

# Comments

on the European Commission proposal for a  
directive amending the Fourth Anti-Money  
Laundering Directive (EU) 849/2015  
- Fifth Anti-Money Laundering Directive -

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The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the Savings Banks Finance Group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent approximately 1,700 banks.

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Comments on the European Commission proposal for a directive amending the Fourth Anti-Money Laundering Directive (EU) 849/2015 - Fifth Anti-Money Laundering Directive -

The European Commission published on 5 July 2016 a proposal for a directive amending the Fourth Anti-Money Laundering Directive (Directive (EU) 2015/849) [referred to in the following as the "Fifth Anti-Money Laundering (AML) Directive" on account of the substantial changes in some cases to the anti-money laundering framework]<sup>1</sup>. The proposal is accompanied by a Commission working document<sup>2</sup>.

The German Banking Industry Committee (GBIC) would like to take the reopened debate on creation of an optimal anti-money laundering and counter-terrorist financing (AML/CFT) framework as an opportunity to input its own experience and ideas.

We should welcome a discussion of the following points:

## **I. Proposed amendments to Directive (EU) 2015/849**

### **1. Deadline for transposition**

The deadline for transposition of the Fourth and Fifth AML Directive into Member State national law – 1 January 2017 – is much too tight and unrealistic.

In Germany, like in other Member States, no bill has yet been presented for transposition of the Fourth AML Directive. Even once national legislation transposing the Fourth and Fifth AML Directive has been adopted, technical implementation will take some considerable time.

Following adoption of the transposing legislation, implementing guidelines agreed with national supervisors will be additionally required to translate the legal provisions into technical/organisational, IT-supported work instructions and processes. Drafting and agreeing these will take time. Accompanying supervisory guidelines such as the EBA Risk Factor Guidelines cannot take national specificities and institution-specific technical conditions into account or, if so, only to a limited extent. They cannot therefore replace the implementing guidelines agreed with national supervisors in practice. Furthermore, the statutory provisions often have to be further specified so that they can be implemented in the first place. Examples in this context are consideration of the customer's reputation in their risk assessment and the question of how, in addition to a risk assessment of the customer, a risk assessment of "*transactions*" should be carried out.

Without a realistic transposition deadline, which should not be less than twelve months from adoption of the national transposing legislation, the aforementioned processes required for implementation will not be manageable.

### **2. Beneficial ownership**

Lowering the EU-wide minimum threshold of 25% to 10% for determining beneficial ownership of so-called "*passive non-financial entities*" (passive NFEs) leads to an unwarranted increase in checking and documentation requirements. Contrary to the planned schematic approach the present risk based

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<sup>1</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC, COM/2016/0450 final – 2016 /0208 (COD)

<sup>2</sup> Commission Staff Working Document Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC, SWD/2016/0223 final – 2016 /0208 (COD)

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approach should be continued. It thus should be left to obliged entities to raise their due diligence in individual cases where they believe that a particular customer poses a higher money laundering or terrorist financing risk. This may of course also apply in regard to passive NFEs not engaged in business themselves if these constitute a higher risk in individual cases. However, not every family trust behind an international corporation harbours a higher money laundering risk. Fully abandoning the risk-based approach would therefore not be appropriate.

In addition, lowering the minimum threshold for beneficial ownership would lead to the identification of persons that have no actual controlling influence on a company. Influence in company law terms is only exercised from the present threshold of over 25%, as this represents at least a blocking minority. For these reasons, the 10% beneficial ownership threshold failed to prevail under the FATCA and CRS regimes. These apply the 25% threshold, which the FATF likewise considers appropriate.

If, despite the above-mentioned arguments, a threshold lowered to 10% for the legal entities in question is to be generally adopted, efficiency aspects would at any rate have to be taken into account. Particularly existing customers have little understanding for inquiries about corporate ownership structures. The result is often lengthy tracking processes. With this in mind, implementation by credit institutions, particularly for existing customers, should only be mandatory for the period after establishment of the central registers of beneficial owners pursuant to Article 30 (3) of the Fourth Anti-Money Laundering Directive. This applies particularly as register-based updating of existing accounts is likely to generate much more reliable results than updating based on the duty of customers to cooperate or on public information that is currently only available to a limited extent.

In this case, the Fifth AML Directive should, in our view, be supplemented, e.g. in Article 30 (1) of the Fourth AML Directive, by stipulating that the registers of beneficial owners expressly include all beneficial owners under the EU-wide minimum threshold (currently 25%). If the minimum threshold for passive NFEs is lowered to 10%, the registers should list these and their beneficial owners with shareholdings of more than 10%.

