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BANKING STAKEHOLDER GROUP

EBA Consultation Paper: effective management of ML/TF risks when providing access to financial services (EBA/CP/2022/13)

Introduction

This consultation follows on from EBA's earlier work on the interaction between effective management of AML risk and access to financial services launched with its call for evidence on de-risking.

In this consultation EBA is seeking feedback on:

- A proposed new section in the existing ML/TF risk factor guidelines, which cover matters such as customer due diligence, addressing customers which are non-profit organizations (NPOs); and
- New guidelines which directly address the effective management of ML/TF risks by financial institutions when providing access to financial services, including to customers who have legitimate reasons why they are unable to provide standard identity verification.

The BSG has previously discussed the interaction between access and effective ML/TF management in its own initiative reports on AML strategy and on de-risking.

We welcome EBA's efforts to bring further clarity in this area, which is in the interests of both customers seeking to engage in legitimate activity and financial institutions trying to ensure that AML controls are proportionate as well as effective.

In this response we make some general comments on areas that in our view remain to be addressed, before responding to the specific questions EBA asks in the consultation paper.

General comments

The context for EBA's work is that, while banks retain freedom of contract and have discretion to choose whether to serve a particular customer except where legal obligations exist, decisions not to

serve particular clients or types of clients can have a significant impact on those clients' capacity to carry out normal, day-to-day activities.

We note that EBA's changes to the guidelines do not address all of the categories of customer potentially subject to unwarranted de-risking that were identified in responses to its call for evidence. We understand that different responses may be needed to address the specific issues for different customer groups.

Accidental Americans

The term 'accidental Americans' has come to be used to describe individuals who have obligations under the US FATCA legislation despite being citizens of another country and without residing in the US. Such individuals can face difficulties in getting access to financial services in other jurisdictions since the introduction of FATCA, for example where they do not possess a US social security number.

We recognise that this is not a situation that EBA alone can resolve and urge the EU authorities to continue dialogue with US counterparts. However, in the meantime, we welcome EBA's clarification in the consultation paper that having a reporting obligation under FATCA is not in itself an appropriate ground for denying access and that customers who are subject to the US tax regime, if they are EU citizens or if they legally reside in the EU, are entitled to access a payment account with basic features under the PAD.

Payment institution customers

Another category identified in EBA's call for evidence was payment institution (PI) customers, with some respondents arguing that PIs had been unfairly de-risked by their banks.

We recognised in our earlier own initiative report the challenges in this area arising from on the one hand the potential incentives for banks to de-risk competitors and on the other the need to ensure that PIs do have sufficient ML/TF controls in place to be able to satisfy banks' legitimate interest in managing ML/TF risk, given that any failings in the customer's controls also impacts the ML/TF exposure of the bank.

We agree with EBA that this issue should be further considered in the review of PSD2. We also agree that it would not be appropriate to address the issues for this customer group in the same guidelines as those for NPOs and individuals. However, we think EBA could make a difference before the PSD2 review by identifying good practices in resolving situations where the appropriateness of de-risking decisions is questioned. This is because:

- competent authorities are well-placed to determine whether a bank's decision in relation to a PI customer have a reasonable basis in relation to ML/TF risk, given that both banks and PIs are supervised for AML purposes

- competent authorities are able to engage in dialogue with competition authorities to reach a consistent view of whether a bank's decision to de-risk a specific PI has an adequate ML/TF justification and how to reconcile that with any competition concerns.

In that regard we welcome the publication of EBA's recent peer review on authorization under PSD2, which includes competent authorities' consideration of AML risks and controls. However, the review found that many competent authorities are not carrying out assessments appropriately at the moment.

We hope that EBA will take further steps to enhance competent authorities' assessments of new applicants in line with the peer review recommendations, and that it will also work with competent authorities to ensure that such enhancements are reflected in their supervision of already-authorized institutions.

We consider that these steps will help to reduce the scope for unwarranted de-risking of payment institutions and therefore benefit the payment institutions themselves, their banking providers and customers.

Section 4 – Guidelines amending the ML/TF risk factor Guidelines

1. Do you have any comments on the annex that covers NPO customers?

The BSG supports the addition of an annex to address specific issues relating to NPO customers.

By their nature, many NPOs provide valuable services to those in need but necessarily have to act in situations and jurisdictions which may expose them to higher ML/TF risks. They may also be less aware of the need to manage ML/TF risks and of how to do so effectively than corporate customers or financial institutions themselves.

