

**Objet** : Observation on the EBA’ consultation paper on internal policies, procedures and controls to ensure the implementation of Union and national restrictive measures

***1 - A common approach between AML/CFT and restrictive measures***

AML/CFT and restrictive measures are different legal regimes providing different legal and procedural requirements and processes that are designed to take into account the diversity of the underlying structure of the Anti-Financial Crime Framework.

i) While AML and CTF require ex post monitoring and relate in each case to clandestine criminal activity in a wide array of criminal sectors encompassing a “tipping off” prohibition, financial sanctions (“restrictive measures”) are imposed by targeted published legal acts and require ex-ante screening of transactions.

ii) While all regulatory requirements on Financial Institutions (FIs) entail operational and financial risks, it is crucial for both an effective and efficient implementation of such requirements that they are clear, not contradictory and administered by one and the same competent authority so as to provide clear guidance in the interest of legal security and thus an effective implementation.

The implementation of these regulatory requirements becomes all the more difficult as diverging guidelines, issued by diverging competent authorities and regulating bodies, set forth specific operational requirements with diverging terminology and distinct expectations as to an FI’s processes and framework.

Already now, there is a widespread divergence between guidance and interpretation of EU restrictive measures between the so far competent EU authorities and national competent authorities, among national competent authorities and vis-à-vis other non-EU competent authorities, mostly in parallel applicable sanctions regimes (e.g. US and UK regimes).

***2- The compliance of all restrictive measures is not an obligation of result***

Current EU regulation does not impose an obligation of results to financial institutions for the application of all restrictive measures. Some NCAs may have raised their own expectations and stated an obligation of results in respect of the application of targeted restrictive measures only.

The obligation of result does not currently exist in any EU regulations or legislative acts nor has been recognized by the EU Court of Justice.

Furthermore, when it comes to sectoral restrictive measures such as trade embargoes, the EU regulators have taken recognition of :

* The primary responsibility of non-financial operators initiating the underlying trades.
* The standard set-up of financial institutions which is based on screening and analysis of transactions related to targeted jurisdictions and territories subject to sectoral restrictions and which underlying economic purpose relate to targeted business sectors.

to adopt the current principle of an obligation of means.

Therefore, we do not understand on which regulatory grounds, the draft guidelines states

on p. 46: “(…) *compliance by the financial institutions with the restrictive measures in an obligation of results and not of means. As such, a risk-based approach is not appropriate in this situation. Nevertheless, (…)*” and are of the opinion that standards set in these new guidelines do not introduce such concept, in order to leave room for proportionality as “ensuring proportionality” effectively appears to be one of the guiding principles set forth by EBA.

However, we would like to emphasize that current EU regulation does not impose an obligation of result to financial institutions for the application of all restrictive measures, nor the EU court of justice.

Otherwise, the implementation of this obligation of result in the case of sectoral restrictive measures seems very complicated or impossible for banks, which only come in a second phase. Indeed, the verifications are the primarily responsibility of operators initiating the underlying trade and action of banks is limited to the screening and analysis of transactions related to targeted jurisdiction and territories subject to sectoral restrictions and special type of business sector.

Hence, it would be helpful if EBA could reflect the distinction between targeted and sectoral and restrictive measures and reaffirm the current principle of an obligation of means.

***3 – A general requirement for four-eyes review of all false positive decisions (paragraph 32d) is not appropriate***

The prescribed requirements for a four-eyes review of false positive decisions implies that financial institutions should not have the discretion to determine the most appropriate method for handling alerts (paragraph 32d).

PSP should remain responsible for setting-up their internal decision process on a risk-based approach so as to decide which alerts could require a four-eyes review and which could not, taking into consideration that this framework remains under the control of the Management Body.

We also think that this requirement creates an additional burden for financial institutions whereas the analysis of false positive is not complicated, so it doesn’t require a four eyes review systematically. Moreover, in case of doubt because of lack of information, FI should report the situation to national competent authorities, before concluding their analysis.

