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Government of JERSEY

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Joint Committee of the European Supervisory Authorities
Sent by upload

Dear Sirs,

Joint consultation paper: risk factors guidelines

The Government of Jersey welcomes the Joint Committee of the European Supervisory Authorities Consultation on joint guidelines on risk factors published in draft on 21 October 2015 (the "**guidelines**").

The guidelines set out factors that firms should consider when assessing the money laundering and terrorist financing ("**ML/TF**") risk associated with a business relationship or occasional transaction. They also set out how firms should adjust the extent of their customer due diligence ("**CDD**") measures in a way that is commensurate to the ML/TF risk that they have identified.

The Government of Jersey is not, however, of the view that the guidelines as consulted upon are currently conducive to the effective implementation of Directive (EU) 2015/849 (the "**4MLD**"). We hope to offer, through this response, constructive comment as to how the guidelines could be amended to ensure effective implementation of 4MLD.

It should be noted that a response has also been submitted to the consultation by the Jersey Financial Services Commission (the "**JFSC**"), the financial regulator in Jersey. That response addresses a number of points of detail concerning the guidelines to the extent they concern the regulation of a firm's assessment of ML/TF risk and application of CDD measures. The Government of Jersey supports the points made by the JFSC in its response to the consultation.

Assessment of Country and Geographic Risk

The Government of Jersey's particular concern in the consultation relates to wording used in the guidelines concerning assessment of country and geographic risk and the effect of such wording on a jurisdiction such as Jersey. Para 23 of the consultation document states that:

"*Risk factors firms should consider when identifying the level of ML/TF risk associated with a jurisdiction include […] Is the jurisdiction a known tax haven, secrecy haven or offshore jurisdiction? "*

None of the terms “tax haven”, “secrecy haven” and “offshore jurisdiction” are defined in the guidelines; nor are there currently any internationally agreed definitions of these terms. The Government of Jersey is of the view that, as a fundamental principle, the guidelines issued by the ESAs should be remain consistent with the content, intention and language of 4MLD.

Article 9 of 4MLD requires Member States to apply a more objective approach in identifying high risk countries by reference to specified strategic deficiencies and Article 9(4) specifically points to the use of “relevant evaluations, assessments or reports drawn up by international organisations and standard setters with competence in the field of preventing money laundering and combating terrorist financing” when delegated acts are being drawn up by the Commission as to high risk third countries. The Government of Jersey is of the opinion that the ESAs should adopt the same intention and language of Article 9 of 4MLD when considering and drafting guidelines as to country and geographic risk. If this approach was not adopted, and the current draft wording was retained, it would risk the guidelines appearing inconsistent with 4MLD which would not be conducive to firms adopting risk-based, proportionate and effective AML/CFT policies and procedures <u>in line</u> with the requirements set out in 4MLD.

The proposed approach moves away from the clear steer in Article 9 of the Directive towards the use of relevant evaluations and assessments to identify high risk third countries which is not conducive to the effective implementation of 4MLD.

The Government of Jersey would therefore suggest to the ESAs that the specific bullet point listed above in the consultation is removed in its entirety as it appears inconsistent with the content, intention and language of 4MLD and, therefore, would not be conducive to the effective implementation of 4MLD.

<u>“Relevant Evaluations, assessments and reports”</u>

The Government of Jersey would wish to comment on the guidelines more generally as to the part concerning countries and geographic areas covered at paragraphs 22 to 24 of the guidelines.

In keeping with comments made above, guidelines drafted to assist in the identifications of high risk third countries should be as closely linked to the Directive in content, intention and language as possible. It is therefore our view that the interpretation of “relevant evaluations, assessments and reports” contained in Article 9(4) of the Directive should first and foremost, be translated in the guidelines into evaluations, assessments and reports conducted by the FATF or a FATF-style regional body e.g. MONEYVAL. This is in keeping with the purpose of the Directive (to combat ML/FT) and is what we consider to be the intention of Article 9(4) of the Directive. We believe this is adequately covered in the guidelines in the first bullet point of paragraph 23.

As previously noted, we would suggest that the third bullet point of paragraph 23 containing the terms “tax haven”, “secrecy haven” and “offshore jurisdiction” be removed from the guidelines altogether, however, if the ESAs are of the opinion that reference must be made to tax <u>in terms of ML/TF risk</u>, with which we disagree, then we believe the guidelines should only refer to terms and standards that are agreed at international and/or EU level.

References should therefore be restricted to firms being permitted to take into account elements that the European Commission defined as “good tax governance” in 2012, and what has been previously characterized as the “OECD plus” which forms the current EU acquis on fair tax competition.

These elements are: (i) OECD/Global Forum reports that rate jurisdictions for tax transparency and information sharing; (ii) commitment to automatic exchange of information based on the Common Reporting Standard; and (iii) compliance with the EU’s Code of Conduct on Business Taxation at European level as endorsed by the Code Group.

The Government of Jersey is of the view that the guidelines outlined in paragraph 23 could be re-drafted to better reflect this approach. Amendments to the guidelines in this regard would better reflect terms and standards that are agreed at an international and/or EU level.

<u>General nature of business conducted in a jurisdiction</u>

It is accepted that by virtue of the provisions of Article 9, Article 16, Article 18 and Annex II & Annex III of 4MLD, the ESAs may wish to include reference to the general nature of business conducted in a jurisdiction as a factor that should be considered when considering country and geographic risk. The Government of Jersey is of the view that this would be an effective addition to the guidelines and should be considered by the ESAs. The inclusion of such a reference would further support the case for removal of the objectionable terms in Paragraph 23 as outlined above.

<u>Other relevant references in other parts of the guidelines</u>

It is also of note that elsewhere in the guidance the term “offshore jurisdictions” appears. This is of particular note in the sectoral guidance for investment managers, where it appears (at paragraph 196 of Title III of the guidelines) that offshore jurisdictions are to be considered as presenting a high risk.

In keeping with points made earlier in this response we would submit that such references in the guidelines are inconsistent with the content, intention and language of 4MLD and should be removed. If reference is to be made to high risk third countries elsewhere in the guidelines (such as in sectoral guidance for investment managers), this should refer back to determination of high risk third countries under Article 9 and appropriate guidelines which would be at paragraph 23 and 24 of the guidelines as currently drafted (<u>with</u> suggested amendments).

The Government of Jersey is of the view that it is not conducive to the effective implementation of 4MLD for broad-brush statements, such as the statement cited in paragraph 196, to be included in the guidelines. The inclusion of such statements again risks the guidelines being incompatible with the content, language and intention of 4MLD.

Conclusion

The Government of Jersey has raised the points made above concerning the consultation with the European Commission ("the Commission") on a bilateral basis through the Channel Islands Brussels Office.

The Government of Jersey would invite the ESAs to consider these comments and suggestions in order to ensure that the guidelines are conducive to firms adopting risk-based, proportionate and effective AML/CFT policies and procedures in line with the requirements set out in 4MLD. Please do not hesitate to contact me if any part of this response needs clarifying or if further information is required.

Yours faithfully,

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