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WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Financial Services Attachés Working Party on Financial Services and the Banking Union (AML)
N° Cion doc.:	10286/21 + ADD 1
Subject:	AMLR: Commission services non-papers on article 17 and on FATF's revised Recommendation 25

Article 17				
340	Article 17 Inability to comply with the requirement to apply customer due diligence measures	Article 17 Inability to comply with the requirement to apply customer due diligence measures	Article 17 Inability to comply with the requirement to apply customer due diligence measures	Article 17 Inability to comply with the requirement to apply customer due diligence measures Text Origin: Commission Proposal
Article 17(1), first subparagraph				
341	1. Where an obliged entity is unable to comply with the customer due diligence measures laid down in Article 16(1), it shall refrain from carrying out a transaction or establishing a business relationship, and shall terminate the business relationship and consider filing a suspicious transaction report to the FIU in relation to the customer in accordance with Article 50.	1. Where an obliged entity is unable to comply with the customer due diligence measures laid down in Article 16(1), it shall refrain from carrying out a transaction or establishing a business relationship, and shall terminate the business relationship ***or adopt alternative measures instead of and having equivalent effect to terminating business relationship*** and consider filing a suspicious transaction report to the FIU in relation to the customer in accordance with Article 50.	1. Where an obliged entity is unable to comply with the customer due diligence measures laid down in Article 16(1), it shall ~~*refrain from carrying*~~***not carry*** out a transaction or ~~*establishing*~~***establish*** a business relationship, and shall terminate the business relationship and consider filing a suspicious transaction report to the FIU in relation to the customer in accordance with Article 50. ***Where there is a suspicion of money laundering or terrorist financing, the obliged entity shall file a suspicious transaction report to the FIU.***	1. ***[***Where an obliged entity is unable to comply with the customer due diligence measures laid down in Article 16(1), it shall refrain from carrying out a transaction or establishing a business relationship, and shall terminate the business relationship and consider filing a suspicious transaction report to the FIU in relation to the customer in accordance with Article 50. ***]*** Com to propose Subpara on CONS addition with regard to Insurance sector

				Com to propose a drat to cover EP amendment on STR under Art 50 CONS to revert EC to revert Text Origin: Commission Proposal TM9 29082023
Article 17(1), second subparagraph				
342	The first subparagraph shall not apply to notaries, lawyers and other independent legal professionals, auditors, external accountants and tax advisors, to the strict extent that those persons ascertain the legal position of their client, or perform the task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings.	The first subparagraph shall not apply to notaries, lawyers and other independent legal professionals, auditors, external accountants and tax advisors, to the strict extent that those persons ascertain the legal position of their client, or perform the task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings.	~~*The first subparagraph*~~***Paragraph 1*** shall not apply to notaries, lawyers and other independent legal professionals, auditors, external accountants and tax advisors, to the strict extent that those persons ~~*ascertain the legal position of their client, or perform the task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings.*~~**:**	COM to provide drafting suggestions for lines 342-342c EC to revert TM10 30082023 COM suggestion: we propose to keep the first subpara (line 342) unaltered from our initial proposal and to add a subparagraph that replicates recital 9 to the enabling provisions, with an addition **qualifying the concept of knowledge or purpose, which can also be derived from objective factual circumstances**~~regarding factual indications of criminal intent to be~~

				~~combined with the explicit declaration ("know") by the client that advice is sought for criminal purposes for both the enacting provision and the recital, as proposed below~~. We advise against any reference to the term 'suspicion' or 'well grounded suspicion' as the terminology reflects the threshold applied to the reporting of suspicions to the FIU. Such a reporting does not require a high level of confidence that a crime is being committed, as it is primarily the task of the FIU to confirm whether a suspicion exists or not. Here, however, as the measure lifts the right to lawyer-client confidentiality, such a threshold would be too low as it would essentially result in the lawyer giving up the legal privilege every time they cannot exclude that the advice is sought for a criminal act, which risks fundamentally jeopardising the trust relationship between the lawyer and the

				client that forms the basis of the legal privilege. *Article 17(1), second (line 342) and third subparagraph (new line)* The first subparagraph shall not apply to notaries, lawyers and other independent legal professionals, auditors, external accountants and tax advisors, to the strict extent that those persons ascertain the legal position of their client, or perform the task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings. **However, the exemption set out in the second subparagraph shall not apply when the obliged entities referred therein: (a) take part in money laundering, its predicate offences or terrorist financing;**

