



**RESPONSE TO THE FINDINGS OF THE EUROPEAN COMMISSION'S REPORT  
ON THE APPLICATION OF THE THIRD ANTI-MONEY LAUNDERING DIRECTIVE**

**Response from:**

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## **About Leaseurope**

Leaseurope brings together 44 member associations representing the leasing, long term and/or short term automotive rental industries in the 32 European countries in which they are present. The scope of products covered by Leaseurope members' ranges from hire purchase and finance leases to operating leases of all asset categories (automotive, equipment and real estate). It also includes the short term rental of cars, vans and trucks.

The Federation's mission is to represent the European leasing and automotive rental industry, ensuring the sector's voice is heard by European and international policy makers.

Please note that this response also takes into account Leaseurope's comments on the findings of the European Supervisory Authorities Reports<sup>1</sup>.

Leaseurope welcomes this report as a viable resource which can identify how different elements of the Third AML Directive have been applied, what factors can drive changes and what the possible options are for changing the existing rules.

### **The treatment of leasing under European Anti-Money Laundering (AML) rules**

Leasing companies across Europe generally fall within the scope of the Third Anti-Money Laundering Directive 2005/60/EC and Commission Directive 2006/70/EC (the "Implementing Measures").

Where leasing companies come under the scope of the Third AML Directive and its Implementing Measures three customer due diligence (CDD) scenarios can apply.

1. Normal CDD requirements apply under Articles 7, 8 and 9(6) of the Third AML Directive.
2. Reduced CDD requirements apply under Articles 11 and 12 of the Third AML Directive in situations of little risk, as clarified by the Recitals and Articles 3 and 4 of the Implementing Measures.
3. Enhanced CDD requirements apply in situations which by their nature can present a higher risk of money laundering or terrorist financing under Article 13 of the Third AML Directive.

In addition to the above criteria, when there is a suspicion of money laundering, or terrorist financing, CDD requirements apply regardless of any derogation or exemptions contained in the Third AML Directive or its Implementing Measures.

As discussed in the following document, the provisions contained in the Third AML Directive and its Implementing Measures have been interpreted differently across the EU. The misinterpretation and lack of harmonization of EU AML rules has given rise to uncertainties and difficulties for lessors across the EU. Explanations on these leasing specific concerns follow.

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<sup>1</sup>Report on the legal, regulatory and supervisory implementation across EU Member States in relation to the Beneficial Owners CDD requirements and Report on the legal and regulatory provisions and supervisory expectations across EU Member States of Simplified Due Diligence requirements where the customers are credit and financial institutions.

## Introductory Observations

Leaseurope the European voice of the leasing industry welcomes the opportunity to respond to the European Commission's consultation 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 (COM (2012) 168 final, hereafter: the Report).

Generally we would like to warn against the dangers of gold-plating that any future AML Directive could cause and we urge the European Commission to propose legislation for a Fourth AML Directive which would keep the possibility of gold-plating to an absolute minimum, as this is contrary to the aim of European Union Directives, notably that EU law should be applied in a uniform manner.

Throughout this document reference is made to a lease agreement. This refers to the basic concept of a lease, i.e. leasing an asset to be able to use the asset.

## Specific Observations

### 1. Applying a risk-based approach (RBA)

#### **Report finding:**

1. *Additional rules on the RBA*
2. *Possible granting by the European Commission to the Joint Committee on Anti-Money Laundering the power to provide guidance on issues affecting financial sector supervision*

#### **Leaseurope position:**

1. Leaseurope recognizes the importance of a risk based approach for its industry, as this RBA is a cornerstone of the Third AML Directive. But Leaseurope does not feel at this stage, that any introduction of additional rules on the risk based approach *per se* would be appropriate.
2. Leaseurope does not support the foreseen granting by the European Commission to the Joint Committee of the European Supervisory Authorities' Sub Committee on Anti-Money Laundering the power to provide guidance on issues affecting financial sector supervision.

#### **Justification:**

1. Leaseurope has discovered that any difficulties that may arise in practice regarding the risk based approach do not stem from the Directive itself, but rather from national implementation and interpretation of the rules. Difficulties that have arisen in national contexts could be resolved by principle-based guidelines on the application of the risk based approach for financial institutions, as have been developed in some Member States;<sup>2</sup> however, it is crucial that any such guidelines remain examples and not, in practice, be enforced as indicators on a compulsory basis.
2. Leaseurope is providing a lack of support here, as more often than not financial sector stakeholders are not involved in the drafting of such guidance. However, if it were clarified that consultation and transparency would occur, then there is a possibility that Leaseurope could give support here. However, more clarity is required here as to whether the guidelines would be for example technical in nature.

