FIAU Financial Intelligence Analysis Unit Malta

BANK ĊENTRALI TA' MALTA
EUROSISTEMA
CENTRAL BANK OF MALTA

Clarifications on AML/CFT issues under Regulation (EU)

2024/886 (IPR)

Question and Answers

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Disclaimer

Please note that the answers provided in this document are of a general character and are based on the current state of affairs. Cases that are more specific than those considered in this document or future events may make it necessary for the interested party to seek ulterior guidance or advice.

Q1: Do banks have the right to reject outright the provision of instant payments to customers deemed as high risk?

The scope of the obligation for payment service providers (PSPs) to offer the payment service of instant credit transfers in euro to their payment service users (PSUs) (Article 5a(1) of the IPR) does not include any outright exclusions of any type of PSUs. This would mean that there is no possibility for a PSP not to provide the payment service of sending and receiving instant credit transfers in euro to entire categories of PSUs, including customers deemed to pose a higher ML/TF risk. Rather, the necessity of rejecting a specific payment order for an instant credit transfer in euro should be assessed on a case-by-case basis.

Q2: Do banks have the right to reject the provision of instant payments to customers in respect of which a bank would have filed an external report with the Financial Intelligence Unit (FIU)? Especially considering that in such cases, the bank would not be able to give any reasons for such decision, due to the concern about tipping-off.

Where the instant credit transfer transaction in question is known or suspected to be related to proceeds of crime or terrorist financing, the bank is obliged to submit a report to the FIU and refrain from carrying out that transaction pursuant to Articles 33 and 35 of Directive (EU) 2015/849 (corresponding to Articles 69 and 71 of Regulation (EU) 2024/1624, which will apply as of 10 July 2027).

In the case of a subsequent payment order for an instant credit transfer in euro by a PSU in respect of whom a suspicious transaction report had been previously filed, such subsequent payment order should only be refused on a case-by-case basis and where necessary to enable the bank to assess the transaction and determine whether there is an obligation to submit a suspicious transaction report and refrain from carrying out that transaction. In other words, the fact that a PSU was the subject of a suspicious transaction report in the past should not be considered as a ground for the rejection, by default, of all subsequent payment orders for instant credit transfer in euro by that PSU.

The reference to Article 33 and Article 35 of Directive (EU) 2015/849 (corresponding to Article 69 and Article 71 of Regulation (EU) 2024/1624, which will apply as of 10 July 2027) is to be read as a reference to Regulation 15(3) and Regulation 15(4) of the Prevention of Money Laundering and Funding of Terrorism Regulations. The answer provided also reflects what is stated under Section 5.9 of the Implementing Procedures – Part I on the actions to be taken by subject persons once a Suspicious Transaction Report is filed on a customer. Under the said section, the subject person can either terminate the business relationship or otherwise classify the customer as high risk and apply enhanced due diligence measures to the said particular relationship. In the event of any other suspicious transactions, a subject person is to file a further Suspicious Transaction Report with the FIAU.

Q3: Banks enquire whether the local regulator's stance, that pre-transaction monitoring is still to take place within the 10 seconds scenario, is widespread across the EU? Is there any knowledge of any systems that are used in the EU catering for such requirement?

AML/CFT rules do not specify the methods to be used by PSPs for monitoring transactions. AML/CFT obligations require obliged entities to refrain from or suspend the execution of transactions that are considered suspicious and to report those suspicions to the FIU. To this end, pre-transaction monitoring cannot be excluded or replaced with post-transaction monitoring by default, as this would not enable a PSP to comply with those AML/CFT requirements. This is particularly relevant when considering that specific transactions may already possess clear indications of suspicion that could be detected through monitoring that takes place before the execution of the transaction. This would allow the instant credit transfer to be rejected and reported to the FIU. By opting not to monitor any instant credit transfer request prior to its execution, it is unlikely that PSPs would be able to detect and report even the more evident cases of suspicion.

This course of action is in line with the risk-based approach. A PSP is not to scrutinize every transaction processed but is to identify those transactions that present unusual characteristics and focus its attention on them, especially where any such transactions already of themselves give rise to a suspicion of ML/TF. Considering the nature of the service in question, it is understandable that there will be a greater reliance on post-transaction monitoring of any transactions monitoring. However, there is always a level of pre-transaction monitoring required to identify at the earliest stages possible those transactions that present an especially high level of ML/TF risk. The correct level of pre and post-transaction monitoring has to be therefore determined on a risk-sensitive basis.

Q4: With customers' consent, through adequate clauses in the Terms & Conditions of the product/service, are banks allowed to temporarily suspend the Instant Payment service as a controlling measure against high-risk ML/FT situations?

Article 5a (1) of the IPR states that "PSPs that offer to their PSUs a payment service of sending and receiving credit transfers shall offer to all of their PSUs a payment service of sending and receiving instant credit transfers." Such article does not allow any exceptions or exclusions and therefore, any clauses in the T&Cs to temporarily/permanently suspend instant payment transactions goes against the spirit of the legislation.

