as we should not forget it is the responsibility of the RTO to take all the AML/CFT steps required vis-à-vis its own clients who / which do not have any contact with the executing broker. Thus, the executing broker does not execute orders on behalf of the end customer (whose investment decision rationality and context are not known by the executing broker) but on behalf of its own client, the RTO. In addition, and as mentioned above, executing brokers and RTO are regulated / obliged entities consequently integrated in an activity presenting by nature a low risk of ML/FT. On the contrary, the correspondent banking relationship oversees a scheme in which a bank calls upon another bank, often for geographic / currencies reasons in order to realise operations / transactions involving funds on behalf of its client which, on the contrary in that particular case, presents a high ML/FT risk.

Finally, the procedure for entering into correspondent banking relationships is fairly rigid: in addition to responding to the CBDDQ including 110 questions (compared with 41 questions included in the Wolfsberg's Financial Crimes Compliance Questionnaire or "FCCQ"), it requires both parties' signature of a complex convention (which involves prior negotiations), after the collection of the approval of the management board. Consequently, if the relationship between the executing broker and the RTO was considered as a correspondent banking one, it would cause an important and necessary review of the legal documentation on the matter and human and operational resources' engagement.

Internal policies, controls and procedures of obliged entities (*AML/CFT Regulation, Chapter II*)

- **Compliance functions (*AML/CFT Regulation, art. 9*)**

AMAFI wishes to highlight the proposed Article 9 of AML/CFT Regulation which distinguishes the functions of **compliance manager** (*AML/CFT Regulation, art. 9.1 and 2*) and **compliance officer** (*AML/CFT Regulation, art. 9.3*). Indeed, **this distinction** is a new element of the EU AML/CFT framework which has no equivalent in the French AML/CFT framework. And, even if paragraph 6 of the proposed Article 9 provides that where the size of the obliged entities justifies it, these functions may be performed by the same natural person; according to AMAFI, the distinction operated in this Article 9 mixes different tasks making it difficult for obliged entities to appoint these new EU functions. More precisely, and for example, in France, obliged entities already designated an AML/CFT compliance officer and a senior manager responsible for AML/CFT at the EU level (especially for groups). And AML/CFT compliance officers are usually (and for examples) in charge of the day-to-day operations of the obliged entities' AML/CFT policies but also of the implementation of those policies and of the reporting to the management body and to the national competent authority, training and awareness etc. Besides, paragraph 3 of the proposed Article 9 provides that the compliance officer shall also be responsible for reporting suspicious transactions (STORs[8]) to the Financial Intelligence Unit (FIU), but in French law, depending on the size and the structure of the obliged entity, the AML/CFT compliance officer can be responsible for STORs but can also be the FIU's correspondent (it means the AMLCO is recipient of STORs acknowledgement of receipt and is in charge of the French FIU – TRACFIN – information or documents requests)[9].

[8] Suspicious transaction and order report or "STOR".
[9] For further details see the French Autorité de contrôle prudentiel et de résolution (ACPR) and TRACFIN (French FIU) Joint Guidelines on declaration and information requirements to TRACFIN (in French only).

Furthermore, the procedures for appointing the AMLCO in paragraph 3 of the proposed Article 9 ("*by the boards of directors or governing body*") would present difficulties and important constraints for obliged entities. Indeed, according to AMAFI's members' practices, AMLCO are today appointed by the relevant level of the AML/CFT management taking into consideration the size of the entities, the nature of their activity, the complexity and risk generated by the services and/or activities carried out by the obliged entities.

Therefore, and in view of the above, AMAFI considers the proposed Article 9 needs to be clarified in order to take better account of obliged entities' structures, practices and actual organisations. This need of clarification is even more important considering the fact this proposed Article 9 is provided in the proposal for a regulation on AML/CFT which will be of direct application on obliged entities in every Member States.

Finally, AMAFI believes the distinction provided in the proposed Article 9 echoes the one made in the European Banking Authority (EBA)'s consultation on its Draft Guidelines on AML compliance officers (AMLCO) which ended at the beginning of November[10]. In order to ensure legal and regulatory stability, AMAFI wishes to propose an alignment between the proposed Article 9 and the future Guidelines on AMLCO which distinguish the functions of senior manager responsible for AML/CFT and the AML/CFT compliance officer (AMLCO). Thus, AMAFI suggests the EC to consider the results of the EBA's consultation to adjust and clarify the articulation of Article 9 as they should give a good indication of Member States' national frameworks and obliged entities' practices and organisations regarding AML/CFT compliance functions.