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<sup>2</sup> Such as the Joint Money Laundering Steering Group – Guidance for the UK Financial Sector in the United Kingdom, available here: <http://www.jmlsg.org.uk/industry-guidance/article/part-i-part-ii-part-iii-and-treasury-ministal-approval>.

## 2. Scope

### 2.1. Extension of the scope to cover serious tax crimes

**Report finding:** *Whether tax crimes should be included as a specific category of “serious crimes”.*

**Leaseurope position:** Leaseurope considers that only serious tax crimes should be included in the Fourth AML Directive as a specific category of “serious crimes”.

**Justification:** Leaseurope believes that only serious tax crimes should be included in the Fourth AML Directive as a special category of “serious crimes”, as otherwise minor tax crimes would also be covered, which would undermine the very definition of “serious crimes”.

### 2.2. Extension of the scope

**Report finding:** *Regarding the extension of the scope of AML to covering other types of financial agents.*

**Leaseurope position:** Leaseurope firmly believes that financial agents should be included in the scope of the AML Directive. However, Leaseurope stresses the need to avoid a one-size-fits-all approach and to differentiate between tied and untied intermediaries. The scope of the revised Directive should only be extended to untied intermediaries (e.g. brokers) and not to tied-intermediaries.

**Justification:** Financial agents acting under the full responsibility of a financial institution should remain outside the scope of the Directive. With regard to AML legislation it is the leasing company that conducts the verifications and implements the necessary processes for fulfilling the AML obligations in cases where the financial agent is operating under the full responsibility of the leasing company. Hence, there is no reason to extend the scope here.

This is not however the case for leasing brokers, which act in an independent capacity.

## 3. Customer Due Diligence (CDD)

In order to remark on the comments made in relation to CDD in both the European Commission's Report on the application of the Third AML Directive and the European Supervisory Authority's *Report on the legal and regulatory provisions and supervisory expectations across EU Member States of Simplified Due Diligence requirements where the customers are credit and financial institutions under the Third AML Directive*, it is ultimately necessary to initially point out the current CDD situation in relation to leasing agreements for AML purposes and why that is so.

As evidenced below in the Implementing Measures<sup>3</sup> to the Third AML Directive, leasing transactions are low risk for AML purposes.

#### Extract of Recital 9 of Commission Directive 2006/70/EC

“It should be possible to apply **simplified customer due diligence procedures to products and related transactions in limited circumstances**, for example where the benefits of the financial product in question cannot generally be realised for the benefit of third parties and those benefits are only realisable in the long term, such as some investment insurance policies or savings products, or **where the financial product aims at financing physical assets in the form of leasing agreements in which the legal and beneficial title of the underlying asset remains with the leasing company** or in the form of low value consumer credit, provided the transactions are carried out through bank accounts and are below an appropriate threshold...”

<sup>3</sup> Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of 'politically exposed person' and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis.

### 3.1. Simplified CDD

**Report findings:** *The Report asks respondents whether further consideration should be given to:*

1. *Setting out risk factors to be taken into account when determining if SDD is appropriate;*
2. *Providing specific examples of where SDD may apply;*
3. *Further guidance on risk factors (for example by the Joint Committee's AML Sub Committee);*
4. *A minimum set of measures to be taken in SDD (in Directive or guidance);*

**Leaseurope position:** Simplified CDD procedures should be attached to leasing transactions, as they are low risk transactions for AML purposes.

1. Leaseurope believes that every indicator/risk factor/example offered to qualify a customer as low/normal/high/unacceptable risk would be appreciated, as long as they are clearly defined, applicable and administrable.
2. Leaseurope has demonstrated that leasing as a form of finance is low risk for AML purposes, hence would like to advocate for this to be identified as a specific example of where SDD should be applicable.
3. Leaseurope is in favour of clear indicators, however if financial industry stakeholders are not consulted throughout the drafting of such guidance, then Leaseurope fails to support this initiative as it lacks transparency and the necessary consultation procedures.
4. Leaseurope is against a minimum set of measures to be taken into account when determining SDD and supports maintaining the risk based approach due to sectorial differences that exist within the remit of financial institutions.

**Justification:** Leasing agreements are at a low risk of money laundering primarily due to the payment method used to fund the lease agreement.