				(b) provide legal advice for the purposes of money laundering, its predicate offences or terrorist financing, or **(c) know that the client is seeking legal advice for the purposes of money laundering, its predicate offences or terrorist financing. Knowledge or purpose may be inferred from objective factual circumstances.** Recital 9 Independent legal professionals should be subject to this Regulation when participating in financial or corporate transactions, including when providing tax advice, where there is the risk of the services provided by those legal professionals being misused for the purpose of laundering the proceeds of criminal activity or for the purpose of terrorist financing. There should, however, be exemptions from any obligation to report

				information obtained before, during or after judicial proceedings, or in the course of ascertaining the legal position of a client, which should be covered by the legal privilege. Therefore, legal advice should remain subject to the obligation of professional secrecy, except where the legal professional is taking part in money laundering or terrorist financing, the legal advice is provided for the purposes of money laundering or terrorist financing, or where the legal professional knows that the client is seeking legal advice for the purposes of money laundering or terrorist financing. **Knowledge and purpose can be inferred from objective, factual circumstances. As legal advice may already be sought at the stage of perpetrating the proceeds-generating criminal offence, it is important that cases excluded from the legal privilege extend to situations where the advice**

				is provided in the context of the predicate offences. Legal advice sought in relation to ongoing judicial proceedings should not be deemed to constitute legal advice for the purposes of money laundering of terrorist financing.
Article 17(1), second subparagraph, point (a)				
342a			***(a) ascertain the legal position of their client, except where the legal advice, is provided for the purpose of money laundering, or terrorist financing, or where those persons know or have a have a well-grounded suspicion that the client is seeking legal advice for the purposes of money laundering or terrorist financing or for the purposes of applying for residence rights or citizenship through investment schemes, and the advice is not sought in relation to judicial proceedings; or***	EC to revert TM10 30082023 See explanations below on concerns regarding the reference to CBI/RBI procedures

Article 17(1), second subparagraph, point (b)				
342b			***(b) perform the task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings.***	EC to revert TM10 30082023
Article 17(1a)				
342c		***Member States may set out in their national law that the exemption set forth in this subparagraph does not apply if the obliged professional has positive knowledge that the customer is seeking legal advice for the purposes of money laundering or terrorist financing.***		EC to revert TM10 30082023 See comments below on concerns regarding this approach

The above has consequences also for other articles, such as Articles 16a [new changes in **orange**] and 51 AMLR:

Article 16a

1. Obliged entities shall report to the entity in charge of the central registers referred to in Article 10 of Directive [please insert reference – proposal for 6th Anti-Money Laundering Directive - COM/2021/423 final] any discrepancies they find between the information available in the central registers and the information they collect pursuant to Article [18(5) and Article 16(1)(ba)].

The discrepancies referred to in the first subparagraph shall be reported without undue delay and in any case no later than 14 calendar days after detecting the discrepancy. That report shall be accompanied by the information obtained by the obliged entity indicating the discrepancy and whom the obliged entity considers the beneficial owner(s) and, where applicable, the nominee shareholders and nominee directors to be and why.

2. By way of derogation from paragraph 1, obliged entities may refrain from notifying the register and request additional information from the customers where the discrepancies identified:
(a) are limited to typographical errors, different ways of transliteration, or minor inaccuracies that do not affect the identification of the beneficial owners or their position; or
(b) consist of outdated data, but the beneficial owners are known to the obliged entity from another reliable source and ~~that~~ there are no grounds for suspicion that there is an intention to conceal any information, and
(c) do not concern cases of higher risk to which measures under Section 4 of this Chapter apply.

Where the obliged entity concludes that the beneficial ownership information in the central register is incorrect, obliged entities shall invite the customers to report the correct information to the register pursuant to Article [xx] without undue delay, and in any case within 14 calendar days .

3. Where the customer has not reported the correct information within the timeframes referred to in paragraph 2, second subparagraph , the obliged entity shall report the discrepancy to the register following the procedure set out in paragraph 1, second subparagraph. .

3. This Article shall not apply to notaries, lawyers and other independent legal professionals, auditors, external accountants and tax advisors in relation to information they receive from, or obtain on, one of their clients, in the course of ascertaining the legal position of their client, or performing their task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings.

However, the requirements of this Article shall apply when the obliged entities referred to in the first subparagraph provide legal advice in any of the situations covered by Article ~~[~~17(1), third ~~second~~ subparagraph~~]~~.

Article 51

Specific provisions for reporting of suspicious transactions by certain categories of obliged entities

[…]

2. Notaries, lawyers and other independent legal professionals, auditors, external accountants and tax advisors shall be exempted from the requirements laid down in Article 50(1) to the extent that such exemption relates to information that they receive from, or obtain on, one of their clients, in the course of ascertaining the legal position of their client, or performing their task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings.

However, the exemption set out in the first subparagraph shall not apply when the obliged entities referred therein:
(a) take part in money laundering, its predicate offences or terrorist financing;
(b) provide legal advice for the purposes of money laundering, its predicate offences or terrorist financing, or
(c) know that the client is seeking legal advice for the purposes of money laundering, its predicate offences or terrorist financing. Knowledge or purpose may be inferred from objective factual circumstances.