Where a Member State has stipulated under Article 3 (6a) (i) of the Fourth AML Directive a lower shareholding percentage as an "*indication of ownership or control*", the respective national register should also display the beneficial owners based on this percentage. As different thresholds for cross-border shareholdings would lead to gaps in the register, GBIC recommends harmonising the thresholds in the Fifth AML Directive and deleting the right to set lower thresholds at national level under Article 3 (6a) (i) of the Fourth AML Directive. Only definitive regulation of the threshold percentage allows to strengthen the European single market by fully recording of all the data needed to prevent money laundering and terrorist financing in interconnected national registers.

### **3. Updating requirement**

Article 14 (5) of the Fourth AML Directive stipulates that when an institution has a duty "*in the course of the relevant calendar year*" to contact the customer for the purpose of reviewing any information related to the beneficial owner(s), it is required to apply due diligence measures to the customer again. Reference is made in particular to the duty to contact customers to meet the requirement under Directive 2011/16/EU to update information on the beneficial owner.

GBIC advises against introducing the proposed amendment.

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It could lead to an unwarranted full abandonment of the risk-based approach. In addition, the proposed wording does not make sufficiently clear whether the amendment, possibly via Directive 2011/16/EU, is intended to actually even set a rigid one-year period for renewed compliance with the due diligence requirements in regard to all existing customers; this would have to be rejected.

Where reviewing the information on the beneficial owner pursuant to Directive 2011/16/EU reveals that the relevant circumstances of the customer have changed, Article 14 (5) of the Fourth AML Directive already ensures that the due diligence requirements under the Fourth AML Directive have to be complied with on a risk-sensitive basis. This is, in our view, more than sufficient and is already only barely still in line with a risk-based approach. Expanding an obligation under Directive 2011/16/EU to review information on the beneficial owner to lead to an automatic obligation to review all due diligence requirements under the Fourth AML Directive is plainly and diametrically opposed to a risk-based approach.

#### **4. Tightening the conditions for acceptance of payment cards from third countries**

The Commission proposal inserts the following paragraph 3 in Article 12 of the Fourth AML Directive:

*"3. Member States shall ensure that **Union credit institutions and financial institutions** acting as acquirers only accept payments carried out with prepaid cards issued in third countries where such cards meet requirements equivalent to those set out in points (a), (b), (c) of the first subparagraph of Article 13 (1) and Article 14, or can be considered to meet the requirements in paragraphs 1 and 2 of this Article."* [Emphasis in bold print added by GBIC]

For credit institutions, it is important that they can rely on all participating parties. This requirement should therefore apply not only to "*Union credit institutions and financial institutions*" but uniformly to all obliged entities. The new paragraph 3 of Article 12 would then begin as follows:

*"3. Member States shall ensure that **obliged entities** acting as acquirers only accept payments (...)"*

The Commission should, in addition, establish a central list of those cited "*third countries*" that can be assumed to meet "*equivalent requirements*".

#### **5. Inclusion of eIDAS in Article 13 (1) (a) of the Fifth AML Directive**

As explained in more detail in section II.1, GBIC welcomes the proposed inclusion of eIDAS<sup>3</sup> in Article 13 (1) (a) of the Fifth AML Directive. To allow identification of customers using notified *electronic means of identification* pursuant to eIDAS throughout Europe as of 29 September 2018, either:

- the words "*electronic*" and "*electronically*" in Article 6 (1) of the eIDAS Regulation should be deleted

or

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<sup>3</sup> Regulation (EU) No 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 (OJ L 257, 28.8.2014, p. 73); supplemented by Implementing Regulations (EU) 2015/1501 and 2015/1502, Implementing Decisions (EU) 2015/296 and 2015/1984; in addition, the eIDAS Regulation is supplemented in regard to trust services by Implementing Regulation (EU) 2015/806 and Implementing Decisions (EU) 2015/1505 and 2015/1506

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- it should be made clear in the Fifth AML Directive that identification and “*authentication*” using an *electronic means of identification* from another Member State pursuant to eIDAS must be allowed by Member States whenever identification and “*authentication*” are required for anti-money laundering purposes under the national law of the Member State, without electronic identification and “*authentication*” being simultaneously required under the national law of the Member State.

