

**MasterCard’s comments on the ESAs Joint Consultation Paper on
Guidelines on risk factors and simplified and enhanced customer due diligence**

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MasterCard appreciates the opportunity to comment on the draft Joint Guidelines under Article 17 and 18(4) of Directive (EU) 2015/849 on simplified and enhanced customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions, launched by the Joint Committee of the three European Supervisory Authorities (EBA, EIOPA and ESMA - ESAs) on 21 October 2015 (“Draft Guidelines”).

As a global payments network, MasterCard is fully committed to compliance with legislation on anti-money laundering and fight against financing of terrorism, and believes that it would be beneficial to follow a harmonized approach throughout the EU. The Fourth EU Anti-Money Laundering Directive (4th AMLD), to be transposed into national legislation by Member States no later than 26 June 2017, gives Member States the opportunity to implement simplified due diligence (SDD), with further guidance to be issued by the ESA’s. MasterCard welcomes that the ESAs have started this process in a timely manner before the implementation date of the 4th AMLD, giving Member States the opportunity to take the Guidelines into account for the transposition of the 4th AMLD.

The Draft Guidelines seek to help firms identify, assess and manage the money-laundering and terrorist financing risk (ML/TF risk) in a risk-based, proportionate and effective way and to clarify how competent authorities in the EU expect firms to discharge their obligations in this field. MasterCard would like to submit the following comments on specific points made and questions raised in the Draft Guidelines:

1. *Consultation questions under 5.2*

a) Do you consider that these guidelines are conducive to firms adopting risk-based, proportionate and effective AML/CFT policies and procedures in line with the requirements set out in Directive (EU) 2015/849?

The Draft Guidelines are in MasterCard’s view in line with the 4th AMLD, they are proportionate and MasterCard also welcomes the emphasis on the risk-based approach. MasterCard understands that the ESAs did not want to be too prescriptive as it is an inherent feature of a risk-based approach that every entity has a different risk-profile and needs to conduct their own risk assessment. MasterCard understands that the ESAs did not want to provide the recipe for a “box-ticking exercise”. However this can also lead to legal uncertainty for obliged entities as they cannot know whether enforcement authorities will share their assessment. The result could be that obliged entities would ultimately refrain from implementing SDD measures for fear of conducting a risk

assessment that would not be in line with the risk assessment of the competent regulator (see also below).

MasterCard therefore believes that it is important to point out in the Draft Guidelines that one of the features of a risk-based approach is that enforcement authorities when auditing obliged entities should take into account whether the entities conduct their risk assessments in a way that can be considered reasonable within the framework of the SDD Guidelines, and that risk-based approach does not mean “no-risk approach”.

Further, in MasterCard’s view the Draft Guidelines could be more specific in some points without compromising the risk-based-approach (please see below under 3.).

b) Do you consider that these guidelines are conducive to competent authorities effectively monitoring firms’ compliance with applicable AML/CFT requirements in relation to individual risk assessments and the application of both simplified and enhanced customer due diligence measures?

MasterCard believes that the points made under 1.a) above are not only in the interest of obliged entities, but would also provide more clarity for enforcement authorities.

c) The guidelines in Title III of this consultation paper are organised by types of business. Respondents to this consultation paper are invited to express their views on whether such an approach gives sufficient clarity on the scope of application of the AMLD to the various entities subject to its requirements or whether it would be preferable to follow a legally-driven classification of the various sectors; for example, for the asset management sector, this would mean referring to entities covered by Directive 2009/65/EC and Directive 2011/61/EU and for the individual portfolio management or investment advice activities, or entities providing other investment services or activities, to entities covered by Directive 2014/65/EU.

From MasterCard’s perspective the approach that the ESAs chose, i.e. organize the paper by type of business rather than a legally-driven classification of the various sectors, is reasonable, seems more practical and provide for more clarity.

2. *Title II*

MasterCard welcomes the clear statement in paragraph 17 that risk factors are not exhaustive nor that there is an expectation that firms should consider all risk factors in all cases, but instead should take a holistic view of the risks associated with a certain situation. We agree that the presence of isolated risk factors does not necessarily move a situation into a higher or lower risk category. Obligated entities should be allowed to look at the full picture, weighing all relevant factors in a specific case before making a decision.

3. *Title III*

Chapter 3: Sectoral Guidelines for electronic money issuers

MasterCard in general agrees with the risk factors to be taken into account when assessing the ML/TF risk. MasterCard also welcomes that the Draft Guidelines follow a risk-based approach and leave a certain level of discretion to obliged entities to assess the ML/TF risks on a case-by-case basis (see also above). On the other hand the Draft Guidelines will have limited practical value if they remain too unspecific and leave obliged entities with a high level of uncertainty. This could ultimately prevent them from introducing electronic money products under simplified due diligence.

MasterCard welcomes that the 4th AMLD provides more clarity as to the fact that (i) electronic money products can be issued anonymously where the risk is low and the strict thresholds and requirements of Art. 12 of the 4th AMLD are respected (Recital 7 4th AMLD); and that (ii) SDD can be implemented in addition. MasterCard also believes that the thresholds in the Third Anti-Money Laundering Directive (3rd AMLD) for SDD for *reloadable* electronic money products set a reasonable limit for SDD products, provided that such SDD is not understood as a complete omission of any customer due diligence. Art. 11 (5) (d) of the 3rd AMLD allowed SDD for electronic money products “*where, if it is possible to recharge, a limit of EUR 2 500 is imposed on the total amount transacted in a calendar year, except when an amount of EUR 1 000 or more is redeemed in that same calendar year upon the electronic money holder’s request in accordance with Article 11 of Directive 2009/110/EC.*” In our view, this – already existing – limit should be listed as an example for an electronic money product that may qualify for SDD as it represents a low risk, provided that there are no additional risk factors that indicate a higher risk (e.g. unlimited cash access could indicate a higher risk). In our view, this would be in line with the concept of a risk-based approach and at the same time provide more clarity and legal certainty for both obliged entities and enforcement authorities.

MasterCard also believe that the Draft Guidelines provide a very good opportunity to promote a harmonized approach within the EU and the Common Market. In MasterCard’s view it would therefore be counterproductive to see the fact that a certain product can only be used in a particular Member States as a factor that indicates a lower risk (see paragraph 115 on utility and negotiability).