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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

AMLTF feedback and summary of comments received

1. The AMLTF issued a 3 month consultation on 25th March 2008 on its common understanding to deal with payments that lack the required information in respect of European Regulation 1781/2006. This common understanding was developed by the AMLTF, with the assistance of an informal consultation with the industry, including an Industry workshop held in January 2008 and a public hearing was held on 6th May 2008 during the 3 month consultation.

2. This common understanding is based on the current functioning of payment, messaging and settlement systems and aims to ensure a level playing field between European payment service providers. This document aims to take into account the current level of compliance with the FATF Special Recommendation VII outside the EU, and the fact that funds transfers is a mass business. An annex describes some existing practices that our liaison with the financial services industry has identified. It outlines some measures that are currently being employed by payment services providers.

3. 13¹ responses were received to the consultation. Listed below is a summary of the comments received and the AMLTF's members response to those comments

¹ British Banking Association (BBA), The French Banking Federation (FBF), Association of the Luxembourg Fund industry (ALFI), The Luxembourg Bankers' Association (ABBL), Zentraler Kreditausschuss (ZKA), Danish Bankers Association (DBA), Austrian Federal Economic Chamber (WKO), Association of Foreign Banks in Germany (AFB), European Banking Federation (EBF), Swedish Bankers' Association (SBA), European Payment Council (EPC), Estonian Banking Association (EBA) and Swedbank

Status of the Common understanding.

4. Many respondents questioned the status of the common understanding.

5. In response AMLTF member propose that the common understanding should state that this common understanding shall not be seen as an extension to this Regulation adding obligations but rather as a clarification on the requirements in this Regulation, so as to provide PSPs with a common understanding of supervisory expectations on compliance with this Regulation.

Article 8 of the Regulation

6. Many respondents viewed it very difficult to apply filters to assess incomplete / missing information at the time of receipt of the incoming message. Further the Danish Bankers Association viewed that the filters would not create a level playing field, and preferred to assess "complete information" in Article 4 and 6 instead, and develop a common understanding of such an assessment of complete information. Also, many observed that the application of filters be done on a best endeavors basis. In addition many respondents suggested reference needs to be made to the €/US\$ 1000 threshold (as per Recital 17), when undertaking such an assessment of completeness. Furthermore the BBA proposed that a filter be made to detect information clearly intended to circumvent the intention of Special Recommendation VII and Regulation 1781/2006', for example, such as the various formulations around "a customer/one of our customers/un de nos clients/ein Kunde".

7. In response AMLTF members note the comments, and remain of the view that they support PSPs using filters to assess detection of incomplete/missing information, including the BBA proposal of having a filter to detect information clearly intended to circumvent the Regulation.

8. Further, the AMLTF view that the obligation to undertake an assessment of completeness should be applied at the time of receipt of the incoming message, irrespective of the amount of the message and the potential ability for PSPs to apply the "threshold", albeit at a later stage.

9. Further AMLTF members note that the definition of “complete information” is found in the Regulation and is not an issue of which formats to use, but which information is needed. Further they suggest PSPs could solve this either bilaterally or in group discussions.

3. Common understanding on Articles 9 §1 and 10 of the Regulation

10. Many respondents advised that they were unable to hold funds. For example many cited German domestic legislation which forbids this.

11. During the consultation period of the Common Understanding, the EC provided² the opinion to the AMLTF that the PSP is only able to freeze funds, once the information is complete. Given this opinion was only received during the consultation, this EC view has subsequently been discussed amongst the AMLTF members agreed to update Section 3.1.4 of the common understanding to reflect this EC interpretation.

3.1.1 Internal policy, processes and procedures

12. Many respondents prefer to systemically process all messages and then conduct a post event review. Further some cited that customers could claim for breach of contract. Also it was noted that that one of the key objectives of FATF SRVII was to enhance traceability of funds.

13. AMLTF members accept these comments, and whilst they recognize that many PSPs wish to conduct post event review, this should not exclude other options.

3.1.2 The PSP chooses to reject the transfer (if able)

14. Many respondents wished that the common understanding would emphasize that the assessment of suspicion should be in accordance with existing Directives and requirements, and not be anything further.

15. AMLTF members accept this comment and agree to reflect this within Section 3.1.2.

² in correspondence from the EC dated 6 June 2008 to Chair of AMLTF

3.1.3 The PSP chooses to execute the transfer

16. When the PSP asks for complete information, many commented that the proposed timeframe of 7 working days was not realistic for many jurisdictions from outside the EEA.

Follow up to the request for complete information.

17. All the respondents preferred Option B to Option A, i.e. they preferred that the PSP define its own policies and set up procedures and processes in order to complete an appropriate follow up to its requests for complete information.

18. Further the German Savings Bank Federation preferred the PSP to batch requests for assessing and following up on incomplete information i.e. in 28 day periods.

19. AMLTF members propose to redraft this section, such that the PSP should establish its own policies and procedures, and could endeavour to define and communicate its desired timeframe, for a response to its requests, including following up such requests.

