**CONSULTATION PAPER ON THE TWO SETS OF DRAFT GUIDELINES ON INTERNAL POLICIES, PROCEDURES AND CONTROLS TO ENSURE THE IMPLEMENTATION OF UNION AND NATIONAL RESTRICTIVE MEASURES**

ABI’s response

24 March 2024

The Italian Banking Association (ABI) would like to thank the European Banking Authority (EBA) for providing the opportunity to comment on the two sets of draft Guidelines on internal policies, procedures and controls to ensure the implementation of Union and national restrictive measures.

1. General remarks

ABI supports these draft Guidelines considering that the topic is very important for banks, especially following the issue of the thirteen packages of regulations that the European Union issued to counter Russia's aggression against Ukraine.

ABI considers the implementation and compliance timeline (31 December 2024) too ambitious given the consultation already runs until the end of March and the final set of Guidelines may not be published until Q3/2024. In this perspective, the date of entry into force of the two sets of guidelines should be set at December 2025.

Furthermore, given that the draft Guidelines contain indications regarding personal data to be processed for “control” purposes, they should be drafted also with the involvement of EPDB and give clear indications, if necessary, on data that can be considered “special categories of personal data” pursuant to Article 9 GDPR (e.g. nationality), in order to create regulatory certainty.

1. Detailed comments on the FIRST Draft Guidelines on internal policies, procedures and controls to ensure the implementation of Union and national restrictive measures

2. Subject matter, scope and definitions

We note that the section “Definitions” in the 1st set of Guidelines refers to “restrictive measures” while the 2nd set refers to both “restrictive measures” and “sectoral restrictive measures”. We suggest referring to “sectoral restrictive measures” also in the 1st set of Guidelines.

4. Guidelines on internal policies, procedures and controls to ensure the implementation of Union and national restrictive measures

* **General Provisions**

We suggest modifying the guideline (“**GL**”) **n.1** as follows, including the concept of a risk-based approach:

“*Financial institutions should identify and assess which areas of their business are particularly vulnerable or exposed to restrictive measures and to circumvention of restrictive measures. On this basis, they should put in place, implement and maintain up-to-date policies, procedures and controls to ensure that they can comply effectively with restrictive measures regimes,* ***using a risk-based approach****.*”

* **The role of the management body in its supervisory function – section 4.1.1**

We propose the following amendment:

* **GL n. 10:** *“Where the financial institution is the parent undertaking of a group, the management body* ***in its supervisory function*** *of that parent undertaking should also perform the above tasks listed from a) to c) at group level. The ultimate responsibility for compliance with restrictive measures lies with each entity of the group.”.*
* **The role of the senior staff member in charge of compliance with restrictive measures - section 4.1.3**

In case of groups, and in order to avoid duplication, we ask to clarify that:

1. the new figure, responsible for compliance with the restrictive measures, can be considered to be unique at group level and appointed only at parent company level, according to Guidelines no. 17. It is suggested to clarify that even in case of outsourcing of the function within the group, the figure of the Group Manager can be considered unique at group level and coinciding with the figure appointed to the entity to which the function has been outsourced.

* **Appointing the senior staff member – section 4.1.3.1**

We propose the following amendments:

* **GL n. 13**: “*~~Financial institutions~~* ***The management body in its supervisory function of each entity of a group*** *should appoint a senior staff member in charge of performing the functions and tasks set out in paragraphs 19 to 21. The management body should ensure that the senior staff member has the knowledge and understanding of restrictive measures necessary to fulfil their functions effectively*.”
* **GL n. 14**: “*The management body* ***in its supervisory function*** *may assign this role to a senior staff member who already has other duties or functions within the financial institution* ***or the parent company*** *(such as the* ***group*** *AML/CFT compliance officer or the chief compliance officer) provided that: […]..*”
* **GL n. 15**: “*The management body* ***in its supervisory function*** *may allow the senior staff member to assign and delegate the tasks stipulated in paragraphs 19 to 21 to other staff acting under the direction and supervision of the senior staff member, provided that the ultimate responsibility for the effective fulfilment of those tasks remains with the senior staff member.”*. We think it is relevant also to clarify which liabilities the senior staff member may incur in performing tasks stipulated in paragraphs 19 to 21.
* **The role of the senior staff member - section 4.1.3.2**