***4 – The suspension of the operations – management and analysis of alerts***

Several instances suggest that activity should be suspended until an alert can be addressed:

1. Paragraph 35 states that “*PSPs and CASPs should refrain from providing financial services to a person prior to coming to an informed decision.*” Does this imply that the account of an existing client should be restricted when a new potential match alert is generated until the alert can be resolved?
2. Paragraph 47 specifies that PSPs and CASPs should have policies and procedures to suspend any operations “without delay” when the screening system generate an alert regarding a “possible match” with a natural person or legal entity subject to restrictive measures.

The suspension of all financial services to the benefit of all customers for which a customer screening alert is pending, whether false or true positive, would be disproportionate to the objective as false alerts represent the vast majority of the alerts. This suspension would not only deprive too many customers from their legitimate rights to such services, but might also create a prejudice to them.

Besides, this seems in contradiction with newly adopted regulation regarding instant payments, which encourages to stop screening payments against EU sanction lists.

***5 - The general principle of screening of transfers is contrary to the updated Regulation 260/2012 on Instant payment and the EU practice of non screening of domestic transfers***

According to draft §20 (4.1.5) “*PSPs and CASPs should screen all transfers of funds and crypto assets prior to their completion.*”.

However, this statement conflicts with the clauses of the new article 5 d. of Reg. EU 260/2012 regarding the handling of SEPA Instant Payments. These proposed clauses 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, the draft §20 not only opposes the aforementioned proposal but also poses significant challenges, including hindering payment completion.

Therefore, since the new EBA guidelines reinforce a consistent customer data screening among all EU PSPs, §20 principle should limit the requirement of screening to cross-border transfers with EU third countries only.

***6 – The operational steps necessary to upload the lists does not allow them to be implemented “as soon as” they are published***

The consultation (Section 4.3. No. 31b -list management) requires a list upload “*as soon as”*. The adequate legal terminology would be “*without undue delay*” as provided for in No. 30.

We respectfully remind that the list management process is complex and necessitates several steps before screening against new entries is effective: it generally requires a specific list format, the completion of non-regression tests, etc. Nevertheless, once new lists of designations have been issued, the process of updating immediately starts but takes some time.

This is necessary given the technical and personnel restrictions, including labour law, for list updates that are published late at night or on weekends and non-banking days. 365/24/7 workdays are not feasible and are not allowed in the EU. The imposition of such an obligation would necessarily imply to outsourcing solutions, in countries outside EU such as India or similar.

***7 - The requirements for conducting a restrictive measures exposure assessment need to be adapted***

We are very much concerned that there will be challenges in meeting some of the outlined requirements for conducting restrictive measures exposure assessments (article 4.2.). Besides, the requirement to conduct a group wide assessment on an ongoing base might increase operational risks of failures, rather, exposure assessment should be performed on an annual basis.

As regards the content requirements, per articles under section 4.2, financial institutions should identify and assess :

- the “origin and destination of transaction.”

- the “geographic risk”, including jurisdictions and territories known to be used to circumvent restrictive measures

- the “customer risk” which should include :

* customers becoming subject to list-based sanctions themselves.
* prospective risk of customer becoming subject to list-based sanctions;
* activity of its customer base and complexity of the activity, including any links to industries or sectors that may be subject to economic or any other restrictive measures, as well as frequency and types of transactions.

- “products and services risk, …”. ie the expected use by customers of products and services and transactional analysis of customers.

We recommend that EBA norm on conducting a restrictive measure assessment provides for the general framework which financial institutions should adhere to but leave them with responsibility to determine which key risk indicators should be taken into account to assess their risk exposure and the adequacy of their framework for complying with the restrictive measures regulations.

As regards the review requirement, instead of stating a general principle of updating the risk-assessment on an ongoing base, more consideration should be taken of existing standards, whereby financial institutions update their restrictive measures exposure assessment in such triggering events as :

* significant changes in restrictive measures regulations (for instance, the inclusion of a new regime of restrictive measures or addition of new measures to existing regimes);
* prior to providing new products/offering new product delivery channels/servicing new client groups/entering new geographical areas;
* significant changes to the institution’s activity profile, customer base, organisational structure or business model;
* identification of non-implementation of restrictive measures and circumvention of restrictive measures, which reveals the inappropriateness of the restrictive measures exposure assessment;
* deficiencies in existing restrictive measures exposure assessment as identified by the financial institution or by the competent authority for the supervision of internal policies, procedures and controls to ensure the implementation of Union and national restrictive measures.

