

EBA Consultation Paper Draft Guidelines on the characteristics of a risk-based approach to anti-money laundering and terrorist financing supervision, and the steps to be taken when conducting supervision on a risk-sensitive basis under Article 48(10) of Directive (EU) 2015/849 (a The Risk Based Supervision Guidelines mending the Joint Guidelines ESAs 2016 72) - The Risk Based Supervision Guidelines

Background

The EBA is mandated by Article 48(10) of Directive (EU) 2015/849 to issue guidelines to competent authorities on the characteristics of a risk-based approach to AML/CFT supervision (RBS). The first iterations of these guidelines were published in 2016 as joint guidelines, setting out the steps that supervisors should take when conducting AML/CFT supervision on a risk-sensitive basis. Based on a number of reports that have considered the extent to which competent authorities have implemented an effective, risk-based approach to AML/CFT supervision. The EBA assessed these reports and concluded that there was need for further guidance on this topic to ensure effective AML/CFT supervision going forward. Against that background, the EBA has revised the guidelines, which now forms the consultation document.

The proposed amendments address the key challenges for supervisors when implementing the risk-based approach. They also take into consideration changes in the EU legal framework that came into force since the guidelines were first issued and new international guidance by the FATF and the Basel Committee on banking Supervision on this topic.

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

BSG response

In general, the BSG welcomes more harmonised and coordinated supervisory practices across the EU. In that sense, the clarifications to the guidelines set better preconditions to that end. The identified shortcomings and the associated changes in these guidelines give, in the view of the BSG, a potential to improve the EU's supervisory system to properly identify and address ML/TF risks. The BSG also agrees with the EBA that a risk-based supervisory approach, focussing on the greatest ML/TF risks in the respective jurisdiction, sector and sub-sector is the right way forward.

Amendments to “Subject matter, scope and definitions”

The BSG supports the clarifications and additions made in this part of the guideline.

Amendments to Guideline 4.1: Implementing the RBS model

The BSG welcomes the clarification to guideline 4.1 paragraph 14 and 15 and agrees that the actions of the competent authorities' supervisory actions should be commensurate to the ML/TF risk and not assumed from the size of the subject of assessment. In our experience, this has not always been the case so far where supervisory activities towards larger credit institutions have been in focus and against that background, the clarification is welcome. At the same time, ML/TF supervision of large financial institutions is warranted as they have a large number of customers and process a large number of transactions. However, this should not replace the need to focus supervisory actions on the sectors and sub-sectors where ML/TF risks are high. This could entail difficulties for competent authorities to decide their supervisory actions balancing the size of the ML/TF risks given the size of the institution, which risks creating an imbalance where large institutions are subject to more and more intrusive supervisory actions. The EBA guideline could further clarify how competent authorities should balance supervisory activities towards institutions with large number of customers and transactions versus credit and financial institutions (large or small) that pose a high ML/TF risk.

The BSG supports the grouping of credit institutions or financial institutions that share the same key characteristics into one cluster. Regarding guideline 4.1 paragraph 18 referring to domestic credit or financial institutions in the same sector that should not be clustered but instead treated as one subject of assessment. The BSG acknowledges that this guideline concerns *domestic* institutions but would at the same time wish to highlight that for cross-border credit institutions or financial institutions, the current situation entails multiple ML/TF inspections by competent authorities. While the different competent authorities currently coordinate in such a way that the ML/TF inspections of the different competent authorities are not performed during the same time period, but rather carried out in a sequence, this practice entails a large burden on the subjects of the assessment. However, there are also cases where the ML/TF inspections occur from multiple competent authorities during the same time interval, which means a strain on the same employees of the credit institution. As noted further below in the guidelines, the different supervisory authorities often ask for the same information but with different intervals and in different formats. The same concerns supervisory ML/TF inspections during which a substantial amount of information is requested from the supervised entity. It would be preferable if these inspections could be coordinated, for example through the AML/CFT colleges, both in terms of the supervisory ML/TF inspections as the questionnaires as it would lessen the burden on the subjects of assessment as well as save resources for the competent authorities, improve the knowledge-sharing and capacity building of competent authorities. This issue is also covered in

guideline 96 a). However, the EBA could consider clarifying or amending the guidelines to stimulate more coordinated supervisory actions.

Improved coordination would also improve supervisory convergence on the interpretation of the rules, which currently differ between competent authorities leading the different supervisory outcomes of the same rule. In some cases, this is due to differences in local legislation, in other cases it is the interpretation by competent authorities that differs. While this in some cases could be attributed to the different political contexts in Member States, the BSG considers harmonisation and supervisory convergence of high importance. The EBA could consider providing more guidance to competent authorities on the *interpretation* of AML/CFT rules or convening more practical sessions where supervisors share experiences on the practical application to specific situations.

The BSG strongly encourages the enhanced cooperation and exchange of information between competent authorities and between competent authorities and other stakeholders such as FiUs, tax authorities, law enforcement agencies. The BSG notes that cooperation and information sharing between competent authorities and in particular FiUs have improved over the last year. However, cooperation and information sharing need to improve further for the whole system to be efficient. It would also strengthen knowledge of ML/TF risks by the various authorities in the respective jurisdiction. The BSG agrees with the continuity risks of informal arrangements which prevail in many cases and welcome the practical modalities set out in the revised guideline. However, as also noted in the draft revised guideline (e.g. in paragraph 23) there are legal restrictions in many Member States for the efficient information sharing which needs to be addressed by legislators. The EBA could consider mapping the possibilities and restrictions for the cooperation and sharing of information within Member States as well as cross-border to provide best practices as well as input for legislative changes.