With regard to **GL n.** **19**, please consider the following comments:

* **lett c) ii):** *”new or prospective changes to restrictive measures and their impact on the financial institution”*. With regard to the word “prospective” we underline that the sanctions environment is very volatile and it is difficult to make a prediction. Furthermore, it is often not disclosed what the new restrictive measures will be. We suggest deleting “or prospective”;
* **lett c) iii):** we suggest:

- deleting “*the number of alert awaiting analysis*”;

* modifying “*the time between the alert and the report submitted to competent authority” with ““the time between the alert* ***is assessed as true match on a person or entity subject to asset freeze*** *and report submitted to competent authority”.* The reason is that a report to an authority can only be made once there are sufficient grounds to confirm that it is a true match and there is no licenses that would be applicable in that case;
* giving only general principle instead of “*the amount of frozen assets and the nature of those assets*”;
* clarifying the part “*the number of breaches identified and the reason for those breaches*”; it is unclear if this refers to a situation where a competent regulatory body had identified a breach. This seems to be inspired by US Block and Reject reports requirements, as well as the obligation to self-incriminate oneself under the US “*Voluntary Self Disclosure*” rules, but t**here is no such requirement under EU law**. Thus we recommend to add “*breaches identified by a competent authorities*” or to delete this point.
* **Conducting a restrictive measures exposure assessment – section 4.2**

We suggest modifying **GL n. 22** as follows, integrating the “*restrictive measures exposure assessment*” as part of the AML/CFT self-assessment. It’s relevant because, depending on the complexity of the Financial Institutions, this allows for the combination of "stand alone" riskiness from a sanctions perspective with other risks detected at the AML/CFT level. Thus, we suggest the following addition:

“*Financial institutions should carry out a restrictive measures exposure assessment, to understand the extent to which each area of their business is exposed to restrictive measures and vulnerable to circumvention of restrictive measures.* ***Financial institutions, based on institution’s nature and size, the nature, scope and complexity of its activities, and its exposure to restrictive measures, can carry out this assessment as a part of the AML/CFT self-assessment****.*”.

* **Conducting a restrictive measures exposure assessment – section 4.2**
* **GL n. 23** lists the factors to be identified and assessed by Financial Institutions when they carry out the restrictive measures exposure assessment. Among these there are the ones referred to the geographic risk which include *“(i)where the financial institution conducts its business, i.e. the jurisdictions and territories in which the financial institution is established or operates” and “(ii) the extent to which those jurisdictions and territories are exposed to restrictive measures or are known to be used to circumvent restrictive measures*” and the ones referred to the customer risk including “*the number of customers, type of customers and the complexity of those customers, such as the identification of the beneficial owner*”.

It would be useful to identify which sources Financial Institutions can use to identify jurisdictions known to be used to circumvent restrictive measures and to receive clarification on how to evaluate the complexity of customers.

In particular:

* **lett. b)** Restrictive measures exposure assessment could be considered regular risk assessment exercise of a Financial Institution where a control adequacy is performed regularly to assess the effectiveness of the implemented restrictive measures. The concept of “Likelihood” in this case is not clear and needs to be further detailed in order to understand if the expectations is to define a level of coverage of the restrictive measures;
* **lett. d)** it is worth clarifying if we are speaking about “*risk impact*”;
* **lett. e, point b):** There is no legal requirement under financial Sanctions to collect data about the sector to which the company belongs. This would have a serious impact on the KYC and we ask to consider deleting this part;
  + In **GL n. 26** the regulatory expectations is that the assessment is done depending on the risk assessment of the institution. This Guideline is requesting an update which is not implementable in practice considering the changes are frequent and is not in line with AML regulatory expectations. Please also consider that there is no legal requirement but only a best practice to provide Financial Sanctions risk assessment. Our suggestion is to delete the entire point. Otherwise, if GL n. 26 remains, we underline that the significant changes mentioned in lett. a) cannot be so broad and shall be better specified. Same reasoning on the need to keep inherent risk annually update also valid for the letters below.
* **Effective restrictive measures policies and procedures – section 4.3**
* We suggest modifying **GL n. 30** as follows: “*Policies, procedures and controls for the implementation of restrictive measures will be effective if they enable the financial institution to fully and properly implement restrictive measures ~~without delay~~* ***as soon as possible.***”;
* With regard to **GL** **n. 31 lett. b)** the draft guideline states that policies, procedures and controls for the implementation of restrictive measures should at least include “*processes to update applicable lists of restrictive measures regimes as soon as they are published*”. Financial Institutions usually rely on info-providers for sanctions lists including their update. Accordingly, lists are duly updated in the screening tool as soon as they are available by the info-provider. Technical time for the alignment of the info-provider shall be considered. Hence, we suggest to replace current point b) with the following:

