23rd February 2024

EBF Response

EBA Consultation paper on Guidelines on preventing the abuse of funds and certain crypto-assets transfers for ML/TF (Travel rule Guidelines)

Question 1. Do you agree with the proposed provisions? If you do not agree, please explain how you think these provisions should be amended and set out why they should be amended. Please provide evidence of the impact these provisions would have if they were maintained as drafted'?

1. General remarks

EBF supports the effort by European Banking Authority (EBA) to issue guidelines that will enhance a common understanding, across the EU, on the application of effective procedures, to detect and manage the transfer of funds and crypto assets lacking the required information on the payer/originator and the payee/beneficiary, by PSPs, IPSPs, CASPS and ICASPs and competent authorities.

The expansion of the scope of Regulation (EU) 2023/1113, recasting Regulation (EU) 2015/847 to cover transfers of crypto – asset while also extending the definition of 'financial institution' to include that CASPs are subject to the same AML/CFT system and control requirements as other credit and financial institutions within the scope of Directive (EU) 2015/849, has inevitably **increased the need to create a consistent set of rules regarding all legal definitions, categories and requirements pursuant to the envisaged EU AML regulation both for transfer of funds and crypto-assets.**

Moreover, FATF initiated a review of Recommendation 16 (Wire Transfers) to examine areas in which R.16 may need adjustment to reflect changes in market developments, to avoid loss of relevant information, and to better meet the objective of the recommendation itself. The scope of R.16 as well the content/quality of the information that must accompany the transfer of funds – among other issues – are under discussion and this would have an impact on Regulation (EU) 2023/1113 and on the related EBA's Guidelines. **Considering the above, we hope that actions envisaged at the international and European level will be consistent and harmonized as far as possible.**

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In this paper we provide our comments and highlight our suggestions responding to the questions raised by EBA to enhance clarity and consistency to the draft guidelines proposed. This paper reflects the same numbering of paragraphs as per the draft guidelines issued by EBA in the context of this consultation.

2. Detailed comments

2.Subject matter, scope, and definitions

Paragraph 9 - Definitions

a. Transfer Chain:

For both the transfer of funds and the transfer of crypto-assets, it must be ensured that only service providers that also fall within the scope of the "Regulation (EU) 2023/1113 on information accompanying transfers of funds and certain crypto-assets" are covered by the definition of the "transfer chain".

To ensure this already in the definition, **the proposed definition of the "transfer chain" should be supplemented as follows:**

"Transfer chain:

Means the end-to-end sequence of parties, processes, and interactions involved in facilitating the transfer of funds and transfer of crypto-assets from the payer or originator to the payee or beneficiary**, exclusively in the sphere of PSP, IPSP, CASP, ICASP**."

b. R- transactions:

It is unclear if R-transactions require transparency controls as well on missing/meaningless information. Transactions are already subject to payment transparency control when sent by the Ordering PSP and received by the IPSP(s) and the Beneficiary PSP.

Several Market practices exist on the topic. Some PSP tend to consider R-transaction as Bank-to-Bank transaction (equivalent to MT202 and not to MT103/MT202COV) as the funds are retransferred to the bank and not directly to the client.

We suggest that clarification is required as to whether these flows are subject (or not) to Payment Transparency controls. The draft guideline should be adjusted to clarify that rejected, returned, or recalled transfer of funds (R-transactions) do not constitute a new transfer of funds within the meaning of Article 3 of the Regulation and hence that the requirements of the same Regulation should not apply to such R-Transactions. Indeed, R-Transactions are to be considered as exceptions pertaining to the original payment transaction for which such obligations have been already met.

A new paragraph 9A. Exception handling should be added to clarify that "The exceptions pertaining to a transfer of funds (Reject, Return or Recall transactions) don't constitute a new transfer of funds in the scope of Regulation (UE) 2023/1113."

This proposal will avoid unnecessary frictions in the handling of R-Transactions.