COM comments on the co-legislators' respective positions

As indicated in the TM of 30 August, we have concerns regarding the amendment introduced by the Council (line 342c) and the proposal by the EP to consider that advice sought in relation to the obtention of citizenship- or residence-by-investment be scoped out of the legal privilege.

Ad Council amendment (line 342c): the amendment takes over part of the instances where the legal privilege is excluded that are quoted in recital (9) of the Commission proposal. These instances are already part of EU law as they are listed under recital 9 of Directive (EU) 2015/849, currently in force and were first introduced in recital 17 of Directive 2001/97 when the scope of obliged entities was extended to non-financial sector operators. These instances have been analysed by the EU Court of Justice in Case C-305/05 *Ordre des barreaux*, without being put into question (see § 24). By delegating it to national law to define whether these instances fall under the legal privilege or not, the Council questions the approach taken by the EU legislator since legal professions have been subject to AML/CFT obligations and runs contrary to the harmonisation objective of this reform. We consider that the different scope accorded to the legal privilege across Member States, and the lack of harmonisation of this concept at EU level, is no argument to delegate the decision on whether to consider these instances as outside the scope of the legal privilege, as indeed they have been part of the Union legal framework for more than two decades now. Incidentally, we note that the fact that these instances correspond to situations of lawyer participation in a crime is not problematic from a legal perspective. This matter has indeed already been addressed by the ECHR in Case 12323/11 *Michaud v France*, where the ECHR held that the fact that any lawyer found to be involved in a money-laundering operation would in any event be liable to criminal proceedings "does not prevent a State or a group of States from combining the repressive provisions they have adopted with a specifically preventive mechanism." (see § 124).

We understand that the wish of the co-legislators is to see a codification – to the extent possible – of the confines of the legal privilege. In this sense, in our view the approach taken by the European Parliament to integrate the instances exempted from the legal privilege as set out in recital (9), and to move them to the enacting provisions, is a more consistent choice with the intent of the reform and follows the common approach to these cases that the EU legislator had decided to take already back in 2001.

Ad EP amendment (line 342a) regarding CBI/RBI: we already expressed the Commission's position in relation to citizenship-by-investment. This view notwithstanding, we consider that the amendment introduces a carve-out from the legal privilege that constitutes a serious interference with the right to a fair trial enshrined in Article 47 of the Charter. Indeed, this carve-out would systematically remove the legal privilege from any advice that lawyers provide to clients in relation to CBI/RBI, except in relation to judicial proceedings. The package already contains measures to mitigate risks in this area, including by making operators assisting in the obtention of RBI obliged entities subject to AML/CFT requirements. When a lawyer ascertains the client's position in relation to CBI/RBI, however:

(i) there is no indication that the lawyer is acting beyond the scope of its role in the exercise of the right of defence, so it is unclear what additional risks this proposal would mitigate that less intrusive measures could not, and
(ii) any assistance provided to such clients to perpetrate a crime would anyway be captured by the instances enumerated in recital (9).

We therefore consider that it is unlikely that such an interference would – if challenged before the Court – be considered justified or proportionate.

Finally, during the TM the Council referred to some Member States noting the relevance for the AML/CFT package of the recent ECJ Case C- 694/20 *Orde van Vlaamse Balies*. The case in question is certainly of relevance in terms of the recollection of the principle that any interference with a fundamental right, including the protection of privacy of communications between a client and a lawyer (Article 7 of the Charter) should be legal, justified and proportionate. However, this grid to assess the compatibility of an interference with EU fundamental rights is the one traditionally used by the Court, and no different from the one it adopted in Case C-305/05 presented above, which dealt specifically with AML/CFT measures discussed in this package, where the Court reached the conclusion that the interference with fundamental rights was justified and proportionate.

At the same time, we would like to note that the Court invalidated the provision in the DAC6 on the ground that the notification imposed on the lawyer could contribute to the objective of the act but was not strictly necessary to attain that objective and justify an interference with Article 7 of the Charter since:

(i) other intermediaries could file the same report - which is not the case for the AML/CFT framework where filing of STRs is done in relation to the transaction(s) requested by the client, which is specific to that obliged entity;
(ii) there is no risk on reliance on other intermediaries – which again given the explanation under (i) does not apply to the AML/CFT framework, also in light of the strict rules prohibiting tipping-off
(iii) the client himself could file the report – this is not conceivable under the AML/CFT framework whose primary objective is to prevent and detect crime, not to ensure the administration and enforcement of taxes, and where there is no expectation of transparency on the side of a client wishing to commit money laundering or terrorist financing (see §44 of the Advocate General's opinion stressing this difference in contexts);

(iv) disclosure of the identity of the lawyer would not assist tax authorities in the performance of their tasks – this aspect finds no correspondence in the reporting mechanism for STRs under the AML/CFT framework.

