

BSG response to EBA Consultation Paper on the Guidelines on the role, tasks and responsibilities AML/CFT compliance officers

On 29 July, the EBA issued a consultation on draft guidelines on policies and procedures in relation to compliance management and the role and responsibilities of the AML/CFT Compliance Officer. The proposed guidelines are new and are intended to complement existing guidelines e.g. the EBA Guidelines on Internal Governance. The rationale for issuing a new guidelines is the EBA's assessment that the requirements set out in Directive (EU) 2015/849 have been implemented unevenly across different sectors and Member States, and that they are not always applied effectively.

The BSG welcomes the opportunity to comment on the draft guidelines.

General remarks

The BSG underlines the importance of ensuring that it is clear for both competent authorities and regulated firms how these guidelines relate to and can be implemented coherently alongside other guidelines on internal governance and control functions. One way to do this would be to extend existing guidelines instead of creating an additional layer. Another would be to give examples of how the different guidelines interact in practice. Without this clarity, it is more difficult for financial institutions to adhere to the guidelines.

The BSG stresses that the guidelines need to cater for the different corporate governance structures that exist in the Member States. In some countries, financial institutions have a one-layer management structure. In others, e.g. in the Nordics, financial institutions have a two-layer management structure often with a Board of Directors and an executive management team responsible for running the business. Implementing the draft guidelines could create difficulties for the two-layer management structures as it would be difficult e.g. to appoint a member of the Board of Directors to the function of member of the management body responsible for AML/CFT. It would be helpful if EBA could clarify expectations of how the guidelines would work in practice in the common models of corporate governance.

Additionally, the BSG highlights that there is a lot of focus on the responsibilities for risk identification, but not a lot of focus on the implementation of controls that align resource to risk and focus on effective management of risk. We consider that this point should come out more clearly to

complement the approach proposed in EBA's draft guidelines on a risk-based approach to AML supervision

The BSG believes that the proposed guidelines are quite detailed and prescriptive e.g. regarding the list of information that should be included in reports (GL 4.2), however there is a lack of detail on how the AML risk management framework should work. The BSG is of the view that approaching AML processes in a task-oriented way should be avoided and that it would be preferable to adopt a more strategic and risk-led view setting up clear guidelines/orientations on the outcomes that should be achieved, in particular in relation to governance arrangements that should be in place at Group Level. Furthermore, a too prescriptive approach could set a precedence for other areas leading to a more complex and cumbersome rulebook for financial institutions that may not actually be effective in all situations in delivering good AML outcomes.

We find the use of the term "compliance" in the draft guidelines unclear. This difficulty is compounded because the term "compliance" is often used to refer specifically to the second line of defence. The set-up in different financial institutions can differ and some tasks that are proposed as tasks of the AML/CFT compliance officer are in some financial institutions performed by the first line of defence and others might be at least partly performed by internal audit as part of the third line of defence. The BSG considers that the draft guidelines do not sufficiently reflect upon the differentiation of duties between the first, second and third lines of defence and this could lead to weaknesses in the framework. An example is in the section D 'Monitoring Compliance' in paragraphs 45-48: how would this fit with an internal audit function? The draft guidelines are also not fully clear about how the relationship between the general compliance function and the AML/CFT compliance function should be. Should the general compliance function have an overarching role and also monitor AML/CFT compliance? Or are these two parallel, completely separate compliance streams?

We consider that it would be helpful to reference the need for the management body and the AML/CFT Compliance Officer to take into account the interaction between AML and other regulatory responsibilities, particularly fair treatment of customer responsibilities, and ensure that the overall approach is coherent.

The present guidelines will in future need to be aligned with the recently proposed AML regulation, in particular article 9 Compliance Functions.

Comments on the section "Subject matter, scope and definitions"

Scope of Application

The scope of application should be more granular, for instance it should be clear what "*all existing management body structure*" means for the purpose of falling within the scope of the guidelines.