It would however be acceptable to have a clause within the said Terms & Conditions setting out that, to the extent that is allowed in terms of law, individual instant payment transactions may not be processed within 10 seconds or even rejected when this is necessary to ensure compliance with the PSP's obligations at law, including the PSP's AML/CFT obligations.

Q5: With customers' consent, through adequate clauses in the Terms & Conditions of the product/service, are banks allowed to introduce capping/limits on the value of Instant Payment transactions to mitigate against high-risk ML/FT situations?

As per Article 5a(6) of the IPR, upon the request of the PSU, the PSP may offer the possibility of limits, either on a per day or a per transaction basis. However, the PSU has the right to modify and lift individual limits with immediate effect, at any time. To this effect, introducing a clause in the T&Cs providing for cappings/limits would go against the said provision.

However, PSPs may rely on other means of monitoring such as pre-transaction and post transaction monitoring or even temporarily block the funds which are credited into the payee's account as may be required and on a case-by-case basis, until necessary checks are carried out.

Q6: Due to real-time monitoring obligations, there is a significant likelihood that a considerable proportion of instant payments will be rejected. However, many of these rejections may not be the result of an actual AML red flag. Instead, they may stem from the fact that the transaction in question would not appear to align with the customer's established transaction profile. In such instances, rather than triggering an immediate rejection, a more effective approach might involve conducting further due diligence through post-transaction monitoring. This would allow a bank to gather documentary evidence to verify the source of funds or update the customer's profile accordingly without unnecessarily interrupting the flow of legitimate transactions. By adopting this method, real-time alerts could serve as a prompt for follow-up actions, ensuring that AML compliance obligations are still met yet.

Vide reply to Q3.

Q7: Time monitoring criteria - It is believed that this approach balances the need for robust AML controls with the operational efficiency required for handling instant payments and which is considered to be well within the spirit of the Instant Payment regulations. Moreover, it will surely reduce customer complaints, which are very time consuming and cannot always be efficiently resolved without the need for arbitration.

Question is unclear and therefore no reply could be provided.

Q8: It is opined that the Instant Payment product should not be seen by regulators as similar to a normal SWIFT or SEPA payment. Since the main aim of FIUs is to prevent and detect crime, if instant payments are stopped due to AML/CFT controls at pre-screening, this will result in funds being automatically instantly rejected and returned to originating bank, losing the possibility to block and freeze such funds. Therefore, in the case of the Instant Payment product, reviewing payments post transaction could be a better solution to give a possibility to confiscate funds related to criminal activity.

i) Please refer to the reply provided to Q3 hereabove. Depending on whether the PSP is servicing the payor or the payee, the following scenarios can arise: If the AML/CFT concerns arise on the side of the payer' s PSP, the payer's PSP is to reject the payment order for an instant credit transfer, has to inform the payer that the transaction cannot be executed within 10 seconds without disclosing the reason for this where it can give rise to 'tipping off', and it has to restore the balance of the payer's payment account in case it has already been debited. Where there is already a suspicion of ML/TF, the payer's PSP is then to file a Suspicious Transaction Report so as to comply with its obligation under the AML/CFT framework.

ii) If the AML/CFT concerns arise on the side of the payee' s PSP, the payee's PSP is not to make the amount of the instant credit transfer transaction available on the payment account of the payee and has to inform the payer's PSP within 10 seconds that the transaction cannot be executed. The payer's PSP is to inform the payer that the transaction cannot be executed within 10 seconds without, should there already be a suspicion of ML/TF, disclosing the reason for this so that there is no 'tipping off', and is to restore the balance of the payer's payment account in case it has already been debited. The payee's PSP is to then file a Suspicious Transaction Report where there is a suspicion of ML/TF so as to comply with its obligation under the AML/CFT framework.

iii) Where the AML/CFT concerns arise on the side of the payee' s PSP, the payee's PSP may in alternative to (ii) above, credit the payment account of the payee with the amount of the instant credit transfer transaction within 10 seconds while also informing the payer's PSP, who is to also inform the payer about the execution of the instant credit transfer, in line with requirements of IPR. The payee's PSP, after executing the instant credit transfer, blocks the amount of the payment transaction on the payment account of the payee which is therefore not available to the payee, until any necessary AML/CFT checks are completed. At any point where the PSP has a suspicion of ML/TF, it is to file an STR and, depending on the stage where it is filed, await instructions as to whether the amount is to be released or otherwise.

Whether a payee's PSP is to act in line with (ii) or (iii) above, is left to the PSP concerned. However, it should be borne in mind that there is always the need to avoid as much as possible any instance of tipping-off and at no stage can the PSP disclose that it has filed an STR or is otherwise awaiting for instructions from the FIAU. In addition, one would have to assess whether there is a legal basis to block the amount credited on the account.

Please also note that as clarified in the answer to question 27 included in the Q&As on IPR Implementation, the payer's PSP should not unilaterally requalify a payment order from one type of credit transfer (as submitted by the payer) to another type, as this does not correspond with the choice made by the payer.

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