
AFME response to the BaFin's guidance for credit institutions

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The Association for Financial Markets in Europe¹ (AFME) welcomes the opportunity to comment on the Federal Financial Supervisory Authority's (BaFin) Konsultation 01/2021 - Auslegungs- und Anwendungshinweise Besonderer Teil: Kreditinstitute gemäß § 51 Abs. 8 GwG²

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors, and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

Please note that our comments on the BaFin's guidance are made from the perspective of international businesses that operate in Germany.

Our comments to the guidance are provided below. Each comment is preceded by an excerpt from the BaFin's guidance and an unofficial translation, provided to AFME, of that particular excerpt. Please note that the English translation was not done by an accredited translator. We would welcome it if the BaFin could consider publishing an official English translation of the guidance in the future to assist international businesses currently operating in Germany.

AFME Comments

Inhalt 3 Investmentgeschäft/Investment business

3.2. Abklärung des wirtschaftlich Berechtigten eines Investmentvermögens/Clarification of the beneficial owner of an investment asset

'Aus diesem Grund ist die 6 Anlegerstruktur jedes Investmentvermögens abzuklären. Aufgrund der Systematik des § 3 Abs. 2 GwG ist bei einem normalen Risiko davon auszugehen, dass jeder einzelne Anleger, der mehr als 25 % der Anteile eines Investmentvermögens hält, wirtschaftlich Berechtigter der KVG ist. Soweit dies der Fall ist, sind diese Anleger nach Maßgabe des § 11 Abs. 5 GwG zu identifizieren. Die gesamte Prüfung ist angemessen zu dokumentieren.'

'For this reason, the investor structure of each investment asset must be clarified. Based on the nomenclature of GwG § 3 (2) it is to be assumed in the event of a normal risk, that each individual investor which holds more than

¹ AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is registered on the EU Transparency Register, registration number 65110063986-76.

²BaFin Konsultation 01/2021 - Auslegungs- und Anwendungshinweise Besonderer Teil: Kreditinstitute gemäß § 51 Abs. 8 GwG available here

https://www.bafin.de/SharedDocs/Downloads/DE/Konsultation/2021/dl_kon_0121_aua_bt_gw.pdf?_blob=publicationFile&v=2

25 % of the shares of an investment asset is the beneficial owner of the KVG. In so far as this is the case, these investors shall be identified in accordance with GwG § 11 (5). The entire examination shall be adequately documented.'

We understand that the investor structure/ultimate beneficial owner (UBO) of a Special Fund has to be clarified and/or identified and have assumed that where the term KVG is used, it instead refers to "Investmentvermögen", we would welcome clarification, if that is not the case .

'Bei einer Geschäftsbeziehung eines Kreditinstituts zu einer regulierten KVG mit Sitz in einem anderen EU-/EWR-Mitgliedstaat oder einem Drittstaat, deren Anforderungen an die Verhinderung, Aufdeckung und Bekämpfung von Geldwäsche und Terrorismusfinanzierung den FATF-Empfehlungen entsprechen, gelten dieselben Grundsätze. Ist weder die KVG noch das Investmentvermögen reguliert, bestimmt sich der Umfang der Maßnahmen nach einem potentiell erhöhten Risiko für Geldwäsche und Terrorismusfinanzierung.'

'In the case of a business relationship between a credit institution and a regulated KVG domiciled in another EU/EEA Member State or a third country whose requirements for prevention, detection and fight against money laundering and terrorist financing comply with the FATF recommendations, the same principles shall apply. Where neither the KVG nor investment assets are regulated, the scope of the measures is determined by a potentially increased risk for money laundering and terrorist financing.'

AFME acknowledges that the BaFin provides exemptions to ID&V and UBOs in Germany, the EU and third countries whose frameworks comply with the FATF.

In addition, there is no explicit international disclosure obligation on Portfolio Managers (de: Portfoliomanagement/KVG) to disclose this information to the banks or other financial institutions who are acting as brokers. Moreover, in practice it proves difficult if not impossible for firms to obtain information on investors from the Portfolio Management (de: Portfoliomanagement). We ask the BaFin to acknowledge this in the guidance.

