

## Comments

To “Guidelines on preventing the abuse of funds and certain crypto-assets transfers for money laundering and terrorist financing purposes under Regulation (EU) 2023/1113”

(EBA/CP/2023/35)

Register of Interest Representatives

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The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 1,700 banks.

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**Question: "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?"**

## General Comments

The replacement of the previous "Funds Transfer Regulation"<sup>1</sup>, due to the expansion of its scope to include the transfer of certain crypto-assets, requires the review and corresponding extension of the accompanying EBA Guidelines. GBIC welcomes the opportunity to comment on the respective proposal<sup>2</sup> by the European Banking Authority (EBA).

Regarding the already established scope area, i.e. the **transfer of funds**, the legislators decided to make only very limited modifications to the regulation's provisions. At this background, the EBA's proposal to extensively restructure and rewrite the previous Guidelines<sup>3</sup> raises significant concerns:

- The comprehensive changes of definitions, categories, and requirements is mostly made without clear reference to the previous provisions and without explanations regarding their rationale. This unnecessary overhaul and its lack of transparency can lead to legal uncertainty, unjustified operational changes for banks and competent authorities alike, and higher risks from a ML/TF perspective.
- Thus, we call for a much greater degree of stability: Only where changes or clarifications are materially justified, amendments to the Guidelines' provisions should be made.
- Such necessary amendments result from new or changed provisions at the level of the regulation (e.g. the inclusion of the LEI and its equivalents). They could also take the form of absolute reasonable modifications where banks' and authorities' experiences point to possibly imprecise provisions of the previous Guidelines.
- Any amendments should be accompanied by explanations and references to the previous Guidelines' provisions to increase transparency and clarity.

Finally, strict consistency regarding all legal definitions, categories and requirements pursuant to the envisaged EU AML regulation needs to be ensured. In addition to the comments on specific provisions given in the following section, the above general comments should be urgently taken into account and lead to a comprehensive revision of the proposal.

In view of the impact on current practices and the potential interdependencies with the envisaged EU AML regulation, we call on the EBA and national competent authorities to foresee adequate timelines that facilitate a sound and realistic implementation. It should be ensured

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<sup>1</sup> Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849

<sup>2</sup> Consultation Paper, Guidelines on preventing the abuse of funds and certain crypto-assets transfers for money laundering and terrorist financing purposes under Regulation (EU) 2023/1113, EBA/CP/2023/35

<sup>3</sup> Joint Guidelines under Article 25 of Regulation (EU) 2015/847 on the measures payment service providers should take to detect missing or incomplete information on the payer or the payee, and the procedures they should put in place to manage a transfer of funds lacking the required information, JC/GL/2017/16

that the new guidelines' implications should not fall at what is an operationally challenging period throughout financial services (the months December and January).

Regarding the new scope area, i.e. the **transfer of certain crypto-assets**, we want to emphasise that the respective market standards and procedures show a much lower degree of maturity than for established transfers of funds – not least since their regulatory framework (MiCAR) has only just been established. Regarding the "Travel Rule Guidelines", authorities should aim to seek a reasonable balance between the timely need for regulatory clarity and the flexibility to adapt the rules subject to the further development and dialogue with the market participants.

## Specific Comments

In addition to the general comments, that imply necessary change of a broad range of the draft Guidelines's provisions, we suggest several concrete changes to specific sections or paragraphs.

### Definitions (page 13)

#### Paragraph 9 (Definition of "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.**"

### Section 2.1 (Determining whether a card, instrument or device is used exclusively for the payment of goods or services)

#### Paragraphs 4 and 5:

We would like to encourage a sharpening to the effect that the respective obligations of the payer's PSP/CASP and the payee's (i.e. the merchant's) PSP/CASP are better differentiated: This could help PSPs and third party providers involved in the value chain, such as payment scheme managers, to better align their practices with the regulation's and guideline's expectations.

### Section 2.2 (Linked transfers in relation to the 1000 EUR threshold)

#### Paragraphs 6 and 7:

Particularly with regard to 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.

Paragraph 7b:

With a view on the complexity and diversity of the respective scenarios, we acknowledge that a strict and explicit designation of the concept "short timeframe" may be not feasible. However, we could welcome a narrowing in order to facilitate a more harmonized understanding across the member states and possible internationally (e.g. through exemplary or time spans, case examples reflecting different scenarios or factors impacting an acceptable timeframe etc.).