The compatibility of AML/CFT measures with the confidentiality of lawyer-client communication was already assessed by the ECHR in *Michaud*, where the Court found the interference with Article 8 ECHR proportionate and confirmed the ECJ's position in *Ordre des barreaux* that the legal professional privilege is not absolute (see these aspects also quoted in the Advocate General's opinion in *Orde van Vlaamse Balies*).

As regards Article 47 of the Charter, of relevance is the confirmation by the Court of the position it took in *Ordre des barreaux* that the exercise of the right of defence is linked to judicial proceedings and that, when the lawyer is not acting as the defence counsel for his or her client in a dispute, the mere fact that the lawyer's advice or the subject of their consultation may give rise to litigation at a later stage does not mean that the lawyer acted for the purposes and in the interests of the rights of defence of their clients, so that disclosures in such cases could not thus constitute an interference with Article 47 of the Charter.

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Changes needed to substantive requirements for express trusts and similar legal arrangements following FATF's adoption of revised Recommendation 25 and its interpretative note

Introduction

Following a revision launched in February 2021, in February 2023 FATF updated its international standards on combating money laundering and the financing of terrorism & proliferation – "the FATF Recommendations"[1], including Recommendation 25 and its Interpretative Note (R25) on transparency and beneficial ownership of legal arrangements and a revised glossary. This paper suggests targeted changes to the relevant AMLR and AMLD provisions as initially proposed by the Commission proposals[2], to ensure that they are in line with the revised R25.

Change 1 – Beneficial owner of a trust

The revised R25 and the respective explanations in the glossary emphasise the relevance of the objects of a power for the identification of the beneficial owners. This concept applies in relation to express trusts of a discretionary nature, i.e. where the trustee retains discretion over to whom they distribute the assets held in the trust, or their benefits. Unlike in a "fixed" express trust, where the beneficiaries are pre-determined or can be identified by a common feature (what the proposal labels as the "class of beneficiaries"), in a discretionary trust the objects of a power may never become beneficiaries due to the discretion enjoyed by the trustee. Objects of a power are the individuals or entities that the trustee can select from when exercising their discretion in the allocation of trust assets or benefits. Similarly to the situation of a class of beneficiaries, R25 does not recommend countries to ensure that the full set of beneficial ownership information on the individuals and entities that are objects of a power be collected. However, completely excluding this situation from the requirement to hold beneficial ownership information would mean that in relation to discretionary trusts there would be no information collected until the trustee exercises their discretion. This would not be consistent with the transparency approach taken to fixed express trusts,[3] where the class of beneficiary is subject to disclosure before the individual beneficiaries are identified. In order to ensure transparency of discretionary trusts, it is furthermore necessary to ensure that information is also collected on default takers, i.e. the individuals who receive the assets or benefits should the trustee fail to exercise their discretion.

[1] FATF Recommendations 2012.pdf.coredownload.inline.pdf (fatf-gafi.org)
[2] COM/2021/420 final and COM/2021/423 final
[3] See Article 43a oft he Council General Approach to AMLR.

To avoid a disproportionate processing of personal data, specific provisions could be added regarding discretionary trusts and the extent of information to be collected for the objects of a power and default takers. One way to approach this could be to have a dedicated article for discretionary trusts along the lines of Article 43a in the Council General Approach to AMLR:

Article 43b

Identification of objects of a power and default takers in discretionary trusts

In the case of discretionary trusts, where beneficiaries have yet to be selected, the objects of a power and default takers shall be identified. Beneficiaries among the objects of a power shall be beneficial owner(s) as soon as they are selected. Default takers shall be beneficial owners when the trustees fail to exercise their discretion.

Article 43a of the Council General Approach would need to be revised to exclude discretionary trusts:

Article 43a

Identification of a class of beneficiaries

1. In case of legal entities under Article 42a or**, with the exception of discretionary trusts,** express trusts and similar legal arrangements under Article 43, where beneficiaries have yet to be determined, the class of beneficiaries and its general characteristics shall be identified. Beneficiaries within the class shall be beneficial owner(s) as soon as they are identified or designated.

A new point (f) could be added to Article 44 of the Council General Approach to AMLR to explicit what information needs to be collected on the objects of a power/default takers:

(f) where objects of a power and default takers are identified under Article 43b:

(i) for natural persons, their name(s) and surname(s);

(ii) for legal entities and legal arrangements, their names;

(iii) for a class, its description.