Lastly, we understand that the BaFin differentiates between funds. However, we would welcome more guidance as to when it would be appropriate to apply Simplified Due Diligence (SDD), especially when considering normal mutual funds (Sondervermögen) of equivalently regulated fund managers registered in low-risk jurisdictions or within the European Union.

3.4. Abklärung des wirtschaftlich Berechtigten bei Brokern/Clarification of the beneficial owner of brokers

'Bei Brokern besteht die Abklärungspflicht gegenüber dem Vertragspartner des Handelsgeschäfts. Dies ist im Regelfall die KVG oder der Portfoliomanager. Begründet der Broker eine Korrespondenzbeziehung im Sinne von § 1 Abs. 21 Nr. 2 GwG zu einer KVG oder zu einem externen Portfoliomanager zwecks Abwicklung von Wertpapiergeschäften, bestimmt sich der Umfang der Maßnahmen nach dem individuell vorliegenden Risiko für Geldwäsche und Terrorismusfinanzierung unter Berücksichtigung der in den Anlagen 1 und 2 GwG sowie in den Leitlinien zu Risikofaktoren der Europäischen Aufsichtsbehörden (ESAs) genannten Risikofaktoren. Handelt es sich bei dieser Geschäftsbeziehung nicht um eine Korrespondenzbeziehung i.S.v. § 1 Abs. 21 GwG, bestimmt sich der Umfang der Maßnahmen nach einem potentiell erhöhten Risiko für Geldwäsche und Terrorismusfinanzierung.'

'In the case of brokers, the obligation of clarification is against the contractual partner of the trade. This is usually the KVG or the portfolio manager. If the broker establishes a correspondent relationship within the meaning of

GwG § 1 (21) No. 2 with a KVG or an external portfolio manager for the purpose of settling securities transactions the scope of the measures shall be determined on the basis of the individual risk for money laundering and terrorist financing, taking into account the risk factors set out in GwG annexes 1 and 2 and the contained Risk Factor Guidelines of the European Supervisory Authorities (ESAs). If this business relationship is not a correspondent relationship as per GwG § 1 (21) the scope of the measures is determined by a potentially increased risk for money laundering and terrorist financing.'

We welcome that the brokerage services to an investment manager are viewed through a lens of correspondent relationships.

We note that the German AML Act applies a risk-based approach with regard to correspondent relationships and that as a result EDD applies solely in case of cross-border correspondent relationships with respondents in third countries.

Inhalt 5 Korrespondenzbankbeziehungen/Correspondent Banking Relationships

Please note that there are two 5.1.2 sub-paragraphs in the Chapter 5.

5.1.2. Allgemeine Sorgfaltspflichten/General due diligence requirements

„Unterhalten mehrere Banken innerhalb einer Gruppe Korrespondenzbankbeziehungen mit einer Respondenzbank, ist im Rahmen der gruppenweiten Pflichten (§ 9 Abs. 1 GwG) sicherzustellen, dass die Risikobewertungen der jeweiligen Banken mit der gruppenweiten Risikobewertungspolitik übereinstimmen und angemessene Informationsaustauschmechanismen eingerichtet sind. Gemäß § 9 Abs. 1 Satz 3 GwG ist sicherzustellen, dass die Korrespondenzbankbeziehung wirksam und koordiniert überwacht wird.“

‘Where several banks within a group have correspondent banking relationships with a respondent bank, it needs to be ensured as part of the group-wide obligations (GwG § 9, (1)) that the risk assessments of the respective banks are matching by the group-wide risk assessment policy and that appropriate information exchange mechanisms are established. According to GwG § 9 (1) sentence 3 it needs to be ensured that the correspondent banking relationship is monitored effectively and coordinated.’

5.1.2. Verstärkte Sorgfaltspflichten/Enhanced due diligence requirements

Overall question on the chapter.