Generally speaking, lease instalments are debited from a current account at a financial institution subject to the provisions of Third AML Directive and its Implementing Measures. This means that a potential lessee has already been identified and (CDD) has already been carried out by the financial institution holding the lessee's current account: i) at the time the current account was opened; and ii) as part of the financial institution's on-going security checks. If these checks are to be repeated for a leasing transaction then this situation results in a repetition of customer identification procedures, and can cause delays and inefficiencies. The European Commission has aimed to avoid this in Recital 27 of the Third AML Directive<sup>4</sup>.

CDD checks made by the above mentioned financial institution and those conducted by the leasing company prior to the conclusion of the lease transaction ensure that when lease instalments are paid from a lessee's account via a direct debit or standing order, as is commonly the case, the 'paper trail' for the lease instalments cannot be concealed. The origin of the lease instalments can thus be traced back without difficulty.

In other words, when a lessor carries out its own CDD measures before the conclusion of a lease agreement, this is the second time that those checks are being made on the lessee.<sup>5</sup> This means that a high level of CDD is built into any given leasing transaction.

As a customer is unlikely to have the option of paying the lease instalments in ways other than direct debit/standing order<sup>6</sup>, it is extremely unlikely, if not impossible, for a criminal to launder money by payment through a large cash deposit in favour of the lessor. This fact in itself acts as a deterrent to criminals wanting to launder money through leasing transactions.

For the reasons outlined above Leaseurope strongly supports and advocates the retention of the

<sup>4</sup> Extract from Recital of the Third AML: *In order to avoid repeated customer identification procedures, leading to delays and inefficiency in business, it is appropriate, subject to suitable safeguards, to allow customers to be introduced whose identification has been carried out elsewhere.*

<sup>5</sup> As explained above, the first time CDD was carried out it was by the lessee's own bank (i.e. the financial institution holding the lessee's current account).

<sup>6</sup> We note that in Germany, 90% of leasing transactions are paid for via direct debit.

simplified CDD procedure and the inclusion of leasing contracts within this category.

### 3.2. Regular CDD

**Report findings:** *The European Commission is considering harmonizing the approach to identification and/or compiling a list of EU-wide recognized identity documents issued by Member States in order to facilitate customer identification/verification.*

**Leaseurope position:** Leaseurope would support such steps.

**Justification:** The harmonisation of the approach to identification would help in the identification of customers in cross-border contexts. However, the European Commission should avoid the issue of for example harmonizing passports with biometrics, as it may not be possible to harmonise this aspect in practice, as all Member States have different methods and levels of identification.

### 4. Politically Exposed Persons (PEPs)

**Report findings:** *Consideration to be given as to whether to incorporate the new Financial Action Task Force (FATF) provisions for domestic and international PEPs in the upcoming AML Directive.*

**Leaseurope position:** Leaseurope would like to assert that a single jurisdiction be applied to PEPs, instead to differentiating between domestic and foreign PEPs.

In order to facilitate the identification of such, a list of EU PEPs should be provided. If this is not possible then the European Commission must provide a comprehensive list of respective positions that are to be considered as prominent positions.

**Justification:** Providing a single European jurisdiction definition for PEPs would remove the requirement for leasing companies to identify domestic PEPs. This would have proven to be a huge administrative burden, as often small leasing companies do not have the funds to purchase commercial PEP lists. Additionally, commercial PEP lists often lack legal certainty.

The provision of an EU list of PEPs in an appropriate electronic format would facilitate leasing companies in their identification of PEPs and provide for legal certainty. Given the apparent difficulties with the provision of such a list, efforts should be made alternatively to further define who constitutes as a PEP, and in which prominent positions that they normally reside.

### 5. Identification of Beneficial Ownership

**Report findings:**

1. *Extent to which ownership and control information is publicly available varies considerably.*
2. *There are apparent differences in terms of what constitutes a beneficial owner depending on the jurisdiction.*

**Leaseurope position:**

1. Leaseurope is of the view that the CDD requirements for identifying the Beneficial Owner imposed by the Third AML Directive are the single most challenging element from an implementation perspective.

2. Leaseurope strongly suggests that a future AML Directive should provide a fairly clear cut definition of the concept of "control", a definition on what can be considered as "control" and on applicable measures to identify "control, as these are essentially prerequisites for an efficient, pragmatic and harmonized implementation of the Beneficial Owner identification obligation. Leaseurope therefore proposes that "control" within complex multi-layered corporate structures (i.e. 2<sup>nd</sup> level) should be assumed to exist for beneficial ownership purposes, if the natural person has a majority shareholding (i. e. over 50 %) in the customer, and that this definition is used throughout the EU27.