4.Preventing the abuse of funds and certain crypto-assets transfers for money laundering and terrorist financing purposes

2. Exclusion from the scope of Regulation (EU) 2023/1113 and derogations

Guideline 2.1 - Determining whether a card, instrument or device is used exclusively for the payment of goods or services (Article 2(3) point (a) and (5) point (b) of Regulation (EU) 2023/1113)

Paragraph 4:

The objectives and criteria of this guideline must be clarified and further enhanced. We provide further below the rationale and supporting information as to why it is unclear with current criteria to determine whether a card, an electronic money instrument, a mobile phone or any other digital or IT prepaid or postpaid device with similar characteristics, is used for the purchase of good or not.

Payments can include cards payments, but also other payment solutions based on SEPA SCT, Instant payments, SEPA SDD etc. For instance, on a marketplace, buyers have already the choice to pay with their card, or to scan a QR code that will automatically initiate a wire transfer.

EPI will further develop these purchase payment solutions based on SCT instant payment for example. If we don't align the requirements, these SEPA based payment solutions will never be viable (sanctions filtering will prevent the execution of multiple purchases because of false hits). The investigation of such hits is currently not possible since merchants are not able to provide their PSP (acquirer) with any information regarding a buyer that is just paying for his goods in a point of sale /marketplace).

Cards payments (Visa Direct, money send etc.) and wire transfers (SEPA SCT) can both be used for the purchase goods or services initiated on the point of interaction.

Insofar as purchases of goods and services can be differentiated from simple money transfers between parties, requirements and exemptions should be the same whatever the means of payment.

In fact, we need to adopt a reasoning more oriented on the usage (i.e. the final purpose of the transaction) than the product itself (i.e. the tool to perform the purpose of the transaction).

By doing so we will avoid:

i. creating different requirements for systems and products that have the same usage (i.e. payment of goods and services).
ii. the exclusion of person from SEPA perimeter due to their name/origin.

iii. unfair competition. Currently, FIs do not filter card payments but are requested to do it for money transfers. A client who wishes to buy a product or a service can be blocked in SEPA but can perform the exact same transaction using his/her credit card. We need a more homogeneous approach.

Consequently, it **must be made clear** that all payment solutions when used exclusively for purchase of goods and services and initiated on the point of interaction must be included in the exemption even when covered/support by wire transfers.

Hence, we are proposing the following new wording:

2.1.4 "For PSPs to determine whether a card, instrument, or device (even supported with wire transfer) is exclusively used for the payment of goods or services, PSPs should make, at least, the following assessments […]"

Additional comment:

A wire transfer is also considered as an "instrument" by the Banque de France (Payments and market infrastructures in the digital era – chapter 2 "Means of payment and payment instruments" updated on 17/12/2018).

The interpretation of this term should not be limited to card or digital device whereas it also encompasses card, cheque, credit transfer, direct debit, etc.

We understand that SWIFT and EPI are working on the creation of a Purpose code that will allow to differentiate these Purchase payments from P2P transfers.

Guideline 2.2. - Linked transfers in relation to the 1000 EUR threshold (Article 2(5)(c), Article 5(2), Article 6(2) and Article 7(3) of Regulation (EU) 2023/1113)

Paragraph 6 and 7 ("persons linked / connected"):

Particularly regarding the use of the terms "persons linked / connected", it must be ensured that these correspond to the requirements of the planned EU AML Regulation so that identical definitions are used here.

Another point we consider should be clarified is the time period to be considered when determining whether there is a relationship between transfers or not, as well as clarification regarding the scope of "related persons".

Additionally, definitions and criteria applicable to the risk management policies set out in the consultation paper should be defined. Two points come under question:

Cases of intentional fractionation

Are simplified due diligence measures are (or should be) included to determine whether this is a case of intentional fractionation and, if so, will it be relevant to ascertain if there are related transfers (and the threshold of 1000 EUR in question) at the moment and for future moments (for data backlog purposes), if it is proven that there is no deliberate fractionation, even if there is a relationship between the operations?

