European Payment Institutions Federation aisbl

Brussels, 19 July 2012

European Commission
Directorate General – Internal Market and Financial Services
Capital and Companies
Financial Crime
Anti-Money Laundering Unit
Rue de Spa 2 – 1040
Brussels

For the attention of: Mr. Tobias Mackie

Dear Mr. Mackie,

In response to the invitation to comment on the report from the European Commission to the European Parliament and the Council on the application of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the "Application Report"), conveyed during the meeting held in Brussels on June 15th, 2012 between you and representatives of the European Payments Institution Federation ("EPIF"), we hereby share our views on such report.

For easier reference, we have followed the number and headings of the Application Report.

1. INTRODUCTION

EPIF welcomes and encourages the private stakeholder consultation that is currently taking place concerning the review of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the "AMLD"). Moreover, we welcome the impact assessment currently being carried out by the European Commission ("EC"), on which EPIF and its members are participating.

With regards to such review, EPIF has already submitted two position papers to the EC earlier in the year, the first one on the review of the AMLD itself and the second one providing feedback on the EC's staff working paper on Anti-money laundering of and reporting by payment institutions in various cross-border situations, dated October 31st, 2011 (the "CSWP")[1].

Nevertheless, we welcome the opportunity to comment on the Application Report, since it considers several potential changes to the AMLD that could have a significant impact on the payments sector.

2. APPLICATION OF THE DIRECTIVE

2.1 Applying a risk-based approach

[1] Commission Staff Working Paper on Anti-money laundering supervision of and reporting by payment institutions in various cross-border situations, 3 October 2011, SEC(2011)1178 final.

EPIF supports the strengthening of the risk-based approach (RBA) contained in the AMLD, and its application by both obliged entities and supervisors. This latter point is fundamental to ensure an appropriate supervision of entities in relation to their size and nature.

With regards to the level of harmonization to be achieved in relation to the adoption of RBAs, we believe a greater level of harmonization would be needed in order to achieve a consistent application of rules at a European level, especially in relation to those Financial Institutions (FIs) operating in different Member States on a cross-border basis.

On the contrary, leaving it for Member States to develop their own RBAs at national level could result in 27 different AML regimes being developed; with the significant cost that complying with them would bring to FIs acting on a cross-border basis. On this point, we believe that the idea to develop a supranational approach to risk assessments and the possibility of issuing supranational guidance in order to mitigate the impact of having 27 different RBA regimes is a good one in principle. However, we are conscious of the fact that developing such approach and guidance would entail the setting up of mechanisms that currently do not exist, and would therefore take a significant time to achieve. In the meantime, FIs operating on a cross-border basis would need to observe the different national RBAs, with the corresponding impact it would have on systems and resources.

Finally, and in relation to the proposal to introduce a requirement that risk-based procedures designed by obliged entities are appropriate to their size and nature, we fully support such proposal, since FIs need to be capable to adapt the RBA they implement to their size and nature of their business, for cost reasons but also to ensure their RBA is indeed effective.

2.2 Criminalisation of ML/TF

Generally speaking, EPIF supports all efforts geared towards achieving greater harmonization on AML/TF legislation. Consequently, we would welcome greater harmonization regarding the criminalisation of the offenses of money laundering and terrorist financing.

2.3 Scope

2.3.1 Serious crimes

With regards to the inclusion of “tax crimes” as a predicate offence of money laundering, we support the inclusion of tax crimes as a specific category of “serious crimes” under Article 3(5) of the AMLD. As to whether the term “tax crimes” should be further defined, it seems advisable to define this term in a wide manner that covers the different tax-related criminal offenses that exist as per the Member States’ criminal legislation.

2.3.2 Broadening the scope beyond the existing obliged entities

EPIF does not have any specific views with regards to the potential inclusion of the gambling sector, national central banks, letting agents or dealers in precious stones and metals, as envisaged in paragraphs (a), (c), (d) and (e) of this paragraph, since it would not be affected by any of these.

However, and in relation to extension of the scope of the AMLD to all agents operating on behalf of FIs, we believe that the inclusion of such agents in the list of obliged entities under the AMLD would have serious consequences for the payments sector, in particular for those PIs operating large agent networks throughout the EEA (MoneyGram, Western Union, etc).

In the event that agents of PIs are required to become obliged entities in their own right, this would go against some of the objectives behind the implementation of the Payment Services Directive ("PSD"), in particular the wider access of consumers to payment services, and would constitute a wholesale limitation to the offering of payment services that the PSD itself does not envisage. The PSD was enacted, among other goals, to enable more competition in the EU payments market by eliminating existing barriers of entry in some EU Member States, i.e. barriers that mean that payment services could only be offered by regulated financial firms. Therefore, re-introducing barriers of entry such as requiring agents to be obliged entities in their own right would go against the spirit of the PSD, and should thus be avoided and discouraged by the EC.