The BSG considers that clarity should be given, specially where a financial services operator is part of a group, as to the type of management body structures (e.g. from a sole director to a board of directors or from dual management structures to unitary management structures) that are considered to be in the scope of application, and, on the other hand, which (if any) might be considered to be excluded (e.g. management bodies of branches, considering that these do not have legal personality). It is not clear for example whether a branch that has a management body structure should duplicate the appointments at board level (of the branch) or whether the AML/CTF Compliance Officer of the branch should coordinate/report directly to the Group AML/CTF Compliance Officer, who reports directly to the member of the management body of the parent company responsible for AML/CTF.

Definitions

To interpret the guidelines correctly, consideration should be given to including the following definitions while allowing for the difference in corporate governance structures described above:

- Member of the management body responsible for AML/CFT
- Senior Manager in charge of AML/CFT
- AML/CFT Compliance Officer
- Group AML/CFT Compliance Officer
- Member of the Group management body or senior manager responsible for AML/CFT
- Organisational and Operational Coordination structure at Group Level with sufficient decision power for the group AML/CFT management

Alternatively, it would be beneficial to provide some clear examples and best practices as to how these persons should fit in the organisation, at least in the most common corporate governance structures currently operating in the EU.

Interaction with other guidelines

Given that these Guidelines complement, but do not replace, very relevant guidelines issued by the European Supervisory Authorities on wider governance arrangements and suitability checks, specific cross-references should be provided to be clear as to how they interplay with the current guidelines on the role of AML/CFT Compliance Officer following a Single Rulebook style.

Comments on Guideline 4.1 ‘Role and responsibilities of the management body in the AML/CFT framework and of the senior manager responsible for AML/CFT’

Regarding section 4.1, the BSG considers that the guidelines need to cater for two-layer management structures that exist in the corporate governance structure in e.g. the Nordics. It is essential to clarify whether the management body in which a member shall be appointed with responsibility for AML/CFT can be interpreted as the management leadership team and not the Board of Directors.

Likewise, one-tier management structures where the management body is conceived as one unique and inseparable body through which all functions are performed collectively, would require specific mention in the EBA Guidelines related to the fact that the individual allocation of responsibilities to the management body can be only implemented if they are appropriately delegated in members of the senior management.

Additionally, it would be helpful to state more explicitly that the key responsibility of the management body is to assure itself about the effectiveness of controls in place.

In relation to EBA’s finding (reported in its 2019/2020 AML/CFT review of competent authorities approaches to the AML/CFT supervision of banks) that AML/CFT supervisors in some Member States did not interact with financial institutions’ senior management because there was no legal or regulatory requirement in those Member States to appoint an AML/CFT compliance officer at a level that was sufficiently senior to report to the financial institution’s senior management body, no orientation is given as to how to address this important issue in the benefit of supervisory convergence. Therefore, we consider that more clarity should be given as to what person (if any), and at what level (e.g. management level, the AML/CFT Compliance Officer or the Group AML/CFT Compliance Officer), should be the person appointed/registered with the Competent Authority and for what purposes (reporting, contact point, etc.).

One aspect that remains important and it is linked to the previous point is to clearly identify who in the organisation is ultimately responsible for the implementation of the laws, regulations and administrative provisions necessary to comply with the Directive (EU) 2015/849, in particular when the financial operator is part of a group. In our opinion, the management body should bear this responsibility, but guidelines are needed in this respect, to explain that the responsibility sits in fact with them and not with the AML/CFT Compliance Officer (e.g. paragraph 29 of the guidelines might create confusion regarding this point).

Comments on Guideline 4.2 ‘Role and responsibilities of the AML/CFT compliance officer’

On section 4.2.4 Role and responsibilities of AML/CFT compliance officer, the BSG notes that the tasks as drafted in section 4.2.4 e.g. develop ML/TF risk assessments, prepare policies and assessing training needs could be performed by the first line of defence. In BSG’s view, it should be possible for a financial institution to set up their internal working methods, fully respecting the important task of the second line of defence (what BSG would refer to as the “compliance” function). Thus, the guidelines would need to allow for more flexibility in this respect.