- **Integrity of employees entrusted with tasks related to the obliged entity's compliance with draft AML/CFT Regulations (*AML/CFT Regulation, art. 11*)**

Even if Chapter VI of the AML/CFT Regulation proposal provides "Data protection and record-retention" requirements, AMAFI wishes to suggest to the EC to coordinate the proposed Article 11 with data protection requirements[11] in order to prevent any employers' infringement of such requirements regarding employees' personal data.

Customer due diligence (*AML/CFT Regulation, Chapter III*) & beneficial ownership transparency (*AML/CFT Regulation, Chapter IV*)

- **Identification and verification of the customer's identity (*AML/CFT Regulation, arts. 18 and 44*)**

Paragraphs 2 and 4 of the proposed Article 18 provides that "*For the purposes of identifying the beneficial owner of a legal entity, obliged entities shall collect the information referred to in Article 44(1), point (a), and the information referred to in paragraph 1, point (b), of this Article*. (…) *Obliged entities shall obtain the information, documents and data necessary for the verification of the customer and beneficial owner identity through either of the following:*
(a) the submission of the identity document, passport or equivalent and the acquisition of information from reliable and independent sources, whether accessed directly or provided by the customer;
(b) the use of electronic identification means and relevant trust services as set out in Regulation (EU) 910/2014."

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[10] EBA – Consultation Paper – Draft Guidelines on policies and procedures in relation to compliance management and the role and responsibilities of the AML/CFT Compliance Officer under Article 8 and Chapter VI of Directive (EU) 2015/849 (*EBA/CP/2021/31*). AMAFI also responded to this Consultation: see (*AMAFI / 21-59*).
[11] And more particularly with the General Data Protection Regulation (GDPR): Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

And paragraph 1 of the proposed Article 44 provides: "*For the purpose of this Regulation, beneficial ownership information shall be adequate, accurate, and current and include the following:*
(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;
(b) the nature and extent of the beneficial interest held in the legal entity or legal arrangement, whether through ownership interest or control via other means, as well as the date of acquisition of the beneficial interest held;
(c) information on the legal entity or legal arrangement of which the natural person is the beneficial owner in accordance with Article 16(1) point (b), as well as the description of the control and ownership structure."

Thus, in the context of customer due diligence (CDD), and more particularly of identification and verification of the customer's identity, obliged entities would have the obligation to obtain the beneficial owner's identity document, passport or equivalent and the date of acquisition of the beneficial interest held by the beneficial owner. Those requirements would cause important constraints to obliged entities (in particular regarding the time and the resources such obligations would mobilise). Indeed, today, in France, obliged entities have the obligation to collect only the following information: surname, forename, date and place of birth of the beneficial owner. That is why, AMAFI would recommend the EC to grant to Member States the possibility to maintain their actual national requirements on this particular topic. All the more so as mentioned above and in link with recital 35 and articles 12 and 13 of the EC's proposal for 6th Directive on AML/CFT (see below), with the aim of ensuring a proportionate and balanced approach and to guarantee the rights to private life and personal data protection, it should be possible for Member States to provide for exemptions to the disclosure of the personal information on the beneficial owner.

- **Identification of Beneficial Owners for corporate and other legal entities (*AML/CFT Regulation, recital 65 and art. 42*)**

Recitals 65 and 66 of EC's proposal for an AML/CFT Regulation provides: "*Detailed rules should be laid down to identify the beneficial owners of corporate and other legal entities and to harmonise definitions of beneficial ownership. While a specified percentage shareholding or ownership interest does not automatically determine the beneficial owners, it should be one factor among others to be taken into account.* ***Member States should be able, however, to decide that a percentage lower than 25% may be an indication of ownership or control****.* ***Control through ownership interest of 25% plus one of the shares or voting rights or other ownership interest should be assessed on every level of ownership, meaning that this threshold should apply to every link in the ownership structure and that every link in the ownership structure and the combination of them should be properly examined***.

A meaningful identification of the beneficial owners requires a determination of whether control is exercised via other means. ***The determination of control through an ownership interest is necessary but not sufficient and it does not exhaust the necessary checks to determine the beneficial owners****. The test on whether any natural person exercises control via other means is not a subsequent test to be performed only when it is not possible to determine an ownership interest.* ***The two tests, namely that of control through an ownership interest and that of control via other means, should be performed in parallel****. Control through other means may include the right to appoint or remove more than half of the members of the board of the corporate entity; the ability to exert a significant influence on the decisions taken by the corporate entity; control through formal or informal agreements with owners, members or the corporate entities, as well as voting arrangements;* ***links with family members of managers or directors or those owning or controlling the corporate entity****; use of formal or informal nominee arrangements*."

