Verband der Auslandsbanken in Deutschland e.V.
Association of Foreign Banks in Germany

INTERESSENVERTRETUNG
AUSLÄNDISCHER BANKEN,
KAPITALANLAGEGESELLSCHAFTEN,
FINANZDIENSTLEISTUNGSINSTITUTE
UND REPRÄSENTANZEN

REPRESENTAION OF INTERESTS
OF FOREIGN BANKS,
INVESTMENT MANAGEMENT COMPANIES,
FINANCIAL SERVICES INSTITUTIONS
AND REPRESENTATIVE OFFICES

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Joint Consultation on common understanding of the obligations imposed by European Regulation 1781/2006 on the information on the payer accompanying funds transfers to payment service providers of payees

Dear Madam, dear Sir,

The Association of Foreign Banks in Germany very much appreciates that the three Level 3-Committees have launched the present consultation and welcomes the intention to reach a common understanding on how to deal with the obligations pursuant to Art. 8, 9 and 10 (1) of Regulation 1781/2006.

Our Association represents more than 170 foreign banks, financial services institutions, investment management companies and representative offices active in Germany, among them several entities belonging to the leading institutions world-wide (for further information on our association, please cf. the EU register of interest representatives, Identification No.: 95840804-38 or our website www.vab.de). Many of our members are engaged in the funds transfer business – often on a cross-border basis with entities located outside the EEA – and consequently have a strong interest in a workable and common application of Regulation 1781/2006.

In view of this, we have noted with great interest the current work of the three Level 3 Committees and would like to comment on some of the issues raised and solutions proposed. Indeed, any common understanding should reflect the fact that funds transfers is a mass business and that the underlying FATF Special Recommendation VII has been transposed in different ways in jurisdictions outside of the EEA.

1. Common understanding on Articles 9 (1) and 10 of Regulation 1781/2006

The treatment of transfers that are incomplete according to Art. 9 (1) of the Regulation as suggested in para. 9 -38 of the consultation paper appears difficult.

For once, the option of rejecting or holding incomplete transfers (cf. 3.1.2 and 3.1.4 of the consultation paper) may conflict with civil law requirements, as it will do at least in Germany. According to Sec. 676g of the German Civil Code, the PSP of the payee is in principle obliged to credit incoming transfers to the payee´s account. Only when the transfer conflicts with embargo or sanction rules may the funds be held by the PSP or rejected.

Secondly, there are many situations in which missing or incomplete information on the payer could be perfectly legitimate. Due to the fact that FATF SR VII permits countries to adopt a de minimus threshold of no more € 1,000 or US$ 1,000, and that some third countries such as the USA or Switzerland have made use of this possibility, funds transfers below this threshold coming from such third countries may in general and in accordance with the FATF Special Recommendation lack the required originator information.

In view of this, we are very sceptical whether the option of systematically rejecting or holding all transfers which are incomplete, is feasible. On the contrary, PSPs should have the possibility to systematically process all transfers – of course unless this would contradict the restrictions imposed by European financial sanctions (e.g. Regulations 2580/2001 and 881/2002), by Directive 2005/60/EC or by other obligations under national law (e.g. national embargo rules).

Instead, we welcome the idea of a risk-based approach which would permit each PSP to set out and specify in its internal processes and procedures how to deal with incomplete transfers – including the possibility to systematically process all transfers – and to determine whether or not the incompleteness of the information included in the funds transfer requires further action, other than asking for complete information after having executed the transfer (as stipulated in Art. 9 (1) which remains unaffected). Such risk-based approach would allow PSPs to also pay regard to e.g. the provenance of the transfer or whether the country of the payer PSP has made use of the de minimus threshold and to make use of the risk criteria it has already implemented due to the Third AML Directive. In this context, we would like to stress that missing or incomplete information within the meaning of Regulation 1781/2006 or no response by the payer PSP to a request for complete information should not, on a stand-alone basis, be decisive for the assessment of the suspicious character of a transfer or for the decision to hold or reject a transfer. Such understanding would not adequately reflect the fact that there is no obligation to include the information requested under Regulation 1781/2006 in case of funds transfers from third countries falling under the de minimus threshold. Payee PSPs should therefore rather have the possibility to rely on their own assessment of the risk related to a particular transfer with incomplete or missing information. Due to the implementation of the KYC, research and monitoring obligations as well as of the enhanced CDD requirements relating to cross-border correspondent banking relationships with institutions from third countries resulting from the Third AML Directive, payee PSPs should already be in an adequate position to assess the suspicious character of transactions and find the appropriate way to deal with transfers missing the required information.

Answer to Question 1: In view of the above, we prefer the proposed Option B:

Answer to Question 2: N.A., as the option of holding payments would in principle be contrary to German civil law.

2. Common understanding on Art. 9 (2) of Regulation 1781/2006 – Regularity of failure and Transmission to the authorities

Answer to Question 3: We welcome that the three Level 3-Committees suggest a list of criteria in order to assist PSPs in determining whether other PSPs regularly fail to provide the required information. However, we suggest that the common understanding explicitly states that this list of criteria is non-exhaustive.

Furthermore, the list should include the criterion of whether the failing payer PSP is a third country PSP which makes legitimate use of the de minimus threshold. If this is the case, e.g. for funds transfers below US$ 1,000 coming from the USA, the incompleteness of the required information and/or the payer PSP´s non-reaction to requests for complete information should have only limited relevance for determining regularity of failure. This would be in line with Recital 17 of Regulation 1781/2006, according to which the fact should be taken into account "that the revised interpretative note to SR VII of the FATF allows third countries to set a threshold of € 1,000 or US$ 1,000 for the obligation to send information on the payer, without prejudice to the objective of efficiently combating money laundering and terrorist financing".

In this context, we would like to emphasize our support of para. 44 of the consultation paper. Indeed, failure to supply information should not be confused with suspicious activities and a corresponding report should be clearly distinguished from a Suspicious Transaction Report as set out in the Third AML Directive.

3. Common understanding on Art. 9 (2) of Regulation 1781/2006 – Decision as to restrict or terminate the business relationship with a PSP reported as being regularly failing

We strongly endorse the sentiment that disruption of commercial relationships is to be avoided if at all possible. Payee PSPs would rarely wish to do so purely for breaches of Regulation 1781/2006, in particular if this concerns third country correspondent banks which are already subject to enhanced due diligence under the Third AML Directive and where the risk of being abused for money laundering or terrorist financing is already paid regard to.

Answer to Question 4: Therefore, we suggest that the decision to terminate or restrict the business relationship should be a measure of last resort which, in principle, should be at the discretion of each PSP in accordance with its risk assessment. If coordinated measures at a broader level nevertheless seem necessary, it should be the task of the competent authorities and national governments.

4. Threshold

We suggest that the last sentence of para. 51 of the consultation paper be deleted. In view of the above, the fact of whether the payer PSP makes legitimate use of the threshold should already be taken into account in the policies and procedures to be set up by the payee PSPs and their individual risk-based approach.

In case of any queries relating to the above or should you wish further information, please do not hesitate to contact us.

Best regards

Wolfgang Vahldiek Sabine Kimmich