In the event agents of PIs are required to become obliged entities, this would entail significant costs for them, since they would need to prepare, approve and apply their own AML programs, recruit AML/Compliance personnel, depending on the Member State conduct annual external audits on the functioning of their AML programs, etc.

This could result in a large number of such agents not wanting to continue being, or become, agents of PIs. Alternatively, they could choose to remain agents of PIs but passing-on the cost of Compliance to their principals, who would then be in the difficult position of deciding whether to absorb such costs in a context of ever growing pressure on margins, or pass them on to consumers. This would result in more expensive payment services for consumers across the EEA.

By requiring that agents of PIs become obliged entities in their own rights a duplication of requirements would take place, with the resulting duplication of costs.

On the contrary, were agents of FIs, including PIs, to become directly responsible for certain acts and omissions (as opposed of the obliged entities being the only ones having responsibility for observing AML rules, notwithstanding the possibility that they delegate certain activities to their agents), this would be a more efficient way of ensuring rules are complied with. Under this scenario, although PIs would continue to have primary responsibility for the observance of AML rules, agents would become responsible for complying with rules that are commensurate with their size and the nature of the activities they carry out.

As an example, agents are best placed to identify certain suspicious activity that takes place at their physical location. Under new rules, agents could be held responsible for identifying and reporting

such activity (directly to FIUs). Accordingly, they would be directly responsible vis-à-vis the national supervisors for failing to do so, in addition to the responsibilities they could have vis-à-vis their principals under their relevant contracts.

Notwithstanding the foregoing, please note that the UKMTA does not see the proposal that agents should become obliged entities in their own right under AMLD in a negative light. Given that several of UKMTA's members are small payment institutions ("SPIs") that are registered in their own right, UKMTA does not see the introduction of a rule to require agents of FIs to be obliged entities in their own right as a rule which will negatively affect the operations of its membership.

With regards to the reference to exemptions mentioned in letter (f) of this section, the PSD already dictates that money remittance is a regulated payment service for which a license or an authorization is needed.

2.4 Customer due diligence

As a principle, EPIF believes Customer Due Diligence (CDD) requirements should be consistent across Member States and should increase in line with the risk profile of the activity, without hampering low-value payment products from being developed and offered.

Regular CDD

With regards to regular CDD requirements, EPIF would welcome a consistent approach regarding the application of the CDD rules on occasional transactions (Art. 7 (b) of the AMLD). This provision states that CDD measures shall apply to "occasional transactions amounting to EUR 15,000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked".

However, some Member States have reduced this threshold considerably at their discretion (France's threshold has been lowered to EUR 8,000, Italy and Spain apply CDD to all transactions regardless the amount, etc.).

Therefore, we advocate for increased harmonization in relation to this threshold, eliminating the possibility that Member States deviate from the agreed threshold. Furthermore, we believe the current threshold is appropriate.

More importantly, we believe clearer rules are required regarding the interpretation of what constitutes "several operations which seem to be linked". This clarification is needed in order to apply consistent rules on a cross-border basis, and avoid the problem that diverging national interpretations have on the application of regular CDD rules. An example of clarification could be the setting of a specific timeframe (e.g. one week) during which several transactions made by the same individual would be considered as linked.

With regards to the €1,000 threshold for electronic funds transfer set forth in the Wire Transfer Regulation, we support extending the partial exemptions from CDD requirements set forth in such provision to products other than electronic money products. Hence, we support the application of simplified due diligence (SDD) to certain low-value transactions (e.g. electronic funds transfer below €1,000).

In connection to third party reliance, EPIF would welcome clearer rules regarding the ability of a firm to rely on other regulated financial institutions for purposes of customer due diligence. In particular, we would welcome a harmonized approach on the topic of whether a written agreement is needed with the regulated financial institution that such a firm would be relying on. On this topic, we believe such an agreement should not be required.

The approach of harmonising the documents used for identification and registration on a Europe-wide level – in particular upon conclusion of framework agreements for payment services with not-present persons – is desirable and necessary to create combating money laundering on a pan-European basis on a consistent basis.

At the moment, there are substantial differences among Member States regarding the personal documents that are permissible for the identification of customers (e.g. current invoice from customers' utility companies, drivers licence, etc.), as well as regarding the transmission of the identifying documents at the time of the conclusion of the contract in the case of non-present persons (e.g. photocopies of identity cards). Ideally, the provision of the required identity documents should also be permissible online, specifically for contracts concluded with non-present persons, in order to fulfil the requirements of the internet-based and other innovative payment procedures.

