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EBF comments on ESMA guidelines on certain aspects of the MiFID compliance function requirements

General Remarks

The EBF is of the view that the proposed guidelines could usefully enhance clarity and foster convergence in the implementation of the MiFID organizational requirements relating to certain aspects of the compliance function. Whilst we broadly agree with the content of the proposed guidelines in view of their overall consistency to the MiFID's regulatory principles, we note that more emphasis on the proportionality of the requirements according to the firm's size, clients and products or services offered is still missing.

Furthermore, we note, however, that, contrary to ESMA's view, the guidelines would impose new regulation and do in some aspects go further than the Implementing Directive. That directive does not, for example, grant the compliance officer the right of attendance to meetings of senior management of the supervisory function.

The EBF stresses in any case the importance of close coordination between ESMA and the European Commission to ensure that any potential changes required to these guidelines, following the review of the MiFID, are kept to a strict minimum.

Furthermore, the EBF has additional detailed remarks (see below).

Detailed Remarks

Compliance risk assessment

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.

Yes.

Monitoring obligations of the compliance function

Q2: Please provide your comments (with reasons) on any or all aspects of this guideline on

the monitoring obligations of the compliance function.

The EBF is concerned by text in the guideline stating that “the compliance function establishes a monitoring program that covers all relevant areas of the investment firm's services...” It is our view that whatever it is considered as "relevant" is decided from a risk based approach. The guidelines should not be understood as if the compliance function should focus on all areas connected to investment services.

With regard to guideline 17, while the text rightly points out that it is the task of the compliance function to monitor first level controls by the firm's business units (i.e. to perform second level controls), we believe it would be desirable for the guidelines to reemphasise and underline more clearly business units' own responsibility to ensure that all legal requirements are met.

Guideline 18 rightly states that the monitoring activities performed by the compliance function include the surveillance of the business units' first level controls. Primarily it is, however, in the business units' responsibility to comply with the legal framework. Further, the compliance function has to be integrated pro-actively by the business units. We, therefore, ask for clarification of this aspect in the guideline.

Finally, guideline 9 states that “the compliance function should not have a role in determining the outcome of complaints”. No reason is given for this. It should be noted that the compliance function can be very helpful in ensuring the complaint is handled fairly for the client and that the required independence of the Compliance function supports the firm's ability to treat complaints fairly.

Reporting obligations of the compliance function

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

According to guideline 20 sentence 2 the compliance report should contain “a description of the implementation and effectiveness of the firm's compliance program” rather than a description of the overall control environment. We suggest the latter is a more adequate reference as it considers all business controls.

Guideline 26 describes that some member states require investment firms to send compliance reports to the regulator. As the description of the practice in different member states does not constitute a guideline, and, furthermore, we do not find that such a requirement should be called for, guideline 26 ought to be deleted.

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

We broadly agree with requirements for the advisory obligation but would suggest an amendment to clarify that such obligation also involves providing advice on the application of relevant laws, rules and regulations. This concept is implicit in guideline 27 but not expressly

stated.

Guideline 29 focus on the compliance function's duty to arrange training for the investment firm's staff. In this context the business unit's responsibility for the performance of trainings for its staff should be mentioned. The compliance function solely has to advise and support the business units. We suggest, therefore, the following clarification in the respective guideline:

"29. The investment firm needs to ensure that its staff are adequately trained. ~~For this, the compliance function should arrange training and/or other support for staff. Where training is performed by other units, t~~The compliance function should support these business units in performing any training for its staff. [...]"

According to their content guideline 34-36 should rather be shifted to "V.II. Guidelines on organisational requirements of the compliance function, Effectiveness of the compliance function". They are right in describing the role "that the compliance function should be involved" in processes and information flows. That's why they belong to the next chapter. In this respect it should additionally be pointed out, that primarily the business units are responsible for the compliance officer's involvement into relevant information. We ask for a clarification of this point.

Effectiveness of the compliance function

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

We agree on the proposed guidelines. We note, however, that guideline 42 fails to acknowledge that the compliance function is sometimes organized with "sub compliance groups" that are dedicated to different units within the investment firm. From a "need to know" point of view such sub compliance groups should not have access to all information systems - as that would imply crossing Chinese walls. As a consequence, the sentence "(...) the compliance officer should have access to all information systems within the investment firm (...)" should be modified.

