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Your ref., Your message of Our ref., person in charge Extension Date

BSBV 99/Horvath 3141 12 Jan 2016

**Joint Consultation: 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**

The Division Bank and Insurance of the Austrian Federal Economic Chamber, as representative of the entire Austrian banking industry, appreciates the possibility to comment on the above cited joint consultation paper and would like to submit the following position:

Below you will find our input to 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).

1. (15), 3rd bullet point: The “reasoning 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. (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. (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?;
29. (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;
30. (57), 1st bullet point, subitem i.a.: adverse information about any family member of a customer must and will often not have any link towards the customer itself;

We ask you to give our remarks due consideration.

Yours sincerely,

Dr. Franz Rudorfer

Managing Director

Division Bank and Insurance