Commercial relationships

Are "commercial relationships" included in the definition? (for example, invoices payment)- if so, specific risk factors (such as jurisdiction and type of activity/market segment) will have to be taken into consideration as aggravating factors in the delineation of time periods and other criteria to be reflected in the appropriate policies.

Guideline 3 - Transmitting information with the transfer (Article 4, Article 5, Article 6 and Article 14 of Regulation (EU) 2023/1113)

Paragraph 13

Regarding steps to address technical limitations we consider the transition period until the 31 July 2025 as too short, considering that there is currently no established standard.

Guideline 3.3. - Batch transfers (Article 6(1), Article 7(2) (c), Article 15, Article 16(1), Article 20 of Regulation (EU) 2023/1113)

Paragraph 19

In practice, an intermediary PSP is not settling the individual underlying parties but merely facilitating and passing on bundled funds from the originating PSP to the beneficiary PSP for the settlement (disbursement).

The responsibility for complying with the Regulation in the scenario of one-to-many bundled transfer of funds should be clarified and placed on the originating PSP and beneficiary PSPs. The originating PSPs typically could capture and retain the required information, and ensure they are available at the point of disbursement by the beneficiary bank.
Intermediary PSPs (ISPSs) by the nature of their role in the payment flow often never get full details of the underlying parties in a bundled transfer of funds. It is not technically feasible for IPSPs to collect such details and still efficiently perform their roles as intermediaries without disrupting the flow of funds.

The wording of the Guideline 3.3, as related to batched transfers and the role of an intermediary PSP, could create challenges in the payment system, including:

- The operational burden of vetting remitter and beneficiary details in an alternative channel will impact payment processing and settlement.
- Files shared via alternative channels would create additional sanctions screening obligations that would be difficult to meet.

- There would be transaction monitoring requirements that would be challenging to meet with such manual data exchange.

Paragraph 19 as currently written contradicts Article 6 (1) of the Regulation which states:

In the case of a batch file transfer from a single payer where the payment service providers of the payees are established outside the Union, Article 4(1) shall not apply to the individual transfers bundled together therein, provided that the batch file contains the information referred to in Article 4(1), (2) and (3), that that information has been verified in accordance with Article 4(4) and (5), and that the individual transfers carry the payment account number of the payer or, where Article 4(3) applies, the unique transaction identifier.

Hence, we are suggesting the following:

That this section is revised to recognize newer payment models that involve multiple intermediaries which could make it impractical to share batched files offline across the entire payment chain.

The originating PSP should retain the obligation to capture and verify the required information on the payer which aligns with the spirit of Article 6 (1) of the Regulation.

Guidelines 4.2. - Providing the name of the payer (Article 4(1) point (a) of Regulation (EU) 2023/1113), of the payee (Article 4(2) point (a) of Regulation (EU) 2023/1113), of the originator (Article 14(1) point (a) of Regulation (EU) 2023/1113), and of the beneficiary (Article 14(2) point (a) of Regulation (EU) 2023/1113)

Paragraph 22 (a, b, c) (and paragraph 27):

Paragraphs 22 (and para. 27) correctly foresee the possibility that systems for funds transfers (relevant for PSPs/ISPSs) and crypto-transfers (relevant for CASPs/ICASPs) might have technical limitations which affect the transmission of information. However, the subsequent and specifying references "Where technical limitations exist, as referred to in paragraph 13, that…" are misleading since paragraph 13 does only refer to crypto transfers.

In fact, paragraph 13 refers to the transfer of crypto-assets while paragraph 22 refers to the transfer of funds.

In addition, in relation to all DLT refinements, the draft guidelines should include criteria and georeferencing forecasts of the DLT itself. The reason for the specification is to be able to detect crypto-assets activities in sanctioned countries, affected by AML/FS/CFT operating restrictions or careless.