Furthermore, the access requirements of commercial registers should be coordinated with the requirements for the prevention of ML; in particular, access to the representative bodies or individuals of legal persons should be accessible. Pan-European access to commercial registers is also desirable.

EPIF also supports the Commission's suggestion of FIs being permitted to fulfil their CDD duties after the establishment of a business relationship, instead of at the establishment of a business relationship, if the contractual partner does not receive any payments until then or other assets are not dispensed.

Enhanced CDD

EPIF welcomes a more flexible approach to EDD, commensurate to the risks that are being addressed. On this note, we welcome the application of a risk-based approach with respect to new payment methods (e.g. electronic and mobile payments), in particular only applying EDD to non-face-to-face situations when the relevant factors justify it (customer risk, geographical risk and product, service or delivery channel risk factors, monetary value).

We would also advise against a blanket categorisation of certain payment services as high-risk which in all cases requires EDD (as made in certain jurisdiction – e.g. the categorisation of money remittance as a high risk activity by the Spanish AML Act[2]). On the contrary, we believe a RBA should approach to the categorisation of services in general, taking into account the nature of the service but also the geographical areas involved, the delivery channels/methods, the monetary values, etc.

SDD

We support the adoption of the FATF's recommendations regarding SDD, which allow FIs to apply SDD measures "where the risks of money laundering or terrorist financing are lower…and provided there has been an adequate analysis of the risk by the country or by the financial institution."

In relation to the potential options, we believe the new AMLD should indeed set out the specific risk factors that need to be taken into consideration when determining if SDD is appropriate. Such an enumeration should in no event be conclusive. We would also welcome the adoption of further guidance on risk factors and the specification of minimum measures that should be taken in SDD situations. Thus, the simplification of the application of the SDD – as opposed to the regular CDD – is desirable.

2.5 Politically Exposed Persons (PEPs)

EPIF would like to point out practical difficulties in the implementation of payment institutions' enhanced CDD obligations pertaining to payments transactions for Politically Exposed Persons (PEPs), due to the lack of public databases. Furthermore privately generated databases add a substantial cost for payment institutions.

In relation to the topics under consideration by the EC, we would support the application of a risk-based approach to PEPs. Furthermore, we suggest the possibility of self-certification by means of a declaration from the customer, is envisaged as a means of identifying PEPs, at products that have a low risk of being used by PEPs to launder the proceeds of criminal activity (e.g. money remittance).

2.6 Beneficial ownership

2.6.1 The 25% beneficial ownership threshold

EPIF does not see any issues with maintaining the current threshold at 25% of beneficial ownership.

2.6.2 Beneficial ownership – implementation issues

EPIF welcomes the adoption of a harmonized approach to determining the threshold by Member States.

2.6.3 Availability of beneficial ownership information

[2] Article 11, Act 10/2010, of 28 April, on the prevention of money laundering and terrorist financing.

EPIF would welcome the availability of public information in order to help FIs deal with beneficial owners. In EPIF's view, Member States should be mandated to expand the information included in their national commercial registers to include data of beneficial owners. Moreover, it would be desirable to make the information on such registers available at a pan-European level.

2.6.4 Further considerations

EPIF would welcome the clarification of the definition of the beneficial owner as well as the adoption of measures to promote the transparency of the ownership of legal persons.

2.7 Reporting obligations

EPIF expressly supports the introduction of the following requirements in the AMLD, with regards to reporting obligations:

- Reinforce the existing provisions requiring FIUs to provide timely generic feedback to reporting entities;
- Introducing an explicit requirement that reporting be done to the host country FIU;

2.8 FIUs

EPIF does not have any comment with regards to this section, other than reiterating its support for measures that allow for a more effective combating of ML/TF.

2.9 Group Compliance

EPIF supports the possibility that groups of companies operating on a cross-border basis can have group-wide programmes against ML/TF, including rules for intra-group sharing of information. EPIF also believes that, in order for group-wide programmes to be effective, a high level of harmonization of rules at a European level should be achieved, as advocated before in this document.

2.10 Supervision

With regards to the measures the EC is considering in the area of supervision, EPIF agrees that better coordination and clarity among the different legislative instruments (PSD, AMLD, E-Money Directive) is needed. In particular, EPIF would like to comment as follows:

- Allocation of supervisory powers between home and host authorities. EPIF believes it would be necessary that the AMLD clarifies the host and home member states' supervisory powers with regards to AML.

