



*European Association of Co-operative Banks
Groupement Européen des Banques Coopératives
Europäische Vereinigung der Genossenschaftsbanken*



EACB position on ESMA's Consultation paper on Guidelines on certain aspects of the MiFID compliance function requirements

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The voice of 4.000 local and retail banks, 51 million members, 181 million customers

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General Remarks

The members of the European Association of Co-operative Banks (EACB) are pleased to comment on ESMA's Consultation paper on *Guidelines on certain aspects of the MiFID compliance function requirements*.

The European Co-operative Banks welcome ESMA's initiative to enhance clarity and foster convergence in the implementation of the MiFID organisational requirements relating to certain aspects of the compliance function.

We would nonetheless like to stress (as set out in the explanatory text of the Consultation) that the Guidelines are not intended to introduce additional requirements for investment firms or competent supervisory authorities outside the scope of Article 13 of MiFID and Article 6 of the MiFID Implementing Directive. We would therefore welcome clarification on this in the final ESMA Guidelines.

Furthermore we would ask for a clarification in the final version of the ESMA-Guideline that they should be read together with the proportionality principle as set out in Article 6(1) of the MiFID Implementing Directive (paragraph 5 of the Consultation paper).

We consequently would greatly appreciate, if our detailed views and comments are taken into account in the ongoing preparation of the final version of the Guidelines.

Detailed Remarks

Please be aware that our references to paragraphs relate to the main body of the Consultation (chapters III to V) only.

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 both *paragraphs 10* and *11*. As a side note, we would like to point out that question 1 mentions "reporting activities" of the compliance function. Yet, neither Guidelines nor the aforementioned explanatory text cover this issue, so we were unable to subsequently comment on this issue.

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

Please find below our detailed comments to the individual paragraphs:



- *Guideline III.II.:* The obligation of the monitoring program should in general only cover the investment services and only in relevant instances its ancillary services.
- *Paragraph 14:* Remote controls and monitoring activities have proven very effective in the past. We therefore we would consider making on-site inspections a possible alternative, albeit not a compulsory one. It should further be clarified that monitoring activities should not necessarily be performed continuously and that the frequency is depending on the size of the function and of the operations (principle of proportionality).

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

Please find below our detailed comments to the individual paragraphs:

- *Paragraph 20(c):* The current proposal suggests that future regulatory changes likely to have a significant impact on the business shall already be addressed in the compliance report. In our view, such a requirement would be excessive. According to Article 9(2) in conjunction with Article 6 of the MiFID Implementing Directive, the Compliance Report merely has to address matters that are relevant to the compliance tasks. This involves monitoring and assessing the adequacy and effectiveness of the organisational procedures and policies aimed at ensuring compliance with the regulatory requirements as well as advice and support to help the operational units to meet these requirements (cf. Article 6(2) of the MiFID implementing Directive). Hence, forecasts concerning prospective future regulatory changes are not warranted by the existing mandate. We therefore propose to change para. 20(c) into "relevant regulatory changes which have a significant impact on the business".
- *Paragraph 21:* In line with our comments above, we also believe that suggesting necessary remedial steps does not form part of the compliance function's responsibilities. This task is incumbent upon the unit in which shortcomings have been discovered. Otherwise, the compliance function would provide its own checks and balances by having to assess the adequacy and effectiveness of its own proposals. We therefore suggestion the deletion of the second sentence of paragraph 21.
- *Paragraph 24:* According to the proposal some competent authorities require investment firms to provide them with compliance function reports. As the description of practice in different Member States does not constitute a guideline, such a requirement should not be called for. We therefore would suggest deletion of paragraph 24.

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

Please find below our detailed comments to the individual paragraphs:

- *Guideline III.III.:* An editorial oversight might have occurred, as the compliance report should contain a description of the implementation and effectiveness of the firm's compliance program. We think that instead of "compliance program" it



- should be referring to the organisational measures and procedures the investment firm has put in place to comply with the MiFID requirements.
- *Paragraph 25:* Investor protection is only an indirect effect of the compliance function's task by monitoring and assessing the effectiveness and adequacy of the organisational measures and procedures in order to comply with the regulatory requirements. We therefore ask for alteration of the second sentence by deleting "but also to engage staff with the principle of improving investor protection".
 - *Paragraph 26:* We believe that too much emphasis is put on the compliance function delivering training to staff. We believe that the training should lie more within the operational units themselves and that the compliance function should be limited to an advisory and support dimension. We would therefore suggest an according adaption of the paragraph.
 - *Paragraph 27:* The proposal suggests training should generally be performed on a regular basis. We regard this as too general. Whether training will be necessary on a regular or on an ad-hoc basis is going to depend on the specific circumstances of the individual case at hand. We therefore suggest to amended paragraph 27 as following:
 - o 27. Training should be performed on a regular basis, and/or in specific cases need-based training should be performed where depending on what is necessary to impart the staff with the necessary knowledge. Training should be delivered as appropriate – for example, to the investment firm's entire staff as a whole, or to specific business units, or even to a particular individual.