Hence, for clarification, we suggest amending it as follows:

"Where technical limitations exist, as referred to in paragraph 13 in the case of crypto-transfers or comparable constraints in the case of transfer of funds, that…"

Guideline 4.3. - Providing the address, including the name of the country, official personal document number, and the customer identification number or, alternatively, date and place of birth of the payer (Article 4(1) point (c) of Regulation (EU) 2023/1113) and of the originator (Article 14(1) point (d) of Regulation (EU) 2023/1113)

Paragraph 23:

The wording should be aligned to the envisaged AML Regulation to ensure that the addresses that are included with the transfer of funds is the verified address.

For legal entities, the principal place of business should be preferrable as the registered address in several countries does not give an indication of the actual location of the legal entity and might be the address of a law firm office or corporate service provider without any connection to the actual legal entity.

Also, in some countries there is no indication of a street number, street name, city, postal code, country as component of an address (e.g. some countries in Africa where there is no street name, only PO Box and country). Therefore, to avoid the huge volume of requests for missing elements on the customers address data (by intermediary PSPs or beneficiary PSPs), country and city should be the compulsory information and the other components of the address could be considered as optional.

Hence, we propose the following amendments:

"23. The payer's PSP and originator's CASP should provide the following:

> "23. The payer's PSP and originator's CASP should provide the following:
>
> a. For natural persons, the **usual place of residence** ~~**habitual residence**~~ of the payer or originator. In case of a vulnerable person as referred to in paragraph 19b of "EBA Guidelines on policies and controls for the effective management of money laundering and terrorist financing (ML/TF) risks when providing access to financial services" and cannot reasonably be expected to provide an address in relation to their **usual place of residence** ~~**habitual residence**~~, the PSP or the CASP may use a **postal** addresses that is provided in alternative documentation as referred to in that Guidelines paragraph 19(b), where such documentation contains an address and where its use is permitted under the national law of the payer.
>
> b. For legal persons, the payer or originator's **address of the registered or official office or, if different, the principal place of business** ~~**registered office**~~."

Paragraph 26:

In relation to Article 4.1 c) and Article 14.d) of the Regulation, the draft guidelines should:

a. be sharpened, in line with the Regulation, to the effect that the data indicated (the address including the name of the country, the official personal document number, the customer identification number, the date and place of birth) are understood to be alternatively and not cumulatively.
b. Clarify what is meant by "customer identification number".

Failure to specify the expected data could lead to an uneven interpretation of the rule.

In relation to Article 4.1 d) and Article 14.e) of the Regulation, the draft guidelines should specify:

a. whether with the indication "subject to the existence of the necessary field in the relevant payments message format […]" the regulation limits the control over the LEI code only to the type of messages that dedicate a specific/structured field to the LEI code (consequently excluding SWIFT MT, where a dedicated LEI field is not present: it is present only for option F a row 6 where it is possible insert a generic Customer Identification Number).
b. if the "BIC" code can be considered as an equivalent official identifier of the LEI code when the payer or payee of a transfer of funds is a PSP.

Guideline 4.4 - Providing an equivalent Identifier to the LEI of the payer (Article 4(1) point (d) of Regulation (EU) 2023/1113), of the payee (Article 4(2) point (c) of Regulation (EU) 2023/1113), of the originator (Article 14(1) point (e) of Regulation (EU) 2023/1113) and of the beneficiary (Article 14(2) point (d) of Regulation (EU) 2023/1113)

Paragraph 28:

The draft guideline's clarification of the rather vague term "any equivalent official Identifier" is welcomed since it correctly categorises the term around official commercial registers and comparable registries for legal entities.

However, strict consistency with the respective requirements and definitions of the envisaged AML regulation is required to avoid legal uncertainty. We therefore suggest that the EBA performs a corresponding cross-check in coordination with the European Commission.