Amendments to Guideline 4.2: Step 1 - Identification of risk and mitigating factors

Concerning guideline 4.2 paragraph 24 on the obligation of competent authorities to identify and understand the ML/TF risk factors, the BSG considers the situation to have improved over the last years. However, increased cooperation with other authorities could lead to a further improved understanding of the ML/TF risks by competent authorities, and in particular, as regards the ML/TF of different sectors and subsectors. This could be further stressed in the guideline. Another issue is the continued rapid turnover in staff at competent authorities as well as limited resources allocated.

Regarding the type of information and sources (guideline 4.2 paragraphs 29-33), the BSG would again like to stress the legal restrictions of information sharing, in particular regarding more detailed information such as the *scale* of the financial crimes committed. As resources also are scarce in FiUs and law enforcement agencies, it is uncertain if any authority has the full picture. One indication of this is that a recent CEPS report notes that there are 1.1 million SARs a year and that only 10% are investigated. As indicated by the draft revised guideline, in some cases information sharing is excluded by applicable law (e.g. in paragraph 30 o) and p). In addition, the draft guideline mentions in paragraph 31 f) the use of publicly available information from reputable sources. The BSG notes that “adverse media screening” is not allowed for credit institutions and financial institutions in all Member States, although in other Member States credit institutions and financial institutions would be expected to do

this as a matter of course. Against that background, it could be investigated whether there are significant restrictions applying to competent authorities. The BSG would encourage an exercise by the EBA to map these restrictions for the efficient sharing of information, both between authorities within a Member State as well as cross-border. This could form the basis for “best practices” and provide a foundation for changes in the respective jurisdictions.

Paragraphs 47 and 48 refers to the finding in the EBA report of February 2020 which noted that “most supervisory authorities used questionnaires at different intervals to obtain data from banks to inform their ML/TF risk assessment of each bank”. In the draft revised guideline, the EBA notes that “supervisors asked for similar data but in different formats and, in some instances, it transpired that only part of the information requested from banks was in fact used by competent authorities”. Against that background, the clarification in the revised guideline is welcomed by the BSG. However, in the case of cross-border credit institutions and financial institutions, they currently face requests from different supervisors as regards data on ML/TF. The BSG would welcome further clarification that supervisors that are part of an AML/CFT college for a specific institution, should coordinate their requests, preferably by agreeing on the set of information needed, the time interval as well as the format.

Amendments to Guideline 4.3: Step 2: Risk assessment

The BSG welcome the clarifications to the requirements on competent authorities to develop sectoral, sub-sectoral and individual risk assessment (paragraphs 49-58, 66, 71). This will further decrease the existence of divergent views between competent authorities and representatives of the sector. More importantly, the individual risk assessment cannot be a tick-box exercise, it needs to be focussed on the presence and level of ML/TF risks and the effectiveness of the AML/CFT controls in the subject of assessment.

On paragraphs 60-62, the BSG again notes that supervisory cooperation, particularly as regards inspections and reporting requirements are not currently coordinated for cross-border institutions. Again, the BSG would welcome further coordination by competent authorities, preferably by coordinated supervisory inspections, with coordinated reporting requirements and formats. This could be further encouraged by the EBA and stressed in the revised guideline.

Amendments to Guideline 4.4: Step 3 – Supervision

On paragraph 75c), the BSG notes and agrees that subjects of assessment that are exposed to more significant ML/TF risks should be supervised more frequently as compared to focussing on subjects of assessment purely because they are large. However, the BSG wishes for more clarity on how a competent authority should form their supervisory plan when balancing different types of institutions in terms of size, type of business activities and exposure to more significant ML/TF risks.

Regarding the identification of emerging risks, supervisors may need to take additional steps to understand the risk profile in relation to firms and activities outside the regulatory perimeter for financial services to which regulated firms provide services, or to understand emerging issues in firms where requirements prior to registration may be more limited than those in place for others requiring

authorisation or which are not supervised for non-AML purposes. Where these firms are customers of regulated financial institutions their risk profile may have a wider impact on the financial sector.

On the use of supervisory tools and the frequency of supervision, the BSG welcomes the clarifications (paragraphs 79, 85-97). BSG notes that full scope on-site inspections are currently the most frequently used supervisory tool leading to few actively supervised subjects of assessments. Such assessments may continue to be appropriate where new sectors are brought within the scope of AML supervision (meaning there is limited existing information to help target supervisory assessments) or for new firms, but in general, we would expect to see a trend towards increasing use of more focused assessments to allow a better matching of resource to risk, and better coverage of different areas of risk.

The BSG would like to stress that feedback to the sector (paragraphs 122-123) is currently not provided in a timely manner. In fact, in many cases the feedback can be provided only after a year or two and often quite later than the given timeline which creates uncertainty in the sector on what needs to be remedied. Also, at that time, many people in the supervised entity will have moved on to new jobs within or outside the institution, and it is difficult to follow up on the requested remedial actions and recommendations. Moreover, during that period, changes may have been made to strengthen the institutions' ability to combat financial crime, meaning that a full analysis of which of the requested remedial actions and recommendations are still outstanding. Alternatively, the long delay in feedback could also lead to the subject of assessment waiting with taking remedial actions due to the uncertainty, leaving weaknesses and deficiencies in the AML/CFT system for a longer period. The BSG would welcome further clarifications in the guideline as regards the timeline for feedback to the sector. One option would be to have a more continuous dialogue on the remedial actions between the competent authority and the subject of assessment.

Amendments to Guideline 4.5: Step 4 – Monitoring and updating of the RBS model

The BSG supports the changes and clarifications proposed in this section of the revised guideline.