**8 – The report to the local competent authority**

§19 d (part I) and §49 a (part II) provides for the report of suspension of execution of transfers.

As long as a transfer is suspended and not executed, we do not understand why and for which purposes it should be reported to NCAs.

Besides, should both § rather relate to transfers which have been rejected due to EU sanctions, we are of the opinion that no such regulatory reporting is required in the current EU Sanction regulation.

**ANNEX : Observations on selected articles – Section I**

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|  | **Guidelines on internal policies, procedures and controls  to ensure the implementation of Union and national restrictive measures** |  |  |
| 14 | The management body **may assign this role to a senior staff member who already has other duties or functions within the financial institution** (**such as the AML/CFT compliance officer or the chief compliance officer**) **provided that**: a. this does not affect the ability of this senior staff member to carry out their duties or functions effectively; and b. **this combination of tasks does not raise any conflicts of interest**, such as conflicts between operational and control tasks assigned to this staff member. |  | *FBF : Remplacer AML/CTF Officer par Financial Crime / Financial Security Officer* |
| 19 | The senior staff member should:  a. take the measures necessary to ensure compliance with Section 4.2 on the restrictive measures exposure assessment;  b. take the measures necessary to ensure compliance with Section 4.3 on effective restrictive measures policies and procedures; |  |  |
| c. provide regular and adequate information to the management body to enable it to carry out its functions as defined in Section 4.1.1 and Section 4.1.2 Management information should at least include: i) changes to the financial institution’s restrictive measures exposure and the outcome of the financial institution’s restrictive measures exposure assessment; ii) new or prospective changes to restrictive measures regimes and their impact on the financial institution; **iii) statistics and information relating to: ▪the number of alerts generated; ▪the number of alerts awaiting analysis; ▪the number of reports submitted to the competent authority; ▪the time between the alert and the report submitted to the competent authority; ▪the amount of frozen assets and the nature of those assets; ▪the number of breaches identified and the reason for those breaches;** **iv) information relating to human and technical resources and the adequacy of those resources in light of the financial institution’s restrictive measures exposure**; v) deficiencies or shortcomings identified in relation to the financial institution’s restrictive measures policies, procedures and controls, including information by the national authority competent for the implementation of restrictive measures; **vi) breaches and cases of circumvention of restrictive measures and the reasons for those breaches and circumvention;** vii) proposals on how to address any changes in regulatory requirements or in restrictive measures exposure, or any deficiencies or shortcomings in the financial institution’s restrictive measures policies, procedures or controls that have been identified and **cases of non-implementation and circumvention of restrictive measures that have been identified.** |  | *FBF - c) information to be provided to a dedicated Management committee rather than the EXCO itself  FBF - c)iii) - average time between the adjudicated positive alert and the report to NCA FBF - c) - vi) is redondant with c) iii)* |
| d. report all suspensions of execution of transfers of funds and freezing measures as well as identified breaches of restrictive measures to the relevant national authorities competent for the implementation of restrictive measures and/or to the competent supervisory authority as per national requirements;  e. cooperate effectively and constructively with national authorities competent for the implementation of restrictive measures and competent authorities for the supervision of policies, procedures and controls for the implementation of restrictive measures. |  | *FBF : to delete the reporting of suspension of transfers of funds* |
| 22 | 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**. |  | *FBF - Our understanding is that RA should be performed on an annual basis* |
| 23 | When carrying out a restrictive measures exposure assessment, financial institutions should identify and assess:  a. which restrictive measures regimes apply to them;  b. **the likelihood of non-implementation of restrictive measures**;  c. **the likelihood of circumvention of restrictive measures**;  d. the impact of any breaches of restrictive measures;  and e. the following risk factors: a) geographic risk, including: i. where the financial institution conducts its business, i.e. the jurisdictions and territories in which the financial institution is established or operates; ii. the extent to which those jurisdictions and territories are exposed to restrictive measures or are **known to be used to circumvent** restrictive measures; iii. origin and destination of transactions. b) customer risk, including: i. links of customers and, if applicable, their beneficial owners and shareholders, to countries for which restrictive measures are in place due to a situation affecting this country, or known to be used to circumvent restrictive measures; ii. the number of customers, type of customers and the complexity of those customers, such as the identification of the beneficial owner; iii. activity of its customer base, and complexity of the activity, including any links to industries or sectors that may be subject to economic or any other restrictive measures, as well as frequency and types of transactions. |  | *FBF - b) and c) should be removed - Mention of circumvention exposure is premature, in the absence of official list of corridor countries on the full scope of countries under restrictive measures* |