Otherwise Member States would be free to circumvent the aim of mandatory recognition of notified electronic means of identification for anti-money laundering purposes as of 29 September 2018 by formulating their national law accordingly. If, namely, national AML legislation were to merely call for identification and authentication<sup>4</sup> and to merely allow electronic identification, as is currently the case in, for example, Germany, notified electronic means of identification from other Member States would also have to be refused recognition after 29 September 2018 as well.

## **6. List of due diligence requirements for dealings with customers from high-risk third countries/RFI standards for correspondent banking relationships**

When it comes to setting common requests for information (RFI) standards for correspondent banking relationships (see also section II.2) and setting the due diligence requirements in regard to customers from high-risk third countries, the Fifth AML Directive should not provide any scope for Member States to set additional due diligence requirements.

The due diligence requirements to be applied to customers from high-risk third countries under Article 18a (1) (a)–(g) of the Fifth AML Directive are in line with the seven FATF recommendations. They should be set as a definitive list and further specified by EBA guidelines agreed with the FATF and guidelines issued by Member State supervisors.

Common definitive standards agreed with the FATF should also be set for requests for information for maintaining correspondent banking relationships.

Only at least common EEA-wide

- lists of due diligence requirements for dealings with customers from high-risk third countries and
- RFI standards for correspondent banking relationships

allow implementation in the short term. At the same time, these can also help to preserve the unity of the European single market and strengthen its legal uniformity and legal certainty.

The initially envisaged full harmonisation of the due diligence requirements that are to be applied (see Commission Staff Working Document<sup>5</sup>, p. 73, no.8) should be adopted. For the reasons mentioned, such full harmonisation is also proportionate in GBIC’s view. That goes particularly if fully harmonised, definitive RFI standards for correspondent banking relationships are established at the same time (see section II.2 for more details).

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<sup>4</sup> In German legal language, identification is “verified” (*überprüft*) and not “authenticated” (*authentifiziert*); see also section II.3

<sup>5</sup> See footnote 2

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## **7. Broader Financial Intelligence Unit powers**

GBIC recommends, in addition, that Financial Intelligence Units (FIU) should also be obligated to share information obtained on suspicious transactions with credit institutions. This would make it easier for credit institutions to adjust their risk-based processes in a timely manner.

Practice has shown that intensified communication by the investigating/prosecuting authorities with entities required to report suspicious transactions – naturally on a sound legal basis – is needed to significantly improve the results of suspicious transaction reporting.

Even if this objective cannot be achieved in the current legislative initiative, it should be pursued further within the FATF. In GBIC's view, the present framework displays considerable shortcomings in this respect.

## **8. National account information registers**

GBIC welcomes it that the proposed amendments in Articles 30 and 31 of the Fifth AML Directive are also geared to national registers in Member States. This approach is right. Only national registers allow processing and recording of all relevant information. A register at European level would fail to take due account of the wide differences in the legal form of companies in Member States. Realisation of such a project is unlikely to be feasible in the foreseeable future.

## **II. Additional ideas by the banking industry to improve the AML/CFT framework**

Ever since the creation of the AML/CFT framework in Germany in 1992/93, GBIC has always participated constructively and committedly in development of a both effective and efficient regulatory framework. In the discussion on a number of amendments to FATF recommendations, EU directives and national legislative initiatives, GBIC has gained insight into strengths and weaknesses of the regulatory framework. This is complemented by the experience it has made in regard to application of the law at national and global level. Based on and prompted by this insight and experience, we therefore wish to add to our comments on the present draft directive by presenting some ideas that would be helpful for timely and efficient implementation of the objectives pursued by the directive.

We should like to address the following points in particular:

### **1. Modern, forward-looking identification without having to switch media**

GBIC shares the Commission's view that secure remote identification can be performed electronically. GBIC likewise believes that recognition of secure electronic copies of original documents as well as electronic assertions, attestations or credentials as valid means of identity is important (recital 17 of the Fifth AML Directive). GBIC therefore welcomes the proposed inclusion of Regulation (EU) No 910/2014 (eIDAS) in the Fifth AML Directive. However, in GBIC's view, it has proved to be the case that confining the regulatory framework to certain means of identification generally fails to take due account of the diverse 'know your customer' (KYC) requirements in practice. If secure means of identification are to be widely used, these have to be accepted by the great majority of bank customers. Their success depends,

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on the one hand, on striking a proper balance between security and convenience and, on the other hand, on avoiding any confinement to certain identification procedures.

