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Ihr Zeichen, Ihre Nachricht vom Unser Zeichen, Sacharbeiter Durchwahl Datum

BSBV 115/Dr.Egger 3137 22 January 2015

**EBA – Consultation Joint Guidelines under Article 17 and 18(4) of Directive (EU) 2015/849**

**(The Risk Factors Guidelines)**

The Division Bank and Insurance of the Austrian Federal Economic Chamber, as representation of the entire Austrian banking industry, appreciates the possibility to comment on the

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 and would like to submit the following position:

**General Remarks on Directive (EU) 2015/849**

1. Calculation of beneficial owners (Art. 3): According to Art. 3 para. 6 of the 4th anti-money laundering directive, beneficial owners are defined as natural persons who ultimately own or control a legal entity through direct or indirect ownership of a sufficient percentage of the shares. A shareholding of 25 % plus one share would be sufficient. In this respect we strongly urge for an EU wide harmonized approach regarding the calculation methodology for the beneficial ownership, which would either mean a rule that prohibits the calculation on a proportional basis (as opposed to a calculation of a sufficient participation on each ownership level) or at least a rule that states that already existing customers are exempt. In our opinion, the text of the 4th anti-money laundering directive does not support a calculation on a proportional basis. This should be made clear also in the joint guidelines.
2. Customer and beneficial owner verification (Art. 13): Current standards for the verification of customers and beneficial owners within the EEA are very diverse, including the expected official public documentation and registers. This becomes very evident in particular in the course of international syndicated loans and private equity deals (e.g. in case of involvement of legal persons in offshore destinations), where the involved banks adhere to different local standards in regard to the reliable documentation. Thus in some countries there are much stricter regulatory requirements (e.g. Austrian banks must fulfill stricter verification requirements than German banks). In general, the verification of beneficial owner information should focus strongly on the country specific requirements (e.g. if a self-declaration of beneficial ownership is the only source of information available in a jurisdiction, this should be sufficient for verification purposes).
3. Beneficial owner register (Art. 30): It will be necessary to provide a legal clarification in the guidelines that banks may rely on any information entered into the mandatory beneficial owner registry for all risk classes and that these registers can be used as a publicly reliable source of information for the bank. There should be no obligation to interview the client or undergo further verification of the information obtained from the register through other sources (at least insofar as there is no indication of incorrect or incomplete data existing in the register). The bank should further not be obliged to update the information, as long as the information in the register has not changed. In general, the bank should be able to rely on information obtained from a public registry on beneficial owners and should not be obliged to investigate further.
4. Reliable Third Parties (Art. 25-27): It is important to define which parties can be considered reliable third parties for the banks in the future. Moreover, it would be necessary to be able to rely on all EU notaries.

Art. 9 of Directive (EU) 2015/849 states, that the EU-Commission will adopt a delegated act, in which the high-risk countries will be identified. Credit and financial institutions domiciled in high-risk countries, where the majority stake is held by banks domiciled within the EEA (and therefore must comply with the Group standards) must continue to be allowed to be used as qualified third parties. The same should apply in cases of lawyers, notaries, public accountants, financial auditors and other reliable parties that must adhere to Directive (EU) 2015/849.

A practical solution must be found for banks operating in some high risk jurisdictions for the identification of customers and representatives. Thus, it should be clarified that banks may employ other third parties (apart from reliable third parties), for example by instructing assistants (e.g. lawyers, notaries) about the obligations under Directive (EU) 2015/849 and having these assistants perform the identification accordingly. These aspects should not only apply to the identification, but also for the proof of beneficial ownership (in case that there are no reliable public sources in a specific jurisdiction).

**Questions:**

1. ***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*?**

Yes, we do consider these guidelines as conducive. They contain valuable guiding principles on applying the risk- based approach by laying out a methodology on how the risks of AML and CFT should be identified and assessed by firms. The catalogue of the risk factors, which have to be taken into consideration when identifying and assessing potential AML/ CFT risks is very helpful and can easily be implemented and incorporated in internal procedures concerning the prevention of money laundering and terrorist financing. Additionally, we strongly support the emphasis on the nature and the size of a firms' business when applying a risk-based approach. Therefore the guidelines allow firms to adopt effective AML and CFT procedures and policies which are proportionate to their activities.