| c) products and services risk, including:  i. the nature of the financial institution’s products and services; ii. the extent to which the provision of these products and services exposes the financial institution to the risk of breaches of restrictive measures and circumvention of restrictive measures. d) delivery channels risk, including whether the use of intermediaries, agents, third parties, correspondent banking relationships or other delivery channels creates vulnerabilities, including by  i. limiting the visibility the financial institution has on the parties involved; ii. making the financial institution dependent on the screening processes of third par-ties; iii. increasing the financial institution’s exposure to geographic risks because they are operating, or based in, countries for which restrictive measures are in place due to a situation affecting this country or countries known to be used to circumvent restrictive measures. |  |
| 24 | Financial institutions should base this assessment on a sufficiently diverse range of information sources, including at least the following: a. information obtained as part of the application of the financial institution’s customer due diligence measures, in compliance with the provisions of Article 13 of Directive (EU) 2015/849;  b. information from international bodies, government, national competent authorities including AML/CFT supervisors, FIUs and LEAs, such as up-to-date typologies on the circumvention of restrictive measures;  c. information from credible and reliable open sources, such as reports in reputable newspapers and other reputable media outlets;  d. information from credible and reliable commercial organisations, such as risk reports;  e. **where this is available**, an analysis of previous restrictive measures alerts (true positive and **false positive matches**) **to identify situations where true positive matches are most likely to occur**. |  | *FBF - b) and c) to be performed on HR customers only (no generalisation of Adverse News search to all customers)* |
| 25 | **Financial institutions should consider whether retroactive screening of their customer database and past transaction records could be useful and proportionate in this context.** This may be the case where the financial institution has identified or has reasonable grounds to suspect that its previous screening system was inadequate or ineffective. |  | Assessment / Decision should be made at the time when a system-deficiency has been found out and not when performing this annual risk-assessment  FBF - Same comment => art 25 should be deleted |
| 26 | Financial institutions should ensure that their restrictive measures exposure assessment remains up to date and relevant. To achieve this, financial institutions should review and, if necessary, **update their restrictive measures exposure assessment in at least the following situations**:  **a. significant changes in restrictive measures regulations (**for instance, the inclusion of a new regime of restrictive measures or addition of new measures to existing regimes);  b. **prior to providing new products/offering new product delivery channels/servicing new client groups/entering new geographical areas**;  **c. significant changes to the institution’s activity profile, customer base, organisational structure or business model**;  d. identification of non-implementation of restrictive measures and circumvention of restrictive measures, which reveals the inappropriateness of the restrictive measures exposure assessment;  e. deficiencies in existing restrictive measures exposure assessment as identified by the financial institution or the competent authority for the supervision of internal policies, procedures and controls to ensure the implementation of Union and national restrictive measures. |  | *FBF - Objectives are met in other processes - such as when implementing new restrictive measure, assessing a new activity, new products or new distribution channels for a specific Métier or Entity - and NOT at Group-wide level* |
| 30 | 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. |  | *FBF - "without undue delay" would be more realistic* |
| 31 | They should at least include, in line with provisions in Section 4.4 of the Guidelines on internal policies, procedures and controls to ensure the implementation of Union and national restrictive measures under Regulation (EU) 2023/1113:  a. processes to ensure that the financial institutions have all up-to-date information concerning the applicable restrictive measures;  b. processes **to update applicable lists of restrictive measures regimes as soon as they are published**;  c. processes to ensure that the restrictive measures exposure assessment remains relevant and up to date;  d. **processes to ensure** that policies, procedures and controls are commensurate to the restrictive measures exposure assessment and **that all areas have the resources necessary to ensure compliance with the internal policies, procedures and controls for the implementation of restrictive measures**; |  | *FBF - c) process should ensure RA methodology relevancy before any annual exercice but not provide for triggering an update exercice between two annual RAs* |
| e. processes to ensure that restrictive measures policies and procedures are regularly reviewed, amended and updated when and where necessary, are implemented effectively and performed as intended, and to take remedial action immediately should shortcomings be identified; 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) 2023/111315;  g. **in case of true positive matches**, procedures for follow-up actions, **including immediate suspension, freezing and reporting to competent authorities once the screening system generates an alert of a possible 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; h. a documented internal organisation that clearly sets out the tasks and responsibilities in relation to restrictive measures, including in case of outsourcing. |  | *FBF - g) provision should be split between Transaction filtering and Customer Base screening, since it applies to true positive matches ONLY, when alert results from the latter.* |