Another point is that guideline 42 offers the possibility of granting the compliance officer the right of attendance for meetings of senior management of the supervisory function. The European legislator had not seen any necessity to grant such a right to the compliance officer. MiFID implementation directive does not contain such a rule. It's rather the compliance officer who was to give a written report to the senior management. Same is applicable with regard to the supervisory board (art. 9(2), (3)). We therefore suggest the deletion sentences 3-5:

„42. Compliance staff should at all times have access to the relevant information for their tasks including all relevant databases. In order to have a permanent overview of the areas of the investment firm where sensitive or relevant information might arise, the compliance officer should have access to all information systems within the investment firm as well as any internal or external audit reports or other reporting to senior management or the supervisory board, if any. ~~Where relevant, the compliance officer~~

~~should also be granted right of attendance for meetings of senior management or the supervisory function. Where this right is not granted, this should be documented and explained in writing. For this, the compliance officer should have in-depth knowledge of the investment firm's organisation, corporate culture and decision making processes in order to be able to identify for which meetings his or her attendance is important."~~

Furthermore:

- It should be clarified what the differences are between a "designated compliance officer" and a "compliance officer". Otherwise "designated" should be deleted (guideline 44).
- It should be clarified that the expertise described should be within the compliance *function* and not by the compliance *officer* (guideline 45).

Permanence of the compliance function

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?

Please also state the reasons for your answers.

The EBF is of the opinion that guideline 47 should be deleted as firms have the tools (such as the "compliance charter" quoted in the following guideline 48) to solve any continuity problems in the compliance function.

Independence of the compliance function

Q7: Do you agree that investment firms should ensure that the compliance function holds a position in the organizational 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?

Both questions can be answered with an unrestricted "Yes".

However we consider the statement in guideline 51 whereupon the compliance function performs the day-to-day-business independently from senior management as not compatible with the senior management's responsibility. In the end it is the senior management who takes the whole responsibility. Compliance cannot and should not operate in a vacuum. That includes the senior management's responsibility for the compliance function. It may be sufficient that the compliance function should not suffer interference in its Risk Management but guidelines 51 goes beyond this. We therefore suggest the following amendments in guideline 51:

„51. ~~While~~The senior management is responsible for establishing an appropriate compliance organisation and for monitoring the effectiveness of the organisation that has been implemented. The compliance officer is within his, the tasks fulfillment only bound by instructions from the senior management. ~~performed by the compliance function in the day-to-day business should be carried out independently from senior management and other units of the investment firm. In particular, t~~The investment firm's organisation should ensure that other business units may not issue instructions or otherwise influence compliance staff and their activities. Senior management's instructions to compliance staff should be general and should not interfere with the compliance function's day-to-day activities.~~The investment firm should ensure that the decision on the appointment and replacement of the compliance officer may only be taken by senior management or the supervisory function.~~”

Exemptions

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

We propose to shift guideline 50 in the section IV.III to section IV.V. "Combining the compliance function with other functions". It should also be made clear that the combination of compliance function with the legal unit is not necessarily an unsound approach insofar as it does not impair the compliance function's independence. A combination of the compliance and the legal unit does not ipso facto impact compliance's independence and in fact such combinations often create various synergies in terms of expertise and cost savings.

Combining the compliance function with other functions

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

We propose to change this headline in "Combining the compliance function with other internal control function" just to make it more coherent with the contents of the proposed measures.

Sounder and more efficient co-ordination of the compliance function with other control function might be achieved by way of formal agreements among the implied functions with explicit service level agreements (SLA) regarding timing, methodology used and outputs delivered. Such agreements would not transfer the final responsibility from one control function to the other.

Outsourcing of the compliance function

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

We note that the guidelines make no distinction between group-internal and external outsourcing (e.g. guideline 57 and 58) and invite ESMA to clarify whether such a difference would have any impact in the conditions for outsourcing.

Review of the compliance function by competent authorities

Q12: Do you agree that competent authorities should also review, as part of the ongoing supervisory process, whether measures implemented by investment firms for the compliance function are adequate, and whether the compliance function fulfils its responsibilities appropriately? Please also state the reasons for your answer.

Q13: Do you agree that competent authorities should also assess whether amendments to the organization of the compliance function are required due to changes in the scope of the business model of the investment firm, and where such amendments are necessary, monitor whether these amendments have been implemented?

We think that the guidelines should stress that the responsibility (i.e. licensing, approval, assessment) for the compliance function should rest with the senior management. As a result, the senior management should be allowed some flexibility to establish the compliance function in a way that is adapted to the individual investment firm. Consequently, ESMA should refrain from recommending any practice that waters down the role of the senior management. In this regard, guideline 68 should be deleted.