While paragraph 1 of the proposed Article 42 provides: "*In case of corporate entities, the beneficial owner(s) as defined in Article 2(22) shall be the natural person(s)* ***who control(s), directly or indirectly, the corporate entity****, either* ***through an ownership interest*** *or through control via other means.*
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 via other means' ***shall include at least one of the following****:*
(a) the right to appoint or remove more than half of the members of the board or similar officers of the corporate entity;
(b) the ability to exert a significant influence on the decisions taken by the corporate entity, including veto rights, decision rights and any decisions regarding profit distributions or leading to a shift in assets;
(c) control, whether shared or not, through formal or informal agreements with owners, members or the corporate entities, provisions in the articles of association, partnership agreements, syndication agreements, or equivalent documents depending on the specific characteristics of the legal entity, as well as voting arrangements;
(d) links with family members of managers or directors/those owning or controlling the corporate entity*;*
(e) use of formal or informal nominee arrangements.
Control via other means may be determined also in accordance with the criteria of Article 22(1) to (5) of Directive 2013/34/EU."

First of all, AMAFI considers the drafting of recital 65 and of the second subparagraph of the proposed Article 42.1 mentioned above is ambiguous, and that its impacts could be potentially important for obliged entities (for example, should obliged entities consider the threshold of 25% to every level of ownership?). Therefore, AMAFI wishes to suggest to the EC to clarify the writing of recital 65 and of the second subparagraph of the proposed Article 42.1.

Then, AMAFI wishes to draw the EC's attention to point (d) of the proposed Article 42.1 quoted above, which according to AMAFI needs to be clarified as it is not understandable for obliged entities at this stage.

- **Provisions relating to the interconnection of Member States' central registers holding beneficial ownership information (*AML/CFT Regulation, art. 48; AMLD 6, recital (36) and following., Chapter II, arts. 10 to 13 included*)**

As exposed in our previous answers (*AMAFI / 20-25* and *20-51*), in AMAFI's view, a prompt delivery of the EU consolidated beneficial ownership register gathering the information hold in the 28 different central national registers would considerably facilitate the application of customer due diligence measures. Indeed, as of now, as soon as they enter into a European relationship (which is the case of investment firms), financial entities should require access to all those registers which are not as easily accessible as the French register. Moreover, a consolidated European register would allow obliged entities to allocate their resources more efficiently.

As mentioned below, if AMAFI noticed the EC's proposal for a 6th AML/CFT Directive provides a whole Chapter on the registers and dedicated section on beneficial ownership registers and their access rules (see below: *AMLD 6, Chapter II, Section I, arts 10 to 13 included*), and even if the proposed Article 10 of the 6th AML/CFT Directive proposal provides for the empowerment of the EC to adopt implementing acts in the matter (it only targets the format for the submission of beneficial ownership information to the central register – see *AMLD 6, art. 10.4*); AMAFI regrets the provisions regarding the interconnection of Member States' central registers holding beneficial ownership information through the European Central Platform established by Directive (EU) 2017/1132[12], are not provided in the EC's proposal for an AML/CFT Regulation of direct application, or at least in a dedicated delegated regulation of direct application for its prompt delivery. That would indeed and thus participate to legal and regulatory stability in the matter, and that it would foster harmonisation.

[12] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law.

Customer due diligence (*AML/CFT Regulation, Chapter III*)

- **Verification of the customer and beneficial owner identity through the use of electronic identification means (*AML/CFT Regulation, arts. 18.4 and 22.1*)**

Point (b) of paragraph 4 of the proposed Article 18 and point (d) of paragraph 1 of the proposed Article 22 of the EC's proposal for an AML/CFT Regulation refer to the use of electronic identification means for verification of the customer and beneficial owner identity. Nevertheless, point (d) of paragraph 1 of the proposed Article 22 relegates to the future AMLA[13] (by two years after the entry into force of the EC's proposal for a Regulation on AML/CFT) to draft regulatory technical standards (RTS) specifying "*the list of attributes which electronic identification means (…) services referred to in Article 18(4), point (b), must feature in order to fulfil the requirements of Article 16, points (a), (b) and (c) in case of standard, simplified and enhanced customer diligence*."

According to AMAFI it is regrettable to put off the discussions on the electronic identification means whereas, in the context of technological developments and progress in digitalisation, remote customer onboardings multiply.

While awaiting for the future AMLA RTS specifying the list of attributes which electronic identification means must feature in order to fulfil EU's AML/CFT requirements, obliged entities would therefore not be able to resort to proper electronic identification means where remote performance of CDD could be carried out, whereas:

- the identification solutions as set out in Regulation (EU) N° 910/2014 of the European Parliament and of the Council[14] and the proposal for an amendment to it in relation to a framework for a European Digital Identity[15] will soon enable secure and trusted means of customer identification and verification for both prospective and existing customers and facilitate the remote performance of CDD; and
- some Member States have already notified their electronic identification schemes pursuant to Article 9(1) of Regulation (EU) N° 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market[16].