**Justification:**

1. In Annex 1 we have provided an illustration of the steps needed to be taken when identifying

beneficial owners in Germany.<sup>7</sup> As evidenced by the illustration, identifying the beneficial owner is burdensome and complicated.

2. Leaseurope proposes that the definition of control is based solely upon percentage of shareholding and not whether an individual or company has the control to remove or appoint company directors. We call for a definition of control to be as simple as possible which will allow leasing companies to check this requirement as easily as possible. We also suggest that the European Commission should explore options to introduce corresponding changes to the company law regime of the EU which would include formal cooperation and reporting obligations for non-listed companies to furnish/submit the relevant information mentioned above to the public registries and to keep them updated as a result of changes that may occur within the company from time to time. One such example of this would be the European Commission's Directive for the interconnection of business registers which was formally adopted a few weeks ago, which Leaseurope strongly supports. Hence, Leaseurope urges the European Commission to provide in the new proposal for a Fourth AML Directive practical ways of implementing the requirements pertaining to beneficial ownership.

## 6. Group compliance

**Report findings:** *Introducing an explicit possibility of allowing intra-group flows of information on potentially suspicious transaction prior to the filing of a report, while respecting data protection obligations.*

**Leaseurope position:** Leaseurope is of the opinion that intra-flows of information prior to the filing of a report should be clarified in the proposal for a Fourth Directive. Leaseurope also calls for a clarification on the definition of "group", and suggests that the definition in the Capital Requirements Directive be applied here.

**Justification:** These clarifications could facilitate the unveiling of other information that could contribute to the report being made. Failure to include a clarification on this matter could prevent such transfers of information, due to the new data protection framework.

## 7. Protection of personal data

**Report findings:** *Consideration could be given to introducing in the revised Directive, clear and balanced rules which set out how personal data should be handled in order to enable an effective AML/CFT compliance.*

**Leaseurope position:** Leaseurope does acknowledge that there may be potential contentions between AML compliance requirements and upcoming proposal for a Regulation on Data Protection. Thus, in order to ensure a coherent approach Leaseurope would like to encourage that the revised AML Directive include clear and balanced rules which would set out how personal data should be handled in order to enable effective AML/CFT compliance whilst respecting fundamental rights.

**Justification:** The only way to achieve this balance initially is if further interaction between AML regulators and the data protection supervisors take place, in order to identify potential conflicts of interest. The introduction of such data protection rules should lead to a clear workable regime for financial institutions.

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<sup>7</sup> There are other providers who do this type of work

**Annex 1**  
**Identification of beneficial owners**

**Identification of beneficial owners in Germany**

**(i) German Money Laundering Act**

For the purposes of this Act, the term “beneficial owner” is defined as the natural person(s) who ultimately owns or controls the contracting party, or the natural person on whose behalf a transaction or activity is being conducted. It is applied in particular circumstances:

- In the case of corporate entities which are not listed on a regulated market;

a. The natural person(s) who directly or indirectly hold(s) more than 25% of the capital shares or control(s) more than 25% of the voting rights.

- In the case of legal entities, such as foundations, and legal arrangements, such as trusts, which administer and distribute funds or arrange for third parties to administer and distribute funds;

b. The natural person(s) who acts as a faithful donor or exercise(s) control over 25% or more of the property of a legal arrangement or entity;

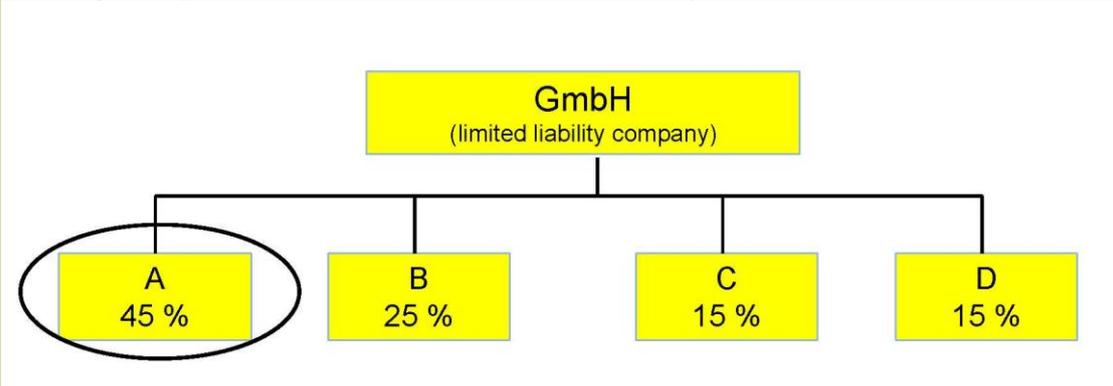
c. The natural person(s) who is the beneficiary of 25% or more of the property of a legal arrangement or entity.

d. Where the individuals that benefit from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates.

e. The natural person who carries out any other way directly or indirectly controlling influence on the distribution of income or wealth management.