“*processes to update applicable lists of restrictive measures regimes as soon as they are published and given the necessary technical time for uploading in the screening systems the lists delivered by info-providers*”;

* Policies, procedures and controls for the implementation of restrictive measures should at least include (**GL n. 31. lett. f**) “*procedures for swiftly investigating all potential matches, including pursuant to the Guidelines on internal policies, procedures and controls to ensure the implementation of Union and national restrictive measures under Regulation (EU) 2023/1113*”. We suggest the following amendment:

“*procedures for swiftly* ***starting*** *investigating all potential matches……*”.

The proposed amendments intend to address cases which require more time for the investigations to be closed pending the acquisition of necessary information and documentation as necessary;

* We suggest the following amendments in the **GL n. 31 lett. g)**:

“*in case of* ***confirmed*** *true positive matches, procedures for follow-up actions,* *including immediate suspension, freezing and reporting to competent authorities once* ***the potential match is assessed as true match*** *pursuant to the Guidelines on internal policies, procedures and controls to ensure the implementation of Union and national restrictive measures under Regulation (EU) 2023/1113”.*

The reason is that a report to the authorities is made only in case of assessed true match against the asset freeze list;

* **GL n. 31 lett. f)** Often it is not about only speed, but also diligence, thus cases may require further clarifications – the term swiftly shall be deleted;
* **GL n. 31 lett. g)** it shall be amended by including “*immediate suspension, freezing and reporting to competent authorities once the potential match is assessed as true match pursuant to the Guidelines on internal policies, procedures and controls to ensure the implementation of Union and national restrictive measures under Regulation (EU) 2023/1113*”. A report to the authorities is made only in case of assessed true match against the asset freeze list- no requirement to report sectoral sanctioned entities.
* We suggest the following amendments in the **GL n. 31 lett. g)**:

“*in case of confirmed true positive matches, procedures for follow-up actions,* *including immediate suspension, freezing and reporting to competent authorities once the potential match is assessed as true match pursuant to the Guidelines on internal policies, procedures and controls to ensure the implementation of Union and national restrictive measures under Regulation (EU) 2023/1113”.*

The reason is that a report to the authorities is made only in case of assessed true match against the asset freeze list.

1. Detailed comments on the SECOND Draft Guidelines on internal policies, procedures and controls to ensure the implementation of Union and national restrictive measures under Regulation (EU) 2023/1113

* **General provisions**

We suggest the possibility to integrate the “restrictive measures exposure policies and procedures” in statute of AML/CFT. For this reason, we propose the following text:

“PSPs and CASPs should put in place policies, procedures and controls to be able to comply with restrictive measures. Such policies, procedures and controls **will depend on nature, size, integrated in the same policies and procedures dedicated to AML/CFT, as applicable, and** should follow the EBA Guidelines on internal policies, procedures and controls to ensure the implementation of Union and national restrictive measures.”.

* **List management – section 4.1.2**

We suggest specifying, in **GL n.**  **8**, even the other regimes to which PSPs and CASPs are subject:

“PSPs and CASPs should specify in their policies and procedures the national and **EU** ~~supranational and international~~ restrictive measures regimes to which they are subject **and possibly the other restrictive measure regime to which they want to apply**.”