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|  |  | **Guidelines on internal policies, procedures and controls to ensure  the implementation of Union and national restrictive measures under Regulation (EU) 2023/1113** |  |  |
|  | 12 | PSPs and CASPs should assess whether the data they hold is sufficiently accurate, up to date and detailed to enable them **to establish if a party to the transfer or their beneficial owner or proxy is subject to restrictive measures** pursuant to Regulation (EU) 2023/1113. |  | *FBF : As the rule points out the need for accurate and updated data, we understand that it relates to customers ONLY* |
|  | 16 | They should also list trigger events when screening should always take place and keep this list up to date. Trigger events should include at least: a. for all customers: a change in any of the existing designations or restrictive measures, or a new designation or the adoption of a new restrictive measure. b. **for individual customers**: i. at customer onboarding, before a business relationship has been established, or before a transfer of funds or crypto-assets has been carried out; ii. if significant changes in the customer due diligence data of an existing customer occur, such as change of name; iii.**if reasonable grounds exist to suspect that the customer, or a person known to be connected with the customer, is attempting to circumvent restrictive measures.** |  | *FBF : need to clarify notion of individual customers vs natural persons (§17).* |
| 17 | PSPs and CASPs should screen at least the following customer information, in line with the applicable restrictive measures: a. for natural persons: a. the first name and surname, in the original and transliteration of such data; and b. date of birth b. for legal persons: the legal name, in the original and/or transliteration of such data;  c. for both natural persons and legal persons: any other names, aliases, transcriptions in other alphabets, trade names, where available in the restrictive measures-related lists. |  | *FBF : a) screening of names/surnames is performed in the original OR in transliteration of data* |
| 18 | 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;  b. persons authorised to act on behalf of the customer; c. **persons connected to the customer, such as natural and legal persons within the management or ownership structure, who may be controlling/exercising a dominant influence on the entity** as defined in Article 1 of Council Regulation (EC) No 2580/2001. |  | *FBF : c) is acceptable as long as "to the extent that this information is available"* |
| **4.1.5. Funds & Cryptoasset Transfer** | 20 | PSPs and CASPs **should screen all transfers of funds** and crypto-assets **prior to their completion**, whether they are carried out as part of a business relationship or as part of a one-off transaction. |  | *FBF : provision should be limited to cross-border transfers out of EU*, since a consistent customer data screening framework will be reinforced by EBA guidelines |
|  | 32 | Such policies and procedures should include: a. steps for processing an alert without delay, for each type of transfer of funds or crypto-assets; b. rules following the general record-keeping policy of the PSPs and CASPs, in compliance with Article 26 of Regulation (EU) 2023/1113, for the documentation of any decision taken in respect of alerts; c. measures to comply with Section 4.2.2 of these guidelines; d.different levels of review to be carried out, **for example the discard of false positives approved by at least two people**. |  | *FBF a) "without undue delay" and rule applicable to asset-freezing measures ONLY* *FBF d) 4 eyes principle is not mandatory in the current regulation and banks implement a RBA on decision rule to discard alerts* |
|  | 35 | 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.** |  | *FBF : rule is applicable to customer on-boarding and filtered transactions ONLY* |
|  | 38 | In case an assessment remains inconclusive, PSPs and CASPs should consider engaging with the national authority competent for the implementation of restrictive measures. **The ultimate responsibility for complying with the restrictive measures lies with the PSPs and CASPs.** |  | *FBF - 2nd sentence should be read as a general reminder of PSPs ultimate responsability to comply with restrictive measures* |