1. ***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?***

Yes, the guidelines very clearly determine the specifications of the risk-based approach as well as the application of simplified and enhanced customer due diligence. Thus, these guidelines help the competent authorities to set clear expectations of the risk factors, which should be considered by firms when making their risk assessment and customer due diligence. On the other side, the guidelines also help firms to better understand what measures are expected of them and which risk factors have to be considered when identifying and assessing the AML/CFT risks as well as deciding on the appropriate customer due diligence level. Additionally, the fact that the competent authorities have to take into account the nature, scale and complexity of the firms' activities when assessing and monitoring a firms compliance with the applicable AML/CFT requirements allows an effective and proportionate evaluation of a firm.

1. ***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 individual portfolio management or investment advice activities, or entities providing other investment services or activities, to entities covered by Directive 2014/65/EU.***

We welcome the chosen structure of these guidelines in general and especially the structure of the sector specific Title III. The fact, that the guidelines contain a part, that is applicable to all firms (Title II) and a supplementary part (Title II), that is sector specific, allows to develop a common understanding of the risk-based approach and should lead to a uniform EU-wide standard. By focusing on different types of business, instead of focusing on legal definitions of the different sectors, the guidelines are sufficiently clear and even better understandable for the addressees."

**Specific Comments**

Below you will find further input on the consultation (numbers at the start of each of the comments point at the item of the draft which is being commented, capitalized terms have the meaning as given to them in the drafts).

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1. (12, 13): Risk assessments: methodology and risk factors: Consideration of risk-related factors for occasional walk-in customers:

The occasional walk-in customer is not a classic customer relationship. Thus, there is typically no client base and no ongoing customer behaviour that needs to be assessed and monitored. An assessment of the necessary risk factors followed by a risk-classification cannot therefore be technically considered and does the make sense in the absence of any follow-up business.

1. (15), 3rd bullet point: The “*reasoning as set out in regulatory fines*” will only be known to a firm which has been fined. Due to the fact that such firms will certainly have an interest to not be charged with any additional fines for a continued non-compliance and other firms will typically have no knowledge of the fine (not to talk about the reasoning for such fine) the second half of the sentence should be deleted (starting from “*and the reasoning…*”);
2. (16), 2nd and last bullet point are too unspecific and too broad and should be deleted;
3. (18), items b) and c)

Since Firms are in no position to track a customer’s (or even a beneficial owner’s) “*nature and behaviour*” and since these terms are way too unspecific, the item c) should be deleted. Also it is suggested to keep out generally reputational risk aspects and therefor to delete also sub-item b);

1. (18) - (21): In general the factors and questions to consider in the guidelines by the European Supervisory Authorities go beyond the risk factors mentioned in the 4th Anti-Money Laundering Directive (2015/849). While Annex III of Directive 2015/849 mentions “cash-intensive business” as a consideration for potentially higher risk of money laundering, the guidelines mention in reference 19 additional sectors, such as construction, pharmaceuticals, healthcare and public procurement. It is therefore no clear, which is considered the minimum standard.

Consideration of risk factors relevant to the beneficial owner (from reference 18 et seq): As there is usually no personal contact with beneficial owners, some of the required information gathering is possible only with greatly increased costs. Furthermore, most of this information will not be available at the time the customer is set up in the banking system and therefore cannot be taken into account in the risk-rating process. An updating of existing customers is not feasible due to missing resources.

In addition, the guidelines include a new risk factor (reference 19), which is a customer holding a public position that might enable them to abuse public office for private gain. In light of the already existing PEP definition and the overall high risk associated with this factor, such an additional factor which is very wide in scope and relating to virtually the same risk seems unnecessary.