* **Screening the customer base – section 4.1.4**
* With regard to **GL n.** **16 b. i.**, we underline that there is no system for customer screening before making a transfer; the screening is done before onboarding and on an ongoing basis as per point ii) and a.) Thus, we propose modifying the **GL** **16 b. i.** in “*i. at customer onboarding, before a business relationship has been established~~, or before a transfer of funds or crypto-assets has been carried out~~.*”;
* Considering that the customer screening is already done based on the **GL** **n.** **16 b. i. and ii.**, point iii. does not represent a significant change of customer data or sanctions change. We suggest deleting it. In addition, a person known to be connected with the customer, is something very broad and cannot be part of customers screening process. This cannot be implemented in practice;
* With regard to **GL** **n.** **17 a, b**, we suggest eliminating the check on “the original” as the systems only check the transliteration; besides we underline that there is no added value to screen against the date of birth because there are millions of same dates of birth globally. This would generate a massive number of false positives in the screening tools. The starting point in screening is the name and the date of birth, which are thereafter used as one of the most important pieces of information to identify whether it is a true hit or a false positive. In line with this comment, we propose the following amendment:

“a. for natural persons:

1. the first name and surname in the transliteration of such dataand
2. **~~.~~**

“*b. for legal persons: the legal name, in the original ~~and~~/or transliteration of such data”*;

* With regard to **GL** **n.** **17 c**, we suggest specifying to add strong aliases to reduce the perimeter and also exclude the weak aliases, otherwise this would create a lot of false positives that bear the risk not to identify true matches. Here a possible amendment: “*for both natural persons and legal persons: any other names,* ***strong*** *aliases, ~~transcriptions in other alphabets, trade names,~~ where available in the restrictive measures-related lists.*”;
* We propose adding in the **GL** **n.** **18 a.** the following text referring to the V European Directive, EU Directive 2018/843 when the beneficial owner is mentioned: “*When screening customers that are legal persons or natural persons, PSPs and CASPs should, to the extent that this information is available, also screen: a. beneficial owners,* ***as stated in EU Directive 2018/843***”;
* With regard to the **GL** **n.** **18 c.** kindly note that the expectation is to obtain information on parties in the ownership structure that have been detected within the KYC. Thus, this shall be amended by reference to AML requirements. Otherwise, we are mixing the two topics and without any legal ground create a new requirement. Besides, the compliance burden for the Financial Institutions would be extremely relevant and some of the information required are not currently available.
* **Screening of transfers of funds and crypto-assets – section 4.1.5.**
* **GL n.** **20** conflicts with the recently approved amendments to Regulation (EU) 260/2012 regarding the handling of SEPA Instant Payments. These new rules specifically prohibit the screening of SEPA IP transactions against the EU sanctions list. Additionally, this requirement contradicts the prevailing market practice, which typically does not involve screening domestic transfers. Given that domestic transfers constitute the majority of payments in the payment environment, this proposed Guideline not only is in contrast with the regime in force but would also pose significant challenges, including hindering payment completion and necessitating increased resources for PSPs and CASPs to manage the surge in alert volumes. We underline that the words “*all transfers of funds*” is, in particular, in obvious conflict with the new SEPA Instant regulation where PSP’s are forbidden to screen against certain restrictive measures-lists. Also, it is important to consider that no law requires that domestic payments are screened;
* **GL n.** **21**, in particular the wording “*all parties to transfers of funds*” is in obvious conflict with the new SEPA Instant regulation where PSP’s are forbidden to screen against certain restrictive measures-lists. Also, the point doesn’t consider that no law requires that domestic payments are screened;
* **GL n.** **22**: We suggest excluding instant payments from the screening in GL n. 22 for the above mentioned reasons;
* With regard to  **GL** **n.** **22b**, on topo of the above comments, we propose the following amendment: “*the purpose of the transfer of funds or crypto-assets and other free text fields that provide further information regarding the actual sender/recipient of funds or crypto-assets* ***in detailed cases or with a risk-based approach***”;
* Considering that all intermediaries are supervised entities required to comply with the same sector regulations, we believe it is too onerous and ineffective to include the intermediary institutions, correspondents, with screening of identification codes such as BIC, SWIFT and other. We propose to eliminate **GL** **n.** **22 c**.
* **Calibration – section 4.1.6**

At **GL** **n.** **25** the difference between a. and b. is unclear; as a matter of fact both cases relate to the percentages in matching of the fuzzy logic.