Therefore, AMAFI wishes to suggest to the European and national competent authorities to initiate the discussions on this issue as soon as possible in order to enable obliged entities to respond to their prospective and existing clients' demands and needs, but also to foster harmonisation, to secure minimum requirements (notably on security and data protection matters), while supporting innovations and competition in the EU framework.

- **Identification of the purpose and intended nature of a business relationship or occasional transaction (*AML/CFT Regulation, art. 20*)**

The proposed Article 20 provides that "*Before entering into a business relationship or performing an occasional transaction, an obliged entity shall obtain at least the following information in order to understand its purpose and intended nature:*
(a) the purpose of the envisaged account, transaction or business relationship;
(b) the estimated amount and economic rationale of the envisaged transactions or activities;
(c) the source of funds;
(d) the destination of funds."

[13] Anti-money laundering authority – AMLA.
[14] Regulation (EU) N° 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.
[15] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) N° 910/2014 as regards establishing a framework for a European Digital Identity, June 2021, COM/2021/281 final.
[16] See the Notices from Member States published in the Official Journal of the European Union (JOEU): "Electronic identification schemes notified pursuant to Article 9(1) of Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market" (link).

According to AMAFI this proposed Article and the obligation for obliged entities to collect that information to understand the purpose and intended nature of a business relationship or occasional transaction it provides, seems disproportionate and does not respect the risk-based approach principle which was introduced by the 4th Directive on AML/CFT.

AMAFI wishes to underline that French law[17] provides the obligation for obliged entities to collect such information according to the situation and the risks concerned.

- **Ongoing monitoring of the business relationship and monitoring of transactions performed by customers (*AML/CFT Regulation, art. 21.2*)**

Paragraph 2 of the proposed Article 21 provides that "*In the context of the ongoing monitoring* [of the business relationship]*, obliged entities shall ensure that the relevant documents, data or information of the customer are kept up-to-date.*
The frequency of updating customer information pursuant to the first sub-paragraph shall be based on the risk posed by the business relationship. The frequency of updating of customer information shall in any case not exceed five years."

Thus, according to the proposed Article 21, paragraph 2, the frequency of updating customer information shall (in any case) not exceed five (5) years. This threshold is extremely problematic for low-risk AMAFI's members' retail clients. Operational impacts would be indeed considerable for AMAFI's retail banks members. Thus, and for example, this would imply for retail banks to conduct about 400 thousand complementary updates. AMAFI also wishes to stress that every client relationship is not always digital which makes it even more complicated to conduct a complete update of customer information. Yet, the consequence of an incomplete review and update of a customer information is the end or the restriction of the relationship with the considered customer. Furthermore, an increasing number of obliged entities (including insurance companies) initiated reflections to turn off that periodic review of customer information logic in order to proceed with updates of customer information only when a specified / listed events occurs or is identified – notably thanks to internal or external, private or public, database systems, on which obliged entities' client portfolio is screened. That is why AMAFI would like to suggest to the EC to delete the threshold of five (5) years and to enable obliged entities to organise the customer information updates according to their business model and the risk.

- **Regulatory technical standards on the information necessary for the performance of customer due diligence (*AML/CFT Regulation, art. 22*)**

As mentioned above, regarding point (d) of paragraph 1 of the proposed Article 22, AMAFI considers it is regrettable to put off the discussions on the electronic identification means whereas, in the context of technological developments and progress in digitalisation, remote customer onboardings multiply.

More generally, AMAFI proposes to the EC to clarify the articulation of the future AMLA RTS on the information necessary for the performance of CDD and the KYC measures referred in Articles 16 and following.

[17] And more particularly article R. 561-20-4 of the French Code monétaire et financier (which was modified in the context of the transposition of the 5th Directive in national law).

- **Third-country policy and ML/FT threats from outside the Union (*AML/CFT Regulation, Chapter III, Section 2, arts. 23 to 26*)**

The proposed Articles 23 to 26 of the EC's proposal for a Regulation on AML/CFT create categories of third countries based on their AML frameworks, with different corresponding obligations for obliged entities:

- *Third countries with significant strategic deficiencies in their national AML/CFT regimes*[18] would be designated as "high-risk third countries" (in a European "black list") identified in delegated acts (DAs) adopted by the EC taking notably into account of the FATF[19] assessment[20] (see *AML/CFT Regulation, art. 23.3*). Obliged entities shall apply enhanced CDD for transactions involving persons from these third countries.
- *Third countries with compliance weaknesses in their national AML/CFT regime*[21] would be identified in DAs adopted by the EC (in a European "grey list") taking notably into account of the FATF assessment[22] (see *AML/CFT Regulation, art. 24.3*). Obliged entities shall apply specific enhanced CDD identified in the DAs for transactions involving persons from these third countries.
- *Third countries posing a threat to the EU's financial system*[23] would be identified in DAs adopted by the EC, taking into account of "*relevant evaluations, assessments or reports drawn up by international organisations and standard setters with competence in the field of preventing* [ML/CFT]" (see *AML/CFT Regulation, art. 25.4*) and using the EC's own assessment. DAs shall also identify countermeasures and specific enhanced CDD. When drawing up the DAs, the EC may request AMLA's opinion.

