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CONSULTATION REACTION

Reaction of the Dutch Banking Association (NVB) regarding draft amendments to the EBA ML/TF Risk Factors Guidelines and the Guidelines on effective management of ML/TF risks and access to financial services

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Introduction

6 December 2022 EBA issued a consultation paper on effective management of ML/TF risks and access to financial services and drafted questions to facilitate the consultation process. As a general remark, the Dutch Banking Association (NVB) supports the addition of the annex to address specific issues related to not-for-profit organisations (NPOs).

The NVB considers the amendments to the guidelines as useful and explanative. We would like to bring a number of items to your attention and have used the five questions to structure our reaction to the following sections:

- Section 4 - Guidelines amending the ML/TF Risk Factors Guidelines;
- Section 5 - Guidelines on policies and controls for the effective management of ML/TF risks when providing access to financial services:

Section 4

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

Guidelines 9 & 10

To support the risk based approach it is requested to make the following adjustments to the text of guideline 9 (page 13) and guideline 10 (pages 13 -15).

- We are of the opinion that not all information and documentation listed in guideline 9 should be obtained in all cases. A risk-based approach regarding this information and documentation is in our view possible. Therefore we request to change “should refer” mentioned in 9a) to f) into “may refer”.
- In our opinion the risk factors listed in guideline 10 also do not need to be considered in all cases. Therefore we request to change the sentence: “*When identifying the risk associated with clients that are NPOs, firms should consider at least the following risk factors:*” into: “The following risk factors may be relevant to consider when identifying the risk associated with clients that are NPOs.”

These changes will reduce unnecessary administrative burden for NPO’s, where the information, documentation or risk factors are not relevant from a risk perspective.

The guidelines for NPOs appear to be inclined towards established (international) organisations (e.g. Red Cross, Doctors Without Borders). These guidelines provide little guidance on how to assess the risk profile of newly established and small NPOs. In those cases there may not be an opportunity to assess the reputation, demonstration of the management capability or disclosed annual reports/financial statements. Therefore, these risk indicators may be less relevant for newly established

or smaller NPOs. Therefore, we request to add further clarification on how to assess the identified risk factors in guideline 9 and 10 in those circumstances.

In guideline 10f the scope seems to be broadened to “other crimes” apart from ML and TF, whereas in our opinion focus of these guidelines should be on (predicate offences to) ML and TF. Referring to ‘other crimes’ may be less effective.

Guideline 11e
According to guideline 11e (page 15) funding from governments, supranational or international organisations should be considered as a risk reducing factor. However, NPOs often receive funds from public as well as private parties. We recognize that the guideline does not provide detailed guidance on how to consider funding from a combination of public and private parties. Therefore, we request to add a risk-based approach for assessing the ratio of public and private funding. Additionally, it should be recognized that funding received from governments from high-risk third countries should not be considered as a risk reducing factor.

Guideline 11f
In guideline 11f (page 15) the use of the word “*it*” is confusing. We assume that “*it*” refers to the NPO. Therefore we suggested to replace “*it*” by “NPO”. The sentence will then read as follows: “The NPO does not have any links with high-risk third countries, or if the NPO has, the NPO can demonstrate that it has taken appropriate steps to mitigate the ML/TF risks…”.

Guideline 11f can serve as an example that these guidelines are more beneficial to larger NPOs than smaller ones. For instance requiring written AML procedures may not be proportionate for a small NPO with a restricted objective and limited money flows (e.g. volunteers building a school in a high-risk third country).

Section 5

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’?
General comments
We acknowledge that nowadays access to the banking system is needed to be able to participate in society. We also are aware of some clients encountering difficulties to access the banking system. For the Netherlands we would like to draw your attention to the recent report ‘From recovery to balance” by the Dutch Central Bank, addressing consequences of banks’ stricter ML/TF policies and operations https://www.dnb.nl/media/mdgafi3a/from-recovery-to-balance.pdf. The report states that client relationships are more often terminated for other reasons than ML/TF risks. Out of ~45k terminated client relationships only 7,700 (17%) were exited for AML/CFT reasons. Other reasons were for instance: non-responsive clients and clients outside the bank’s risk appetite (e.g. based on the ESG framework). Therefore, we like to point out that it should be acknowledged that there are other legitimate reasons for financial institutions to refuse or terminate business relationships.

In our view "*individual customer*" should be removed from the de-risking definition because refusing or terminating a business relation with an individual client is always decided on a case-by-case basis and in practice there are multiple legitimate reasons to do so. Furthermore, the Dutch AML/CFT law includes the legal obligation to refuse and terminate relationships with individual clients when AML/CFT requirements cannot be fulfilled (Wwft article 5 derived from AMLD article 14 sub 4). In our opinion de-risking is only harmful and unwarranted when categories of clients are excluded.

Guideline 10
Since not every financial service or product is a prerequisite for participation in society, we request to be more explicit on "access to financial services". More specifically, payment accounts are a prerequisite for participation and we suggest to use "access to a basic payment account" with the provision that the involved client does not already hold a payment account with an institution. Similar to the limited access as described in the PAD.