This approach would also require expanding the exemption from the beneficial owners identification under Article 43(1) introduced by Council in relation to beneficiaries as follows:

Article 43

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

1. In case of express trusts, the beneficial owners shall be all the following natural persons:

(a) the settlor(s);

(b) the trustee(s);

(c) the protector(s), if any;

(d) the beneficiaries, unless Article**s** 43a or **43b ~~applies~~ apply**;

(e) any other natural person exercising ultimate control over the express trust by means of direct or indirect ownership or by other means, including through a chain of control or ownership.

Definitions could be added to Article 2 after the definition of 'express trust' to facilitate the application of the requirement:

(22b) 'objects of a power' means the natural or legal persons or class of natural or legal persons among whom trustees may select the beneficiaries in a discretionary trusts;

(22c) 'default taker' means the natural or legal persons or class of natural or legal persons who are the beneficiaries of a discretionary trusts should the trustees fail to exercise their discretion;

Finally, a recital could be introduced to explain the extension of requirements to cover objects of a power and default takers:

(68a) Discretionary trusts allow their trustee(s) discretion on the allocation of the trust assets or benefits derived from them. As such, no beneficiaries or class of beneficiaries is determined from the outset, but rather a pool of persons from among which the trustees can choose the beneficiaries, or persons who will become beneficiaries should the trustees not exercise their discretion. Such discretion may be misused and allow for the obfuscation of beneficial owners should a minimum level of transparency not be imposed for discretionary trusts too, as transparency on beneficiaries would only be achieved upon the exercise of the trustees' discretion. Therefore, in order to ensure an adequate and consistent transparency for all types of legal arrangements, it is important that in the case of discretionary trusts information is also collected on the objects of a trustee's power, and on the default takers who would receive the assets or benefits should the trustees fail to exercise their discretion.

Change 2 – Identification of legal arrangements

Paragraph 2 of the revised Interpretative Note to Recommendation 25 recommends that countries with express trusts and other similar legal arrangements governed under their law should (i) have mechanisms that identify the different types, forms and basic features of express trusts and/or similar legal arrangements; (ii) identify and describe the processes for setting up those legal arrangements and for obtaining basic (see change 4) and beneficial ownership information on the legal arrangement and (iii) make the information under (i) and (ii) publicly available. In addition, paragraph 12 of that Recommendation recommends that countries designate and make publicly known the agency(ies) responsible for responding to all international requests for beneficial ownership information.

The above recommendations can be met by expanding on the notification procedure set out in Article 43(2) and 43(3) AMLR. As regards the recommendation under paragraph 12, this would imply only making the authority in charge of the register known, while Member States retain the competence for relations with counterparts in third countries, which fall outside the scope of the AML/CFT framework:

Article 43

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

[…]

2.In the case of legal entities and legal arrangements similar to express trusts, the beneficial owners shall be the natural persons holding equivalent or similar positions to those referred to under paragraph 1.

Member States shall notify to the Commission by [3 months from the date of application of this Regulation] a list of legal arrangements and of legal entities, similar to express trusts, where the beneficial owner(s) is identified in accordance with paragraph 1.

The notification referred to in the second subparagraph shall be accompanied by a description of:

(a) their form and basic features;

(b) the process through which they can be set up;

(c) the process for accessing basic and beneficial ownership information on those legal entities and legal arrangements;

(d) the websites at which the registers referred to under Article 10 of Directive [*please insert reference – proposal for 6th Anti-Money Laundering Directive - COM/2021/423 final*] where information on beneficial owners of those legal entities and legal arrangements can be consulted and the contact detail of the Authorities in charge of those registers.

3.The Commission is empowered to adopt, by means of an implementing act, a list of legal arrangements and legal entities governed under the laws of Member States which should be subject to the same beneficial ownership transparency requirements as express trusts**, accompanied by the information referred to in the previous paragraph, third subparagraph**. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 61(2) of this Regulation.

Change 3 – Scope of the risk assessment

Both revised interpretive notes to recommendations 24 and 25 require an assessment of the risks associated with foreign vehicles, whether legal entities or legal arrangements. The need to understand the exposure to foreign structures was already integrated in the original COM proposal. In addition, in relation to legal arrangements, paragraph 3 of the revised interpretive note to recommendation 25 specifies the scope of the risk assessment as covering both arrangements that are governed under the law of a country and for which the trustee (or equivalent) resides in its territory or which are administered from the territory of that country. It is proposed to slightly amend Article 8 AMLD in relation to this second change, and to introduce new recitals 12a and 12b in AMLD to explain the scope of the risk assessment.