As exposed in our previous answers (*AMAFI / 20-25* and *20-51* / *20-52*), in AMAFI's view, enhanced CDD measures implemented in cases of business relationships or transactions linked with high risk third countries should be enforced through a Regulation to be harmonised and should be harmonised with FATF's recommendations. The latter was partially taken into account as the proposed future European (i and ii) "black" and "grey" lists (see *AML/CFT Regulation, arts. 23 and 24*), and (iii) list of third countries posing a threat to the EU's financial system (see *AML/CFT Regulation, art. 25*) mentioned above would more specifically consider FATF assessments (and more particularly the (iv and v) FATF's black and grey lists of third countries) whilst leaving the EC the possibility to complete or to pick / select only some of the third countries listed in the FATF's black and grey lists. In this way, obliged entities would have to consider those five (5) different European and international third countries lists. In this context, AMAFI wishes to draw the attention of the EC to the difficulty for obliged entities to implement and take into consideration so many lists in their AML/CFT framework's settings and additional measures. Therefore, AMAFI wishes to suggest to the EC to align the future European "black" and "grey" lists with the FATF's "black" and "grey" lists. Thus, obliged entities could focus on taking into consideration and implementing at least one EC's lists: the proposed list of third countries posing a threat to the EU's financial system stated in the proposed Article 25 of EC's proposal for an AML/CFT Regulation.

Then, as exposed in our previous answers (*AMAFI / 20-25* and *20-51* / *20-52*), for the same purposes of allowing obliged entities to allocate their resources all the more efficiently, AMAFI proposes to the EC to considers the opportunity to establish a "white list" of low-risk third countries at European level. That would indeed facilitate business relationships with third countries imposing equivalent requirements and participate in a better efficiency of the EU AML/CFT framework. Consequently, it would be welcomed if the EU was considering establishing a list of third countries which would impose equivalent requirements to those laid down in the EU AML/CFT framework.

[18] See *AML/CFT Regulation, Chapter III, Section 2, art. 23*.
[19] The Financial Action Task Force - FATF.
[20] More particularly, see here the FATF's List of High-Risk Jurisdictions subject to a Call for Action also called the "FATF's black list" (link).
[21] See *AML/CFT Regulation, Chapter III, Section 2, art. 24*.
[22] More particularly, see here the FATF's List of Jurisdictions under Increased Monitoring, also called the "FATF's grey list" (link).
[23] See *AML/CFT Regulation, Chapter III, Section 2, art. 25*.

- **Simplified customer due diligence (CDD) measures (*__AML/CFT Regulation, art. 27__*)**

Paragraph 4 of the proposed Article 27 provides: "*Obliged entities shall verify* ***__on a regular basis__*** *that the conditions for the application of simplified due diligence continue to exist. The frequency of such verifications shall be commensurate to the nature and size of the business and the risks posed by the specific relationship*".

AMAFI wishes to suggest to the EC to align the frequency of such verifications with the frequency of updating customer information mentioned above (as referred in *AML/CFT Regulation, art. 21.2*): i.e. delete any threshold and enable obliged entities to organise the frequency of the customer information updates and of verifying the conditions for the application of simplified due diligence according to their business model and the risks considered. Otherwise, obliged entities could have to re-open business relationship information / files in between two reviews in order to ensure the customer information are updated (for example to ensure the legal person is still regulated and / or listed), thus creating additional workload.

Furthermore, AMAFI wishes to suggest to the EC to ensure the good articulation of the EU AML/CFT framework with the national frameworks which can provide in some Member States specificities in the context of simplified CDD measures. Indeed, and for example, in France, in different cases of ML/CFT lower risks enumerated expressively and in the absence of ML/CFT suspicion[24], obliged entities can, in compliance with Articles L. 561-9 (2°) and R. 561-14-2 of the French Code monétaire et financier, apply simplified CDD measures – which means, in France, they can proceed only to the identification of the customer (and, as the case may be, of its beneficial owner) and not to the verification of its identity (it means obliged entities don't have the obligation to consult the national register of beneficial ownership information for example) when entering into a relationship with this considered customer.