3.1.4 The PSP chooses to hold the funds, if able

20. As stated above, the EC has now provided the opinion that the PSP is only able to freeze funds, once the information is complete. Also many respondents have advised that they are not able to hold funds in their jurisdictions, propose that this section be deleted.

21. AMLTF members agree to reflect the EC opinion in Section 3.1.4

3.2 The PSP becomes aware that a transfer is incomplete after having executed the transfer

22. The European Payment Council does not see the need for this section, as the situation it seeks to address is already embraced under 3.1.3. Further the German Banking Federation commented that the anti-money laundering officer can be involved if there are grounds for suspicion. These are not, however, constituted merely by the fact that a payment is accompanied by incomplete payer data or that the payer bank has not responded to a request for further information. Broadening the obligations of the payee bank in this

way would not only go beyond the requirements of the EU Regulation. It would also infer a conscious unwillingness to cooperate on the part of payer banks which send transfers with incomplete information. The common understanding should not be based on such conjecture. The requirement to try and trace payer information should be kept completely separate from the assessment of the suspicious character of incoming payments from a money-laundering perspective.

23. AMLTF members note these comments and recognize that incomplete information may not necessarily infer suspicious.

Common understanding on Article 9 §2

4.1 The regularity of failure

24. The BBA has observed that care needs to be exercised to ensure that “failure” is not confused with formatting differences or variations in approach towards complying with financial sanctions requirements. There are two elements present in “failure”, namely not including anywhere within the funds transfer, irrespective of message type, solely the information specified in Articles 4 and 6 depending on which applies in the given case; and not responding to a request from a payee PSP to supply the missing information. The degree of failure is compounded if the request has to be repeated and is still not complied with. AMLTF members accept that this section be amended accordingly.

25. Further the Swedish Banking federation have noted that in the early days of implementation PSPs have limited experience of being able to identify such regularly failing PSPs, but that over time PSPs should be able to define their own failure definition based on their own experience. Accordingly AMLTF members accept that this section be amended to reflect this.

26. Others proposed that when assessing such failure reference be made as to whether the amount of the transfer exceeds the €/US\$ 1000 threshold (as per Recital 17) – See also Section 6.

27. Of the proposed criterion, a), d) and e) were preferred. Accordingly AMLTF accept the proposal to reorder this section in order of preferred criteria.

28. The French Banking Federation prefers a risk based approach in the determination of criteria which shall not be imposed by the common understanding but proposed as example, each organization being free to add or take away specific criteria that will match or not match the feature of its customers. AMLTF members accept this comment.

29. The consequences of defaulting transfer shall also be endorsed by each organization and termination of the commercial relationship considered on a risk based approach by each bank. AMLTF members accept this comment.

4.3 Transmission to the authorities

30. The French Banking Federation was concerned that such a transmission is a proposed onerous addition for PSPs. AMTLF members noted this comment.

4.4 Decision as to restrict or terminate the business relationship with a PSP reported as being regularly failing

31. Many respondents were concerned that such a coordination mechanism may produce a "black list" of PSPs, and were not supportive of production of such a list. However they welcomed the coordination by supervisors of any proposed measures taken towards a regularly failing PSP.

32. AMLTF members noted these comments and view that the activities that need to be taken by the PSPs to fulfill the aim of the Regulation are activities within the field of AML/CFT and as such should be a part of the PSPs AML/CFT policies. Reaching compliance of full information of the payer is preventing money laundering and terrorist financing and enables ML/TF investigations.

5. Internal data collecting and reporting

33. The Danish Bankers Association preferred to encourage the parties to come to an agreement which minimizes extra audits that do not provide any

benefit to the process. Accordingly propose changing this section to note that such reports could be subject to internal control and audits.

6. Threshold

34. Many responded supported greater acknowledge of this threshold of €/US\$ 1,000 throughout the common understanding, and not just in this section.

35. AMLTF members agreed to redraft this section to make clearer that the existence of a threshold, although relevant for assessing the risk and regularity of failure, does not exclude the application of the procedure cited earlier within the common understanding.

7. Review of the common understanding

36. Some respondents suggested that it be more appropriate that the common understanding be revised at the same time as the Regulation 1781/2006 is reviewed, rather than in 2010.

37. AMLTF members propose that the common understanding may be reviewed at a time, dependant on compliance by PSPs with the Regulation, but not later than the EC's review of the Regulation.

Other

38. For intermediaries, many in Industry view that the Payee PSP should address a request for missing information direct to the Payer PSP. It should not be necessary to involve the intermediary PSP, other than on occasions where their help is needed to provide a payer PSP transaction reference number in order to trace the payment.

39. AMLTF members noted this comment and view that Art 13.4 places obligation on intermediary PSPs.

40. Some respondents view that is sufficient to have information in Field 20 in the Swift standard message and that this meets the obligation according to the Regulation for a "unique identifier". However, in non EU payments there must be information on the banks account in Field 50 in the Swift message.

41. AMLTF members noted the comments on the format of such information.