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

Please find below our detailed comments to the individual paragraphs:

- *Paragraph 35:* We do not agree that the extension of a firm's business activity has to result in a similar extension of the compliance function. The need for expansion relies on the actual business case at hand, which can take various forms and therefore cannot trigger a general requirement to enlarge the compliance function. Furthermore we believe that the number of staff required for the compliance function is largely dependent on the type of operations (principle of proportionality). We therefore strongly suggest the complete deletion of the second sentence ("Where an investment firm's business unit activities are significantly extended [...]").
- *Paragraph 37:* The key priority is that investment firms' senior management provides the compliance function with appropriate resources without dictating compulsory budgets. Our suggestion would be to amended the paragraph as follows:
 - o 37. When the investment firm provides a budget for the compliance function, this budget should be Adequate resources also include the allocation of an appropriate budget for the compliance function. [...]
- *Paragraph 38:* According to the MiFID Implementing Directive, the compliance officer is only obligated to report to the senior management in writing and does not have the right of attendance of meetings of the senior management or even



the supervisory function. As this was clearly not envisioned by the legislator neither in MiFID nor its Implementing Directive, we suggest the deletion of the third to the fifth sentence (“Where relevant, the compliance officer should [...]”).

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.

In accordance with our answers to question 2 and our comments to *paragraph 14*, we believe that the frequency of activities (in particular of monitoring activities) could be on a recurring, ad-hoc or continuous basis and do not necessarily have to be performed on an ongoing permanent basis.

Furthermore we are in favour of the deletion of *paragraph 42*, as investment firm already possess the tools (such as the “compliance charter” referred to in the next paragraph) to comprehensively address any possible continuity problems.

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 both questions, but would like to give further explanation to *paragraph 45*. It suggests that the compliance function should perform day-to-day business totally independent from its senior management. In our view this is conflicting with senior management's responsibilities which bear responsibility to the whole firm, including its compliance function. Practically speaking, at most it could be envisaged that the compliance officer should have to record, if the senior management deviates from a crucial assessments or recommendations issued by him.

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

Combining the compliance function with the legal unit (*paragraph 50*) should be dealt with under 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.

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



On a more general note, we would advocate to change the headline of Guideline IV.V. to "Combining the compliance function with other internal control function" to be more coherent with the content of the proposed measures.

With regards to achieving a sound and efficient co-ordination of the compliance function with other control function (i.e. reducing the risk of redundant or omitted controls in some areas/processes, lowering cost of controls while maintaining the same level of risk mitigation), we would like to highlight that in some Member State countries (such as Italy) explicit Service-Level Agreements exist to combine the compliance function with other functions. They define timing, methodology used and the outputs to be delivered. Obviously, such an agreement does not transfer the responsibility from one control function to the other, but has proven of great efficiency in the past by investment firms in those Member States that practise this custom.

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

We can in general agree with the Guideline and all paragraphs, but would like to draw your attention in particular to *paragraph 58*. Firstly, we point out that the use of the term "due diligence", is not appropriate in this context. We suggest using the term "assessment". Secondly, we would like to stress that the intensity of the required assessment should also be based on proportionality criteria (nature, scale, complexity and risk of the outsourced tasks and processes).

On the subject of *paragraph 60* on partial outsourcing, we suggest a clarification that the person appointed to supervise and monitor the outsourced function could also be the responsible of the compliance function. Furthermore, we would propose that the monitoring may be performed periodically (at least annually) in accordance with the outsource activity, the size of the operation and the type of services provided.

Q13: Do you agree that competent authorities should also assess whether amendments to the organisation 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?

Please refer to our answer to Question 5 and our remarks to paragraph 35.



Contact

The EACB trusts that its comments will be taken into consideration. Should there be any need for further information any questions on this paper, please contact:

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