Also, we suggest to clarify the definition of a client as envisaged here (e.g. the PAD definition: any natural person who is acting for purposes which are outside his trade, business, craft or profession are addressed in the EBA Guidelines).

Guideline 11
This guideline (page 21) should accommodate decisions not to onboard a client when the institution cannot determine upfront if ML/TF can adequately and efficiently be mitigated. This may also occur in situations where new risks emerge.

Guideline 13
Guideline 13 (page 22) requests banks to state in their procedures reasonable grounds on which they would suspect that ML/TF is taking place or being attempted. With regard to FATCA and the risk indicia, does EBA consider a missing Tax Identification Number (TIN) or a client's refusal to provide a TIN as an indicator for tax evasion? Taking into consideration the related statements made on page 32-33 regarding the interaction of FATCA and PAD? If so, we recommend to add this indicator to the guidelines.

Guideline 14
According to guideline 14 (page 22), institutions should document any decision to refuse or terminate a business relationship and the reason for doing so. A clarification is needed that refusals and terminations of client relationships resulting from AML/CFT reasons should be documented. If a client relationship is refused or terminated for other reasons (e.g. ESG framework, client non-responsiveness) documenting the decision is not according to data minimisation requirements nor proportionate and thus would lead to a GDPR breach. Whereas, documenting refusals or terminations of client relationships for AML/CFT reasons can be considered as necessary processing of personal data to adhere to AML/CFT obligations and is likely to be considered in line with GDPR requirements.

We suggest to add a statement on data retention to guideline 14. For reference, GDPR states in article 5.1(e) that "…personal data shall be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed".

Guideline 15
This guideline may imply with *"…should set out in their account opening policies and procedures how they can adjust their CDD requirements to account for the fact that the limited functionalities of a basic*

payment account go towards mitigating the risk that the client could abuse these products and services for financial crime purposes" that CDD requirements for basic payment accounts should be less rigorous than regular CDD requirements. We suggest to elaborate that also for a basic banking account adequate CDD processes and a proportionate AML/CFT control framework are required.

Furthermore we request to include in the guideline requirements and supervisory consequences regarding basic payment accounts. Due to the risk mitigating nature of the characteristics of a basic payment account, controls can be defined in accordance with this specific risk profile. Elements to consider could be: no new products, intensity of monitoring measures, review type and frequency, etc. We suggest to further elaborate on the practical implications for adherence to AML/CFT laws and regulations.

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

Guideline 18

These are existing requirements under the EBA ML/TF Risk Factor Guidelines. We question the added value of repeating these specifically for NPOs in this guideline (page 22).

Guideline 19

There seems to be some inconsistency in the wording of guideline 19 (page 23) where it states "*…guidance should at least set out*…" and in the following a), b) and c) it is mentioned that "…*where permitted by national law"*.

Several elements in this guideline need further clarification:

- Guideline 19a mentions that only full names and date of birth are required. If this is less than national law permits, would this also be applicable to the situations and types of identification mentioned in 19b and 19c?
- What is the definition of a robust enough/sufficiently reliable document for identification and verification?
- With regard to Ukrainian refugees several alternative types of identification are already accepted. To facilitate banks in using these documents DNB and the Ministry of Finance have given approval on the use of these ID documents in the Netherlands. Their approval incudes:
  1) no remediation obligations until this group has a common valid ID document;
  2) banks are allowed to close accounts if refugees do not reply to remediation actions.

  As a result, remediation is required at the moment the refugee has a common valid ID document. Is this also the assumption of EBA? If so, we suggest to add it in this statement.

Guideline 19d

Guideline 19d (page 23-24) is not clear. Apparently some text is missing or not correct. *"In cases where support for these vulnerable customers is disbursed in the form of prepaid cards and where the conditions related to simplified due diligence are met as set out in Guidelines 4.41, 9.15, 10.18 of the EBA's ML/TF Risk Factors Guidelines, the indication that credit and financial institutions may postpone the application of initial customer due diligence measures to a later date."*

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

Guideline 21c

The following statement in this guideline (page 24) needs clarification: *"…limits on the amount and/or number of person-to-person transfers (further or larger transfers are possible on a case-by-case basis)…*". If the intention is to restrict transactions to other private individuals, the execution thereof is highly dependent on the technical possibility to establish whether the counterparty account holder is a private individual or legal entity.

Guideline 21e

In guideline 21e (page 25) the mitigating action reads as follows: *"…limits on the size of deposits and transfers from unidentified third parties, in particular where this is unexpected…"* and requires further explanation. When does a party qualify as "unidentified" and when does such a deposit or transfer qualify as "unexpected'? It is difficult to envisage situations where a deposit or transfer from an unidentified third party is to be expected because in general it will be unexpected.

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

Guideline 22

We suggest to elaborate on the scope of this guideline (page 25). We suggest to clearly state that the scope is limited to refusals and terminations of client relationships for ML/TF risks. Other reasons for refusing or terminating client relationships should be out of scope.