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Re: Consultation paper on certain aspects of the MiFID compliance function requirements

Dear Sir, Madam,

We welcome the opportunity to respond to ESMA's consultation paper: "Guidelines on certain aspects of the MiFID compliance function requirements". We believe the guidelines provide a good and comprehensive overview of what regulators should expect of a compliance function in an investment firm.

Although this paper is mostly aimed at the separate compliance function ("Compliance"), of course not all compliance controls lie directly with this function. It is general practice to distinguish level 1 and level 2 controls. The former are policies, procedures, systems and controls that have been put in place by the business of a firm to check itself. The latter are put in place by the Compliance department and complement the level 1 controls. This practice is made explicit, for example, by the German BaFin in "MaComp"ⁱ. It would be useful to clarify in the guidelines which parts of a firm are mainly responsible for level one and level two controls. Moreover, we suggest stating clearly that the business is also responsible for conducting its own monitoring of level one controls. This would establish the basis for Compliance to put in place level two controls.

We trust you find these comments useful. Please let us know if we can provide further information.

Yours sincerely,

A handwritten signature in blue ink, appearing to be 'AP', with a long horizontal stroke extending to the right.

Andrew Procter
Global head Government and Regulatory Affairs



Questions

Q1: Do you agree that investment firms should ensure that, where the compliance function takes a risk-based approach, any comprehensive risk assessment is performed to determine the focus and the scope of the monitoring, reporting and advisory activities of the compliance function? Please also state the reasons for your answers.

We agree with this general statement as it acknowledges the need for the investment firm and its Compliance officer to find the necessary balance between resources, risks and other functions. However, we do feel more clarity could be provided as to how a risk assessment should be performed. To avoid confusion we would suggest outlining more clearly the assessment process as well as the factors that should be considered. For example, a statement could be included in the guidelines that the assessment should consider each relevant law and regulation and should be based on a consideration of all relevant policies, procedures, systems and controls, the results of the level one monitoring, the results of the level two monitoring and any internal or external audit findings.

Q2: Please provide your comments (with reasons) on any or all aspects of this guideline on the monitoring obligations of the compliance function.

We agree with the guideline on monitoring but would suggest that it is made clear that the monitoring envisioned relates to level two independent monitoring as opposed to monitoring of the level one controls (which would ideally be carried out by the business). To the extent that the paper contemplates monitoring of the level one controls, this should be made explicit.

Additionally, as there seems to be some confusion on this in the industry, we would also clarify whether the guidelines recommend the Compliance function has monitoring programs for all laws and regulations or whether it can be solely risk based.

Paragraph 13 of the paper (p 7) states that “the compliance function within each investment firm should take the group of which it is part into account . . . it should nevertheless remain responsible for monitoring its own compliance risk.” While we understand the concept ESMA sets out, this point could create perverse results if it is understood to require separate compliance functions for each legal entity. As we assume this is not ESMA’s intention, we would suggest the removal of this paragraph from the paper or at least clarification that this is not intended.

Paragraph 13 should also clarify that the geographic scope of the guidelines is limited and does not apply to branches of investment firms outside the European Union.

Q3: Please provide your comments (with reasons) on any and all aspects of this guideline on reporting obligations of the compliance function.

We agree with the proposed reporting obligations. However, we do question if the guidelines should ask for a description of the implementation and effectiveness of the Compliance function rather than a description of the overall control environment. In our view, the latter is a more appropriate approach as it looks beyond just the compliance controls and considers the business controls as well.

In addition, paragraph 20(a) would seem to require the inclusion of the results of all monitoring programs. As this could mean having to create an extremely long document in which a large number of issues in the document could distract readers from important points that require their



attention, we would suggest changing this to a requirement to report breaches and deficiencies which are material.

Paragraph 20(b) and (c) require the Compliance function to report regulatory changes. Section (b) contains a parenthetical of “where senior management has not been made aware . . . through other channels”, which is not included in section(c). To ensure clarity of responsibility and consistency we would suggest aligning the language.