Having said this, the video identification that has been successfully introduced in several Member States since the adoption of eIDAS should, for instance, be included in Article 13 (1) (a) of the Fifth AML Directive as an example of a permissible procedure. Video identification is identification based on personal presence and thus not remote identification in the classical sense. However, like remote identification, video identification allows identification outside bank branches, also across borders. It has proved reliable and secure in practice. It has been a success when it comes to opening accounts across borders and enjoys a high level of customer acceptance, thus strengthening the unity of the internal market.

Irrespective of the above-mentioned concrete procedures, consideration should be given to having the directive set the guiding principle for customer identification but allowing Member States to flesh out its implementation on the basis of the means of identification available nationally in each case. The main provision should merely stipulate that a principal national means of identification (such as an ID document or passport in many Member States) allows the collection of the relevant customer data. Depending on the 'strength' of this principal medium, other media should be eligible for use as well if necessary. Where an obligated to perform identification receives only a simple, i.e. non-certified, copy/scan of an ID document from a customer electronically, it would have to use further means of identification (e.g. funds transfer from a customer's reference account or an inquiry with a credit agency (such as Schufa in Germany)). This regulatory approach would, on the one hand, take due account of individual national specificities and, on the other hand, leave room for the dynamic progress in digital identification procedures without confining itself to any specific means of identification. This is important also in view of the fact that national ID documents still differ widely. In the present phase of technological progress, this approach appears best suited, in our view, to achieving optimal results.

## **2. Reducing the regulatory overload when establishing and maintaining correspondent banking relationships**

One of the Commission's motives behind the Fifth AML Directive is a harmonised treatment of third-country risk (recital 9 of the Fifth AML Directive). Consequently, the Fifth AML Directive should also set common maximum RFI standards for the secure establishment and maintenance of correspondent banking relationships that should be consistent with the FATF maximum RFI standards.

The requirements for establishing and maintaining correspondent banking relationships have been tightened in recent years to an unacceptable and, in some cases, clearly excessive extent. This has led in practice to a reduction in the number of correspondent banking relationships and thus to a negative impact on the global economy (see the Bank for International Settlements (BIS) report on correspondent banking relationships of July 2016, p.1 ff., 11<sup>6</sup>). We are well aware that, besides continuously tightened regulatory and supervisory requirements, higher internal compliance standards by banks for correspondent banking relationships ('race to the top') have also contributed to this situation. Against this backdrop, we wonder how this unsatisfactory development can be reversed to an appropriate level.

In our view, the Fifth AML Directive should set common (though not globally mandatory) maximum standards for the KYC data needed for the secure establishment and maintenance of correspondent banking relationships. Ideally, these should be consistent with FATF standards that likewise still have to

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<sup>6</sup> Available at [www.bis.org/cpmi/publ/d147.pdf](http://www.bis.org/cpmi/publ/d147.pdf), as at 26 August 2016, 3.15 pm

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be drafted. To strengthen uniform application of the law and transparency of requirements, particularly within the internal market, any national 'gold-plating' should be ruled out.

In addition, the risk-based approach should be given more recognition in regulation of correspondent banking relationships. For this purpose, it should be stipulated at EU level that correspondent banking relationships between banks within the EEA are low-risk. As a consequence, the KYC standards for correspondent banking relationships within the EEA should require only a limited amount of information on correspondent banks. The same goes for correspondent banking relationships in countries that have AML/CFT standards equivalent to those in the EEA. This would free up resources for the more complicated handling of correspondent banking relationships with credit institutions in higher-risk countries and could perhaps counter the current trend towards more 'de-risking' in the area of correspondent banking business. It would, at the same time, help to maintain a globally functioning correspondent banking system.

### **3. In German legal language, identity is "verified" (*überprüft*) and not "authenticated" (*authentifiziert*)**

The word "*Authentifizierung*" (authentication) of identity should be replaced in the German-language version of EU legislation by the term "*Überprüfung*" (verification), which is used in German-speaking Member States of the EU and in Switzerland.

The German version of the eIDAS Regulation and the associated EU legal acts, as well as of the Fourth AML Directive (Directive (EU) 2015/849), refer for no apparent material reason to "*Authentifizierung*" instead of "*Überprüfung*" of identity. In contrast, the German AML Act, the Austrian Banking Act and the Swiss AML Act refer to "*Überprüfung*" of identity for AML purposes. "*Authentifizierung*" is not used in either the German AML Act or the Austrian Banking Act or the Swiss AML Act. Retaining the term "*Überprüfung*" also in EU law would be a contribution towards preserving the German language and thus the Union objective of cultural (language) diversity in accordance with Article 167 (1) of the TFEU. It would also help to increase legal certainty in German-speaking Member States and beyond (Switzerland).

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