Most factors mentioned in association with a customer’s or a beneficial owner’s reputation, appear to be mostly “no-go” factors, meaning such factors would in most cases be a clear indication for not onboarding such a customer in the first place and/or immediately submitting a suspicious activity report. It is therefore highly questionable, if these should be seen as merely “risk factors”. Examples of these factors are:

* Are there suggestions that the customer or beneficial owner or anyone associated with them may have handled the proceeds from crime?
* Are there any adverse media reports about the customer, for example are there any allegations of criminality or terrorism (proven or not) against the customer or their beneficial owners?
* Is the customer, beneficial owner or anyone associated with them subject to an asset freeze due to criminal proceedings or allegations of terrorism or terrorist financing?

The same applies for several factors in relation to a customer’s nature and behavior, e.g.:

* Does the firm have any doubts about the veracity or accuracy of the customer’s or beneficial owner’s identity?
* Are there indications that the customer might seek to avoid the establishment of a business relationship?
* Is the customer’s ownership and control structure transparent and does it make sense?

While risk factors in relation to e.g. geographical risks or product risks can be integrated as part of a standardized risk model, the above customer risks seem to be stand-alone factors. Therefore further guidance would be helpful on which factors are expected to be reflected in a risk rating model and which factors must considered outside of such a model. In general, the expectation would be that all relevant risk factors can be integrated as part of an automated risk model using IT systems.

