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VBNL

To the Dutch Finance Minister
Mr W.B. Hoekstra
Postbus 20201
2500 EE DEN HAAG

Amsterdam, May, 23 2019

Dear Mister Hoekstra,

In the past year, various authorities have been conceiving laws and regulations regarding cryptocurrencies. An important body is the Financial Action Task Force (FATF) that operates at international level and proposes recommendations for the purpose of combating money laundering and terrorist financing. Your The Ministry is a participant to the FATF and is responsible for the introduction of European regulations to prevent money laundering and terrorist financing.

United Bitcoin Companies Netherlands (VBNL) represents a group of companies that stimulate further professionalization of the market for providers of wallet and exchange services in virtual currencies. From this expert role, which is recognized by various stakeholders, both VBNL and its individual members, expressed great concern about some technical parts of the intended implementation of the fifth anti-money laundering directive (AMLD5) in the Dutch law (Wwft).

At the beginning of this year, your Ministry contacted the VBNL as you were considering a specific FATF-recommendation. This recommendation is not only important for virtual currencies. It has a wider impact as it pertains to the so-called *"virtual asset transfer"*. The recommendation affects all parties that use virtual currency, blockchain and distributed ledger technology are active, since that is all covered by virtual assets:

> "*Countries should consider virtual assets as "property," "proceeds," "funds", "funds or other assets," or other "corresponding value". Countries should apply the relevant measures under the FATF Recommendations to virtual assets and virtual asset service providers (VASPs).*" [1]

The recommendation, contained in paragraph 7b of the Interpretive Note, has the effect that all companies must pass on personal information about customers and non-customers, whereby all this information must be available to all parties throughout the entire value chain:

> *"Countries should ensure that originating VASPs obtain and hold required and accurate originator information and required beneficiary information on virtual asset transfers, submit the above information to beneficiary VASPs and counterparts (if any), and make it available on request to appropriate authorities."*

We stress that the money laundering measures for market parties in the crypto field are leading them to identify customers, monitor transactions and report suspicious transactions. In addition, Article 33 of the European anti-money laundering directive, prescribes an obligation to provide all desired customer information at any time to the investigating authorities. These investigating authorities are mandated to exchange them. As a result, all relevant information that the EU and FATF want is available, provided it is adequately requested under European regulations. To be clear: we do not object to those rules.

We do object however to article 7b in the FATF recommendation as it is superfluous. It is not necessary to send customer data around the world by default, if it can be requested or checked on a case-by-case basis. Therefore, the members of the VBNL reiterate that they support the vision of the private sector as expressed during the FATF meeting in Vienna (see Annex 1).

In the meantime, your Ministry has informed the VBNL that the responses by market parties with respect to definitions and impossible implementation will not be taken onboard. Even the Europol position that the requirements are 'overkill' appears not to have mattered. This is of great concern to us.

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[1] https://www.fatf-gafi.org/publications/fatfrecommendations/documents/regulation-virtual-assets-interpretive-note.html

A problem with a larger scope than cryptocurrency providers
The VBNL and Privacy First have discussed their joint position on this matter. We are of the opinion that the recommendation by the FATF is totally unwanted, excessive and has a big negative impact on the privacy of all citizens and businesses in the European Union. It will furthermore unduly stifle innovation in the area of blockchain.

We also note that this is about much more than just the "cashless payments" that you are referring to in your letter to parliament, dated March 21, 2019:

> "*Er is overeenstemming bereikt over een concept voor een zogenaamde 'Interpretive Note' (toelichting) bij de desbetreffende Aanbeveling 15 over nieuwe technologieën. De tekst hiervan zal in juni definitief worden vastgesteld, na consultatie van de private sector, specifiek op het terrein van girale overschrijvingen.*"[2]

If the proposal were to be approved without further consideration, the Ministry of Finance would order, in one go, for a very broad spectrum of future applications, without proper consultation of the public or parliament, an unlimited, orchestrated data export of personal data from EU citizens and companies to all countries in the world. The Ministry of Justice would be given the task of including sanctions in criminal law, civil law and administrative law that all companies will comply with this recommendation. The citizens and businesses involved are insufficiently represented and heard in this process.

Broader interdepartmental discussion and impact assessment is desirable
VBNL and Privacy First find it undesirable to see paragraph 7b of the interpretive note as a mere technical adjustment. It is much more than that and we urge your Ministry to carry out a thorough impact assessment and to ensure adequate interdepartmental consultation and political debate on this subject. Below we list the questions that could be further investigated.

The ECB noted this week that there are no internationally agreed definitions for crypto assets and virtual assets. In addition, the FATF definition is completely different from the EU definition formulated by the ECB Crypto-Assets Task Force based on the current EU approach:

> "*Any asset recorded in digital form that is not and does not represent either a financial claim on, or a financial liability of, any natural or legal person, and which does not embody a proprietary right against an entity*."[3]

Is it appropriate to support a far-reaching FATF measure if technology and regulations are still developing? Isn't this unnecessarily anticipating a European discussion about definitions and the object of regulation that has not been completed at all, according to the opinions of ESMA and others?[4]

The current comprehensive definition leads to additional costs for future business models where digital value transfer takes place. Think of assets that represent value for real estate, utilities or trade in raw materials. What impact does the rule have on cost levels in business operations, on innovation, on the internal European market in which blockchain appears to be playing a prominent role?[5] Perhaps the Ministry of Economic Affairs could shed some light onto these questions?