Paragraph 22 states that “[t]he reports provided to senior management should also be provided to the supervisory function” While this makes sense for annual reports we do not believe that ad hoc reports should be sent to the supervisory function unless they contain material information.

Paragraph 24 notes that “some [regulators] require investment firms to provide them with compliance function reports”. It does not confirm whether this is an actual requirement under the guideline. For the same reason as set out above with regard to internal reports, we do not agree that reports should be provided to regulators as a matter of standard practice and instead should be provided only upon request. As such we suggest removing this paragraph.

Q4: Please provide your comments (with reasons) on any or all aspects of this guideline on the Advisory obligations of the compliance function.

We agree with the guidance on the advisory duties of the Compliance function, but would suggest this also involve providing advice on the application of relevant laws, rules and regulations. This concept is implied to in paragraph 30 but could be made more explicit.

Paragraph 33 states that “compliance should be regularly involved in all correspondence with the competent authorities.” It is common in large – cross border – financial firms, for contact persons to be appointed who are responsible for co-ordinating and dealing with requests from authorities. Where these are standard requests (such as data downloads) we do not think Compliance should always be involved. We would therefore suggest a change of language to “Compliance should be involved in all material (or non-routine) correspondence with the competent authorities”.

Q5: Please provide your comments (with reasons) on any or all aspects of this guideline on the effectiveness of the compliance function.

Paragraph 35 states “whether the number of [compliance] staff is still adequate for the fulfilment of the duties of the compliance function should be monitored regularly by the investment firm.” We generally agree with this requirement but it is unclear whether this is an internal compliance task or a task of some other part of the organisation. As such, we would suggest clarifying this point.

This paragraph goes on to state that “[w]here an investment firm’s business unit activities are significantly extended, the investment firm should ensure that the compliance function is similarly extended.” We would agree in principal but it should be made clear that the increase in Compliance staff is only required to the extent that existing resources are insufficient to cover the expansion.

Q6: Do you agree that, in order to ensure that the compliance function performs its tasks and responsibilities on an ongoing permanent basis, investment firms should provide: (i) adequate stand-in arrangements for the responsibilities of the compliance officer which



apply when the compliance officer is absent; and (ii) arrangements to ensure that the responsibilities of the compliance function are performed on an ongoing basis?

We agree with the statement and would answer yes to both questions.

Q7: Do you agree that investment firms should ensure that the compliance function holds a position in the organisational structure that ensures that the compliance officer and other compliance function staff are independent when performing their tasks? Please also state the reasons for your answer.

Q8: Do you agree that investment firms should ensure that the organisation of the compliance function guarantees that the compliance officer's daily decisions are taken independently from any influence of the business units and that the compliance officer is appointed and replaced by senior management only?

We agree with the requirement and would answer yes to both questions. However, we should note that paragraph 45 states “[i]n particular, the investment firm’s organisation should ensure that other business units may not issue instructions or otherwise influence compliance staff and their activities.” We would suggest clarifying that the independence called for is independence from the business itself rather than from other control functions. We do not consider it necessary for Compliance to act in isolation from other control functions. The key test is that Compliance remains properly independent and responsible for its decisions.

Q9: Please provide your comments (with reasons) on any or all aspects of this guideline on Article 6(3) exemptions.

Paragraph 50 states that “The compliance function should generally not be combined with the legal unit, or be subordinate to internal control functions, where this could undermine the compliance function’s independence.” We would suggest deleting the specific reference to the legal unit as it is inconsistent with what appears in paragraph 52 and 54. There, combining the compliance function with other control units besides internal audit is permitted. We agree that the more important part of the requirement is that there should not be a combination or subordination if it could undermine the Compliance function’s independence.

Q10: Please provide your comments (with reasons) on any or all aspects of this guideline on combining the compliance function with other functions.

We have no comments.

Q11: Please provide your comments (with reasons) on any or all aspects of this guideline on outsourcing of the compliance function.

We have no comments.

ⁱ Mindestanforderungen an die Compliance-Funktion und die weiteren Verhaltens-, Organisations- und Transparenzpflichten nach §§ 31 ff. WpHG für Wertpapierdienstleistungsunternehmen (MaComp)