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Bank of Portugal
R. do Comércio, 148 (1100-150 Lisboa)

29 March 2018

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Dear Sir/Madam

Re: The proposed Notice on the Prevention of Money Laundering and Terrorist Financing in Portugal

The EMA is the EU trade body representing electronic money issuers and alternative payment service providers. Our members include leading payments and e-commerce businesses worldwide that provide online payments, card-based products, electronic vouchers and mobile payment instruments. Most members operate across the EU, most frequently on a cross-border basis. A list of current EMA members is provided at the end of this document.

We have reviewed the Draft Notice on the Prevention of Money Laundering and Terrorist Financing ("projeto de aviso sobre a prevenção do branqueamento de capitais e do financiamento do terrorismo") in Portugal, and we have set out our comments below in relation to Paragraph 2c of Annex II of the Draft Notice.

1. **Exclusions under Article 12 4MLD**: we note that Article 12 of the 4th Money Laundering Directive[1] ('4MLD'), which sets out an exemption from customer due diligence ('CDD') for e-money products subject to certain restrictions, was <u>not</u> transposed into Law N.º 83/2017 of 18 August on 'Measures to Combat Money Laundering and Terrorist Financing' implementing 4MLD.

2. **SDD provisions - Article 15 4MLD**: we further note that paragraph 2(c) of Annex II introduces a transaction threshold of EUR 150 for e-money issuers wishing to postpone verification of identity under the simplified due diligence ('SDD') provisions (Chapter II, Section II, Article 28 of the Draft Notice). This means that verification of identity must

1 Directive (EU) 2015/849.

take place for all e-money products once the user has spent EUR 150, irrespective of the risk posed by the product, or the application of risk mitigating controls.

Whilst 4MLD is minimum harmonizing, and Portugal may consider a stricter approach is appropriate, Article 15 was intended to provide flexibility to firms offering new and innovative payment and other FinTech services. It allows firms to consider the risk posed residually, after its risk management strategy has been applied, and to implement a risk-based approach to the extent and timing of CDD elements. A product that has no cash access and no person to person functionality for example would pose a very low risk of money laundering (when appropriate controls are in place) and a higher aggregate turnover limit would be appropriate.

Under the Law N.° 83/2017 however, the restriction introduced to Article 15 through the EUR 150 threshold in the Draft Notice severely restricts the ability of firms to develop innovative solutions and FinTech propositions in the e-money sector.

This is because, most such products are limited in their functionality, meaning that users will usually wish to begin using the product immediately, and may discard the product relatively quickly if it does not meet their expectations. The ability to delay the friction and cost associated with verification is important, and key to the success of many such products.

The allowance under the previous Third Money Laundering Directive (3MLD) was EUR 2500 annually, and there is little evidence of abuse of that regime.

We would be grateful if the Bank of Portugal could review these provisions, and allow industry to demonstrate the merits of a flexible approach to SDD.

Further arguments

1. Art 15 is based on the principle of a holistic, risk-based approach to AML/CTF. The EUR 150 threshold restricts this approach.

Articles 12 and 15 4MLD operate in fundamentally different ways. Art 12 is prescriptive; it affords an absolute exemption from CDD obligations (apart from monitoring) based on the implementation of specific transaction thresholds and restrictions on product functionality. No further risk assessment by Member States or obliged entities is required, as the legislator has pre-judged the level of risk appropriate to the exemption. Art 15, on the other hand, allows for an appropriate degree of due diligence to be applied based on an assessment of risk. Here, the CDD measures applied are expected to match the risk, holistically assessed. Art 15 is thus based on the principle of a risk-based approach as stated in recital 22 4MLD:

> The risk of money laundering and terrorist financing is not the same in every case. Accordingly, a holistic, risk- based approach should be used. The risk-based approach is not an unduly permissive option for Member States and obliged entities. It involves the use of evidence-based

> decision-making in order to target the risks of money laundering and terrorist financing facing the Union and those operating within it more effectively.

By introducing an absolute threshold for electronic money products under art 15, the Draft Notice does not allow e-money issuers to calibrate CDD measures to the overall risk their products pose, as is intended under the principle of a holistic, risk-based approach.

2. There are electronic money products which are low risk yet do not conform to the EUR 150 threshold. These should be allowed to benefit from SDD under art 15.

While the EUR 150 threshold may be intended to limit the risk of products for which verification may be postponed, it is a blunt instrument for this purpose. The risk that e-money products may be used for money laundering or terrorist financing is made up of a number of interrelated factors that differ for each product, such as whether it may be used to access cash, allow person to person transfers, operate within a single jurisdiction or cross border, apply sophisticated monitoring systems, be tied to a single e-commerce platform etc. As the EBA Risk Factor Guidelines at para 113 state: "*the level of ML/TF risk associated with electronic money (e-money) depends primarily on the features of individual e-money products . . ..*" In this respect, the overall value of the instrument may itself not be indicative of risk at all, but intrinsic to the consumer product proposition and thus the commercial success of the product.