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[2] https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2019/03/21/verslag-plenaire-vergadering-fatf/verslag-plenaire-vergadering-fatf.pdf
[3] https://www.ecb.europa.eu/pub/pdf/scpops/ecb.op223~3ce14e986c.en.pdf
[4] https://www.esma.europa.eu/file/49978/download?token=56LqdNMN
[5] https://www.eublockchainforum.eu/about

The Ministry of Justice could further investigate:

- whether there is an imbalance in the consideration of privacy on the one hand and the fight against crime on the other?
- whether an unimpeded, unprotected obligation for standardized export of customer data through all future value chains is an appropriate requirement?
- what the "silent party" data consent issues would be for transactions where the recipient does not even know that his data is provided by the sender?
- how the recommendations for good regulation with respect to definitions and object of regulation apply to this proposal?
- whether, by analogy, the data retention judgment of the Court of Justice does not set a precedent to be taken into account?[6]

Finally, we would like to point out the constitutional aspects that are within the remit of the Ministry of the Interior and Kingdom Relations. The FATF adopted a new mandate in April this year, describing international cooperation and obligations for participating countries. However, that mandate does not in any way clarify how the participating countries consider themselves bound by other international conventions, in particular those relating to data protection and human rights. How does the FATF's mandate relate to the EU decision-making rules? How does the proposed recommendation fit in with the conventions on the protection of privacy, such as those of the Council of Europe and the proposed changes to them? How do European treaties and guidelines interrelate with the FATF Interpretive note?

Appropriate consideration in parliament is desirable

We are not convinced of the thoroughness of the considerations that are currently being made under your responsibility. This concerns both the implementation of the AMLD5 in Dutch legislation and the discussion that is currently ongoing around the FATF recommendation.

We point out that there is a major social debate surrounding the introduction of the second payment services directive in Europe (PSD2). The nature of the debate is such that it delayed the introduction of the Dutch law and it was decided that an information campaign had to be set up to ensure that citizens are aware of their rights and obligations with regard to the storage and dissemination of their personal data.

The potential scope of the present measure is much wider. Firstly, both consumers and businesses would be denied the right to agree to a third-party data provision. Secondly, it is not about cashless payments at all, but about potentially all future economic processes that are implemented with new blockchain technology.

We hope to have convinced you that there is every reason not to agree with the present FATF-recommendation and to reconsider the decision-making process. It is important that a more well-founded, socially supported vision is developed, both at national and international level. We are of course available to provide further explanation of our views.

With kind regards

Verenigde Bitcoinbedrijven Nederland /
United Bitcoincompanies Netherlands

Privacy First

[6] European Court of Justice, 21 december 2016, Tele2 (C-203/15 & C-698/15)

Annex 1: Relevant parts of the private sector position on virtual assets – Vienna, May 7, 2019

We understand that the FATF has requested a summary of the principal feedback regarding the Interpretative Note to Recommendation 15 that was provided by represented Virtual Asset associations (VAAs) and individual industry participants during the 2019 FATF Private Sector Consultative Forum on May 6, 2019. This joint industry letter summarizes the principal feedback given by such VAAs.

1. Support

As emphasized by all VAAs and individual industry participants, we support the need for the adoption and enforcement of a robust AML framework by Virtual Asset Service Providers (VASPs), consistent with the FATF recommendations R10-21 subject to minor comments.

2. Technical challenges with regards to 7(b)

With regards to the language currently proposed in paragraph 7(b), we have material technical challenges to ensuring efficient and effective compliance and would therefore suggest small, but important, modifications to the current wording. We believe these modifications to be essential for ensuring that R16 is met in full by the industry.

The language adjustments we propose for paragraph 7(b) are as follows:

> R.16 – Countries should ensure that originating VASPs obtain and hold required and accurate originator information ~~and required beneficiary information~~ on virtual asset transfers, ~~submit the above information to beneficiary VASPs and counterparts (if any),~~ and make it available on request to appropriate authorities.

It is not necessary for this information to be attached directly to virtual asset transfers. Countries should ensure that beneficiary VASPs obtain and hold required ~~originator information and required~~ and accurate beneficiary information on virtual asset transfers, and make it available on request to appropriate authorities. Other requirements of R.16 (including monitoring of the availability of information, and taking freezing action and prohibiting transactions with designated persons and entities) apply on the same basis as set out in R.16. Countries should also ensure that VASPs implement effective and appropriate measures to ensure that the objectives of R.16 are met, in particular the prevention of transactions with designated persons or entities.

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4. Definitions

We appreciate the definitions may already be final and not be able to be changed, we would note that the scope of the definitions creates some of the challenges set out above.

In particular, the term virtual asset is defined as “a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes”. As a result, the term “virtual asset” covers any transferable asset that is used for payment or investment purposes, whether financial or not financial. This could cover a host of other uses, including fractional interests in collectibles, for example, as well as in-game tokens and event tickets to name a few. These types of assets are not currently covered in the FATF Recommendations or member-country AML regulations.

The complication is compounded by the fact that tokenization now allows consumers to hold an interest, via a digital token on a blockchain, in a real-world asset that is not necessarily a financial or monetary instrument but that may have some value. As a result, we believe the definition of "virtual asset" is too broad for the purposes of the Interpretive Note generally and paragraph 7(b) in particular, and we recommend the following:

1. For purposes of R.16, the definition of "virtual asset" could be limited to virtual assets transferable for "payment or as a medium of exchange", and exclude virtual assets transferable "for investment purposes".

2. The definition of "virtual asset service provider" could be limited to those institutions directly providing a financial service to a beneficial owner of virtual assets, and exclude third-party service providers to those organizations that provide services ancillary to a virtual asset platform.

3. Paragraph 7(b) could make clear that it is only applicable to virtual asset service providers that conduct a transfer on behalf of a beneficial owner of virtual assets, and only to such virtual assets that operate as a medium of exchange and not to all virtual assets.

Alternatively, these definitional matters could be addressed in the form of guidance or in the form of exclusion categories from the definitions of virtual asset and VASP.

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