- **Provisions regarding politically exposed persons (*__AML/CFT Regulation, arts. 2 (25), and 32 to 36 included__*)**

As mentioned in our previous answer (*AMAFI / 20-51*) business relationships including "politically exposed persons" (PEP) can be difficult to identify by obliged entities due to diverging implementation across Member States. Indeed, even if the European definition of PEP has already been unified in the 4th Directive (see *AMLD 4, art. 3 (9)*), Member States were left some room for adaptation according to their specificities as functions involved within the European definition of PEP defer from one Member State to another.

Then, and also, as exposed in our previous answers (*AMAFI / 20-25* and *20-51* / *20-52*), AMAFI considers that in order to facilitate this implementation, two solutions are possible: the first one, in the short run, is to enforce this definition through a Regulation (for harmonisation purposes); the second one, in a longer-term, could be to develop a EU register of PEP containing nominative information and fulfilled by each Member States.

If the first solution was considered by the EC as the proposal for an AML/CFT Regulation prescribes a revised EU definition of the PEP concept in point (25) of the proposed Article 2 (wider than the one provided in the 4th AML/CFT Directive), AMAFI regrets however the fact the second solution it suggested in 2020 is not mentioned in the EC's proposal for an AML/CFT Regulation. That is why, AMAFI wishes to suggest again to the EC to consider the opportunity to create a European register of PEP containing nominative information[25] to facilitate the identification of PEP by regulated entities. Moreover, it is worth noting that this creation would allow regulated entities to allocate their resources more efficiently. Finally, and as already mentioned above, AMAFI supports the importance of its proposal coordination with data protection requirements[26] in order to prevent any infringements.

[24] See more particularly Articles R. 561-15 and R. 561-16 of the French Code monétaire et financier.
[25] It should be noted that some Member States have already structured their own central register (*e.g.* Italy) which should serve the EC usefully as examples to improve.
[26] And more particularly with the General Data Protection Regulation (GDPR) – see above.

- **Provisions regarding performance by third parties (*AML/CFT Regulation, Section 6, arts. 38 to 41 included*)**

Regarding the proposed Article 39 on the process of reliance on another obliged entity, its paragraph 3 provides: "*The information referred to in paragraphs 1 and 2 shall be provided by the obliged entity relied upon without delay and in any case within five working days*".
AMAFI considers the delay of five (5) working days to provide such information is too short in practice for obliged entities. That is why AMAFI wishes to suggest to the EC to extend that time limit to ten (10) working days.

Then, paragraph 1 of the proposed Article 40 about outsourcing provides: "*Obliged entities may outsource tasks deriving from requirements under this Regulation for the purpose of performing customer due diligence to an agent or external service provider, whether a natural or legal person, with the exception of natural or legal persons residing or established in third countries identified pursuant to Section 2 of this Chapter.* (…)".
AMAFI considers it would be relevant and appropriate to provide for an exception to the prohibition (provided in the first subparagraph of the proposed Article 40.1) for obliged entities to outsource such tasks to an agent or external service provider, established in a third country identified according to the EC's assessment (*AML/CFT Regulation, Chapter III, Section 2*), in order to authorise the outsourcing of those tasks within a group. And more particularly to natural or legal persons corresponding to natural persons working in / for a branch of the group or to (a) branch(es) established in those third countries. Thus, and in line with paragraph 4 of the proposed Article 38, AMAFI wishes to propose to the EC to enable obliged entities to outsource tasks deriving from requirements under this proposal for an AML/CFT Regulation for the purpose of performing CDD to a natural or legal person, part of the same group but established in those third countries.

Reporting obligations (*AML/CFT Regulation, Chapter V*)

- **Reporting of suspicious transactions (*AML/CFT Regulation, art. 50*)**

Paragraph 1 of the proposed Article 50 provides that "*Obliged entities shall report to the FIU all suspicious transactions, including attempted transactions.*
Obliged entities, and, where applicable, their directors and employees, shall cooperate fully by promptly:
(a) reporting to the FIU, on their own initiative, where the obliged entity knows, suspects or has reasonable grounds to suspect that funds, regardless of the amount involved, are the proceeds of criminal activity or are related to terrorist financing, and by responding to requests by the FIU for additional information in such cases;
(b) providing the FIU directly, at its request, with all necessary information.
For the purposes of points (a) and (b), ***obliged entities shall reply to a request for information by the FIU within 5 days***. ***In justified and urgent cases***, ***FIUs shall be able to shorten such a deadline to 24 hours***."