Consequently, we welcome EBA's efforts in this annex to clarify the steps that financial institutions can take to manage ML/TF risks related to NPO customers in such a way as to maintain customers' access to services.

We also welcome efforts to distinguish within the NPO population between those undertaking lower-risk and higher-risk activities, and to ensure that credit and financial institutions distinguish between them appropriately.

As indicated above we agree that it is appropriate to give separate consideration to NPOs rather than try to address all customer groups together. It is helpful that EBA's proposed definition of 'NPO' is aligned with the FATF definition.

The guidelines could also elaborate on the difference between NPOs and NGOs, which are very similar and regularly mixed-up.

We think that the factors included in the Annex are helpful. However, we think there are two additional areas that should be included.

Competent authority outreach to NPOs

We also see an important role for competent authorities, and in time potentially the EU's new Anti-Money Laundering Authority, in promoting understanding among NPOs of the importance of identifying and managing ML/TF risks in their operations and of techniques for doing so. We note that

this is one of the practices recommended in the FATF's June 2015 Best Practices on Combating the Abuse of Non-Profit Organisations, which cites case studies from several EU countries.

The FATF report also provides useful examples of areas to cover in such outreach, including factors that can help to enhance and demonstrate the NPO's organizational integrity, and the particular issues related to the use of cash.

We recommend that EBA add an extra section to the Annex addressed to NCAs incorporating outreach to NPOs.

Risk mitigants for NPOs operating in higher-risk jurisdictions

The Annex helpfully makes the point that not all NPOs operate in high-risk jurisdictions. However, it says little about the possibility for NPOs that do operate in such jurisdictions to put in place controls to reduce or manage the inherent risk, in a way that may reduce their ML/TF risk profile. This is a separate issue from the question of humanitarian operations in countries subject to sanctions, which is already addressed.

We recommend that EBA incorporate a section explicitly referencing the possibility for NPOs that do operate in high-risk jurisdictions to put in place controls that can reduce the inherent risk of such operations, and draw on the FATF report referred to above to give indicative examples. As an example, it would be helpful to say more about what kind of evidence a bank might be able to obtain, and how, to get assurance that an NPO was operating within the scope of an applicable exemption from the sanctions regime, as discussed in paragraph 12.

Section 5 – Guidelines on policies and controls for the effective management of ML/TF risks when providing access to financial services

2. *Do you have any comments on the section 'Subject matter, scope and definitions'? If you do not agree, please set out why you do not agree and if possible, provide evidence of the adverse impact provisions in this section would have.*

No comments.

3. Do you have any comments on the section titled 'General requirements'?

We welcome the inclusion of a distinction between the risk profile of a category of customers and the risk profile of an individual customer within that category and clarifications in relation to payment accounts with basic features.

The guidelines could also consider differentiating between situations in which a financial institution has reported its client for suspicion of ML/TF activity.

4. Do you have any comments on the section titled 'adjusting monitoring'?

We welcome the inclusion of material on handling cases where individuals have legitimate reasons for being unable to provide traditional identity documentation.

We think this section would also benefit from conveying more clearly that there is an expectation of lower monitoring in low risk cases. We therefore propose to add the following text at the end of paragraph 18.

"The measures referred to in points a) to c) should be used in a way and with a frequency that is proportionate so as not to constitute an unduly onerous obligation on customers constituting a low risk. Credit and financial institutions should ensure that ongoing monitoring is less intensive for customers identified as lower risk where they continue to carry out their activities within the profile established under point a)."

5. Do you have any comments on the section titled 'applying restrictions to services or products'?

We recognize the benefits of such adaptations but also EBA's recognition that this will only be possible "where permitted by national law" is helpful given that we understand that such adaptations will not be permitted in at least one Member State.

No other comments.

6. Do you have any comments on the section titled 'Complaint mechanisms'?

We think EBA should consider whether there is more that can be said here about communication to clients. The aim of this would be to provide customers with the possibility to understand why their access to a financial service has been refused, particularly if there are steps they may be able to take to address the issue, without 'tipping them off' about any specific ML/TF concerns.

We also note that existing complaint mechanisms are often limited to customers that are consumers and, in some cases, SMEs. We think there is a need to consider some form of mediation or complaint resolution in cases where a bank decides to de-risk a PI customer.