Guideline 5.1. - Procedures to detect missing information (Article 7, Article 11, Article 16 and Article 20 of Regulation (EU) 2023/1113)

Paragraph 29

The concept of 'adequate' should be clarified regarding possible real-time or ex post monitoring of operations with possible missing information.

Guideline 5.2. - Admissible characters or inputs checks on transfers of funds (Article 7(1) and Article 11(1) of Regulation (EU) 2023/1113)

Paragraph 30 (c):

Lit c. should be amended as follows to reflect established mechanisms:

> "c. the system prevents the sending or receiving of transfers where inadmissible characters or inputs are detected or, where applicable, provides clear business rules or other means of assistance on how to proceed in such instances.

Guideline 5.4 -Missing information checks (Article 7 (2), Article 11 (2), Article 16 (1) and Article 20 of Regulation (EU) 2023/1113)

Paragraphs 37 to 39:

Next to provisions on how to proceed in the case of missing information, several articles of Regulation (EU) 2023/1113 explicitly refer to incomplete information on the payer or the payee. The draft Guidelines, as of now, only ascertain cases of incomplete or meaningless/inconsistent information and this further can raise question as to whether this definition of incompleteness can be extended to information relating to the address, such as province, house number or postal code.

Further clarification on both the qualification as certain information requirements being met in an "incomplete way" and the resulting possible courses of action for PSPs would be welcome.

Guideline 6 - Transfers with missing or incomplete information (Article 8, Article 12, Article 17 and Article 21 of Regulation (EU) 2023/1113)

There is a need to introduce guidelines on rejections for Payment Transparency reasons not accepted by the counterparty. Financial Institutions can face cases where flows are rejected due to lack of mandatory information, but the counterparty did not accept the R-transaction. Example: the client of the counterparty has been off-boarded (no account) between the date of the initial transaction and the date of the R-transaction.

Hence, we suggest that the concept "reject" should be clarified in order to understand whether it covers interbank rejection transactions or returns of funds.

Further, regarding the obligation to obtain the information provided for in Article 4 of the Regulation when faced with an interbank operation for credit recovery (for example, or a rejection of an operation whose necessary information was omitted or incomplete) - we propose that interbank operations be excluded of these obligations when returning or rejecting transactions, with the guarantee that these are transactions between banks that do not involve a direct return to the customer.

We propose as an alternative to make compulsory the acceptation of R-transactions even when rejected for compliance reason(s).

Furthermore, this Guideline suggests the behaviour and actions that a Crypto-Asset Service Provider (CASP) is required to adhere to in the case of a transfer lacking necessary information under the FTR, specifically in the context of transfers with incomplete or missing information. Despite the awareness that FTR uses the term "reject" multiple times to indicate one of the options available to the PSP/CASP of the beneficiary when receiving funds or crypto-assets for its client, we believe that the term does not accurately reflect a feasible option for transfers involving crypto-assets, in light of the fact that in the absence of intermediaries there is no acceptance or rejection of a transaction.

If the transfer is authorized by the CASP of the originator because, in its assessment, all information is complete, the order is recorded on the blockchain, and once confirmations are received from validators, the crypto-assets are "credited" to the beneficiary's account. In this mechanism, the CASP of the beneficiary cannot intervene to "reject" a transfer of crypto-assets once written in the ledger and, therefore, cannot reject it.

Having said that, we believe it would be appropriate to clarify whether the term "reject" refers to the described dynamics, and if so, we consider it useful to use more suitable terms – also used by FTR and the EBA in the draft guideline 66 – such as "return" or "not making the crypto-asset available to its client".