1. (19), 1st, 2nd and 3rd bullet points: Since most, if not all, retail clients of a firm will every now and then buy at (e.g.) a pharmacy, each such retail client will have a link to pharmaceuticals. Thus, it is suggested that the EBA defines a conclusive industry list setting out, which specific industries come together in EBA’s opinion with an enhanced “*corruption risk*”/”*higher ML or TF risk*”/”*sectors that involve significant amount of cash*”, rather than raising the question whether there are links to any such industries/sectors. At least it should be clearly described which quality such links should have in order for such link to qualify as risk factor. However, if this is not possible, we suggest to delete these items;
2. (19), 4th bullet point: In Austria (and other jurisdictions) firms can rely on the certificate of registration once they check a company (e.g. for granting a loan). For a bank transaction to be valid and enforceable firms do not have the obligation to verify a company’s constitutional document (e.g. articles of association), which typically sets out the purpose of a company. In addition the constitutional documents of a company may not be easily accessible. Therefore the requirement “purpose of their establishment” should be either rephrased in the sense that it may constitute an additional risk factor if a firm positively knows from one of its customers (legal person) to act beyond its legal capacity, but it should not be suggested that firms have to check the purpose of a customer’s establishment;
3. (19), 5th bullet point: From the Directive itself it is clear that PEPs have to be identified and monitored. Other than “*family members*” and “*persons known to be close associates*” (each as defined in the Directive) the Directive is not suggesting any requirement for a firm to investigate into any broader political “*connections*” or “*links*” to a PEP. Thus, this sub-item should be deleted.
4. (19), 6th bullet point: It shall either be specified what such holding of “*another public position*” actually is (other than a position which classifies a customer as PEP); otherwise, the point should be deleted;
5. (19), 7th bullet point: Firms will not be able to assess if such requirements are “*enforceable*” or actually can provide such sureness and reliability. Even if there are any such requirements the extent of the disclosure requirements are often debatable and are always subject to change over time. Firms shall not be forced to give a binding opinion or only to make close investigations on such matters (this should be stated in the guidelines);
6. (19), 8th bullet point: Same comment as for item (viii) above but with reference to the quality of such “*AML/CFT regime*”/”*obligations*”;
7. (19), 9th bullet point: The guidelines should either (preferred) specify which jurisdictions are considered to have a “*low level of “corruption*”, or set out which source(s) can be considered as binding for ranking such jurisdictions;
8. (19), 10th bullet point: It should be specified what such “*background*” actually is. A firm should not be required to dig into the history of its customers, thus the reference to “*the former business*” should be taken out and there should be given much more specific guidance on how a firm is expected to investigate into “*the planned business activity*” of a customer;
9. (20), 1st, 2nd and 4th bullet point as well as (64), 2nd bullet point, sub item ii. : A freeze of assets will only be known to a firm if the asset freeze is directed against a customer’s asset held within such firm (typically an account). Prior to an asset freeze and/or an order for an account opening, a firm will typically not have positive knowledge about any criminal proceedings. Thus, such information is not available to any of the other firms in contrast to the one which is notified by the authority/court of any such procedures. Such a customer is anyhow already targeted by the authority, therefore the 2nd bullet point is either pointless or superfluous. To include risk factors only on the basis of rumors (“*allegations*”, “*proven or not*”, “*suggestions*”) should be clearly avoided (above all it conflicts with the presumption of the principle of innocence);
10. (21), 1st bullet point: If a firm has doubts about the veracity or accuracy of the customer´s or beneficial owners identity, it will not be entitled to onboard such a client, respectively it will have to do a suspicion report and/or terminate the business relationship. Since all of this is part of given law anyway there is no room for guidance;
11. (21), 2nd bullet point: If a customer avoids a business relationship, he would not be onboarded or the rules for an occasional transaction will apply;
12. (21), 3rd bullet point: Whether a company structure makes sense or not, is first and foremost a company matter. A firm may not have the ability to judge whether a given structure makes sense. This should be rephrased to indicate that only if a firm has a reason to believe that such a structure gives reason to believe that there may be an AML/CTF matter, the respective customer should be monitored and put under enhanced due diligence or reported. Without having a meter for transparency there will be no objective criteria for distinguishing transparent from intransparent structures;
13. (21), 5th bullet point: What is meant by an “*asset holding vehicle*”? Companies will in many cases hold assets. If this point refers to fiduciary/trust schemes the wording should be redrafted;
14. (21), 6th bullet point: Firms will not be able to judge the sound reason for the change of the customer´s ownership;
15. (21), 7th bullet point: It should be specified which thresholds are meant;
16. (21), 9th bullet point: It should be clearly expressed that only a plausibility check but no full proof should be expected;
17. (21), 10th bullet point: Please specify what is meant with the wording “*their products*”;
18. (21), 11th bullet point: Again it should only be a plausible but at the same time “*economic* AND *lawful rationale*”;
19. (22), item c): please specify “*personal links*”;
20. (23) – throughout: Item “23”should only express that a firm should consider the quality of a jurisdiction by applying a trustworthy source;
21. (23), 3rd bullet point: What would be the consequences in the case of such information? Putting a customer domiciled in such jurisdiction into a higher risk category only for this reason? Law enforcement typically does not provide any such information whilst reliance on media reports only is not recommended.
22. (23), 5th bullet point: A clear definition for each of these terms, or even better a list of jurisdictions which qualify as “*tax haven*”, “*secrecy haven*” or “*offshore jurisdiction*” would be very helpful;
23. (23), 8th bullet point: A firm will not be able to judge on whether or not a jurisdiction is “*politically stable*“ (whatever this means);
24. (26), 2nd bullet point: Firms will not be able to investigate if any such third party will indeed have a possibility to give any such instructions;
25. (27), 2nd bullet point: Any current account will allow – as receiving account – to be finally credited from a third party (such as in the event where an invoice is being paid not by the debtor (addressee of the invoice) but someone else). Is this a risk factor to be included? Is a mortgage loan which is prepaid (which happens often) to be seen as such “*certain mortgage … product*”? Again, an official list of products which bear higher (or lower) risk would be helpful;
26. (28), 2nd bullet point: The credit balance will finally determine to which extent a current account will facilitate a high value transaction. On the same token, the nominal value of a bond determines the potential transaction value. Again it would be helpful to have a list of products which EBA considers to fall within this category;
27. (29), item a): Does this mean that all internet banking activities (like giving a transfer order) will be high risk activities?;
28. (33) – (35): The guidelines do not provide sufficient guidance on the expectation of the weighting of single risk factors. However, apart from the actual risks to consider and the questions to assess when making a judgement on a customer´s money laundering risk, the risk weighting is one of the most important aspects. The guidelines state that “*firms should make an informed judgement about the relevance of different risk factors in the context of a business relationship or occasional transaction*”. Further “*firms may decide that a customer’s personal links to a high risk jurisdiction is less relevant in light of the features of the product they seek*”. This approach would mean, that the bank would be expected to risk weigh different factors differently for certain customers. This will make it almost impossible to develop any sort of automated standardized risk model. Also the risk model will take on a complexity that is hard to understand for employees outside of AML departments.