Regarding the reporting to the management body, the BSG agrees to the importance of such reporting and find the list of information to be included in the activity report highly useful. However, the current drafting of the guideline is very detailed and prescriptive. This approach risks create a tick-the-box approach to compliance. It should be possible for financial institutions and the respective management bodies to arrange their internal reporting more freely commensurate to their risk as long as the institution fulfils the requirements to fully understand and manage the ML/TF risks they are subject to. Moreover, as mentioned in the section above, some of the reporting may be performed by the first line of defence as described depending on the organisational set-up of the financial institution.

On 4.2.4 c) concerning customers including high-risk customers, the BSG takes the view that CDD policies and procedures could be prepared by the first line of defence although review and sign-off by the AML compliance function would be important. Moreover, while it is important to have clear decision-making policies and procedures for on-boarding high-risk customers in line with the risk appetite of the financial institutions at sufficiently high level in senior management, a requirement to have the AML/CFT compliance officer exercise an advisory role before a final decision is taken by senior management on onboarding each new high risk customer could create an unnecessary complex decision-making process, particularly in large financial institutions. Consideration should be given to ways of ensuring that this requirement can be implemented effectively in institutions of different sizes and complexity.

As mentioned before, there is a lot of focus on the responsibilities for risk identification, but not a lot of focus on the implementation of controls that align resource to risk and focus on effective management of risk. As an example, the BSG suggests adding into the description of compliance officer responsibilities in paras 43-44 a responsibility to ensure that simplified customer due diligence is used for lower-risk customer groups, as well as enhanced due diligence where appropriate. This would ensure a proportionate approach and avoid harming access to financial services and financial inclusion through ‘over-compliance’.

The AML/CFT Compliance Officer should be provided with a “name” or specific “designation” (e.g. as the MLRO in the UK) in order to clearly differentiate this person from the member of the management body or the senior manager responsible for AML/CFT or from the Compliance Officer when the AML/CFT Compliance Officer is a different person. Otherwise, it might not be clear who is who and responsibilities might be blurred.

Comments on Guideline 4.3 ‘Organisation of the AML/CFT compliance function at group level’

On paragraph 4.3.3., the BSG reiterates the comment that the management body and the requirement to designate a member of the group management body or senior manager responsible for AML/CFT compliance function needs to cater for those financial institutions that have two-layer corporate governance structures and that the management body does not mean the Board of Directors.

Regarding the tasks and reporting of the Group AML/CFT compliance officer, the guidelines should be amended to cater for the different organisational set-ups of financial institutions, where some may have divided certain tasks between first, second and third line of defence.

As mentioned before, clear examples of good and bad practices built on supervisory experience should help financial services operators to identify how the governance arrangements and organisational requirements should work in practice (in terms of coordination, reporting, etc.) and what outcomes are expected from them.

Finally, it might be useful to understand how these guidelines interplay with the forthcoming EBA Guidelines on cooperation and information exchange between prudential supervisors, AML/CFT supervisors and Financial Intelligence Units.

Comments on Guideline 4.4 ‘Review of the AML/CFT compliance function by competent authorities’

The BSG believes that the content of this section is too narrow. While the suitability of the individual AML/CFT compliance officer is important, it is insufficient to provide a view of the effectiveness of the AML compliance function. The BSG is of the view that the AML/CFT compliance officer’s ability to deliver effective function will also depend significantly on support received from the management body and resource allocated as much as individual competence.

Furthermore, it would be useful to have some examples of good and bad practices identified in the past when reviewing the conditions relating to integrity, expertise and knowledge of the legal and regulatory AML/CFT framework that the AML/CFT Compliance Officer or the Group AML/CFT Compliance Officer should meet.

Detailed points

- Page 22, para 28: ‘local’ to whom? Does this refer to the place where the regulated firm is established or the location of the AML Compliance Officer? Para 30: ‘independent’ reporting line – independent of whom? Do we mean ‘direct’, ‘unmediated’?.
- Page 37, para 82: need to mention ‘AML risk profile’ of the regulated firm too. Para 83: add ‘and vice versa’.
- Page 38, para 84: c) and d) need to emphasise importance of “effectiveness”, not just “consistency”.
- Para 86: ‘direct reporting line for communication’ ... what does this mean? Again, is it a direct line of communication (we agree that this is important, but not the same as reporting line).