Can the BaFin confirm that the enhanced due diligence (EDD) requirements concern the existing senior manager approval processes for correspondent relationships?

1. Es sind ausreichende Informationen über den Respondenten einzuholen, um die Art seiner Geschäftstätigkeit in vollem Umfang verstehen und seine Reputation, seine Kontrollen zur Verhinderung der Geldwäsche und Terrorismusfinanzierung sowie die Qualität der Aufsicht seines Sitzlandes bewerten zu können.

(..)

‘b. Reputation: Informationen über Mitglieder der Geschäftsleitung und Eigentümer der Respondenzbank, etwaige wirtschaftlich Berechtigte und ob in Bezug auf diese spezifische Geldwäsche- und

Terrorismusfinanzierungsrisiken bestehen (z.B. als PeP oder mit Sitz in einem von der Europäischen Kommission nach Artikel 9 der Richtlinie (EU) 2015/849 ermittelten Drittstaat mit hohem Risiko).'

1. Adequate information on the respondent should be obtained to fully understand its business activities and assess its reputation, controls to prevent money laundering and terrorist financing and the quality of the supervision of the country of residence.

(...)

'b. Reputation: Information on directors and owners of the respondent bank, any beneficial owner and whether in relation to them specific money laundering and terrorist financing risks exist (e.g., PEP or domiciled in a high risk third country specified by the European Commission pursuant to Article 9 of Directive (EU) 2015/849).'

We suggest the deletion of the term “owner” – on the basis that the term “owner” is not used in the terminology of the EU-AMLD and the GwG Money Laundering Act. There is currently no obligation to obtain information about “owners” who are not also beneficial owners.

In addition, AFME believes that a reference to directors in relation to establishing reputation should be removed. We understand that obtaining sufficient information on beneficial owners on a risk-based approach is sufficient as set out in FATF Best Practices on Beneficial Ownership for Legal Persons³ in order to satisfy the requirement in the guidance.

Inhalt 6 Monitoringsysteme/Monitoring systems

6.2.8 Auslagerung ins Ausland (§ 6 Abs. 7 GwG i.V.m. § 25h Abs. 2 KWG und § 7 Abs. 5 GWG)/Outsourcing abroad (GwG § 6 (7) in conjunction with KWG § 25h (2) KWG and GwG § 7 (5))

'Darüber hinausgehende Untersuchungshandlungen und die abschließende Beurteilung der Treffer dürfen nicht in Drittstaaten stattfinden. Insbesondere dürfen sogenannte False Positives nicht in Drittstaaten geschlossen werden.'

'Further investigation activities and the final assessment of the hits may not take place in third countries. In particular, so-called false positives may not be closed in third countries.'

In accordance with GwG Money Laundering Act, outsourcing is permissible providing requirements for outsourcing are met. Where activities are outsourced, adequate checks, controls and training are put in place by the outsourcing entity. The responsibility remains without doubt with the outsourcing party. Additionally, we wish to draw your attention to para 45 Abs. 4 GwG Money Laundering Act which expressly permits the involvement of third parties in the fulfilment of the SAR reporting obligation without restrictions.

Accordingly, we would urge the BaFin to reconsider the view that false positives cannot be closed in third countries and suggest that the guidance is unnecessarily restrictive in this regard.

³ <https://www.fatf-gafi.org/media/fatf/documents/best-practices-beneficial-ownership-legal-persons.pdf>

Inhalt 7 Trade Finance/Trade Finance

The BaFin may wish to consider and refer to the globally accepted standards and guidance on Trade Finance Principles, as published by the Wolfsberg Group , ICC and BAFT in their guidance.⁴

The above is only our high-level comment on the Trade Finance chapter. If you would like to receive further information, please let us know.

We welcome the opportunity to respond to this consultation. Should you wish to discuss with us any of the comments made in our submission in further detail, please do not hesitate to get in touch. Our contact details are provided below.

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⁴ Wolfsberg group Trade Finance Principles available here <https://www.wolfsberg-principles.com/sites/default/files/wb/Trade%20Finance%20Principles%202019.pdf>