**(ii) Example**

The following example illustrates how this beneficial owner may be identified:



*In this example, the beneficial owner is shareholder A. Shareholders B, C and D hold exactly 25 per cent or fewer of the shares and therefore do not meet the requirements of a beneficial owner.*

**(iii) Solution developed by German credit agency (Creditreform): tool to identify the beneficial owner**

Based on the requirements to define/identify a beneficial owner by law, Creditreform developed a tool to identify the beneficial owner. It is based on the existing Creditreform database, which includes all relevant information about legal persons and their corporate integration. It is a fully automated process.

The tool is linked to the credit reports that leasing companies use to get objective information on the lessee. To identify the beneficial owner, authorised parties can establish the share-ownership ratios by reviewing the information supplied.

The beneficial owner can easily be determined with the help of an automated system based on a customer platform called “CrefoSystem” used to facilitate workflows in business processes. Every transaction, every rule obeyed and every interaction with the user is documented and chronologically recorded.

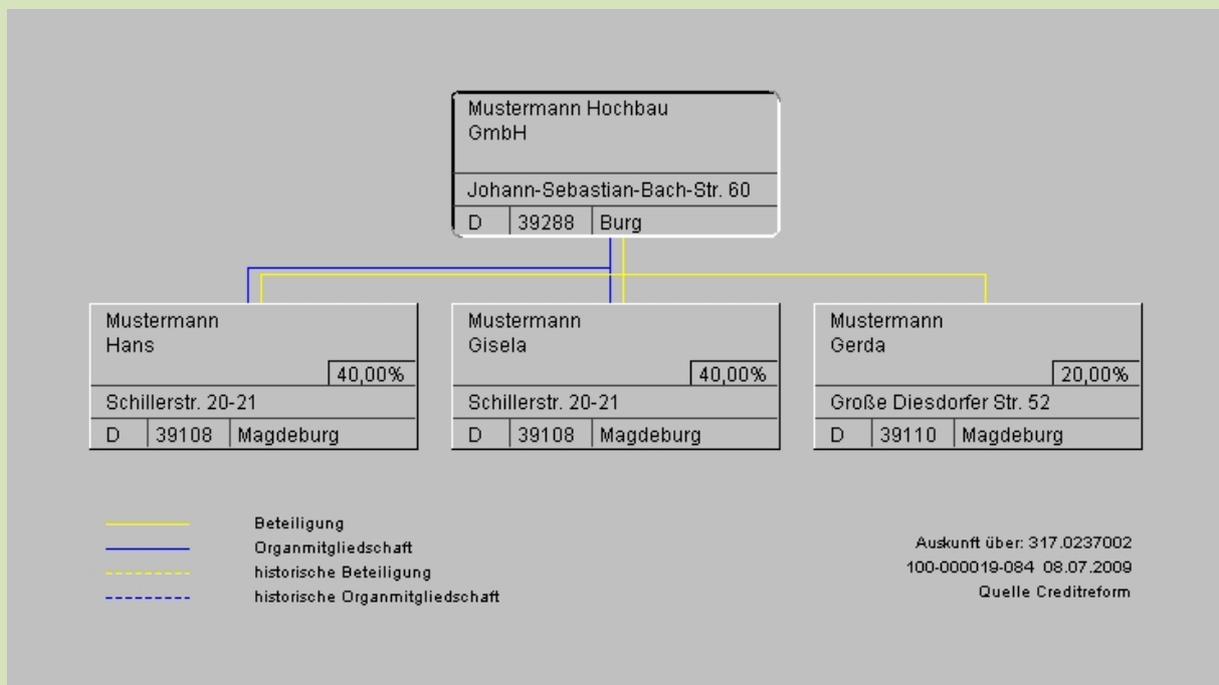


Figure: example of integrated information (source. Creditreform)

**(iv) Acceptance by German supervisory authorities**

German supervisory authorities are well aware of the working method of this tool. They accept it as a *supporting* instrument when a beneficial owner has to be identified. Nevertheless leasing companies are obliged to take additional measures, if necessary.