AMAFI considers the deadlines imposed to obliged entities to reply to any FIU's request in the context of suspicious transactions, provided in the last subparagraph of the proposed Article 50.1, are very short. AMAFI wishes to suggest to the EC to leave to the FIUs the possibility to fix such deadline on a case-by-case basis, and in justified and urgent cases, to shorten that deadline to not less than 48 hours.

Summary of AMAFI's additional proposals

Considering the scope of the EC's proposal for a Regulation on AML/CFT, and as stated above, AMAFI believes that the following issues should be considered by the EC to allow obliged entities to allocate their resources more efficiently:

(1) **Establishment of a "whitelist" of low-risk third countries at European level**: in order to facilitate business relationships with third countries imposing equivalent requirements and for better efficiency of EU AML/CFT framework, it would be welcomed if the EU was considering establishing a list of third countries which impose equivalent requirements to those laid down in the EU AML/CFT framework.

(2) **Creating a consolidated European central register of named Political Exposed Persons** to facilitate the identification of PEP by regulated entities and allow them to allocate their resources more efficiently.

EUROPEAN COMMISSION'S PROPOSAL FOR A 6TH DIRECTIVE ON AML/CFT

AMAFI wishes to draw the attention of the European Commission on the following subjects:

Beneficial ownership registers (*AMLD 6, Chapter II*)

- **Provisions relating to the interconnection of Member States' central registers holding beneficial ownership information (*AML/CFT Regulation, art. 48; AMLD 6, recital (36) and following., Chapter II, arts. 10 to 13 included*)**

As exposed in our previous answers (*AMAFI / 20-25* and *20-51*), and mentioned above, in AMAFI's view, a prompt delivery of the EU consolidated beneficial ownership register gathering the information hold in the 28 different central national registers would considerably facilitate the application of customer due diligence measures and would allow obliged entities to allocate their resources more efficiently.

As noted above, the EC's proposal for a 6th AML/CFT Directive provides a whole Chapter on the registers and dedicated section on beneficial ownership registers and their access rules (see below: *AMLD 6, Chapter II, Section I, arts 10 to 13 included*), and even if the proposed Article 10 of the 6th AML/CFT Directive proposal provides for the empowerment of the EC to adopt implementing acts in the matter (it unfortunately only targets the format for the submission of beneficial ownership information to the central register – see *AMLD 6, art. 10.4*); AMAFI regrets the provisions regarding the interconnection of Member States' central registers holding beneficial ownership information through the European Central Platform established by Directive (EU) 2017/1132[27], are not provided in the EC's proposal for an AML/CFT Regulation of direct application, or at least in a dedicated delegated regulation of direct application for its prompt delivery. That would indeed and thus participate to legal and regulatory stability in the matter, and that it would foster harmonisation.

- **Reporting of discrepancies between beneficial ownership information held in the central registers and beneficial ownership information available to obliged entities (*AMLD 6, recitals 23-25, art. 10 par. 5 and 6*)**

Paragraphs 5 and 6 of the proposed Article 10 provide that "*Member States shall require that **the beneficial ownership information held in the central registers is adequate, accurate and up-to-dat**e. For that purpose, Member State shall apply at least the following requirements:*
*(a)**obliged entities shall report to the entity in charge of the central registers** any **discrepancies they find between the beneficial ownership information available in the central registers and the beneficial ownership information available to them** pursuant to Article 18 of Regulation [please insert reference – proposal for Anti-Money Laundering Regulation].*
(…)
Member States shall require that the reporting of discrepancies (…) ***takes place within 14 calendar days after detecting the discrepancy***. *In cases of lower risk to which measures under Section 3 of Chapter III of Regulation [please insert reference – proposal for Anti-Money Laundering Regulation] apply, Member States may allow obliged entities to request the customer to rectify discrepancies of a technical nature that do not hinder the identification of the beneficial owner(s) directly with the entity in charge of the central registers.*"

AMAFI considers regulating the reporting of discrepancies within a 14 calendar days deadline after detecting the discrepancy can be risky. All the more so as we do not have the necessary distance to evaluate / assess if that deadline is sufficient or not; AMAFI wishes to suggest to the EC to extend that time limit to thirty (30) calendar days.

[27] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law.

Finally, AMAFI regrets the "discrepancy" concept is not clarified in the EC's proposal for a 6th AML/CFT Directive while there is an important necessity of a harmonised European procedure of reporting of discrepancies between beneficial ownership information held in the central registers and beneficial ownership information available to obliged entities. That is why, and in connection with the above, AMAFI regrets the provisions regarding the reporting of discrepancies between beneficial ownership information held in the central registers and beneficial ownership information available to obliged entities, are not provided in the EC's proposal for an AML/CFT Regulation of direct application or at least in a dedicated delegated regulation of direct application, and for legal and regulatory stability in the matter.

