Brussels, 03.02.2023
Final

EACB Position Paper on the EBA Consultation on AML/CFT Risk Factors and the Effective Management of ML/TF Risks when Providing Access to Financial Services

The **European Association of Co-operative Banks** (EACB) represents, promotes and defends the common interests of its 27 member institutions and of cooperative banks, with regard to banking as well as to co-operative legislation. Founded in 1970, today the EACB is a leading professional lobbying association in the European banking industry. Co-operative banks play a major role in the financial and economic system. They contribute widely to stability thanks to their anti-cyclical behaviour, they are driver of local and social growth with 2.700 locally operating banks and 52,000 outlets, they serve 223 million customers, mainly consumers, SMEs and communities. Europe's co-operative banks represent 87 million members and 705,000 employees and have an average market share in Europe of about 20%.

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Introduction

Europe's cooperative banks serve 214 million customers, who are mainly consumers, retailers, SMEs and communities. This makes them drivers of local and social growth and major contributors to financial and economic stability by merit of their anti-cyclical behaviour. The main service provided to the retail markets by cooperative banks is the provision of credit – the biggest market share being in consumer loans and mortgage loans.

The EACB (the European Association of Cooperative Banks), which represents Europe's cooperative banks towards the European regulator, has carefully reviewed with its Members the consultation paper on the guidelines on money laundering and terrorist financing (ML/TF) risk factors and draft guidelines on policies and control for the effective management of ML/TF risks when providing access to financial services under Directive (EU) 205/849, known as the Payment Accounts Directive (PAD).

Whilst it complements the European Banking Authority (EBA) on the careful consultation process undertaken to amend and draft new guidelines on managing ML/TF risks, the EACB would like to draw the EBA's attention to several concerns that it has identified with the proposed guidelines.

Our overall observations regarding the guidelines are the following:

- Annex that covers NPO customers: The requirements should be made more workable and proportionate, cutting compliance costs to avoid the guidelines exacerbating de-risking rather than remedying it. In part, this could be achieved by lowering requirements for first-time NPO customers who are nevertheless reputable.

- Subject matter, scope and definitions: The guidelines address only obliged entities as defined in Articles 3(1) and 3(2) of the AMLD4. These concepts are outdated, which could, by excluding presently wide spread payment services, upset the playing field.

- General requirements: The guidelines contradict current practices in identifying and managing ML/TF risks and the management's independent decision-making duty.

- Applying restrictions to services or products: The requirements in this section unduly burden the monitoring system by creating new categories of business relationships across various products and services.

- Complaint mechanisms: The requirements in this section, specifically that to hand over the respective report to each rejected customer, could impose an undue volume of legal actions upon banks, Member States' legal systems and pose undue liability risks to banks' employees.

In this context, the EACB generally wishes to remark that the present guidelines contradict the development of anti-money laundering legislation (AML/CFT) in the European Union (EU), which has granted banks discretion in the identification of risks and their management.

Part I - EACB Comments on the Consultation Questions regarding ML/TF risk factors

Q1. Do you have any comments on the Annex that covers NPO customers?

Some requirements laid out in the Annex on customers that are NPOs are unworkable and excessively costly. The proposed guidelines could, consequently, exacerbate de-risking instead of containing it. This dilemma affects, in particular, the requirements to obtain a "detailed list of staff and beneficiaries for each of its activities" (p.13, paragraph 9, point e) and a "reasonable assurance" that the NPO conducts its activities in line with the exemptions provided in the EU/UN financial sanctions regime or that it benefits from a derogation granted by a relevant competent authority (p.15, paragraph 12). Sketching out the transactions that an NPO will likely request based on detailed staff and beneficiaries lists across activities, for instance, would be particularly challenging for multinational and crowdsourced (open call) NPOs whose staff are widely spread and operations frequently ad hoc. In this scenario, the difficulty in obtaining sufficient information, in terms of their potentially poor quality and high costs in the face of low profitability, would encourage rather than remedy de-risking. Ultimately, NPOs could be hindered in their operations, and, especially small NPOs might have to revert to less transparent means to send and receive payments.

The EACB thus suggests that the EBA makes the requirements that the Annex on NPO customers covers more workable and risk-appropriate. In this context, questions arise about whether firms may pass on these requirements to clients and whether only an initial assessment or the continuous maintenance of this information is necessary for clients that are an NPO for the first time.

Part II - EACB Comments on the Consultation Questions regarding ML/TF Risk Management when Providing Access to Financial Services

Q2. 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.

The EACB regrets that the present guidelines address only obliged entities as defined in Articles 3(1) and 3(2) of Directive 2015/849/EC (AMLD4). More specifically, because they ultimately refer to Annex I of Directive 2007/64/EC, the guidelines cover an outdated array of payment services. By exempting, for example, account information services (AIS) and payment initiation services (PIS), the present guidelines could upset the playing field. Even following the public hearing on January 10, 2023, it remains unclear to the EACB how the EBA intends to solve this issue with the review of Directive 2015/2366/EU (PSD2), as the proposed AMLD6 does not, at this point, include a similar mandate for guidelines.

Q3. Do you have any comments on the section titled "General requirements"?

While the EACB appreciates that the present draft guidelines intend to ensure vulnerable customers' access to financial services (paragraphs 9 and 10), we would like to highlight that they contradict rather than complement the currently practised approach to managing ML/TF risks. In essence, the draft guidelines are too prescriptive, resulting in a general obligation for credit and financial institutions to conduct contracts with natural and legal persons that they would otherwise not pursue under the established methods for identifying and dealing with ML/TF risks. The guidelines would thereby, firstly, push banks to thwart Financial Intelligence Units' advice, which regularly issue warnings against certain groups. These messages and banks following them do not violate Article 21 of the Charter of Fundamental Rights (CFR) on non-discrimination and subsequently do not necessitate the protection that the present guidelines seek. They, however, secondly, limit banks' freedom to conduct business as enshrined in Article 16 of the CFR. The benefit from these guidelines for the few customers who are wrongfully denied access to financial services is, therefore and thirdly, outweighed by the burden that the EACB expects them to impose upon the banking sector.

Within the general requirements section, the EACB would further like to draw your attention to paragraphs 11 and 12, which equally contradict current practices. Banks can no longer take general risk-minimising measures, wherefore these cannot be outlined in their policies, procedures and controls. Such an obligation under the current guidelines would contradict the independent decision-making duty of the board of directors. It would also restrict the management's discretion in business policy decisions and therefore infringe upon the freedom to provide services.

Q4. Do you have any comments on the section titled "Adjusting monitoring"?

NA

Q5. Do you have any comments on the section titled "Applying Restrictions to Services or Products"?

The section on applying restrictions to services or products could lead to an undue burden for monitoring systems by creating new categories of business relationships across various products and services.

Additionally, the above-mentioned FIU warnings show that the fraud potential of certain groups should be considered by the addressees when restricting access to (online) products or services.

Q6. Do you have any comments on the section titled "Complaint mechanisms"?

The requirements laid out in the "Complaint mechanisms" section disproportionately grow the volume of documentation, which may be traced back to, especially, the EU General Data Protection Regulation.

Additionally, handing over the respective report to each rejected customer could create a large volume of legal actions, cumbersome bureaucracy for Member State's legal systems, overburdening them, and liability issues for the responsible bank employees.

Contact:

The EACB trusts that its comments will be taken into account.

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