|  | 40 | PSPs and CASPs should pay particular attention to sectoral restrictive measures that are related to a specific jurisdiction or territory. Under such restrictive measures, PSPs and CASPs should screen all underlying information relating to the transfer of funds or crypto-assets to or from that specific jurisdiction or territory or **to transfers of funds or crypto-assets initiated by customers who are known to conduct business in that specific jurisdiction or territory.** To the extent that this is available, PSPs and CASPs should screen: a. information on the country (ies) of nationality, place of birth; b. information on the habitual residence or place of activity through other addresses; c. information on the country to or from which the transfer of funds or crypto-assets is carried out, where the transfer of funds or crypto-assets is executed; d. purpose of the transfer of funds or crypto-assets and other free text fields that provide further information regarding the goods, vessels, country of destination or country of origin of the goods for which the payment is made. |  | *FBF - Transfers of funds are screened only on the basis of contained information related to specific jurisdictions and not on the basis of customer activity / exposure on such jurisdictions.* |
| 42 | Examples of controls PSPs and CASPs **may also** put in place include, but are not limited to: a. upon establishing business relations, acquiring the relevant information from the customer, such as about the customer’s type of business, countries where the customer is conducting business; b. **requesting additional information from the custome**r, **such as a description of dual-use goods**, **information about the appropriate licence for dealing with the dual-use goods, country of origin of the goods, information about the end user of the goods**; c. requesting more detailed information from the customer about the purpose of a transfer of funds or crypto-assets; d. using the following data: shipping registers, **real estate records** and other publicly available data sets (where available). |  | *FBF - b) should not be focussed on dual-use goods only but deal with goods subject to sectoral restrictive measures. FBF - c) reference to real-estate not considered as relevant and should be suppressed* |
|  | 45 | Due diligence policies and procedures should allow PSPs and CASPs to detect possible attempts to circumvent restrictive measures, such as attempts to: a. omit, delete or alter information in payment messages such as empty fields or meaningless information; b. channel transfers through persons connected with a customer who is subject to restrictive measures, for example by examining that customer’s recent operations; c. structure transfers of funds or crypto-assets to conceal the involvement of a designated party; d. conceal the beneficial ownership or control of assets; e. use fake or fraudulent background documentation for the transfer of funds or crypto-assets. |  | FBF - a) notion of omitting, deleting or altering information are self-explanatory and need not to provide examples |
|  | 48 | PSPs and CASPs should set out in their policies and procedures which information they will provide to customers whose transfer of funds or crypto-assets has been frozen. **This information should include information about the customer’s options.** |  | *FBF - Article should state that it relates to fund transfers only* |
| 49 | PSPs and CASPs should have clear processes for reporting without delay to the national authority competent for the implementation of restrictive measures or to the competent supervisory authority in accordance with national requirements as applicable: a. the implementation of a restrictive measure, such as any freezing measures and suspension of operations; and b. the discovery of the breach of restrictive measures, c. any transfers of funds or crypto-assets processed by or for the benefit of a customer subject to restrictive measures after the publication of the measure, for example because of an incident or anomaly in the functioning of the screening system. |  | *FBF - c) is redundant with b) since both relate to potential breaches* |