* **Reliance on third parties and outsourcing – section 4.1.7**

We suggest deleting **GL** **n.** **27 d**. Group entities could rely on internal policies and procedures which will apply across the group: this is a strong mitigant.

* **Due diligence and verification measures for alert analysis – section 4.2**

According to the peculiarities of each kind of transfer of funds, it is important to allow diversifying the double level of review by providing for the intervention of a person after an initial exclusively automatic check.

* **Policies and procedures for the management and analysis of alerts – section 4.2.1**

We suggest modifying **GL** **n.** **32 d** as follows to introduce a risk-based approach to reduce the perimeter of controls:

“*different levels of review to be carried out, for example the discard of false positives approved by at least two people,* ***in detailed cases or with a risk-based approach****.”.*

* **Due diligence measures for alert analysis - section 4.2.2**

In **GL n.** **35**, the Guidelines state “*PSPs and CASPs should set out in their policies and procedures how to deal with cases where it is not possible to conclude with certainty after additional due diligence that a match is a true positive match, a false positive match or a situation of homonyms. PSPs and CASPs should refrain from providing financial services to a person prior to coming to an informed decision*.” Such (interim) freezing of assets and rejection of processing payment instructions in case of insufficient information should be set forth in legal EU requirements in order to prevent (civil) liability of the FI. It would halt processing of funds considerably given the high number of false positives generated by the screening tools given the manifold name similarities and the regulatory expectations of fuzzy logic. Also, some national authorities may expect processing of funds if there is no clear evidence that the hit is a true hit. Please consider that the same comment applies to Section 4.3.1 (GL n. 47) too. Here, to the contrary, the statement that “If PSPs’ and CASPs’ internal analysis of the alert confirms that the possible match is the designated entity” seem to imply that the analysis must have been finalized and evidence for the identification must be secured.

* **Controls and due diligence measures to comply with sectoral restrictive measures – section 4.2.4**
* **GL n.** **40** requires an investigation that goes beyond and thus partially contradicts what is required under AML KYC for client information. FIs do not have information on the “habitual residence or place of activity” in practice. The terminology should thus be better aligned with AML KYC requirements. As to the same Section, also, screening against the place of birth as such does not yield meaningful results since the place of birth as such does not imply a sanctions problem, but the name of the person or entity that is sanctioned. Under EU law, there are no pure geographical sanctions attached to “place of birth”. Also, countries are not entirely sanctioned anymore under EU law. No single geographical location being a place of birth is as such sanctioned. Although the place of birth may give an indication of the nationality, nationality regimes differ (being related to either the nationality of parents or to the place of birth). Thus, the place of birth is primarily an element of identification after having received an alert on the listed name of the sanctioned person;
* With regard to **GL** **n.** **41** there are (as of now) no integrated geo-localization tools in screening systems of FIs (No. 41). This applies primarily to online services of exporters and providers of services and seems mainly to be inspired by US expectations as to US Iranian sanctions and similar country-based sanctions regimes. This seems also problematic in relation to EU Data Protection law;
* We suggest modifying **GL** **n.** **42** with: “*Examples of controls PSPs and CASPs may also put in place,* ***where deemed appropriate,*** *include, but are not limited to:…*”;
* **GL** **n.** **48**, states that “*customers whose transfer of funds or crypto-assets has been frozen“* shall be informed by the FI as to their options. There is no such requirement under the law. It would entail legal counselling by the FI contrary to restrictions on legal counselling competences and gives the impression of helping the customer to circumvent sanctions.
* **Suspending the execution of transfers of funds or crypto-assets and freezing funds or crypto-assets – section 4.3.1**

We note that a suspension or freeze (**GL n.** **47 b**) shall be done once the alert is assessed as true positive, otherwise the system will block funds of non-sanctioned parties which may result in civil claims and damages for non-execution of a payment order. We ask to better clarify this point.

* **Reporting measures - section 4.3.2**

We suggest removing **GL** **n.** **49 b**. because there is no such legal requirement asking to report the discovery of the breach of restrictive measures.