In connection with the possibility of returning crypto-assets to the CASP of the originator or to a self-hosted wallet, another critical issue should be addressed. In both cases, the question arises as to who would be responsible for paying the fee associated with the return of crypto-assets (e.g., gas fee). If the CASP of the beneficiary has concluded that the received information is incomplete or untrue (in the case of involvement of another CASP) or cannot demonstrate the identity of the involved party (in the case of a transfer from a self-hosted wallet - please refer to the following points for this difficulty), who should bear the costs of the network fee? Is it possible to deduct both the operational costs and the network fees that the CASP should incur for the return from the crypto-assets of the transferor? In case of disputes, what liabilities could be attributed to the CASP for not completing the transfer or for reversing the crypto-assets?

Guideline 6.3. - Requesting required information (Article 8(1) point (b), Article 12(1) point (b), Article 17(1) point (b) and Article 21 (1) point (b) of Regulation (EU) 2023/1113)

Paragraph 43:

Paragraph 43 correctly reflects that requests for information to PSPs or CASPs outside the Union typically require longer deadlines. This justifies the proposed deadline of 5 instead of 3 days in the case of intra-EU payments (the first two case groups mentioned in the paragraph). However, the Guidelines should also acknowledge that even more complex chains of communication might require additional working days to effectively ensure realistic assessments and response cycles. We consider that from a product perspective, due to the volatility of these products, a longer period is critical.

Thus, **should be amended as follows:**

"Longer deadlines may be set where transfer chains involve:

a. more than two parties in the transfer flow (including intermediaries and non-banks);

b. at least one PSP, IPSP, CASP or ICASP that is based outside of the EU.

"These deadlines should not exceed <u>seven</u> working days in total."

We propose the extension of the deadline from five to seven working days when some of the points described regarding information chains are verified - the criteria presented in fact lead to a naturally longer due diligence period, justified, for example, by issues of time zones, language barriers, and the complexity of the information transmission chain.

<u>Paragraph 45:</u>

Articles 8(2) and 12(2) of regulation (EU) 2023/1113 stipulate the possible courses of action for the payee's PSP and the ISPSP, respectively, when a PSP has repeatedly failed to provide requested information on the payee or payer. The rejection of payments is just one possible course of action. It follows that the related provision on reminders according to paragraph 45 of the Guidelines may not imply any stricter restriction of this range of options.

To resolve this contradiction, the draft Guideline's misleading wording should be amended:

> "[…] a PSP or IPSP should advise the prior PSP or IPSP in the transfer chain that, if the required information is not received before a particular deadline, the PSP or IPSP <u>**might**</u> reject the transfer and may treat the PSP or IPSP as […]"

Guideline 9 - Obligations on the payer's PSP, payee's PSP and IPSPs where a transfer is a direct debit.

<u>Paragraph 75:</u>

The processing logic of direct debits, which is fundamentally different from credit transfers, require a specific and harmonized approach to fulfilling the travel rules obligations: This states that the provision of the payer's information commences on the payee's side as part of the direct debit collection. This had already been reflected by the previous Guidelines (paragraph 9 of JC/GL/2017/16).

Section 9 of the draft Guidelines unfortunately misses this aspect since it only mentions the provisions of the required payee's information.

To maintain legal certainty and current practice, paragraph 75 should be amended as follows:

> "75. Where a transfer of funds is a direct debit, the PSP of the payee should send the required information on the <u>payer and the</u> payee to the PSP of the payer <u>as part of the direct debit collection. For that purpose, the information on the payer is provided by the payee to its PSP, e.g. based on data received</u> at the time when the direct debit mandate is established or modified. Upon receipt of that information by the payer's PSP, the payee's PSP and IPSP should consider the information requirements in Article 4 points (2) and (4) and Article 5 points (1) and (2) of Regulation (EU) 2023/1113 to be met."

About EBF

The European Banking Federation is the voice of the European banking sector, bringing together national banking associations from across Europe. The federation is committed to a thriving European economy that is underpinned by a stable, secure, and inclusive financial ecosystem, and to a flourishing society where financing is available to fund the dreams of citizens, businesses, and innovators everywhere.

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