Anti-money laundering supervision (***AMLD 6, Chapter IV, Section 4***)

- **Scope of application of administrative sanctions and measures (*AMLD 6, art. 39.3*)**

Paragraph 3 of the proposed Article 39 provides: "*In the event of a breach of Regulation [please insert reference – proposal for Anti-Money Laundering Regulation - COM/2021/420 final], Member States shall ensure that where obligations apply to legal persons, administrative sanctions and measures can be applied to the senior management* ***and to other natural persons who under national law are responsible for the breach***.
Member States shall ensure that where supervisors identify breaches which are subject to criminal sanctions, they inform the authorities competent for investigating and prosecuting criminal activities in a timely manner."

For clarity and rational purposes, AMAFI wishes to suggest to the EC to specify the "*other natural persons*" which are mentioned in the first subparagraph of the proposed Article 39.3 only concerns the non-financial professions referred in point 3 of the proposed Article 3 of the EC's proposal for an AML/CFT Regulation.

- **Publication of administrative sanctions and measures (*AMLD 6, art. 42.1*)**

Paragraph 1 of the proposed Article 42 provides: "*Member States shall ensure that a decision imposing an administrative sanction or measure for breach of Regulation [please insert reference – proposal for Anti-Money Laundering Regulation - COM/2021/420 final] against which there is no appeal shall be published by the supervisors on their official website immediately after the person sanctioned is informed of that decision. The publication shall include at least information on the type and nature of the breach* ***and the identity of the persons responsible****. Member States shall not be obliged to apply this subparagraph to decisions imposing measures that are of an investigatory nature.*

Where the publication of the identity of the persons responsible as referred to in the first subparagraph or the personal data of such persons is considered by the supervisors to be disproportionate following a case-by-case assessment, or where publication jeopardises the stability of financial markets or an on-going investigation, supervisors shall:
(a)delay the publication of the decision to impose an administrative sanction or measure until the moment at which the reasons for not publishing it cease to exist;
(b)publish the decision to impose an administrative sanction or measure on an anonymous basis in a manner in accordance with national law, if such anonymous publication ensures an effective protection of the personal data concerned; in that case, the publication of the relevant data may be postponed for a reasonable period of time if it is provided that within that period the reasons for anonymous publication shall cease to exist;
(c)not publish the decision to impose an administrative sanction or measure at all in the event that the options set out in points (a) and (b) are considered insufficient to ensure one of the following:
(i) that the stability of financial markets would not be put in jeopardy;
(ii) the proportionality of the publication of the decision with regard to measures which are deemed to be of a minor nature."

AMAFI's members wish to request the EC to delete the terms "*and the identity of the persons responsible*" provided in the first subparagraph of the proposed Article 42.1 stated above.

Indeed, and for example, in most of cases, the persons responsible of any violation in practice would be employees of the obliged entity acting by delegation in the implementation of its AML/CFT framework. Yet it is the obliged entities' governing bodies which are designated as responsibles. Therefore, if the EC would take into account AMAFI's request, the second part of the proposed Article 42.1 would be irrelevant and should also be deleted.

Cooperation (*AMLD 6, Chapter V, Section 2*)

- **Cooperation in relation to credit institutions (*AMLD 6, art. 48.1*)**

Paragraph 1 of the proposed Article 48 provides: "*Member States shall ensure that financial supervisors, FIUs and authorities competent for the supervision of credit institutions under other legal acts cooperate closely with each other within their respective competences and provide each other with information relevant for the performance of their respective tasks. Such cooperation and information exchange shall not impinge on an ongoing inquiry, investigation or proceedings in accordance with the criminal or administrative law of the Member State where the financial supervisor or authority entrusted with competences for the supervision of credit institutions under other legal acts is located and shall not affect obligations of professional secrecy as provided in Article 50(1).*"

AMAFI wishes to suggest to the EC to specify in the first sentence of the proposed Article 48.1 stated above that financial supervisors, FIUs and authorities (competent for the supervision of credit institutions) cooperate closely with each other and provide each other with information **only for AML/CFT purposes**.

About AMAFI

Association française des marchés financiers (AMAFI) *is the trade organisation working at national, European and international levels to represent financial market participants in France. AMAFI mainly acts on behalf of investment firms and credit institutions (French, European and global firms), operating in and/or from France (corporate and investment banks – CIBs, brokers-dealers, exchanges, and private banks).* ***AMAFI is deeply involved in all regulatory matters that concern financial instruments*** *(MiFID II, AML/CFT, PRIIPs, etc.). AMAFI has more than 150 members operating in equities and fixed-income and interest rate products, as well as commodities, derivatives and structured products for both professional and retail clients. Nearly one third of its members are subsidiaries or branches of non-French institutions.*