Article 8

National risk assessment

[…]

4.Each Member State shall use the national risk assessment to:

[…]

(c) assess the risks of money laundering and terrorist financing associated with each type of legal person **established ~~and legal arrangement~~** in their territory **and each type of legal arrangement which is governed under their law, or which is administered in their territory or whose trustees or persons holding equivalent positions in similar legal arrangements reside in their territory,** and have an understanding of the exposure to risks deriving from foreign legal persons and legal arrangements;

[…]

(12a) Legal entities and legal arrangements may provide a means for criminals to hide behind a veil of legitimacy and may thus be misused to launder illicit proceeds, whether domestically or across borders. To mitigate these risks, it is important that Member States understand the risks associated with the legal entities and legal arrangements that are in their territory, whether because the entities are established there, or because trustees of express trusts or persons holding equivalent positions in similar legal arrangements are established or reside there, or they administer the legal arrangement from there. In the case of legal arrangements, given the settlor's right as to the choice of the law that governs the arrangement, it is equally important that Member States have an understanding of the risks associated with the legal arrangements that can be created under their law, irrespective of whether their laws explicitly regulate them, or their creation finds its source in the freedom of contract of the parties and is recognised by national Courts.

(12b) Given the integrated nature of the international financial system and openness of the Union economy, risks associated with legal entities and legal arrangements expand beyond those in the Union territory. It is thus important that the Union and its Member States have an understanding of the exposure to risks emanating from foreign legal entities and legal arrangements. Such an assessment of risks does not need to address each individual foreign legal entity or legal arrangement that has a sufficient link with the Union, whether by virtue of it acquiring real estate or being awarded public procurements, or because of transactions with obliged entities that allow them to access the Union's financial system and economy. The risk assessment should however enable the Union and its Member States to understand what type of foreign legal entities and legal arrangements enjoy such an access to the Union's financial system and economy, and what types of risks are associated with that access.

Given that the mitigating measures regarding non-EU vehicles are introduced in the AML Regulation (Article 48), it is proposed to slightly modify its accompanying recital 75 to explain that risk mitigation applies to entities having a sufficient link with the Union. The recital should also reflect the element of the public procurement award introduced by R24 after the Commission's proposal and which is integrated in the Council's General Approach to AMLR. In addition, it is proposed to modify both Article 48 and recital 75 AMLR to address the need, explained above, to expand the concept of "trusts in the territory of a country" to also include trustee (or equivalent) residence (this element being already integrated in the Council's General Approach to the AMLR):

(75) The risks posed by foreign corporate entities and legal arrangements, which are misused to channel proceeds of funds into the Union's financial system, need to be mitigated. Since beneficial ownership standards in place in third countries might not be sufficient to allow for the same level of transparency and timely availability of beneficial ownership information as in the Union, there is a need to ensure adequate means to identify the beneficial owners of foreign corporate entities or legal arrangements in specific circumstances ***where those entities have a sufficient link with the Union's financial system and economy****. Therefore, legal entities incorporated outside the Union and express trusts or similar legal arrangements administered outside the Union* ***or whose trustees or persons***

holding equivalent positions in similar legal arrangements are established or reside outside the Union *should be required to disclose their beneficial owners whenever they operate in the Union by entering into a business relationship with a Union's obliged entity****, by being awarded a public procurement in the Union*** *or by acquiring real estate in the Union.*

Article 48

Foreign legal entities and arrangements

1.Beneficial ownership information of legal entities incorporated outside the Union or of express trusts or similar legal arrangements administered outside the Union **or whose trustee(s) or persons holding equivalent positions in similar legal arrangements to an express trust are established or reside outside the Union** shall be held in the central register referred to in Article 10 of Directive [please insert reference – proposal for 6th Anti-Money Laundering Directive - COM/2021/423 final] set up by the Member State where such entities or trustees of express trusts or persons holding equivalent positions in similar legal arrangements:

[…]

Change 4 – Trustees obligations

Art 46 AMLR

The revised recommendation 25 and its interpretive note expands substantially the amount of information that should be held by trustees (or equivalent). This includes not only beneficial ownership information, but also:

- basic information on the trust, encompassing:
  - the identifier of the legal arrangement (e.g. the name, the unique identifier such as a tax identification number or equivalent, where this exists),
  - the trust deed (or equivalent) and purposes, if any, and
  - the residence of the trustee/equivalent or equivalent or of the place from where the legal arrangement is administered
- basic and beneficial ownership information on the legal entities and legal arrangements that are parties to the trust
- information on agents of the trust and service providers to it.

Such information must also be adequate, accurate and current, and regularly verified. Whilst the inclusion of the trust deed and purpose implicitly requires the trustee to collect information on the assets held in the trust or managed to it, we suggest making the requirement to collect this information as part of the basic information explicit to ensure legal clarity.