In our opinion it is necessary to provide further and more detailed information on the risk weighing approach e.g. which factors should weigh higher for certain customer types. Also, the question must be answered, if a standard risk weighing model is possible on the basis of the overall type of customers and the general business model of the bank or whether a single view assessment is expected for each customer. If a single view is expected, further information is required on how this should be implemented.

1. (42), 2nd bullet point, subitem i.: reversely, does this mean, in the case of applying normal or enhanced CDD, a firm will have to take, for example a passport and an ID-card from a private individual when taking-on as new client?;
2. (49), 2nd bullet point: once a business relationship has been established with a PEP, e.g. by opening a current account, the business is typically continuous. Therefore, the description “*or continuing*” should be deleted;
3. (57), 1st bullet point, subitem i.a.: adverse information’s about any family member of a customer must and will often not have any link towards the customer itself;
4. (72) – (94): While reference is made to the definition of correspondent banking as defined in Article 3(8)(a) of Directive (EU) 2015/849, the guidelines should take the opportunity for a more detailed assessment and clarification on what business/conduct constitutes a correspondent relationship. Thus, some examples of such relationships would be beneficial. Also, as stated in reference 77, it should be clearly described, what criteria need to be taken into account when assessing if the respondent is not subject to adequate AML/CFT supervision.

Regarding reference 87, the expectation is that correspondents should always adequately document their EDD measures and decision-making process. Again here it would be important to mention examples of what kind of documentation process would be seen as adequate or what process would not be acceptable under any circumstances.

1. (95) – (110): While many considerations taken in the sectoral guidelines for retail banks address pressing issues in regards to dealing with retail customers from an anti-money laundering perspective, in particular in regards to the updating of customer information, the sector guidelines make very little reference to customer risk factors associated with natural persons. Many risk factors seem specifically aimed only at legal persons, which are not considered the main customer segment of retail banks (e.g. the customer is a cash-intensive undertaking, the customer is a new undertaking, the customer’s beneficial owner cannot easily be identified). In particular in regards to the application of a lower risk of money laundering, more factors relating to natural persons would be required. Currently three out of the four factors relate to legal persons, which are not generally target customers of retail banks (e.g. public listed companies, public administration, credit- or financial institutions)
2. (149): The sectoral guidelines for wealth management state that simplified due diligence is not appropriate in a wealth management context. This would mean that a customer in this segment could never be considered a “low risk” customer. This seems to go against the general risk-based approach stated in the guidance as well as the consideration of “private banking” merely as a factor (Annex III of Directive 2015/849). If a risk model would allow for the calculation of a low risk customer, despite taking into consideration a potential high risk product or business area, then the application of simplified due diligence should be possible also in the context of wealth management, if all other factors do not assess a higher risk of money laundering. This sector should at the very least include the risk-reducing factor of long-term business relationships, which have been inconspicuous from a money-laundering perspective, as this is also done in other sectors. In addition, a high threshold (of 700,000 EUR or 1 million) is to be set in order to identify the customers in this area accordingly.

It would also mean that banks specifically aimed at wealth management clients would have a distorted risk model, which would not necessarily reflect the actual money laundering risk of the customers or the bank. Therefore, if the appropriate risk factors taken into consideration allow for the categorization of low risk customers in this segment, then the simplified due diligence approach for wealth management customers should be possible under these conditions as well.

Please give our concerns due consideration.

Yours sincerely,

Dr. Franz Rudorfer

Managing Director

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