**Section 3 (Transmitting information with the transfer)**

Paragraph 17

In general, and with a view on the end-to-end payment chain, completeness of all relevant payment information is key. Therefore, rather than limiting this aspect to the information on the payee and the payer, we suggest including an additional prompt to observe a general "complete and accurate" forwarding of all relevant payment information", not least in view of batch payments.

Furthermore, according to the last sentence the domestic IPSP or PSP is required to assess whether the transfer is correctly identified as a cross-border transfer. It should be clarified that in cases of cross-border transfers or in cases of doubt, the transfer should be deemed to constitute a cross-border transfer, resulting in the use of appropriate payment channels that may facilitate the necessary transmission of information.

**Section 4 (Information to be transmitted with the transfer)**

Paragraph 21:

In addition to the IBAN and card number, as outlined in paragraph 21, a broad range of other identifiers unambiguously representing an account exist. For clarification, this could be expressed by inserting a new last sentence in this paragraph:

"21. PSPs may treat the International Bank Account Number (IBAN) if available - or, where the transfer of funds is made using a payment card, the number of that card (including the Primary Account Number (PAN)) - as the payment account number, on condition that the number used permits the fund transfer to be traced to the payer or the payee. **The same applies to other identifier classifications systems that allow for the unambiguous identification of an account by the account servicing PSP.**"

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

Paragraphs 22 and 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. 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..."

#### 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 preferable as the registered address in a number of countries does not give an indication of the actual location of the legal entity and would assist any investigation or screening process but might be a law firm office or corporate service provider without any connection to the actual legal entity. Hence, we propose the following amendments:

"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 24:

A harmonised order of priority for address elements may be beneficial. However, the granularity implied by this requirement can only lead to meaningful results when applied in the context of structured message formats (e.g. ISO20022 MX Messages). Therefore, please consider limiting the requirement to these instances.

#### Paragraph 26:

To ensure consistency and legal certainty, paragraph 26 needs to be amended as regards the list of required information to the wording used in Article 4 (1) (c) of regulation (EU) 2023/1113: The submission of the payer's address or their personal document number is to be made alternatively and not cumulatively ("or" rather than "and"). Furthermore, we would suggest changing the word "unambiguous" to "accurate and complete" to avoid the introduction of additional terminology that may lead to uncertainty:

"26. Where the information on the name, the account number, address **and or** the official personal document number prevents the **unambiguous accurate and complete** identification of the payer or originator, the payer's PSP or the originator's CASP should transfer the information on the date and place of birth in addition to the address and official personal document number."

#### **Section 4.4 (Providing an equivalent Identifier to the LEI of the payer)**

##### Paragraph 28:

The draft Guidelines' clarification of the rather vague term “equivalent Identifier” is to be welcomed since it correctly categorises the term in the area of 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.

#### **Section 5.2 (Admissible characters or inputs checks on transfers of funds)**

##### Paragraph 30 (lit. 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**; and”

#### **Section 5.4 (Missing information checks)**

##### 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. 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.

By the same token, guidance enabling a more harmonized approach towards the classification of meaningless information could be supportive too (e.g. through representative negative examples or qualitative parameters).

#### **Section 6.2 (Rejecting or returning a transfer in the case of crypto-assets)**

The legal concepts of rejecting or returning a transfer, originating from the regulation's orientation towards traditional transfers of funds, is a crucial example for our general comment on the interplay of regulation (EU) 2023/1113 with the underlying structures of crypto assets as given in our introductory remarks: In particular the concept of a rejection implies the existence of a pertinent technical environment, which has been created in the “traditional payment world” by SWIFT and CSMs, but is lacking in many crypto-asset ecosystems.

The concrete technical measures and business practices suitable to achieve compliance with the legal provisions – in particular in the global, cross-border setting typical for many crypto-

asset ecosystems – will only crystallise gradually and through an ongoing dialogue between competent authorities and the crypto-assets industry.

### **Section 6.3 (Requesting required information)**

#### 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.

Thus, case group 3 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 **seven five** working days in total.”

#### Paragraph 45:

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 **might will** reject the transfer and may treat the PSP or IPSP as [...]”

### **Section 9 (Obligations on the payer’s PSP, payee’s PSP and IPSPs where a transfer is a direct debit)**

#### Paragraph 75:

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. In order 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 **payer and the payee** to the PSP of the payer **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** 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.”