As explained above, this obligation is incumbent of trustees (or equivalent) residing in a country or administering the trust from that country. This last change could already be anticipated in the works that led to the Council's General Approach to AMLR, and therefore it is proposed to use that version as a basis for adding the new requirements placed upon the trustee/equivalent, without entering into issues such as the timeframe for updating of information, which is left in square brackets. The below modifications are proposed to Article 46:

Article 46

Trustees obligations

1. In case of any legal arrangement administered in a Member State or whose trustee or the person holding an equivalent position in a similar legal arrangement is established or resides in a Member State, trustees and persons holding an equivalent position in a similar legal arrangement shall obtain and hold **the following information** ~~**adequate, accurate and current beneficial ownership information as defined under Article 44**~~ regarding the legal arrangement**:**

(a) basic information on the legal arrangement;

(b) adequate, accurate and current beneficial ownership information as provided under Article 44;

(c) where legal entities or legal arrangements are parties to the trust, basic and beneficial ownership information on those legal entities and legal arrangements;

(d) information on any agent authorised to act on behalf of the legal arrangement or to take any action in relation to it, and on the obliged entities with which the trustee or person holding an equivalent position in a similar legal arrangement enter into a business relationship on behalf of the legal arrangement.

The ~~**Such**~~ information **referred to in the first subparagraph** shall be maintained for five years after the**ir** involvement of the trustee **or the person holding an equivalent position** with the express trust or similar legal arrangement ceases to exist.

1b. Beneficial ownership information **and basic information on the legal arrangement** shall be obtained and reported to the register referred to in Article 10 of Directive [please insert reference – proposal for 6th Anti-Money Laundering Directive – COM/2021/423 final] by the trustee or the person holding an equivalent position in a similar legal arrangement without undue delay after the creation of the express trust or similar legal arrangements. Without undue delay after any change of the information, and in any case no later than **[**28**]** calendar days following ~~**any**~~ **the** change of the beneficial owner**ship or** of **the basic information on** the **legal arrangement** ~~**trust**~~, the trustee or the person holding an equivalent position in a similar legal arrangement shall ensure that the updated information is reported to the register.

The trustee or the person holding an equivalent position **in a similar legal arrangement** shall regularly verify that **the information** they hold ~~**updated information**~~ over the ~~**beneficial ownership of the**~~ legal arrangement **pursuant to paragraph 1, first subparagraph is updated**. ~~**As a minimum, s**~~**S**uch verification shall be performed **at least** annually**,** whether as a self-standing process or as part of other periodical processes.

2. The persons referred to in paragraph 1 shall disclose their status and provide the information on the beneficial owner(s) **and on the assets of the legal arrangements that are to be managed in the context of a business relationship or occasional transaction** to obliged entities when the obliged entities are taking customer due diligence measures in accordance with Chapter III.

3. The beneficial owner(s) of a legal arrangement other than the trustee or person holding an equivalent position, **its agents and the obliged entities servicing the legal arrangement** shall provide the trustee or person holding an equivalent position in a similar legal arrangement with all the information and documentation necessary for the trustee or person holding an equivalent position to comply with the requirements of this Chapter. The same cooperation shall be provided by those

persons and, in the case of legal arrangements, their trustees, who are the links that mediate the indirect position of beneficial owner(s) of the legal arrangement.

4. Trustees of an express trust and persons holding an equivalent position in a similar legal arrangement shall make the information collected pursuant to this Article available, upon request and without delay, to competent authorities.

In order to provide sufficient clarity on the scope of the information to be collected, it is proposed to introduce a definition of 'basic information' on legal entities and legal arrangements after the definition of 'legal arrangement' in AMLR as follows:

(23a) 'basic information' means:

(a) in relation to a legal entity:

(i) legal form and name of the legal entity;

(ii) instrument of constitution, and the statutes if they are contained in a separate instrument;

(iii) address of the registered or official office and, if different, the principal place of business, and the country of incorporation;

(iv) a list of legal representatives;

(v) where applicable, a list of shareholders or members, including information on the number of shares held by each shareholder and the categories of those shares and the nature of the associated voting rights;

(vi) where available, the registration number, the European Unique identifier, the tax identification number and the Legal Entity Identifier;

(vii) in the case of foundations, the assets held by the foundation to pursue its purposes;

(b) in relation to a legal arrangement:

(i) the name or unique identifier of the legal arrangement;

(ii) the trust deed or equivalent;

(iii) the purpose(s) of the legal arrangement, if any;

(iv) the assets held in the legal arrangement or managed through it;

(v) the place of residence of the trustee(s) of the express trusts or persons holding equivalent positions in the similar legal arrangement, and, if different, the place from where the express trust or similar legal arrangement is administered.