- Preventative and enforcement powers of host state authorities. On this area, and following the CSWP, EPIF understands that PIs operating on a cross-border basis through branch establishments or agents are subject to the host, as opposed to the home, member state's AML rules and that this view will be reflected in the new AMLD (for PIs operating on a purely cross-border services basis and not though a branch establishment or agent, the converse would be true). Moreover, and in relation to PIs operating on a cross-border basis through branch offices or through agents, EPIF understands that the jurisdiction of the host member state over that PI regarding AML matters (but excluding rules of a prudential regulation nature) shall be confirmed. Notwithstanding the foregoing, EPIF believes that the host member state should not restrict the number of agents that a PI wants to on-board for reasons other than the possibility that the appointment of a particular agent, as opposed to a category or number of agents, could increase the risk of ML/TF. Such restriction could not be justified by a host state supervisor's dislike of a category of agent or for budgetary reasons, since doing so would attempt against the letter of the PSD (Art. 17, paragraph 6).

- The ability, subject to the condition of proportionality, of host state authorities to impose an obligation for a super-agent/central contact point for agents, or to have a compliance officer on their territory. In connection with these suggestions, we believe that introducing a requirement to have in-country compliance officers for all the host member states where a FI operates is not a guarantee of having an effective AML/TF program. While we recognize the importance of being able to report SARs and liaise with supervisors in their own language and following the host member state's AML rules, we also believe in the benefits that setting-up multi-jurisdictional AML/Compliance hubs can have. This allows for compliance officers working on different countries to share trends, patterns and information (in observance of group compliance rules), allowing for a more effective prevention of ML/TF.

2.11 Self-Regulatory Bodies

This section does not apply to the payments sector and hence EPIF will not comment on it.

2.12 Third Country Equivalence

In relation to this topic, EPIF believes that a pan-European approach to granting "equivalent" status to third-countries would be beneficial. Hence, we believe that the publication of a pan-European list of countries enjoying "equivalent" status would be beneficial.

2.13 Administrative Sanctions for Non Compliance with the Directive

EPIF supports the AMLD considering a set of minimum common rules to be applied to key aspects of the sanctioning regime

2.14 Protection of Personal Data (DP)

EPIF would welcome a better alignment between the AMLD and the Data Protection Directive, especially with respect to the collection and management of information on customers for the purpose of customer identification and transaction monitoring.

In addition, a number of Member States have adopted a restrictive approach to the implementation of the Data Protection Directive which renders compliance with AML obligations (and related obligations under financial and economic sanctions regimes) difficult as well as poses cross-border compliance challenges for payment institutions. Therefore, we would welcome greater harmonization in the sense of flexible rules being agreed that allow FIs to perform their tasks and obligations in relation to the prevention of ML in an unhindered way.

With regards to the specification of data-retention periods at a European level, EPIF supports this recommendation.

3. COMMISSION'S ASSESSMENT OF THE DIRECTIVE'S TREATMENT OF LAWYERS AND OTHER INDEPENDENT LEGAL PROFESSIONALS

This section does not apply to the payments sector and hence EPIF will not comment on it.

4. CONCLUSION

As it transpires from several of the comments made in this document, EPIF supports greater harmonization of the AML/TF rules applicable at a European level. The existing regime set forth by the AMLD is not based on the maximum harmonization principle, but rather on the minimum harmonization one.

This results in Member States having the chance of implementing different rules for different subject matters, which often results in an uncoordinated and diverging application of the AMLD.

PIs intending to operate on a pan-European basis have to deal with different AML regimes, causing them to considerably increase the resources needed for the application of AML rules in each country (included but not limited to software and systems development, hiring and training staff, obtaining local legal advice). This has a direct impact on the cost of the services they provide and partially offset the advantages of being able to operate at a pan-European level under a single platform, as permitted under the PSD.

Considering that AML is a fundamental part of the regulatory regime applicable to PIs operating in the EU, we recommend a change of the legislative approach of the AML regulation, following instead an approach similar to the one followed in the adoption of the PSD. This would entail a maximum harmonisation regime, included but not limited to the elimination of Art. 5 of the AMLD.

ANNEX: CROSS-BORDER WIRE TRANSFERS

In EPIF's view, it would appear that the requirement to request the beneficiary's account number (or a unique reference number for products/services not entailing the use of an account, like occasional money remittance) would be proportionate and straightforward to meet.

However, for certain transactions (e.g. transfers below €1,000), the obligation to obtain complete information on the payer (CIP) may seem too cumbersome and disproportionate.

ABOUT US

EPIF represents the interests of the payment institution sector at European level. Its members represent the broad range of business models covered by the Payment Services Directive (PSD) and include companies and national associations from every part of Europe. EPIF seeks to represent the voice of this industry with EU institutions, policy makers and stakeholders. It aims to play a constructive role in shaping and developing market conditions for payments in a modern and constantly evolving environment.