Examples of such products include those used exclusively on a single e-commerce platform, enabling the sale of goods and services from known merchants, and lacking either cash access or P2P functionality. It is difficult to envisage how with the aid of good monitoring systems, the EUR 150 limit would be appropriate. It is likely to act as a barrier to entry and serve no meaningful AML deterrence role.

There are many products that are on a spectrum of risk, some for which no threshold at all would be appropriate, whilst others merit a considerably higher threshold.

Article 15 also imposes a higher due diligence requirement; it requires the application of all aspects of CDD (ID&V of the customer and the beneficial owner, assessing the purpose of the business relationship, monitoring) and does not, unlike Article 12, afford an absolute exemption from any of these obligations.

Many consumers may as an alternative be driven back to the use of cash, which carries a much higher inherent risk of money laundering and terrorist financing. Products such as that described above should not be prevented from benefitting from SDD under art 15.

3. Transactions limits are not the only, or the most appropriate means of limiting risk

The imposition of the EUR 150 limit, suggests that this control is uniquely placed to restrict the risk of money laundering, and that firms should not be given the option of adopting alternative controls. This restricts innovation, it is an inappropriate means of controlling the risk of money laundering in many instances, and provides a false sense of security to both firms and NCAs.

A more global risk management framework is better than limiting business practices though a single parameter that will do significant business.

4. The e-money industry has shown itself prudent and responsible in assessing the risk of its products and is safer than cash.

There has been a significant change in the information available on AML compliance by the sector since the publication of the current EBA Risk Factor Guidelines. The UK FCA has been undertaking a thematic review of the e-money sector, and is expected to publish its findings in June or July 2018. Informal feedback suggests that: contrary to the suspicions of some law enforcement and supervisory authorities, AML compliance in the sector is robust and the industry has demonstrated good practices and a responsible attitude to the combatting of financial crime.

The UK is currently home to approximately 50% of the EU e-money industry, and the review represents a significant source of evidence when devising regulatory guidelines and legislation.

There are now therefore evidence based arguments for allowing the industry to practice the risk based approach which is enshrined in 4MLD, and to implement appropriate limits on the adoption of SDD, including customised aggregate transaction limits.

Conclusion

There are good arguments for the removal of the EUR 150 limit introduced by the Draft Notice, they are consistent with a risk based approach, and they enable business and consumer good to be achieved.

There is also now good supervisory evidence that suggests the higher SDD limits, currently practiced by issuers have not led to any failings and that a responsible and effective AML regime is practiced by the industry.

We request that the EUR 150 limit introduced at paragraph 2(c) of Annex II of the Draft Notice be reviewed and a new approach allowing firms to assess the most appropriate limit based on a specific risk assessment to be introduced.

Yours faithfully,

Thaer Sabri

Dr Thaer Sabri

Chief Executive Officer
Electronic Money Association

List of EMA members as of March 2018

- Advanced Payment Solutions Ltd
- Airbnb Inc
- Allegro Group
- American Express
- Azimo Limited
- Bitstamp
- BlaBla Connect UK Ltd
- Blackhawk Network Ltd
- Boku Inc
- CashFlows
- Citadel Commerce UK Ltd
- Clearsettle
- Coinbase
- Corner Banca SA
- Ebanx
- eBay Europe Sarl
- Euronet Worldwide Inc
- Facebook Payments International Ltd
- First Rate Exchange Services
- Flex-e-card
- Flywire
- GoCardless Ltd
- Google Payment Ltd
- IDT Financial Services Limited
- Imagor SA
- Intuit Inc.
- Ixaris Systems Ltd
- Merpay Ltd.
- MuchBetter
- Nvayo Limited
- One Money Mail Ltd
- Optal
- Park Card Services Limited
- Paybase Limited
- Payoneer
- PayPal Europe Ltd
- PayPoint Plc
- Paysafe Group
- PPRO Financial Ltd
- PrePay Solutions
- R. Raphael & Sons plc
- Remitly
- SafeCharge UK Limited
- Securiclick Limited
- Skrill Limited
- Starpay Global Ltd.
- Stripe
- Syspay Ltd
- Transact Payments Limited
- Transact24 (UK) Ltd
- TransferWise Ltd
- TrueLayer Limited
- Uber BV
- Valitor
- Vitesse PSP Ltd
- Viva Payments SA
- Wave Crest Holdings Ltd
- Wirecard AG
- Wirex Limited
- Worldpay UK Limited