Given the extensive scope of these modifications, it is proposed to add a new recital 72a to cover basic trust information and to modify recital 72 AMLR relating to trustees' obligations. The below text is based on the Council's General Approach as it already integrated the concept of trustee residence:

(72) There is a need to ensure a level playing field among the different types of legal forms and to avoid the misuse of express trusts and legal arrangements, which are often layered in complex structures to further obscure beneficial ownership. Trustees of any express trust administered or ***established or*** *residing in a Member State should thus be responsible for obtaining and holding adequate, accurate and current beneficial ownership information regarding the express trust, and for disclosing their status and providing this information to obliged entities carrying out costumer due diligence. Any other beneficial owner of the express trust should assist the trustee in obtaining such information.*

(72a) The nature of legal arrangements and the lack of publicity about their structures and purpose places a particular onus on the trustees or persons in equivalent positions in similar legal arrangements to obtain and hold all relevant information on the legal arrangement. Such information should enable an identification of the legal arrangement, the assets placed therein or administered through it, and any agent or service provider to the trust. In order to facilitate the activities of competent authorities in the prevention, detection and investigation of money laundering, its predicate offences and terrorist financing, it is important that trustees keep this information up-to-date and that they hold it for a sufficient amount of time after they cease their role as trustees or equivalent. The provision of a basic amount of information on the legal arrangement to obliged entities is also necessary to enable them to fully ascertain the purpose of the business relationship or occasional transaction involving the legal arrangement, adequately assess the associated risks, and implement commensurate measures to mitigate those risks.

Changes required to the CDD chapter

The modifications made to Recommendation 25 need to be mirrored in the CDD requirements that apply to obliged entities, specifically in relation to Article 18. The proposed text below integrates the need for obliged entities to obtain information on the assets of the trust under their management, as well as basic information on the trust – which was partly already included under the draft tabled by the Commission – and on the objects of a power and default takers for discretionary trusts. For this latter point, it is proposed to integrate part of the text already developed by the Council in its General Approach in relation to legal arrangements and legal entities whose beneficiaries are identified by a class. The draft also tries to incorporate revisions made by both co-legislators that we consider non-controversial and which improve the legal clarity of the text. At this stage, we do not propose solutions for the implementation of Article 48 on foreign legal entities and legal arrangements, pending discussions between co-legislators.

Article 18

Identification and verification of the customer's **and beneficial owner's** identity

1. With the exception of cases of lower risk to which measures under Section 3 apply and irrespective of the application of additional measures in cases of higher risk under Section 4 obliged entities shall obtain at least the following information in order to identify the customer and the person acting on their behalf:

[…]

(c) for a trustee of an express trust or a person holding an equivalent position in a similar legal arrangement:

(i) ~~**the information referred to in Article 44(1), points (a) and (b), and in point (b) of this paragraph for all the persons identified as beneficial owners**~~ **basic information on the legal**

arrangement. However, with regard to the assets held in the legal arrangement or managed through it, only the assets that are to be managed in the context of the business relationship or occasional transaction shall be identified;

(ii) the address of residence of the trustee(s) or person(s) holding an equivalent position in a similar legal arrangement **and, if different, the place from where the express trust or similar legal arrangement is administered**, ~~**and**~~ the powers that regulate and bind the legal arrangements, as well as, where available, the tax identification number and the Legal Entity Identifier;

[…]

2. For the purposes of identifying the beneficial owner of a legal entity **or of a legal arrangement**, 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**~~.

Where, after having exhausted all possible means of identification pursuant to the first subparagraph, no natural person is identified as beneficial owner, or where there **are** ~~**is any**~~ doubt that the person(s) identified is/are the beneficial owner(s), obliged entities shall record that **no beneficial owner was identified and** identify **all** the natural person(s) holding the position(s) of senior managing official(s) in the corporate or other legal entity and shall verify their identity. **Where the performance of such verification may tip off the customer that the obliged entity has doubts regarding the beneficial ownership of the legal person, the obliged entity shall abstain from verifying the senior managing officials' identity, and shall instead record the steps taken to ascertain the identity of the beneficial owners and senior managing officials.** Obliged entities shall keep records of the actions taken as well as of the difficulties encountered during the identification process, which led to resorting to the identification of a senior managing official.

3.In the case of beneficiaries of **[**trusts or similar legal entities or arrangements**]** that are designated by particular characteristics or class, an obliged entity shall obtain sufficient information concerning the beneficiary so that it will be able to establish the identity of the beneficiary at the time of the payout or at the time of the exercise by the beneficiary of its vested rights.

3a. In the case of discretionary trusts, an obliged entity shall obtain sufficient information concerning the objects of a power and default takers so that it will be able to establish the identity of the beneficiary at the time of the exercise by the trustees of their power of discretion, or at the time when the default takers become the beneficiaries due to the trustees' failure to exercise their power of discretion.

[…]