

## CONSULTATION REACTION

### Reaction of the Dutch Banking Association on the proposed amendments to the EBA ML/TF Risk Factors Guidelines

Date: 29 Augustus 2023

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#### Introduction

The Dutch Banking Association (Nederlandse Vereniging van Banken, hereafter: NVB) welcomes the opportunity to comment on the consultation paper published by EBA on 31 May 2023 regarding the proposals to amend the ML/TF Risk Factors Guidelines. The proposed changes extend the scope of these Guidelines to crypto-asset service providers (CASPs).

In general we would like to express our support to address issues related to CASPs as well as the guidance to credit and financial institutions (banks) when entering into business relationships with CASPs. Nonetheless, there are several topics we would like to bring to your attention and merit further clarification.

We have used the nine questions in the consultation paper to structure our reaction and would like to highlight the following key elements.

- 1) The risk-based approach is essential for an effective and efficient AML/CFT framework. Banks need to be able to differentiate between the risks posed by different CASPs.
- 2) Registrations and licenses for CASPs are assigned by supervisors. Therefore NVB requests EBA to include guidance on the extent to which banks can rely in their Client Due Diligence (hereafter: CDD) on the administered registrations and licenses.
- 3) Banks are not in a position to take a 'supervisory' role or responsibility to ensure an adequate AML/CFT framework at the responding entities, or more specifically, scrutinise their applied transaction monitoring systems and processes.

#### Question 1: Do you have any comments on the proposed changes to definitions?

##### *NVB reaction*

In the proposed amendments the term 'crypto-assets' is used, which is not defined in the Directive (EU) 2015/849 and Regulation (EU) 2015/847 (recast), but in the Markets in Crypto Assets Regulation (EU) 2023/1114 (hereafter: MiCAR) and the proposed EU AMLR (COM/2021/420 final). NVB suggest to clarify whether banks are to apply the MiCAR definition of virtual assets in relation to the EBA ML/TF Risk Factors Guidelines.

#### Question 2: Do you have any comments on the proposed changes to Guideline 1?

##### *NVB reaction*

No comment.

#### Question 3: Do you have any comments on the proposed changes to Guideline 2?

Guideline 2 states: "...unregulated business that provide services related to crypto assets...". How should "unregulated" be interpreted in this context? Does it refer to not being regulated under MiCAR or under the AML/CFT regulatory and supervisory framework provided for in Directive (EU) 2015/849?

**Question 4: Do you have any comments on the proposed changes to Guideline 4?**

*NVB reaction*

As a general comment we would like to draw your attention to the risk assessment by and considerations of banks before entering into relationships with CASPs. In our opinion banks should not have to apply a similar approach to CASPs as is required for PSPs with regard to access to the financial system (i.e., PSD2 articles 35 and 36). Banks should have full discretion to decide with which CASP they are inclined to establish (correspondent) relationships. In case of increased potential financial crime risk banks should not be forced to perform or deliver extended substantiation or evidencing when rejecting a CASP.

▪ **4.60**

Important to note that, particularly in the context of correspondent relationships, banks do not possess nor have access to all details of the underlying transaction (e.g., clients of the respondent) to detect and assess its unusualness. Additionally, the current Guidelines explicitly mention: "Transactions may be unusual [...] based on [...] the category to which the customer belongs". The latter part - on the category - is not part of the proposals. Since categorising client groups contributes to an effective and efficient AML/CFT framework, we suggest to maintain that element in the amended EBA ML/TF Risk Factors Guidelines.

▪ **4.61 and 4.74**

- Does EBA intend to cover indirect exposure to CASPs,? In situations where a bank does not offer crypto-asset services and does not have relationships with CASPs?
- If the intention is to cover indirect exposure, would it be required for banks that are not crypto-assets service providers, to analyse the distributed ledger connected to a transaction?
- To which extent can banks apply a risk-based approach to assess the background of a transaction?
- We would like to note that specific controls related to the identification of CASPs are limited, thereby complicating the recognition of these counterparties in transactions.

- Clarification by EBA on how to treat entities with multiple licenses, would be welcomed. For example, an entity with both a PSP license, banking license and/or CASP license.

**Question 5: Do you have any comments on the proposed changes to Guideline 6?**

*NVB reaction*

No comment.

**Question 6: Do you have any comments on the proposed changes to Guideline 8?**

*NVB reaction*

**8.17 c)**

In our opinion the proposed amendment stretches beyond the scope of banks' CDD responsibilities (e.g., performance of sample testing and/or on-site inspections) and is considered disproportionate. We believe that this level of scrutiny is the role and responsibility of supervisory authorities and part of their licencing or registration procedures. They are responsible to ascertain that licenced or registered CASPs have and execute adequate AML/CFT controls (e.g., transaction monitoring) prior to granting a license or registration. Banks are not in a position, to ensure that transaction monitoring systems and processes applied by respondents are adequate for the type and nature of their business activities.

**Question 7: Do you have any comments on the proposed changes to Guideline 9?**

*NVB reaction*

▪ **9.20 and 9.21**

Banks should be allowed to perform CDD measures based on the type of services offered to CASPs. The guidelines on crypto-assets should not be applicable when a bank only provides traditional services to a CASP that do not involve transfers of crypto-assets, for example corporate lending products that are not related to a correspondent relationship with a CASP.

All requirements under 9.20 and 9.21 should only be mandatory where a bank is directly exposed to the CASP's business operations. The application of all requirements, regardless of the product offering would be disproportionate.

▪ **9.21**

We like to bring the following questions and comments to your attention regarding specific elements of 9.21.

- a) Banks perform CDD to assess ML/TF risks. How should “dialogue” be understood in the context of this requirement? And how can a dialogue with a client be evidenced?
- b) What is meant by “senior management” in this context? Legal representatives are already in scope of CDD measures. We also note that it is not risk increasing if the UBOs and senior management are not the same individuals.
- c) We request further clarification on what banks specifically would need to assess. Additionally, can sharing with banks (voluntary) performed CDD measures by CASPs give rise to objections from a competition law perspective?
- f) In some cases it is difficult to establish if a client is providing services for which a license or registration is required. Would it be sufficient if banks rely on client statements in this regard?

**Question 8: Do you have any comments on the proposed changes to Guidelines 10, 15 and 17?**

*NVB reaction*

No comments.

**Question 9: Do you have any comments on the proposed changes to Guideline 21?**

*NVB reaction*

EBA could consider adding as a risk factor the use of an FX-transaction prior to and/or after converting from fiat to cryptocurrency and vice versa. This may indicate layering and complicates payment transparency.

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